JULY 1995

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 1995

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

Secretary of Labor, MSHA on behalf of James Hyles, et al. v. All American Asphalt, Docket Nos. WEST 93-336-DM, etc. (Judge Cetti, May 24, 1995)

Secretary of Labor, MSHA v. Dewey Hubbard and Robert Hardin, et al., Docket Nos. KENT 94-1194, etc. (Judge Melick, May 23, 1995)

Secretary of Labor, MSHA v. Western Fuels-Utah, Inc., Docket No. WEST 93-298. (Judge Cetti, June 5, 1995)

Secretary of Labor, MSHA v. R B Coal Company, Inc., Docket No. KENT 95-596. (Request for Relief from Final MSHA Order.)

Secretary of Labor, MSHA on behalf of Richard Glover & Leon Kehrer v. Consolidation Coal Company, Docket No. LAKE 95-78-D. (Judge Melick, June 15, 1995)

Secretary of Labor, MSHA v. Topper Coal Company, Inc., Docket No. KENT 94-944-R, etc. (Judge Hodgdon, June 15, 1995)

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

Secretary of Labor, MSHA v. Tanglewood Energy, Inc., et al., Docket Nos. WEVA 93-277, etc. (Numerous unpublished Default Orders)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 13, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 93-277, etc.
	:	Case Nos. 46-06329-03607, etc.
v.	:	
TANGLEWOOD ENERGY, INC., and FERN COVE, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On March 28, 1995, the Commission received from Tanglewood Energy, Inc. and Fern Cove, Inc., a Request for Relief from Final Commission Orders and Late-Filed Petition for Discretionary Review. In the motion, the operators seek to reopen 119 cases, each of which involves either an uncontested civil penalty assessment that had become a final order of the Commission by operation of section 105(a) of the Mine Act, 30 U.S.C. § 815(a), or a default order issued by a Commission administrative law judge that had become final pursuant to section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1). The operators request relief on the basis of "excusable neglect" in accordance with Fed. R. Civ. P. 60(b)(1) ("Rule 60(b)(1)").[1] The operators attached the affidavit of Randy Burke, president of both corporations. Mr. Burke's affidavit addresses the contested cases and his failure to seek counsel during the course of proceedings in these cases.

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[1] Rule 60(b) provides, in part:

> [T]he court may relieve a party . . . from a final judgement, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect; . . . .

Fed. R. Civ. P. 60(b)(1).

On April 20, 1995, the Commission received the Secretary of Labor's opposition to the request. The Secretary argues that the Commission lacks jurisdiction to reopen the orders that have become final by operation of section 105(a) of the Mine Act. S. Opp'n at 4-7. He asserts that, even if the Commission has jurisdiction, it should deny the request because the operators have failed to set forth adequate grounds for relief under Rule 60(b)(1). *Id.* at 7-8. The Secretary submits that the majority of the cases are time-barred under the time limitations set forth in Rule 60(b). *Id.* at 9-10. He also contends that, in any event, the operators did not offer an explanation for their failure to file notices of contest to the proposed penalty assessments and that the explanation for their default is not clear and convincing evidence of excusable neglect. *Id.* at 10-13. The Secretary argues that, in fact, the operators are seeking relief under Rule 60(b)(1) because an action to collect the penalties was filed in the United States District Court for the Northern District of West Virginia on January 10, 1995. *Id.* at 2-3, 14-15.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary's proposed penalty assessment to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to timely provide such notice, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). Here, because the operators failed to contest the proposed assessments in 94 of the subject cases, those assessments became final orders of the Commission.

Between March 28, and August 24, 1994, default orders were entered in the remaining 25 cases due to the operators' failure to file appropriate responsive pleadings to the Secretary's penalty proposals or to the judge's show cause orders. Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Under section 113(d)(1) of the Mine Act, a decision becomes a final decision of the Commission if the Commission does not direct its review within 40 days of its issuance. The Commission did not direct review of the default orders; thus, they became final orders of the Commission between May 7, 1994, and October 3, 1994.

The Secretary, in opposing relief, relies on the language of section 105(a) of the Mine Act, which provides: "If, within 30 days . . . the operator fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty, . . . [it] shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. § 815(a).[2] The Commission has held that, in appropriate circumstances, it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources,*

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[2] That provision is also set forth in Commission Procedural Rule 27. 29 C.F.R. § 2700.27.

Inc., 15 FMSHRC 782, 786-89 (May 1993); *Peabody Coal Co.*, 16 FMSHRC 2030, 2031 (October 1994); *Pit*, 16 FMSHRC 2033, 2034 (October 1994); *Lakeview Rock Products, Inc.*, 16 FMSHRC 2388, 2389 (December 1994). We reject the Secretary's argument that the Commission lacks such jurisdiction.

Relief from a final Commission order is available to a party under Rule 60(b)(1) in circumstances including mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). A motion requesting relief based on such allegations must be made "within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320. (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 619 n.1 (April 1990). Rule 60(b) is "the mechanism by which courts temper the finality of judgments with the necessity to distribute justice" and "is a tool which trial courts are to use sparingly. . . ." *Randall*, 820 F.2d at 1322; *Pit*, 16 FMSHRC at 2034.

The operators offer no explanation, either in the motion or in their president's affidavit, attached thereto, for their failure to contest the proposed assessments. Thus, they have failed to set forth grounds establishing that Rule 60(b)(1) relief is appropriate for the uncontested assessments that became final by operation of section 105(a) of the Mine Act. Their request for relief as to these final orders is denied.

As to the 25 default orders issued by the administrative law judge, the operators argue that they failed to file appropriate pleadings due to an "inadequate understanding of the legal process involved and the fraudulent procedure for contesting citations and penalties." Mot. at 4-5. Their lack of understanding of the legal process does not provide sufficient grounds to justify relief under Rule 60(b)(1) and they offer no explanation of their statement concerning "fraudulent" contest procedures. Accordingly, their request for relief as to the default orders is also denied.

For the foregoing reasons, the operators' motion is denied.[3]

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

[3] Chairman Jordan and Commissioner Marks also find the operators' motion untimely. It was received by the Commission on March 28, 1995, approximately 5 to 10 months after the judges' default orders had become final, and only after the United States Attorney's Office had already filed actions to collect penalties proposed in the final orders. They conclude that the operators have failed to file their motion within a reasonable time. *See Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142, 1143 (August 1986).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 95-596
	:	A.C. No. 15-17077-03543
v.	:	
RB COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On June 21, 1995, the Commission received from RB Coal Company, Inc. ("RB") a request seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

RB states that it did not mail a "Green Card" request for a hearing until "day 45" because the card had been misplaced among its papers on penalty assessments that it intended to pay. RB states that it is proceeding pro se and has recently implemented procedures for contesting penalties.

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May

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

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

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 21, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 92-334-M
FORT SCOTT FERTILIZER-CULLOR, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 93-117-M
JAMES CULLOR, employed by FORT SCOTT FERTILIZER-CULLOR, INC.	:	

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

DECISION

BY THE COMMISSION:

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involve a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Fort Scott Fertilizer-Cullor, Inc. ("Fort Scott"), alleging violations of 30 C.F.R. § 56.14101.[1]

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[1] Section 56.14101 provides, in part:

> (a) *Minimum requirements.* (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. . . .

The Secretary of Labor filed petitions for civil penalties against Fort Scott and also against its agent, James Cullor, pursuant to section 110(c) of the Mine Act, for knowingly authorizing, ordering, or carrying out the violations.[2] Administrative Law Judge Jerold Feldman vacated the citation and order on the basis that the violative conditions were the result of employee misconduct and dismissed the penalty proceedings against Fort Scott and Cullor. 15 FMSHRC 2354 (November 1993) (ALJ).

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's recognition of employee misconduct as a defense to Mine Act violations and his reliance on certain factors in determining that misconduct had occurred. The Secretary also challenged the judge's finding that the violative conditions were the result of tampering, on the grounds that it is not supported by substantial evidence. For the reasons that follow, we reverse the judge's dismissal of the citation and order, which was based on his determination that employee misconduct is a defense to liability. We also vacate his determination that misconduct occurred and remand for further proceedings.

> (b) *Testing.* (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair; . . .

[2] Section 110(c) provides:

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

30 U.S.C. § 820(c).

I.

Procedural and Factual Background

On May 22, 1992, two truck drivers at Fort Scott's limestone quarry in El Dorado, Missouri, telephoned the MSHA District Office and, asserting that the brakes on a 30-ton haulage truck (the "big Euclid") and a 15-ton haulage truck (the "small Euclid") were defective, requested an inspection. 15 FMSHRC at 2358; Tr. 96, 165. On May 27, they informed James Cullor, a supervisor, that the brakes on their trucks were inoperable. 15 FMSHRC at 2358. He instructed them to park the trucks, which were then in use, so that they could be checked. *Id.* at 2358-59. MSHA Inspector Michael Marler arrived shortly thereafter. *Id.* at 2359.

The brakes were tested and found to be defective. 15 FMSHRC at 2359. Inspector Marler issued a citation for the big Euclid, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and a section 104(d)(1) withdrawal order for the small Euclid, alleging violations of section 56.14101. The inspector designated the alleged violations as significant and substantial ("S&S") and the result of Fort Scott's unwarrantable failure to comply with the cited standard. After repairs were made to the trucks, the withdrawal order and citation were terminated on June 10 and July 9, 1992, respectively. Subsequently, the Secretary filed a civil penalty petition against Cullor, charging him with knowingly authorizing, ordering, or carrying out the violations.[3]

Following an evidentiary hearing in the civil penalty proceedings, during which the operator stipulated to the fact that the brakes on both trucks were defective, the judge found, in essence, that the drivers were disgruntled employees who had caused the violative conditions by tampering with the slack adjusters on the trucks' brakes. 15 FMSHRC at 2355-58, 2360-62. The judge concluded that deliberate employee misconduct is a defense to liability under the Mine Act and, on that basis, dismissed the penalty proceedings against both Fort Scott and Cullor. *Id.* at 2362-63.

[3] In June 1992, the two miners were terminated by Fort Scott. 15 FMSHRC at 2355. Failure to wear steel-toed boots was given as the reason. *Id.* Both filed discrimination complaints with MSHA against Fort Scott pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). *Id.* MSHA subsequently determined that Fort Scott had not discriminated against the complainants in violation of the Act. *Id.*

II.

Disposition

A. Employee Misconduct

1. As a defense to violations

On review, the Secretary contends that the judge erred in creating an exception to the liability scheme of the Mine Act, under which liability for violations is established without regard to fault. S. Br. at 8-14. The Secretary argues that deliberate employee misconduct is not a defense to a violation of the Act or its standards. *Id.* at 12-13. The Secretary states that an operator's lack of fault is to be considered only in assessing a civil penalty. *Id.* at 10-11. Fort Scott responds that employees should not be allowed to create Mine Act violations to retaliate against management in labor disputes. F. S. Letter at 2.

It is well established that operators are liable without regard to fault for violations of the Mine Act. *E.g.*, *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The Commission and the courts have also consistently held that a miner's misconduct in causing a violation is not a defense to liability. For example, in *Allied Products*, the court held that the operator is liable for violations even where "significant employee misconduct" caused the violations. 666 F.2d at 893-94. The court concluded: "If the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation . . . ; the operator is liable." *Id.* at 894. Similarly, in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351 (September 1991), the Commission observed that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." *See also Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754, 757-58 (May 1992).

Accordingly, we conclude that the judge erred in treating employee misconduct as a defense to liability under the Mine Act and we reverse his finding to that effect. Based on the operator's stipulation that the brakes were defective, we conclude that the judge also erred in vacating the citation and order.

2. Effect on other matters

Although employee misconduct is not a defense to liability for a violation, it is relevant in determining other issues, i.e., the operator's negligence for penalty purposes, unwarrantable

misconduct occurred.[5]

b. Secretary's determination regarding discrimination

The judge found that the Secretary's decision not to prosecute the miners' subsequent discrimination complaints supported a conclusion that the complaints about the brakes were not legitimate. 15 FMSHRC at 2361-62 & n.4. The Secretary argues that, because his determination of no discrimination cannot support a negative inference in a section 105(c)(3) discrimination case, neither can it support a negative inference in a civil penalty case involving a different incident and issue. S. Br. at 16-17.

We agree. The Secretary's administrative determination of no discrimination in an unrelated subsequent incident does not justify the inference that the brake complaints were not legitimate. Congress designed section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3), as an "independent avenue of adjudication" of section 105(c) claims. *Roland v. Secretary of Labor*, 7 FMSHRC 630, 635-36 (May 1985). The Commission may find discrimination where the Secretary has not. *See, e.g.*, *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 974 (June 1993); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 608-09 (April 1993). The Secretary's determination not to prosecute the discrimination cases is not probative of whether Fort Scott discriminated against the miners or of whether the miners engaged in previous misconduct. We therefore conclude that the judge erred in relying on the Secretary's decision not to prosecute the discrimination complaints.

c. Secretary's refusal to produce files

At the hearing, the judge ordered the Secretary to produce MSHA's investigatory report in the discrimination cases. 15 FMSHRC at 2361. Based on the Secretary's refusal to produce the report, the judge inferred that this material would have been adverse to the Secretary's case in the present matter. *Id.* at 2361-62 & n.5.

MSHA's refusal to produce the investigatory report in the discrimination cases, like its decision not to prosecute those cases, is not probative of whether employee misconduct occurred. Moreover, the Commission has generally recognized that the Secretary's investigative files are protected by a qualified official information privilege. *Secretary of Labor on behalf of Gregory*

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[5] The Commissioners agree in result that the judge erred. Chairman Jordan and Commissioner Marks agree with the Secretary that reliance on an employee's exercise of his Mine Act rights as an indication of employee misconduct would undermine the rights and protections accorded in the Mine Act. *See* S. Br. at 19. They believe such reliance could exert a chilling effect on the exercise of miners' rights under section 103(g)(1). Commissioners Doyle and Holen are of the opinion that the complaint to MSHA has no probative value as to whether the miners engaged in misconduct.

failure,[4] and liability under section 110(c) of the Mine Act. The operator's fault or lack thereof is also a factor to be considered in assessing a civil penalty. *Asarco, Inc.*, 8 FMSHRC at 1636. The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Rather, the operator's supervision, training, and disciplining of those miners is relevant. *Id.*; *Western Fuels-Utah, Inc.*, 10 FMSHRC at 261. In determining unwarrantable failure, the Commission has found that, where a miner was acting as the employer's agent at the time, intentional misconduct is imputable to the operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-98 (February 1991). In *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226 (June 1994), the Commission found no section 110(c) liability on the part of a supervisor where the violation arose from a rank-and-file employee's failure to follow instructions. *Id.* at 1233-34.

3. Impermissible considerations

To support his conclusion that the miners tampered with the brakes, the judge relied, in part, on their complaint to MSHA regarding the brakes, the Secretary's failure to prosecute their discrimination complaints, and the Secretary's refusal to produce the investigatory report on those complaints. 15 FMSHRC at 2361-62. For the following reasons, we conclude that the judge erred in considering these matters, and we therefore vacate and remand for further analysis his determination of employee tampering.

a. Miners' report to MSHA

The Mine Act, in section 103(g)(1), expressly confers on miners and their representatives the right to notify the Secretary of violations and imminent dangers. 30 U.S.C. § 813(g)(1). Upon receiving such notification, the Secretary is required to conduct "an immediate inspection." *Id.* Section 105(c) protects miners from discrimination arising from exercise of that right. 30 U.S.C. § 815(c).

In support of his finding, the judge stated that the miners were "anticipating Marler's inspection." 15 FMSHRC at 2361. The record reflects only that the miners contacted MSHA and were aware that an inspection would result, not that they knew when the inspector would arrive. Consequently, this factor affords no support for the judge's finding. We conclude that the judge erred in considering the miners' complaint to MSHA in determining whether employee

[4] Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Id.* at 2002-04 & n.5; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

v. Thunder Basin Coal Co., 15 FMSHRC 2228, 2237-38 (November 1993). *See also In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1007-09 (June 1992). Accordingly, we conclude that the judge's negative inference based on the Secretary's failure to produce the investigation files was error.[6]

B. Remand

The question of violation need not be reexamined. On remand, the judge shall address the issues of whether the violations were S&S and caused by the operator's unwarrantable failure. In his decision, the judge stated: "The respondents have stipulated . . . to the fact that there was a reasonable likelihood that the hazards contributed to by these conditions *could* result in injuries of a reasonably serious nature." 15 FMSHRC at 2355 (emphasis added). The third prong of the test for S&S is whether there exists a reasonable likelihood that the hazard contributed to *will* (not *could*) result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984).

Concerning the issue of tampering, we note that the judge did not address evidence referenced by the Secretary on review, S. Br. 27-28, that the miners had made previous complaints about brake problems and that their complaints had been ignored; the judge shall evaluate this evidence on remand. The judge shall also assess appropriate penalties against Fort Scott based on the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). Finally, he shall enter findings and conclusions regarding Cullor's liability, if any, under section 110(c) of the Act.

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[6] We do not reach the Secretary's argument that substantial evidence does not support the judge's determination of employee misconduct. S. Br. 20-29.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision that deliberate employee misconduct is a defense to operator liability for Mine Act violations. We also vacate his finding that such misconduct occurred and remand for an analysis of that issue, consistent with this opinion, insofar as it is relevant to determination of the remaining issues.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 5 1995

SAM COLLETTE, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 95-37-DM
	:	WE MD 94-11
BOART LONGYEAR COMPANY, Respondent	:	Lone Tree Mine

DECISION

Appearances: Sam Collette, Hominy, Oklahoma, pro se; Matthew McNulty, Esq., VanCott, Bagley, Cornwall and McCarthy, Salt Lake City, Utah for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Sam Collette pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act" alleging violations by the Boart Longyear Company (Longyear) of Section 105(c)(1) of the Act.[1] In his unedited complaint of discrimination Mr. Collette states as follows:

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[1] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complainant notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine iof an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

"I have worked for Longyear since 2-27-89, on 12-10-92 I injured back trying to move rig with a piece of timber and a water truck. I had [illegible] on my chest and around my heart and low back pain; I spent one night in hospital. I seen Dr. P. Herz, I went threw physical therapy until 1-16-93; I wanted to back to work. I talked Dr. into giving my a 50 lb limited, went to work driving water truck rom 1-19-93 to 2-24-93. The lower back pain encrease il. I went back to Dr. Herz. I continue physical therapy it made me worse. Dr. Herz take me off therpy and had a MRI scan of the lumbar spine showed generative disease L4-5 & L5-S1. Right posterolateral herniation at L4-5. Lumbar epidural steroids were administered but these did not help. SIIS had me see Dr. Ready July, 1993. He seen me for 15 min. He said I could return to work at light duty. SIIS sent me to C.E. Quazaleri, M.D. A repeat MRI scan showed a small right [illegible] at L3-4 with associated marginal osteophyte formation plus small right central disc protrusion. There was right [illegible] disc protrusion at L4-5.

