DECEMBER 2001

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

DECEMBER 2001

No cases were filed in which Review was granted during the month of December:

No cases were filed in which Review was denied during the month of December:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	Docket No. WEVA 2000-55
v.	:	
ARCH OF WEST VIRGINIA	:	

BEFORE: Verheggen, Chairman; Jordan, Riley and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). In this case, the Secretary of Labor issued two citations to Arch of West Virginia ("Arch") for the condition of fuel trucks alleging violations of 30 C.F.R. § 77.1606(c), which provides: "Equipment defects affecting safety shall be corrected before the equipment is used." Arch contested the citations and the United Mine Workers of America ("UMWA") intervened in support of the Secretary's position. After a hearing, Administrative Law Judge Hodgdon vacated the two citations. 23 FMSHRC 447, 452-53 (Apr. 2001) (ALJ). Although the UMWA filed a petition for discretionary review with the Commission, the Secretary did not.

After granting the UMWA's petition, the Commission issued a briefing order directing the parties to address the issue of the standing of the UMWA to file an appeal when the Secretary has not sought review of a judge's decision. The Commission also invited the Secretary to address the standing issue. Pursuant to that order, the Secretary filed a brief, in which she stated that it was her intention not to enforce the citations and to vacate them if the case proceeded. Sec'y Br. at 1. Subsequently, the Secretary vacated both citations.

In light of the Secretary's vacation of the citations at issue, we vacate our direction for review and dismiss these proceedings.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 14, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:		
	:	Docket Nos.	KENT 2000-128-R
	:		KENT 2000-129-R
v.	:		KENT 2000-130-R
	:		KENT 2000-168
	:		
KINDER MORGAN OPERATING L.P. "C"	:		

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, 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. (1994) ("Mine Act" or "Act"), the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Kinder Morgan Operating L.P. "C" ("Kinder Morgan") three citations alleging violations of mandatory safety standards. At issue is whether Administrative Law Judge T. Todd Hodgdon correctly determined that the site at which the violations allegedly occurred constitutes a "mine" within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). 23 FMSHRC 73 (Jan. 2001) (ALJ). We granted Kinder Morgan's petition for discretionary review challenging the judge's determination of jurisdiction. In addition, the Commission heard oral argument on the matter.

Commissioners are evenly divided regarding the disposition of this case. The effect of the split decision is to leave standing the judge's affirmation of the citations and assessment of penalties. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The portion of the decision upon which all Commissioners agree is followed by the opinions of Commissioner Jordan and Commissioner Beatty, and of Chairman Verheggen and Commissioner Riley, respectively, setting forth their separate views.

I.

Factual and Procedural Background

The facts underlying the alleged violations are not contested. Joint Stipulation ("JS") at 1.[1] Kinder Morgan operates the Grand Rivers Terminal (the "Terminal"), a marine terminal near Grand River, Kentucky. 23 FMSHRC at 74. The Terminal consists of three separate areas: (1) a rail-to-ground unloading and storage facility ("GRT-1"); (2) a rail-to-barge loading facility ("GRT-2"); and (3) a barge-to-ground unloading and ground-to-barge loading facility ("GRT-4"). *Id.* Kinder Morgan annually receives an average of approximately 10 million tons of processed coal from various mines at the Terminal by rail (95%) and by barge (5%). *Id.*; JS at 3. It is a bailee of the coal in that the coal is owned by the end user, rather than by Kinder Morgan, and Kinder Morgan is responsible for the coal only from the time that it is unloaded until the time that it is subsequently reloaded. 23 FMSHRC at 74. More than 95% of all coal received by the Terminal is owned and shipped to the Tennessee Valley Authority ("TVA"), which purchases the coal for use in its 11 coal-fired plants. *Id.* Alabama Power and West Kentucky Energy have historically delivered and received the non-TVA coal. *Id.* at 76.

No washing, screening, crushing, or sizing of coal occurs at the Terminal. *Id.* at 74. TVA requires the coal of each coal producer to meet certain specifications, and it is the responsibility of the coal producer or supplier to meet those specifications prior to loading the coal on to trains or barges at the coal producer's or supplier's loading facilities. JS at 4-5. For instance, in its various contracts with different producers of Illinois basin coal and Western coal, TVA requires the coal of each producer to meet certain specifications such as moisture content, ash content, percentage of volatile matter, heating value (BTU), SO_2 content, grindability and chlorine content. *Id.* at 4. Kinder Morgan is not a party to TVA's contracts with the coal producers, and has no responsibility to deliver coal to TVA that meets the contract specifications. 23 FMSHRC at 74.

As described more fully below, coal shipments are processed through the Terminal in three ways: (1) rail-to-stockpile-to-barge; (2) barge-to-stockpile-to-barge; and (3) rail-to-barge. *Id.*

TVA Coal: Rail-to-Stockpile-to-Barge. When coal is processed from rail to stockpile to barge, the coal is first unloaded from rail cars into a 100-ton hopper at GRT-1.[2] *Id.* at 74. From

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[1] The Secretary of Labor and Kinder Morgan stipulated to the facts in this proceeding. 23 FMSHRC at 74.

[2] The parties stipulated that "[a]pproximately 95% of coal received by rail is unloaded by Kinder Morgan at GRT-1 (the remainder being direct dumped at GRT-2)." JS at 5. That stipulation appears somewhat inconsistent with the parties' stipulation that "[a]pproximately twenty percent (20%) of the coal arriving at the Terminal by rail is unloaded from bottom dump

the hopper, coal is fed on to two stationary inclined belts which transfer the coal either to surface stockpiles (approximately 60% of the coal) or to a conveyor belt transfer system ("BTS"), connecting GRT-1 and GRT-4 (approximately 40%). *Id.* Coal in the surface stockpiles is subsequently moved by dozers and trucks into hoppers which deposit it on to the BTS, which conveys the coal to GRT-4. *Id.* at 75. Kinder Morgan maintains up to 18 working stockpiles for TVA's coal. *Id.* TVA selects coal from suppliers it designates and chooses the working stockpile where Kinder must place it. *Id.*

When the coal arrives at the GRT-4 via the BTS, it is dumped by a chute on to a 150-foot inclined belt on a radial stacker. *Id.* The radial stacker segregates the coal into separate stockpiles at GRT-4. *Id.* The radial stacker cannot create the required number of stockpiles, so some of the coal is pushed by dozers into stockpiles, and some of the coal is loaded into haulage trucks by front-end loaders for dumping into stockpiles. *Id.*; JS at 6.

When the stockpiled coal is to be loaded into a barge, it is pushed into one of four feeders. 23 FMSHRC at 75. The feeders are computer controlled to facilitate precise "layer-loading"[3] from different surface stockpiles. *Id.* Each feeder transfers coal at a predetermined rate on to the main belt in a 605-foot draw-off tunnel in the underground coal layer-loading facility. *Id.* The tunnel is concrete-lined throughout, and ventilated by two 30-inch diameter exhaust fans. JS at 6. Methane is monitored by hand-held methane detectors. *Id.* TVA identifies which stockpiles are to have coal removed and the amount to be removed. 23 FMSHRC at 75.

After leaving the draw-off tunnel, the coal is transferred on to a portable rail-mounted belt conveyor. *Id.* Samples of each coal load are then taken by TVA's independent laboratory, which collects, bags, and removes samples on a daily basis and sends them by courier to TVA's facilities in Tennessee for analysis. *Id.* The conveyor then loads the layered coal into barges for shipment as fuel to TVA. *Id.*; JS at 6.

TVA Coal: Barge-to-Stockpile-to-Barge. Approximately five percent of the coal processed at the Terminal arrives by barge at GRT-4. 23 FMSHRC at 75. Coal unloaded by barge at GRT-4 is never transported to GRT-1 or GRT-2. JS at 7. Coal is unloaded from barges at GRT-4 by a crane, which places it in a feeder for a 735-foot inclined belt on a stacker. 23 FMSHRC at 75. The coal is then stockpiled, as directed by TVA. *Id.* When the coal is to be loaded on to a barge, it is layer-loaded in an identical manner, described above, as the coal arriving at GRT-4 from GRT-1 on the BTS. *Id.*

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rail cars at GRT-2 . . . ." *Id.* at 7. The judge did not resolve this apparent discrepancy. *See* 23 FMSHRC at 75. Nor was the matter clarified during oral argument. Oral Arg. Tr. at 12-13.

[3] Layer-loading occurs when coal is "loaded on top of other coals, akin to a parfait." JS at 5.

TVA Coal: Rail-to-Barge. When coal is moved from rail to barge, it is unloaded from rail cars at GRT-2 into a surge bin. *Id.* at 76. It is then directly loaded on to TVA barges. *Id.* There is no on-the-ground storage or layer-loading of coal at GRT-2. *Id.* Coal is sometimes temporarily stored on the rail cars until it is time to load the barges. *Id.*

Non-TVA Coal. Non-TVA coal accounts for less than five percent of the coal received at the Terminal. *Id.* The non-TVA coal is unloaded, stored and loaded at the Terminal by Kinder Morgan in the same manner as TVA coal. *Id.*

Beginning in 1989, the Terminal was inspected by MSHA inspectors from the Division for Metal and Non-Metal Mine Safety. JS at 3. In 1998, the Terminal was first inspected by MSHA inspectors from the Division for Coal Mine Safety.[4] *Id.* On February 2, 2000, an MSHA inspector issued three citations to Kinder Morgan alleging significant and substantial ("S&S") violations of 30 C.F.R. §§ 77.205(b), 77.202, and 77.1104, which describe accumulations of coal and coal dust on the walkway of a load belt, on the belt and floor of the sample room, and in the load-out tunnel.[5] Citations Nos. 7641076, 7641077, 7641078. Kinder Morgan challenged MSHA's jurisdiction, although it did not challenge the facts underlying the alleged violations. 23 FMSHRC at 74. The parties stipulated to the facts and submitted briefs, and the matter was decided by Judge Hodgdon. *Id.*

The judge concluded that the Terminal was a "mine" subject to Mine Act jurisdiction. *Id.* at 79. He first relied on the definition of mine in section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), which includes "facilities . . . used in . . . the work of preparing coal," and the definition of "work of preparing the coal" in section 3(i) of the Act, 30 U.S.C. § 802(i). *Id.* at 76. The judge then reasoned that because Kinder Morgan engages in three functions listed in the definition of "work of preparing the coal," namely, "storing," "mixing," and "loading," the Terminal is subject to the Act under the "functional analysis" employed by the Commission in *RNS Services, Inc.*, 18 FMSHRC 523, 529 (Apr. 1996), *aff'd*, 115 F.3d 182 (3d Cir. 1997). *Id.* at 78. In addition, the judge noted that the delivery of coal in this case is a step earlier than delivery to the consumer after it is processed, which the Fourth Circuit Court of Appeals had stated would not fall within the coverage of the Mine Act. *Id.* at 78, *citing United Energy Services, Inc. v. MSHA*, 35 F.3d 971, 975 (4th Cir. 1994). He explained that Kinder Morgan was not the consumer of the coal and it engaged in further processing by layer-loading. *Id.* at 78-79. He further distinguished the marine terminal found to be outside Mine Act coverage in *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982), from the Terminal, on the basis that, unlike Elam, Kinder Morgan engaged in coal preparation usually performed by a mine operator by layer-

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[4] The Terminal has not been inspected by the Occupational Safety and Health Administration. JS at 3.

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

loading coal to meet TVA's specifications and to render the coal fit for TVA's particular use. *Id.* at 79. Accordingly, the judge affirmed the citations and assessed penalties in the sum of $187 for all three citations, which the Secretary had proposed. *Id.* at 79-80.

Kinder Morgan argues that the judge erred in concluding that the Terminal is subject to Mine Act jurisdiction. KM Br. at 5-19. It asserts that the Mine Act does not apply to the handling of coal after it has been rendered useable and fully marketed to its final consumer, and that by the time that Kinder Morgan receives the coal, it is processed and marketed. *Id.* at 5-9. Kinder Morgan also submits that contrary to the judge's conclusions, coal is considered delivered to a consumer when it is loaded on trains or barges at a coal producer's loading facilities. *Id.* at 14-15. In addition, it contends that layer-loading does not constitute "mixing." *Id.* at 16.

The Secretary responds that the judge correctly concluded that the Terminal is subject to the Mine Act. S. Br. at 9. She submits that Kinder Morgan's storing, mixing and loading of coal constitutes the work of preparing the coal set forth in section 3(i) of the Mine Act. *Id.* at 13. The Secretary asserts that the test for jurisdiction set forth in *Elam* is satisfied because Kinder Morgan prepares coal to meet certain specifications, and prepares it for a particular use. *Id.* at 14-19. Accordingly, the Secretary requests that the judge's decision be affirmed. *Id.* at 24.

II.

Separate Opinions of the Commissioners

Commissioner Jordan and Commissioner Beatty, in favor of affirming the judge:

Section 4 of the Mine Act provides that "[e]ach coal or other mine, the product of which enter commerce, or the operations or products of which affect commerce, . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Under section 3(h)(1) of the Mine Act, "coal or other mine" is defined as including "lands, . . . facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of preparing coal . . . . " 30 U.S.C. § 802(h)(1). Section 3(i) of the Mine Act defines "work of preparing the coal" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. § 802(i).

The legislative history of the Mine Act indicates that Congress intended a broad interpretation of what constitutes a "coal or other mine" under the Act. The Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*"). *See Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cr. 1979), *cert. denied*, 444 U.S. 1015 (1980) ("[T]he

statute makes clear that the concept that was to be conveyed by the word [mine] is much more encompassing that the usual meaning attributed to it – the word means what the statute says it means.").

In considering the phrase "work of preparing the coal," the Commission has inquired not only into whether the entity performs one or more activities listed in section 3(i), but also into the nature of the operation performing such activities. *Elam*, 4 FMSHRC at 7-8. In *Elam*, the Commission explained that "'work of preparing [the] coal' connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications." *Id.* at 8. It concluded that although Elam performed several of the functions included in coal preparation at its commercial loading dock, it did so solely to facilitate its loading business rather than to meet customers' specifications or to render the coal fit for any particular use, and that, accordingly, its facility was not a mine. *Id.*

In contrast, in *Mineral Coal Sales*, the Commission determined that the handling of coal at a loading facility constituted "work of preparing the coal" because the work was performed to make the coal suitable for a particular use or to meet market specifications. *Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 620 (May 1985). Such handling included custom blending or mixing the coal to meet the specifications and needs of a broker's customers, in addition to storing, crushing, sizing, and loading the coal on to railroad cars. *Id.* at 616-18, 620.

Applying the above criteria, we conclude that Kinder Morgan engages in the "work of preparing the coal," thereby bringing the Terminal within Mine Act jurisdiction. First, substantial evidence supports the judge's determination that Kinder Morgan engages in three activities listed in section 3(i) of the Mine Act as "work of preparing the coal." 23 FMSHRC at 78. It is undisputed that Kinder Morgan engages in "storing," and "loading" of coal at the Terminal. S. Br. at 14 n.3; KM Reply Br. at 2 ("If the Act applies to Kinder Morgan, then it applies to every entity who stores or loads coal . . . ."). In addition, substantial evidence supports the judge's determination that Kinder Morgan engages in "mixing," by layer-loading the coal. 23 FMSHRC at 78.[6] The contract between Kinder Morgan and TVA, entitled "Transloading and Blending Contract," refers to work performed by Kinder Morgan as blending and sets forth requirements for Kinder Morgan's operation and maintenance of its "blending systems." Rudd Aff. Ex. A at 1, 2; JS at 4. Thus, by layer-loading, Kinder Morgan engages in blending or mixing.[7]

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[6] The term "mix" is defined as meaning "to stir, shake, or otherwise bring together with of loss of separateness or identity; to bring together in close association." Webster's Third New International Dictionary 1448 (1993). Synonyms for "mix" include "mingle," "commingle," and "blend." *Id.* In layer-loading the coal, coal from different stockpiles is "brought together in close association," and has lost the separateness that was maintained by individual stockpiles.

[7] The Commission previously has noted that a purpose of coal preparation has been described as increasing the value of fuel by making it more suitable for uses of the consumer in part by "mixing or blending." *Elam*, 4 FMSHRC at 8 n.5.

Furthermore, substantial evidence supports the judge's determination that the second prong of the *Elam* test is satisfied, that is, that Kinder Morgan engages in work usually performed by the operator of a coal mine by undertaking the activities to make coal suitable for a particular use or to meet market specifications. As stipulated by the parties, Kinder Morgan maintains 18 working stockpiles for TVA's coal, and TVA designates which coal from which suppliers will be placed into each working stockpile. JS at 5. In addition, TVA determines the individual working stockpiles from which coal is to be removed for layer-loading in the draw-off tunnel and for loading into barges. *Id.* at 7. Thus, it appears that Kinder Morgan engages in storing and mixing to meet TVA's specifications and to render the coal fit for TVA's particular use, i.e., as fuel in its power plants. 22 FMSHRC at 78-79. Because non-TVA coal is treated in the same manner as TVA coal (JS at 8), the same conclusions may be applied to handling of non-TVA coal. Therefore, the Terminal may be distinguished from the marine terminal found to be outside of Mine Act jurisdiction in *Elam*, which engaged in listed activities for its own loading purposes. Rather, like the loading dock held to be a "mine" in *Mineral Coal Sales*, 7 FMSHRC at 620, the Terminal handles coal to meet market specifications and for a particular purpose other than for its own use.

In concluding that the nature of the Terminal brings it outside of Mine Act jurisdiction, our colleagues rely upon factors that they conclude were applied in *Herman v. Associated Electric Cooperative, Inc.*, 172 F.3d 1079 (8th Cir. 1999). Slip op. at 9, 10. That decision involved an electric utility, which is distinguishable by its nature from the Terminal. Moreover, unlike the Terminal, the electric utility at issue in *Associated Electric* was the end-use consumer, a factor which the court found significant. 172 F.3d at 1080, 1083 ("If Congress wishes to expand the Act to cover consumers of coal such as utilities . . . , it is better suited to that task than this court."). In fact, other courts reviewing coal handling by utilities have concluded that such utilities fall within Mine Act jurisdiction. *See Pa. Elec. Co. v. FMSHRC*, 969 F.2d 1501, 1504 (3d Cir. 1992), *aff'g* 11 FMSHRC 1875 (Oct. 1989); *United Energy Services*, 35 F.3d at 975. Further, at least one court has noted its disagreement with the decision in *Associated Electric*. *See In Re: Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1354 (2001) ("We do not entirely agree with the majority opinion of the Eighth Circuit in *Herman* and distinguish the facts from our present case . . . .").[8] In sum, we conclude that Kinder Morgan engages in the "work of preparing the coal" at the Terminal, and MSHA properly asserted its inspection authority over the facility.

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[8] As evident in this case, Mine Act jurisdiction turns on the particular facts relating to each operator's activities. Thus, we do not share our colleagues' concern over MSHA's failure to articulate a bright line "uniform national standard" delineating the limits of that jurisdiction. Slip op. at 10.

For the foregoing reasons, we would affirm the judge's determination that the Terminal is a mine and uphold the citations and penalties.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, in favor of reversing the judge:

Our colleagues believe that the marine transportation terminal (the "Terminal") operated by Kinder Morgan Operating L.P. "C" ("Kinder Morgan") constitutes a "mine" within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). We disagree.

Section 3(h)(1) of the Act defines a "coal or other mine" in part as "lands, . . . facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of preparing coal." 30 U.S.C. § 802(h)(1). Section 3(i) defines "work of preparing the coal" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. § 802(i).

In concluding that the Terminal constitutes a mine, our colleagues apply the test set forth in *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982), and opine that Kinder Morgan engaged in the "work of preparing the coal" within the meaning of section 3(i) of the Act. Slip op. at 6-7. In *Elam*, the Commission recognized that the determination of whether an operator engages in coal preparation involves an inquiry not only into whether the operator performs the activities listed in section 3(i), but also into the nature of the operation. 4 FMSHRC at 7. The Commission stated that "simply because [a company] in some manner handles coal does not mean that it automatically is a 'mine' subject to the Act." *Id.* The Commission further explained that "'work of preparing [the] coal' connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications." *Id.* at 8.

As the connection with the mining industry or proximity to the mine site or related facilities becomes more attenuated, factors other than those considered by our colleagues are relevant to the nature of the cited operation because they more fully illustrate whether the work performed at a facility is that "usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications."[1] *Id.* Such factors include whether the coal has been sold or has entered interstate commerce; whether MSHA has exercised jurisdiction over the entity that handled the coal before or after the cited company; the degree of handling performed; and whether such handling is the type usually performed by an end-use consumer. *See Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078, 1082-83 (8th Cir. 1999) (finding no Mine Act jurisdiction based on such factors as whether coal had entered the stream of commerce; the degree to which the coal was processed by the cited entity; and whether such handling was that which is usually performed by an end-use consumer); *RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 185 (3d Cir. 1997) (finding Mine Act jurisdiction based in part on consideration that

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[1] Thus, such factors more fully define whether the coal handling being performed is that which is "usually done by the operator of the coal mine" within the meaning of section 3(i) of the Act. 30 U.S.C. § 802(i).

MSHA exercised jurisdiction on company that handled coal after the cited entity), *aff'g RNS Servs. Inc.*, 18 FMSHRC 523 (Apr. 1996). These factors must be balanced in accordance with the facts of each particular case.

As our colleagues have stated, it is undisputed that Kinder Morgan engages in at least two of the activities listed in section 3(i) at the Terminal. Slip op. at 6; *see* S. Br. at 14 n.3; KM Reply Br. at 2. We disagree, however, that our colleagues' cursory inquiry into the nature of the facility establishes that the Terminal is subject to Mine Act jurisdiction. Instead, we find that, after applying and balancing the factors set forth above, the work performed at the Terminal falls outside of Mine Act jurisdiction. Before any coal reaches the Terminal, it has already entered the stream of interstate commerce in that it has been sold to customers outside the mining industry. JS at 3, 8. In addition, there is no evidence in the record that MSHA has asserted jurisdiction over barges or railroad cars bringing coal to the Terminal, over barges transporting coal from the Terminal to TVA or other electric utilities, or over the utilities that unload, handle, and consume the coal. *See* KM Br. at 17 (suggesting that if Mine Act jurisdiction extends to the Terminal, it must also extend to such carriers and utilities). Here, the Secretary has selectively proclaimed MSHA jurisdiction over an island in the stream of interstate commerce without articulating a uniform national standard delineating the limits or extent of Mine Act authority over the transportation or utility industry.[2] Before plunging ahead, as the Secretary exhorts, the Commission would do well to ascertain how far along in that commercial current MSHA is inclined to drift and what other creatures inhabit the stream.

Moreover, given the degree to which the coal has already been processed before arriving at the Terminal, the degree of coal handling by Kinder Morgan is minimal. *See* JS at 4-5 (providing that the coal producer processes the coal to meet TVA's contract specifications before loading the coal on to railroad cars or barges en route to the Terminal). Further, it appears that the type of handling performed by Kinder Morgan is the type usually performed by an end-use consumer. *See* Oral Arg. Tr. at 7-8 (asserting that Kinder Morgan's activities are essentially the type of work regularly done by electric utilities). Thus, given that the coal has already been processed to meet market specifications and entered the stream of commerce, we conclude that more than the de minimis handling of coal performed by Kinder Morgan is required to bring the Terminal within Mine Act jurisdiction. *See Associated Elec.*, 172 F.3d at 1083 ("[A]fter a mine delivers processed, marketable coal to a utility[,] any further operations to prepare the coal for combustion are not subject to MSHA jurisdiction.").

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[2] The record does not even provide a definitive answer to the question of whether the MSHA jurisdiction sought here applies to other marine terminals on the East or West Coast, the Great Lakes, or elsewhere on our inland waterways where commercial transport or shipping companies handle coal or other extracted minerals. *See, e.g.*, Oral Arg. Tr. 19-20.

Accordingly, we would reverse the judge's determination that the Terminal is subject to the Mine Act, and vacate the citations and associated civil penalties.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 5, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-30-M
Petitioner	:	A.C. No. 23-01787-05549
v.	:	
	:	West Fork Mine/Mill
THE DOE RUN COMPANY,	:	
Respondent	:	

DECISION

Appearances: Gregory Tronson, Esq. and Lydia Tzagoloff, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania.

Before: Judge Bulluck

This case is before me upon Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration ("MSHA"), against the Doe Run Company ("Doe Run"), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). The petition seeks a civil penalty of $25,000.00 for an alleged violation of section 57.15005, 30 U.S.C.
§ 57.15005.

A hearing was held in St. Louis, Missouri. The parties' Post Hearing Briefs are of record. For the reasons set forth below, the citation shall be AFFIRMED, as modified.

I. Stipulations

1. Doe Run operates the West Fork Mine, MSHA ID No. 23-01787, an underground lead and zinc mine near Bunker, Missouri.

2. Doe Run and its mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801 et seq.

3. In the year 2000, Doe Run worked 1,719,972 hours and West Fork worked 228,525 hours. West Fork was a medium-sized mine and Doe Run is a medium-sized operator.

4. In the 24 months prior to January 24, 2000, the West Fork Mine had 28 assessed violations in 42 inspection days.

5. The presiding Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act, 30 U.S.C. § 815.

6. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

7. Citation No. 7880464 was issued pursuant to Section 104(a) at Doe Run's West Fork Mine on January 24, 2000, alleging a violation of 30 C.F.R. § 57.15005.

8. Under the heading and caption "Condition or Practice" the citation alleges as follows:

> A shaft maintenance man was fatally injured at this operation on October 18, 1999, when his lanyard snagged a bolt on a shaft guide fish plate. The lanyard had not been attached to the hoist cable, instead it was left with both clips attached to the belt D-ring. Standing on the guard elevated the worker above the handrail, allowing a 32 inch loop to overhang the handrail and hook the bolt on the skips ascent.

9. The citation was terminated on January 12, 2000, when a newly redesigned cage was installed.

10. The subject citation was properly served by duly authorized representatives of the Department of Labor upon agents for Doe Run on the date and at the place indicated therein.

11. The subject citation may be admitted into evidence to establish the issuance, but not for the truth of any statement asserted therein.

12. Doe Run's mining operations affect interstate commerce.

13. Mining at the West Fork Mine was conducted by room and pillar mining by a process of drilling and shooting the faces and then loading the material into trucks for transport.

14. In 1998, the Doe Run Company took over the operation of West Fork from Asarco Incorporated.

15. The mine was normally operated two, ten-hour shifts per day, five days a week. Total employment was 101 employees. The mine is no longer producing ore and no longer has a separate MSHA ID number.

16. The ore body was drilled, blasted, loaded onto haul trucks, and transported to the production shaft.

17. The ore was hoisted by skip to the surface where it was crushed and conveyed to the mill.

18. This case arose out of an accident on October 18, 1999. At about 9:30 a.m. on that day, James W. ("Billy") Vest, a shaft maintenance repairman, was fatally injured while performing a routine shaft inspection.

19. Mr. Vest was working with another employee, Willard Cooper, another maintenance repairman.

20. The accident occurred during the weekly hoist and shaft inspection that was typically performed on Monday mornings.

21. Mr. Vest and Mr. Cooper had already inspected the service hoist first that morning and were in the process of starting the inspection process of the production hoist and shaft.

22. The inspection involves riding the work deck on top of the production skip.

23. The work deck on top of the skip was provided with a top handrail, midrail and 3 inch high toe board around the perimeter of the work deck on all four sides. The top handrail was 40 inches above the deck floor and the midrail was 22 inches above the work deck floor. The top guide rollers projected above the work deck floor and were guarded by expanded metal enclosures 26.5 inches high x 12 inches deep x 30 inches wide. The work deck was protected by a 54 x 53 inch bonnet installed at a height of 93.5 inches above the deck floor.

24. The railings on the entrance side to the work deck were removed immediately after the accident to provide better access to provide assistance to Mr. Vest. The photographs taken after the accident do not show the two railings on one side of the work deck but they were present at the time of the accident.

25. The shaft opening was guarded with a handrail and provided with a gate for access onto the top of the skip. Additionally, the collar level access was restricted by a fence equipped with a gate. The skip blocked the shaft when it was in position at the collar level of the shaft.

26. Mr. Vest and Mr. Cooper positioned the production skip at the shaft collar so they could step onto the work deck on top of the skip.

27. Mr. Vest and Mr. Cooper had accessed the work deck on top of the production skip.

28. Both Mr. Vest and Mr. Cooper were wearing safety belts and lanyards when they got

on the work deck.

29. Mr. Vest radioed Gary Huffman, hoistman, at approximately 9:30 a.m. to raise the skip so he and Mr. Cooper could inspect the ore chutes in the head frame.

30. Mr. Vest received internal injuries from the safety belt and lanyard pulling him down against the handrail.

31. Mr. Vest had a total of 13 years and 9 months experience, all at West Fork. He had held the job of shaft maintenance repairman for 2 years and 9 months. He and Mr. Cooper had received the required training, including task training, in accordance with 30 C.F.R. Part 48. He and Mr. Cooper were experienced in the inspection of the hoist and shaft.

32. MSHA conducted an investigation with the assistance of mine management and selected employees.

33. After the accident, MSHA did a thorough inspection of the production hoist's electrical circuits and mechanical components and they were functioning properly. Tests were performed on the limit switches, speed and over travel devices, as well as the bell signal and all were functional and working properly.

II. Factual Background

On the morning of October 18, 1999, after completing a visual inspection of the service hoist that transports miners into and out of the underground levels of the mine, shaft maintenance repairmen Billy Vest and Willard Cooper began a weekly inspection of the production hoist and shaft (Tr. 24, 149-50). The production hoist moves ore from the mine to an above ground, elevated chute, and then dumps it into a bin (Tr. 64-65, 176). Inspection of the production hoist involves riding up to the top of the head frame to the ore chutes, on the work deck atop the production skip, for a maintenance check of the liners and scrolls, and a check of the shaft guide rails and fishplates during ascent and descent for build-up of calcium deposits, cracks, loose bolts and any conditions that could be hazardous in the shaft (Tr. 24, 34, 175-76, 202, 205-06). There are actually two skips, side-by-side, in the shaft; when one is up dumping ore the other is underground for loading (Tr. 63-64). After bringing the north skip to the collar, Billy Vest stepped onto one of two elevated wheel guard cages on the work deck, followed by Willard Cooper who stepped onto the other (Tr 150-151, 158-59). Both miners had on safety belts with lanyards (Stip. 28; Tr. 150, 152, 156). Cooper tied-off above the thimble on the rope, then turned his back to Vest, facing the shaft rails for the visual inspection on ascent (Tr. 156-59; Ex. P-2, p. 5). The last time Cooper saw Vest before the accident, Vest was standing on the wheel guard cage, facing the center hoist cable with his back to the guide rails and his lanyard attached to the back of his belt (Tr. 75-76, 159). As soon as Cooper tied-on, at approximately 9:30 a.m., Vest radioed to hoistman Gary "Sugarbear" Huffman to take them up to the chutes, and the skip began

moving slowly (Stip. 29; Tr. 152, 159-60). At the same time, having not seen Vest tie-off, Cooper asked Vest what he was hooked onto, and as he turned around to face Vest, Vest was already caught (Tr. 152, 160-61, 167). Vest's lanyard, hanging outside of the moving skip into the shaft, had snagged a bolt on a fishplate and pulled him down against the railing (Tr. 25). Cooper found Vest sitting on top of the wheel guard cage with his left leg underneath him and the other on the work platform floor, with his back against the top handrail (Tr. 16, 53, 152-55, 187). Cooper immediately belled the skip to a stop, then down, until he saw slack in Vest's belt (Tr. 153-54). The skip had traveled about a foot when the lanyard snagged the bolt, and an additional two feet before it stopped (Tr. 25). Cooper immediately released Vest's belt and radioed Huffman for help (Tr. 155-56). While workers were administering first aid to Vest, he commented, "I killed myself," and ultimately died as a result of internal injuries (Tr. 78, 165).

MSHA Inspector Michael Davis arrived on-site on October 19th and, along with MSHA Inspectors Robert Seelke and Vern Miller, conducted an accident investigation. On January 12, 2000, prior to issuance of Citation No. 7880464 by Inspector Davis on January 24th , Doe Run abated the hazardous condition by redesigning the cage, and the citation was terminated the same day it was issued (Tr. 45, 77). The work platform floor surrounding the rope attachment and thimble was raised above the wheel guard cages to increase the standing and work surface, and screening was installed to prevent objects from extending beyond the cage (Tr. 191-92). Citation No. 7880464 alleges that Doe Run's violation of section 57.15005 was "significant and substantial" and the result of the operator's moderate negligence.

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F.R. § 57.15005 provides, in pertinent part, that "[s]afety belts and lines shall be worn when persons work where there is danger of falling. . . ." Like the surface companion to the underground standard at issue herein, the mandate that safety belts and lines be worn under section 57.1005 necessitates that they be worn properly. *Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754, 757 (May 1992), *citing Austin Power, Inc.*, 9 FMSHRC 2015 (December 1987), *aff'd* 861 F.2d 99 (5th Cir. 1988). Furthermore, the Commission has held that "[t]he fact that belts are not worn properly is a violation under this standard for which the operator is liable irrespective of employee misconduct." *Id.* (citations omitted).

The parties have stipulated that safety belts and lanyards were worn by Billy Vest and Willard Cooper when the accident occurred (Stip. 28). Doe Run has conceded that there was a danger of falling from the wheel guard cages on the skip (Tr. 224-25, 239-40). However, the company challenges that there was a danger of falling from the work platform floor, where it contends that Vest had been standing, because of the two-tiered handrails surrounding the skip. Moreover, Doe Run argues that there was no violation because Vest did not actually fall. Since it is undisputed that there was a danger of falling from the wheel guard cage, the issue, then, is whether that danger existed from the work platform floor, if I find that Vest had been standing

there. An actual fall need not have occurred for a violation to be established. Under applicable precedent, a determination must be made as to whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized a danger of falling under the circumstances in this case. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

Inspector Davis testified that he interviewed witnesses, took measurements, photographs and made sketches of the accident scene, compiled field notes, and concluded that Billy Vest's death was caused by his failure to properly wear his fall protection while riding the skip (Tr. 14-15, 18-19; Ex. P-1, P-2, P-3). Davis's conclusion was based, in part, on his findings that the size of the skip's work platform floor restricted work activity, and that Vest had been standing on one of the wheel guard cages when his lanyard snagged the bolt (Tr. 22-23, 29, 31-32). Davis testified that, in positioning Vest on the wheel guard cage, he considered the length of Vest's lanyard, the location of the bolt, the amount of travel of the skip, Vest's location after the accident, interview statements, and particularly Willard Cooper's statement that Vest had been standing on the cage (Tr. 25-26). That position, he explained, would have put the top handrail approximately 13 to 14 inches above Vest's foot (midcalf) (Tr. 27, 71; Ex. P-2, p.6). Finally, Davis testified that, because the hoist is a moving conveyance, the potential for falls always exists, irrespective of whether workers stand on the floor or elevated above the handrails on the wheel guard cages, due to unforseen jerks, sudden stops and falling objects, as well as the leaning and moving required of the workers in performance of their maintenance duties (Tr. 32-34, 85). In the instant case, he opined, had Vest's back not slammed into the shaft guide rail, he would have been pulled from the cage (Tr. 85-86). Therefore, he concluded, fall protection is always required "[a]ny time that they step on top of that conveyance" (Tr. 33-34).

In addition to testifying that Billy Vest had stepped onto the wheel guard cage just before the skip began its ascent, Willard Cooper also maintained that, because the work platform floor's standing room allowance of 8 ½ inches was "just too tight to turn around," and because the floor was generally wet, the maintenance crew always rode the skip standing on the cages (Tr. 164, 166, 168, 172-73; see also Tr. 22-23, 32). Myron "Rat" Halbert, whom Vest had been training to perform shaft inspections, similarly testified that he and Vest had always ridden on the wheel guard cages during entire inspections (Tr. 174, 178).

Gharib Ibrahim, a civil engineer at MSHA's Bruceton Research Center in Pittsburgh, Pennsylvania, assisted in determining Billy Vest's position at the time of the accident, and testified as an expert witness for the Secretary. Ibrahim testified that he had spoken with one of the investigators, reviewed the investigative notes, sketches and photographs, and run a computer analysis of the accident data (Tr. 94-95, 110). The two possible scenarios of where Vest had been standing, he explained, result in different horizontal and vertical forces exerted by his body on the top handrail: if he had been standing on the work platform floor the force would be downward with at least 1/3 of that force pushing outward, whereas standing on the guard cage would exert downward force with outward force almost diminished to zero (Tr. 96, 98-99, 101-02, 103-06, 144). Based on the downward deflection of 10 ½ inches and negligible outward

deflection of the top handrail, Ibrahim opined that Vest had been standing on the wheel guard cage when the accident occurred (Tr. 97, 99-103, 120; Ex. 2, p.4; see Ex. 15). Vest had not been pulled out of the skip, he testified, because the shaft guide rail provided a barrier (Tr. 119-20, 125).

Doe Run's witnesses disagreed with Garhib Ibrahim's conclusion as to Vest's placement on the skip. Safety specialist Owen Erickson opined, based on his own common sense, that no matter where Vest had been standing, because he was not a fixture, only vertical force would have been exerted on the handrail by his body (Tr. 217-20). Therefore, he reasoned, no conclusion as to Vest's position could be drawn from the defection of the top handrail (Tr. 220). Safety manager David Brown testified that, in his opinion, more time had elapsed than Cooper realized between Cooper's last view of Vest and when he found him injured, and that Vest had probably stepped down from the guard cage; otherwise, if he had been elevated on the cage, he would have fallen down the shaft (Tr. 252-55, 266-67, 271, 279). Neither Erickson nor Brown have any background or training in engineering, and for that reason I give their opinions little weight (Tr. 222, 266).

I have considered the evidence in its entirety respecting where Vest was situated when the accident occurred, including the MSHA video simulating a similar type of accident (Ex. R-1). Based on credible evidence that Vest had last been seen standing on the wheel guard cage, that he and other shaft maintenance workers had routinely conducted shaft inspections riding the cages, and Ibrahim's placement of Vest on the cage from an engineering analysis, I find that Vest had been standing on the cage when his lanyard snagged the fishplate bolt. It is also my finding that fall protection was required from <u>all</u> locations on the skip, and that a reasonably prudent person would have recognized the danger of falling for the reasons that Inspector Davis enumerated--it is a moving conveyance that can become unstable at any time, and the full range of maintenance duties requires movement on the part of the workers. As the Commission noted, finding a violation of section 56.1005 applicable to surface mines, where an employee had been standing on an 18 foot ladder installing a light fixture without benefit of a safety belt, "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Indeed, Doe Run recognizes the danger of falling from moving hoists and provides safety belts at no cost to its employees. The company's Safety Rule Book, its Handbook of Safe Practices, and its Preventive Maintenance Work Order require use of safety belts and ropes during performance of shaft inspection or work (Tr. 34-39, 212-15; Ex. P-5, p. 25, P-6, p. 7). Moreover, Doe Run's Part 48 annual training of its employees and its weekly safety meetings address fall protection (Tr. 188, 196, 227-33; Ex. R-4, R-5, R-6). In this case, it is clear that Vest's failure to wear his safety belt and lanyard properly, as required, violated the standard. As a consequence, Doe Run is strictly liable.

B. Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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 Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Davis testified that he determined the violation to be S&S because of the resultant fatality (Tr. 40). The violation involved in this case created the discrete hazard of falling. Tragically, Billy Vest suffered the ultimate consequence of his failure to use fall protection properly and, furthermore, there is convincing evidence that, had the shaft guide rail not acted as a barrier, he would have fallen down the shaft. Because his injuries were fatal, I find that the violation was S&S and very serious.

C. Penalty

While the Secretary has proposed a penalty of $25,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Doe Run is a medium-sized operator, with no violations of the same standard at issue in its two year history (Stips. 3, 4; Ex. 12). The proposed penalty will not affect Doe Run's ability to remain in business (Resp. Br. at 8).

The remaining criteria involve consideration of the gravity of the violation and Doe Run's negligence in causing it. As stated previously, I find the violation to be very serious. My

assessment of Doe Run's negligence, however, differs substantially from that of the Secretary. Inspector Davis testified that he found Doe Run moderately negligent because there was no supervisory oversight of shaft inspections to ensure use of fall protection, by spot-check observation or accompaniment, despite the heightened potential for falls in this line of work, and also because the lanyard was overly long (Tr. 40- 43, 44-45, 83). Respecting the lanyard, other than the bare allegation, no evidence has been presented to support this conclusion. On the other hand, the record is replete with evidence that Doe Run is a safety conscious operation, and that use of fall protection had been "pounded" into the shaft maintenance crew not only by management, but also by Billy Vest as trainer of many junior workers, and that fall protection had been properly and uniformly used at the mine (Tr. 55-56, 59-61, 77-78, 160-62, 166, 168-69, 175-80, 185-86, 188-90, 193-99; Ex P-1). Additionally, there is some evidence that management had periodically observed its maintenance crew riding the hoists (Tr. 184-85, 192-98). This level of observation, combined with Part 48 annual training and weekly safety meetings, leads me to conclude that Doe Run satisfied the level of care necessary to ensure the safety of its shaft maintenance crew and that the company was not negligent. The record in its entirety is simply lacking in evidence that Doe Run should have anticipated Vest's failure to tie-off, nor is there any indication that spot-checks would have prevented Vest's deviation from his routine, compliant behavior. Doe Run bears no duty, by law or regulation, to have supervisors present each time employees tie-off. *See Mar-Land,* 14 FMSHRC at 759. Therefore, having considered Doe Run's medium size, insignificant history of prior violations, seriousness of the violation, lack of negligence, and good faith abatement, I find that a civil penalty of $5,000.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation No. 7880464 is **AFFIRMED**, as modified to reduce the level of negligence to "none," and the Doe Run Company is ordered to **PAY** a penalty of $5,000.00 within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-142
Petitioner	:	A. C. No. 15-17587-03572
v.	:	
	:	
OHIO COUNTY COAL COMPANY,	:	
Respondent	:	Freedom Mine

DECISION

Appearances: Arthur J. Parks, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Madisonville, Kentucky, and J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner;
Flem Gordon, Esq., Gordon & Gordon, P.S.C., Madisonville, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (1994), the "Act" charging the Ohio County Coal Company (Ohio County) with three violations of mandatory standards and proposing civil penalties of $423.00 for those violations. The general issue before me is whether Ohio County violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7645093 alleges a violation of the standard at 30 C.F.R. § 75.1725(a) and charges that "[t]he belt was running into the framing and was hot to the touch in the following locations along the No. 4 belt entry at spad number 3+30, 4+90, 13+30, 14+00, 19+60, 23+10 and crosscut No. 17 the company removed from service immediately." The cited standard, 30 C.F.R. § 75.1725(a), provides that "[m]obile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Inspector Charles Jones of the Department of Labor's Mine Safety and Health Administration (MSHA), has been a coal mine inspector since September 1999. He has 21 years underground coal mine experience and for 14 of those years he served as a safety committeeman.

Jones testified that on October 19, 2000, he was inspecting the No. 4 belt entry accompanied by miner's representative Chris Johnson. He found that at seven locations the belt was running into and cutting into the bottom of the metal belt framing. At those locations the frame was too hot to hold. While Jones opined that the violation was not "significant and substantial" and that injuries and illnesses were unlikely, he nevertheless believed that if the belt would cut further into the frame there was a possibility of coal spillage and, because of the heat generated by belt friction, there could be fire or smoke from burning coal. He believed that the described hazard was unlikely, however, because the area had been rock dusted and there was no loose coal. Based on the credible testimony of Inspector Jones, I find that indeed, there was a violation of the cited standard of low to moderate gravity.

Inspector Jones found moderate negligence basing his conclusion on the fact that none of the seven violative conditions had been reported in the belt examiner's book. He noted however that the belt had cut about one inch into the steel framing so he concluded that the belt had been misaligned for at least a week. Jones also opined that there had been at least two previous belt examinations during which the violative condition should have been observed. Indeed, the belt had already cut through the support bracket and had already cut into the frame itself about one inch at the time of its discovery. Under these circumstances I agree that the operator is chargeable with moderate negligence.

In reaching these conclusions I have not disregarded the testimony of mine superintendent Ricky Brown. However, for the reasons stated below, I find his testimony to be entitled to but little weight. Brown was not present at the time the citations were issued and only later appeared at the scene to realign the belt. Brown did not deny that the belt was cutting into the metal frame as described by Inspector Jones and testified only that he did not notice it. Brown readjusted the belt with "cowhide" gloves and did not, with such gloved hands, find the frame to be hot at the locations he held it. This qualified testimony accordingly does not negate the affirmative testimony of Inspector Jones.

Citation No. 7645100 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> Loose coal and float coal dust 0 to 1 ft. deep, 5 ft. wide, and for a distance of 8 ft. was allowed to accumulate under the takeup located at the No. 6 header. The belt and header was [*sic*] energized and this mine deliberates [*sic*] 19,634 cubic feet of methane in a 24 hours [*sic*].

The cited standard, 30 C.F.R. § 75.400, provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

On October 30, 2001, Inspector Jones, accompanied by Andy Schultz, a miner's

representative and belt examiner, observed loose coal and float coal dust under the take-up located at the No. 6 header. Coal and float coal dust was, according to Jones, 1 foot deep and 5 feet wide for a distance of 8 feet. He measured the accumulation with a measuring stick. The condition was particularly hazardous according to Jones because the belt was running in the coal dust and indeed, the dust at that location had begun to crystallize. The material was black in color. The take-up was also kicking up dust and coal dust was being suspended in the air. Jones noted on the face of the citation that "injury or illness" was "reasonably likely" and could reasonably be expected to cause "lost workdays or restricted duty." He opined at hearing that the belt running against the coal accumulation with sufficient heat to cause crystallization, could result in smoke and fire. Jones opined that even should the accumulation have been wet it would have made no difference under the circumstances presumably because the heat generated would have dried the coal. He further opined that one person would likely have been affected. He opined that the carbon monoxide monitor would trigger an alarm outside and that a person would enter the mine to locate the cause thereby becoming exposed to the smoke. Within this framework of evidence I find that indeed the violation has been proven as charged and was "significant and substantial" and of high gravity.

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 safety 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 Inc. 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Jones opined that the violation was the result of only moderate negligence because the

condition had not been listed in the belt examiner's books as a hazard. Jones also opined however that the condition should have been discovered during a proper pre-shift examination, noting that the condition had existed for at least 48 hours - - sufficient time for the coal dust to become crystallized. Based on this credible evidence I agree that the operator is chargeable with moderate negligence.

In reaching these conclusions I have not disregarded the testimony of pre-shift and belt examiner Andrew Schultz who accompanied Jones on his inspection. Schultz had initially agreed with Jones that the materials cited were in fact coal and coal dust but testified that he later changed his mind after the inspector had departed and as he cleaned up the material. He then purportedly concluded that the material was not coal at all but only mud and fire clay. I find for several reasons however that this testimony is entitled to but little weight. First, I note that Schultz, as the belt examiner, was a person responsible for reporting violative conditions in the examination books. Since the violative condition alleged herein had not been reported, he would have been motivated not to find the cited condition to be violative. Second, it is undisputed that the take-up was "kicking up" coal dust and that coal dust was being placed in suspension. Schultz did not deny or otherwise account for this in his testimony. Third, Inspector Jones has 21 years of underground coal mining experience, 14 of which as a safety committeeman. Clearly he is well qualified to ascertain the identity of coal, crystallized coal and coal dust. His expert testimony in this regard is entitled to significant weight and I find in this case that it is controlling.

Citation No. 7645101 charges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

> The No. 7 belt was not being maintained. The belt was rubbing and cutting into the wood timbers located at crosscut No. 19. These wood timbers were hot and there was loose coal and coal float dust 0 to 4 inch [*sic*] deep on top of rock dust surface in the immediate area. Company removed this belt from service immediately.

As previously noted, the cited standard requires that mobile and stationary machinery and equipment be maintained in safe operating condition and machinery or equipment in unsafe condition be removed from service immediately.

According to Inspector Jones, the No. 7 belt was in fact rubbing and cutting into wood timbers located at crosscut No. 19, where there was also loose coal and float coal dust. The top belt was cutting into several timbers when coal was off the belt and the timbers were scorched and hot to the touch. Inasmuch as there was up to 4 inches of loose coal in the vicinity, Inspector Jones concluded that should the timbers catch fire from the friction then coal nearby could also ignite resulting in smoke and fire. On the face of the citation he opined that "injury or illness was reasonably likely" and could reasonably be expected to result in "lost work days or restricted duties." He also concluded therefore

that the violation was "significant and substantial." I find that the credible evidence supports these findings and that the violation was of high gravity.

Jones opined that the violation was a result of moderate negligence because the hazardous condition was not listed on the belt examiner's report. Jones also opined that the condition had existed for at least two days and that the scorched timbers were obvious. Indeed, according to Jones, he smelled wood burning from the scorched timbers several crosscuts from the cited condition. Within this framework of credible evidence I conclude that the violation was the result of moderate negligence.

In reaching these conclusions I have not disregarded the testimony of belt examiner Schultz. Schultz maintains that Inspector Jones failed to mention to him that there were hot timbers and accumulations. Schultz admits however that there was in fact evidence that the belt had been rubbing on the timbers. Schultz claimed that he did not in fact remove the timbers and claimed that he did not know whether they were in fact ever removed. Inspector Jones credibly testified in rebuttal however that he observed Schultz himself remove the timbers and loose coal after Schultz was told that a citation would be issued. I also note that Schultz did not deny that the cited loose coal existed in proximity to the cited timbers. Under the circumstances I do not find reason to discount the inspector's testimony.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Gravity and negligence findings have been previously noted in this decision. Respondent has a significant history of violations but the great majority of those violations were not deemed "significant and substantial" and were subject to minimal $55.00 penalties. As a result I find that the operator had a moderate history of violations. It has been stipulated by the parties that the operator produced 684,797 tons of coal. Presumably this is the annual tonnage for a recent year and would place the operator in a medium to large size category. It has been further stipulated that the penalties proposed by the Secretary "are appropriate to the size of this operator's business and will not affect its ability to continue in business." It has also been stipulated that the operator "demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation." Under the circumstances the following civil penalties are found to be appropriate: Citation No. 7645093 - $55.00, Citation No. 7645100 - $200.00, Citation No. 7645101 - $200.00.

ORDER

Citations No. 7645093, 7645100 and 7645101 are hereby affirmed as written and the Ohio County Coal Company is directed to pay civil penalties of $455.00, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 13, 2001

EAGLE ENERGY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 98-72-R
	:	Citation No. 7166391; 3/11/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 98-73-R
ADMINISTRATION (MSHA),	:	Citation No. 7166392; 3/11/98
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-123
Petitioner	:	A.C. No. 46-07711-03674
v.	:	
	:	Mine No. 1
EAGLE ENERGY, INC.	:	
Respondent	:	

REMAND DECISION

Before: Judge Feldman

These consolidated contest and civil penalty cases have been remanded by the Commission. 23 FMSHRC 1107 (Oct. 2001). These matters concern the failure of three Eagle Energy, Inc. (Eagle Energy) foremen to note nine hazardous kettle bottoms during the course of 17 preshift and onshift examinations. The kettle bottoms were observed by MSHA inspectors on February 26, 1998, shortly after they arrived at the No. 1 mine to investigate an unrelated fatal rib roll accident. *Id.*

A kettle bottom is the oblong or cylindrical fossilized remains of a tree trunk that is embedded in a mine roof. *Id.* at 1108 n.2. Kettle bottoms are exposed during the mining process and they are frequent occurrences at Eagle Energy's No. 1 mine. *Id.* at 1108. Kettle bottoms are hazardous because they can drop out of a mine roof without warning, sometimes causing serious injuries to miners. *Id.* at 1108 n.2. Thus, kettle bottoms require supplemental roof support to ensure that they do not suddenly fall from the roof. *Id.* at 1108-09.

When kettle bottoms are exposed during the course of mining, it is common for Eagle Energy's foremen to identify them with spray paint to alert roof bolters that additional support is needed. *Id.* at 1109; Tr.II 558, 850-51.[1] The proper way to support a kettle bottom is to secure the kettle bottom's perimeter with bolted half-headers or roof plates to prevent its separation from the roof. *Id.* at 1109.

Three of the nine kettle bottoms were located in close proximity to each other, in a cluster, in a heavily traveled area of the mine in the No. 2 entry 27 feet inby the dumping point. *Id.* These three kettle bottoms were highlighted by orange spray paint. *Id.* The painted kettle bottom cluster was photographed by Mine Safety and Health Administration (MSHA) inspector Vaughn Gartin. *Id.*; Gov. Ex. 11A-E. After six additional unpainted kettle bottoms had been detected by MSHA inspectors, Eagle Energy vice-president Larry Ward instructed safety director Jeffrey Bennett to use orange spray paint to identify these six conditions for additional roof support. 23 FMSHRC at 1111.

One of the three painted kettle bottoms had a line spray painted through it. The initial decision determined that the line was a centerline that typically is drawn by the section foreman, or at his direction, at the completion of a mining cycle to ensure that the continuous miner stays on course as it advances during the next cut. *Eagle Energy, Inc.*, 22 FMSHRC, 860, 863 (July 2000)(ALJ); Tr.II 248, Tr.III 62, 445.

The initial decision determined Eagle Energy's repeated failures to note these hazardous roof conditions were significant and substantial (S&S) violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). These mandatory safety standards require adequate preshift and onshift examinations. *Id.* at 874-76. The initial decision also determined the cited violations were attributable to Eagle Energy's unwarrantable failure. *Id.* at 876-78.

In its remand, the Commission affirmed the fact of occurrence of the violations of sections 75.360(b) and 75.362(a)(1) as well as their S&S nature.[2] 23 FMSHRC at 1118. However, the Commission vacated the unwarrantability determination and the $12,000 civil penalty imposed and remanded these matters for reevaluation consistent with its opinion. Specifically, the Commission rejected application of the "missing witness" rule to draw the adverse inference that Eagle Energy failed to call the foreman responsible for drawing the centerline through the kettle bottom because that foreman's testimony would have been unfavorable to Eagle Energy. The Commission concluded application of the missing witness rule was unreasonable because the identity of the witness who painted the kettle bottoms apparently was not known to either party. 23 FMSHRC at 1120.

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[1] The hearing in these matters was conducted in three sessions. The transcript pages are referred to by session using Roman Numerals I, II and III, followed by the page number.

[2] As noted by the Commission, Eagle Energy did not appeal the initial S&S determination. 23 FMSHRC at 1113, n.10.

Consequently, the Commission directed that . . .

> [o]n remand, the judge must reexamine the record and any reasonable inferences [footnote omitted] to be drawn from it to determine whether the Secretary has established by a preponderance of the evidence that the kettle bottoms were painted as early as February 24, whether they were painted later, or whether there is evidence in the record as to when they were painted. [Footnote omitted]. If the Secretary failed to establish when the cluster of kettle bottoms was painted, the judge must nevertheless also consider whether any miners saw or should have discovered the kettle bottoms.

23 FMSHRC 1121.

As a threshold matter, in remanding these cases, the Commission concluded that all of the nine subject roof conditions were hazardous kettle bottoms that were exposed during the normal mining cycles between February 24 and February 26, 1998, rather than the harmless roof irregularities alleged by Eagle Energy. 23 FMSHRC at 1118. With respect to the three painted kettle bottoms, the Commission concluded they were exposed during the mining cycle on February 24, 1998. *Id.* Finally, the Commission concluded the orange paint sprayed on the cluster of kettle bottoms was a signal that additional roof support was needed, rather than graffiti or doodling as claimed by Eagle Energy. *Id.* at 1117. These Commission findings are important considerations in resolving the unwarrantability issue. While it is understandable that preshift and onshift examiners would repeatedly ignore harmless roof irregularities or graffiti, it is inexcusable that these examiners would fail to note hazardous kettle bottoms, especially those that had been identified because of their need for supplemental roof support.

Discussion

During the period February 24 through February 26, 1998, preshift and onshift examinations at Eagle Energy's Mine No. 1 were performed by section foreman. For the reasons discussed below, the Secretary has met her burden of proving that the line painted through the painted kettle bottom was a centerline that was painted by, or at the direction of, the day shift section foreman on February 24, 1998. The Secretary has also demonstrated, by circumstantial evidence, that the foreman responsible for painting the centerline also contemporaneously identified the kettle bottom cluster with spray paint to alert the roof bolter that additional roof support was required. Moreover, even if the foreman who painted the centerline failed to detect and paint the kettle bottom that intersected it, such failure by that foreman to note the kettle bottom hazard in subsequent onshift and preshift examinations would still constitute unwarrantable conduct. In addition, the repeated failure of preshift and onshift examiners to note these painted hazards was unwarrantable even if the examiners lacked actual knowledge of the conditions because they failed to see them. In this regard, the examiners' failure to know that a subordinate had identified a dangerous roof condition would evidence inadequate supervision and training that would also constitute unwarrantable conduct attributable to Eagle Energy.

Finally, based on common law principles of agency, Eagle Energy cannot prevent imputation of a foreman's negligence by asserting that it is unable to identify the foreman, or that it was unaware of the foreman's conduct.

A linchpin in determining when the kettle bottom cluster was painted is the line spray painted through one of the painted kettle bottoms. For it is reasonable to infer that the person who was responsible for painting the line through the kettle bottom, in close proximity to two other kettle bottoms, noticed these three dangerous roof conditions at that time and highlighted them for additional roof support, particularly in view of the fact that the kettle bottom cluster was highlighted with the identical color spray paint as the subject line painted on the roof. 22 FMSHRC at 863, 865; *see Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (substantial evidence standard may be met through reasonable inferences drawn from indirect evidence). This conclusion is supported by the practice of Eagle Energy's foremen who identify kettle bottoms with spray paint to alert roof bolters that additional roof support is needed. 23 FMSHRC at 1108-09.

Eagle Energy section foremen Larry Sanders, Thomas Fisher and Carter Miles all maintained they could not be certain whether the line through the kettle bottom, depicted in the photographic evidence, was a centerline, a belt hanger line, or some other unidentifiable line. Gov. Exs. 11A-C and 11E. For example, when provided with the photographs of the painted kettle bottom cluster taken by inspector Gartin, Saunders claimed he was unable to identify any lines depicted in the photographs that were painted on the roof in the vicinity of the kettle bottoms.[3] Tr.II 540-42; Gov. Exs. 11A-C and 11E.

The foremen's inability to identify the lines in proximity to the painted kettle bottom cluster shown in the photographs might be plausible if they had never personally observed the area. However, the citations in issue charged these foremen with the repeated failure to identify dangerous roof conditions during their mine examinations. These dangerous conditions were observed by MSHA during the course of a fatal accident investigation. It is reasonable to conclude that in the days following February 26, these foremen viewed the cited painted kettle bottom area after it was first observed by MSHA, particularly since it was located in a heavily traveled area of the mine. Thus, the purported inability of Saunders, Fisher and Carter to identify guidelines routinely painted on the roof at their direction during the mining cycle lacks credibility.

On the other hand, The Secretary presented credible evidence that the subject line drawn through the kettle bottom was a centerline. In this regard, I credit the testimony of Richard Keith Casto, an Eagle Energy miner with 24 years experience, including past experience as a continuous miner operator, that the line intersecting the kettle bottom was a centerline. Tr.I 197-99, 244-49.

Having concluded the subject line was a centerline, the focus shifts to who painted the centerline and when the centerline was painted. As previously noted, the Commission has

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[3] The evidence reflected there were two lines in the photographs, one of which was a centerline and the other was a belt hanger line.

concluded the kettle bottom cluster inby the dumping point was exposed during the normal mining cycle during the day shift on February 24, 1998. It follows that the centerline through the kettle bottom was painted during the day shift on February 24, 1998. Larry Saunders was the day shift section foreman during the relevant period. Eagle Energy does not contend that anyone else was directly responsible for the section's mining activities during that shift.

Saunders denies the line drawn through the kettle bottom was painted by him or at his direction. In addition, Saunders asserts that he never observed either the line painted through the kettle bottom, or the kettle bottom cluster. In the absence of any evidence that another individual was directly responsible for mining of the section during the day shift on February 24, Saunders' denials simply are not credible. In this regard, it has been noted that it was not surprising that Eagle Energy management personnel would be reticent to admit knowledge of the presence of hazardous unsupported painted kettle bottoms during the two day period from February 24 to February 26, 1998, that immediately preceded a fatal rib-roll related roof accident. 22 FMSHRC at 872.

Assuming, for the sake of argument, that Saunders was not the foreman responsible for painting the centerline, Eagle Energy's reported inability to determine the true identity of the responsible foreman is not material to the issue of unwarrantable failure. The centerline was painted on February 24 by, or under the supervision of, a section foreman. A section foreman is a mine operator's agent.[4] At common law, acts and knowledge of an agent are attributable to a principal. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000) *citing Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977), aff'd, 590 F.2d 95 (4th Cir. 1979).

The Commission consistently has held, based on common law principles of agency, that the negligent acts of a foreman are imputable to a mine operator for penalty assessment and unwarrantable failure purposes, even in instances where an operator is unaware of a foreman's negligence. *Mettiki Coal Corporation*, 13 FMSHRC 760, 772 (May 1991); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-98; (February 1991); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (August 1982) (*"SOCCO"*).

Thus, even Eagle Energy's claimed ignorance of the identity of the supervisor responsible for painting the centerline is not a defense. Put another way, Eagle Energy cannot, as a matter of law, insulate itself from the extremely high negligence manifest in this case by a supervisor based on its assertion that it is unable to determine the identity of that supervisor.[5]

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[4] Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . . " 30 U.S.C. § 802(e).

[5] With respect to the issue of the ultimate burden of proof, it is important to distinguish the act of painting the subject centerline, from the act of painting the kettle bottoms. Contrary to Eagle Energy's claims, the Secretary should not have the burden of proof with respect to

Although Eagle Energy cannot avoid responsibility for knowing which of its foremen painted the centerline, the Secretary bears the burden of proving that Eagle Energy's conduct was unwarrantable. *Garden Creek Poccahontas Co.*, 11 FMSHRC 2148, 2152 (Nov, 1989). Similarly, the Secretary bears the ultimate burden of proof with respect to establishing when the kettle bottom cluster was painted. The ultimate burden of proof, also known as the burden of persuasion, never shifts and remains with the Secretary. Courts, however, have noted that, "[u]nfortunately, the etymology of the phrase 'burden of proof' is such that the phrase can be used to mean solely the burden of persuasion, solely the burden of production, or both." *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 734 (3rd Cir. 1993). The burden of persuasion requires a party *to prove* the fact in issue. *Id.* at 735. The burden of production requires a party to make a prima facie showing of the fact in issue. *Id.* at 734.

The burden of production, also called the burden of going forward, is initially borne by the party with the burden of proof. After the party with the burden of proof satisfies its burden of production by producing sufficient evidence to support its case, the burden of production *shifts* to the other party, who must, in turn, produce enough evidence to rebut the opposing party's case by introducing enough evidence to raise material questions of fact. *Bruner v Office of Personnel Management*, 996 F.2d 290, 293 (Fed. Cir. 1993).

The Secretary has satisfied her burden of production by demonstrating that the subject kettle bottom cluster inby the dumping point was exposed during the normal mining cycle on February 24. In addition, the Secretary presented evidence that the line drawn through one of the kettle bottoms was a centerline that was painted shortly after the kettle bottoms were exposed. As previously discussed, this evidence supports the inference that the foreman responsible for painting the centerline through the hazardous kettle bottom recognized the need for additional roof support and painted the kettle bottoms to alert the roof bolter. Thus, the Secretary has presented a prima facie case that the cluster of kettle bottoms was painted by, or at the direction of, the section foreman when first observed during the day shift on February 24, 1998.

Although the burden of proving when the kettle bottom cluster was painted remains with the Secretary, having presented prima facie evidence on this issue, the burden of going forward

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identifying the foreman responsible for painting the centerline. It is a ". . . familiar principle that, 'when the true facts relating to [a] disputed issue lie particularly within the knowledge of one party, the burden of proof may properly be assigned to that party 'in the interests of fairness.'" *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289, 1292 (9th Cir. 1993), *aff'd* at 70 F.3d 1278, *citing United States v. Hayes*, 369 F.2d 671, 676 (9th Cir. 1966) and *United States v. New York, N.H. & H.R.R. Co.*, 355 U.S. 253, 256 n.5, 78 S.Ct. 212, 214-15 n.5, 2 L.Ed.2d 247 (1957) ("the ordinary rule, based upon considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"). Between the Secretary and Eagle Energy, only Eagle Energy can know who was responsible for the subject centerline. Thus, the burden of proving when, and by whom, the centerline was painted should more properly be assigned to Eagle Energy.

shifts to Eagle Energy to rebut the Secretary's case. The fact that the kettle bottoms were painted is indisputable. Eagle Energy has failed to present any evidence concerning when the kettle bottoms were painted, relying instead on the assertion, rejected by the Commission, that the paint was doodling or graffiti.

In the absence of Eagle Energy's satisfaction of its burden of going forward, the Secretary has demonstrated, by a preponderance of the evidence, that the kettle bottom cluster was painted on February 24, 1998. After these kettle bottoms were painted, Saunders failed to note them during his onshift examination on February 24. In addition, Eagle Energy section foremen Saunders, Fisher and Miles collectively performed 16 subsequent preshift and onshift examinations during the period beginning on February 24 until the painted conditions were observed by MSHA on February 26, 1998, without noting any hazardous roof conditions. Like Saunders, Fisher and Miles also deny any knowledge of the painted kettle bottoms. Similarly, all three section foremen also deny painting, or even seeing, the centerline that was painted through the kettle bottom.