On 2-22-94 Longyear offered a job driving a worker truck, based on Dr. Ready release light duty 39 lb. driving water truck on trial basis. I refused the job because I felt like it would in danger my health. The juring, getting up and down out of truck. I tried this job and the pain was to much. In drilling there is a lot of off the road driving. Longyear said I volanary quit, by refusing a job. My doctor Dr. Herz & Dr. Quaglier said driving a truck is not good for me. I tried this job on 1-19-93 to 2-2-93 the pain got were if like I need pain pill to continue driving. I am in more pain now, then before. I don't take pain pill except as a last resort. When Longyear learn of reason for refusing job, they said they bought two new truck with air ride, seats which was not meanson at the time of job offer. But in my opinion it still not suitable because of the off road driving & set up and down out of truck with a back disorder. Longyear has stop all medical rehabilitation, & "SIIS" comp. checks. Longyear said I didn't try to work because I didn't get a hold of them about job offer. I received job offer threw SIIS, they said to get hold of there office not Longyear. I contact OSHA in Oklahoma City around 3-4-94, they revered my to DELISH of NV. I filled out a discrimination report with them. I asked if I need to threw your offices, Calvin Murry said he didn't think so. After 55 days I called them and they said had to go threw MSAHA your office. The only release I have is Dr. Ready, I have tried to get job & can't. Contacted OK employment office on 3-6-94. They said with that release for work they couldn't help me. I have also contact OLD Employers, with no help. My OSHA rights are reieved. I was up for rehabilitation "consided quit 3-2-94" ".

In his complaint before this Commission Mr. Collette added that: "I am requesting a lagetemate [sic] job orfer [sic], a job that won't endanger my health, back pay, proper medical treatment and retrained . . . P.S. Is driving a water truck safe for me?" In his post hearing "final argument" Collette summarizes his complaint as follows:

> Boart Longyear Company discriminated against Sam Collette in failing to offer a true "light-duty" job that Sam Collette was capable of performing because he had reported an alleged danger to Board Longyear Company, i.e. the potential danger to health and safety presented by his back problem and associated pain. Further Boart Longyear Company failed to address the health and safety concerns of Sam Collette after Sam Collette's refusal to perform work that he reasonably believed was not within his functionable [sic] capacities and would therefore endanger his health and safety.

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub. nom. *Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by any protected activity.

If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc. Coal Corp. v. FMSHRC,* 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Dir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB Transportation Management Corp.*,462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

For a work refusal to come within the protection of the Act, the miner must have a good faith, reasonable belief that the work in question is hazardous. See generally, *Robinette*, 3 FMSHRC at 807-12. In determining whether the miner's belief in a hazard is reasonable, the judge must look to the miner's account

of the conditions precipitating the work refusal and also to the operator's response. An operator has an obligation to address the danger perceived by the miner. Secretary on behalf of *Pratt v. River Hurricane Coal Company, Inc.*, 5 FMSHRC 1529, 1534 (September 1983); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brook v. Metric Constructors, Inc.* 766 F.2d 469 (11th Cir. 1985). As stated in *Gilbert v. FMSHRC,* 866 F.2d 1433 (D.C. Cir. 1989), once it is determined that a miner has expressed a good faith reasonable concern, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern in a way that his fears reasonably should have been quelled. In other words, did management explain to the miner that the problems of concern had been corrected? 866 F.2d at 1441. See also *Secretary on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997-99 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), aff'd 866 F.2d 431 (6th Cir. 1989) (table).

Within this framework of law it is clear that Mr. Collette cannot prevail under either of his theories of discrimination. Under his first theory he claims that Longyear failed to offer him a true "light duty" job on February 28, 1994, in retaliation for his complaint on February 25, 1993, to Tom Joiner, Longyear's Manager of Safety, that his work driving a water truck caused him constant pain in his back. Even assuming, arguendo, that his complaint about back pain while driving a water truck constituted a protected safety complaint and even assuming that Longyear's job offer, through the Nevada State Industrial Insurance System (SIIS) on February 28, 1994, was motivated at least in part by this activity I find that Longyear has nevertheless affirmatively proven that it had no other light duty jobs at the mine which Collette could have performed within his limited physical capacities and for which he was qualified. The credible evidence shows that the only other light duty jobs then existent were that of secretary and zone manager -- positions for which Collette was not qualified. Moreover, these positions were then filled. Collette's termination for his failure to accept Longyear's job offer was therefore in any event not in violation of the Act.[2]

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[2] It is noted that Mr. Collette disagrees with the findings of the Nevada State Industrial Insurance System determination that he was not sufficiently disabled to qualify for workers' compensation. He appears to agree with the determination of the Social Security Administration that he was apparently disabled with respect to his former work activity as a water truck driver.

Collette also appears to suggest that Longyear's filing with the Nevada SIIS of an incorrect job description for the position of water truck driver was also a retaliatory response to his health and safety complaint. It was acknowledged by Longyear at hearing that the report, indeed, erroneously indicated that only four to five pounds of pressure was required to depress the water truck clutch pedal whereas it actually required 50-74 pounds of pressure. This erroneous information could very well have misled examining physicians into concluding that Collette had the residual capacities to perform the job offered by Longyear and therefore could have resulted in the erroneous denial to him of worker's compensation. However, Collette has failed to show that this error was in retaliation for his claimed protected activity. The credible evidence suggests the error was inadvertent and while it may very well have been a material fact to the determination by the Nevada SIIS in denying worker's compensation benefits, that issue is not before me in this proceeding.[3]

I further find that the Complainant cannot prevail under his second theory of discrimination, i.e. that he suffered discrimination because he refused to perform the work as a water truck driver under the reasonable belief that, because of his back pain and injury, such work was not within his functional capacities and would therefore endanger his health and safety. It appears that Collette rejected the Longyear job offer made through Cheryl Price, a representative of the Nevada SIIS, around February 28, 1994 (Tr. 184). However, because of Collette's physical inability to perform any work for which he was then qualified at the subject mine I do not find that his resulting termination was in retaliation for his refusal to accept the job of water truck driver. It was a natural consequence dictated by Collette's election and his own physical condition and job skills.

There is a legitimate question, moreover, whether such idiosyncratic problems as Collette's back injury, over which the mine operator has no control, were intended by Congress, in any event, to support a miner's right under the Act to refuse work. See *Price v. Monterey Coal Co.*, 12 FMSHRC 1505 (August 1990) (Commissioner Doyle,concurring) The genesis for the recognition of certain work refusals as protected activity is the Senate Report on the 1977 Act, which endorsed a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 81, 95th Cong., 1st Sess 35 (1977). In order to be protected, work refusals must be based upon the

---

[3] At hearing the parties were advised to bring this error to the attention of the Nevada State Industrial Insurance System for appropriate corrective action by that agency. It appears that Longyear has, in fact, now notified that agency of the error.

miner's's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC 812; *Gilbert v. FMSHRC*, 866 F.2d 1933 at 1439 (D.C. Cir. 1989).

The case at bar would also be illustrative of what the Commission in the *Price* decision was describing as beyond the Congressional intent in endorsing a limited right to refuse "to work in conditions which are believed to be unsafe or unhealthful". By that very language it is clear that the intent was to protect against "conditions" inherent in the work process and not to provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries would find working most jobs in the mining industry impossible. While it is truly unfortunate that persons such as Mr. Collette may not, because of such injuries, be able to perform work in the industry it is not the purpose of the Act to remedy such problems. To hold a mine operator responsible under such circumstances would effectively make him a guarantor of compensation. It is clearly not the purpose of the Act, but rather worker's compensation, social security disability and other similar laws to provide loss of income protection under these circumstances.

ORDER

Discrimination Proceedings Docket No. WEST 95-37-DM are hereby dismissed.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Mr. Sam Collette, 121 South Haines, Hominy, OK 74035

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 12 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-74
Petitioner	:	A.C. No. 11-00877-04033
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., and Ruben Chapa, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll Corp., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Fauver

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

The case involves three § 104(d)(2) orders, each alleging a violation of 30 C.F.R. § 75.400. A settlement of Order No. 4054145 was approved at the hearing. The proceeding as to Order No. 4054043 was stayed pending a decision as to Order No. 4054148, which went to hearing.

Respondent acknowledges the violation alleged in Order No. 4054148, but contests the inspector's findings that the violation was "significant and substantial" and was due to an "unwarrantable" failure to comply within the meaning of § 104(d) of the Act. Respondent seeks to have those findings deleted from the order and to have the proposed civil penalty reduced accordingly.

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

FINDINGS OF FACT

1. Respondent owns and operates the Wabash Mine, which produces coal for sale or use in or substantially affecting interstate commerce.

2. Respondent is a large coal operator, producing about 39 million tons of bituminous coal a year. The Wabash Mine produces about 1.8 million tons annually.

3. On September 1, 1993, MSHA Mine Inspector Steve Miller issued Order No. 4054148 at the Wabash Mine, alleging the following conditions:

> Accumulations of dry loose coal and coal float dust were allowed to accumulate at the junction of the Main South No. 1 head roller and the Mother belt. Accumulations were packed solid under the Mother belt in this area. The accumulations measured approximately 3 feet (east side Main South No. 1) to 6 inches in depth, 4 feet to 8 feet in width, and 85 feet in length along Main South No. 1 and 200 feet in length along the Mother belt. The bottom of the Mother belt was observed running on packed dry coal, and in loose dry coal for a distance of approximately 15 feet.

4. The evidence sustains the inspector's findings as to the above conditions. The inspector observed the conditions and made reasonable measurements and estimates of the accumulations.

5. The accumulations of loose coal and float coal dust had accumulated over a period of several days. They were wet in places, mainly beneath the surface layers. The layers that came into contact with or were closest to the conveyor belts were generally dry.

6. There were ignition sources in the areas of the accumulations. For about 15 feet, one of the accumulations was in contact with a running conveyor belt and the friction of the belt running against the combustible materials was reasonably likely to result in a mine fire.

7. The Wabash Mine is a large mine, with about 26 miles of conveyor belts. The mine has two portals, a North and South portal. The area at issue was the intersection of the Main South No. 1 Belt and the Mother Belt.

DISCUSSION WITH FURTHER FINDINGS

The inspector cited a violation of 30 C.F.R. § 75.400, which is a reprint of a statutory safety standard. The standard provides:

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

Respondent acknowledges a violation of § 75.400 but contests the inspector's findings that it was "significant and substantial" and "unwarrantable."

Significant and Substantial Violation

The inspector found that the violation was "significant and substantial" under § 104(d)(1) of the Act, which provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the

area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations" without abatement of the violation (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)), based on the particular facts surrounding the violation (Texasgulf, Inc., 10 FMSHRC 498, (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, (1987)). In Mathies the Commission further stated:

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

The Commission's definition does not state whether the likelihood of injury or illness must be "more probable than not" to establish a significant and substantial violation. For a better understanding of the Commission's test, I believe this issue should be resolved.

As I interpret the Commission's decisions, the third Mathies element -- "a reasonable likelihood that the hazard contributed to will result in an injury or illness" -- does not mean "more probable that not."

I begin by noting the Commission's discussion of a "significant and substantial" violation as falling "between two extremes" (in National Gypsum):

> Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation

need not be so grave as to constitute an imminent danger. (An "imminent danger" is a condition "which could reasonably be expected to cause death or serious physical harm" before the condition can be abated. Section 3(j).) At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes -- mere existence of a violation, and existence of an imminent danger . . . . [3 FMSHRC at 828.]

The legislative history of the Act makes clear that an "imminent danger" is not to be defined in terms of "a percentage of probability":

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. * * * [1]

It follows that a significant and substantial violation, which by statute is less than an imminent danger,[2] is determined in terms of "the potential of the risk" of injury or illness, not a "percentage of probability." Tests such as "more probable than not" or some other percentage of probability are inconsistent with § 104(d) and the Act's legislative history.

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[1] S. Rep. No. 95-181, 95th Cong. 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

[2] Section 104(d) excludes imminent dangers from its definition of a significant and substantial violation.

This interpretation is also indicated by Commission decisions affirming a significant and substantial violation where the facts do not show injury or illness was "more probable than not." For example, in U.S. Steel Mining co., 7 FMSHRC 327 (1985), the issue was whether the failure to install a bushing for a cable entering a water pump was a significant and substantial violation. The judge found that the pump vibrated, that vibrations could eventually cause a worn spot in the insulation, and that if the circuit protection systems also failed, a worn spot in the cable could energize the pump frame and cause an electrical shock. The judge found that injury was "reasonably likely" to occur. 5 FMSHRC 1788 (1983). In affirming, the Commission stated, inter alia:

> On review, U.S. Steel argues that the facts indicated that the occurrence of the events necessary to create the hazard, the cutting of the wires' insulation and failure of the electrical safety systems, are too remote and speculative for the hazard to be reasonably likely to happen and, consequently, that the judge erred in concluding that the violation was significant and substantial.
> * * *
>
> * * * The fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in the feared accident. As we have concluded previously, a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. U.S. Steel Mining Co., 5 FMSHRC 1673, 1574 (July 1984). The administrative law judge correctly considered such continued normal mining operations. He noted that the pump vibrated when in operation and that the vibration could cause a cut in the power wires' insulation in the absence of a protective bushing. In view of the fact that the vibration was constant and in view of the testimony of the inspector that the insulation of the power wires could be cut and that the cut could result in the pump becoming the ground, we agree that in the context of normal mining operations, an electrical accident was reasonably likely to occur.

In the above decision, the finding that injury was "reasonably likely" was based upon a reasonable potential for injury, not a finding that it was more probable than not that injury would result. Indeed, based upon the facts found by the

trial judge, one could not find that it was "more probable than not" that the circuit protection systems would also fail in the event a bare spot developed in the cable.

Applying the Mathies test to this case, I find that the evidence amply supports the inspector's finding that the violation was "reasonably likely" to result in serious injury. In the event of fire, the accumulations presented a high risk of propagating a fire and causing serious injuries by burns or smoke inhalation. The accumulations not only provided a large amount of fuel to propagate a mine fire, but they were in contact with a running conveyor belt. The friction of the belt running in loose coal and coal dust could start a fire.

To hold that the extensive accumulations of loose coal and float coal dust in this case were not a significant and substantial violation would run counter to a fundamental purpose of the statute. The primary concern in passing the Mine Act was to prevent mine fires and explosions. The Congressional standard that is reprinted as § 75.400 is central to that purpose (Black Diamond Coal Company, 7 FMSHRC 1117 (1985); and see: Buck Creek Coal, Inc., v. FMSHRC, 52 F. 3d 133 (7th Cir. 1995)) and is "directed at preventing accumulations in the first place, not at cleaning up the materials within a reasonable period of time after they have accumulated." Old Ben Coal Company, 1 FMSHRC 1954 (1979).

In Black Diamond Coal Mining Company, supra, the Commission discussed the clear Congressional intent to eliminate fuel sources of explosions and fires in active workings of underground coal mines:

> * * * We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated "(i)t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be

> the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Respondent's contention that wet accumulations of loose coal and coal dust should not be considered a fire hazard lacks merit. As I found in Green River Coal Co., Inc., 13 FMSHRC 1247, 1254-53 (1991):

> Loose coal is not "mud" and can propagate a mine fire. Once a fire spreads, the heat can rapidly dry loose coal or coal dust and further propagate a fire. A mine fire is one of the principal dangers in underground coal mining. Permitting substantial accumulations of fuel for a fire underground is a "significant and substantial" violation.

Respondent's contention that its fire-detection and fire-fighting systems render the violation non-significant and substantial also lacks merit. The "likelihood of a fire has no bearing on the separate question of whether such a fire would be likely to result in injury." Buck Creek Coal, supra. As the Seventh Circuit stated further:

> The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires.

Also, in assessing the gravity of a safety violation it is not reasonable to presume that all other safety standards will be complied with in the event of an emergency. Moreover, the friction points between the moving belt and the accumulations support the inspector's finding that a fire was reasonably likely.

The Commission has also held that "the inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented." Cement National Gypsum Company, 3 FMSHRC at 825-826. In Mathies, the Commission concluded that the judge gave appropriate weight to the inspector's judgment and concluded that the inspector's testimony was "reasonable, logical, and credible" based upon his first-hand observations. I find that Inspector

Miller credibly testified regarding the accumulations of combustible materials and the bases of his finding that the violation was significant and substantial.

Unwarrantable Violation

The Commission has held that an "unwarrantable" violation within the meaning of § 104(d) means "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2001 (1987). This may be shown by evidence that "a violative condition or practice was not corrected prior to issuance of a citation or order because of 'indifference, willful intent or serious lack of reasonable care.'" Id. at 2003.

Respondent has a poor history of compliance with § 75.400. In a short period of one year and two months before the instant violation, Respondent was issued 63 citations and orders for accumulations in violation of § 75.400, three of which were on the same belt at issue. In numerous contacts with MSHA inspectors, Respondent had been cited for § 75.400 violations and notified of the dangers presented by its recurring accumulations of combustible materials.

Despite this knowledge, Respondent allowed the accumulations at issue to develop over several days. The combustible materials were extensive and put Respondent on notice that prompt action was necessary to clean up the area. Due to the massive size of the accumulations, after the inspection it took 16 miners 4½ hours to remove the accumulations to abate the violation, working while the belt was stopped. Before the inspection, Respondent kept the belt running and assigned only one miner to clean up the accumulations. Respondent's conduct in allowing the accumulations to develop and assigning only one miner to attempt to clean up tons of loose coal and float coal dust was "aggravated conduct constituting more than ordinary negligence." Its plainly inadequate effort to clean up the extensive accumulations is consistent with the testimony of Cecile Scott and Leonard Gallagher that there was no regular maintenance on the belts and Scott's testimony that it was more common to clear combustible material so that the belt would not be running in loose coal, rather than cleaning up the accumulations.

Respondent has made some important improvements since Inspector Miller's order on September 1, 1993. However, the post-inspection changes do not alter the reasonable grounds for

the inspector's findings that the extensive accumulations on September 1 were "significant and substantial" and due to an "unwarrantable" failure to comply with the safety standard.

Civil Penalty

Section 110(i) of the Act provides six criteria for assessing a civil penalty: history of violations, size of the mining business, effect of penalty on the operator's ability to remain in business, negligence, gravity, and abatement efforts after notice of the violation.

Respondent is a large operator. The proposed penalty will not affect its ability to continue in business. The gravity of the violation was high -- a "significant and substantial" violation. Negligence was high -- an "unwarrantable" violation. After notice of the violation, Respondent made a good faith effort to abate the violation. Respondent has a poor history of compliance with § 75.400.