Testimony by Eagle Energy foremen that they did not see any unsupported, painted kettle bottoms during their examinations does not mean they were unpainted or otherwise undetectable. 22 FMSHRC at 870. Their repeated failure to note the painted kettle bottom cluster for approximately 17 examinations is aggravated, unjustified and inexcusable conduct constituting an unwarrantable failure whether or not they were aware of these conditions. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987).

Obviously, the repeated failure of Saunders, Fisher and Miles to note hazardous roof conditions during their examinations despite actual observation of the conditions would constitute aggravated conduct. However, even if their testimony that they were unaware of the painted kettle bottoms were credible, their lack of knowledge would be an aggravating, rather than a mitigating factor, that is imputable to Eagle Energy. A section foreman is responsible for the adequate supervision of his subordinates, as well as for his awareness of hazardous roof conditions in his section, especially those highlighted with reflective spray paint. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988); *SOCCO*, 4 FMSHRC at 1464.

Although the evidence supports the inference that the kettle bottoms were painted during the day shift on February 24, I note, parenthetically, that even if they were painted later, Eagle Energy's conduct would still be unwarrantable. The uncontroverted fact is that these dangerous roof conditions were not reported by preshift and onshift examiners even after these hazards were identified by orange reflective paint. As I previously noted, "even the failure to note hazardous roof conditions that were marked for remedial action during the course of *one* preshift or onshift examination may constitute unwarrantable conduct." 22 FMSHRC at 877 (emphasis in original).

Finally, putting aside the issue of when the kettle bottoms were painted, suppose the kettle bottoms had never been painted. Under such circumstances, the failure by the foreman responsible for drawing the centerline through the kettle bottom to note this hazardous roof condition during successive preshift and onshift examinations from February 24 through February 26 evidences a reckless disregard that could provide an independent basis for an unwarrantable failure.

In its remand, the Commission also directed me to consider the impact of the degree of obviousness of all nine cited kettle bottoms, rather than just the painted ones, on the unwarrantability and civil penalty issues.[6] The remaining six unpainted kettle bottoms ranged from six to ten inches in diameter and were located in less frequently traveled mine areas. The unwarrantability and civil penalty determinations in the initial decision primarily were based on Eagle Energy's failure to correct the obvious painted kettle bottoms that were located in a heavily traveled area of the mine.

Given Eagle Energy's failure to note and correct the obvious, its additional failure to note six additional relatively obscure roof conditions demonstrates an additional degree of negligence when viewed from a cumulative perspective. However, while the failure to note these six kettle bottoms during mine examinations may constitute moderately high negligence, given their small size and rather remote locations, in the absence of the three unnoted painted kettle bottoms, such failure would not provide a basis for an unwarrantability finding or an increase in civil penalty.

Turning to the civil penalty issue, the initial decision imposing a total $12,000 civil penalty relied on the duration of the unsupported painted kettle bottoms since February 24 as a basis for increasing the $6,000 total civil penalty initially proposed by the Secretary. The Commission has directed me to reconsider my gravity and negligence findings in light of my findings and conclusions on remand. Having concluded that kettle bottom hazards remained unnoted in the examination books on February 26, although they were first observed and painted on February 24, I can find no mitigating circumstances to justify a reduction in the $12,000 civil penalty assessed in the initial decision. In this regard, these hazardous roof conditions were obvious and posed a high degree of danger; they were located in a frequently traveled area of the mine inby the dumping point; and, despite Eagle Energy's knowledge of these hazards, the preshift and onshift examiners allowed these hazards to continue to exist for an extended period of time. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). In short, the violations were extremely grave and attributable to a reckless disregard. Accordingly, the $12,000 civil penalty for the violations of sections 75.360(b) and 75.362(a)(1) is reinstated.

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[6] One of the cited unpainted kettle bottoms had a roof plate secured by a roof bolt driven through its center. This method was ineffective given the slickensided nature of kettle bottoms that can cause them to separate and fall from the roof at any moment. 22 FMSHRC at 863.

ORDER

In view of the above, **IT IS ORDERED** that 104(d)(2) Order Nos. 7166391 and 7166392 reflecting that the cited violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) governing preshift and onshift examinations, respectively, were attributable to Eagle Energy, Inc.'s unwarrantable failure **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Eagle Energy, Inc., shall pay a total civil penalty of $12,000 in satisfaction of 104(d)(2) Order Nos. 7166391 and 7166392. Payment is to be made within 40 days of the date of this decision. Upon timely receipt of payment, these consolidated contest and civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 18, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-50
Petitioner	:	A.C. No. 42-01566-03635
	:	
v.	:	
	:	Skyline Mine No. 3
CANYON FUEL COMPANY, LLC.,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq. Office of the Solicitor, U. S. Department of Labor, Denver, Colorado on behalf of Petitioner.
Anne Wathen O'Donnell, Esq., Arch Coal, Inc., St. Louis, Missouri, on behalf of Respondent

Before: Judge Cetti

This case is before me upon a petition for civil penalty filed by the Secretary of Labor (Secretary) through her Mine Safety and Health Administration (MSHA), against Canyon Fuel Company, L.L.C. (Canyon Fuel), pursuant to Section 105(d) of the Federal Mine Safety and Health Act (Mine Act or Act), 30 U.S.C. § 801, *et seq*. Canyon Fuel filed a timely answer denying that the longwall foreman walked under an unsupported roof. The citation also charged that the alleged violation was an unwarrantable S&S violation of the standard. That standard 30 C.F.R. § 7512202(b) simply and plainly states:

> No person shall work or travel under unsupported roof unless in accordance with this subpart.

Upon careful evaluation of all the evidence, I find and conclude that the preponderance of the evidence presented fails to establish the alleged violation of the standard. The reasons for this finding and conclusion are discussed below after the Stipulations entered into the record by the parties at the hearing.

STIPULATIONS

1. Respondent is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the Skyline No. 3 Mine, MSHA Identification No. 42-015663.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, etc. of the Act.

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

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of respondent at the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issue and not for the truthfulness or relevancy of any statement stated there.

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

7. The proposed penalty will not affect the respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. Respondent is a large mine operator with 10,362,687 ton-hours of production in 1998.

10. The certified copy of the MSHA assessed violations entry accurately reflect the history of this mine for the two years prior to the date of this citation.

FINDINGS AND CONCLUSIONS

Skyline Mine No. 3, on August 27, 1998, had an unintentional roof fall in the stageloader area of the 4 left Longwall Headgate, Entry #1, inby the 42 crosscut. No one was hurt. Canyon Fuel immediately reported the unintentional fall to MSHA.

The longwall foreman, Kenneth DeMille, is charged in Inspector Lemon's citation with walking under unsupported roof in the caved area. DeMille is the only fully percipient witness as to where he traveled and the conditions of the area traveled. When DeMille came to work the morning after the roof fall, he was instructed by his superior to check the longwall shields to make sure the tops of the shields were pressed against the roof. This was a necessary safety measure after a fall immediately outby the longwall shield. The longwall shield is shown to be immediately inby the fall area in Gov.'s Exhibit Nos. 3 and 5. This is also shown in the Inspector's field notes received in evidence as Respondent's Exhibit No. 1, page 4. This longwall shield extended from the inby edge of the fall area about 800 feet to the tailgate area.

Just before foreman DeMille was going to start his inspection of the longwall, he was informed by the crew on the prior shift that the tailgate area was unsupported. Not being able to get to the longwall shield through the unsupported tailgate, he went to the headgate area by way of crosscut 42. His purpose was to make sure the shield supports were up against the roof and to make the tailgate entry passable. He stopped at the danger sign closest to the cave to evaluate the area. He did not hear any flaking of cribs or coal and detected no indication of movement in the strata. He observed that there was a narrow supported passageway along the right rib wall to the longwall shield. The passageway was between the right rib wall and the two eight-inch by eight-inch timbers that were on four-foot centers. The distance from the most inby timber to the tip of the protecting canopy of the longwall shield was four to five feet. He traveled along this supported passageway to the protection of the longwall shield. He then traveled along the 800-foot long shield to the tailgate area and observed that the tailgate entry was unsupported. Tr. 234, line 10-13. He then traveled along the shield back to the headgate.

As he stood under the protection of shields No. 1 and No. 2 of the longwall at the headgate, DeMille saw through the darkness of the caved area two cap lights and thought it might be some of his crew. To make sure they did not come through the fall area, he called out. "Don't come through here." The two cap lights were those of Inspector Lemon and Jack Hatch , the mine's safety person. Lemon was 30 or more feet away on the opposite side of the caved area. In the darkness, both men could only see cap lights and yelled to each other back and forth through the darkness. Inspector Lemon shouted asking DeMille if he got there through the tailgate. DeMille replied, "No," that he came along the rib and walked between the rib and the timbers. DeMille shouted back, "You shouldn't have done that. It's a dangerous thing to do. I am going to have to issue you a citation." He also told DeMille to return through the tailgate. DeMille apologized for doing something the Inspector thought was hazardous. DeMille testified he went back to the tailgate and only after working on it, he made it safe so he could exit through the tailgate.

The testimony of DeMille that he walked along the side of the right rib between the eight-inch by eight-inch timbers and the rib is corroborated by the testimony of the mine superintendent, Richard Parkins, who, on checking, observed the footprints in the 20-inch wide passageway between the rib and the eight-inch square timbers on four-foot centers adjacent to the cave area.

FURTHER FINDINGS AND DISCUSSION

After careful review of the testimony of each of the witnesses and the record as a whole, I determined and concluded that DeMille, the longwall foreman, did not walk under unsupported roof in violation of the cited standard. He did not travel through the fall area but through a passageway adjacent to it. This 20-inch wide passageway had all the support required by the roof-control plan. I credit DeMille's testimony.

A major portion of the Secretary's presentation was evidence of two specific roof-falls not in Skyline Mine No. 3 but in other mines that occurred a number of years ago where the

original fall with the passage of time continued so as to encompass an area of the mine larger than the original immediate area of the fall. Gov. Exhibits 8 and 9 are investigation reports of falls at other mines, not reports of the mine at issue.

Since there was a possibility of the fall continuing, there was arguably some hazard for DeMille to travel the 20-inch wide passageway to the shield. I find, under the facts presented in the case, that this mere possibility is insufficient to carry the Secretary's burden of proof establishing a violation of the plain wording of the cited section which prohibits walking under an unsupported roof.

Although Inspector Lemon was under the impression that DeMille walked through a portion of the caved area, he was in a poor position to observe how DeMille traveled to the longwall shield. There were cribs in front of the Inspector as he peered into the darkness of the cave area where no bodies could be seen. It appears from the testimony of the safety man Hatch, who accompanied Inspector Lemon, that he and the Inspector only saw some flashes of light from DeMille's cap light. Hatch testified that it appeared to him that DeMille did, in fact, enter the 20-inch wide supported passageway by going between the eight-inch square timbers and the rib.

The fact that the mine made plans, after the unintentional fall, for a wider and more solid passageway for its miners to reach the face is not persuasive to establish that the 20-inch wide passageway traveled by DeMille was not supported as required by the mine's roof-control plan. See Respondent's Ex. 6 for measurements of the supporting roof structures. Likewise, I am not persuaded by DeMille's spontaneous apology for doing something that the Inspector apparently thought was hazardous. It only indicates DeMille's respect for the Inspector's opinion even though the Inspector took no measurements nor did he make any close inspection of the passageway that DeMille traveled. It appears from DeMille's testimony that he was always under supported roof.

I find that the preponderance of the evidence fails to establish that DeMille walked under unsupported roof. The citation should be dismissed.

ORDER

Citation No. 4715196 is **VACATED** and this Penalty Proceeding is **DISMISSED**. Citation No. 4891490 was previously vacated by the Secretary.

August F. Cetti

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 18, 2001

ORMET PRIMARY ALUMINUM. CORPORATION, BURNSIDE ALUMINA DIVISION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. CENT 2000-233-RM
	:	Citation No. 7884162; 3/14/2000
v.	:	Docket No. CENT 2000-234-RM
	:	Citation No. 7884168; 3/14/2000
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 2000-235-RM
	:	Citation No. 7884188; 4/4/2000
	:	Docket No. CENT 2000-236-RM
	:	Citation No. 7884189; 4/4/2000
	:	Docket No. CENT 2000-237-RM
	:	Citation No. 7884193; 4/5/2000
	:	Docket No. CENT 2000-322-RM
	:	Citation No. 7885282; 6/5/2000
	:	Docket No. CENT 2000-323-RM
	:	Citation No. 7885279; 5/17/2000
	:	Ormet Corporation
	:	Mine ID 16-00354
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 2000-331-M
	:	A. C. No. 16-00354-05548
v.	:	Docket No. CENT 2000-435-M
	:	A.C. No. 16-00354-05549
ORMET PRIMARY ALUMINUM, CORPORATION, BURNSIDE	:	Docket No. CENT 2001-182-M
	:	A.C. No. 16-00354-05550

ALUMINA DIVISION, :
Respondent : Ormet Corporation

DECISION

Appearances: Brian Duncan, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner;
John C. Artz, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Notices of Contest filed by Ormet Primary Aluminum Corporation and corresponding Petitions for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"). 30 U.S.C. § 815. The petitions allege that Ormet is liable for seven violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in Baton Rouge, Louisiana.[1] The parties submitted briefs following receipt of the transcript.[2] At the commencement of the hearing, the Secretary withdrew two of the alleged violations and the petitions as to those citations will be dismissed. The Secretary proposes civil penalties totaling $769.00 for the remaining charges. For the reasons set forth below, I find that Ormet committed two of the alleged violations and impose civil penalties totaling $315.00.

Findings of Fact - Conclusions of Law

During March and April, 2000, MSHA inspector John Ramirez conducted an inspection of Ormet's Burnside Aluminum Division's alumina mill in Ascension County, Louisiana. He issued several citations alleging violations of mandatory safety and health standards. On May 17, 2000, fellow MSHA inspector, James Bussell, performed a follow-up compliance inspection to determine whether violations cited by Ramirez had been abated. He also visited the mine on June 5, 2000, and issued a citation for failure to timely report a work-related accident. Both

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[1] The civil penalty proceeding as to Citation No. 7885282 had not yet been filed at the time of the hearing. The issues raised by Ormet's related contest proceeding, as well as penalty issues common to all of the citations were heard and, by agreement of the parties, this decision disposes of all issues raised in the subsequently filed civil penalty proceeding, Docket No. CENT 2001-182-M.

[2] Substantial delays were experienced in obtaining the transcript. It was necessary to request further review of the court reporter's notes to supply some 27 pages that had been omitted from the transcript initially submitted. The official transcript consists of pages numbered 1 through 40, followed by pages numbered 40-1 through 40-27, followed by pages numbered 41 through 314. See the Amended Briefing Order entered on September 19, 2001.

Ramirez and Bussell have 14 years of experience as MSHA inspectors and both have considerable prior mining experience. They also had inspected Ormet's facility on several prior occasions.

The citations are discussed below in the order that they were presented at the hearing.

Citation No. 7884162

Citation No. 7884162 was issued by Ramirez on March 14, 2000, and alleged a violation of 30 C.F.R. § 56.9300(a), which requires that: "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The conditions he observed were noted on the citation as:

> Berms or guardrails were not provided on the banks of roadways where a drop-off existed of sufficient grade and depth to cause a vehicle to overturn. Fatal injuries could occur as a result of the condition. The affected roadway runs east and west along the pipelines to the mud lakes and two other roads running south from that same road. Tire tracks were observed as close as one foot from the edge. Only persons that check and maintain the pipeline use the road. It is traveled at least once a shift.

He concluded that it was unlikely that the violation would result in an injury – but that an injury could be fatal, that the violation was not significant and substantial, that one person was affected and that the operator's negligence was moderate. The citation was subsequently modified to reduce the operator's negligence to low because the condition had existed for a long time and had not been noted in prior inspections.

Ramirez was concerned about two areas that he determined were "roadways," neither of which had berms or guardrails separating the traveled surfaces from drainage ditches running alongside them.

The area of Ramirez's primary concern consisted of cleared ground running north/south for about six-tenths of a mile along the pipeline, on which there were numerous vehicle tracks. The area was accessed from a short east/west road but did not connect with any other road or portion of Ormet's facility. A picture taken by Ramirez showed marks where a tracked, as opposed to a wheeled, vehicle traveled within one foot of the edge of a drainage ditch. (Ex. S-4, Tr. 119). Ramirez believed that the area was part of the pipeline inspection road that was used once each shift by Ormet's employees. (Tr. 20). The area is depicted in exhibits S-4 and O-9.

The other area was an unpaved road approximately two-tenths of a mile long that ran east/west connecting the paved plant access road with another unpaved road that ran north/south alongside a pipeline from the plant to the "mud lakes," or settlement ponds, about one mile

away.[3] The road was used once per shift by an employee in a pickup truck to inspect the pipeline. A drainage ditch about five feet deep ran along the north side of the east/west road and was closest to it near its intersection with the paved plant access road. As it proceeded away from that intersection, the road curved gradually away from the ditch, such that it ran roughly parallel to the ditch for only about half of its length, i.e. about one-tenth of a mile. The road had a shoulder which measured six feet wide at its closest proximity to the ditch. Both the Secretary and Ormet introduced pictures of the short east/west road into evidence. (Ex. S-5, O-7, O-8).

Ramirez had inspected Ormet's facility on more than six prior occasions, but had never determined that the mud lakes road posed a safety hazard and had not issued any citations to that effect. He issued the instant citation because his observation of a track mark within one foot of the edge of a ditch raised a concern that a vehicle might be inadvertently driven into the ditch, injuring the driver.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

I find that the Secretary has not carried her burden of proof with respect to this alleged violation. The area primarily focused on by Ramirez was not a roadway and the drainage ditch running alongside the short east/west road did not present a hazard to vehicle operators.

Ormet's witnesses and exhibits, including an aerial photograph of the area (Ex. O-1), clarified that the roadway used to inspect the pipeline starts at the plant access road, proceeds west for two-tenths of a mile and then runs about seven-tenths of a mile south along the pipeline. However, the north/south portion is on the opposite side of the pipeline from the area depicted in exhibits S-4 and O-9. There is a small, approximately one foot deep, drainage ditch running alongside the north/south roadway, but it does not present a hazard. The north/south portion of the mud lakes road is shown in exhibit O-10.

Ramirez did not recall whether there was a roadway on the other side of the pipeline from the area depicted in exhibit S-4. (Tr. 61). However, he later admitted that it was possible that there was such a roadway used for inspection of the pipeline and that the area he cited was used only temporarily to clean out the drainage ditch. (Tr. 122). His field notes, which may have refreshed his recollection and clarified his testimony, were not available because he had not brought them with him to the hearing.

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[3] The east/west road was also used by a farmer to access land beyond the north/south mud lakes road.

Ramirez mistakenly concluded that the area depicted in exhibit S-4 was part of the pipeline inspection road. In fact, it was not a roadway at all. It was simply ground that had been traversed by a tracked backhoe that had dredged out the drainage ditch. It was not normally traveled by Ormet employees and was used only to maintain the ditch every few years or to make repairs to the pipeline that could not be effectuated from the north/south mud lakes road.

The short east/west road was part of the pipeline inspection road and there was a drainage ditch that ran alongside it. However, that ditch was sufficiently far away from the road that it did not present an appreciable hazard to the operators of vehicles. As noted above, the road curves gradually away from the ditch such that it was close to it for only about one-tenth of a mile nearest the plant access road. A vehicle traveling that portion of the road would be moving relatively slowly because the driver would have just turned onto the road or would be preparing to turn onto the plant access road. Olin K. Dart, Jr., Ph.D., testified as an expert in the field of civil engineering, specializing in highway design and traffic engineering. He inspected the area and measured the width of the shoulder on the ditch side of the east/west roadway as six feet for the short distance that the ditch paralleled the road and testified that, in his opinion, the shoulder presented sufficient protection from the hazard of a vehicle overturning in the ditch and was typical of roadway/ditch configurations in that area.

Ramirez testified that he observed tire marks within one foot of the ditch at that location. However, that testimony is inconsistent with the weight of the evidence and I find that the only vehicle tracks he observed in close proximity to a ditch were the tracks made by the backhoe depicted in exhibit S-4. Both exhibit S-5, depicting the east/west road, and exhibit S-4, depicting the area traversed by the backhoe, bore the notation that tire marks were observed within one foot of the edge of the ditch. Vehicle tracks, made by the tracked backhoe, are shown close to the edge of the ditch in exhibit S-4. Any vehicle tracks within one foot of the ditch running alongside the east/west road would have had to have been on the shoulder, several feet from the roadway surface, and Ramirez would surely have taken a picture of them.

If Ramirez had not mistakenly concluded that the area used by the backhoe was part of the mud lakes pipeline road, it is highly unlikely that he would have concluded that a violation existed. Ramirez had inspected the mud lakes road during six to eight prior inspections and, like other MSHA inspectors that inspected Ormet's facilities twice yearly, had determined that the road's proximity to the ditch did not violate the regulation. While he testified that conditions in both of the described areas were the bases for the citation, it is apparent that the work area depicted in exhibit S-4 was the primary, if not the exclusive, focus of his violation assessment. The citation itself initially refers to "roadways," but goes on to describe the "affected roadway" as one that "runs . . . along the pipelines to the mud lakes." It was the presence of the tracks within one foot of the ditch that prompted his concern. But, those tracks were not on a roadway.

The Secretary has not proven the violation alleged in Citation No. 7884162.

Citation No. 7884168

Citation No. 7884168 was issued by Ramirez on March 14, 2000, and alleged a violation of 30 C.F.R. § 56.20003(b), which requires that "[t]he floor of every workplace shall be maintained in a clean and, so far as possible, dry condition." The conditions he observed were described in the citation as follows:

> Poor housekeeping was evident on the north side of the red mud tank in the 368 area. The mud does contain caustics and a burn hazard existed if a person slipped, tripped or fell into the mud. The build up was up to 12 inches deep in some areas. Two pumps were observed with worn out packing, causing a large amount of leakage. A supervisor stated that they were hard to keep up with. Evidence (foot prints) of persons entering and leaving the affected area could be seen. Lack of maintenance on the pumps and sump areas created the hazard. It is also evident that the build up has been there for an extended time.

He concluded that it was reasonably likely that an injury would result from the violation and that an injury could be permanently disabling, that it was significant and substantial, and that two persons were affected. He initially assessed the degree of operator negligence as moderate, but later modified it to low because the mud had a low caustic content and an emergency eye wash station was in the area.

The Violation

The area in question is a concrete deck or pad with an approximately one foot high wall or curb around its perimeter. It was designed to collect and retain leakage from pumps and other sources. The red mud is removed from the alumina solution by presses, is washed to remove caustic used in the alumina extraction process and is then pumped to the mud lakes, or settlement ponds, about a mile from the plant. Because of the nature of the material and the process involved, leaks from pump packing and other sources occur on an ongoing basis. The leakage collects on the pad and is periodically cleaned up. The floor of the concrete pad is sloped downward slightly to a drain feeding into a sump pump, which pumps the material back into the pressing/washing process. The area is cleaned with a hose using water extracted as part of the process. The water contains a small amount of caustic and is used to wash the mud, in suspension, down to the sump pump drain. The only work performed in the area is periodic cleaning and occasional pump maintenance and repair.

On the day the citation was issued, the sump pump was not operational and had not been for several days. Efforts had been made to repair it, and Ramirez observed footprints in the mud most likely made by workers involved in the repair effort. There is some dispute as to the thickness of the mud. Ramirez estimated it as 12 inches by measuring the height to which mud was deposited on the boot of the miners' representative. Pictures of the area, taken before and after it had been cleaned, depict a concrete step at the base of a ladder which was measured to

have been six inches higher than the pad floor. Before cleaning, the level of the mud solution was lower than the step, although it was more likely higher in the thicker mud where Ramirez observed the footprints. (Ex. S-8, S-9, O-2, O-3).

I find that Ormet is liable for the violation cited in Citation No. 7884168. The area had not been cleaned in some time, apparently because of the failure to repair the sump pump. No evidence was introduced to establish that the pump could not have been promptly repaired. The buildup of slippery mud in the area presented a hazard to miners maintaining and repairing the sump and other pumps.

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> 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.

Mathies Coal Co, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *See also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> 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., Inc.*, 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 Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

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

Ramirez's S&S assessment was based upon his conclusion that a miner falling while walking through the area might get some of the caustic mud in his eyes and/or ears and suffer a permanent loss of sight or hearing. (Tr. 40-5). I find that possibility too remote to support the S&S designation. Ramirez admitted on cross examination that he did not know the caustic content of the mud or the effect that it would have on human tissue. (Tr. 78). He had previously suffered a burn from caustic material. However, it did not occur at Ormet's facility and his assessment was based upon an assumption that the mud at Ormet's facility was comparable to the substance he had previously encountered. The Secretary did not introduce any evidence quantifying the risk of permanent injury posed by the limited exposure assumed by Ramirez. There is no dispute that workers in the area have access to and use appropriate safety equipment, including eye goggles. There is an eye wash station in the immediate area, and emergency showers and clean clothing are available. Assuming that a fall was reasonably likely, it is considerably less likely that caustic material would get into a miner's eye or ear, and there is no evidence to support a finding that relatively prompt flushing at the eye wash station would not be sufficient to avoid injury, much less a reasonably serious injury.

I find that the violation was not S&S and that, while an injury may have been reasonably likely, the injury would result in no more than lost work days or restricted duty. I agree with Ramirez's conclusion that the operator's negligence was low.

Citation No. 7884183 and Order No. 7885279

Citation No. 7884183 was issued by Ramirez on April 4, 2000, and alleged a violation of 30 C.F.R. § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places." The conditions that he observed were noted on the citation as:

> A safe means of access was not provided to persons through the filtration area. It included: the press floor, the half deck, and the pad area. The grating between the presses was irregular and bent, scale was observed throughout the half deck and on the floor, hoses, scrap pipe and mud was observed. A slip, trip and fall hazard existed as a result of the condition.

He concluded that it was unlikely that an injury would occur as a result of the violation – but that an injury could result in lost time or restricted duty, that it affected one person, and was

the result of the operator's moderate negligence. He required that the violation be corrected by April 24, 2000. Ormet did not contest the citation.

The press floor of the plant is about 20 feet above the concrete pad area. The presses remove the "liquor" containing the dissolved alumina from the solids, the red mud-like substance. It is a dirty process and there is spillage throughout the press floor. The presses are separated by aisles and the flooring consists largely of open steel grating, bridging drainage channels that allow for the area to be washed down with hoses. Ramirez observed pieces of grating that were bent and/or not seated properly and loose pieces of pipe and hose that he determined were tripping hazards. (Ex. S-11).

The half deck refers to a platform that is suspended about five feet below the press floor. It contains piping, conduit and equipment associated with the presses, and has narrow walkways with hand railings and floors consisting of grating. Leakage from the presses drips onto the half deck and builds up on the surfaces of the pipes, conduit and equipment. The deposits are referred to as "scale." Some of the material hardens as it drips down, resulting in stalactite-type formations. The formation of scale is an ongoing process and Ramirez recognized that there would always be some scale present. He felt that the buildup had been allowed to go too far. (Tr. 40-18). Some of the scale was loose and some was very hard. Scale is dense material and its weight had caused deflection in at least one horizontal piece of electrical conduit. Ramirez was concerned about loose scale falling on persons who might be traversing or working on the pad area some 15-20 feet below, and about heavy deposits deforming and breaking the electrical conduit. Although he noted the scale buildup in the body of the citation, the only hazard he specifically identified was the trip and fall hazard presented by the grating and materials on the press floor.

Ramirez testified that he took a conservative approach to the violations that he observed in the area and chose to issue one citation encompassing several conditions that could have been cited separately. He also stated that, in retrospect, the violation may have been more properly evaluated to have presented a reasonably likely possibility of an injury occurring from a slip and fall and that, if a heavy deposit of scale fell and struck a miner on the pad floor, a permanent or fatal injury could result. He, like Bussell later, rated the possibility of an injury to a miner on the pad floor as remote because no-one worked in that area; they merely passed through occasionally.

On May 17, 2000, Bussell visited Ormet's plant to, among other things, terminate Citation No. 7884183. He concluded that some of the conditions cited by Ramirez had not been abated by Ormet and issued Order No. 7885279, pursuant to section 104(b) of the Act, barring access to the pad area below the press floor and half deck until the unsafe conditions were corrected and inspected by MSHA for compliance. He described the conditions in the body of the order as follows:

> A safe means of access was not provided to persons working or traveling in the pad area below the press floor. The buildup of material on top of the piping,

conduit, and framework above the pad area had not been taken down sufficiently to protect persons from the hazard. The pad area below the press floor was barricaded off and entry to the area is denied except to remove the material creating the hazard, and until MSHA can inspect the area for compliance.

Bussell was satisfied that Ormet had abated the unsafe conditions on the press floor that Ramirez had itemized on the citation as presenting the "slip, trip, and fall hazard." (Tr. 179-80). Bussell's concern was the scale buildup on the half deck. Although he was not present when Ramirez issued the citation on April 4th, he saw no-one working on scale removal and concluded that virtually no effort had been devoted to removing the scale. He observed what he considered to be loose scale on conduit and throughout the half deck area, as well as deteriorated pipe insulation. His order essentially closed-off the pad area below the half deck. He allowed the barricades barring access to the closed area to be moved as progress was made removing the scale, a process that took nearly two months.

Terry E. Bozeman, Ormet's superintendent of the digestion/filtration area, was present when Ramirez made his inspection and issued the citation. He testified that Ramirez told him that, in order to abate the citation, Ormet needed to eliminate the slip and fall hazards on the press floor and remove the loose scale, not the hard cemented-on scale, on the half deck. Ormet employs two persons to do scaling and assigned one of them to work solely on the half deck. Bozeman observed the person working on a daily basis and testified that all of the loose scale was removed within one week of Ramirez's inspection and that by the time Bussell came to abate the citation, approximately 50% of the remaining scale had been removed. The hard scale, which was similar to concrete, had to be chiseled off by hand or with an air hammer.

Bozeman was surprised and aggravated by Bussell's assessment of the abatement effort on the half deck. He felt that all of the loose scale, which was Ramirez's concern, had been removed and that the miners' representative who had also accompanied Ramirez on the inspection was also of the opinion that the scale problem had been corrected. Bussell, however, had no recollection of anyone at Ormet, including the miners' representative, claiming to have made an effort to eliminate the scale buildup. Rather, Ormet officials told him that, due to vacation schedules and other demands, there had been essentially no time available to remove the scale.

It is apparent that the citation issued by Ramirez, which is not contested by Ormet, was properly issued and that the gravity and negligence factors were correctly assessed. It is also clear that Ramirez and Bussell differed considerably on their respective evaluations of the condition of the half deck scale. Neither inspector explained how he determined whether scale was loose or cemented and it appears, from the single photograph depicting scale observed by Bussell, that it would be difficult to make such a determination from observation alone. (Ex. S-15). Of course, Bussell was not present when Ramirez issued the citation. The evaluation of a general condition like that noted by Ramirez ("scale was observed throughout the half deck") is somewhat subjective and it is not surprising that inspectors would differ in their evaluations of

such conditions.

The parties' dramatically different positions on Ormet's efforts to abate the scale buildup cannot be reconciled, even when the subjective nature of the evaluation is considered. Bussell did not make his compliance inspection until six weeks after Ramirez had issued the citation, well past the 20 days that had been allowed for abatement. Had Ormet actually removed all of the loose scale within the first week, and had one person been exclusively assigned to remove scale for the additional five weeks prior to Bussell's inspection, it is virtually impossible that Bussell would have reached the conclusions that he did. He testified that if he had seen any evidence of progress on abatement of the scale buildup he most likely would have extended the time allowed for compliance. However, he concluded from his observations that virtually no effort had been made. I find that, while Ormet may have devoted some effort to removal of the half deck scale between April 4 and May 17, 2000, it had not taken adequate steps to abate the hazard posed by the scale.

Ormet's claim of having made a good faith effort to abate the hazards identified by Ramirez also has support in the record. The only hazard specifically identified by Ramirez in the body of the citation was the trip, slip, and fall hazard presented by the grating and obstacles on the walkways of the press floor. There is no dispute that those conditions were satisfactorily abated. While Ormet should have done more to remove the scale buildup, its abatement effort cannot properly be categorized as completely non-compliant, which resulted in imposition of an additional 10 points in the penalty calculation, as well as loss of the 30% reduction in the originally proposed penalty. *See* 30 C.F.R. § 100.3(f). A more appropriate penalty would be that which would have been assessed without addition of the 10 penalty points added for failure to abate the violation.

Citation No. 7884193

Citation No 7884193 was issued by Ramirez on April 5, 2000, for what he perceived to be a violation of 30 C.F.R. § 56.11001, which requires that a "[s]afe means of access shall be provided and maintained to all working places." The conditions that resulted in the violation were described on the citation as:

> A safe means of access was not provided to persons in the 350 area shaker floor. A buildup of alumina up to 5 feet deep was observed on the roof area between the #1 and #2 kilns. The weight of the material was not known but the hazard of structural failure could exist. Persons work under the affected area.

He concluded that it was unlikely that an injury would result from the violation – but that an injury could be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. The roof area is depicted in exhibits S-15 and O-5.

The roof in question is adjacent to kilns that are used to dry Ormet's final product, alumina, which is a white crystalline substance. It is abrasive and eventually wears through the walls of the kilns' cooling equipment. Alumina leaking through such openings, as well as smaller amounts that simply escape the drying/cooling process, accumulates alongside the kilns on the roof. There are three kilns, which operate at very high temperatures, approximately 2,500 degrees Fahrenheit, effectively preventing access to the roof. Every three months, the kilns are shut down, one of them is repaired and refurbished and the alumina accumulated in the area is removed.

Ramirez did not go onto the roof. In consultation with the miners' and management representatives, he estimated the thickness of the deposit at five feet at its highest point. However, he did not know the slope of the roof. (Tr. 96). Nor did he know the composition of the roof. (Tr. 47, 100). There was a vertical corrugated steel wall at the far end of the roof. He observed the underside of the roof from the affected area and concluded that it was likely that the roof deck was constructed of a similar corrugated material. The structural components of the roof appeared to be of "pretty heavy construction" and were in good condition. (Tr. 55). He observed no deflected or corroded members. (Tr. 100). He based his assessment on the possibility that, under the weight of the alumina, the roof decking might give way between the supports and that pieces of the roof structure might strike persons working in the affected area. (Tr. 54-56).

Ormet's witnesses and exhibits established that the roof is not constructed of corrugated material, as Ramirez had assumed. Rather, it is constructed of steel decking with an overlay of steel plate. (Tr. 249-50). A picture taken in May of 2000, also shows that there is a slope to the roof, such that the depth of the material observed and photographed by Ramirez was likely no more than three feet. (Ex. O-5). The photographs also show an outline on the corrugated metal wall of a prior, considerably thicker accumulation. Jeffery Yeager, who had been Ormet's safety services manager at the Burnside facility, related an incident when one of the coolers fell onto the roof. The cooler weighed about 1,500 pounds and fell from a distance of five feet causing no damage to the roof. The May 2000, photograph, moreover, depicts a somewhat smaller, but comparable, accumulation that Bussell concluded was sufficient to abate a similar violation that he had issued.

Ramirez noted that the alumina was exposed to rain which might dramatically increase its weight. However, the heat from the kilns would tend to dry the alumina and Yeager testified that the material tended to crust over when rained on, such that water penetrated only one to two inches. I accept this testimony and find that rainfall would only marginally add to the weight of the accumulations.

I find that the Secretary has failed to carry her burden of proof with respect to this alleged violation, i.e., that the buildup of alumina posed a safety risk to the workers in the affected area. While the quantity of alumina was not as great as Ramirez estimated, the main failing is that his conclusions were based upon an erroneous assumption about the structure of the roof. It was not

made of relatively light corrugated material. Rather, it was made of steel decking with an overlay of steel plate and had safely supported, not only considerably greater accumulations, but the impact of the 1,500 pound cooler. Bussell, a similarly experienced inspector, had concluded that comparable accumulations did not violate the regulation.

Citation No. 7885282

Citation No. 7885282 was issued on June 5, 2000, by inspector Bussell. It alleged a violation of 30 C.F.R. § 50.20(a), which requires that certain occupational injuries be reported to MSHA within 10 working days. The grounds for the charge were noted on the citation as:

> A miner . . . was injured on March 31, 2000, which resulted in 11 days loss of work. The employee received a fractured finger due to accidently striking his right index finger with a knocker while operating a hitting valve. The Company failed to complete and submit an MSHA 7000-1 (Mine accident, injury and illness report) within the 10 working days required by this standard.

MSHA's attention was called to the potential violation by Ormet's submission of a report regarding the accident. (Ex. S-17). The report had been prepared on April 18, 2000, and bore a notation that the "accident did not turn into a LTA until 4/6/00." Potential late reporting violations are discussed at staff meetings in the MSHA office. The inspectors and their supervisor review the circumstances of each case and it is determined whether or not a citation should be issued. Where an operator claims extenuating circumstances, an inspector reviews them and has discretion to accept a late submission. (Tr. 113, 189-91). As noted on the report, Ormet claimed extenuating circumstances.

The miner had left work on March 31, 2000, at the end of his shift, but returned from the parking lot to the guard station and claimed to have suffered an on-the-job injury to his finger. According to Yeager, who investigated the accident, the guard checked the finger, which did not appear to have suffered trauma, and the miner was able to move it freely. The guard asked the miner to fill out paperwork reporting the injury, but the miner declined and left.[4] The following day, a Saturday, the miner apparently went to a hospital emergency room. The hospital called Ormet to verify his workmen's compensation coverage, which triggered the investigation by Yager. Ormet was skeptical that the miner had been injured while on-the-job, but eventually concluded on April 6, 2000, that he may have been so injured. Yeager filled out the report form, MSHA 7000-1, on April 18, 2000, and it was mailed. Yeager testified that, consistent with longstanding company practice, it was most likely mailed on the 18th. Bussell testified that, according to his recollection, the envelope had not been postmarked on the 18th, but "more like the 20th." However, he had thrown away the envelope shortly after it was received. The date of

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[4] A miner reporting an injury must undergo drug and alcohol screening. It is possible that the miner declined to file the report to avoid that obligation. The miner was subsequently terminated on the basis of a positive drug/alcohol test.

mailing is considered to be the date the report was submitted. (Tr. 207).

Regardless of whether the report was mailed on the 18th or the 20th, it was submitted timely based upon Bussell's testimony. Bussell did not recall the specifics of Ormet's justification, but testified that he determined that the injury became reportable on April 6, 2000. (Tr. 191, 203). Bussell apparently accepted Ormet's claim that the injury was not reasonably determined to be work-related until April 6, 2000. The regulation requires that the report be submitted within 10 working days of becoming reportable. The 6th was a Thursday and the 20th was the tenth working day after the 6th.

The Secretary advances several alternative arguments in support of the citation. However, her arguments are inconsistent with the evidence. It is argued that Ormet was notified of the claimed injury on March 31st and April 1st, and that a report prepared on April 18th was untimely using either of those dates as the starting point for the reporting period. However, both Ramirez and Bussell testified that inspectors have discretion to take into consideration extenuating circumstances when determining whether a report is timely. Bussell's testimony regarding this citation was somewhat inconsistent due to his limited recollection of the facts, and he clearly struggled in his attempts to reconstruct the events surrounding issuance of the citation.[5] He testified that he could not recall the circumstances surrounding this report, concluding that he must not have found any extenuating circumstances. (Tr. 190-91). He was fairly firm, however, in recalling that he used April 6th as the date the injury became reportable. Under the circumstances, I find that the starting date for the reporting period was April 6, 2000, the date Ormet obtained sufficient information to justify a determination that an on-the-job injury may have occurred.

The Secretary also argues that, even if April 6th is used as the starting date, the report was untimely because Ormet's plant operates seven days a week, such that the report should have been submitted by April 16, 2000. Ormet counters that only weekdays should be counted because the term "working days" does not normally include weekends and holidays, that Bussell's testimony is consistent with its interpretation, and that the office staff responsible for preparing such reports does not work on weekends. Ormet's arguments are well taken. The term "working days" does not normally include weekends and holidays, and Bussell's testimony, although unclear, indicates that he counted only weekdays in determining the period within which the report should have been submitted. The Ormet personnel responsible for preparing and submitting the reports did not work on weekends. (Tr. 208). I find that only non-holiday weekdays can properly be used to determine the reporting period.

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[5] For example, he testified that April 6th was "evidently" when the miner received (not sought) medical treatment, thereby making the accident reportable. (Tr. 191). In fact, the miner sought, and may have obtained, medical treatment on April 1, 2000, when he visited the hospital emergency room.

April 6, 2000, was a Thursday. The report was submitted the date it was postmarked. Whether it was postmarked on April 18th, as Yager testified was probable, or on April 20th, as Bussell recalled, it would have been submitted on or before the 10th work day after Bussell determined that the injury became reportable.

As noted previously, Bussell's testimony with regard to this citation was inconsistent. Obviously, if he used April 6th as the starting date for the reporting period and the 18th as the submission date, as he stated at one point, he must have miscalculated the number of working days. Even if he used April 20th as the submission date, he would have had to have made a mistake. It may be that he, in fact, did not find any extenuating circumstances to justify tolling of the reporting period. However, his inability to recall the circumstances and his fairly certain recollection that he used the 6th as the starting date, can justify no other conclusion but that the Secretary has failed to carry her burden of proof as to this violation.

The Appropriate Civil Penalty

In excess of 500,000 man-hours are worked per year at Ormet's mine, which makes it a relatively large mine and a medium-sized controlling entity. The parties have stipulated that the payment of the proposed civil penalties would not threaten Ormet's ability to continue in business. I find that neither payment of the proposed civil penalties, nor payment of the reduced civil penalties imposed by this decision, will impair Ormet's ability to continue in business. I also find that the civil penalties imposed below are appropriate to the size of Ormet's business. Ormet has a relatively good history of violations, with 47 violations having been issued over 69 inspection days in the 24 months preceding March 14, 2000.

The proposed civil penalty for Citation No. 7884168 was $184.00. The violation is sustained. However, the violation presented a reasonable likelihood of an injury resulting in lost work days or restricted duty, rather than a permanent injury, and is not S&S. Taking into consideration all of the factors required to be addressed under section 110(i) of the Act, I impose a civil penalty of $100.00 for that violation.

The proposed civil penalty for Citation No. 7884183 and Order No. 7885279 was $420.00. The violation is sustained. However, the imposition of 10 penalty points for failure to abate the violation, in addition to loss of the 30% reduction in penalty for good faith abatement, is too harsh and is not supported by the evidence. Taking into consideration all of the factors required to be addressed under section 110(i) of the Act, I impose a civil penalty of $215.00 for that violation.

ORDER

As to the citations withdrawn by the Secretary, Citation Nos. 7884188 and 7884189, the petition in Docket No. CENT 2000-435-M is **DISMISSED**.

Citation Nos. 7884162, 7884193 and 7885282 are hereby **VACATED** and the related petitions for assessment of civil penalties are **DISMISSED** as to those citations.

Citations Nos. 7884168 and 7884183 and Order No. 7885279 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $315.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

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/mh

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December 26, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 1999-178 A.C. No. 34-01787-03543
v.	:	Mine: Pollyanna No. 8
GEORGES COLLIERS, INC., Respondent,	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-391 A.C. No. 34-01787-03576-A
v.	:	Mine: Pollyanna No. 8
VINCENT SMEDLEY, Employed by GEORGES COLLIERS, INC.,	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-400 A. C. No. 34-01787-03578-A
v.	:	Mine: Pollyanna No. 8
KENNETH CLARK, Employed by GEORGES COLLIERS, INC.,	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-401 A.C. No. 34-01787-03578-A
v.	:	Mine: Pollyanna No. 8
TIM BALL, Employed by GEORGES COLLIERS, INC.,	:	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. CENT 2000-157
	:	A.C. No. 34-01707-03532
	:	
v.	:	Docket No. CENT 2000-197
	:	A.C. No. 34-01707-03531
	:	
GEORGES COLLIERS INCORPORATED, Respondent.	:	Docket No. CENT 2000-263
	:	A.C. No. 34-01707-03533
	:	
	:	Docket No. CENT 2000-264
	:	A.C. No. 34-01707-03534
	:	
	:	Docket No. CENT 1999-278
	:	A.C. No. 34-01707-03530
	:	
	:	Docket No. CENT 2000-326
	:	A.C. No. 34-01707-03535
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	:	Docket No. CENT 2000-474
	:	A.C. No. 34-01707-03537
	:	
	:	Docket No. CENT 2000-475
	:	A.C. No. 34-01707-03538
	:	
	:	Pollyanna No. 6
	:	
	:	Docket No. CENT 1999-50
	:	A.C. No. 34-01787-03541
	:	
	:	Docket No. CENT 1999-51
	:	A.C. No. 34-01787-03542
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	:	Docket No. CENT 1999-179
	:	A.C. No. 34-01787-03544
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	:	Docket No. CENT 1999-180
	:	A.C. No. 34-01787-03545
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	:	Docket No. CENT 1999-181
	:	A.C. No. 34-01787-03546

: Docket No. CENT 1999-182
: A.C. No. 34-01787-03547
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: Docket No. CENT 1999-183
: A.C. No. 34-01787-03548
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: Docket No. CENT 1999-211
: A.C. No. 34-01787-03550
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: Docket No. CENT 1999-234
: A.C. No. 34-01787-03551
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: Docket No. CENT 1999-279
: A.C. No. 34-01787-03552
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: Docket No. CENT 1999-303
: A.C. No. 34-01787-03554
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: Docket No. CENT 1999-304
: A.C. No. 34-01787-035553
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: Docket No. CENT 1999-339
: A.C. No. 34-01787-03555
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: Docket No. CENT 2000-158
: A.C. No. 34-01787-03560
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: Docket No. CENT 2000-159
: A.C. No. 34-01787-03561
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: Docket No. CENT 2000-160
: A.C. No. 34-1787-03562
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: Docket No. CENT 2000-161
: A.C. No. 34-1787-03563
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: Docket No. CENT 2000-164
: A.C. No. 34-01787-03565
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: Docket No. CENT 2000-165
: A.C. No. 34-01787-03566
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: Docket No. CENT 2000-166
: A.C. No. 34-01787-03567

: Docket No. CENT 2000-167
: A.C. No. 34-01787-03568
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: Docket No. CENT 2000-196
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: Docket No. CENT 2000-292
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: Docket No. CENT 2000-299
: A.C. No. 34-01787-03556
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: Docket No. CENT 2000-300
: A.C. No. 34-01787-03564
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: Docket No. CENT 2000-327
: A.C. No. 34-01787-03574
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: Docket No. CENT 2000-328
: A. C. No. 34-01787-03575
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: Docket No. CENT 2000-418
: A.C. No. 34-01787-03582
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: Docket No. CENT 2000-420
: A.C. No. 34-01787-03583
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: Docket No. CENT 2000-426
: A.C. No. 34-01787-03579

:	Docket No. CENT 2000-427
:	A.C. No. 34-01787-003580
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:	Docket No. CENT 2000-428
:	A.C. No. 34-01787-03581
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:	Docket No. CENT 2001-6
:	A.C. No. 34-01787-03585
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:	Docket No. CENT 2001-7
:	A.C. No. 34-01787-03589
:	
:	Pollyanna No. 8
:	
:	Docket No. CENT 2000-163
:	A.C. No. 34-01790-03509
:	
:	Milton Mine

DECISION

Appearances: Christopher V. Grier, Esquire, and Brian Duncan, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary;
Elizabeth M. Christian, Esquire, San Antonio, Texas, for the Respondent.

Before: Judge Barbour

These consolidated civil penalty cases arise under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. §§815, 820).[1] They involve allegations that Georges Colliers, Inc. (GCI) and its named supervisory agents were responsible for several violations of mandatory safety standards for underground coal mines, as well as allegations that GCI alone was responsible for numerous other violations. The cases were heard in Fort Smith, Arkansas. Counsels have submitted briefs.

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[1] At the hearing counsel for GCI stated that one of the cases, Docket No. CENT 2000-157, is associated with a section 110(c) (30 U.S.C. § 820 (c)) proceeding the Secretary is preparing to file against GCI employee, Al Lolly. (Section 110(c) provides that whenever an agent of the operator knowingly violates a mandatory safety standard a civil penalty will be assessed against the agent.) Counsel maintained Docket No. CENT 2000-157 should be tried with the section 110(c) proceeding. Therefore, counsel orally moved that Docket No. CENT 2000-157 be severed from the consolidated cases and be stayed pending the filing of the case against Lolly. Over the objection of counsel for the Secretary, the motion was granted (Tr. 10-11). The oral order severing and staying Docket No. CENT 2000-157 is affirmed.

In the cases involving GCI and its supervisory agents (Docket Nos. CENT 1999-178, etc.), the issues are whether GCI violated the standards as alleged, and whether the agents knowingly violated them. If violations are found to have occurred, the questions become the amounts of the civil penalties that must be assessed against the company and against the individuals in light of the statutory civil penalty criteria.

In the cases involving the violations that are not associated with the individual civil penalty cases (Docket Nos. CENT 2000-197, etc.), the parties have submitted extensive stipulations effectively limiting the cases to the single issue of whether the amount of the civil penalties assessed will affect GCI's ability to continue in business.

DOCKET NOS. CENT 1999-178, ETC., STIPULATIONS

The parties agree as follows:

> 1. [GCI] is engaged in mining and its mining operations affect interstate commerce . . .[;]
>
> 2. [GCI] is the owner and operator of the Pollyanna No. 6 [Mine], Pollyanna No. 8 [Mine], and [the] Milton [Mine] . . . but . . . no longer operate[s] any of those mines as of December 1, 2000 . . . [;]
>
> 3. [GCI] is subject to the jurisdiction of the [Act] . . . [;]
>
> 4. [The] . . . Administrative Law Judge has jurisdiction in this matter[;]
>
> 5. [T]he subject citations were properly served by Fred Marietti, Earl R. Simmons and Gary W. Jones, duly authorized representatives of the Secretary upon . . . agent[s] of . . . [GCI] 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 relevancy of any statements asserted therein[;]
>
> 6. [T]he exhibits to be offered by [the Respondent] and the Secretary are stipulated to be authentic but no stipulation is made to their relevance or the truth of the matter asserted therein[;]

7. [GCI] is a mine operator with 407,034 tons of production in 1997 and 334,912 tons of production in 1998[;][2]

8. [C]ertified copies of . . . [MSHA's] assessed violations history accurately reflect the history of the mine for two years prior to the date of the citations and/or orders[;]

9. Tim Ball, Kenneth Clark and James V. Smedley are no longer employed by [GCI][;]

10. Tim Ball, Kenneth Clark and James V. Smedley have no previous history of being cited for violations of the [A]ct as agents nor as miners (Tr.13-15; *see also* Tr. 481).

GCI, ITS MANAGEMENT PERSONNEL, AND THE POLLYANNA NO. 8 MINE

Craig Jackson, the president of GCI, testified regarding the history of GCI and its involvement with mining. Jackson explained that GCI came into existence in the early 1990s, when it was formed to take over the operations of P&K[3] and HMI, two small eastern Oklahoma coal operators. Both P&K and HMI faced financial difficulties and both sought financial aid from Heller Financial, Inc., a Chicago investment firm. Heller acquired the assets of the companies, including the Pollyanna No. 8 Mine, and GCI was formed to own and operate the mines (Tr. 522).

GCI borrowed funds from Heller to finance its operations. As part of the loan arrangements, GCI gave Heller production estimates, which if maintained, would provide GCI with sufficient revenue to generate a profit and to service the loan payments.

When GCI's initial attempts at profitability were unsuccessful, Craig Jackson was hired to reverse GCI's financial situation (Tr. 522-523). Jackson, was named vice president for underground operations and was put in charge of the underground operations at the Pollyanna No. 8 Mine (Tr. 522-523). Under Jackson's direction the economic situation improved, but GCI still did not meet its production projections. As a result GCI continued to have difficulty making a profit and servicing its loan.

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[2] The parties also agree that the company employs less than 50 persons and is small in size (Tr. 110-111).

[3] The transcript erroneously refers to the company as PNK, rather than to its correct name, P&K (*see* GCI Br. 5 n.1).

In January 1998, Jackson was named president (Tr. 523-524, 575). As president, Jackson was responsible for running the entire company. The company's individual mine superintendents were responsible for day-to-day operations at its mines. Jackson's primary task remained to make GCI profitable (Tr. 558) and Jackson was candid about the difficulties he faced. He stated, "[GCI had] . . . severe violation problems. Production was not up to par. We [also] had administrative structural problems" (Tr. 524). One of the "administrative structural problems" was finding proper personnel to fill management positions (Tr. 525-526). Jackson believed this was due to "shortcomings in [mining] experience" among potential supervisors in eastern Oklahoma (*Id.)*.

After becoming president, Jackson instituted personnel changes. He put Tim Ball in charge of purchasing supplies and equipment for the Pollyanna No. 8 Mine. He also assigned Ball to help train miners (Tr. 639). Ball had other duties as well. Jackson believed he could rely on Ball, in part, because Ball knew the mine. Ball had worked at Pollyanna No. 8 Mine before GCI took over (Tr. 638-639). Ball viewed himself, in some ways, as a de facto mine superintendent (Tr. 641, 685).

In October 1998, Jackson hired Steve Brown as the actual superintendent of the Pollyanna No. 8 Mine (Tr. 532, 640). Until then, Ball believed that he was "pretty much running [the] mine" (Tr. 640). However, Jackson wanted more coal cut, so Jackson brought Brown in to make the mine more productive.

Jackson testified that in addition to his concern about productivity, he was concerned about the number of alleged violations cited at the mine and about the relationship between mine and MSHA personnel (Tr. 530). He stated that Brown's "primary focus" was "to try to safely get production up and . . . [to] try to alleviate . . . some of the conflict . . . between [GCI personnel] and MSHA" (*Id.)*. Jackson thought that Brown was very experienced and a good miner (Tr. 528).

When Brown became supervisor, Ball was "moved up" to the position of business unit manager because Jackson had "some issues with . . . Brown's ability to do . . . administrative work" (Tr. 535-536). According to Jackson, the change "allow[ed] . . . Brown to concentrate on the underground aspects of the mine, and . . . allow[ed] . . . Ball . . . to handle the administrative . . . [and] other . . . project-related aspects . . . of the mine" (*Id.*). Ball agreed that as a result of the change Brown "was handling the underground operations" and he, Ball, "was handling the surface administrative operations" (Tr. 694, *see also* Tr. 650, 691-692). In addition, Brown had authority to hire and fire employees and to authorize pay raises (Tr. 533). In Jackson's view, it was Brown who had ultimate responsibility for the operation of the mine. Brown was responsible for implementing mine plans and for overseeing mining (Tr. 555). Jackson did not give Brown directives (Tr. 533). However, when it came to health and safety, Jackson agreed that it was not entirely clear who was responsible (Tr. 555, 558). The legal identity report that Jackson signed on behalf of the company identified both Ball and Brown as "Person[s] with Overall Responsibility for a Health and Safety Program at All of the Operator's Mines" (Tr. 555,

558, 560; Resp. Exh. 1).

After Brown became the superintendent, production increased. However, Brown's relationship with the miners was far from smooth. Jackson heard that Brown was abrupt and rough. Brown denied the allegations, but the rumors continued to come to Jackson's attention (Tr. 529, 534).

Shortly after November 3, 1998, Brown was demoted to section foreman, and Ball was assigned to act as superintendent (Tr. 691). A few weeks thereafter, Brown was formally warned about the way he related to other employees. Brown's problems with the miners continued and early in 1999, Brown was fired (Tr. 687-688; Resp. Exh. 15, Resp. Exh. 16). Ball signed Brown's warning and separation notices (Tr. 689, 691; Resp. Exh. 15, Resp. Exh. 16).

THE NOVEMBER 3, INSPECTION

On the evening of November 3, 1998, MSHA inspectors arrived at the Pollyanna No. 8 Mine. Among the inspectors was Fred Marietti. Brown and Ball were not at the mine. They had left for the day and gone home. However, Jackson stopped by the mine on his way home from the GCI office. The MSHA authorities told Jackson they had come to the mine to conduct an inspection. Jackson wanted a GCI management official at the mine during the inspection. Since Brown was coming back to the mine at 4:00 a.m. the next morning, he decided that Ball should "cover" until Brown returned (Tr. 549). Jackson called Ball and asked him to return to the mine (Tr. 549, 655). Jackson especially wanted Ball present because Ball had worked with Jackson on submitting a request to MSHA to approve taking 30-foot cuts during advance mining. Jackson stated he knew "that the 30-foot cuts were going to be an issue" (Tr. 549, 563, *see also* Tr. 551-552).[4]

It was Inspector Marietti's first visit to the mine (Tr. 53). Prior to arriving, Marietti was told to be on the lookout for extended cuts and inadequate ventilation (Tr. 27). When he got to the mine, Marietti was joined by MSHA inspection supervisors, Art Gore and Gary Jones, and by

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[4] Early in 1998, Ball drafted a proposal to allow continuous mining machines (continuous miners or miners) to take 30-foot cuts. The company submitted the plan to MSHA for approval (Tr. 652). According to Ball, sometime between August and September 1998, Jackson went to the MSHA District Office in Denver to discuss the plan. MSHA approved a restricted version of the plan that allowed the company to take 30-foot cuts, but only during retreat mining. The company then sought specific approval to take 30-foot cuts during advance mining (Tr. 543-544). MSHA responded by allowing the cuts on a temporary basis in the presence of an MSHA technical inspector (Tr. 544). The agency never gave unrestricted approval for 30-foot cuts.

MSHA inspector Earl Simmons (Tr. 53). On November 3, there were approximately nine persons working underground and one person working on the surface (Tr. 25, 27).

After Marietti changed his clothing, he and Simmons proceeded underground (Tr. 54). They traveled to the 001 section. They proceeded to the No. 1 and the No. 2 entries, then to the No. 3 entry where mining was underway. There, Simmons and Marietti observed conditions that lead Simmons to issue all but one of the citations and orders that are contested in the individual civil penalty proceedings (Tr. 56).

THE DECEMBER 4, INSPECTION

On December 4, 1998, Jones returned to the mine to finish the November 3, inspection (Tr. 274). As an inspector, Jones was required to issue a citation or order whenever he observed what he believed to be a violation of the Act or the regulations. Jones traveled to the 001 section where active mining was taking place. He walked into the area between the No. 5 and No. 6 cross cuts. There, Jones observed conditions that lead him to cite the remaining violation that is at issue in the individual civil penalty proceedings.

MSHA'S DECISION TO CHARGE THE INDIVIDUAL RESPONDENTS WITH SECTION 110(c) LIABILITY

In late February or early March 1999, MSHA assigned Inspector Danny Vetter to further investigate the citations and orders that were issued in November and December 1998, and to recommend whether any individuals should be held liable personally for the alleged violations. Vetter traveled from his Colorado office to Oklahoma where he spoke with miners who worked at the Pollyanna No. 8 Mine.

As part of the investigation, Vetter attempted to determine the persons who were in charge at the mine. One of the first persons he interviewed was Danny Hill, the continuous miner operator on the November 3 and December 4, evening shifts (Tr. 306). In addition to Hill, Vetter also interviewed James Smedley. Vetter testified that Smedley identified himself as the evening shift foreman and supervisor (Tr. 312-313). Vetter also spoke with Kenneth Clark who Vetter believed was the foreman of the afternoon shift— the shift prior to Smedley's. Vetter did not speak with Tim Ball (Tr. 308-310), but Vetter testified that his investigation revealed that Ball was one of those "calling the shots" at the mine (Tr. 313). This was confirmed by many of the hourly employees to whom Vetter spoke (*Id.*). Vetter acknowledged that positions and titles at a mine change frequently. Therefore, what Vetter looked for was whether the miners regarded a person as having supervisory authority and whether that person actually had some control over the operation of the mine (Tr. 314, 484). In Vetter's opinion, Ball met these criteria (Tr. 485).

As a result of the investigation, Vetter recommended that Smedley, Clark and Ball be charged with individual liability for knowing violations of the regulations (Tr. 481).

ALLEGATIONS OF VIOLATIONS AND §110(c) LIABILITY

CITATION/ORDER NO.	DATE	30 C.F.R.§
4715067	11/3/98	75.370(a)(1)

Order No. 4715067, which was issued pursuant to section 104(d) of the Act, states:

> The operator failed to comply with page 8, of the Ventilation Plan approved 9/30/98 in that 3,000 cfm of air was not maintained where the roof bolting machine was installing roof bolts in the No. 3 entry left cross cut on the 001 MMU. No air movement could be detected at the roof bolter when checked with an anemometer. The line brattice was observed not properly installed. 0.6% of methane was detected where the roof bolter was observed drilling (Gov. Exh. 1).

At approximately 10:11 p.m., Marietti saw a roof-bolting machine in the No. 3 entry, left cross cut. Tim Sisco, operator of the machine, was beginning to install roof bolts (Tr. 63, 81, 83). In addition, Marietti observed a continuous miner operated in the entry. The miner was backing out of a cross cut (Tr. 83-84). Danny Hill was operating the miner (Tr. 63-64). As best Marietti could recall, Smedley was the only supervisory person on duty during the shift (Tr. 48).

Marietti approached the roof-bolting machine. He checked the velocity of air at the machine with an anemometer. The mine ventilation plan required a velocity of at least 3,000 cubic feet per minute (cfm) to flow over the machine (*see* Tr. 32, 37, 59; Gov. Exh. 17 at 17). Marietti's anemometer detected no air movement. The lack of ventilation was due to the fact that a line brattice was dislodged (Tr. 35). Although the brattice should have extended on a diagonal across the No. 3 entry, 16-feet of it had fallen to the floor (Tr. 35, 41, 47-48; Gov. Exh. 12) where part of it was "kind of rolled up in a ball", crumpled, and "covered with muck and mud and coal" (Tr. 51, 317, *see also* Tr. 45, 319; Gov. Exh. 12). The fallen brattice was obvious (Tr. 41).

The mine had a history of liberating methane. In fact, Hill told Marietti when coal was cut at the mine, "a lot" of methane was liberated (Tr. 63). Marietti checked the atmosphere around the roof-bolting machine and found .6 % methane (Tr. 61). This was not an excessive amount of methane, but there was no ventilation to remove it nor to remove any subsequently liberated methane (Tr. 61). Marietti believed without ventilation there was a danger the methane would accumulate and reach the point where it would ignite (Tr. 38). Smedley also thought this was possible (Tr. 724). An ignition source for the methane could be the arcs and sparks that

sometimes resulted during roof bolting (Tr. 38). Also, the roof-bolting machine had electrical components and the machine's trailing cable carried electricity (*Id.*, 60). An ignition could be fatal to miners (Tr. 39). Marietti also feared that dust from drilling the roof could present a respirable health hazard since there was no ventilation (Tr. 37-38).

Seven miners who worked in close proximity to one another in the entry, were exposed to the hazards (Tr. 38-39). Furthermore, Marietti believed the lack of ventilation was a significant and substantial contribution to a mine safety hazard (S&S) because as mining continued without ventilation, an ignition was reasonably likely to occur (*Id.*).

Marietti found the violation was caused by GCI's unwarrantable failure to comply with its ventilation plan. Sisco and Hill told Marietti that Smedley had been on the section, in the vicinity of the roof-bolting machine, shortly before Marietti arrived (Tr. 49). Sisco said that Smedley told him the entry was ready for mining and that he should begin roof bolting (Tr. 41). Vetter testified that four or five months later when he too spoke with Sisco, Sisco's story had not changed. Sisco told Vetter that Smedley said "everything's fine, I took the gas check, just go in and [roof] bolt" (Tr. 316, *see also* Tr. 318, 322, 339). However, everything was not "fine". There was no ventilation.

Marietti believed Smedley should have known from seeing the fallen brattice that there was inadequate air at the roof-bolting machine (Tr. 44). Indeed, since the ventilation requirements of the plan could not be met without a properly installed line brattice, Marietti was certain that Smedley knew the ventilation was inadequate. Marietti also believed that the brattice was allowed to remain down on purpose so the roof-bolting machine could be operated in the left cross cut while at the same time the continuous miner could be operated in the opposite cross cut. Hill told Marietti this was what actually happened (*Id.*, Tr. 316-317).

Smedley responded that when the inspectors arrived he was working in a different entry — approximately 200 feet from the No. 3 entry. He maintained he never saw the brattice on the mine floor and did not know about the lack of ventilation at the roof-bolting machine until after the condition was cited (Tr. 705-706). Smedley asserted that he had been in the entry prior to the roof bolter moving into the left cross cut. At that time the brattice was properly installed (Tr. 720-721; *see* Gov. Exh 12.). Smedley pointed out that the continuous miner could have tore down the line brattice after he left the area (Tr. 727, 733).[5]

Smedley stated that he was not always present while the continuous miner machine and the roof-bolting machine were operating (Tr. 728). Moreover, he was the only foreman on the shift. He had many responsibilities including the training of newly employed and inexperienced miners (Tr. 708). He did not have a full crew on November 3 (Tr. 706). He acknowledged that

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[5] Although the brattice looked as though it had not been used in "awhile" (Tr. 45), Marietti acknowledged if it had been pulled down by the continuous miner, it could have become dirty and crumpled in very little time (Tr. 66-67), and that it could have been torn down after Smedley made his on-shift examination (Tr. 68).

he had not said much to the inspectors when they questioned him about conditions on the section, but this was because he found the inspectors "very intimidating" (Tr. 726).

THE VIOLATION

Section 75.370(a)(1) requires an operator to "develop and follow a [mine] ventilation plan approved by the [Secretary]" (30 C.F.R. §75.370(a)(1)). Once the plan is approved and adopted its provisions are enforceable as mandatory standards (*Freeman United Coal Mining Co.*, 11 FMSHRC 161, 164 (February 1989), *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987); *see also Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976)). Here, the approved and adopted plan required a minimum quantity of 3,000 cfm of air to pass by the roof-bolting machine while the machine was operating (Tr. 32, 37, 59; Gov. Exh. 17 at 17). Marietti's testimony that he attempted to measure the air and was not able to detect any movement was not refuted (Tr. 35). The violation existed as charged.