Considering all of the criteria in § 110(i), I find that a civil penalty of $9,600 is appropriate for the violation cited in Order No. 4054148.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated 30 C.F.R. § 75.400 as alleged in Order No. 4054148.

ORDER

1. The proposed settlement of Order No. 4054145 is APPROVED. Respondent shall pay the approved civil penalty of $8,000 for the violation in that order within 30 days from the date of this Decision.

2. Order No. 4054148 is AFFIRMED.

3. Respondent shall pay a civil penalty of $9,600 for the violation in Order No. 4054148 within 30 days from the date of this Decision.

4. The STAY in Order No. 4054043 is LIFTED. The parties shall have 15 days from the date of this Decision to file their joint or separate proposed findings, conclusions and civil penalty as to Order No. 4054043.

5. This Decision constitutes the judge's final disposition of all issues as to Order No. 4054148 and therefore constitutes a final decision for purposes of any petition to review the Decision as to that order. However, the case remains open before the judge as to Order No. 4054043 until a final decision is entered as to that order.

William Fauver
Administrative Law Judge

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JUL 17 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-73-D
on behalf of	:	MSHA Case No. PITT CD 94-04
RANDY CUNNINGHAM,	:	
Complainant	:	Dilworth Mine
v.	:	Mine I.D. No. 36-04281
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Amchan

This case is before me pursuant to a discrimination complaint filed pursuant to section 105(c) of the Act. The Secretary has filed a motion to withdraw the discrimination complaint and to dismiss the proposed civil penalty. I have construed this motion as one requesting approval of a settlement agreement. The motion is granted.

Mr. Cunningham filed a complaint with MSHA alleging that he was not paid for an hour during which he served as a walkaround representative during an MSHA inspection. Respondent has agreed to pay him for this hour and the Secretary has agreed to withdraw its proposed civil penalty.

I conclude this agreement is consistent with the Act. I therefore grant the Secretary's motion and dismiss this case.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Pamela W. McKee, Esq., Office of the Solicitor,
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3535 Market Street, Philadelphia, PA 19104

Elizabeth Chamberlin, Esq., Consolidation Coal Company,
1800 Washington Road, Pittsburgh, PA 15241

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 17 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 95-80
	:	A.C. No. 36-05466-04033
v.	:	
	:	Mine: Emerald No. 1
CYPRUS EMERALD RESOURCES CORP., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; R. Henry Moore, Esq., Buchanan, Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Amchan

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Upon commencement of the hearing on May 31, 1995, the parties advised me that they had achieved a settlement of the entire case. The terms of the settlement are as follows:

Order No. 3668845: The penalty is reduced from $1,000 to $600.

Order No. 3668699: The penalty is reduced from $5,500 to $4,000.

Order No. 3672349: This order is modified to a section 104(a) citation. The unwarrantable failure allegation is deleted and the penalty is reduced from $5,000 to $2,000.

Order No. 3672354: This order is modified to a section 104(a) citation. The unwarrantable failure allegation is deleted and the penalty is reduced from $4,200 to $3,000.

Order No. 3672355: This order is modified to a section 104(a) citation. The unwarrantable failure allegation is deleted and the penalty is reduced from $9,500 to $6,000.

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is **GRANTED** and Respondent shall pay the approved penalties within 30 days of this decision. Upon such payment this case is **DISMISSED**.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

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\lh

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JUL 17 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-482-M
Petitioner	:	A.C. No. 45-03284-05501
v.	:	
	:	Docket No. WEST 93-649-M
COWLITZ VALLEY SAND & GRAVEL,	:	A.C. No. 45-03284-05502
Respondent	:	
	:	Docket No. WEST 94-78-M
	:	A.C. No. 45-03284-05503
	:	
	:	Docket No. WEST 94-237-M
	:	A.C. No. 45-03284-05504
	:	
	:	Cowlitz Valley Sand & Gravel

DECISION

Appearances: Cathy L. Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington for Petitioner;
James A. Nelson, Esq., Toledo, Washington for the Respondent

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," charging Cowlitz Valley Sand and Gravel (Cowlitz) with multiple violations under the Act and proposing civil penalties for those violations. A preliminary issue is whether Cowlitz, during relevant times, was under the jurisdiction of the Act. A bench decision was rendered on this jurisdictional issue following hearings and that decision follows with only non-substantive corrections:

> THE COURT: All right. I'm prepared to rule. First of all, let me note that the issue is very well framed by Respondent in its memorandum of law. That memorandum sets forth the basis for jurisdiction under the Mine Safety and Health Act of 1977, which I'll refer to as the Mine Act, over any mine as dependent upon interstate commerce as set forth in the Mine Act. Section 4 of the Mine Act reads as follows: "Each coal or other mine, the products of which enter commerce, or the operations or products of which

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

Section 3(b) of the Mine Act defines commerce as "trade, traffic, commerce, transportation or communication among the several states or between a place in a state and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same state but through a point outside thereof."

As Counsel for Cowlitz notes also in his memorandum, as of March 1, 1993, Cowlitz had not commenced production. I believe there's no dispute that no products had in fact entered commerce as of March 1, 1993. Again, Cowlitz's Counsel states correctly, I believe, the issue then is as of March 1, 1993, had the operations of Cowlitz Valley Sand & Gravel Company affected commerce within the meaning of that term and Section 4 of the Mine Act.

I'm relying to a large extent on a Ninth Circuit decision, *Cyprus Industrial Minerals Co.* v. *Federal Mine Safety and Health Review Commission*, 664 F.2d 1116 (1981) in which the drilling of an exploratory shaft in search of a commercially exploitable deposit was found subject to the Act. Several Commission Judges have also found jurisdiction under similar circumstances. *Secretary v. SH&M Coal Co.*, 11 FMSHRC 1154 (June 1989), a decision of Judge Koutras and Judge Amchan recently in *Secretary* v. *The Pit*, (September 1994). Each of these cases supports the proposition that since the operator was preparing for activities that clearly would effect commerce that is sufficient to bring it within the scope of jurisdiction under the Mine Act.

There's no need to review the evidence in this case because it is undisputed and it is in effect essentially stipulated that Cowlitz was in preparation for activities that clearly would affect commerce at the time of the March 1,1993, inspection. But just to review the evidence on this issue, we have first of all Exhibit No. 2 submitted by the Petitioner, which is a letter dated November 18, 1992, from Ms. Wallace [on behalf of Cowlitz], which states that, among other things, "We have also started to move overburden to the west side of the equipment site in order to stockpile on the west side and create a berm to help prevent any unknown problems unseen at this time." There are other statements in that letter indicating preparation for commencement of mining of crushed rock that was to be sold in commerce.

The testimony of Mr. Sam Tomes [a Cowlitz foreman] also corroborates that they were beginning preparations or were continuing preparations for the sale of mine product, which he testified actually began in July of 1993. Mr. Tomes testified that they were, prior to March 1, 1993, setting up crushers, conveyers, welding legs on conveyers, building chutes, and partially removing a hill at the facility in order to set up the plant. Also that they were constructing an access road beginning as early as January and through April of 1993 to permit better access to the mine site. That they were continuing -- and he was continuing to perform tests on the crushers. That he was adjusting the crushers and actually placing product through the crushers to further adjust the crushers.[1]

I don't even have to go into the inspectors' testimony on this point to establish clearly that these were activities in preparation for activities that would clearly affect commerce. Again, I would cite to you the *Cyprus Industrial Minerals* case, as well as the two Administrative Law Judges' decisions, and also the case cited by the Secretary, that is *Godwin* v. *the Occupational Safety and Review Commission*, 540 F.2d 1013, a Ninth Circuit decision in 1976.

I would also note in this case the Respondent's use of equipment that, by the testimony of Mr. Tomes again, originated out of the state of Washington. That is the equipment that was manufactured in Iowa and Oregon.

I also note that under Section 3(h)(1) of the Mine Act itself a coal or other mine is defined -- and this is a long definition but within that definition there is the plain language itself explicitly that equipment that is located at a site where mining will take place and will be used in the extraction of minerals or the milling of minerals is subject to Mine Act jurisdiction even if mining has not commenced.

That section reads in part as follows: "'Coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or if in liquid form are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations underground passageways, shafts, slopes, tunnels, and

---

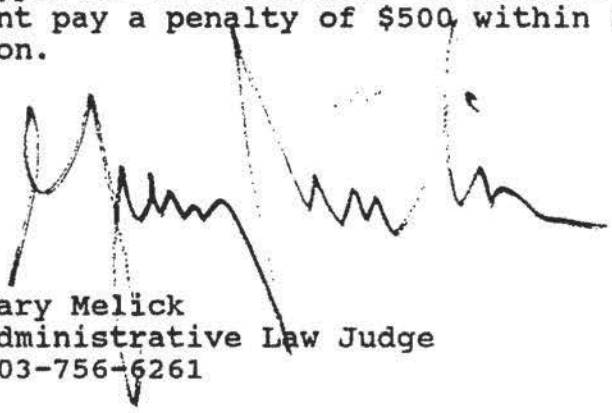
[1] To the extent that mine product was used on the premises of the Cowlitz mine to improve the access road this operation also affected commerce within the meaning of the Act. See *Fry v. United States*, 421 U.S. 542, 547 (1975); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)

workings, structures, facilities, equipment, machines, tools, or other property on the surface or underground used in or to be used in or resulting from the work of extracting such minerals from their natural deposits in nonliquid forms or used in or to be used in the milling of such minerals."

Under the circumstances, jurisdiction lies under the Mine Act over this operation and did so as of March 1, 1993.

Conditioned upon this finding of jurisdiction the parties thereafter reached a settlement in which the Petitioner vacated Citation Nos. 4127598 and 4128390 and with respect to the remaining violations agreed to reduce the proposed penalties from $874 to $500 based in part on the operator's good faith belief that it had not yet become subject to MSHA jurisdiction. The Secretary subsequently filed a written motion in support of the settlement. I have considered the representations and documentation submitted in these cases and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE the Motion for Approval of Settlement is **GRANTED** and it is **ORDERED** that Respondent pay a penalty of $500 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 19 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 91-97
Petitioner	:	A. C. No. 40-02755-03525
v.	:	
	:	Docket No. SE 91-533
FAITH COAL COMPANY,	:	A. C. No. 40-02755-03527
Respondent	:	
	:	Docket No. SE 92-315
	:	A. C. No. 40-02755-03536
	:	
	:	Docket No. SE 92-316
	:	A. C. No. 40-02755-03537
	:	
	:	Docket No. SE 92-343
	:	A. C. No. 40-02755-03538
	:	
	:	Docket No. SE 92-372
	:	A. C. No. 40-02755-03540
	:	
	:	Docket No. SE 92-373
	:	A. C. No. 40-02755-03541
	:	
	:	Docket No. SE 92-375
	:	A. C. No. 40-02755-03542
	:	
	:	Docket No. SE 92-463
	:	A. C. No. 40-02755-03543
	:	
	:	Docket No. SE 92-464
	:	A. C. No. 40-02755-03544
	:	
	:	Docket No. SE 92-488
	:	A. C. No. 40-02755-03545
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	:	Docket No. SE 93-78
	:	A. C. No. 40-02755-03547
	:	
	:	Docket No. SE 93-79
	:	A. C. No. 40-02755-03548

: Docket No. SE-93-194
: A. C. No. 40-02755-03549
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: Docket No. SE-93-195
: A. C. No. 40-02755-03550
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: Docket No. SE 93-257
: A. C. No. 40-02755-03552
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: Docket No. SE 93-300
: A. C. No. 40-02755-03553
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: Docket No. SE 93-348
: A. C. No. 40-02755-03555
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: Docket No. SE 93-365
: A. C. No. 40-02755-03556
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: Docket No. SE 93-366
: A. C. No. 40-02755-03557
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: Docket No. SE 93-411
: A. C. No. 40-02755-03558
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: Docket No. SE 94-42
: A. C. No. 40-02755-03561
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: Docket No. SE 94-75
: A. C. No. 40-02755-03562
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: Docket No. SE 94-96
: A. C. No. 40-02755-03563
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: Docket No. SE 94-256
: A. C. No. 40-02755-03564
:
: Docket No. SE 94-257
: A. C. No. 40-02755-03565
:
: No. 15 Mine

DECISION

Appearances: Ann T. Knauff, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, TN, for Petitioner;
Russell Leonard, Esq., 603 Cumberland St., Cowan, TN, for Respondent;
Lonnie Stockwell, Faith Coal Company, Palmer, TN, for Respondent.

Before: Judge David Barbour

These consolidated cases are before me upon petitions for the assessment of civil penalties filed by the Secretary of Labor (Secretary) pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 820). The petitions charge Faith Coal Company (Faith) with numerous violations of mandatory safety and health standards at its No. 15 Mine. The issues are whether Faith violated the cited standards and, if so, the amount of the civil penalties to be assessed.

The cases were heard in Jasper, Tennessee. The Secretary was represented by counsel, Ann T. Knauff. Faith was represented by counsel, Russell Leonard, and by its owner, Lonnie Stockwell. (Leonard's appearance was limited to one day and to one issue -- the effect of any civil penalties assessed on Faith's ability to continue in business.)

As indicated below, many of the alleged violations were settled. The settlements were explained thoroughly by counsel for the Secretary. I have considered the explanations and find them appropriate.

The settlements are approved. Although the Secretary proposed civil penalties for the settled violations, the parties understood that the penalties assessed will be those I find warranted in light all of the statutory penalty criteria; particularly, the criterion relating to Faith's ability to continue in business (Tr. II 259, 265-270, 330).

STIPULATIONS

The parties agreed that:

1. Faith was a contract operator for Tennessee Consolidated Coal Company (TCC).

2. Faith's contract with TCC was dissolved by mutual agreement on September 30, 1993.

3. Faith engaged in commerce.

4. The Act applied to Faith's No. 15 Mine, and the Commission had jurisdiction to hear and decide the cases.

5. The inspectors who issued the subject citations and orders were authorized representatives of the Secretary and were acting within the scope of their authority when they inspected the mine.

6. The mine has been abandoned temporarily since October 1, 1993 (See Tr. II 9-10).

CONTESTED CITATIONS AND ORDERS

Docket No. SE 92-316

Citation/ Order No.	Date	30 C.F.R.	Assessment
3395933	2/26/92	75.1808	$20

Citation No. 3395933 states:

> The approved books and records being maintained in the mine office on the surface were not stored in a fire proof repository to minimize their destruction by fire or other hazards (Joint Exh. 6).

Inspector Clyde J. Layne testified that on February 26, 1992, he went to the mine and found that none of the approved books and records were kept in a fireproof structure as required by section 75.1808. Rather, they were lying in the open, on a desk

(Tr. III 519). The mine office was housed in a metal "van-type truck body" (Tr. III 520; See Joint Exh. 6A). Layne considered the outside of the truck body to be fireproof, but the inside of the truck body was cluttered with combustible materials -- maps, paper bags, cardboard items and mine record books. Most of the books and records on a desk were in the midst of the clutter (Tr. III 522). If a fire started, the books and records would have burned (Tr. III 521-522).

Grinding wheels and torches were located inside the truck body (Tr. III 523). Although the truck body did not contain a central fire fighting system, there was a fire extinguisher at its rear.

The office was used on an intermittent basis. If a fire started and the approved books and records burned, miners probably would not have been endangered (Tr. III 525). Although Faith was negligent, Stockwell meant to correct the conditions that resulted in the violation but had not gotten around to it (Id.)

Faith abated the conditions by putting the books in an old, metal refrigerator (Tr. III 526). According to Layne, metal refrigerators were used as fire proof repositories at several other mines, and their use had been approved by the MSHA field office supervisor (Id. 527-528).

Stockwell did not disagree with the inspector's description of the conditions. However, he did not believe the conditions constituted a violation. He regarded the truck body as a fireproof repository (Tr. III 529).

The Violation

I ruled from the bench that the violation existed as charged. I stated:

> [T]hat the building itself is fireproof may well be true, but ... even though [the] building is made of metal ... if [Faith's] records are kept inside ... and in such ... condition that they are subject to fire, they must be stored in a fireproof repository inside the ... building
> (Tr. III 530).

I affirm the ruling.

Gravity and Negligence

I also find, based upon Layne's testimony, that the violation was not serious and that Faith was negligent in allowing the violation to exist.

DOCKET NO. SE 92-343

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396042	3/02/92	77.1104	$94

Citation No. 3396042 states:

> Accumulation[s] of combustible materials (loose wooden planks, and dry weeds) that could create a fire hazard had accumulated around the powder storage magazine on the surface (Joint Exh. 13).

Clyde Layne testified that on March 2, 1992, he observed a powder magazine sitting on wooden planks and surrounded by weeds. Layne believed that this condition was a violation of section 77.1104, which prohibits accumulations of combustible materials where they can create a fire hazard. Layne also believed that two miners were exposed to the hazard created by the conditions (Tr. III 538-539).

Layne found the alleged violation to be a significant and substantial contribution to a mine safety hazard (S&S) because the powder storage magazine was located near the road to the mine entrance and miners traveled along the road. If the accumulated combustible materials caught fire, they could heat the magazine to the point where the powder could explode and miners could be hurt (Tr. III 539, 545). Such a fire could be started by a forest fire, by lightning, or by a person flipping a cigarette butt out of the window of a passing car (Tr. III 542-543).

Layne did not know how long the conditions had existed. Nor did he know if his supervisor had told Stockwell that the location of the powder magazine was acceptable (Tr. II 540-541). Nonetheless, Layne believed Faith was negligent in allowing the conditions to exist (Tr. III 539-540).

According to Layne, the conditions were abated when Stockwell's brother, James Stockwell, removed all of the planks and all of the weeds from beneath and around the magazine (Tr. III 542, 544).

James Stockwell testified that the magazine was installed on March 1, 1992, the day before Layne cited Faith for the alleged violation, and that Layne's supervisor had approved the location of the magazine (Tr. III 548-549). James Stockwell asked the supervisor about the location of the magazine because he was concerned it might be too close to a telephone pole. According to James Stockwell, the supervisor stated that there was nothing wrong with the location (Tr. III 553).

James Stockwell also stated that the magazine was located on the side of a spoil bank and that a board was placed under it to level the magazine (Tr. III 550-551). The only "planting" Stockwell remembered near the magazine was one pine tree, approximately 10 feet away (Tr. III 552).

The Violation

I find that a violation of section 77.1104 existed. Although the witnesses' testimony was in conflict regarding the vegetation around the magazine, it is clear, as James Stockwell himself testified, that at least one wooden board was underneath the magazine. This board was enough to establish an accumulation of prohibited combustible material and the creation of a prohibited fire hazard.

Further, although I credit James Stockwell's testimony regarding a conversation with Layne's supervisor concerning the acceptability of the magazine's location, the conversation, as recounted by James Stockwell, involved the location of the magazine, not the board under it, and the conversation does not impact the existence of the violation.