GRAVITY AND S&S

The hazards posed by the violation—those of a dangerous methane build up and/or of exposure to respirable dust—were described by Marietti. It is true that Marietti measured only .6% methane. However, without ventilation the quantity of methane reasonably could have been expected to increase. All of the witnesses agreed that the Pollyanna No. 8 Mine liberated methane, and Marietti's testimony that he was told it liberated "a lot" of methane was not disputed (Tr. 63). Moreover, the testimony established that several potential ignition sources were present. The act of drilling into the roof could have resulted in arcs and sparks, and the roof-bolting machine itself had electrical components which could have malfunctioned (Tr. 60). Ignition of the methane could have caused Sisco's death or serious injury. It also could have endanger the other miners working on the section.

The explosion hazard was augmented by the fact that without perceptible air movement, respirable dust created by the drilling could not escape (Tr. 37-38). While this hazard was not as immediate as that posed by a build up of methane, it nevertheless contributed to the overall danger caused by failing to comply with the approved ventilation plan.

In addition to being very serious, the violation was S&S. 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 safety 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 Inc. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (*approving Mathies* criteria)).

The third element of the *Mathies* formula requires the Secretary to 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement (*U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *see also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991)).

The Secretary's proof satisfies all of the elements of *Mathies*. There was an underlying violation of section 75.370(a)(1). The violation contributed to the hazard of methane accumulating in the atmosphere around the roof-bolting machine operator. As mining and roof bolting continued there was a reasonable likelihood that methane would reach dangerous levels given the total lack of ventilation and the propensity of the mine to liberate methane. No one disagreed with Marietti that the roof-bolting machine had electrical components that could arc or spark and that the very act of drilling into the roof could produce sparks (Tr. 38, 60). If methane accumulated due to the lack of ventilation and an explosion resulted, it was reasonably likely that Sisco and perhaps the other miners on the section would have been seriously burned or even killed.

NEGLIGENCE AND UNWARRANTABLE FAILURE

Negligence is the failure to exercise the care due under the circumstances. Smedley, the section supervisor, was responsible for making sure there was compliance with the ventilation plan. The plan required a minimum of 3,000 cfm of air at the roof-bolting machine. Therefore, Smedley was required to ensure that the air velocity met the requirement.

Smedley testified that when mining was taking place in the No. 3 entry, he was working about 200-feet away; and that he was not always present when the continuous miner and the roof-bolting machine were operating (Tr. 706-708). He also maintained that he had other responsibilities requiring his presence and attention (Tr. 728). I have no doubt all of this is true,

but it is beside the point. The other duties and the demands on his time did not divest Smedley of responsibility. Rather, supervisors are held to a higher standard of care because of their many responsibilities.

Smedley knew that coal was being cut and the roof was being bolted in the No. 3 entry. Smedley also knew that the mine liberated methane. While these operations were on-going, Smedley should have determined whether there was adequate ventilation as specified in the plan. There is no indication he did. In failing to ensure compliance with the plan while roof bolting and mining were taking place, Smedley, and through Smedley, GCI, failed to meet the standard of care required. Therefore, I conclude GCI was negligent.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence (9 FMSHRC at 2001). The Commission stated the conduct is characterized by "reckless disregard", "intentional misconduct", "indifference", or a "serious lack of reasonable care" (9 FMSHRC at 2003-04; *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (March 2000) *see also Buck Creek Co. Inc. v. FMSHRC*, 52 F.3d 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test)).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all of the facts and circumstances of the case. Factors that may be indicative of aggravated conduct include the length of time the violation has existed; whether the violation is obvious or poses a high degree of danger; whether the operator has been placed on notice that greater efforts are necessary for compliance; the operator's efforts in abating the violative condition; and the operator's knowledge of the existence of the violation (*see Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (August 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (January 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705,709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)).

The testimony establishes that the failure to comply with the ventilation plan was caused by the fact that the line brattice was down. Vetter testified, without dispute, that there was no way to meet the plan's ventilation requirements without the brattice being in place (Tr. 316-317). Marietti believed that the fallen brattice was so obvious Smedley should have known there was inadequate ventilation (Tr. 41). However, although Marietti thought the brattice had been on the floor for "awhile" (because it was covered with dirt and coal residue) he agreed that it could have become that way by being pulled down recently by the continuous miner (Tr. 66-67). Moreover, he admitted it could have been pulled down after Smedley visited the area (Tr. 68).

This is exactly what Smedley said happened. He was adamant that the brattice was in place when he was in the area. Further, Smedley was not contradicted when he testified that the

continuous miner was configured in such a way Hill might not have known if the machine tore down the brattice (Tr. 727, 733). If Smedley did not visit the entry after the brattice was torn down, then he would not have known of the situation. Further, if Hill was unaware the brattice had fallen, then he could not have alerted Smedley to the problem.

The Secretary did not establish the brattice was on the floor when Smedley was in the entry, and a preponderance of the evidence does not establish that Smedley, and through Smedley, GCI, was on notice that the violation was in existence a long period of time. The record does not support finding that Smedley was more than ordinarily negligent in failing to discover and correct the ventilation deficiency when roof bolting was taking place. Therefore, I find that GCI did not unwarrantably fail to comply with section 75.370(a)(1).

SMEDLEY'S 110(C) LIABILITY

The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of the violative condition (*Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982, *cert. denied* 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-362 (D.C. Cir. 1997)). To establish 110(c) liability the Secretary must prove only that the individual knowingly acted, not that the individual knowingly violated the law *(Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992)*(citing United States v. Int'l. Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition" *(Kenny Richardson*, 3 FMSHRC at 16). Moreover, section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence (*Target Industries, Inc.*, 23 FMSHRC 945, 963 (September 2001)).

Smedley was the section supervisor and therefore an agent of GCI. However, because the necessary predicate of conduct constituting more than ordinary negligence does not exist, Smedley is not individually liable for the violation of section 75.370(a)(1).

CITATION/ORDER NO.	DATE	30 C.F.R.§
4715068	11/3/98	75.362(d)(2)

Order No. 4715068, which was issued pursuant to section 104(d) of the Act, states:

> The roof bolter operator and the foreman did not do an adequate on-shift examination in that neither person made the methane test at the face from under permanent roof support using an extendable probe or other acceptable means before the roof bolter was brought into the No. 3 entry left cross cut of the 001MMU. The roof bolter

> was observed bolting roof in this entry. When questioned by the . . . [inspector], the foreman and the roof bolter operator stated that neither had made the required test at the face. The foreman made a methane test at the last row of roof bolts according to the foreman, Vince Smedley, and did not use an extendable probe. The coal face was about 20 feet inby the last row of permanent roof support. 0.6% methane was detected when tested by MSHA at the last row of roof bolts. This entry was cited on. . . [Order] No. 4715067 for not having any ventilation in this entry while roof bolting (Gov. Exh. 2).

While Marietti was in the left cross cut and after he confirmed there was no ventilation, he asked Sisco whether methane checks were being made at the face. Sisco replied that he did not have an extendable probe (Tr. 90, 108).[6] Smedley had a methanometer in his possession, but the extendable probe was on another roof-bolting machine, approximately 150- to 200-feet from the No. 3 entry (*Id.*). Marietti believed that not using a probe to check for methane was a violation of section 75.362(d)(2), a regulation that in part requires a qualified person to test for methane "at the face from under permanent roof support, using extendable probes" (Tr. 108, *see also* Tr. 102).

Marietti spoke with Smedley about the situation. Smedley said that he tested for methane but did not use a probe. Smedley did not say where the test took place (Tr. 100-101). However, Sisco told Marietti that Smedley took the test at the last row of roof bolts (Tr. 93).

Even though there never had been an explosion at the mine (Tr. 103), Marietti believed failing to take the methane reading at the face with an extendable probe was "highly likely" to result in conditions leading to one. The lack of ventilation meant that methane could build up rapidly (*see* Tr. 90-91, 94). Also, roof bolting activities could result in a spark which in turn could serve as an ignition source. If a concentration of methane migrated back to the roof bolting machine and ignited, the explosion could result in a serious burn injury to Sisco or in his death. Marietti also noted that because the entry recently had been cut, no rock dust was present to reduce chances that an explosion would propagate throughout the entry (Tr. 96). He stated "basically this could [have] resulted in a catastrophic accident" in which all of the miners on the section could have died (*Id.*). Without testing at the face, Smedley could not know if methane had built or was building to a dangerous level (Tr. 102).

Crediting Sisco's statement that Smedley had checked for methane at the last row of roof bolts not at the face, Marietti thought it should have been obvious to Smedley that he was checking from the wrong location (Tr. 98-99). Smedley was the supervisor. Despite the fact he

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[6] An extendable probe is a device that allows a person to check for methane from under supported roof. A methanometer is attached to the end of a pole. A person stands under supported roof and extends the pole inby to the face where the methanometer records the methane content.

knew or should have known what was required, he did not comply (Tr. 101). In Marietti's opinion, this was aggravated conduct.

Based on his interview with Sisco, Vetter thought that Smedley should be found liable for the violation (Tr. 336, 340). Vetter noted that when Marietti asked Smedley why he did not take the test with a probe, Smedley replied that he "just didn't" (Tr. 340).

Smedley listed several problems he had while running the section — a new haulage system that frequently stopped; employee absenteeism; and inexperienced miners who required training. Because of these problems Smedley stated he had delegated the responsibility for taking the tests to Sisco (Tr. 710). In a mine as small as Pollyanna No. 8, Smedley believed such a delegation was "fairly normal" (Tr. 711).

THE VIOLATION

Section 75.362(d)(2) requires a qualified person to make tests for methane "at the face from under permanent roof support, unless extendable probes or other acceptable means are used". The evidence establishes that the face in the cross cut was located 20-feet inby the last row of roof supports (Gov. Exh. 2). Therefore, it was impossible for a certified person to conduct a methane test at the face from under permanent roof support without using an extendable probe.

An extendable probe was not located in the vicinity of the roof-bolting machine. Marietti did not see one, and his testimony that he was told it was between 150- to 200-feet away from the roof-bolting machine was not contradicted (Tr. 108). In addition, Marietti's testimony that Sisco admitted he did not check for methane at the face because the probe was unavailable was not refuted, and I credit it (Tr. 90,108). I also believe that Smedley told Marietti he took the test but that he did not use a probe (Tr. 101). Smedley appeared as a witness. Had he taken a test at the face with a probe, it would have been in his self interest to say so.

Smedley was the supervisor. He was certified to test for methane and he was responsible for making sure such tests were conducted properly. The evidence establishes that neither Smedley (nor anyone else) tested for methane "at the face from under permanent roof support" as required by the standard, and I therefore find that the violation existed as charged.

GRAVITY AND S&S

The violation was very serious and S&S. Because the mine freely liberated methane it was important to make sure the requirements for methane testing were observed. Failing to test for methane at the face meant that the point where methane was most likely to be liberated was not checked. As a result, methane could build to dangerous levels without anyone knowing. Because Sisco was engaged in roof bolting, potential ignition sources were present. An arc or spark from the act of drilling into the roof or from a defective component of the roof-bolting

machine could ignite the methane if it migrated from the face outby. An ignition could have lead to Sisco's serious injury or death, and also could have endangered others on the section.

A potentially explosive methane buildup was reasonably likely to occur. Likelihood must be viewed in the context of all of the conditions that existed in association with the violation—namely, the fact that there was no measurable ventilation in the area of the roof-bolting machine, and the fact that the mine freely liberated methane. Without ventilation, methane was reasonably likely to build and to do so in conjunction with continuing roof bolting activity. A disaster was likely to ensue.

NEGLIGENCE AND UNWARRANTABLE FAILURE

As the section supervisor, it was Smedley's duty to ensure a methane test was conducted at the face. He should have made certain an extendable probe was at or near the roof-bolting machine, not 150 to 200 feet away (Tr. 108). When he checked for methane he should have used that probe. Smedley knew of the propensity of the mine to liberate methane. Nevertheless, he did not properly check, nor make sure anyone else did. In failing to ensure the methane check was properly conducted Smedley, and through Smedley, GCI, was highly negligent.

Moreover, when viewed in the context of other conditions that existed on the section, the failure to ensure a methane test was conducted at the face represented aggravated conduct. The mine's tendency to liberate methane and Sisco's roof bolting activities should have alerted Smedley to be especially diligent about methane testing because taken together the conditions created the potential for a very serious accident. Despite Smedley's assertion that Sisco should have tested for methane (Tr. 710), it was Smedley, not Sisco, who ultimately was responsible, and there is no indication Smedley reacted nor made the least effort to ensure compliance. For these reasons I conclude that Smedley, and through Smedley, GCI, unwarrantably failed to comply with section 75.362(d)(2).

SMEDLEY'S §110(c) LIABILITY

Smedley, the supervisor and agent of GCI, failed to ensure the test was conducted properly despite the fact he knew the mine had a propensity to liberate methane, and despite the fact he knew Sisco was engaging in roof bolting. His failure to make sure the test was properly conducted, combined with what he knew about the mine and what he knew or should have known about the conditions on the section, means that his negligence was more than ordinary and that he was responsible for a knowing violation of section 75.362(d)(2).

CITATION/ORDER NO.	DATE	30 C.F.R.§

The citation, which was issued pursuant to section 104(d) of the Act, states in part:

> The methane monitor on the 2G Long Airdox mining machine was not being maintained as required. The monitor was tested with a 2.5 % known calibration mixture of methane and it would not go up to 1 %. The wet coal fines were cleaned from the sensor head and the methane applied and it went up to 1.3% and the machine did not de-energize automatically as required. There was 1.1 to 1.4% CH4 tested with a calibrated hand-held methanometer when the machine had been cutting in the No. 3 entry and right cross cut and was just backing out when observed. The methane monitor had not been calibrated since 09/22/98 (Gov. Exh. 3).

Section 75.342(c) requires a methane monitor on a continuous miner to "automatically deenergize electric equipment . . . when — (1) The methane concentration at any methane monitor reaches 2.0 percent; or (2) The monitor is not operating properly". Marietti maintained the monitor on the continuous miner was not operating properly. Methane could not enter the monitor's sensors because "the sensor head [of the monitor] was plugged with coal" (Tr. 114). Moreover, when the sensor head was unplugged and a known 2.5% concentration of methane was applied to the sensor, the monitor showed a concentration of 1.3% and the continuous miner did not shut down (*Id.*).

Hill, the continuous miner operator, had backed the machine out of the right cross cut (Tr. 134). Hill told Marietti that a rock had hit the monitor when the machine was making a cut (Tr. 114). Marietti estimated this occurred 20 to 25 minutes before Hill backed out of the cross cut (*Id.*, Tr. 115). He speculated that the monitor was "smashed down" into accumulated coal and that the monitor's methane sensors became clogged (*Id.*).

In Marietti's view, the condition of the monitor was hazardous to all of the miners on the section. As the continuous miner cut coal, methane undoubtedly was liberated. Because the machine did not deenergize automatically as required when methane reached 2.0%, the machine's electrical components presented an ignition source for the methane. The combination could have lead to an explosion causing serious injuries, even deaths (Tr. 115-117). Further, as mining continued Marietti believed an explosion was highly likely (Tr. 116).[7]

While Marietti agreed that Hill might not have known the methane monitor was damaged

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[7] Marietti also found that the explosive hazard combined with other conditions affecting the continuous miner created an imminent danger and he issued an order withdrawing the continuous miner from service (Gov. Exh. 27; Tr. 122, 124). The other conditions affecting the miner were permissibility violations; accumulations of combustible materials "all over the machine" (Tr. 129); and the fact that the fire suppression system on the miner was not operating at full capacity (Tr. 121, 124-125). GCI did not contest the order.

when it first was struck by the rock (Tr. 129-130), he believed that both Hill and Smedley subsequently knew. Hill told Marietti that he discussed the condition of the monitor with Smedley; that they determined the monitor "wasn't a problem"; and that Hill should continue mining (Tr. 117, 120). Marietti testified he asked Smedley about this conversation and that Smedley replied he "didn't know anything about it" (*Id.*, 128). However, Marietti believed Hill and accepted as fact that Smedley had told Hill "to go on mining." (Tr. 120-121, 127-128). In Marietti's view, Smedley should have had Hill shut down the continuous miner and repair the monitor (Tr. 120).

For his part, Smedley maintained that he knew nothing about the condition of the methane monitor until after the alleged violation was cited (Tr. 712). The monitor is located on the right side of the continuous miner. It is not readily visible to the continuous miner operator (Tr. 714). Because of its out-of-the-way location, Hill normally would not find the damaged methane monitor until after he finished cutting and was moving to a new location (Tr. 715).

Vetter believed that Smedley should be held responsible for a "knowing" violation of the Act. Vetter based his opinion on Marietti's notes which indicated Hill told Marietti that he and Smedley discussed the fact that the monitor had been damaged but that Smedley said to go ahead and operate the continuous miner (Tr. 329). In addition, Vetter believed Smedley should have seen the damaged monitor because it was dangling by its wires (*Id.*).

THE VIOLATION

Marietti's testimony regarding the condition in which he found the methane monitor was unrebutted. The methane monitor was clogged with coal fines. Methane could not fully register at the sensor heads (Tr. 114). If the methane content of the atmosphere could not register accurately, then the monitor could not "automatically deenergize . . . when . . . [t]he methane content reache[d] 2.0 percent", and the monitor was "not operating properly". The condition violated section 75.342(c).

GRAVITY AND S&S

The violation was both very serious and S&S. As has been frequently noted, the mine tended freely to liberate methane. In fact, a test was conducted and it was found that Hill had been cutting coal in a methane concentration of 1.1 to 1.4 percent (Gov. Exh. 2; Tr. 112). While this methane level was not itself hazardous, methane liberation could have continued in the presence of the energized continuous miner. Had an ignition occurred, it easily could have seriously injured or killed Hill and perhaps others on the section.

Moreover, there was a reasonable likelihood of an accident. The possibility of an explosion caused by the failure to deenergize the monitor must be viewed in the context of all of

the conditions that existed in association with the violation. Methane liberation was common and could be expected to continue. Moreover, there was an *actual* potential ignition source present in that permissibility violations on the continuous miner would have allowed accumulated methane to seep into the continuous miner's electrical components where an arc or spark could have ignited the gas (Gov. Exh. 27 at 2).

NEGLIGENCE AND UNWARRANTABLE FAILURE

It was Smedley's duty as the section supervisor to make sure the methane monitor was operating properly. Smedley knew that the mine had a propensity to liberate methane and that Hill was mining in the cross cut. The continuous miner had to be examined before it began operating. Smedley, therefore, knew or should have known that half of the water sprays of the continuous miner's fire suppression system were not working and that the continuous miner contained permissibility violations (Gov. Exh. 27). These conditions made it all the more important that the machine's methane monitor function properly when coal was cut. Smedley's failure to detect and correct the condition of the monitor reflected his failure to exercise the care required by the circumstances and established his and GCI's negligence.

However, Smedley and the company did not unwarrantably failed to comply with section 75.342(c). The Secretary's contention that their negligence was more than ordinary rests upon what Marietti recalled he was told by Hill — that Hill advised Smedley of the condition of the monitor and that Smedley told him to continue mining (Tr. 117, 120).

Hill was not called to testify by the Secretary. This left Smedley in the position of refuting what Hill supposedly told Marietti by cross examining Marietti. The Secretary, who bore the burden of proof, offered no explanation as to why Hill did not appear as a witness. Smedley contended that prior to the citation of the violation he did not know anything about a conversation with Hill regarding the condition of the monitor (Tr. 128), and that he learned about and discussed with Hill the condition of the monitor only after the citation of the violation (Tr. 712). This was neither inherently improbable nor unbelievable. The monitor was not located in an area of the continuous miner where it was readily visible. The rock damaged the monitor only 20 to 25 minutes before Marietti observed the violation (Tr. 114-115). If Hill did not learn about the condition of the monitor until after the violation was cited, there is no reason Smedley should have told Hill to continue mining despite the monitor's inability to function properly. Under these circumstances I cannot find the out-of-court statement of non-witness Hill established that Smedley exhibited an inexcusable and unjustifiable lack of care. In other words, on the basis of the existing record, I cannot find that Smedley's lack of care rose to the level of unwarrantable failure.

SMEDLEY'S 110(C) LIABILITY

As has been previously noted section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence (*Target Industries, Inc.*, 23 FMSHRC at 945). Here, that necessary predicate does not exist.

CITATION/ORDER NO.	DATE	30 C.F.R.§
4896090	11/3/98	75.220(a)(1)

Citation No. 4896090, which was issued pursuant to section 104(d) of the Act, states in pertinent part:

> The approved roof control plan dated Mar[ch] 8, [19]96 is not being followed. [A d]eep cut measuring approximately 30 feet. . . is present in the No. 3 entry inby [cross]cut 32 off West mains. The roof control plan states on page 12 that only 20 feet is maximum depth . . . [The f]oreman was present on section and should have known that deep cuts were being taken (Gov. Exh. 4).

On November 3, Marietti and Simmons arrived in the No. 3 entry around 9:30 p.m. At that time advance mining was taking place (Tr. 163). Marietti and Simmons noticed a large area of unsupported roof that appeared to exceed 20-feet in length (Tr. 138-139, 148). The approved roof control plan limited a cut to 20-feet. Marietti and Simmons believed that the unsupported area was cut near the beginning of Smedley's shift (Tr. 148). Smedley was not present in the No. 3 entry when the inspectors first arrived. He appeared shortly thereafter (Tr. 156).

At first, Marietti and Simmons tried to measure the cut by throwing a tape measure into the unsupported area. The measurements were inaccurate, so the inspectors waited until the roof was bolted and they measured again (Tr. 139). They found that the cut measured approximately 30-feet in length (Tr. 146-147; Gov. Exh. 12). Simmons issued Citation No. 4896090 to Smedley, charging GCI with violating the roof control plan (Tr. 160-161, 421-422; Gov. Exh. 18 at 35).

Marietti spoke with the continuous miner operator, Hill, who confirmed that he had in fact been making 30-foot cuts (Tr. 159, *see also* Tr. 347). Marietti remembered Hill saying that Smedley had been in the No. 3 entry "most of the time they were making the cuts" (*Id.*). Hill said that Smedley left the entry just before Marietti and Simmons arrived (*Id.*, Tr. 167).

Marietti understood that prior to November 3, GCI requested MSHA to approve 30-foot cuts during advanced mining, but that MSHA authorized them only for a limited time and only when MSHA personnel were present (Tr 140-145, 170; Gov. Exh. 18 at 1, Gov. Exh. 28). Before MSHA would give the kind of approval GCI sought—unrestricted approval—the agency wanted to evaluate the mine's ventilation plan and be certain there was adequate ventilation to

keep extended cut areas free of methane (Tr. 146-147).[8]

It was obvious to Marietti that extended cuts might lead to ventilation that was inadequate to dilute and render harmless methane (147-148). As Marietti stated, "[T]he longer the cut[,] the stronger the air current you need to ventilate [the] cut" (Tr. 148). It also was obvious to Marietti that extended cuts created a roof-fall hazard. The more unsupported roof, the more likely the roof was to collapse. If the roof fell, it would endanger Hill and the fall could carry over the last inby row of roof bolts endangering miners working outby (Tr. 148). All of the miners reasonably could be expected to suffer concussions, broken bones, internal injuries, or death (Tr. 150).

As supervisor, Smedley was required to conduct examinations of the area. To Marietti the extended cut was "very obvious" and he thought Smedley should have observed it during his examinations (Tr. 151-152). Marietti maintained he asked Smedley why the continuous miner operator was taking 30-foot cuts, but Smedley did not reply (Tr. 153). To Marietti "it was obvious that . . . Smedley knew or should have known that [the] 30-foot cuts were . . . made" (Tr. 158).

Marietti further concluded that Smedley and Ball shared responsibility. Although Ball claimed he had not been in the area of the cut and was unaware of it until he joined the inspectors (Tr. 659), Marietti did not consider Ball's actual knowledge to be determinative. Rather, he focused on Ball's responsibilities. Marietti believed that Ball was both the mine's safety coordinator and its functioning superintendent. Marietti noted Ball was listed on the mine's legal identity report as a "person . . . in Charge and Health and Safety" (Tr. 202-203, 485; Resp. Exh. 1). Further, Marietti knew that in April 1998, Ball sent GCI's ventilation plan to MSHA for approval, which indicated to Marietti that Ball was acting on behalf of mine management (Tr. 213; Gov. Exh. 17 at 2). Ball was responsible for making certain everything possible was done to encourage compliance with the approved plan.

Vetter agreed with Marietti about Smedley's and Ball's responsibilities for the extended cut. Vetter testified that Sisco told him Smedley was in the area of the cut. A mobile bridge conveyor operator also said that Smedley went to the area while mining was taking place (Tr. 343-345), and this was reiterated by a second mobile bridge conveyor operator (Tr. 347). Finally, although Hill initially told Vetter he could not recall Smedley being in the area, during a subsequent interview Hill said if he told Marietti and Simmons that Smedley was in the area, then Smedley was there (Tr. 348).

Vetter thought that when determining whether an individual was responsible it was important to examine the person's actual and perceived authority (Tr. 449-451). Like Marietti,

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[8] Marietti noted that the agency was concerned because in the past it had found problems with the ability of the ventilation system to keep 30-foot cuts methane free. During one MSHA supervised test up to 5% methane was recorded, and in all tests at least 1% methane was found (Tr. 172).

Vetter believed that Ball had authority to act on behalf of GCI. Vetter interviewed rank-and-file miners who told Vetter that Ball "had the most day-to-day authority over the [mine]" (Tr. 403). In fact, Smedley and Hill told him that they reported to Ball (Tr. 404, *see also* Tr. 460).

In addition, Keith Springer, a mobile bridge conveyor operator who worked on Smedley's crew, told Vetter that approximately two weeks before the inspection, MSHA and the company conducted a test to determine whether roof and ventilation conditions would permit 30-foot cuts (Tr. 397, 416; *see* Gov. Exh. 16 at 1). The test extended over several days. While it was ongoing MSHA allowed 30-foot cuts to be made at the mine, but restricted them to a specific test area and permission to make the cuts terminated with the test (Tr. 417, 424). Springer told Vetter that despite the fact that the test ended without approval, Ball told the miners they could continue making 30-foot cuts (Tr. 397-398, 416) and that it became "normal rather than abnormal" to make them (Tr. 399).

The practice of routinely making 30-foot cuts also was described by Jeff Tripp, Springer's brother-in-law and a mobile bridge conveyor operator. He told Vetter that "it was general knowledge around the mine, and supported by management including . . . Smedley and . . . Ball, that a 30-foot cut plan was approved" (Tr. 401).

Neither Springer nor Tripp appeared as a witnesses for the Secretary (Tr. 439, 400). Both are sons-in-law of Brown. Counsel for GCI maintained that their statements were "possibly biased [against] . . .Ball" (Tr. 681). Vetter recognized Springer and Tripp might have an interest in making Ball appear responsible (Tr. 442, 455) in that not only are they related to Brown, but they knew that Ball terminated Brown's employment with GCI (Tr. 677, 679). However, Vetter noted that disinterested miners also told him much the same things as Springer and Tripp. For example, John Bear, a mobile bridge conveyor operator, said that Ball told "all of us that the [roof control] plan had been approved . . . [and] for us to start making 30-foot cuts" (Tr. 412) and that after this, it became "normal" to make 30-foot cuts (Tr. 413). Vetter also testified that Darrell Cash, the afternoon continuous miner day-shift operator, said that Ball told the miners that approval of 30-foot cuts was "in the mail" and that miners should "start taking the 30-foot cuts" (Tr. 414). In so doing they should "experiment with the top and see if it . . . [would] hold up" (*Id.*). Finally, John Davis, a roof bolter, said that Ball "told everybody 30-foot cuts were approved and to take the cuts" (Tr. 415).

THE VIOLATION

Section 75.220(a)(1) requires each mine operator to "develop and follow a[n approved] roof control plan". The roof control plan that was in effect on November 3, 1998, limited "cuts into the coal face . . . a maximum distance of 20-feet inby the last full row of permanent roof

supports" (Gov. Exh. 18 at 35). The citation charges GCI with taking a cut of 30-feet in the No. 3 entry (Gov. Exh. 4). Marietti's testimony that the inspectors measured the cut after the unsupported area was roof bolted and that they found the area to be 30-feet in length was not disputed by GCI (Tr. 146-147; Gov. Exh. 12). The testimony confirms that the violation existed as charged.

GRAVITY AND S&S

The violation was both very serious and S&S. Marietti was articulate regarding the dual hazards posed by the violation. Advancing the face beyond the approved limit of 20 feet could mean that the ventilation would be inadequate to carry away methane liberated while the coal was cut and that methane could accumulate rapidly to dangerous levels (Tr. 147-148). Also, extending the cut to 30-feet could mean the area of exposed, unsupported roof "wouldn't support itself" (Tr. 147). If the roof fell, then serious injury or death was likely to result (Tr. 150). Both of the dangers were actual. Both of them endangered Hill and other miners on the section. Either of the hazards was enough to make the violation very serious.

Management personnel knew that effective ventilation and roof control were essential to safety. They did not know the effects of extending by 10-feet the normal and approved cut. By foregoing approved ventilation and roof control to gambling on the unknown, the personnel engaged in a practice that was so potentially risky, its result must be found to have been reasonably likely to contribute to an injury causing methane ignition and/or roof-fall, and this was especially true in the Pollyanna No. 8 Mine, where methane liberation was common.

NEGLIGENCE AND UNWARRANTABLE FAILURE

GCI's efforts to obtain approval from MSHA to extend cuts to 30-feet provide a telling backdrop to the violation. Since at least August 1998, GCI had tried without success to get approval for such cuts during advance mining (Tr. 543-544). Less than two weeks before November 3, MSHA's on-site investigation of GCI's extended cut proposal ended without such approval (Tr. 417, 424). It is simply inconceivable that GCI was under the impression that taking extended cuts during advance mining was permissible.

Therefore, as mining advanced, GCI should have been alert to the need to take only 20-foot cuts. The evidence establishes that GCI was far from alert. The extended cut at the face in the No. 3 entry and the other extended cuts that existed on the section (and which will be discussed subsequently) easily support the inference that GCI was not exercising the care required to ensure compliance with its roof control plan. Rather, when it came to extended cuts, GCI was highly negligent.

The evidence also establishes that GCI, through Smedley, unwarrantable failed to comply with section 75.220(a)(1). While there is no way to know from the record exactly when the violative cut was made, vis-a-vis Smedley's on-shift examination (*see* e.g. Tr. 184), the testimony is more than adequate to conclude that Smedley either was aware of the cited extended cut and ignored it or was more than ordinarily negligent in failing to recognize the cut.

Because it is logical and usual for a section supervisor to visit an area that is being mined under his direction and to do so repeatedly while mining was taking place, I credit the statements the miners made to Marietti and Vetter that Smedley was present when most of the cuts were made and that he left just before the inspectors arrived (Tr. 159-157, 167). The reports of his presence are fully consistent with his duties and are entitled to belief. It follows, therefore, that Smedley almost certainly was present when the subject cited cut was made or right after it was made. As a result, Smedley either knew or should have known of the cut (Tr. 167). In addition, Smedley either knew or should have known that the extended cut was not approved. He was the section supervisor and it was his responsibility to be aware of the provisions of the roof control plan. Either by purposeful inaction or by seriously neglectful inattention, he allowed a violation that posed a very real threat of injury or death to Hill. His conduct, and through him GCI's conduct, was unwarrantable.

I also conclude that Ball was more than ordinarily negligent. Five different miners, three of whom had no apparent interest in discrediting Ball, told Vetter that Ball misinformed them that a 30-foot cut plan had been approved and that "they should continue making the 30-foot cuts" (Tr. 398, *see also* Tr. 397, 399, 401, 412-416). Based on these reported consistent statements—especially those of the apparently disinterested miners—it is reasonable to conclude that Ball mislead miners into thinking the practice was permissible, and that he encouraged them to make the cuts (Tr. 399-400). Although the record does not establish that Ball knew of the cited extended cut until it was pointed out to him by the inspectors— this is not critical. Ball's culpability stems from the fact that the violation arose from misinformation he provided miners about the roof control plan and from his encouragement of extended cuts. Ball's actions, and therefore GCI's, were more than ordinarily negligent.

SMEDLEY'S AND BALL'S 110(C) LIABILITY

The Secretary charges Smedley and Ball with a knowing violation of section 75.220(a)(1). To find that the Secretary has proven her case, I must find that Smedley and Ball knowingly authorized, ordered or carried out the extended cut at the face of the No. 3 entry. Smedley was the supervisor, and he was present on the section either while or right after the cut was made. He saw or should have seen the cut area. Clearly, he was "in a position to protect employee safety" (*Kenney Richardson*, 3 FMSHRC at 16). Despite this, he took no action to prevent the cut nor to support the roof afterwards even though he had "knowledge or reason to know of the [extended cut]" (*Id.*). His failure was unaccountable and inexcusable, and I conclude that Smedley is liable under section 110(c).