S&S and Gravity

The violation was neither S&S nor serious. The potential ignition sources catalogued by Layne (forest fire, lightning or a cigarette butt) were highly speculative. I conclude there was no reasonable likelihood of injury associated with the violation.

Negligence

Faith was negligent in allowing the violation to exist. It knowingly used the wooden board to level the magazine. The cited standard is clear. The circumstances required Faith to make sure combustible material was not allowed in the immediate vicinity of the magazine, and the company failed to meet its standard of care.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396041	3/2/92	75.1713-7(a)(1)	$94

> The operator did not maintain the required supply of first-aid equipment at the mine work site. The following items were missing; one stretcher and one broken-back board (Joint Exh. 12).

During the course of Layne's testimony regarding the alleged violation, it became apparent that the inspector had cited the wrong standard. He stated that he should have cited section 75.1713(a)(3), rather than section 75.1713-7(a)(1) (Tr. III 564). Counsel for the Secretary moved to amend the citation to allege a violation of section 75.1713(a)(3) on the grounds that there was an "understanding between the inspector and the operator about exactly which regulation was being violated" (Tr. III 565). Stockwell objected.

I denied the motion because I concluded there was confusion between the inspector and the operator about the standard. I also concluded that because Stockwell prepared to defend against the citation as written, it was too late to amend it. As a result, I indicated the citation should be vacated (Tr. III 567-568). Nothing in the record convinces me I was wrong, and I affirm the bench ruling.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396045	3/2/92	75.202(a)	$147

Citation No. 3396045 states in part:

> The spacing of roof bolts were not maintained on 5 feet centers located approximately 700 feet inby the ... portal in that several permanent roof bolts were spaced from 5 1/2 to 9 feet apart. Approximately 7 bolts need to be installed in this area.
>
> This entry was driven by another operator and is being cleaned up to install a belt conveyor by the present operator. The [a]pproved [r]oof [c]ontrol [p]lan requires permanent roof supports to be installed on 5 feet by 5 feet [centers] (Joint Exh. 16).

Layne testified that on March 2, 1992, he inspected an entry that was being cleaned for the installation of a belt conveyor, he observed an area of the roof were the spacing of roof bolts exceeded the five foot limit specified in the roof control plan. Several of the bolts were as much as 9 feet apart.

Although the area was low and travel through it could only be done if a person crawled, tracks on the floor indicated to Layne that "people crawled through [the] area" (Tr. III 576, See also Tr. III 564-572, 576, 577).

When Faith took over the mine from the previous operator, the area had been "gobbed out" and travel through it had been impossible. Faith's miners cleared away the gob material and thereby made the area passable (Tr. III 594). The roof bolts had been installed by the previous operator. Nevertheless, in Layne's view, Faith became responsible for the condition of the roof when it assumed control of the mine (Tr. III 570-571).

To abate the condition, the roof bolting machine was moved into the area and the required additional roof bolts were installed (Tr. III 578).

Layne believed that the alleged violation was S&S because a roof fall accident "could be fatal" (Tr. III 582). Layne also believed that because the area had to be pre-shift examined prior to miners working in it, the company should have known of the existence of the improperly spaced roof bolts (Tr. III 379). However, he acknowledged that it was possible for management personnel to crawl through the area and to not see the improperly placed roof bolts, many of which where on the sides of the entry (Tr. III 582, 584).

Stockwell did not dispute that the roof bolts were misplaced. He also agreed that he had crawled through the affected area when Faith started to rehabilitate the entry (Tr. III 600). (Stockwell stated that he believed he was the only person who had crawled through the area (Tr. III 603-604).)

With regard to the general condition of the roof, Stockwell stated that "it was not as good as we [thought]" (Tr. III 602).

The Violation

To establish a violation of section 75.202(a), the Secretary must prove that the affected area was a place where a person or persons worked or traveled, and that the roof was not supported to protect the person or persons from roof falls. Here, the Secretary has met his burden of proof.

Layne believed that miners working to rehabilitate the entry, traveled under the affected roof. However, there also was credible testimony that miners could have traveled in adjacent intake and return entries rather than directly under the roof of the area in question. Given the low height of the entry at the affected point and the fact that miners could have traveled in the adjacent entries, I do not credit Layne's belief. This is especially true, because Stockwell offered a persuasive explanation for the tracks on the floor of the area -- i.e., that he crawled through the entry.

In any event, since Stockwell himself traveled through the affected area on at least one occasion and since Stockwell agreed that the cited roof bolts were not spaced as required by the roof control plan, I find that a violation of section 75.202(a) existed. The plan sets forth the minimum that is required to

support the mine's roof. When, as here, an operator does not meet a minimum requirement of the plan, it is reasonable to conclude that the roof is not supported to protect miners, in this case, Stockwell, from a roof fall hazard.

S&S and Gravity

The Secretary did not establish the S&S nature of the violation. The sole testimony offered by Layne regarding an injurious roof fall was that a roof fall accident "could be fatal" (Tr. III 582). On its own, Layne's opinion does not establish "a reasonable likelihood that the hazard contributed to will result in an injury" (Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984)).

Nevertheless, this was a serious violation. The fact that the evidence established that only Stockwell crawled under the improperly supported roof does not diminish its gravity. The roof did not meet the minimum roof support requirements which means there was at least some likelihood that it would fall. Had it fallen on Stockwell, his death or serious injury almost certainly would have resulted.

Negligence

I also conclude Faith was negligent. If reasonable care had been exercised, the inadequately supported roof would have been properly bolted before it came to Layne's attention. As Layne correctly observed, Faith was the operator and therefore was responsible for the condition of the roof. Faith's negligence is mitigated to some extent by the fact that Faith did not install the roof bolts, and by the fact that the area in question was not subject to frequent visits by mine personnel.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396047	3/3/92	75.208	$88

Citation No. 3396047 states:

> A readily visible warning or a physical barrier was not installed on the end of the permanent roof support to impede travel beyond

> permanent support in the crosscut connecting the Nos. 2 and 3 working places on the 001 section. There was a distance of approximately 15 feet that was not support[ed] with roof supports (Joint Exh. 19).

Layne testified that on March 3, 1992, he inspected a connection between two crosscuts. The roof in the connection was not supported for a distance of approximately 15 feet. Indications had not been placed at the end of the supported roof to warn miners of the lack of support, nor had barriers been installed (Tr. III 629, 633). No miners were at work on the section when Layne observed the condition. However, Layne noticed that one cut had been taken out of the face and that the loading machine was parked approximately 40 feet outby the crosscut (Tr. III 630, 637-638). This signified to Layne that miners recently had worked on the section (Tr. III 630).

There was no indication that miners had passed through the crosscut. Layne did not note any tracks on the floor under the unsupported area (Tr. 630-631).

Layne discussed the condition with Stockwell. Layne stated that Stockwell told him the equipment had been moved to the section the previous day and that work had not yet begun on the section (Tr. III 632). Layne did not believe Stockwell because of the "fresh" cut at the face. (Id.).

Layne found the alleged violation to be S&S. Layne believed miners would take for granted that the roof was supported (Tr. III 632). The lack of any warning device or barrier to impede travel under the roof would reinforce this assumption. If the roof fell and hit a miner, the resulting injury would be "bad" or "fatal" (Id.).

Layne believed that Faith was negligent. The lack of a warning device or barriers should have been detected and corrected. Equipment had been in the area. The area had to be preshift examined. The condition was not noted in the preshift examination book (Tr. III 635, 642-643).

Stockwell maintained that the general area where the alleged violation existed was not a work site prior to Layne's visit (Tr. III 645).

The Violation

I fully credit Layne's testimony. It was consistent and persuasive. As Layne stated, the lack of support left 15 feet of exposed roof. There were no visible warnings of the end of permanent roof support nor any type of barrier. The standard requires readily visible warning signs or barriers under such conditions. The violation existed as charged.

S&S and Gravity

The inspector's testimony falls short of establishing the third element of the Mathies test. The obvious purpose of the standard is to alert miners to stay out of areas where the roof is not supported. The discrete safety hazard contributed to by the violation is that the roof will fall on miners who unexpectedly venture under the unsupported roof. Analysis under Mathies, as further explained by the Commission in U.S. Steel Mining Company Inc., 6 FMSHRC 1834, 1836 (August 1984), requires the Secretary to establish "a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." In the context of a violation of section 75.208, the Secretary must establish that because a sign or barrier is missing, miners will be reasonably likely to proceed beyond permanent roof support and be injured.

I accept as fact that without a sign or barrier, miners will reasonably likely believe the roof is supported when it is not, and inadvertently, will proceed beyond permanent roof support. However, to find it reasonably likely that miners will be injured, the Secretary must offer some evidence regarding the instability of the subject roof.

Layne, without further amplification of what he meant, described the roof as "fair" (Tr. III 633). Also, he noted that the roof lacked visible signs of stress (Tr. III 633). Because the Secretary did not offer any testimony regarding an inherent instability of the roof in the area or any specific signs of instability, I cannot find that the violation was S&S.

Nevertheless, it was a serious violation. As I have found, without visible warning signs or barriers, miners would likely proceed under the unsupported area and subject themselves to the

chance of death or serious injury. As Layne persuasively explained, they would assume the roof was supported properly (Tr. III 632).

In addition, Layne's testimony that work recently had taken place at the face was credible and I accept it as fact. Thus, miners had been in the general vicinity of the unsupported roof and easily could have been exposed to the hazard.

Negligence

Faith was negligent. The fact that miners had been working in the general area required that the area be preshift examined. The violation was obvious visually. Faith should have known of the existence of the unsupported roof and of the lack of visible signs or barriers. The condition should have been detected and corrected.

Docket No. SE 92-463

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024224	5/28/92	75.208	$88

Citation No. 3024224 states:

> The first crosscut on the left side of the No. 1 room had been advanced approximately 22 feet inby the last row of permanent supports, and the area was not posted with a visible warning or provided with a physical barrier to impede travel beyond permanent support (Joint Exh. 29).

MSHA Inspector Tommy D. Frizzell testified that on May 28, 1992, he found that mining had advanced approximately 22 feet inby the last permanent roof supports in the No. 1 room, and that no warning device nor barrier had been installed (Tr. II 276-277, 280). (Frizzell was accompanied by Stockwell during the inspection.) Frizzell measured the unsupported area by tying a tape measure to his hammer and throwing the hammer to the end of the cut (Tr. II 287-288).

The mined area was in "low coal" (i.e., 38 inch coal) (Tr. II 277, 287). Because of the low coal, miners had to travel through the area by "crawling with [their] head[s] down" (Tr. II 278). The only light was from their cap lamps. It was difficult for miners to note the condition of the roof, and Frizzel therefore believed the presence of a warning device or barrier was necessary to alert miners to the fact they were approaching an unsupported area. (Frizzel stated that either a reflective streamer or a barrier that blocked the entry would have been acceptable (Tr. II 279-280).)

Frizzell issued the citation at approximately 8:20 a.m. The shift had stated at approximately 6:00 a.m. Frizzell believed that the preshift examiner should have detected the lack of a warning device or barrier (Tr. II 281). He also believed that equipment had proceeded under the unsupported roof because the area had been cleaned. In addition, he saw equipment tracks on the mine floor and remote control equipment was not in use at the mine (Tr. II. 279).

Frizzell found the alleged violation was S&S. The roof in the cited area was "fair roof" and Frizzell could not detect any "discontinuities" in it (Tr. II 281). Nonetheless, he explained that "[e]ven though the roof may look good on the surface ... when you go inby roof supports you're just gambling" (Tr. II 283). He explained, "roof falls ... [are] the No. 1 killer in the coal mine industry" (Tr. II 295). Had a roof fall occurred while a miner was inby permanent roof supports, the miner could have been fatally injured (Tr. II 284).

In Frizzel's opinion, the person most likely to have been injured was the operator of a roof bolting machine, although any of the seven or eight miners who worked underground were potential targets of the hazard. (Tr. II 284-285, 292). Due to the low height of the coal, canopies were not required on the roof bolting machines and none were provided (Tr. II 297).

A streamer was installed within 25 minutes to abate the condition (Tr. II 286).

Stockwell agreed that a streamer was not hanging at the beginning of the unsupported area. However, he maintained one was in a place when he conducted the preshift examination at

approximately 5:30 a.m. (Tr. II 298, 300, 303). He stated that it was normal practice at the mine to hang a streamer to warn of unsupported roof (Tr. II 298-299).

The Violation

As previously noted, the cited standard requires a visible warning device or a physical barrier at the end of permanent roof support. The parties do not dispute that neither a device nor a barrier was present. Therefore, I find that the violation existed as charged.

S&S and Gravity

Again, I conclude the Secretary has failed to establish a reasonable likelihood that the hazard would have contributed to an injurious roof fall. Frizzell's testimony regarding "fair roof" and the lack of "discontinuities," does not afford a basis for a finding of "reasonable likelihood," and the fact that roof falls are the No. 1 killer of the nation's miners does not speak to the specific circumstances upon which the violation is based.

Nevertheless, the violation was serious. Without a warning device or barrier, a miner intent on entering the area easily could have failed to recognize the lack of roof support; especially since the coal was low. Moreover, and as Frizzell observed, had falling roof hit a miner, death or serious injury could have been expected.

Negligence

Faith was negligent. The lack of a streamer or barrier was obvious visually. In failing to correct the condition, Faith failed to exhibit the care required of it by the circumstances.

Docket No. SE 92-373

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883375	4/13/92	70.208(a)	$50

Citation No. 9883375 states:

> The mine operator did not submit a valid respirable dust sample during the Feb[ruary]/March bimonthly sampling period from designated area sampling point [9]01-0 as shown on the attached advisory dated 4/7/92 (Joint Exh. 27).

Inspector Judy McCormick stated that Faith failed to submit a valid respirable dust sample for the designated area of the roof bolting machine for the bi-monthly period of February/March 1992 (Tr. III 654-655). As McCormick explained, an operator is responsible for collecting the required samples and for submitting them to MSHA. The operator also is responsible for determining when, during the bi-monthly period, the samples will be taken (Tr. III 656). The samples must be mailed within 24 hours of collection. MSHA allows seven days past the end of the sampling cycle for the mail to process. If a sample is not received within 7 days (in this particular case, by April 7, 1992), a violation of the regulation is assumed to exist (Tr. III 671). If a sample is received out of time, it is not considered a valid sample (Tr. III 673). McCormick stated that on April 8, 1992, she was advised by computer, that the subject sample had not been submitted (Tr. III 665).

Operators mail samples to MSHA. McCormick described as "very rare" those instances in which samples are lost in the mail (Tr. III 657). McCormick could not recall if Stockwell orally claimed to have mailed the particular sample in question, but was certain she had not received from him a written notification that it had been mailed. (Tr. III 658).

When asked about the procedures an operator could follow if a sample sent by regular mail was lost, McCormick replied that the operator had to file a lost mail claim with the postal service (Tr. III 659).

On cross examination, McCormick indicated that MSHA's records showed a sample for the designated area was taken by Faith on March 31, 1992, and was processed by MSHA on April 8, 1992. However, the sample was discarded because it was invalid (Tr. III 670). In McCormick's opinion, the alleged violation was largely a "paper work violation," and she did not expect that any miners would become ill because of it (Tr. III 660).

Stockwell testified that the sample was late because he could not get enough sampling devices from TCC. Stockwell also maintained that if Faith's sample had been received on April 7 rather than April 8, 1992, "everything would have been fine" (Tr. III 675).

The Violation

The violation existed as charged. As McCormick's testimony made clear, the violation was based upon the presumption that samples received more than seven days after the end of the sampling cycle were not collected in a timely fashion. Counsel for the Secretary stated, "There is a presumption that ... any sample that is taken within [the] bimonthly sampling period, even if it's taken on the last day, will get to the processing center and through the processing [in] seven days ... and that's a perfectly reasonable presumption" (Tr. III 676).

I agree with counsel. Given the fact that operators and MSHA must rely on the postal service, the allocation of a seven day "grace period" by the agency is a rational way to compensate for any delay of the mail. Faith did not offer any evidence to rebutt the presumption.

Gravity and Negligence

Based upon McCormick's testimony I find that the violation was not serious, and that Faith was negligent.

Docket No. SE 93-348

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883544	2/18/93	70.201(c)	$50

Citation No. 9883544 states in part:

> On January 28, 1993, the operator was notified in writing by the District Manager to submit in writing ... the dates and shifts that respirable dust sampling was to be conducted on each mechanized mining unit. The notification was required to be submitted by February 15, 1993. This operator has failed to submit such notification (Joint Exh. 39).

The citation was issued by Inspector Newell Butler. Butler was an inspector in the health group. He worked under McCormick's supervision. McCormick stated that she approved issuance of the citation, that she reviewed it before it was issued, and that she had firsthand knowledge of the conditions leading to the citation. Therefore, McCormick was allowed to testify concerning the alleged violation (Tr. III 684-685).

According to McCormick, on January 28, 1993, all underground coal mine operators in MSHA's Birmingham, Alabama, subdistrict, were informed by letter that they were required to submit to the subdistrict office a schedule for conducting respirable dust sampling on their mechanized mining units. The schedules were required to be received by February 15, 1993, (Tr. III 686). In McCormick's opinion, 30 C.F.R. 70.201(c) authorizes the subdistrict manager to request such a schedule. (Section 70.201(c) states: "Upon request from the District Manager, the operator shall submit the date on which collecting any respirable dust samples required by this part will begin.")

McCormick explained that MSHA needed to know the date when an operator would begin sampling in order to monitor an operator's sampling program. McCormick described the letter of January 28, 1993, as a "standard letter" and stated that such letters usually were mailed to operators every six months by certified mail, return receipt requested (Tr. III 686).

McCormick identified Joint Exhibit 39A as a copy of the certified mail receipt from the letter that was sent to Faith. The receipt was signed by Christine Stockwell, wife of Lonnie Stockwell, but was not dated. McCormick stated that the person receiving the certified mail was supposed to fill in the date (Tr. III 688, 690). The receipt was returned to the MSHA subdistrict office in Birmingham on February 22, 1993, (Joint Exh. 39A at 4; Tr. III 690).

McCormick testified that when no schedule was received from Faith, the citation was issued (Tr. III 687). McCormick did not believe miners would suffer illness as a result of the alleged violation. She maintained that Faith was negligent in failing to file a response with the subdistrict office (Tr. III 691-692).

Stockwell testified that if he had received the January 28 letter within a reasonable time, he would have had "plenty of time" to respond (Tr. III 693). He stated that he believed the letter was picked up on February 13, 1993, and that he did not have the information needed. He agreed however, that the letter could have been at the post office for several days before it was picked up (Tr. III 694).