I also find that Ball is liable. He too was in a position to protect miners' safety. The testimony established that the miners looked to him as the person with the most "day-to-day authority" over the mine (Tr. 403). The testimony also established that he mislead miners regarding MSHA's approval of the extended cut provision and that he encouraged the practice of taking such cuts. The extended cut in the No. 3 entry was a logical result of Ball's knowing violation of section 75.220(a)(1).

CITATION/ORDER NO.	DATE	30 C.F.R.§
4896091	11/3/98	75.220(a)(1)

Order No. 4896091, which was issued pursuant to section 104(d) of the Act, states in relevant part:

> The approved roof control plan dated Mar[ch] 8, [19]98 is not being followed. A deep cut measuring approximately 30 feet past the last roof bolts [is located] in the No. 3 right [cross]cut . . . . Page 12 of roof control plan and page 6 of ventilation plan states that only 20 feet maximum cuts are to be taken. [The f]oreman was present on . . . [the] section and should have known that deep cuts were being taken (Gov. Exh. 5).

Marietti stated that the order was issued because a 30-foot cut existed in the right cross cut off of the No. 3 entry. When the inspectors arrived the continuous miner was backing out of the cross cut and down the entry (Tr. 186; Gov. Exh. 12). As with the previous citation, Simmons and Marietti confirmed the cut was 30-feet long by measuring it (Tr. 186).

Marietti testified that the extended cut violated the roof control plan and created a potentially unstable roof. A roof-fall could endanger the continuous miner operator, and because it could pull down supported as well as unsupported areas, it also could endanger miners working outby the cross cut (Tr. 187). In addition, there was danger that the ventilation in the cross cut would be inadequate to clear away methane (*Id.*). For the same reasons as stated regarding the prior citation, Marietti believed that the violation created hazards that were reasonably likely to cause serious injury or death. Therefore, he found that the violation was S&S (Tr. 187-188).

In Marietti's view, the violation was the result of high negligence on GCI's part (Tr. 188). Marietti was told that Smedley was present in the entry just prior to Marietti's arrival and while the continuous miner was cutting. Marietti believed that by looking at the roof, Smedley easily could have seen the extended cut (Tr. 188, 190). Even if he did not look at the roof he could have known the cut exceeded 20-feet by observing where the continuous miner's "20-foot mark" was located in relation to the supported roof (*Id.*).

As with the prior citation the Secretary charged both Smedley and Ball with personal liability. Vetter testified that both should be held liable for the same reasons he stated previously

(Tr. 356, 409). Also, as before, Ball maintained he was unaware of the extended cut in the right cross cut until he reached the section on the evening of November 3, when Simmons "showed me some of the worst things that . . . [the inspectors] had found" (Tr. 661).

THE VIOLATION

The citation charges, and the testimony confirms, a cut in the No. 3 right cross cut of 30-feet beyond the last row of roof supports (Gov. Exh. 5; Tr. 186). The cut violated the approved roof control plan (Gov. Exh. 18 at 35), and I find the violation existed as charged.

GRAVITY AND S&S

Testimony regarding the gravity and the nature of the violation tracked that for the previous violation. For the same reasons I find the violation was both very serious and S&S.

NEGLIGENCE AND UNWARRANTABLE FAILURE

Further, I conclude the cut in the right cross cut was due to GCI's high negligence. The conclusion is based upon my view that Smedley and GCI were well aware that extended cuts were not approved but that they did nothing to prevent the taking of the cut in the right cross cut nor to support the area after it was cut. I have credited the hearsay statements of the miners regarding Smedley's presence in the entry during the time the extended cuts -- including the cut at issue -- were taken. As I have noted, it was reasonable and logical for a person in his position to be present during such times. Also, Marietti's testimony was not rebutted that even if Smedley did not look at the roof, he should have known that Hill was in the process of taking an extended cut by observing the "20-feet" mark on the continuous miner (Tr. 188-190). Thus, Smedley either knew or should have known of the cited cut. As the supervisor on the scene Smedley was responsible for understanding the requirements of the plan and for ensuring they were carried out. Smedley either should have stopped the cut or should have had the cut area supported. He totally failed in this regard.

In addition, Smedley's unaccountable failure to act in the presence of the very serious hazard created by the violation was inexcusable and aggravated. The inspector correctly found the violation was due to Smedley's, and thus GCI's, unwarrantable failure.

GCI's unwarrantable failure also was the result of Ball's more than ordinary negligence. He was involved in GCI's attempt to have 30-foot cuts approved. He knew such cuts were not approved. Nevertheless, the testimony supports finding he encouraged miners to believe the practice was permissible. Therefore, I find that the violation was the direct result of the misinformation he provided and of his purposeful lack of care.

SMEDLEY'S AND BALL'S 110(C) LIABILITY

For the same reasons as stated regarding Citation No. 4896090, I also conclude that Smedley and Ball are liable under section 110(c).

CITATION/ORDER NO.	DATE	30 C.F.R.§
4896094	11/3/98	75.220(a)(1)

Order No. 4896094, which was issued pursuant to section 104(d) of the Act, states in part:

> The approved roof control plan dated Mar[ch] 8, [19]98 is not being complied with on the 001-1 MMU. A deep cut measuring 30 feet has been taken in [cross] cut 31 between [the] No. 5 and [No.] 6 entry. . . . [The f]oreman was present on 001-0 MMU and should have known that deep cuts were being taken (Gov. Exh. 6).

Marietti testified that he and Simmons also observed a cross cut that had been driven through the No. 5 entry to connect with a corresponding cross cut in the No. 6 entry (Tr. 193). From looking at the unsupported cut-through area Marietti believed it was cut "in excess of 20-feet" (Tr. 194, 206). Simmons measured the cut-through and found it was 30-feet long. Marietti was not present when the area was measured, but Simmons told Marietti how he made the measurement and recorded its result (Tr. 194).

Marietti explained the exposed, unsupported roof could fall and the fall could override and pull down the bolted roof. The fall could endanger not only the continuous miner operator but also miners working in or traveling through adjacent areas (Tr. 195). The cut-through was open-ended, which Marietti thought made it even more dangerous than the other cited extended cuts (Tr. 196).

Marietti believed the cut-through occurred between 3:00 p.m. and 4:00 p.m. on the shift prior to his arrival (Tr. 197-198, 199). If so, miners had been exposed to its dangers for 6 or 7 hours (Tr. 198-199, 204).

Marietti also believed the cut-through was due to GCI's "high" negligence because the cut area was visually obvious and Smedley either saw it or should have seen it during the examination for his shift (Tr. 199). In addition, Kenneth Clark, the foreman of the prior shift, also should have been aware of the cut-through since it occurred on his shift (Tr. 200-202).

Ball testified that he first saw the cut-through on the evening of November 3 (Tr. 661). Ball agreed the area looked like an extended cut (*Id.*). However, he did not think the condition

was readily obvious because the area was dark. The only illumination was light from cap lamps and equipment (Tr. 663).

Cash, the afternoon-shift continuous miner operator, told how the cut-through happened. He first cut the cross cut from the No. 5 entry. He then went to the No. 6 entry and cut the corresponding cross cut. Inadvertently, he cut too far and broke through the wall of coal separating the cross cuts (Tr. 664-666). Clark confirmed Cash's version of the events. However, Clark stated that when he did an examination for the oncoming shift, the cut-through had not yet been made (Tr. 666-668).

With regard to personal liability for the violation, Marietti believed that Ball was culpable. Ball " was working with . . . [MSHA] on . . . plans for the 30-foot cuts. So basically . . . he was the person responsible and . . . he knew or should have known . . . [whether] they were authorized, and his people should have been trained or informed on that process specifically in that the plan needs to be explained to the miners" (Tr. 206-207).

THE VIOLATION

The citation charges GCI with an extended cut of 30-feet in adjacent cross cuts between the No. 5 and No. 6 entries (Gov. Exh. 5). Thirty feet of unsupported roof was observed by Marietti and Simmons and was measured by Simmons (Tr. 193-194, 196, 206). Even Ball agreed that the cut-through "looked like" an extended cut (Tr. 661). The cut-through violated the roof control plan (Gov. Exh. 18 at 35), and the violation existed as charged.

GRAVITY AND S&S

The violation was both very serious and S&S. Its dangers were even greater than those associated with the previous violations of section 75.220(a)(1). As Marietti persuasively explained, support for the roof was weaker because by joining the cross cuts the continuous miner eliminated one of the roof's main supporting walls (Tr. 196). Further, because the cross cuts were joined, miners in both entries were subject to the possibility of overrides (Tr. 195). While it is true Marietti did not see miners working in the area (Tr. 210), the section was engaged in active mining and it is reasonable to assume that as mining continued, miners would have been working or traveling in the areas of the conjoined cross cuts. Thus, any roof-fall was reasonably likely to cause serious injury or death.

NEGLIGENCE AND UNWARRANTABLE FAILURE

The violation was due to GCI's high negligence. I credit Marietti's opinion that the cut-through occurred on the shift prior to Smedley's (Tr. 197-199). This is what Ball was told by

Cash (Tr. 664-666). I agree with Marietti that while there is no way to determine precisely when the cut-through happened, the evidence points to it occurring near the very end of the afternoon shift. Nothing in the record indicates Clark was not being truthful when he stated the cut-through was not present when he conducted the examination for the oncoming shift (Tr. 667).

Since the cut-through occurred near the end of Clark's shift, it was present during Smedley's shift. Even if the cut-through was as difficult to see as Ball maintained (Tr.663), the other extended cuts made during Smedley's shift should have alerted Smedley to the possibility of extended cuts made prior to his shift. Given the danger to the miners caused by the extended cuts and Smedley's high degree of responsibility for the safety of the miners he supervised, Smedley's failure to detect the unsupported roof represented more than ordinary negligence.

In addition, because Ball mislead miners about MSHA's approval of extended cuts and because he encouraged the practice, I attribute more than ordinary negligence to Ball, and through Ball to GCI. For the same reasons as stated previously, I conclude the Secretary proved the violation also was the result of Ball's, and thus GCI's, unwarrantable failure.

BALL'S 110(C) LIABILITY

However, I also conclude the Secretary did not prove that Ball knowingly violated section 75.220(a)(1). Unlike the other extended cuts, the cut-through was not the result of a knowingly taken 30-foot cut. Rather, its cause was a mistake by Cash who took two cuts of less than 30-feet and unintentionally joined them creating 30 feet of unsupported roof and the violation (Tr. 664-666). Thus, the violation was not the logical result of Ball misinforming the miners about the 30-foot cut provision and of his encouragement of the practice. In addition, I credit Ball's testimony that he was unaware of the cut-through until it was pointed out by the inspectors (Tr. 659, *see also* Tr. 226).

CITATION/ORDER NO.	DATE	30 C.F.R.§
4896095	11/3/98	75.400

Order No. 4896095, which was issued pursuant to section 104(d), states:

> An excessive accumulation of loose coal, coal fines and coal dust has been allowed to accumulate on the 001-0 mmu beginning at [the] face and extending outby for 3 cross cuts in all entries and connecting cross cuts. The accumulations measured up to 20 inches in depth with a section entry average of approximately 10 in[ches]. The accumulations [were] powder dry in areas, damp and wet in areas. Ignition sources of belt and rollers rubbing against accumulations on the continuous haulage belt [were]

present and permissibility violations [were present] on [the] miner. [The] foreman was present on [the] section (Gov. Exh. 7).

Section 75.400 prohibits accumulations of coal dust, loose coal and other combustible materials in active workings and on electric equipment in active workings. Marietta explained that when he and Simmons arrived in the No. 3 entry they observed accumulations of loose coal, coal fines and coal dust in the entry from the last open cross-cut to the belt tail piece. Upon inspection of the entire section, they determined the accumulations existed in all six entries of the section (Tr. 229-230; Gov. Exh. 13). The accumulations were present at the faces of the entries, and they were present in the roadways where equipment was located (Tr. 232). They extended up to 500-feet from the faces (Tr. 228; Gov. Exh. 13). The accumulations ranged in depth from approximately 10- to 20-inches. The accumulations had not been rock dusted (Tr. 236, 238). After the condition was cited, GCI removed the accumulations from the mine, and Marietti testified Ball told Simmons that 400 tons of the material were removed (Tr. 232, 247).

Marietti feared the accumulations would ignite. Trailing cables from electrical equipment provided potential ignition sources (Tr. 233). He also noted that the continuous miner working on the section was not maintained in permissible condition and that its methane monitor was not working properly (Tr. 234). If methane seeped into the continuous miner's electrical compartments and exploded, it could provide an ignition source for the accumulations (*Id.*). All of the miners working on the section were reasonably likely to be burned, to suffer from smoke inhalation, or worse (Tr. 236-237).

Because of the amount and extent of the accumulations, Marietti believed they had existed from two to four days (Tr. 228). He was sure they had not come into existence during a single shift (Tr. 249, 252, *see also* Tr. 255). He also believed if GCI had cleaned up loose coal and coal dust during each shift's mining cycle, as was required, it could have prevented the accumulations (Tr. 233).

Smedley responded that on November 3, his shift lacked that ability. The scoop had broken down during the previous shift and he and another miner did not repair it until around 7:30 p.m. or 8:00 p.m. (Tr.734). Smedley also implied that much of the accumulated material could have been due to a sudden, recent spillage. The mobile bridge conveyor (MBC) haulage system was new and it had a propensity to "spill a great amount of coal" (Tr. 734-735).

Marietti discounted these possibilities. On November 3, no one mentioned to him that clean up efforts had been hampered or discontinued (Tr. 259). No one mentioned to him that the company was having problems with the MBC (Tr. 256). Indeed, when Marietti asked Smedley about the accumulations, Smedley said nothing (Tr. 239).

In Marietti's view, Smedley was highly negligent in allowing the accumulations to exist. They had been in existence for several days (Tr. 237). Smedley was responsible for examining the area. The results of the pre-shift and on-shift examinations had been recorded and there was

no reference in the reports to the accumulations (Tr. 257-258).

In addition, Marietti believed Kenneth Clark, foreman of the afternoon shift, also was "highly" negligent (*Id.*). The accumulations existed on his shift as well. In Marietti's opinion they were so obvious and extensive "any prudent miner" would have known they were there and would have had them cleaned up (Tr. 238).

With regard to personal liability, Marietti and Vetter agreed that Smedley was culpable. Vetter noted that 400 tons of material was taken from the mine to abate the violation (Tr. 382, 385) and that 400 tons was more than sometimes was mined during the course of an entire day (Tr. 357; 360; *see* Gov. Exh. 14). The implication Vetter drew from this was that the accumulations were so large that Smedley simply had to have known of them. Despite his knowledge, he allowed them to continue (Tr. 358, *see also* Tr. 386, 387-388).

Vetter spoke with Smedley about the situation. The only thing Smedley said was that he was training a person on the scoop to do clean up work (Tr. 361). Vetter then spoke with the scoop operator, Todd Brown. He told Vetter that although one of his duties was to clean the section, he never had sufficient time to do it; that either he had to haul supplies; the scoop was inoperable; or the mobile bridge conveyors were constantly running and blocking his way (Tr. 358).

Vetter also thought personal liability extended to Clark. The amount of the accumulations meant that much of the material was present on Clark's shift (Tr. 374-375), and Clark was more than ordinarily negligent in failing to remove it (Tr. 376-378).

THE VIOLATION

In one of its earliest cases, the Commission stated that section 75.400 is violated "when an accumulation of combustible materials exists" (*Old Ben Coal Co.*, 1 FMSHRC 1954, 1956 (December 1979)). GCI did not offer testimony refuting Marietti's description of the accumulations, of their location, and of their extent (Tr. 228-230, 232, 236, 238; Gov. Exh. 13). Ball did not deny that he told Simmons 400 tons of accumulated material were removed in response to the order (Tr. 247). Thus, it is certain that a very large amount of loose coal, coal fines and coal dust accumulated on the section. The accumulated material was combustible, and I find that the violation existed as charged.

GRAVITY AND S&S

The violation was both very serious and S&S. The danger was that an electrical fault or a methane explosion would ignite the coal, coal dust, and coal fines, and that once ignited the fire would spread endangering everyone on the section (Tr. 233). There is no evidence challenging

Marietti's testimony in this regard.

Moreover, the presence of potential ignition sources in the immediate vicinity of the combustible material meant that as mining continued, a fire was reasonably likely. Injuries resulting from a fire would have been reasonably serious or worse.

NEGLIGENCE AND UNWARRANTABLE FAILURE

The violation was due to GCI's high negligence and unwarrantable failure. The extent and the amount of accumulated material indicated that the accumulations had existed at least since Clark's shift and perhaps longer (Tr. 357-358, 360). The material was obvious. Clark and Smedley both should have noted the condition during their respective shifts and should have taken steps to eliminate it. Neither did. The evidence fully supports finding that both either knew of the accumulations and ignored them or were irresponsibly oblivious to them.

I do not credit Smedley's testimony that the scoop was inoperable (Tr. 734). This excuse appears to be a post-citation rationalization given the fact that at the time the violation was cited Smedley did not mention the scoop to Marietti. Surely, if the scoop was the reason the accumulations were not cleaned up or were not in the process of being cleaned up, Smedley would have said so. In addition, there is no factual evidence to support Smedley's suggestion that the accumulations were caused by a sudden and recent malfunction of the MBC. As with the scoop, had it been the case, Smedley would have mentioned it.

The extent of the violative condition and the operator's efforts in abating the condition are among the factors that may signal aggravated conduct constituting more than ordinary negligence (*see Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001)). Here the two factors are conclusive. Only indifference or a serious lack of reasonable care can explain why Smedley and Clark, and through them GCI, allowed the cited extensive accumulations of loose coal, coal fines and coal dust to exist and why they were not eliminated or were not in the process of being eliminated at the time they were observed by the inspectors.

SMEDLEY'S AND CLARK'S 110(C) LIABILITY

Smedley and Clark were section supervisors. Both were "in a position to protect employee safety" (*Kenney Richardson*, 3 FMSHRC at 16). Their presence on the section meant that they were aware of the accumulations. By taking no action to clean up the accumulations Smedley and Clark failed to act in a manner commensurate with their responsibilities. Their failure was more than ordinary and in the midst of such an obvious and very serious violation established their knowing violation of section 75.400.

CITATION/ORDER NO.	DATE	30 C.F.R.§
4896096	11/3/98	75.362(a)(1)

Order No. 4896096, which was issued pursuant to section 104(d), states:

> An inadequate onshift has been conducted by the 001-0 section foreman that has been on the section for approximately 7 hours with numerous hazards present with none being addressed consisting of deep cuts, excessive accumulations, ventilation controls not in place, and warning devices not installed for unsupported places. With these conditions present[,] injuries could occur to the 001-1 personnel (Gov. Exh. 8).

Section 75.362(a)(1), requires a certified person to conduct an on-shift examination of each section where anyone is working during the shift. The examination must be made at least once during the shift or more often if necessary for safety. The person conducting the examination must check for hazardous conditions; test for methane; and determine whether air is moving properly. Section 75.363 requires that any hazardous condition found during the on-shift examination be corrected (*see* Tr. 260-261).

The order was issued by Simmons. Marietti, who was with Simmons and who observed the same conditions that lead Simmons to issue the order, testified that the allegation of an inadequate examination was based on the previously referenced excessive cuts and the accumulations. Marietti described the conditions as creating "obvious" hazards (Tr. 261, *see also* Tr. 266). In addition, Marietti noted the standards required the hazardous conditions to be corrected, and they were not (Tr. 266).

Smedley, was responsible for conducting the on-shift examination for the evening shift. Marietti spoke with Smedley but he could not recall whether Smedley stated he had in fact conducted the examination (Tr. 262, 267). In addition, Marietti could not recall whether there was any record to show Smedley actually conducted it (Tr. 267). However, because of the cited conditions, even if Smedley had conducted the required on-shift examination, it was Marietti's view that the examination was inadequate and therefore a violation of the standard (Tr. 268).

The hazard created by an inadequate on-shift examination was that if the excessive cuts and the accumulations went unreported and uncorrected, then a roof-fall and/or a fire could result. There were energized cables lying in the accumulations and there was energized equipment operating on the section. The cables and the equipment represented potential ignition sources (Tr. 262-263). In addition, the excessive cuts weakened the roof (*Id.*).

Marietti believed that Smedley knew or should have known the hazardous conditions existed. They would have been obvious to any " prudent miner just walking in the area" (Tr. 264). Vetter agreed and thought that Smedley should be held personally liable. He stated that

during his investigation, he spoke with two miners who told him they had seen Smedley performing the on-shift examination before the inspectors arrived on the section (Tr. 364-366). The accumulations and excessive cuts existed then and Smedley should have had the conditions corrected.

THE VIOLATION

Smedley confirmed that usually he conducted the on-shift examination, and that he usually did so at the beginning of the shift when he first went on the section. He maintained that when he examined the section on November 3, none of the cited conditions existed (Tr. 737). Given my previous findings regarding the cut-through and the accumulations, I do not credit this assertion.

The cut-through occurred on the afternoon shift and certainly was present at the start of Smedley's shift (Tr. 664-666). The cut-through created a hazardous roof condition that Smedley should have noted when he conducted the on-shift examination. The accumulations also were present on the afternoon shift and thus at the start of Smedley's shift (Tr. 357-358, 360). They were another hazardous condition that Smedley should have noted.

As stated, section 75.362(a)(1) requires an on-shift examination to be conducted and hazardous conditions to be noted. Section 75.363 requires the hazardous conditions to be corrected immediately. Compliance with section 75.363 is dependent upon compliance with section 75.362(a)(1). If hazardous conditions are not noted then they cannot be corrected, the examination has failed its purpose, and the standard is violated. Thus, a failure to correct hazardous conditions which should have been noted is prima facie evidence of an inadequate on-shift examination and of a violation of section 75.362(a)(1). The existence of the accumulations and the cut-through provide more than enough evidence to establish Smedley's on-shift examination was inadequate and violated section 75.362(a)(1).

GRAVITY AND S&S

The violation was both very serious and S&S. The danger was that miners working on Smedley's crew were subjected to the dual hazards of unsupported roof in the cut-through and of excessive accumulations of loose coal, coal dust, and coal fines throughout the section. Had there been an adequate on-shift examination the hazards would have been noted and corrections would have been initiated. In assessing the gravity and the S&S nature of the violation I must look to the gravity of the hazards created by the conditions, and to the likelihood the hazards would have occurred. The hazards of the cut-through and of the accumulations were found to have been very serious and reasonably likely to occur. The same conclusions are applicable

here.[9]

NEGLIGENCE AND UNWARRANTABLE FAILURE

I conclude that the violation was due to GCI's high negligence and unwarrantable failure. The cut-through and the accumulations were present when Smedley conducted his on-shift examination. The conditions were visually obvious. The regulatory requirement of section 75.362, that he travel throughout the section when conducting the examination, means that he should have seen the cut-through and the accumulations. Because mining was continuing on the section he should have realized the conditions created the danger of roof-fall and fire. Had Smedley complied with the spirit as well as the letter of section 75.362(a)(1), he would have taken steps to eliminate the hazards. He did nothing. Given the obvious nature of the conditions and his blatant failure to address them, Smedley, and through Smedley, GCI, was highly negligent in inadequately examining the section.

Moreover, because the conditions were so obvious and the hazards they created were so serious, Smedley's lack of care was aggravated, and through Smedley, GCI unwarrantably failed to comply with section 75.362(a)(1).

SMEDLEY'S 110(C) LIABILITY

I have no doubt that Smedley's inadequate on-shift examination was a "knowing" violation. Smedley was "in a position to protect employee safety and health" and he failed to act even though he "had reason to know of . . . violative condition[s]" (*Kenny Richardson*, 3 FMSHRC at 16). As GCI's agent, Smedley was responsible for recognizing the serious hazards posed by the unsupported roof in the cut-through and by the accumulations. It was incumbent upon him to conduct his examination with care proportionate to the hazards and purpose of the standard. He did not. Either he was oblivious to the hazards or, if he recognized them, he was purposefully neglectful in carrying out his duty to conduct an adequate examination. In either case, his violation of section 75.362(a)(1) subjects him to personal liability.

CITATION/ORDER NO.	DATE	30 C.F.R.§
4367676	12/4/98	75.362(d)(2)

[9] In addition, a failure to conduct an adequate on-shift examination is a serious violation in its own right in that the inadequate nature of the examination means that a linchpin of miners' safety is fundamentally flawed.

The section 104(d)(1) order 4367676, which was issued pursuant to section 104(d) states in part :

> The required 20 minute methane checks have not been properly made for the *Lee Norse* roof drill . . . located in and roof bolting in the 5 to 6 cross cut of the 001-0MMU. The roof bolter operator stated that the foreman made the methane test at the last row of permanent roof support located about 10 feet from the coal face. The foreman admitted this and stated that he had no excuse. The roof bolter operator was not proved with a methane testing device and no probe was available on the drill. 0.3% methane was detected about 10 [feet] from the face with a hand held methanometer. This mine liberates methane and . . . a [section] 104(d)(1) order was issued previously on this inspection for this type of violation (Gov. Exh. 9).

Section 75.362(d)(2) requires tests for methane at 20-minute intervals during the operation of equipment in working sections and requires they be made at the face from under permanent roof support using an extendable probe or other acceptable means (*see* Tr. 275).

Inspector Gary Jones came to the Pollyanna No. 8 Mine on December 4, to finish the November 3, inspection (Tr. 274). Jones testified that when he arrived, advanced mining had reached its limits and retreat mining was in progress (Tr. 275).

Jones went underground accompanied by Tim Ball and Steve Brown. After proceeding a short distance Brown left the group and Ball and Jones traveled together (Tr. 281). When they reached the 001 section they walked inby to the area of the No. 5 and No. 6 cross cut. Near the face they observed an entry that had been roof bolted to within 10-feet of the face (Tr. 282). Also, they saw a miner, John Davis, who was operating a roof-bolting machine (Tr. 278; *see* Gov. Exh. 13). Jones asked to see Davis' methanometer. Davis replied he did not have one. Jones believed that section 75.362(d)(1)(iii) required a qualified person to check for methane at the face every 20 minutes and to do so from under supported roof. Jones testified that to test at the face from under supported roof, a person needed an extendable probe. So, Jones asked Davis if there was an extendable probe on the roof-bolting machine. Davis said, "No" (Tr. 277). Jones then asked who was making the required methane checks and how they were being made. Davis responded that the foreman, Clark, was making the checks—that he was checking with a methanometer while standing at the end of the line curtain under the last row of roof bolts (Tr. 276).[10]

Shortly thereafter Clark arrived. Jones asked Clark whether he was testing for methane.

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[10] Vetter testified that during his investigation Davis changed his story. Davis told Vetter that, in fact, Clark was not checking for methane (Tr. 390-391).

Clark replied that he was. Jones then asked Clark where he was conducting the tests, and Clark replied at the last row of roof bolts. Jones inquired whether Clark knew the tests had to be made at the face. According to Jones, Clark replied he did and that he had "no excuse" for not doing so (Tr. 282). Jones maintained that during their conversation Clark never stated that anyone other than he was responsible for making the tests. Nor did Clark ever state that he was testing for methane at the face (Tr. 283). In Jones' view, by failing to test at the face, Clark violated section 75.362(d)(2). Because Clark did not make the test at the proper place and knew it, Jones also believed Clark's, and therefore GCI's negligence was "high". In addition, Jones believed the violation was unwarrantable (Tr.289).

After talking to Clark, Jones tested for methane at the last row of roof bolts and found 0.3%. The explosive range of methane is between 5% and 15% (Tr. 291 Gov. Exh. 9). Jones feared that if tests were not made at the face, methane accumulating there would not be detected. Jones agreed that there was good air movement in the entry, but maintained the air movement did not ensure a safe level of methane at the face. He stated, "If we've got 0.3[%] at the end of [the] ventilation device, Lord only knows what we've got at the face" (Tr. 293). He believed it possible that the continuous miner machine would cut into a methane feeder; that methane would accumulate quickly; and that it would reach an amount where it would migrate to the area where Davis was working (Tr. 295-296).

The electrical components of the roof-bolting machine presented a possible ignition source for any methane (Tr. 283, 295). In addition, the act of installing roof bolts could result in a spark if a roof bolt struck the metal plate used to secure the bolt or struck a rock (Tr. 283-284). Jones believed that the presence of methane in the area; the act of roof bolting; and the electrical components of the roof-bolting machine, made an ignition of methane highly likely (Tr. 287-288). Seven miners were working on the section, and an ignition could have been fatal to them all. Under these circumstances, failing to test properly for methane was a significant and substantial contribution of a mine safety hazard (Tr. 288).

Jones also believed Clark knowingly violated section 75.362(d)(2). In addition to the discussion Jones had with Clark on December 4, Jones based his opinion on the fact that (in his view) Clark should have been especially alert to the requirement to test at the face. The company had been cited for a similar violation on November 3, and Clark should have seen the order in which the previous violation was cited since the order was required to be posted on the mine's bulletin board (Tr. 286).

THE VIOLATION

The company did not dispute that methane tests were not conducted at the face. Jones' testimony fully established both the mandate for the tests and that the mandate was not fulfilled.

The violation of section 75.362(d)(2) existed as charged.

GRAVITY AND S&S

The violation was both very serious and S&S. Jones persuasively testified that the failure to check for methane at the face meant that gas could accumulate and migrate from the face toward the roof-bolting machine. A small amount of methane already was present in the atmosphere at the last row of roof bolts, and as Jones stated, "Lord only knows what we've got at the face" (Tr. 293). Moreover, several potential ignition sources were present—sources which Jones described in full (Tr. 283-284,287-288, 295). Additional methane could have accumulated suddenly, without warning. Failing to check for methane at face while mining was ongoing and while miners were present on the section was reasonably likely to have resulted in serious injuries or death to Davis.

NEGLIGENCE AND UNWARRANTABLE FAILURE

The violation was due to GCI's high negligence and unwarrantable failure. The failure to check for methane at the face violated a fundamental safety requirement. Whether Clark actually checked for methane from under the last row of roof bolts, as Davis first told Jones, or whether he did nothing, as Davis later told Vetter — Clark did not conduct the required test at the face. Either he was ignorant of the requirement of section 75.362(d)(2) that he check at the face, or he purposefully disregarded it. His failure to meet the standard of required care represented more than ordinary negligence on his, and through him, on GCI's part.

CLARK'S SECTION 110(C) LIABILITY

Clark was a supervisor and an agent of GCI. As a supervisor he was in a position to protect miner safety and health and was presumed to know what section 75.362(d)(2) requires. No excuse was offered (to Jones, to Vetter, nor at the hearing) for not having and using an extendable probe to test for methane at the face. Given the hazard posed by a methane accumulation at the face, it was incumbent upon Clark to comply. He did not. As a result he knowingly violated section 75.362(d)(2), and he is liable under section 110(c) of the Act.

THE ABILITY TO CONTINUE IN BUSINESS AND THE SIZE CRITERIA AS APPLIED TO THE INDIVIDUAL RESPONDENTS

In assessing civil penalties against individuals who are liable under section 110(c), the

Commission has instructed its judges to "make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to individuals" (*Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997)). In *Ambrosia Coal and Construction Co.*, the Commission stated that "the relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business as applied to an individual, is whether the penalty will affect the individual's ability to meet his [or her] financial obligations" and that "[with] respect to the 'size' criterion . . . as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth" (19 FMSHRC 819, 824 (May 1997)). The Commission further has mandated that its judges "engage in a two-step analysis. . . . First, they must determine a section 110(c) defendant's household financial condition. Second, they then must make findings on the section 110(i) 'size' and 'ability to continue in business' criteria on the basis of the defendant's share of his or her household's net worth, income and expenses" (*Warren R. Steen, employed by Ambrosia Coal & Construction Co.*, 20 FMSHRC 381, 385 (April 1998)). In sum, the judge must make findings based on the "individual's share of the household's income and financial obligations" (*Id.*).

JAMES V. SMEDLEY AND TIM BALL

Neither Smedley nor Ball presented evidence in this regard, and I conclude the size of any civil penalties assessed against them will not affect their abilities to meet their financial obligations.

KENNETH CLARK

Kenneth Clark presented extensive testimony regarding the criteria. He stated that he began working for GCI in May 1996. He stopped working for the company on July 9, 2000, the day GCI ceased mining at Pollyanna No. 8 Mine (Tr. 490-491). On July 9, he held the position of outby foreman, and he was earning approximately $1,100 a week.

Presently, he works at the same mine. It now is operated by Sunrise Coal Company (Sunrise) (Tr. 492). Clark continues to hold the position of outby foreman. Also, he has some management responsibilities (Tr. 508). When he began working for Sunrise, he was earning $937 a week before taxes (Tr. 492). His net earning was approximately $700 (Tr. 494). Currently, his gross salary is $1,145 weekly which is $59,540 annually (Tr. 518).

Clark's wife does not work. In 1998, for federal tax purposes, the couple reported a joint adjusted gross income of $54,866 (Tr. 497; Resp. Exh. 2). The Clarks' only source of income was the salary Clark received from GCI (Tr. 497). In 1999, Clark again was the family's only wage earner. The family's income came from his GCI salary (Tr. 498). In 1999, the couple reported an adjusted gross income of $55,117 (Resp. Exh. 2 at 5). In 2000, they reported an adjusted gross income of $50,019 and, again, their reported income consisted solely of Clark's salary (Tr. 498; Resp. Exh. 2 at 8).

Clark testified that currently he has a savings account with a balance of $10 (Tr. 500). He and his wife do not have a checking account. Clark's unmortgaged home is valued at $75,000 (Tr. 501). Clark values his household possessions at $6,500. He and his wife own a 1987 Isuzu Pup and a 1998 Mercury Sable (Tr. 501-502). The Isuzu is paid for, and the Clarks' owe approximately $12,000 on the Sable (Tr. 502). Clark believes all of his current assets are worth $95,037 (Tr. 503, Resp. Exh.2 at 13).

Clark listed his creditors. He owes $12,686.75, to Ford Credit, with monthly payments of $333.58. He owes a credit card company $4,550 and makes a monthly payment of $116. He owes Sears $4,895.03 and makes a monthly payment of $117. He has two other credit card balances totaling $924.43, on which he is paying $40 a month. He owes $600 to a medical clinic on which he pays $25 a month. He makes insurance payments of $156 a month. Also, he claims gasoline and incidental expenses that total $400 a month (Tr. 504-507). Groceries and household items are indicated by Clark to cost $800 a month (Tr. 509). (This is despite the fact that only he and his wife live in their home (Tr. 519)). Safety clothing costs him approximately $30 a month (Tr. 510). Further, he gives his son approximately $100 a month to help support his son's two children (*Id.*). Electrical bills at his home average $60 a month and water averages $25 a month (Tr. 512). He contributes approximately $80 a month to his church (Tr. 513). Although Clark receives health insurance from Sunrise, the insurance does not cover all prescription drugs, and his wife is under the care of a physician for high blood pressure (Tr. 495, 509).

Clark claims that his total monthly liabilities are approximately $4,885.50, excluding maintenance on his home and automobiles (Tr. 515-516). He testified that in view of his liabilities, paying the proposed civil penalties would be a financial hardship (Tr. 516). The Secretary states she "does not dispute" Clark's financial evidence (*see* Sec. Br. 55).

It is noteworthy that Clark's income is derived solely from his salary. His current take home pay is $700 a week (Tr. 494). This means that at the end of the month, Clark has expendable income of $2,800. His monthly expenses total approximately $2,127[11]—not including the cost of prescription drugs and maintenance on the Clarks' vehicles and home. It therefore appears that despite Clark's adjusted gross annual income of somewhat more than $50,000, Clark's monthly take home pay is almost totally expended to meet legitimate financial obligations.

The Clarks' main assets are their home and pickup truck, both of which they own outright. The Clarks' have been straightforward about their financial situation. The record contains no indication Clark has tried to hide assets. I do not believe in a situation such as this the Act contemplates an individual having to encumber his or her home or vehicle to meet a large civil penalty obligation.

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11 Clark's testimony that monthly expenses for food and household items average $800 at first glance seems excessive, but given the fact that his two grandchildren, for whom he provides voluntary support, regularly and frequently visit. I believe it is not so far outside the realm of possibility to be discounted.

For this reason, I find that the civil penalties proposed to be assessed against Clark will affect adversely Clark's ability to meet his financial obligations, and I conclude that a marked reduction in the civil penalties assessed is warranted. However, this conclusion does not apply to the penalty assess for the violation of section 75.362 (a)(1) (Order No. 4896096). As counsel for the Secretary notes (and for reasons that escape me) Clark's counsel withdrew Clark's financial evidence as it pertains to this violation (Tr. 745; Sec. Br. 55).

GCI'S ABILITY TO CONTINUE IN BUSINESS

GCI also presented extensive evidence regarding the effect of civil penalties on its ability to continue in business. Jackson was an articulate and forthright witness. He testified that he was privy to all of the company's financial dealings and to its financial condition (Tr. 571). As has been noted, Jackson testified about GCI's formation and Heller's original loan to GCI of $13.5 million (Tr. 572-573). According to Jackson, by the second quarter of 1997, it became apparent that GCI would not be able to meet the principal and interest payments on the loan (Tr. 573). Jackson described Heller officials as "very, very upset" (*Id.*).

GCI has remained behind on the loan, and Heller can foreclose at any time (Tr. 584). As a result, the company's continued existence is subject to Heller's day-to-day forbearance (Tr. 576). Heller holds a first lien position on all the assets of GCI inclusive of its stock. It also holds a security interest in all assets, including all of GCI's revenue and contracts (Tr. 573-574). Heller's lean position means that it has an initial right to all of the remaining money and assets of GCI, should GCI default (Tr. 574). In the meantime, interest is accruing on the loan (Resp. Exh. 10).

Prior to January 1998, when Jackson took over as president of GCI, the company had what Jackson described as "substantial loses" (Tr. 584). When Jackson became president, Jackson hired the accounting firm, Arthur Anderson, to audit the company's financial situation. Anderson reported that the book value of the company's assets was between $8 and $9 million (Tr. 575). At that time, the principal amount due on the loan was $13.5 million (*Id.*). Since 1998, GCI has continued to loose money.

Heller receives all of GCI's revenues. It retains approximately .5% of the monies in an escrow account. It sends the balance back to GCI to pay the company's obligations (Tr. 620-621). Although GCI's accounts payable have grown, the company thus far has been able to meet its payroll (Tr. 585, 613).

In July 2000, the company ceased active mining and went from employing approximately 50 miners to employing between 12 and 15 (Tr. 584-585). The employees are primarily involved in reclamation work to satisfy the company's $1.5 to $1.8 million reclamation liability. Because Heller is accountable for the liability should GCI declare bankruptcy, it is in Heller's current interest to keep GCI viable. The money passed back to GCI from Heller has allowed GCI to pay

those creditors who are absolutely necessary to keep the company in business (Tr. 586. According to Jackson, paying creditors continues to be a "struggle" (Tr. 597).

As of February 2001, GCI has liabilities of $19,796,593.80 (Resp Exh. 8 at 1; Tr. 596). Of this amount, $14, 078,754.88, is the long term debt owed to Heller (*Id.*). The company has assets of $8,755,500.07 (Resp. Exh. 8 at 1, 596). The company's cash comes from accounts receivable (Tr. 596-597). Excluding the long-term debt owed to Heller, the company has current cash of $112,000 to $113,000 to pay its liabilities (Tr. 599). The current total value of GCI to its stockholders is a negative $12,239,036.53 (Tr. 606).

GCI no longer is involved in active mining (Tr. 580-581). However, GCI still has contracts to provide coal, which it does through leasing its coal rights to other operators. For example, the Pollyanna No. 8 Mine is operated by Sunrise (Tr. 581-582) (Tr. 581). GCI has no present plans to mine actively and could not do so anyway because under its lease agreements the contract operators have the exclusive right to mine (Tr. 610-611, 616). The income GCI makes from its leases was described by Jackson as "very minimal" (Tr. 583).

Jackson, who has declined a salary in order to aid the company, was of the opinion that the company can not pay the civil penalties assessed in these cases without foregoing payments to its debtors (Tr. 606-608). He stated that with its current debt load, it will be some time in the future before GCI has a positive cash flow (Tr. 608). In addition, the company is negotiating with the Internal Revenue Service to make payment arrangements for its existing excise and payroll tax debts (Tr. 627, 630). In its 1999 federal tax corporate return, the company reported a loss of $4,113,778 (Resp. Exh. 11 at 2).[12] However, Jackson agreed that he could request Heller to approve allocation of some of the company's funds to pay civil penalties (Tr. 614-615).

Jackson's testimony and the documentary evidence submitted by GCI establish that the company's position is precarious. Basically, it continues to operate at the sufferance of Heller. The more obligations the company accumulates, the less likely it is that income will be present to pay the expenses necessary for it to remain viable and, after its lease arrangements expire, to return to active mining. In addition, there is the ever present danger that the company's debt load will become too large for Heller to tolerate, at which point GCI's remaining assets will be sold and the company will cease to exist. Since the company's present assets do not increase in value, any additional debt brings the company closer to that day.

For these reasons, I agree with Jackson that imposition of the proposed assessments will adversely affect GCI's ability to continue in business. I conclude that a substantial reduction in what I otherwise would assess is warranted.

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[12] The 1999 return is the last year GCI filed federal taxes. The company received an extension on filing its year 2000 corporate return (Tr. 631).

GOOD FAITH ABATEMENT

GCI exhibited good faith in abating all of the violations in a timely fashion. As Marietti stated, the company "systematically [took] care of the violations" (Tr. 155).

HISTORY OF PREVIOUS VIOLATIONS

The Secretary offered into evidence a printout of the violations cited at the Pollyanna No. 8 Mine between December 4, 1996 and December 3, 1998 (Gov. Exh. 19). The printout is accurate (*see* Stip. 8). It lists a total of 384 violations in the two year period (*Id.* at 10). This is a large history.

CIVIL PENALTY ASSESSMENTS

A. DOCKET NO. CENT 1999-178, ETC.

In assessing civil penalties the Act mandates that I consider all of the criteria enumerated in section 110(i)(30 U.S.C. §820(i)). With regard to the violations in Docket No. CENT 1999-178 that are associated with the section 110(c) proceedings and with regard to the same violations that are alleged in the individual civil penalty proceedings — Docket Nos. CENT 2000-391, CENT 2000-400, and CENT 2000-401—I have made findings regarding the gravity and negligence of the violations. I also have found that GCI's applicable history of previous violations is large and that the individual respondents have no history of previous violations. In addition, I have noted that the company is small in size (Tr. 110-111). Further, I have found that the size of any penalties assessed against Smedley and Ball will not affect their ability to meet their financial obligations but that the size of any penalties assessed against Clark will. I also have found that GCI established the size of any penalties assessed will affect its ability to continue in business.

With regard to the violations in Docket CENT 1999-178, that are not associated with the individual civil penalty proceedings, the parties have stipulated to all of the civil penalty criteria (Joint Stips.) except the effect of any civil penalties assessed on the company's ability to continue in business. The stipulations are incorporated herein by reference. The assessments made for the non-associated violations reflect the parties stipulations as well as my finding that the size of any penalties assessed will affect GCI's continuation in business.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715067	11/3/98	75.370(a)(1)	$10,000	$2,000

The violation was very serious and was due to ordinary negligence.[13] The parties have stipulated and I have found a large history of previous violations (Joint Stip. 1, Stip. 8; Gov. Exh. 19). The violation was abated in timely fashion. Given the large history of previous violations, the small size of the operator, and the effect of penalties in GCI's ability to continue in business, I assess a penalty of $2,000 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715068	1/3/98	75.362(d)(2)	$15,000	$3,000

The violation was very serious and was due to more than ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $3,000 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715083	11/3/98	75.342(c)	$15,000	$2,000

The violation was very serious and was due to ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $2,000 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715084	11/3/98	75.400	$ 9,000	$1,800

The parties stipulated that the violation existed. They also stipulated the violation was timely abated. It is apparent from the stipulations that this was a serious violation and was due to ordinary negligence. Given the large history of previous violations, the small size of the

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[13] The parties have stipulated that when these violations were cited the operator owed a "high degree of care" and that the gravity of all of the violations in this docket is "high" (Joint Stip. 1). I interpret these stipulations as not inconsistent with my gravity and negligence findings.

operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $1,800 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896090	11/3/98	75.220(a)(1)	$2,000	$400

The violation was very serious and was due to more than ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $400 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896091	11/3/98	75.220(a)(1)	$2,000	$400

The violation was very serious and was due to more than ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $400 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896094	11/3/98	75.220(a)(1)	$2,000	$400

The violation was very serious and was due to more than ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $400 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896095	11/3/98	75.400	$6,000	$1,200

The violation was very serious and was due to more than ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations; the small size of the operator; and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $1,200 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896096	11/3/98	75.362(a)(1)	$6,000	$1,200

The violation was very serious and was due to more than ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $1,200 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715069	11/4/98	75.1100-3	$4,500	$900

The parties stipulated that the violation existed. They also stipulated the violation was timely abated. It is apparent from the stipulations that this was a serious violation and was due to ordinary negligence. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $900 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715085	11/4/98	75.512	$15,000	$3,000

The parties stipulated that the violation existed. They also stipulated the violation was timely abated. It is apparent from the stipulations that this was a serious violation and was due to ordinary negligence. Given the large history of previous violations, the small size of the operator, and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $3,000 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715086	11/4/98	75.503	$9,000	$1,800

The parties stipulated that the violation existed. They also stipulated the violation was timely abated. It is apparent from the stipulations that this was a serious violation and was due to ordinary negligence. Given the large history of previous violations; the small size of the operator; and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $1,800 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3557719	11/5/98	75.360(b)(6)(ii)	$4,000	$800

The parties stipulated that the violation existed. They also stipulated that the violation was timely abated. It is apparent from the stipulations that this was a serious violation and was

due to ordinary negligence. Given the large history of previous violations; the small size of the operator; and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $800 for this violation.

ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3557720	11/5/98	75.360(a)(i)	$5,000	$1,000

The parties stipulated that the violation existed. They also stipulated that the violation was timely abated. It is apparent from the stipulations that this was a serious violation and was due to ordinary negligence. Given GCI's large history of previous violations; the small size of the operator; and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $1,000 for this violation.

ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4367676	12/4/98	75.362(d)(2)	$15,000	$3,000

The violation was very serious and was due to more than ordinary negligence. The violation was abated in a timely fashion. Given the large history of previous violations; the small size of the operator; and the effect of penalties on GCI's ability to continue in business, I assess a penalty of $3,000 for this violation.

			$119,500.00	**$22,900.00**
TOTAL:				

DOCKET NO. CENT 2000-391

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715067	11/3/98	75.370(a)(1)	$1,800	$0

I have found that Smedley did not knowingly violate section 75.370(a)(1). According, no civil penalty is assessed.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715068	11/3/98	75.362(d)(2)	$3,000	$750

I have found that Smedley knowingly violated section 75.362(d)(2). I also have found that the violation was very serious and was abated in good faith. Smedley presented no evidence that the size of a penalty assessed against him would affect adversely his ability to meet his financial obligations. The parties have stipulated that Smedley has no history of previous knowing violations. Given these factors I assess a civil penalty of $750.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4715083	11/3/98	75.342(c)	$3,000	$0

I have found that Smedley did not knowingly violate section 75.342(c). Accordingly, no civil penalty is assessed.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896090	11/3/98	75.220(a)(1)	$600	$175

I have found that Smedley knowingly violated section 75.220(a)(1). I also have found that the violation was very serious and was abated in good faith. Smedley presented no evidence that the size of a penalty assessed against him would affect adversely his ability to meet his financial obligations. The parties stipulated that Smedley has no history of previous knowing violations. Given these factors I assess a civil penalty of $175.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896091	11/3/98	75.220(a)(1)	$600	$175

I have found that Smedley knowingly violated section 75.220(a)(1). I also have found that the violation was very serious and was abated in good faith. Smedley presented no evidence that size of a penalty assessed against him would affect adversely his ability to meet his financial obligations. The parties have stipulated that Smedley has no history of previous knowing violations. Given these factors I assess a civil penalty of $175.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896095	11/3/98	75.400	$1,000	$250

I have found that Smedley knowingly violated section 75.400. I also have found that the violation was very serious and was abated in good faith. Smedley presented no evidence that size of a penalty assessed against him would affect adversely his ability to meet his financial obligations. The parties have stipulated that Smedley has no history of previous knowing violations. Given these factors I assess a civil penalty of $250.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896096	11/3/98	75.362(a)(1)	$1,000	$250

I have found that Smedley knowingly violated section 75.362(a)(1). I also have found that the violation was very serious and was abated in good faith. Smedley presented no evidence that size of a penalty assessed against him would affect adversely his ability to meet his financial obligations. The parties have stipulated that Smedley has no history of previous knowing violations. Given these factors I assess a civil penalty of $250.

TOTAL:	**$11,000**	**$1,600**

DOCKET NO. CENT 2000-400

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896095	11/3/98	75.400	$1,000	$100

I have found that Clark knowingly violated section 75.400. I also have found that the violation was very serious and was abated in good faith. Clark established that the size of any penalty assessed against him would affect adversely his ability to meet his financial obligations. The parties have stipulated that Clark has no history of previous knowing violations. Given these factors I assess a penalty of $100 for this violation.

ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4367676	12/4/98	75.362(d)(2)	$3,000	$800

I have found that Clark knowingly violated section 75.362(d)(2). I also have found that the violation was very serious and was abated in good faith. Clark would have established that the size of any penalty assessed against him would affect adversely his ability to meet his financial obligations, but his counsel withdrew the evidence (Tr. 745). The parties have stipulated that Clark has no history of previous knowing violations. Given these factors I assess a penalty of $800 for this violation.

TOTAL:	**$4,000**	**$900**

DOCKET NO. CENT 2000-401

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896090	11/3/98	75.220(a)(1)	$1,300	$400

I have found that Ball knowingly violated section 75.220(a)(1). I also have found that the violation was very serious and was abated in good faith. Ball presented no evidence that the size of a penalty assessed against him would affect adversely his ability to meet his financial obligations. The parties have stipulated that Ball has no history of previous violations. Given

these factors I assess a penalty of $300 for this violation.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896091	11/3/98	75.220(a)(1)	$1,300	$400

I have found that Ball knowingly violated section 75.220(a)(1). I also have found that the violation was very serious and was abated in good faith. Ball presented no evidence that the size of a penalty assessed would affect adversely his ability to meet his financial obligations. The parties have stipulated that Ball has no history of previous violations. Given these factors I assess a civil penalty of $300.

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896094	11/3/98	75.220(a)(1)	$1,300	$0

I have found that Ball did not knowingly violated section 75.220(a)(1). Accordingly, no civil penalty is assess.

TOTAL:	**$3,900**	**$800**

B. DOCKET NOS. CENT 2000-197, ETC.,

The parties stipulated to all of the civil penalty criteria except the effect of any penalties assessed on GCI's ability to continue in business. I have found that the size of any penalties assessed will affect adversely GCI's ability to continue in business. Given the parties stipulations, which are incorporated by reference, and the finding regarding GCI's ability to continue in business, I assess the following penalties:

CENT 2000-197

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599497	8/18/99	77.1607(p)	$ 55.00	$ 20.00
7599498	8/18/99	77.1605(d)	184.00	70.00
7599499	8/18/99	77.410(c)	184.00	70.00
7599500	8/18/99	77.400(a)	184.00	70.00
7599701	8/18/99	77.1607(i)	196.00	75.00
7599721	9/01/99	77.1605(d)	184.00	70.00
7599722	9/01/99	77.410(c)	184.00	70.00
7599723	9/01/99	77.1605(d)	184.00	70.00
7599724	9/01/99	48.28(a)	264.00	75.00
Total:			$1,619.00	$590.00

CENT 2000-263

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599738	12/01/99	77.404(a)	$ 207.00	$ 75.00
7599739	12/01/99	77.404(a)	207.00	75.00
7599740	12/01/99	77.1605(k)	150.00	55.00
7599743	2/01/00	77.1109(e)(l)	150.00	55.00
7599744	2/01/00	48.29(a)	55.00	20.00
7599745	2/01/00	77.502-2	150.00	55.00
7599746	2/01/00	77.1605(d)	150.00	55.00
7599747	2/01/00	77.404(a)	150.00	55.00
7599748	2/01/00	77.1104	150.00	55.00
7599749	2/01/00	77.1200	55.00	20.00
7599750	2/02/00	77.1605(a)	150.00	55.00
7599751	2/02/00	77.1104	150.00	55.00
7599752	2/02/00	77.1605(a)	150.00	55.00
7599753	2/03/00	77.400(a)	55.00	20.00
7599754	2/03/00	71.501	55.00	20.00
7599755	2/03/00	77.1605(b)	161.00	60.00
7599756	2/03/00	77.1104	150.00	55.00
4367589	2/10/00	77.404(a)	150.00	55.00
Total:			$ 2,445.00	$895.00

CENT 2000-264

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599737	12/01/99	77.404(a)	$600.00	$160.00
4367803	3/27/00	77.404(a)	161.00	60.00
Total:			$761.00	$220.00

CENT 1999-278

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599482	4/06/99	77.1607(o)	$ 161.00	$ 60.00
7599483	4/06/99	77.1301(c)(9)	55.00	20.00
7599485	4/06/99	77.1605(k)	161.00	60.00
7599486	4/06/99	77.1104	161.00	60.00
7599487	4/06/99	77.1301(c)(10)	55.00	20.00
7599489	4/06/99	77.404(a)	161.00	60.00
7599488	4/07/99	77.1110	55.00	20.00
7599490	4/07/99	77.1104	161.00	60.00
7599491	4/07/99	72.620	207.00	75.00
7599492	4/08/99	77.1607(i)	173.00	65.00
Total:			$1,350.00	$500.00

CENT 2000-326

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599790	4/12/00	77.1104	$ 131.00	$ 50.00
7599791	4/12/00	77.1605(b)	131.00	50.00
Total:			$ 262.00	$100.00

CENT 2000-474

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4367611	7/05/00	77.1605(d)	$ 131.00	$ 50.00
4367612	7/05/00	77.410(a)(l)	131.00	50.00
7600681	7/05/00	77.1607(b)	184.00	70.00
7600683	7/05/00	77.1605(b)	140.00	52.00
7600684	7/05/00	77.1104	131.00	50.00
7600685	7/05/00	77.404(a)	131.00	50.00
7600687	7/05/00	77.1605(d)	140.00	52.00
7600689	7/05/00	77.404(a)	131.00	50.00
7600690	7/05/00	77.404(a)	131.00	50.00
4367614	7/05/00	77.1710(h)	131.00	50.00
7600691	7/17/00	77.1607(i)	161.00	60.00
7600692	7/17/00	77.404(a)	131.00	50.00
7600693	7/17/00	77.1104	131.00	50.00
7600694	7/17/00	77.1104	131.00	50.00
7600696	7/17/00	77.1605(a)	140.00	52.00
7600697	7/17/00	77.1104	131.00	50.00
7600698	7/17/00	77.1605(a)	140.00	52.00
7600690	7/17/00	77.404(a)	140.00	52.00
7600700	7/17/00	71.603(a)	184.00	70.00
Total:			$2,670.00	$1,010.00

CENT 2000-475

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7600702	7/18/00	77.1605(a)	$ 140.00	$ 52.00
7600703	7/18/00	77.1605(k)	131.00	50.00
Total:			$ 271.00	$102.00

CENT 1999-50

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty

4367449	8/11/98	75.400	$ 294.00	$ 82.00
4367450	8/11/98	75.370(a)(1)	475.00	95.00
4367451	8/11/98	75.370(a)(1)	1,122.00	234.00
4367452	8/11/98	75.220(a)(1)	557.00	111.00
7599364	8/11/98	75.1403	993.00	199.00
7599365	8/11/98	75.1100-3	277.00	75.00
7599366	8/11/98	75.1100-3	277.00	75.00
7599367	8/11/98	75.1100-2(e)(2)	277.00	75.00
7399368	8/11/98	75.1713-7(b)(4)	277.00	75.00
7599369	8/11/98	75.517	277.00	75.00
7599370	8/11/98	75.516-2(c)	277.00	75.00
7599371	8/11/98	75.516-2(c)	277.00	75.00
7599372	8/11/98	77.1104	277.00	75.00
7599373	8/12/98	75.370(a)(1)	277.00	75.00
7599374	8/12/98	75.370(a)(1)	993.00	199.00
7599375	8/12/98	75.503	993.00	199.00
7599376	8/12/98	75.503	993.00	199.00
7599377	8/12/98	77.400(a)	993.00	199.00
Total:			$9,906.00	$2,192.00

CENT 1999-51

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599378	8/12/98	77.404(a)	$ 993.00	$ 199.00
7599379	8/26/98	75.321(a)(1)	340.00	84.00
9895007	8/27/98	70.100(a)	4,096.00	819.00
Total:			$5,429.00	$1,102.00

CENT 1999-179

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3557707	11/03/98	75.383(b)(1)	$ 55.00	$ 20.00
3557708	11/03/98	75.383(b)(2)	55.00	20.00
3557709	11/03/98	77.208(e)	55.00	20.00
4367661	11/03/98	75.1715	55.00	20.00
4367662	11/03/98	77.502	55.00	20.00
4367663	11/03/98	77.513	55.00	20.00
4367664	11/03/98	77.502	55.00	20.00
4715061	11/03/98	75.601-1	2,391.00	586.00
4715062	11/03/98	75.601-1	399.00	88.00
4715063	11/03/98	75.807	55.00	20.00
4715064	11/03/98	75.601-1	399.00	88.00
4715065	11/03/98	75.601-1	399.00	88.00
4715066	11/03/98	75.602	399.00	88.00

4715339	11/03/98	75.1103-9(d)	399.00	88.00
4715340	11/03/98	75.400	399.00	88.00
4896082	11/03/98	75.400	399.00	88.00
4896083	11/03/98	75.1722(b)	399.00	88.00
4896084	11/03/98	75.1104	55.00	20.00
4896085	11/03/98	75.1722(b)	399.00	88.00
Total:			$6,477.00	$1,558.00

CENT 1999-180

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4896086	11/03/98	75.333(h)	$ 55.00	$ 20.00
4896088	11/03/98	75.208	399.00	88.00
4896089	11/03/98	75.370(a)(1)	399.00	88.00
4896092	11/03/98	75.208	399.00	88.00
4896093	11/03/98	75.370(a)(1)	399.00	88.00
4896097	11/03/98	75.360(e)	55.00	20.00
4896098	11/03/98	75.1713-7(c)	55.00	20.00
3557710	11/04/98	77.516	55.00	20.00
3557711	11/04/98	77.400(a)	55.00	20.00
3557712	11/04/98	77.400	399.00	88.00
3557713	11/04/98	75.516-2(c)	55.00	20.00
3557714	11/04/98	77.904	55.00	20.00
3557715	11/04/98	75.508	55.00	20.00
3557716	11/04/98	70.210(b)	55.00	20.00
3557741	11/04/98	75.400	399.00	88.00
3557742	11/04/98	75.211(d)	55.00	20.00
3557743	11/04/98	75.1715	55.00	20.00
3557744	11/04/98	75.312(d)	55.00	20.00
3557745	11/04/98	75.312(c)	55.00	20.00
Total:			$3,109.00	$788.00

CENT 1999-181

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3557746	11/04/98	75.360(f)	$ 55.00	$ 20.00
3557747	11/04/98	77.208(c)	55.00	20.00
3557748	11/04/98	75.503	399.00	88.00
3557749	11/04/98	75.1100-3	1,122.00	234.00
3557750	11/04/98	75.1100-3	55.00	20.00
3557751	11/04/98	75.503	399.00	88.00
3557752	11/04/98	75.400	399.00	88.00

3557753	11/04/98	75.1100-3	55.00	20.00
3557754	11/04/98	75.1107-9(a)(1)	55.00	20.00
3557755	11/04/98	75.380(d)(4)(ii)	55.00	20.00
4367665	11/04/98	77.404(a)	55.00	20.00
4367666	11/04/98	48.25	1,419.00	284.00
4367667	11/04/98	77.502	55.00	20.00
4367668	11/04/98	75.1715	55.00	20.00
4715070	11/04/98	75.342(a)(4)	55.00	20.00
4715072	11/04/98	75.1107-16(a)	399.00	88.00
4715081	11/04/98	75.1100-3	399.00	88.00
4896099	11/04/98	75.400	399.00	88.00
4896100	11/04/98	75.211(d)	55.00	20.00
Total:			$5,540.00	$1,266.00

CENT 1999-182

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3557717	11/05/98	75.370(a)(1)	$ 55.00	$ 20.00
3557718	11/05/98	75.503	1,122.00	234.00
3557756	11/05/98	77.404(a)	399.00	88.00
3557757	11/05/98	77.404(a)	55.00	20.00
3557758	11/05/98	77.1605(d)	399.00	88.00
3557759	11/05/98	77.1103(a)	55.00	20.00
3557760	11/05/98	77.408	475.00	95.00
3560485	11/05/98	77.1103(a)	55.00	20.00
3560486	11/05/98	77.404(a)	55.00	20.00
3560487	11/05/98	77.502	399.00	88.00
3560488	11/05/98	77.516	55.00	20.00
3560489	11/05/98	77.502	55.00	20.00
3560490	11/05/98	77.404(a)	55.00	20.00
3560491	11/05/98	77.400(a)	55.00	20.00
3560492	11/05/98	77.400(a)	399.00	88.00
3560493	11/05/98	77.400(a)	399.00	88.00
3560494	11/05/98	77.400(c)	399.00	88.00
3560495	11/05/98	77.516	55.00	20.00
3560496	11/05/98	77.516	55.00	20.00
Total:			$4,596.00	$1,077.00

CENT 1999-183

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty

3560497	11/05/98	77.1109(d)	$ 55.00	$ 20.00
3560498	11/05/98	77.1710(h)	55.00	20.00
3560499	11/05/98	50.40(b)	55.00	20.00
3560500	11/05/98	77.502	399.00	88.00
4715071	11/05/98	75.1714-3(b)	1,122.00	234.00
4715087	11/05/98	75.506-1	1,122.00	234.00
4896185	11/05/98	77.516	55.00	20.00
4367247	11/17/98	75.203(d)	55.00	20.00
4367248	11/18/98	75.370(a)(1)	55.00	20.00
4367674	12/04/98	75.208	399.00	88.00
4367675	12/04/98	75.211(d)	55.00	20.00
Total:			$3,427.00	$784.00

CENT 1999-211

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3590059	10/20/98	75.400	$ 1,270.00	$254.00
3590060	10/21/98	75.383(a)	872.00	162.00
4057939	10/21/98	75.380(d)(2)	1,270.00	254.00
4367252	1/27/99	75.1100-3	55.00	20.00
4361254	1/27/99	75.807	55.00	20.00
4367255	1/27/99	75.1914(a)	993.00	195.00
Total:			$ 4,515.00	$905.00

CENT 1999-234

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599673	2/09/99	75.503	$ 760.00	$ 158.00
7599674	2/09/99	75.517	55.00	20.00
7599676	2/09/99	75.800-3(c)	760.00	158.00
7599677	2/10/99	75.321(a)(1)	760.00	158.00
7599678	2/10/99	75.370(a)(1)	1,771.00	354.00
7599679	2/10/99	75.360(a)(1)	1,771.00	354.00
7599684	3/04/99	75.503	2,168.00	434.00
7599685	3/04/99	75.503	2,168.00	434.00
7599686	3/04/99	75.1722(a)	55.00	20.00
3849642	3/10/99	75.350	872.00	174.00
4367541	3/31/99	75.342(a)(4)	259.00	72.00
7600008	4/05/99	75.362(a)(1)	760.00	158.00
7600009	4/05/99	75.321(a)(1)	760.00	158.00
7600010	4/05/99	75.400	55.00	20.00
Total:			$12,974.00	$2,672.00

CENT 1999-279

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599604	11/10/98	75.601-1	$ 2,000.00	$ 400.00
7599675	2/09/99	75.803	9,500.00	1,900.00
4862082	3/10/99	75.380(f)(5)(i)	55.00	20.00
Total:			$11,555.00	$2,320.00

CENT 1999-303

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4862088	3/11/99	75.1722(a)	$ 55.00	$ 20.00
4862089	3/11/99	75.1104	55.00	20.00
4862091	3/11/99	77.402	55.00	20.00
4862092	3/11/99	77.404(a)	55.00	20.00
4862093	3/11/99	77.402	55.00	20.00
4862094	3/13/99	77.516	55.00	20.00
4862095	3/13/99	50.20(b)	55.00	20.00
4367519	5/27/99	75.330(b)(1)(ii)	1,771.00	354.00
Total:			$2,156.00	$494.00

CENT 1999-304

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4862147	3/09/99	75.312(c)	$ 55.00	$ 20.00
4862148	3/09/99	75.312(d)	55.00	20.00
4862149	3/09/99	75.1101-1(b)	55.00	20.00
4862150	3/09/99	75.503	55.00	20.00
4862151	3/09/99	75.333(b)(3)	55.00	20.00
4862152	3/09/99	77.403	55.00	20.00
4862153	3/09/99	75.370(a)(1)	399.00	88.00
4862081	3/10/99	75.1403-6(a)(2)	55.00	20.00
4862083	3/10/99	75.400	399.00	88.00
4862155	3/10/99	75.512	55.00	20.00
1862156	3/10/99	75.400	399.00	88.00
4862157	3/10/99	75.1715	55.00	20.00
4862158	3/10/99	75.900	55.00	20.00
4862159	3/10/99	75.1713-7(b)(4)	55.00	20.00
4862160	3/10/99	75.1104	55.00	20.00
4862084	3/11/99	75.360(b)(8)	55.00	20.00
4862085	3/11/99	75.1715	55.00	20.00
4862086	3/11/99	75.400	399.00	88.00
4862087	3/11/99	75.1100-3	399.00	88.00