The Violation

As noted, section 70.201(c) requires an operator to submit a respirable dust sample collection schedule upon the request of the district manager. Stockwell does not dispute the fact that Faith did not timely comply with the district manager's request. The violation existed as charged.

Gravity and Negligence

McCormick's testimony regarded the non-serious nature of the violation was not disputed, and I credit it.

I also find that Faith was negligent in failing to timely comply with the letter of January 28. The fact that Stockwell had to pick up certified mail at the post office, and the fact that he and his wife had to leave their work early in order to do so, is irrelevant (See Tr. III 396-397). As a mine operator, Stockwell was on notice that the agency would mail communications to him by registered mail. It was his duty to make certain that the mail was received by Faith in a timely fashion and that the company made a timely response. Faith was negligent in failing to meet the duty.

Docket No. SE 93-365

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883549	3/4/93	70.100(a)	$119

Citation No. 9883549 states in part:

> Based on the results of 5 samples ... the average concentration of respirable dust in the working environment of mechanized mining unit (MMS) I.D. [No.] 001-0 was 6.3 mg/m 3 of air. The operator shall take corrective action to lower the concentration of respirable dust to within the permissible limit of 2.0 mg/m 3 and then sample each production shift until 5 valid samples are taken (Joint Exh. 46).

Judy McCormick testified that the citation was issued when the results of five samples submitted by Faith for the working environment of a mechanized mining unit revealed an average concentration of 6.3 milligrams per cubic meter of air. The cited standard requires the operator to maintain an environment of 2.0 milligrams or less (Tr. III 698).

McCormick explained that after an operator submitted required respirable dust samples to MSHA, the agency analyzed the samples and advised the Birmingham subdistrict office of the results of the analysis by a computer message. If the results indicated that the respirable dust concentration was above the permissible limit, a citation was issued (Tr. III 668-669). Here, the results indicated that the miner operating the coal drill had been exposed to an impermissible concentration of respirable dust
(Tr. III 699).

McCormick also stated that had any of the results indicated that the samples were contaminated or improperly analyzed, she would have called the MSHA laboratory and asked personnel to check the samples. In this instance, where there was one sample result that was inordinately high, she believed she had followed

her normal procedures and called the laboratory, but she could not specifically recall having done so (Tr. III 702-703, 708).

McCormick thought the violation was S&S because of the presumption that exposure to respirable dust in excess of the standard can result in the contraction of pneumoconiosis (Tr. III 704). McCormick also found the alleged violation was the result of negligence on Faith's part (Tr. III 707).

The violation was abated when Faith submitted five samples that revealed an average concentration of 1.6 milligrams of respirable dust per cubic meter of air (Tr. III 705).

Stockwell maintained that the sample McCormick thought was inordinately high showed such an "extreme difference" that "somewhere someone should have picked up and followed up on it to see what was going on" (Tr. III 712).

The Violation

Judy McCormick was a professionally competent and responsive witness. I credit her statement that if a sample showed an average concentration of over 5.0 milligrams per cubic meter of air her practice was to call the MSHA laboratory to inquire about the sample (Tr. III 708). Given the number of sample results that were subject to McCormick's review, I do not find it remarkable she could not remember if she called about the particular sample in question. However, I infer from her testimony that she did follow normal procedures and that she was advised nothing was amiss with regard to the sample in question. I therefore conclude that the samples were valid, analyzed properly and that the violation of section 70.100(a) existed as charged.

S&S and Gravity

As McCormick accurately stated, the violation was S&S (See Consolidation Coal Co., . 8 FMSHRC 890 (June 1986), aff'd 824 F. 2d 1071 (D.C. Cir. 1987). Overexposure to respirable dust leads to pneumoconiosis, which in turn leads to disability and death. Thus, the violation also was serious.

Negligence

I agree with McCormick that Faith was negligent. In places where miners normally are required to work or travel, it is the duty of the operator to maintain the average concentration of respirable dust to which each miner is exposed at or below 2.0 milligrams per cubic meter of air. Faith failed to meet this duty.

Docket No. SE 94-96

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883661	10/14/93	70.208(a)	$50

Citation No. 9883661 states in part:

> The mine operator did not submit a valid respirable dust sample during the Aug[ust]/Sept[ember] bimonthly sampling period from designated area sampling point 901-0 (Joint Exh. 59).

McCormick testified that she issued the citation because Faith failed to submit a respirable dust sample for the area in which the roof bolting machine operator was working during the referenced bi-monthly period. The sampling procedure that Faith should have followed was the same as that she had described with respect to Citation No. 9983375 (infra) (Tr. III 717-718).

McCormick was advised by counsel that Faith's defense to the citation was that mining had ceased in September 1993, and she was asked if she knew if the mine was producing coal during the August/September bi-monthly sampling period. McCormick replied that "the computer had not been notified in any way that the mine was not producing" (Tr. III 718). Rather, MSHA was notified the mine had ceased production after the sampling cycle passed, that is, after September (Tr. III 719).

McCormick explained that normally an operator notified the appropriate MSHA field office by telephone when a mine ceased operation and followed up the telephone call with a letter to the appropriate MSHA district manager. The letter is required by 30 C.F.R. § 70.220(a) (Tr. III 719, 721-722). If Stockwell had called her office and stated that the mine was closed or closing,

a message would have been left on her desk. She neither spoke with Stockwell nor received such a message (Tr. III 721).

The alleged violation was abated on November 29,1993. It was around that time MSHA was notified the mine had gone into a non-producing status (Tr. III 722).

In McCormick's view, there was a violation of the cited standard because "the entire sampling cycle of August and September was worked by the operator without collecting a dust sample" (Tr. III 720). McCormick did not consider the violation to be S&S. She did believe it was due to Faith's negligence (Tr. III 723).

Stockwell testified that the mine was shut down a few days before the end of September 1993. He stated that after production ceased, MSHA inspectors McDaniels and Layne came to the mine to conduct an inspection. He told the inspectors that the mine was not producing coal and that he would no longer be conducting bimonthly sampling. He asked the inspectors to "take appropriate action to take care of it" and they told them that they would (Tr. III 728).

Stockwell also stated that he called McCormick's office and spoke with a woman, whose name he did not know. He left a message for McCormick about the mine ceasing production (Tr. III 728-729). Stockwell never wrote a letter to MSHA to report the mine had closed (Tr. III 729).

The Violation

MSHA charged a violation in this case because it assumed that production was ongoing during the entire bimonthly sampling cycle (Tr. III 720). The basic premise of Faith's defense was that if it established production ceased before the end of the sampling cycle, a violation would not have existed.

While I agree there would have been no violation if production ended on or before September 30, I find that the defense was not established. As McCormick noted, section 70.220(a) requires an operator to report a change in the operational status of the mine to the MSHA District Office within 3 working days after the change occurs. Although the regulation

does not state how notification is to be accomplished, the agency's Program Policy Manual (PPM) states that the notification must be in writing (V PPM 15). This is a reasonable interpretation of the regulation and an operator is bound by it.

Stockwell admitted he did not advise MSHA in writing that production had ceased and there is no evidence beyond Stockwell's self-serving assertion to confirm that the mine ceased production before the cycle ended. Accordingly, I find that the violation existed as charged.

Gravity and Negligence

Faith does not dispute McCormick's testimony with regard to the gravity of the violation, and I find that it was not serious (Tr. III 723). Based on McCormick's testimony I find also that Faith was negligent (Tr. III 723).

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883662	10/14/93	70.208(a)	$50

The parties stipulated that the testimony given with respect to Citation No. 9883661 would apply to Citation No. 9883662 (Tr. III 725-726).

The Violation

On the basis of the stipulation I find that the violation existed as charged.

Gravity and Negligence

On the basis of the stipulation I find that the violation was not serious and that Faith was negligent.

Docket No. SE 92-464

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024223	5/27/92	77.402	$88

Citation No. 3024223 states:

> Two hand-held electric (110 volt AC) drills and one hand-held electric grinder observed in the shop were not equipped with controls requiring constant pressure by hand or finger to operate the tools in that the controls were equipped with locking devices (Joint Exh. 30).

Frizzell stated that on May 27, 1992, he observed two hand held electric drills and one electric grinder at the mine. The equipment was located on the surface. The drills and grinder were equipped with trigger locks. (He explained that a trigger lock was one that "if you lock the trigger down, [the equipment will] continue to drill or to grind ... without any pressure being applied by the finger" (Tr. II 305)). Frizzell believed a violation of section 77.402 existed because the standard requires hand-held power tools to be equipped with controls that require constant hand or finger pressure to operate or to be equipped with equivalent safety devices (Id.). According to Frizzell, the regulation prevents a drill that gets stuck or "hangs" while drilling into a surface from twisting and breaking the drill operator's finger or arm (Tr. II 306-307). Also, if the drill is dropped, the regulation prevents the drill from continuing to operate and from drilling into the operator's body (Tr. II 316). Frizzell found the alleged violation to be S&S (Joint Exh. 30).

Frizzell observed the equipment lying on a bench. He did not recall operating the equipment (Tr. II 318). However, he picked up the drills and the grinder, tested the locking devices, and in each instance found that the devices were capable of being engaged (Tr. II 309, 311). Although he did not see anyone using the equipment, the equipment was not tagged-out, and Frizzell believed anyone could have picked up and use the drills and grinder at any time (Tr. II 309-310).

Frizzell explained to both James Stockwell and Lonnie Stockwell that trigger locks were not permitted, and neither corrected him or said that the trigger locks were not present (Tr. II 320-321).

Because the locking devices were obvious, Frizzell believed that Faith's management should have known of their presence, and that Faith was negligent in allowing them to exist.

Stockwell testified that Frizzell was mistaken, that what Frizzell thought were trigger locks, were not. Because his brother had a hot temper, Stockwell did not try to explain to Frizzell that the drills and grinder were not in violation of the standard (Tr. II 315, 324). Rather than have his brother and the inspector get into a heated disagreement, Stockwell defused the situation by removing the equipment from the property.

The Violation

Section 77.402 prohibits locking devices by requiring that hand held power tools be operated through constant hand or finger pressure. I credit Frizzell's testimony that the power drills and the grinder were equipped with locking devices. Further, despite Stockwell's avowal that he "trie[d] with all the strength within [him] to avoid confrontations," it seems highly unlikely to me that he would have accepted a violation he was certain was erroneous (Tr. II 327). I conclude therefore, that the violation existed as charged.

S&S and Gravity

The Secretary did not establish that the violation was S&S. Frizzell did not testify about the circumstances under which the equipment was used and the frequency with which it was used. He did not testify regarding similar violations that had lead to injuries. I can not draw any conclusion from the record regarding the likelihood of injury, and I therefore, can not find the violation was S&S.

Nevertheless, the violation was serious. Frizzell persuasively explained that without pressure sensitive controls, the drills could twist and pose a risk to fingers and hands. He also testified that without such controls, it was possible a drill operator inadvertently could drill into himself or herself

(Tr. 316-317). I accept his testimony regarding the gravity of the violation.

Negligence

In failing to ensure that the trigger locks on the cited equipment had been rendered dysfunctional, Faith failed to meet the standard of care required by the circumstances. Therefore, I find that Faith was negligent.

Docket No. SE 94-42

Citation/ Order No.	Date	30 C.F.R.	Assessment
3202273	7/22/93	75.324(a)(2)	$412

Citation No. 3202273 states:

> The fan house was not provided with air-lock doors to prevent the ventilation being disrupted when equipment is taken through the single explosion door. Equipment and mantrips enter the mine through the door at regular intervals and the ventilation is short-circuited (Joint Exh. 58).

Air lock doors to a mine fan house are designed to protect a fan mine and a ventilation system in the event of an explosion in that they stop the force of a blast from affecting the fan and from disrupting ventilation (Tr. II 339). Frizzell testified that the fan house for the No. 15 Mine was located on the surface, just outside the portal. There was only one door to the fan house. There were no air lock doors. Therefore, each time the door was opened, the main ventilation of the mine was short-circuited and 30,000 cubic feet of air per minute (CFM) escaped into the atmosphere (Tr. II 339-340).

When Frizzell issued the citation, the fan house door had been left open. Frizzell noted that it also was opened every time equipment or a person passed through it (Tr. II 341-342). Frizzell originally believed the condition represented a violation of 30 C.F.R. § 75.333(d)(3). The standard requires doors that are used to control ventilation within an aircourse to

be installed in pairs to form an airlock. However, he modified the citation to allege a violation of section 75.324(a)(2) because opening the fan house door affected mine ventilation by at least 9,000 CFM (Tr. II 343). Frizzell regarded the opening of the door to be an intentional change of ventilation and stated that Stockwell was the person designated to make such changes at the mine (Tr. II 366).

Frizzell found that the alleged violation was S&S. He believed that Faith seldom conducted mining with more than 10,000 or 11,000 CFM at the last open cross cut. Thus, a loss of 30,000 CFM when the fan house door was open left less than the required 9,000 CFM at the last open crosscut (Tr. II 340, 348, 356-357). He also feared that because of the loss of ventilation coal dust could accumulate underground and/or low levels of oxygen could build up (Tr. II 348-349).

Frizzell did not know how long the fan house had lacked air lock doors (Tr. II 351).

Frizzell cited the violation on July 22, 1993. He gave Faith until August 5, 1993 to abate it. When no action was taken by August 30, 1993, he issued a withdrawal order for failure to abate (Tr. II 351-352; Joint Exh. 58 at 4).

On cross examination, Frizzell agreed that the fan could generate as much as 60,000 CFM (Tr. II 357). Despite this, he maintained that, if 30,00 CFM were lost, there was no guarantee that 9,000 CFM would reach the last open cross cut (Tr. II 367).

The Violation

I conclude that the Secretary did not establish a violation of section 75.324(a)(2). The standard requires that a person designated by the operator, supervise any intentional change in ventilation that affects the section ventilation by 9,000 CFM. Therefore, in order to prove a violation, the Secretary must show, among other things, that a change in ventilation affects section ventilation by 9,000 CFM or more.

Frizzell took no air measurements on the section. While his testimony establishes that 30,000 CFM was lost at the fan house when the door was opened, his belief that this invariably

resulted in a loss of 9,000 CFM at the last open cross cut or in less than that amount was entirely speculative. In fact, the Secretary offered no substantive evidence regarding the change in section ventilation when the door was opened.

While it is possible to establish a violation on the basis of a reasonable inference, there are too may imponderables to permit such an inference here. For example, and assuming that Stockwell did not supervise the ventilation changes when the door was open, while Frizzell knew the amount of air that was being lost at the fan house, he did not know for certain the amount that entered the mine, let alone the amount that reached the section. Clearly, the amount was diminished when the door was open, but whether the diminution "affected the section ventilation by 9,000 [CFM]" (30 C.F.R. § 75.324(a)(2)) is a question that cannot be answered on the basis of this record.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024817	3/22/93	75.220	$88

Citation No. 3024817 states:

> The roof control plan was not compatible with the equipment that was being used in that the cutter bar was 11 feet long and the roof bolter could only roof bolt to within 2 feet of the face. The loading controls of the loading machine were 10'6" from the gathering head of the machine. This would create an opening of 13 feet from the last row of roof bolts when the place was cleaned up with the loader. The controls of the loader would be 2.6 feet outby the last bolts (Joint Exh. 56).

MSHA inspector Billy Layne explained that prior to the introduction of automatic temporary roof support systems (ATRS) on roof bolting machines, it was possible to install roof bolts up to the face. However, once the machines were equipped with ATRS, they could only bolt to within two feet of the face. The roof control plan at the mine was adopted by Faith prior to Faith's acquisition of a roof bolting machine with an ATRS (Tr. II 468-470).

The bar on the cutting machine used at the mine took an 11 foot cut. Therefore, when the face was mined, the cut of 11 feet, plus the two feet where the bolting machine had been unable to bolt during the previous mining cycle, created an unsupported area of 13 feet. The approved roof control plan stated, "The operating controls of the loading machine shall not advance inby the last row of roof bolts" (Joint Exh. 54A at 12; See Tr. II 474-475). The controls of the loading machine were 10 1/2 feet from the gathering head of the machine. This meant that the loading machine operator had to proceed under unsupported roof to do his or her job (Tr. II 471-474, 475). (Layne explained that when he wrote in the body of the citation that the controls of the loading machine would be "outby" the last row of roof bolts, he really meant "inby" (Tr. II 475-476, 492).)

Layne did not see the loading machine in operation when its operator was inby the last row of roof bolts (Tr. II 478). Therefore, he did not see the loading machine operator acting in violation of the roof control plan. Accordingly, Layne described the violation as "hypothetical" (Tr. II 478, 493). Layne stated further that the violation would not have existed if cutting machine operators limited the depth to which the bar undercut the coal (Id.)

Layne described the mine roof as consisting of "real fragile shale" and laminated sandstone (Tr. II 479). He did not consider it to be "real good roof" (Id.). Any time a miner proceeded inby the last row of roof bolts, the miner created a hazard to himself or herself. Here, the roof could have fallen and the miner could have been injured seriously or killed (Tr. II 483).

Layne also believed Faith was negligent in allowing the violation to exist (Tr. II 485).

Stockwell stated that although it was "possible" for a loading machine operator to be under unsupported roof, he did not think it was "very likely" (Id.). According to Stockwell, it was mine practice to hang streamers at the last row of roof bolts. When an equipment operator reached that point, he or she would be warned not to proceed (Tr. II 506-507). Stockwell stated he told operators they would be fired if they operated equipment inby permanent roof supports. He never observed an operator doing so (Tr. II 507).

The citation was abated when Faith removed the loading machine from its roof control plan. Effectively, it agreed to no longer use the machine for clean up work (Tr. II 504-505).

The Violation

Section 75.220 requires that each mine operator develop and follow a roof control plan. Once the plan has been approved by MSHA and has been adopted by the operator, provisions of the plan must be followed as though they were mandatory safety standards. Here, the provision of the plan that was allegedly violated required Faith to ensure that the operating controls of the cited loading machine not advance beyond the last row of roof bolts (Joint Exh. 54A at 12).

As Layne candidly stated, he did not observe the loading machine operated with its controls positioned inby the last row of roof bolts (Tr. II 478). Rather, he premised the violation upon his belief that the equipment operator had to proceed under unsupported roof in order to load coal after it had been cut (Tr. II 475).

The Secretary need not prove the existence of a violation by the testimony of a person who observed it. As has been noted previously, the Secretary may establish a violation by inferences derived from circumstantial evidence -- for example, tire tracks or foot prints may prove that equipment or persons went beyond permanent roof support. However, the inferences must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. Garden Creek Pocahontas, 11 FMSHRC 2148, 52-53 (November 1989).