Total:			$2,765.00	$720.00

CENT 1999-339

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4862090	3/11/99	75.220(a)(1)	$ 3,500.00	$ 700.00
4862096	3/13/99	75.1720(c)	872.00	174.00
3849649	6/09/99	75.370(a)(1)	5,000.00	1,000.00
3849650	6/09/99	30 U.S.C.§814(d)(2)	7,000.00	1,400.00
Total:			$16,372.00	$3,274.00

CENT 2000-158

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7600026	5/19/99	75.901	$ 5,000.00	$1,000.00
7600033	5/21/99	77.502	5,000.00	1,000.00
7600038	5/21/99	75.370(a)(1)	8,800.00	1,740.00
7600044	5/27/99	75.514	7,500.00	1,500.00
7599938	6/01/99	75.400	1,200.00	240.00
4367689	6/15/99	75.330(b)(1)(ii)	9,500.00	1,900.00
7602610	8/31/99	75.503	55.00	20.00
7602611	8/31/99	75.400	277.00	75.00
7602613	8/31/99	75.362(a)(1)	655.00	130.00
7602614	8/31/99	75.400	277.00	75.00
7602615	8/31/99	75.1106-3(a)(2)	55.00	20.00
7625405	8/31/99	77.516	55.00	20.00
7625406	8/31/99	77.208(e)	55.00	20.00
7625407	8/31/99	75.1100-3	55.00	20.00
7625409	8/31/99	75.1722(a)	55.00	20.00
7625410	8/31/99	75.1104	55.00	20.00
7625411	8/31/99	75.333(b)(3)	55.00	20.00
7625412	8/31/99	75.33383	55.00	20.00
7625413	8/31/99	75.400	55.00	20.00
Total:			$38,759.00	$7,860.00

CENT 2000-159

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7625414	8/31/99	75.1107-1(a)(3)(ii)	$ 55.00	$ 20.00
7625415	8/31/99	75.1722(b)	55.00	20.00
7625416	8/31/99	75.904	55.00	20.00
7625417	8/31/99	75.904	55.00	20.00

7625418	8/31/99	75.516-2(c)	55.00	20.00
7625419	8/31/99	75.400	340.00	84.00
7625420	8/31/99	75.360(a)(1)	294.00	82.00
7625421	8/31/99	75.520	55.00	20.00
7625422	8/31/99	75.520	55.00	20.00
7625423	8/31/99	75.516	55.00	20.00
7625555	8/31/99	77.1104	55.00	20.00
7625556	8/31/99	77.1101(c)	55.00	20.00
7625557	8/31/99	77.1101(a)	55.00	20.00
7625558	8/31/99	77.1109(d)	55.00	20.00
7625559	8/31/99	75.400	655.00	130.00
7625560	8/31/99	75.364(b)(4)	55.00	20.00
7625561	8/31/99	75.202(a)	399.00	85.00
7625562	8/31/99	75.1100-3	55.00	20.00
7625563	8/31/99	75.1106-5(a)	55.00	20.00
Total:			$2,513.00	$681.00

CENT 2000-160

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7625564	8/31/99	75.807	$ 55.00	$ 20.00
7625565	8/31/99	75.807	55.00	20.00
7625566	8/31/99	75.202(a)	399.00	88.00
7625573	8/31/99	77.809	399.00	88.00
7625574	8/31/99	75.311(f)	55.00	20.00
7602616	9/01/99	75.383(b)(2)	55.00	20.00
7602617	9/01/99	75.383(b)(3)	55.00	20.00
7602618	9/01/99	75.1702	55.00	20.00
7602619	9/01/99	75.202(a)	277.00	75.00
7602620	9/01/99	75.503	55.00	20.00
7602621	9/01/99	75.503	277.00	75.00
7602622	9/01/99	75.520	277.00	75.00
7602623	9/01/99	77.205(a)	277.00	75.00
7602624	9/01/99	77.205(a)	277.00	75.00
7602625	9/01/99	77.404(a)	277.00	75.00
7602626	9/01/99	77.1607(u)	55.00	20.00
7602627	9/01/99	77.1104	55.00	20.00
7602628	9/01/99	77.502	55.00	20.00
7602629	9/01/99	77.1710(e)	277.00	75.00
Total:			$3,287.00	$901.00

CENT 2000-161

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7602630	9/01/99	77.1104	$ 277.00	$ 75.00
7602631	9/01/99	77.404(a)	277.00	75.00
7625424	9/01/99	75.503	655.00	130.00
7625426	9/01/99	48.9(a)	55.00	20.00
7625427	9/01/99	48.9(a)	55.00	20.00
7625428	9/01/99	75.1711-3	55.00	20.00
7625567	9/01/99	75.202(a)	277.00	75.00
7625568	9/01/99	77.1104	55.00	20.00
7625569	9/01/99	77.1104	55.00	20.00
7625570	9/01/99	77.516	55.00	20.00
7625571	9/01/99	77.400(a)	277.00	75.00
7625572	9/01/99	77.1104	55.00	20.00
4367540	9/29/99	75.503	277.00	75.00
Total:			$2,425.00	$645.00

CENT 2000-164

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599973	11/15/99	75.1100-2(e)(1)	$ 55.00	$ 20.00
7599974	11/15/99	75.1100-2(e)(2)	55.00	20.00
7600085	11/15/99	77.206(c)	55.00	20.00
7600086	11/15/99	77.1104	55.00	20.00
7600087	11/15/99	77.404(a)	55.00	20.00
7600088	11/15/99	77.1104	55.00	20.00
7600089	11/15/99	77.202	55.00	20.00
7600090	11/15/99	77.1104	55.00	20.00
7600091	11/15/99	77.1104	55.00	20.00
7600092	11/15/99	77.502	55.00	20.00
7600094	11/15/99	77.1103(d)	55.00	20.00
7600095	11/15/99	75.203(e)(2)	242.00	75.00
7600096	11/15/99	75.1718	55.00	20.00
7600109	11/15/99	75.516-2(c)	55.00	20.00
7600112	11/15/99	75.1100-3	475.00	95.00
7600113	11/15/99	75.1107-16(c)	475.00	95.00
7600116	11/15/99	75.1725(a)	475.00	95.00
7600118	11/15/99	75.370(a)(1)	55.00	20.00
7600119	11/15/99	75.370(a)(1)	242.00	75.00
Total:			$2,679.00	$715.00

CENT 2000-165

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7600121	11/15/99	75.370(a)(1)	$ 475.00	$ 95.00
7599976	11/17/99	75.1725(a)	55.00	20.00
7599977	11/17/99	75.400	242.00	75.00
7600123	11/17/99	77.404(a)	55.00	20.00
4366803	11/18/99	75.400	242.00	75.00
7600098	11/18/99	75.1914(a)	55.00	20.00
7600099	11/18/99	75.503	55.00	20.00
7600100	11/18/99	75.400	55.00	20.00
7600141	11/18/99	75.1914(a)	655.00	130.00
7600142	11/18/99	75.1914(a)	655.00	130.00
7600145	11/22/99	75.1713-7(a)	55.00	20.00
7600146	11/22/99	75.606	55.00	20.00
7600147	11/22/99	75.400	317.00	85.00
7600148	11/22/99	75.807	55.00	20.00
7600149	11/22/99	75.400	55.00	20.00
7600150	11/23/99	77.206(c)	317.00	85.00
4366805	11/29/99	75.1909(a)(3)(i)	242.00	75.00
4367701	11/29/99	75.1909(b)(4)	55.00	20.00
4367702	11/29/99	75.1905(b)(5)	55.00	20.00
Total:			$3,750.00	$970.00

CENT 2000-166

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599978	11/29/99	75.364(b)(4)	$ 55.00	$ 20.00
7599979	11/29/99	75.503	242.00	75.00
7600151	11/29/99	77.1104	55.00	20.00
7600152	11/29/99	75.400	55.00	20.00
7600153	11/29/99	75.1906(d)	55.00	20.00
4366811	12/01/99	75.516-2(c)	55.00	20.00
4367703	12/01/99	75.342(a)(4)	259.00	76.00
4367704	12/06/99	75.370(a)(1)	475.00	95.00
4367705	12/06/99	75.360(a)(1)	55.00	20.00
4366812	12/07/99	75.503	55.00	20.00
7600129	12/21/99	75.364(b)	242.00	75.00
7600130	12/21/99	77.208(d)	242.00	75.00
7600131	12/21/99	75.400	340.00	84.00
7600132	12/21/99	75.516-2(c)	55.00	20.00
7600133	12/21/99	75.333(e)(1)(ii)	55.00	20.00

7600134	12/21/99	75.361(b)	55.00	20.00
4541921	12/27/99	75.360(f)	55.00	20.00
4541922	12/27/99	75.807	55.00	20.00
Total:			$2,460.00	$720.00

CENT 2000-167

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4366814	1/07/00	75.516-2(c)	$ 55.00	$ 20.00
4366815	1/07/00	75.516-2(c)	55.00	20.00
4366816	1/07/00	75.333-(c)(2)	55.00	20.00
4366817	1/07/00	75.333-(c)(2)	55.00	20.00
4366818	1/07/00	75.516-2(c)	55.00	20.00
4366819	1/07/00	75.333-(c)(2)	55.00	20.00
4366820	1/07/00	75.601-1	55.00	20.00
7600154	1/07/00	75.601-1	55.00	20.00
7600155	1/07/00	75.902	55.00	20.00
7600156	1/10/00	75.400	55.00	20.00
Total:			$550.00	$200.00

CENT 2000-196

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4367389	9/01/99	50.20(a)	$55.00	$ 20.00
4367392	9/01/99	50.11(b)	55.00	20.00
4896874	9/01/99	50.11.(b)	55.00	20.00
4896875	9/01/99	50.20(a)	55.00	20.00
7600105	9/21/99	75.1722(c)	55.00	20.00
Total:			$275.00	$100.00

CENT 2000-255

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7602612	8/31/99	75.400	$ 9,000.00	$1,800.00
7600110	11/15/99	75.400	399.00	90.00
7600111	11/15/99	75.400	399.00	90.00
7600114	11/15/99	75.400	399.00	90.00
7600115	11/15/99	75.400	399.00	90.00
7600117	11/15/99	75.333(e)(l)(ii)	55.00	20.00
7600120	11/15/99	75.333(e)(l)(ii)	55.00	20.00
7600124	11/17/99	75.400	224.00	70.00
7600125	11/17/99	75.400	224.00	70.00
4366006	11/29/99	75.1910(g)	55.00	20.00
4366807	11/29/99	75.1909(a)(3)(x)	55.00	20.00

4366808	11/29/99	75.1909(a)(10)	55.00	20.00
4366809	11/29/99	75.1910(i)	55.00	20.00
4366810	11/29/99	75.1910(j)	55.00	20.00
4367706	1/31/00	75.1909(a)(3)(i)	55.00	20.00
4367707	1/31/00	75.202(a)	196.00	75.00
4367708	1/31/00	75.364(b)(4)	55.00	20.00
Total:			$11,735.00	$2,555.00

CENT 2000-265

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3557635	2/17/00	75.400	$ 55.00	$ 20.00
3470271	3/07/00	75.380(d)(4)	55.00	20.00
4367711	3/09/00	75.202(a)	150.00	55.00
4367712	3/14/00	75.403	242.00	75.00
Total:			$502.00	$170.00

CENT 2000-290

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4367459	11/18/99	75.1100-3	$ 3,500.00	$ 700.00
3557621	2/15/00	75.364(b)(4)	55.00	20.00
3557622	2/15/00	75.400	55.00	20.00
3557623	2/15/00	75.1910(f)	55.00	20.00
3557624	2/15/00	75.400	196.00	75.00
3557625	2/15/00	75.1911(a)(4)	55.00	20.00
3557626	2/15/00	75.1909(d)	55.00	20.00
7633535	2/15/00	75.1101-1(b)	55.00	20.00
7633536	2/15/00	75.1103-4(b)	55.00	20.00
7633537	2/15/00	75.1722(b)	196.00	75.00
7633538	2/15/00	75.1722(b)	196.00	75.00
7633539	2/15/00	75.400	55.00	20.00
7633540	2/15/00	75.400	55.00	20.00
7633541	2/15/00	77.404(a)	55.00	20.00
7633542	2/15/00	77.205(b)	55.00	20.00
7633543	2/15/00	77.1110	55.00	20.00
7633544	2/15/00	77.1103(a)	196.00	75.00
7633545	2/15/00	75.203(e)	55.00	20.00
3557627	2/16/00	75.202(a)	196.00	75.00
Total:			$5,195.00	$1,335.00

CENT 2000-291

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
3557628	2/16/00	75.516	$55.00	$ 20.00
3557629	2/16/00	75.202(a)	196.00	75.00
3557630	2/16/00	75.333(c)(3)	55.00	20.00
3557631	2/16/00	75.364(g)	55.00	20.00
3557632	2/16/00	75.1202-1(b)(3)	55.00	20.00
4704677	2/16/00	75.364(h)	55.00	20.00
4704678	2/16/00	75.364(b)	55.00	20.00
4704679	2/16/00	75.372(a)(1)	55.00	20.00
7633546	2/16/00	75.1720(a)	207.00	75.00
7633547	2/16/00	75.400	196.00	75.00
7633548	2/16/00	75.194(f)	55.00	20.00
7633549	2/16/00	75.1914(a)	196.00	75.00
7633550	2/16/00	75.202(a)	55.00	20.00
7633551	2/16/00	75.400	55.00	20.00
7633552	2/16/00	75.1713-7(c)	55.00	20.00
7633553	2/16/00	75.202(a)	55.00	20.00
3557633	2/17/00	75.360(e)	55.00	20.00
3557634	2/17/00	75.202(a)	196.00	75.00
3557636	2/17/00	75.1103-8(b)	55.00	20.00
Total:			$1,761.00	$655.00

CENT 2000-292

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7633554	2/17/00	75.604(b)	$196.00	$ 75.00
7633555	2/17/00	75.1107-9(a)(l)	55.00	20.00
7633556	2/17/00	75.1107-9(a)(l)	55.00	20.00
4367709	2/29/00	75.208	196.00	75.00
4367713	3/23/00	75.1909(b)(5)	55.00	20.00
4367714	3/23/00	75.220(a)(l)	150.00	55.00
4367715	3/28/00	75.1200-1(h)	55.00	20.00
Total:			$762.00	$285.00

CENT 2000-299

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7600043	5/25/99	75.513	$ 55.00	$ 20.00
7599935	6/01/99	75.364(a)(1)	55.00	20.00
7599936	6/01/99	77.404(a)	55.00	20.00
7599937	6/01/99	75.1724	317.00	85.00
3849646	6/02/99	75.400	317.00	85.00

3849647	6/02/99	75.1722(b)	317.00	85.00
3849648	6/02/99	75.400	55.00	20.00
4367520	6/03/99	77.207	55.00	20.00
4367681	6/05/99	77.401(a)(2)	317.00	85.00
4367682	6/07/99	75.503	317.00	85.00
4367683	6/07/99	75.503	317.00	85.00
4367684	6/07/99	75.310(a)(3)	55.00	20.00
4367685	6/09/99	75.1103-4(e)	55.00	20.00
4367686	6/14/99	77.1605(d)	55.00	20.00
4367687	6/14/99	77.1605(b)	317.00	85.00
4367688	6/15/99	75.330(b)(1)(ii)	872.00	175.00
2930987	7/12/99	75.220(a)(1)	277.00	75.00
7600065	7/22/99	75.604(d)	55.00	20.00
Total:			$3,863.00	$1,025.00

CENT 2000-300

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7625425	9/01/99	30 U.S.C. §109(a)	$ 55.00	$ 20.00
7600081	10/13/99	75.370(a)(1)	317.00	85.00
7600082	10/13/99	75.511	55.00	20.00
7599960	10/19/99	75.403	55.00	20.00
7599961	10/19/99	75.370(a)(1)	294.00	85.00
Total:			$776.00	$230.00

CENT 2000-327

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599999	2/07/00	75.400	$196.00	$ 75.00
7600000	2/07/00	75.400	196.00	75.00
7600281	2/07/00	75.202(a)	196.00	75.00
Total:			$588.00	$225.00

CENT 2000-328

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599975	11/15/99	75.400	$ 2,000.00	$ 400.00
7600122	11/15/99	75.360(a)(1)	5,000.00	1,000.00
7600097	11/22/99	75.1906(a)	1,500.00	300.00
7600143	11/22/99	75.400	1,500.00	300.00
7600144	11/22/99	75.1906(b)	850.00	170.00
4367719	4/28/00	75.400	242.00	75.00
Total:			$11,092.00	$2,245.00

CENT 2000-418

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4367720	5/10/00	50.20(a)	$ 55.00	$ 20.00
4541965	5/22/00	75.220(a)(1)	55.00	20.00
4541958	6/05/00	75.202(a)	55.00	20.00
4541959	6/05/00	75.333(b)	55.00	20.00
4541960	6/05/00	75.202(a)	340.00	85.00
4542001	6/05/00	75.202(a)	55.00	20.00
4542002	6/05/00	75.512	55.00	20.00
4542003	6/05/00	75.705-(b)(a)(1)	55.00	20.00
4542004	6/05/00	75.202(a)	131.00	50.00
4542005	6/05/00	75.807	55.00	20.00
4542006	6/05/00	75.512	55.00	20.00
4542007	6/05/00	75.1103-1(a)	55.00	20.00
4542008	6/05/00	75.1106-5(a)	55.00	20.00
4542009	6/05/00	75.1725(a)	131.00	50.00
4542010	6/05/00	75.203(e)(1)	131.00	50.00
4542011	6/06/00	75.1722(c)	131.00	50.00
4542012	6/06/00	75.364(a)(2)(iii)	131.00	50.00
4542021	6/08/00	75.503	55.00	20.00
4542022	6/08/00	75.1403	55.00	20.00
Total:			$1,710.00	$590.00

CENT 2000-420

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4542023	6/08/00	75.1914(a)	$ 55.00	$ 20.00
7600140	6/12/00	50.20(a)	55.00	20.00
4541971	6/15/00	75.310(f)	55.00	20.00
4542030	6/22/00	75.1715	131.00	50.00
Total:			$296.00	$110.00

CENT 2000-426

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7636009	3/13/00	75.372(b)	$ 55.00	$ 20.00
4541961	5/11/00	75.400	150.00	55.00
4541962	5/11/00	75.203(e)(1)	150.00	55.00
4541963	5/22/00	75.333(c)(2)	55.00	20.00
4541966	5/22/00	75.400	55.00	20.00
4541967	5/22/00	75.1907(b)(2)	55.00	20.00
7600304	5/22/00	75.1713-7(a)(l)	55.00	20.00

7600305	5/22/00	77.1104	55.00	20.00
7600306	5/22/00	77.208(c)	55.00	20.00
7600307	5/22/00	75.400	55.00	20.00
7600308	5/22/00	75.400	150.00	55.00
7600309	5/22/00	75.400	150.00	55.00
7600310	5/22/00	75.400	150.00	55.00
7600486	5/22/00	75.400	55.00	20.00
7600488	5/22/00	75.1403	196.00	75.00
7600490	5/22/00	75.1906(k)	55.00	20.00
7600491	5/22/00	75.512	55.00	20.00
7600497	5/22/00	75.1725(a)	196.00	75.00
7600498	5/22/00	75.1722(a)	196.00	75.00
Total:			$1,943.00	$720.00

CENT 2000-427

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7600502	5/22/00	75.308(f)(4)(ii)	$ 55.00	$ 20.00
4541981	5/23/00	75.701	55.00	20.00
4541982	5/23/00	75.1910(i)	55.00	20.00
7600311	5/23/00	75.380(d)(2)	55.00	20.00
7600504	5/23/00	77.1103(b)	55.00	20.00
7600505	5/23/00	75.1910(b)	196.00	75.00
Total:			$471.00	$175.00

CENT 2000-428

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7600282	2/07/00	75.370(a)(1)	$3,500.00	$700.00
4541946	5/30/00	77.516	55.00	20.00
4541969	6/01/00	75.1104	55.00	20.00
Total:			$3,610.00	$740.00

CENT 2001-6

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7600313	6/28/00	75.203(e)(2)	$131.00	$ 50.00
7600314	6/28/00	75.203(b)	131.00	50.00
7600315	6/28/00	75.1909(a)(3)(i)	55.00	20.00
4541973	7/06/00	75.202(a)	131.00	50.00
4542031	7/06/00	75.333(h)	55.00	20.00
Total:			$503.00	$190.00

CENT 2001-7

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
4367716	3/28/00	75.220(a)(1)	$ 900.00	$ 180.00
7600487	5/22/00	75.400	1,000.00	200.00
7600489	5/22/00	75.400	1,800.00	360.00
7600492	5/22/00	75.400	1,800.00	360.00
7600493	5/22/00	75.400	1,300.00	260.00
7600501	5/22/00	75.400	1,800.00	360.00
7600503	5/22/00	75.400	1,800.00	360.00
7600510	5/31/00	77.404(a)	800.00	160.00
4542013	6/08/00	75.334(b)(2)	1,500.00	300.00
4541936	7/07/00	50.20(a)	55.00	20.00
Total:			$12,755.00	$2,560.00

CENT 2000-163

CITATION/ ORDER NO.	DATE	30 C.F.R.§	Proposed Penalty	Assessed Penalty
7599015	8/11/99	50.20(a)	$224.00	$ 70.00
4366680	8/17/99	77.1707(b)	224.00	70.00
7599734	10/27/99	77.1701(a)	294.00	82.00
Total:			$742.00	$ 222.00
TOTAL:			**$213,201.00**	**$49,398.00**

ORDER

James V. Smedley **IS ORDERED** to pay a civil penalty of $1,600.00 within 30 days of the date of this proceeding and upon full payment, Docket No. CENT 2000-391 is **DISMISSED**.

Kenneth Clark **IS ORDERED** to pay a civil penalty of $900.00 within 30 days of the date of this proceeding and upon full payment Docket No. CENT 2000-400 is **DISMISSED**.

Tim Ball **IS ORDERED** to pay a civil penalty of $800.00 within 30 days of the date of this proceeding and upon full payment Docket No. CENT 2000-401 is **DISMISSED.**

Finally, GCI **IS ORDERED** to pay a civil penalty of $72,298.00 within 30 days of the date of this proceeding and upon full payment Docket Nos. CENT 1999-178 and CENT 2000-197, etc., are **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified Mail)

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/wd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

December 27, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 99-39-M A. C. No. 30-02851-05504
v.	:	
DOUGLAS R. RUSHFORD TRUCKING, Respondent	:	Seymour Road Pit

DECISION

Appearances: Suzanne Demitrio, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, on behalf of Petitioner;
Thomas M. Murnane, Esq., Stafford, Trombley, Owens & Curtin, PC, Plattsburgh, New York, on behalf of Respondent.

Before: Judge Melick

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the "Act," is before me upon remand by the Commission for reassessment of a civil penalty against Douglas R. Rushford Trucking (Rushford) for its violation of the standard at 30 C.F.R. § 56.14104(b)(2).[1]

Rushford operated the Seymour Road Pit in Clinton County, New York. On August 28, 1998, when Rushford employee Nile Arnold attempted to inflate a tire on a fuel truck, the wheel rim exploded and struck Arnold in the head. At the time, Arnold was not using a stand-off inflation device nor was there such a device available on the mine site. On August 30, 1998, Arnold died as a result of the injuries he sustained. After conducting an investigation, the Department of Labor's Mine Safety and Health Administration (MSHA) charged Rushford with violating 30 C.F.R. § 56.14104(b)(2). That standard requires that stand-off inflation devices be

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[1] The initial decision of the trial judge, 22 FMSHRC 74 (January 2000), will be noted as "*Rushford ALJ-I*," the trial judge's decision following remand, 22 FMSHRC 1127 (September 2000) as "*Rushford ALJ-II*," the first decision by the Commission on review, 22 FMSHRC 598 (May 2000) as "*Rushford Review I*" and the second decision on review, 23 FMSHRC 790 (August 2001) as "*Rushford Review II.*"

used "to prevent injuries from wheel rims during tire inflation." As indicated, the matter has been remanded for reassessment of a civil penalty.

As the Commission has noted, the initial findings of "gross negligence" and "unwarrantable failure" by the trial judge in *Rushford ALJ-I* were not remanded and became the law of the case. In *Rushford Review-I* the matter was remanded for further explanation of the application of the civil penalty criteria and, in particular, the findings of "gross negligence." Cognizant of the law in this regard and of the specific terms and limits of the remand order, a discussion was provided in *Rushford ALJ-II* for the purpose of explaining where the facts of this case fit into the framework of such "gross negligence" findings. "Gross negligence" is not, of course, a monolithic concept but includes many gradations of severity. The discussion provided in *Rushford ALJ-II* was presented to comply with the Commission's remand order and to explain that the "gross negligence" herein was not at the highest end of the "gross negligence" continuum. The findings of "gross negligence" were not, in fact, reduced to "simple negligence" and no order to that effect was issued. Moreover, no modification of the "unwarrantable failure" findings was made and no order to that effect was issued. In addition, the civil penalty on remand was not decreased, but rather was increased from $3,000.00 to $4,000.00. That increased penalty incorporated the findings of "gross negligence."[2]

In considering whether the civil penalty assessed herein is supported by "substantial evidence" reference to the objective formula set forth in the Secretary of Labor's own regulations at 30 C.F.R. Part 100 may provide a useful comparison. While the Commission and its judges are, of course, not bound by those regulations, they nevertheless provide an objective standard for measuring an appropriate civil penalty by assigning numerical weight to the relevant "Section 110(i) " criteria and then by applying a standardized formula.

Reference to this objective standard, rather than to the Secretary's arbitrary, subjective and secretive "special assessment," removes the process from possible taint due to passion, prejudice or other unlawful motivation. In addition, the factual basis for deriving a penalty under the Part 100 formula is transparent and exposed for all to see. The secretive "special assessment" in this case was made without full disclosure of any considered analysis of the statutory penalty criteria. There is no way to know, therefore, whether the penalty proposed by the Secretary herein was based upon improper considerations and/or erroneous assumptions of fact. Indeed, as we now know, the proposed penalty was in fact based upon erroneous assumptions. In addition there is evidence that the Secretary may have also relied upon improper considerations in that she has argued that certain factors outside the scope of the "Section 110(i)" criteria should be considered in assessing a civil penalty herein.

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[2] The use in *Rushford ALJ-II* of the maximum 25 penalty points for negligence (the equivalent of "reckless disregard" under 30 C.F.R. § 100.3(d)), to compute and compare a penalty under the Secretary's Part 100 formula is likewise inconsistent with any reduction of such "gross negligence" findings to "simple negligence." See 22 FMSHRC at p.1132.

It should also be noted that the Secretary's pleading entitled "Narrative for Special Assessment" which purports to provide a "considered analysis," is nothing more than a form letter used in special assessment cases in which bald assertions are anonymously made that:

> MSHA has carefully evaluated the condition cited, the inspector's relevant information and evaluation, and the information obtained from the Report of Investigation. The proposed penalty reflects the results of an objective and fair appraisal of all the facts presented.

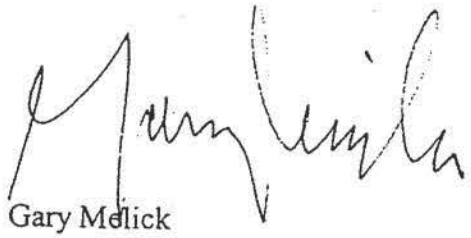
As noted, the Secretary was unable to furnish any information underlying her purported penalty analysis in this case. There is indeed no explanation for the extreme divergence between the Secretary's objective standard civil penalty of $3,234.00 calculated under her Section 100.3 formula and the subjective inadequately substantiated proposal of $25,000.00, in this case. Without an adequate explanation for such a divergence, the credibility of her "special assessment" is indeed further jeopardized by the appearance of arbitrariness and should not properly be considered as a benchmark or guideline for an appropriate *de novo* penalty assessment by the Commission and its judges.

Applying the factual findings in this case, which have now been affirmed by the Commission in *Rushford Review-II*, to the objective formula set forth in 30 C.F.R. § 100.3, would result in a civil penalty of $3,234.00, for the violation herein. Under that formula, Rushford would receive 0 penalty points for its small size, 20 penalty points for its history of violations, 25 penalty points for "gross negligence," 10 penalty points for the fact that the event had "occurred," 10 penalty points for severity in causing the fatality and 1 penalty point for the one person affected by the event. In addition, under 30 C.F.R. § 100.3(f), a 30% reduction would be given for good faith abatement.

Under the circumstances, considering the criteria under Section 110(i) of the Act, and considering that the underlying premise for the remand in *Rushford Review-II* was incorrect, I find that a civil penalty of $4,000.00 is indeed appropriate for the violation at issue herein.

ORDER

Douglas R. Rushford Trucking is hereby directed to pay civil penalties of $4,000.00, for the violation charged herein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 27, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2001-58
Petitioner	:	A.C. No. 46-08476-03513
v.	:	
	:	
C C COAL COMPANY,	:	
Respondent	:	Skitter Creek Mine #1

ORDER DENYING IN PART A MOTION TO COMPEL DISCOVERY AND GRANTING IN PART A MOTION TO COMPEL DISCOVERY

This case is before me on a Petition by the Secretary to assess a Civil Penalty for the alleged violation of mine safety regulations. The parties have filed prehearing summary statements pursuant to my prehearing order and are engaged in discovery in preparation for a hearing now scheduled for January 23, 2002, in Charleston, West Virginia.[1]

On December 11, 2001, the respondent filed a motion to compel discovery, seeking two classes of information; (1) records of the process of calculating the Civil Penalty proposed by the Secretary, and (2) documents obtained in the course of an investigation, including witness statements. On December 19, 2001, the Secretary filed a response to the motion, including copies of the requested investigative documents for my *in camera* inspection. For the reasons given below, I deny the motion with a few exceptions listed..

Method of Assessment

Respondent asserts a need to know the method used by the Secretary in calculating the proposed Civil Penalty in this case. The Secretary responds by invoking the "deliberative process" privilege and contending that Respondent has not shown a compelling need for information on the process to justify overriding the privilege. It is my understanding Respondent has been provided the penalty assessment sheet.

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[1] The timeliness of the Motion to Compel was never seriously in doubt. See, letter of December 26, 2001, from Respondent's Counsel to the Administrative Law Judge.

The motion does not raise legal issues as to the existence and scope of the "deliberative process" privilege. There is no question about the privilege extending to the consultations, oral or written, between government officials leading up to a determination of the amount of a Civil Penalty to assert in a case such as this. Respondent is entitled to know the factual information used by these officials and the criteria which they employed in evaluating the factual information. Respondent is not seeking either the factual information or the criteria. Respondent is seeking to know the significance the officials placed on particular bits of information. This is precisely what is protected by the privilege.

Further, Respondent has not made a compelling showing of need for this privileged information. At the hearing, the way MSHA officials evaluated information in reaching their conclusion as to an appropriate Civil Penalty would not be relevant. The issue at a hearing will be how I evaluate the information presented as it relates to an appropriate Civil Penalty amount.

Investigative Records

The investigative records sought in this case fall into three basic categories; (1) records of interviews with management, (2) records of interviews with miners, and (3) records of conversations with Respondent's attorney. All of these records were created or obtained subsequent to the issuance of a citation by a mine inspector. I find the timing alone qualifies these records under the Work Product privilege; all of them were created or obtained when the probability of litigation was sufficiently great to consider them "in contemplation" of litigation. On the other hand, I find Respondent has shown a sufficient need for the information to overcome this relatively weak privilege. Unless the documents are otherwise privileged, Respondent is entitled to them. The parties appear to agree that the applicable law is well articulated in the decision by Judge Feldman in *Secretary of Labor v. Root Neal & Company,* 21 FMSHRC 835 (July 1999).

The other privilege asserted for these documents is the "informant" privilege. I note initially that this privilege protects only the identity of the informant. It does not protect the information which the informant has provided unless the information is such as to precisely identify the informant. I note also that the privilege extends only to informants who are "miners." I find the privilege does not extend to mine management staff, members of the general public, or to government employees.

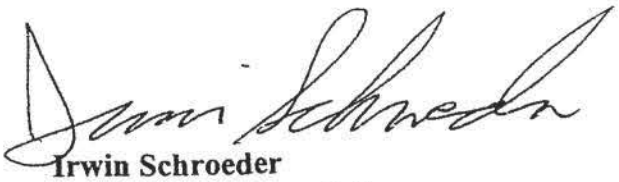
Applying these principles to the documents provided to me *in camera* I conclude the Secretary is obligated to produce all the documents other than the Memoranda to File by Linda Roberts dated January 23 and February 12, 2001.

ORDERED as follows:

1. Secretary will provide to the Respondent all the documents which accompanied the Secretary's December 20, 2001, letter to me except for the Memoranda to File by Linda Roberts

dated January 23 and February 12, 2001.

2. Except for the documents to be produced under paragraph 1, above, the motion to compel discovery is denied.



Irwin Schroeder
Administrative Law Judge
703-756-5232

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