Here, the problem is that the facts from which the violation is to be inferred do not invariably lead to a conclusion that the operating controls of loading machine proceeded inby the last row of roof bolts. Layne agreed the equipment's controls would not have proceeded beyond the last row of roof bolts if the depth of the undercut was limited, and there was no testimony to establish that Faith's practice was to fully undercut the coal. If such a practice existed, it is reasonable to assume the testimony of miners who had worked for Faith would have been helpful to the

Secretary, yet he called no such witnesses to testify. Further, Stockwell's contention that he never had seen a scoop operated inby permanent supports was not refuted or otherwise challenged.

Weighing all of this, I conclude that although the Secretary proved a violation was possible, proof of a possibility did not meet his burden.

Docket No. SE 93-78

Contested Violations

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024472	8/19/92	75.203(a)	$50

Citation No. 3024472 states:

> The method of mining on the 001 section exposed miners to hazards caused by excessive width in a crosscut between the No. 2 and No. 3 entries. The crosscut was driven from 21[feet] to 26 feet wide for 20 feet. The widest point was 26 feet.
>
> The operator had installed timbers and cribs in the area for additional support (Joint Exh. 31).

The parties stipulated that the distances recorded on the citation were correct. The parties also agreed that Faith had installed sufficient roof support by the time the inspector arrived to narrow the roof over the crosscut to permissible limits. In other words, at the time the citation was issued, the crosscut was not "excessively wide" (Tr. II 379).

MSHA inspector Johnny McDaniel testified that a violation existed because the roof strata had been weakened when the roof was cut excessively wide and that although supplemental roof supports had been installed, the citation would impress upon the an operator the need to keep entry widths to allowable distances (Tr. II 381-382). In McDaniel's view, there was a violation the minute the entry was cut too wide. The addition of the posts to

support the roof rectified the hazardous condition but did not vitiate the violation.

Stockwell maintained that during advance mining it was virtually inevitable that an entry would be cut wide, and if the excessive width was timely corrected by setting posts or installing other roof supports, there was no violation (Tr. II 389). I tend to agree with Stockwell, but I need not reach this defense because I conclude the Secretary has not otherwise met his burden of proof.

In pertinent part, the cited standard requires that mining methods not expose any person to hazards caused by excessive widths of crosscuts. To establish a violation, in addition to proving excessive widths, the Secretary must prove that a person was exposed to a hazard from roof weakened by those widths. Here, the crosscut was cut excessively wide for a distance of 20 feet; and I accept McDaniel's testimony that cutting the crosscut excessively wide weakened the roof strata and created a hazard. However, there was no testimony upon which to base a finding that any person was exposed to the hazard, and without evidence of exposure, I cannot find the Secretary proved the alleged violation.

I cannot assume equipment operators were exposed to the excessively wide roof without testimony regarding the distance of the inby end of the equipment from its operator's compartment when the cutting and cleanup operations were in progress. Nor can I assume that miners who set the posts were exposed to the hazard. There was no testimony regarding the practice of setting posts under such circumstances. It may be, for example, that miners worked from behind temporary roof supports. Finally, there was no testimony that miners were exposed to the hazardous roof after the crosscut was driven, but before the posts were set.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024476	8/27/92	75.1107-16(b)	$50

Citation No. 3024476 states:

> A rubber-tired mine tractor ... was not provided with a fire suppression device in proper operating condition and in accordance with the requirements in National Fire Code 17 ... one of the two actuating bottles had been punctured, or the air seal broken (Joint Exh. 33).

McDaniel testified that the fire suppression system on the cited mine tractor was of the dry chemical type. The system included two bottles ("actuating bottles") that contained compressed air. The bottles were interconnected with a chemical container. To use the system, a pin was driven into a metal seal inside an actuating bottle. The seal was punctured and the air within the bottle was expelled, spreading a fire suppressing chemical (Tr. II 393, 402). The actuating bottles were installed at different locations on the tractor so that they could be quickly activated if the need arose. (Tr. II 403).

McDaniel found that one of the bottles on the tractor was useless. There was a hole in the seal and the compressed air had escaped (Id.). With one bottle useless, the fire fighting system was compromised (Tr. II 394, 397).

Fire suppression equipment must be examined on a weekly basis, and McDaniel believed Faith should have known of the violation because the punctured bottle was obvious visually. However, McDaniel did not know how long the bottle had been punctured (Tr. II 395). He agreed the bottle's seal could have been punctured between required examinations (Tr. II 397).

The person most likely to be endangered by the lack of a fully operative fire suppression system was the operator of the tractor (Tr. 398).

The Violation

Section 75.1107-16(b) requires that each fire suppression system be tested and maintained in accordance with the requirements in the National Fire Code (NFC). According to McDaniel, the pertinent part of the code violated was NFC No. 17; Subsection D. Subsection D requires, in part, that the amount of expellent gas for dry chemical systems be checked to ensure that "there is enough to provide an effective discharge" (Joint Exh. 33A). Obviously, this means the system must be maintained to provide an effective discharge of chemicals.

I agree with counsel for the Secretary that the fact the system came with two actuator bottles means both bottles had to be maintained in operative condition to have an "effective discharge" of chemicals. As counsel stated, "both bottles in the system had to be maintained to have [the system] operate as designed" (Sec. Br. 72). I conclude therefore that the violation existed as charged.

Gravity and Negligence

This was not a serious violation. As McDaniel stated, the system retained at least part of its original capacity to fight a fire (Tr. II 394, 397). In addition, the testimony did not establish any conditions associated with the violation that would have made a fire likely.

McDaniel could not say how long the actuator had been punctured. He agreed it could have happened between the required inspections of the system (Tr. 397). I conclude therefore that Faith's negligence in allowing the violation to exist was low.

Docket No. SE 94-256

Citation/ Order No.	Date	30 C.F.R.	Assessment
3202337	6/07/93	75.313	$50

> The methane monitor on a scoop loader ... used to load coal (one of two scoops on the 001 section) would not operate. The operator stated the unit was "jumped" out to

permit the machine to operate.

> The operator stated that the monitor stopped working after he removed it from loading coal; however it was observed loading and hauling coal shortly before it was examined (Joint Exh. 62).

McDaniel testified that the methane monitor on one of the two scoops used on the 001 Section was not working. He tested the monitor by using its test control. When he twisted the test button, the machine would not deenergize. Prior to testing the machine, McDaniel saw it loading two cars of coal (Tr. II 413).

McDaniel stated that after he saw the scoop operating and after he tested its monitor, Stockwell arrived on the section. McDaniel spoke with Stockwell about the monitor. Stockwell explained that it had been "jumped out" (Tr. II 415, 418). (When a methane monitor is "jumped out," the monitor's shut off mechanism is bypassed electrically to allow the machine to operate regardless of methane (Tr. II 415-416).) To the best of McDaniel's recollection, Stockwell took the scoop to the surface after discussing the monitor with McDaniel.

McDaniel acknowledged that a methane monitor was a "very delicate" piece of equipment and that it was "easy for it go down" (Tr. II 418, 419).

Normally the No. 15 Mine does not liberate methane and no methane was detected at the time the violation was cited. When methane was liberated, it was in "very small quantities" (Tr. II 419).

Stockwell testified that he "jumpered out" the monitor because he was going to use the scoop as a means of transportation. He maintained the only time the methane monitor had to be working was when the scoop was loading coal. Stockwell also asserted McDaniel could not have tested the methane monitor by turning a knob because the monitor had a test button (Tr. II 428). Or, if McDaniel did test the monitor, he did so after Stockwell brought the scoop into the mine as a means of transportation, not when it was used to load coal (Tr. II 426).

The Violation

I conclude that the Secretary has not established a violation of section 75.313. The standard cited relates to mine fan stoppages when persons are underground. The citation was issued because the methane monitor on the loading machine was inoperable. 30 C.F.R. § 75.342(a)(1) requires methane monitors to be installed on all loading machines and section 75.342(a)(4) requires that once installed, the monitors be maintained in permissible condition.

The citation does not charge a violation of section 75.342(a)(4). It is an axiom of due process that a respondent must be advised correctly of the standard it is alleged to have violated. When the citation is defective, it must be modified to reflect the proper standard, or it must fail. Here, the citation was not modified.

Finally, I note the Secretary's contention that Stockwell's testimony that he intentionally bypassed the methane monitor should result in a post-hearing finding of unwarrantable failure (Sec. Br. 150). Given the defective citation, I need not reach the issue. I observe, however, that if the correct standard had been cited, I would not have found unwarrantable failure. The original citation did not charge unwarrantable failure and Faith was not given notice that such an allegation was at issue.

Docket No. 93-365

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024810	3/16/93	75.1722(a)	$88

Citation No. 3024810 states:

> The No. 2 belt drive was not suitabl[y] guarded in that chicken wire was being used to guard the moving parts of the belt drive (Joint Exh. 48).

On March 16, 1993, MSHA inspector Billy Layne observed that chicken wire was used to guard the No. 2 belt drive. The wire was not mounted on a frame. The guard was "just wired up" at the

top (Tr. II 445, 454). The wire was located four to six inches away from the moving parts of the belt drive (Tr. II 457).

If the wire had been framed, it might have been acceptable as a guard because it would have been stable enough to keep a person from pushing into the belt drive (Tr. II 446). However, given the way the chicken wire was installed, Layne believed it "would take no effort to get it into the moving parts" (Tr. II 450).

Layne stated that the discharge roller of the belt drive was turning. The roller was located approximately four and one half feet off of the mine floor. In addition, there were other moving parts at various heights ranging from between 12 inches to four and one half feet off the floor (Tr. II 440-441).

Usually, the area around the belt was wet, but in this instance, the belt had not been operating long and the area was dry. In addition, the floor was level (Tr. II 442).

Layne testified that the belt had been installed recently (Tr. II 443-444). Layne was certain it was not in place when he conducted a "pre-opening" inspection of the mine (Tr. II 445). To the best of Layne's recollection, the condition was abated when Faith built a metal frame and secured the wire to the frame (Tr. II 447, 451).

Layne regarded the violation as S&S because belt drives have to be cleaned and without adequate guards, miners doing the cleaning can become caught in the belt drive mechanisms. Normally, only one person is assigned to clean around a belt drive (Tr II 450).

Layne was of the opinion that many of the fatalities that occur in coal mines involve inadequate guards at belt drives (Tr. II 447). He testified that in addition to being killed by belt drives, miners have had limbs severed or broken (Tr. II 447-448). Here, the particular danger presented by the lack of an adequate guard was that a miner would stumble and fall toward the pinch point of the belt drive and the chicken wire would not keep the miner from falling into the pinch point (Tr. II 456).

Layne believed Faith should have known of the inadequate guard, but he also recognized that the belt was newly installed, and he speculated that Faith might not have had time to make

certain the guard met the standard's requirements (Tr. II 448-449).

Stockwell maintained that a few days before the inspection, another MSHA inspector had not found the guard to be out of compliance (Tr. II 460). In addition, he believed that when Layne saw the belt drive, the chicken wire was nailed to a wooden frame (Tr. II 461). Stockwell admitted, however, that he was not at the belt drive when Layne cited the violation (Tr. II 464).

The Violation

Section 75.1722(a) requires that drive and takeup pulleys "which may be contacted by persons, and which may cause injury," shall be guarded. The evidence establishes that the requirements of the standard were not met.

I accept Layne's testimony that the chicken wire was not secured at the bottom of the drive. Layne saw the belt drive and the "guard" on March 16, 1993. Stockwell did not. I also accept Layne's opinion that the pinch point on the belt drive could be contacted. As Layne testified, any miner who stumbled or fell against the unsecured chicken wire could have been caught in the pinch point. The wire would not have been effective in breaking the miner's fall and keeping him or her from the moving parts.

I also conclude that contact with the pinch point could have caused an injury. After all, the belt was traveling over the rollers at the rate of 390 feet per minute (Tr. II 465). The violation existed as charged.

S&S and Gravity

The violation was S&S. While it is true the belt was newly installed and few, if any, miners had yet been exposed to the hazard created by the inadequate guard, I must view the hazard in terms of continued normal mining operations (U. S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1994)).

As Layne noted, during the course of continued normal operations, miners would have been assigned to clean up in the vicinity of the belt drive. Also, the floor around the belt drive would have become wet and slippery (Tr. II 442). I

conclude, therefore, that it was reasonably likely that as mining went on, a miner would have slipped, fallen against the chicken wire and been pulled into the belt drive's pinch point. The miner would have been lucky if he or she was maimed. (I note in this regard, Layne's unrebutted testimony that many of the fatalities recorded by MSHA involve inadequate guards at belt drives (Tr. II 447).)

In addition to being S&S, this was a serious violation. As I have found, the exposure of miners to the hazard meant that dismemberment or death could have been expected.

Negligence

Even though the belt was newly installed, Faith was obligated to make certain the belt drive was guarded properly. Because it installed a "guard" that did not prevent contact by miners, Faith was negligent.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024814	3/17/93	75.220	$128

Citation No. 3024814 states:

> The supplement to the operators roof control plan dated July 22, 1992, was not being complied with in that the last pillar had been split for the belt line and cribs had not been installed for the crosscut on the right hand side of the belt line. The operator's [roof control plan] supplement ... requires that cribs ... be installed in the last open crosscut on the right hand side of the belt line (Joint Exh. 51).

Inspector Layne testified that on March 17, 1993, during the course of the inspection of the mine, he visited a crosscut on the right hand side of the belt line. Approximately five miners were working in the area (Tr. VI 213). Cribs were being installed in the vicinity. Immediately adjacent to the crosscut, the beltline had been driven through a pillar, splitting the pillar. (Tr. VI 215-216; Joint Exh. 51B). According to Layne,

under the approved roof control plan, cribs should have been installed prior to mining the pillar (Tr. VI 216, 218, 219). The approved roof control plan stated, "cribs will be set 5 ft. apart (max)" and "where practical, cribs ... will be set prior to making the split." No cribs had yet been set in the subject crosscut (Tr. VI 218; Joint Exh. 51A).

Layne claimed that Stockwell told him cribs were not installed because Stockwell had to keep the area open to haul gob material and that there would not have been room for equipment to pass through the area if cribs had been installed (Tr. VI 222, 246, 256-257). This meant to Layne that equipment had passed through the area where the cribs were missing (Tr. VI 223). Indeed, according to Layne, extensive work had been done inby the cited area (Tr. VI 245).

Layne testified that the roof in the area was not known as being "really good" and that the mine had a history of roof falls (Tr. VI 225, 226). Although roof bolts had been installed, the area still needed cribs for adequate support of the roof (Tr. VI 229).

According to Layne, "[anyone] that has any ... qualifications" should have known the cribs were required (Tr. VI 221). He described the lack of cribs as "real obvious" (Tr. VI 231). Layne believed that the crosscut had lacked cribs for more than three or four shifts (Tr. VI 233). In Layne's view, the condition should have been noted during the daily preshift examination and should have been corrected (Tr. VI 234).

Layne believed the condition was S&S. Layne stated that given the compromised roof "[y]ou could expect to have a fall in that area" (Tr. VI 247). Ram cars had traveled under the roof as they transported the gob (Tr. VI 249). Layne stated of the roof, "It's roof you would want to pay attention to" (Tr. VI 251). If the roof had fallen and struck a miner, it was likely that the miner would have sustained permanently disabling injuries or have been killed (Id.)

To abate the condition, Faith installed cribs as required (Tr. VI 254).

Because the crosscut was part of an escapeway, Stockwell maintained that if cribs had been used, they would have blocked the escapeway. Also, he noted that the roof control plan required cribs to be set prior to splitting a pillar "where practical." He maintained that it was not "practical" to set the cribs because of the escapeway problem and because the crosscut could not have been used to haul gob if cribs narrowed it (Tr. VI 277-278). In any event, he believed pillar support of the roof was adequate, even after the pillar in question had been split (Tr. VI 276). Finally, although Stockwell stated that Layne was in error when he testified that equipment had passed through the crosscut, he confirmed that miners had worked in the area prior to the day of the inspection (Tr. VI 285).

The Secretary's Motion

Counsel for the Secretary moved that the doctrine of res judicata be invoked and that Stockwell be barred from raising defenses to this and two other alleged violations. According to counsel, Stockwell pleaded guilty to criminal charges involving two counts of violating the Mine Act in a case before a United States Magistrate Judge, in the United States District Court for the Eastern District of Tennessee, and on June 24, 1992, a judgment was filed in the case (U.S. v. Lonnie Ray Stockwell, Case No. 92-074M, CR-1-92-00033-01.) The judge magistrate sentenced Stockwell to three years of probation and ordered Stockwell to pay a fine of $1,500. As a condition of the probation, Stockwell was ordered to refrain from any serious unwarrantable violation of the Act pertaining to roof support and ventilation.

Subsequently, Stockwell was ordered to show cause why probation should not be revoked. The order was supported by a report from Stockwell's probation officer. The report stated that Stockwell had been cited for several unwarrantable violations, including the citation here at issue (Citation No. 3024814) and two other alleged violations. (The latter two alleged violations are included in Docket No. SE 93-366 (Tr. V 61-62).)

The judge magistrate held a probation revocation hearing at which MSHA inspectors testified. Following the hearing, the judge issued an order which stated in part:

> Having heard all of the witnesses and the argument[s]...it is concluded and the [judge] finds serious life threatening violations of the [Mine Act] including but not limited to the conduct of mining well beyond the 12-foot limit beyond roof support were committed or caused to be committed by the defendant in late 1992 and early 1993 in ... Faith Coal Company Mine No. 15 (United States v. Lonnie Ray Stockwell, D. Tenn (September 16, 1993) (Memorandum and Order) 3.)

The judge magistrate revoked Stockwell's probation and sentenced him to six months in prison. Subsequently, the judge denied Stockwell's motion for a new trial and no further appeal was taken.

In moving that the doctrine of res judicata be invoked, Counsel asked that I be bound by the findings of the judge and conclude that the three violations described in the citations and order occurred (Tr. V 31-32, 35, 61-62). Counsel argued that because the judge "found that the violations had occurred at least as issued," no testimony or other evidence should be admitted into the record regarding the alleged violations (Tr. V. 62).

I denied the Secretary's motion. I concluded that I could not determine from the judge's memorandum and order that his decision was based upon his finding that the three alleged violations had occurred as charged (Tr. V 64). I stated:

> [G]iven the general wording of [the judge's] finding that there was a serious, life threatening violation of the Act, including, but not limited to, the conduct of mining well beyond the 12-foot limit beyond roof support in late 1992 and early 1993; and given the number of alleged violations he was asked to consider and upon which he apparently based his finding, I cannot conclude that he must have been referring to the three violations referenced in [the Secretary's] motion (Tr. V 65-66).

I also noted that if I were wrong and the judge had made specific findings concerning the violations' existence, apparently he had taken no evidence and made no findings with respect to negligence and gravity (Tr. V 66). Indeed, these concepts, as applied under the Mine Act, were not relevant to the criminal proceeding. Under both the doctrines of res judicata and collateral estoppel, the issues for which preclusion is sought in the second action must be identical to the issues decided in the first action (See Parkland Hosiery Co, Inc. v. Shore, 439 U.S. 327, 336, n5 (1979)).

For these reasons, I affirm my bench ruling denying the Secretary's motion.

The Violation

Section 75.220 requires an operator to follow its approved roof control plan. The evidence with regard to this alleged violation establishes that Faith did not do so and that the violation existed as charged. The supplement to the roof control plan of July 22, 1992, required that where practical, prior to splitting a pillar, cribs be set as shown on an attached map (Joint Exh. 51B). Layne convincingly testified that the pillar in question had been split to accommodate a beltline, and that cribs had not been set. The only question is whether it was practical to set cribs.

Stockwell testified that it was not practical because if cribs were installed there would not have been sufficient clearance to use the crosscut as a passageway for hauling gob, and because the crosscut could not have been used as an escapeway. However, Stockwell's testimony was overcome by Layne's observation that if Faith had used other available areas to dump the gob, it would not have had to travel through the crosscut. In addition, and as counsel for the Secretary observed, the regulations allow escapeways 4 feet in width when supplemental roof support (e.g., cribs) is necessary. Since the roof control plan provided for a maximum distance between the cribs of 5 feet, the cribs could have been installed and the crosscut could still have been part of a valid escapeway.

I conclude that the violation existed as charged.

S&S and Gravity

The violation was S&S. The cited standard was violated. I accept the testimony of Layne that the failure to set the cribs weakened the roof in the crosscut. I also accept his testimony that roof in the area was not "really good" (Tr. VI 225). By Faith's own admission, miners passed under the area of inadequately supported roof. Given the nature of the roof, the fact that it was inadequately supported, and the exposure of miners to the hazardous roof, I conclude it was reasonably likely that as mining continued and miners passed through the crosscut, a roof fall accident would have occurred. In the event of such an accident, it also was reasonably likely the miners involved would have suffered death or at least serious and disabling injuries. This was roof "you had to pay attention to" and Faith paid no attention to the requirement that the roof be supported adequately (Tr. VI 251).

The violation was serious. As noted, I accept Layne's testimony that the roof was not consistently stable. I also accept his testimony that splitting pillars without installing supplemental support weakened the roof. This common sense observation simply reflects the fact that in mining, as in the rest of life's ventures, rarely is less more. By Stockwell's own admission, the crosscut had been traveled and miners who passed through it had been subjected to hazards that easily could have resulted in serious injury or death.

Negligence

Since miners had traveled through the crosscut, the area had to be preshift examined. The lack of cribs was visually obvious. The violation should have been detected and corrected. Faith failed to exhibit the care required.

Docket No. SE 93-366

Citation/ Order No.	Date	30 C.F.R.	Assessment
3202244	3/17/93	75.220	$2800

Citation No. 3202244 states:

The approved roof control plan dated

> 4-7-92, was not being complied with in that the following conditions [were] observed in the area of survey station No. 114 [:] a place had been driven 24 feet on the left side and 27 1/2 [feet] on the right side inby roof supports; a neck had been driven off this place 23 feet inby roof supports; also a crosscut had been driven into an unsupported area in an adjacent entry which had been advanced inby the crosscut and roof supports had not been installed. The approved roof control plan requires cuts not to exceed 10 feet when conventional equipment is used (Joint Exh. 54).

In addition to finding the conditions constituted a violation of section 75.220, MSHA inspector Larry Anderson, found that the violation was S&S and was caused by Faith's unwarrantable failure to comply with the cited standard.

Anderson testified that when he inspected the mine on March 17, 1993, he was underground with Stockwell and asked him to identify their location on a mine map. Stockwell pointed to Survey Station No. 114. No miners or mining equipment were in the area at the time (Tr. VI 296, 333). However, miners were in the mine doing "dead work" -- i.e., work not directly related to production (Tr. VI 292-297).

Under the roof control plan, when coal was cut with conventional equipment, the cut could not exceed 10 feet in length (Tr. VI 298; Joint Exh. 54A at 13). Anderson noticed that the ribs in the area were jagged and did not have the "look" of coal cut with the continuous mining machine (Tr. VI 299). He believed conventional equipment had been used.

Anderson stated that near Survey Station No. 114, he saw two areas across from one another that had been driven in excess of the allowed limit. One area had been driven 24 feet beyond roof supports. The other had been driven 27 1/2 feet beyond roof supports (Tr. VI 303-304).

In general, the roof in the area had places where water was coming through. Also, the roof was exhibiting scaling, and had

fallen at several locations. (Tr. VI 304). Anderson explained that the roof was shale, and that the water made the shale slip and "just fall out for no reason at all" (Tr. VI 305).

In the same general area, Anderson observed a neck driven 23 feet inby roof supports (Tr. VI 306). From observing the coal ribs in the neck, Anderson determined that the neck area also had been driven with conventional equipment (Id.). There was no roof support in the neck between the last row of roof bolts and the face (Tr. VI 308). The roof condition in the neck was similar to that in the other two areas.

Finally, in an adjacent entry, Anderson observed an area where a crosscut had been driven through, into an unsupported area. Anderson stated, "you cannot advance an entry or a crosscut into an unsupported area unless that area is inaccessible, which this one wasn't" (Tr. VI 309). Anderson identified paragraph 4 on page 5 of the roof control plan as the provision prohibiting the condition he observed (Id.). This portion of the plan required that openings creating an intersection be permanently supported or that at least one row of temporary supports be installed before any other work or travel was permitted in the intersection (Joint Exh. 54A at 5). The unsupported area was approximately 20 feet wide and 30 feet long. In Anderson's opinion, under the roof control plan, roof bolts should have been installed on five foot centers in the area (Tr. VI 311-312, 330).

Anderson measured the areas of unsupported roof with his tape measure. Rather than travel under the roof, he tied the tape to his hammer and threw it to the end of each area (Tr. VI 313).

The areas where the unsupported roof conditions occurred were part of an intake air course. An intake air course must be examined on a daily basis during each production shift (Tr. VI 399). In Anderson's opinion, the conditions were visually obvious and should have been observed during the examinations (Tr. VI 312). In addition, he maintained the conditions were the result of more than ordinary negligence on Faith's part, and that they represented "complete and total disregard for the safety ... of the people [who] work[ed] for [Faith]" (Tr. VI 352).

In finding that the alleged violation was S&S, Anderson considered the generally poor roof conditions in the subject area of the mine, the expanse of unsupported roof and the "strong evidence" that persons had been working under unsupported roof (Tr. VI 316). This "strong evidence" was the fact that to cut the coal for the cited distances, the cutting machine operator, the scoop and the tractor operator, in addition to others, would have had to proceed beyond the last row of permanent roof supports (Tr. VI 317). (Later, Anderson recanted his testimony with respect to the tractor operator. Nevertheless, he believed the tractor operator still was subject to danger in that a roof fall could have traveled into the area where roof supports were installed and could have endangered the tractor operator and others working under supported roof (Tr. VI 350-352).)

Anderson stated that Stockwell conducted the preshift examination on March 17, 1993, as well as on some preceding days. This meant that Stockwell examined the areas where the conditions existed. There were no references to the conditions in the preshift examination book (Tr. VI 320). When Anderson served the citation on Stockwell, Stockwell did not respond to it other than to state that he was not aware of the conditions (Tr. VI 314).

Anderson did not know when the areas had been cut. However, because mining had advanced approximately 500 to 600 feet inby the areas, he judged the areas had been there "for quite some time" (Tr. VI 321).

The conditions were abated by installing timbers to support the roof (Tr. VI 325).

Faith called Dwight D. Morrison as a witness. Morrison was a surveyor for TCC. He testified that he and one other TCC employee were the only surveyors used at the No. 15 Mine (Tr. VI 361). He stated that on April 19, 1993, he went to the mine to measure the areas referred to in the alleged violation (Tr. VI 363-364, 392). He claimed that he found "some differences" between his measurements and the measurements that appear on the citation (VI 365). With respect to the first two areas mentioned in the citation, Morrison found that the left side had been driven 15 feet from the last row of roof bolts, and the right side had been driven 19 feet from the last row of roof bolts

(Tr. VI 366-367). In addition, Morrison claimed that on the left side there was a second row of roof bolts that was difficult to see, and that the inspector may not have noticed (Id.). The final area listed on the citation was not observed by Morrison (Tr. VI 367-368).

On cross examination, Morrison admitted that he had no way to know whether the conditions he found on April 19 1993, existed on March 17, 1993 (Tr. VI 369).

Stockwell believed that Anderson may have missed a second row of roof bolts in the first area because they were underneath a ledge. Despite this, he agreed that a violation of the roof control plan existed in the first and second areas. ("I'm not saying that the violation did not exist...It did exist. But ... it is much too severe .... Some of my men went beyond the ... limit ... [p]robably three to five foot beyond what should have been gone" (Tr. VI 372, 373). Stockwell maintained that, at most, three miners were affected by the conditions (Tr. VI 351).

Stockwell also disputed the presence of the last area mentioned on the citation. He claimed that he never located it and that when the citation was abated, the abatement did not include the area (Tr. VI 373).) However, he agreed he did not protest to Anderson that the citation, as written, was in any way incorrect. He stated that he and Anderson "just don't communicate very well, and it's better ... if I don't argue the point with him" (Tr. VI 390).

Finally, Stockwell maintained that the conditions existed in places that did not have to be examined daily. Because the unsupported areas were not as great as those found by the inspector, and because they existed in places that were not required to be examined daily, the failure to detect and correct the conditions was not due to more than ordinary negligence (Tr. VI 383-384).

The Violation

I conclude the violation existed as charged. Anderson's testimony was compelling. He viewed each of the areas described in the citation. He measured the areas. Stockwell was present when at least two of the areas were measured. As the recipient of the citation, he knew of Anderson's allegations with respect to all of the areas. Stockwell's assertions that Anderson's

measurements were wrong and that the last area mentioned did not exist are completely undermined by his failure on March 17, to disagree in any fashion with Anderson's assessment of the conditions. It defies reason that Stockwell, as the representative of Faith, would have declined to advise the inspector of his mistakes when the "mistakes" had the potential for costing the company money. Stockwell's claim that he and Anderson did not communicate very well, and therefore, that he held his tongue, simply is not believable (Tr. VI 390). To observe that Stockwell is not shy about expressing his opinions, is to state the obvious.

S&S and Gravity

The violation existed as charged. The hazard associated with the violation was that the unsupported roof would fall on miners working under it. Given the fact that the roof in the area was of an unstable nature, and given the fact that miners went under the unsupported roof, as Stockwell admitted, I conclude it was reasonably likely the violation would have contributed to a roof fall that would have resulted in death or serious injury. Anderson was right to find that the violation was S&S.

The violation also was very serious. Stockwell admitted that miners traveled and/or worked under unsupported roof in two of the areas, and I find that they also did so when they cut into the adjacent entry

Although no roof falls yet had occurred in the cited areas, I accept Anderson's testimony that the shale roof was scaling, and was in poor condition. I also accept Anderson's testimony that water posed a problem for roof control, in that it made parts of the roof subject to sudden, unanticipated falls. Exposing miners to unsupported roof under such conditions was equivalent to requiring them to play Russian roulette.

Unwarrantable Failure and Negligence

Anderson was right as well to find that the violation was the result of Faith's unwarrantable failure to comply with its roof control plan. The Commission has defined unwarrantable failure as conduct that is not justifiable and inexcusable. It is conduct that is the result of more than inadvertence,

thoughtlessness or inattention. In short, unwarrantable failure is aggravated conduct constituting more than ordinary negligence (Emery Mining Corporation, 9 FMSHRC 1997, 2001 (December 1987)).

Mining had moved well inby the cited areas and I accept Anderson's testimony that the violation existed for several months. I also accept his testimony that the areas existed in an intake air course that had to be examined daily. Further, given the generally unstable nature of the roof in the area, I conclude that Faith had a high standard of care to ensure that the roof was supported adequately. Faith's failure to meet that standard over a period of several months constituted more than ordinary negligence.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3203325	3/17/93	75.203(a)	$3,100

Order No. 3202245 states:

> Mining methods [were] not compatible with effective roof control on the 001 section in that sightlines had not been used to determine the direction of mining. Several pillars were not uniform in size or shape and the entries had not been driven according to projections (Joint Exh. 55).

In addition to a violation of section 75.203(a), Anderson found that the cited condition was S&S and that Faith unwarrantably failed to comply with the standard.

By way of background, Anderson explained that sight lines are determined by hanging plumb bobs from two separate spads, lining up the strings holding the bobs and sighting the point where the strings align on the face. Once the sight line on the face is established, the width of the entry is marked on the face by measuring from the center of the line (Tr. VI 406-407).

Spads are set according to the mine map and the sight lines are a way of making sure mining is done in conformance with projections on the map (Tr. VI 407). Anderson stated that it is usually the section foreman who is responsible for making certain

that the mine is driven according to the mine plan and in conformance with the sight lines (Tr. VI 408).

According to Anderson, one danger of not conforming to sight lines is that pillars may not be of adequate size to support the roof (Tr. VI 409). The resulting hazard is that the roof may fall. Another danger of mining off plan is that miners may break into abandoned workings. The workings may contain water or oxygen deficient air and these elements may inundate the active workings (Tr. VI 410). A final danger is that if miners are cut off from the surface, would-be rescuers will not know for certain the mine has been driven true to the mine map, and will misdirect rescue efforts (VI 412-413).

Anderson was alerted to the alleged violation when he looked at the mine map and noted irregular variations in pillar sizes (Tr. VI 414). Anderson identified an area on the mine map where he believed sight lines had not been used. He stated that he didn't "see a straight place for any distance on [this portion of] the map" (Tr. VI 417, 435-436; Gov. Exh. 5 (left center portion within blue circle)). (Anderson testified that Gov. Exh. 5 was not the exact map that he used when he cited the alleged violation. Rather, it is a latter version of the map, and it depicts more of the mine than actually existed on March 17. However, it includes the cited area (Tr. VI 446).) Anderson maintained that if sight lines had been used, the map would have "looked like a checkerboard" (Id.).

Anderson stated that although the mine map alerted him to the possibility of a violation, he based the order both on the map and on a visual examination of the areas shown on the map. During his underground inspection, he checked pillar sizes and shapes, and he checked entries to determine if they were straight (Tr. VI 419).

Anderson agreed that if adverse roof conditions were encountered, a mine operator could narrow entries and use additional roof supports. He also agreed that there were times when entries had to be moved out of line. He stated that there was a lot of bad roof at the mine (Tr. VI 441). He maintained, however, that the cited irregularities were so extensive they could not have been the result of adverse roof conditions (Tr. VI 447-448).

Anderson testified that some areas where sightlines had not been used were driven by the previous mine operator. He did not include these areas in the order (Tr. IV 442-443).

By reviewing the dates on the mine map, Anderson determined that Faith had been mining without sightlines for between 30 to 60 days (Tr. VI 420). In Anderson's opinion, Faith should have known of the existence of the violation by observing that the underground entries and crosscuts were not straight and that the pillars were therefore irregular (Tr. VI 423).

The violation was S&S because it resulted in small pillars that put undue stress on the mine roof, and because it raised the possibility that miners unintentionally could cut into old works (Tr. VI 425). (He agreed, however, that no old works were shown on the mine map adjacent to the cited area (Tr. VI 444).) In Anderson's view, it was highly likely that the failure to use sightlines could have lead to the injury of miners because some pillars were much too small (Tr. IV 426). He estimated that some were less than half of their required size (Tr. VI 426-427).

Anderson believed that Faith should have known from past experience that it had to use sightlines. Moreover, Faith received mine maps on a monthly basis and a review of the maps should have indicated the mine was not being driven as required (Tr. VI 431).

Finally, Anderson testified that he had cited the wrong standard. Rather than cite section 75.203(a), which requires that the method of mining not expose any person to hazards caused by excessive widths of rooms, crosscuts, and entries; and that pillar dimensions be compatible with effective control of the roof, he should have cited 30 C.F.R. § 75.203(b), which requires that a sightline or other method of directional control be used to maintain the projected direction of mining (Tr. VI 430, 449-450).

Stockwell testified that the area he understood to be encompassed by the order was much more restricted than that testified to by Anderson. The area that Stockwell thought was involved included one end of a long and narrow pillar. Stockwell maintained that the narrow configuration was due to an engineering mistake. While there were two or three other places that were deliberately off projection, they were caused by bad

roof conditions (Tr. IV 459-460, 463; Gov. Exh. 5 (upper left pink "x")). Most of the area identified by Anderson as being included in the violation was mined by the previous operator (Tr. VI 466).

Stockwell also maintained that surveyors from TCC came to the mine every three or four days to set spads, and that Faith used the spads to establish and follow the sightlines. As he put it, "[W]e followed the sightlines. We followed the spads set by the TCC surveyors" (Tr. VI 471). Stockwell maintained that there was a two or three week period when the affected area was mined, and that TCC's surveyors came to the mine to set spads on the average of every third day during that period (Tr. VI 472).

Motions to Vacate and to Amend

Based on Anderson's admission that he should have cited section 75.203(b), Faith moved to vacate the order of withdrawal. Counsel for the Secretary countered by moving that the order be conformed to the proof (Tr. VI 449-450). I reserved ruling on the motions. Having considered the record, I deny the motion to vacate, and grant the motion to amend.

The law is clear, amendment is to be freely granted where the opposing party is not prejudiced, and this is especially so when the Secretary seeks to allege a substantively related subsection of the standard applied to the cited conditions (Cyprus Empire Corp., 12 FMSHRC 911, 916 (May 1990)). As counsel for the Secretary points out, the essence of the allegation is that Faith did not use sightlines or other methods of directional control to maintain the projected direction of mining in rooms and entries. The inspector testified that he discussed the use of sightlines with Stockwell in conjunction with the order. The order itself indicates that it was abated following such a discussion (Tr. VI 430; Joint Exh. 55). I credit Anderson's testimony.

The order's wording is not a model of clarity. It refers to "mining method" and "effective roof control," phrases that harken back to section 75.203(a). It also states that "sightlines had not been used," which refers obviously to section 75.203(b). I conclude, however, that the confusion inherent in this wording was overcome by Anderson's discussion with Stockwell, and Faith was on notice that the essence of the violation was the failure

to use sightlines or other methods of directional control on the 001 Section.

Moreover, Faith did not show prejudice. It was fully prepared to defend.

The Violation

The issue is whether the Secretary has established that in the cited area, sightlines were not used to control mining direction. I conclude that he has not.

Anderson did not see any surveying or mining being conducted. He had no first-hand knowledge of whether or not sightlines were used. Therefore, the Secretary had to prove the violation by circumstantial evidence. For this reason, the Secretary relied upon Anderson's testimony that the mine map's depiction of irregularly shaped entries and pillars was a visual "tip off" that sightlines had not been used, and upon Anderson's observation, that he looked at the size and shape of the entries and crosscuts to "be sure that they're straight" (Tr. VI 419).

Stockwell countered by testifying, among other things, that such deviations from projections as existed were deliberately made as a result of adverse roof conditions, something that Anderson believed was possible but not likely, given what he viewed as the extensive nature of the deviations (Tr. VI 469). Stockwell also testified that even in the areas where deviations existed, Faith had used sightlines:

> Q: Is it your testimony that ...you ...purposefully mined ... in these directions and in the way that it's shown on this map [Gov. Exh. 5]? Did you do that by design?
>
> A: I did it by design, by spads placed in place by T.L.C. surveyors. They came over there during this time every three or four days. Every time we'd get ... another area opened up, they'd come and set us spads to keep us on the sightlines, and we'd follow the sightlines. The spads are still in place if you want to took at them if you want to go see. But, yes ... we followed the sightlines. We followed the spads set by the T.L.C. surveyors (Tr. VI 471).

To find that a violation existed, I must find this testimony is not credible.

I cannot do so on the basis of this record. As noted, even though he considered it unlikely, Anderson agreed that the deviations could have been caused by roof problems, and indeed, the record is replete with testimony regarding adverse roof conditions. Also, the Secretary did not offer evidence that the required spads were not in place, or testimony from miners that it was a practice at the mine not to follow sightlines. Clearly, such testimony would have been extremely helpful to the Secretary, and its absence raises questions regarding the strength of the Secretary's proof. Lacking such testimony, I cannot discredit Stockwell's insistence that sight lines were followed and that deviations were necessitated by poor roof. Therefore, I conclude that the Secretary has not established a violation of section 75.203(b).

Remaining Civil Penalty Criteria

Having made dispositive findings regarding all of the alleged violations contested by Faith; including the gravity of the violations and Faith's negligence, I turn to the remaining civil penalty criteria.

Ability To Continue In Business

The Act requires that I consider six criteria when I determine the amount of any penalties to be assessed (30 U.S.C. § 820(i)). One of the criteria is the effect of the civil penalties on the operator's ability to continue in business. As a general rule, in the absence of evidence that the imposition of civil penalties will effect adversely the operator's ability to continue in business, it is presumed that no such effect will occur (Sellersburg Stone Company, 5 FMSRHC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). However, the operator may rebutt the presumption.

Counsel for the Secretary argued that Faith had sufficient assets to pay the penalties proposed and that when I evaluated the company's financial status, I should include all assets of the Stockwell family. Counsel stated that the family's money had been commingled with Faith's assets and, in addition, Mrs. Stockwell had undertaken liabilities in support of the mine

(Tr. II 15). In the alternative, counsel argued that because Faith effectively was out of business, consideration of the ability to continue in business criterion was irrelevant and the penalties assessed should be those proposed (Tr. II 16).

Stockwell maintained that it would be wrong to consider all of the family's assets. He testified that although Faith's profits and losses were reported to the IRS on Schedule C of the Stockwells' joint federal income tax return, he was the sole proprietor (Tr. II 137-138). He stated that all of the funds derived from the mine were reinvested in it.

With respect to the commingling of family and company funds, Stockwell explained that when Faith did not have enough money to meet a payroll or to purchase or repair equipment, Mrs. Stockwell wrote checks for the necessary amounts from her personal account. However, Faith always repaid her and she redeposited the payment in her personal account (Tr. II 18). According to Stockwell, there was no intent to co-mingle funds in a joint venture, and the family's assets should not be viewed as assets available to the company (Tr. II 19).

Moreover, although the Stockwells filed joint federal tax returns, there was a separate schedule for Faith that bore Stockwell's name only (Tr. II 20). While it was true that Mrs. Stockwell had authority to sign Faith's checks, she had that authority only as a convenience to Stockwell so that she could buy parts or pay bills when Stockwell was absent (Tr. II 21). Mrs. Stockwell did not keep books for the company and she had no functions within the mining operation (Tr. II 64).

With regard to the family's assets, Stockwell stated that he and his wife jointly own a farm of approximately 213 acres, which they bought in 1969 (Tr. II 114-115).) He also stated that the family home and the five and one half acres on which it stands, is owned by his wife (Tr. II 24-25). The property was purchased and titled in Mrs. Stockwell's name before Stockwell became involved in Faith (Tr. II 25, 105). (At one time, the Stockwells had a larger home. However, it burned in January 1990, and the Stockwells moved into a smaller house (Tr. II 25, 78, 106-107). Stockwell stated that his homeowner's insurance had been cancelled shortly before the fire and that he and his wife "lost everything" in the fire (Tr. II 79).)

The Stockwells also own 165 acres of land in Sequatchie County, Tennessee. According to Stockwell, the land is "just sitting there" (Tr. II 103, 111).

Stockwell maintained that Faith begun operating the No. 15 Mine in late 1990 (Tr. II 26). Prior to that time, the mine was abandoned (Tr. II 12-13). To finance the startup costs and to purchase equipment, Stockwell borrowed over $174,000 from the First National Bank of Shelbyville.

Stockwell identified a letter dated February 14, 1994, from the bank. It stated that an indebtedness of $119,268.64 on the loan was past due. The bank demanded that the account be brought up to date. Payments on the loan are $3,300 per month (Tr. II 29, 145; D. Exh. 2). (The original amount due was $174,531.30 (Tr. II 164); D. Exh. 4).)

Stockwell testified that he had attempted to obtain consolidation loans to prevent foreclosure but had been unsuccessful because he did not have sufficient collateral

(Tr. II 35-36). He stated that if the bank canceled the loan, he would have no hope of returning to mining (Tr. II 127). He added that if he could not continue operating the mine, he would spend the rest of his life trying to pay what he owes (Tr. II 133). Stockwell also stated that all of Faith's mining equipment is held as collateral for the bank loan; as well as all of his farm equipment (Tr. II 145). According to Stockwell, the value of the mining equipment has decreased substantially, because TCC has changed from conventional mining to continuous mining machines (Tr. II 83).

Stockwell added that he also owns $20,533 on a loan he incurred to purchase a home for his father. The loan is delinquent (Tr. II 47, 69; D. Exh. 5).

According to Stockwell, when the mine was operating, it produced approximately $375,000 per year in income. Salaries and other expenses took all of the income. In fact, according to Stockwell, Faith still owes approximately $30,000 in open accounts (Tr. II 33, 62, 142). When Stockwell went to prison, the mine was shut down.

Stockwell maintained his liabilities exceeded his assets by approximately two to one, and that he is facing current liabilities of approximately $300,000 (Tr. II 35). The family (Stockwell, his wife and teenage daughter) is surviving off of his wife's teaching income (Tr. II 53-54). Since returning from prison, he has been unemployed except for working on his farm property which earns him $100 to $150 per week (Tr. II 38).

Stockwell described his financial future as "very bleak...if I don't get back [to mining]" (Tr. II 53; See also Tr. II, 58, 127). He stated that he would like to resume mining as soon as his probationary period ends (Tr. II 58, See also Tr. 127). Stockwell maintained that although he was out of business temporarily, at some point Faith could "turn around to be a profit-making business" (Tr. VI 198). He described the mine as in a state of "temporary cessation" (Tr. II 14).

Finally, Stockwell testified he would not be surprised to learn that he owes MSHA $31,800 in unpaid civil penalties (Tr. II 121). He acknowledged he owes up to $4,200, perhaps more, to the Office of Surface Mining and that he owes the United States government approximately $1,000 in fines levied as a result of his criminal conviction. He stated that he had already paid the government $500 and had arranged to "work off" the rest (Tr. II 124).

Buford Ayers, an assistant supervisor of the Farmer's Home Loan Administration (FHLA), testified that the FLHA loaned the Stockwells the money to finance the farm property and that the current balance due was $55,408.18 (Tr. II 183). Ayers stated that the last financial statement by the Stockwells to the FLHA indicated that the Stockwells had a personal net worth of $164,000. However, the figure included the value of mining equipment that was then estimated at $250,000. Payments to the FHLA had to be made annually. The amount due was $5,043. As of the date of the hearing, the Stockwells were not in arrears (Tr. II 187-188).

Ayers was of the opinion that if the First National Bank of Shelbyville foreclosed on its loan to the Stockwells, they would be forced to default to the FLHA; or, as Ayres put it, "I just don't see how they can make it" (Tr. II 191).

Robert Taylor, an officer of the First National Bank of Shelbyville testified that Stockwell owes the bank approximately $119,000 (Tr. II 150). Taylor stated that the original loan was made to Faith, Stockwell and Mrs. Stockwell (Tr. II 158). The loan is secured by Faith's mining equipment, by a deed of trust on the 165 acres in Sequatchie County, and by a deed of trust for the house the Stockwells occupy (Tr. II 165-166). Taylor stated that the only equipment he considered worth anything was a loading machine, which he evaluated at approximately $15,000 (Tr. II 175-176). He estimated the land that secures the loan as worth approximately $40,00 to $50,000.

According to Taylor, the Stockwell's have tried to avoid bankruptcy and have made an offer to settle their debts, but the bank has rejected the proffered settlement (Tr. 152). Unless Stockwell is able to secure another loan to cover the indebtedness or unless the Stockwells reach a settlement with the bank, the bank will foreclose (Tr. II 153). Foreclosure will include a writ of possession on all of Faith's mining equipment.

Taylor also stated that in the bank's view, Stockwell and Mrs. Stockwell were equally liable for the loan (Tr. II 170-171).

Ann Wilson, the comptroller of TCC, described Faith as "one of the smaller operations" with whom TCC contracted (Tr. V. 86). She testified that to the best of her knowledge the No. 15 Mine was no longer operated and that TCC had no intention of entering into another contract with Faith (Tr. V 76).

According to TCC's records, it paid Faith a total of $119,327.17 in 1990, $282,324.89 in 1991, $209,224.23 in 1992 and $218,556.20 in 1993. The last payment being made to Faith in October 1993 (Tr. V 78-79; Gov. Exh. 3). The total paid in four years was approximately $819,432 (Tr.V. 79).

TCC advanced monies to Faith on occasion. These advances were to provide working capital. In Wilson's opinion, an advance indicated an operator lacked funds to pay for something. However, TCC would not make an advance without collateral (Tr. V 86-87). TCC deducted amounts due it for supplies from coal payments to Faith. If Faith did not mine enough coal to pay through deductions, it wrote a check back to TCC. Wilson identified two such checks that were signed by Chris Stockwell

and that bore the names "Faith Coal Co., Lonnie or Chris Stockwell" (Tr. 81-82; Gov. Exh. 3 at 10).

At the close of the testimony on the ability to continue in business criterion, Stockwell's counsel argued that if Faith and Stockwell had any chance of going back into the coal mining business, that chance would be precluded by any further indebtedness (Tr. II 204-205).

Counsel for the Secretary countered that if a mine operator could not afford to run a mine in a safe and healthful manner, it was MSHA's duty to shut down the operation (Tr. II 207). Counsel pointed out that the total penalties proposed in these cases is approximately $17,000 and that the equity on the farm land on which the FLHA holds the mortgage is more than that (Tr. II 209). Also, Counsel maintained that the Stockwells have no realistic possibility of resuming mining (Tr. II 214). Therefore, the ability to continue in business criterion really is irrelevant.

Settlement Suggestion

Following introduction of most of the evidence on the criterion, I issued a bench ruling regarding "what the ability to continue in business criter[ion] means and how ... it should be applied" (Tr. III 241). I indicated that my ruling was provisional, and that I would express my complete views in the written decision (Id.).

I then stated that in my view, any penalties assessed in these cases should be more then minimal but less than those proposed. (Tr. III 244). Based upon that ruling I suggested, off the record, a settlement plan that I believed was equitable to the parties. The suggestion was rejected by counsel for the Secretary because, in the Secretary's view, Faith's history of prior violations and Stockwell's criminal conviction, did not warrant any reduction of the proposed penalties. Further, counsel maintained that Faith had not met its burden of proof with respect to the ability to continue in business criterion (Tr. III 249-252).

Findings on Ability To Continue in Business Criterion

As I noted at the hearing, the assessment of a civil penalty is mandatory for any violation found to exist (30. U.S.C. § 820(a); Spurlock Mining Company, Inc., 16 FMSHRC 697,699 (April 1994); Tazco, Inc., 3 FMSHRC 1895 (August 1981). As I also noted, although some Commission judges have held that the criterion is no longer relevant when an operator is effectively out of business (See Spurlock Mining Company, Inc., 15 FMSHRC 629 (April 1993) (ALJ Melick), aff'd in result 16 FMSHRC 697), other judges have found the fact that a company has ceased to operate to be a basis for reducing penalties, sometimes to nominal amounts (Iron Mountain Ore Co., 11 FMSHRC 1840, 1850 (November 1986) (Judge Morris); CRO Coal Co., Inc., 2 FMSHRC 2247, 2249 (August 1980) (ALJ Steffey)).

In general, I agree with Commission Administrative Law Judge George Koutras that the essence of the civil penalty assessment process requires a balancing of all the statutory criteria, including, obviously, the ability to continue in business criterion, (Broken Hill Mining Co., Inc., 15 FMSHRC 1331, 1348-49 (July 1993)). Further, I view weighing the criteria and equalizing the balance as affording the judge considerable discretion. (Penalties are assessed de novo by the judge and the judge is not bound by the formula for assessment that the Secretary has adopted (Shamrock Coal Co., 1 FMSHRC 469 aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersbrug Stone Co., 5 FMSHRC 287, 291-292 (March 1983).)

The question is whether Faith offered sufficient credible evidence to prove that the size of any penalty assessed would effect its ability to continue in business, and if so, the extent to which that proof and the other criteria should impact the civil penalties.

In answering the question, I note first my agreement with the Secretary's contention that the assets of both Stockwell and his wife should be considered when evaluating the ability to continue in business criterion. Although Faith was organized as a sole proprietorship and although Stockwell was the titular sole proprietor, there is no doubt that Mrs. Stockwell made her personal assets available to the company when required and that, in effect, she served as a full financial partner in the business. Mrs. Stockwell had the authority to sign checks on Faith's behalf (Tr. II 19). Mrs. Stockwell also wrote checks for

the company from her personal account, checks that allowed the company to continue in operation when it did not have enough money to cover current expenses (Tr. II 18, 65). Moreover, when Faith needed a loan to purchase mining equipment and initiate mining, Mrs. Stockwell signed for the loan along with her husband (Tr. II 61). But for Mrs. Stockwell, Faith would not have been able to go into and to continue with the business of mining. The company functioned fiscally as a husband and wife partnership, and I will look to the realities of the business rather than to its formalities.

Those realities lead me to conclude at the hearing that the Stockwells were in precarious financial straits, and nothing since has caused me to change my view (Tr. III 245-247). I accept as fact that the Stockwells owe the First National Bank of Shelbyville, $119,268.64. I also accept as fact that collateral on this loan includes the mining equipment at the No. 15 Mine, the deed of trust on the 165 acres in Sequatchie County and the property and house where the Stockwells are living (Tr. 165-166). In addition, I accept Stockwell's and Taylor's testimony that the mining equipment has lost most of its value and that the land that secures the loan is worth less than half the amount due (Tr. II 175-176).

Ayers credibly stated that he was thoroughly familiar with all aspects of the FLHA loan on the farm; and I find persuasive his opinion that if the Stockwells are unable to make arrangements with the First National Bank, they will default on the FLHA loan. Ayers stated that if the Stockwells defaulted, he did not know how they "could make it," and neither do I (Tr. II 191).

Scenarios can be devised by counsel for the Secretary concerning how the Stockwells can be assessed the full amount of the proposed penalties and pay them, but counsel is not a professional banker; Taylor and Ayers are, and I give great weight to their testimony and to their opinions.

I conclude from their testimony that additional debt of the type proposed by the Secretary will force the Stockwells to default on their obligations to the bank, and to the FLHA; with the result that they may loose the mining equipment, their house, farm and their other property.

To say that this would have a detrimental effect on Faith's ability to continue in mining, understates the matter. Stockwell indicated a desire to continue mining and I take him at his word (Tr. II 58, 127). As long as he has the equipment, his return to the business remains a possibility. Once the equipment is gone, so is the reasonable likelihood of resuming operations.

Stockwell's sins of commission and omission under the Act already have resulted in penalties other than those the Secretary seeks here. If Stockwell returns to mining, he will do so with first-hand knowledge of the civil and criminal sanctions engendered by violations of the Act and regulations. Given this, I do not believe assessing penalties less than those proposed in these cases will lessen his incentives for compliance.

I think it is fair to state that the Secretary's approach to penalty amounts is driven by a desire to make it as difficult as possible for Stockwell ever to mine again. Counsel for the Secretary was candid about this -- "If a mine operator cannot afford to run the mine in a safe and healthy way, it is our business to shut it down" (Tr. II 207). However, civil penalties are remedial not punitive, and the ability to continue in business criterion is not intended to be used to thwart mining. Rather, it is to be used to encourage the continuation or resumption of safe mining. If the Secretary believes an operator should be barred from mining, other remedies are available, as Stockwell's experience before the judge magistrate has shown.

Therefore, when assessing civil penalties in these cases, I will afford more weight than would otherwise be the case to the ability to continue in business criterion.

Size and Good Faith Abatement

Faith is small in size, and unless otherwise specifically noted, the company demonstrated good faith in attempting to achieve rapid compliance.

History of Previous Violations

Faith Coal Company has a large history of previous violations (Joint Exh. 61).

Penalty Amounts

When all of the criteria are considered, I conclude that the resulting assessments should be more than minimal but less than proposed.

ORDER

Docket No. SE 91-97

This case was assigned to Commission Administrative Law Judge Gary Melick. On September 20, 1991, the parties agreed to settle the matter and they filed a joint motion to approve the settlement. Judge Melick rejected the settlement and scheduled the matter for hearing.

A hearing was conducted on September 24, 1991. It was not completed because Faith requested and received permission to present additional evidence and to call additional witnesses. Judge Melick set December 4, 1991, as the date the hearing would resume. Subsequently, the matter was the subject of numerous continuances and stays for reasons fully outside the control of the judge. (The chronology of the case is documented in Secretary's post trial brief at pages 5-9.)

The case was reassigned to me with the understanding that Faith would have the opportunity to present additional evidence and call additional witnesses during the subject consolidated hearings. At the beginning of the second session of hearings, Stockwell stated that Faith would not present any additional documentary evidence or offer any further witnesses (Tr. V 17-18, 22-23).

The parties resumed settlement negotiations. As a result, the parties agreed to resubmit their original motion to approve the settlement, with the understanding that it be reviewed in the context of the evidence that has been offered regarding the affect of any penalties assessed on Faith's ability to continue in business (Sec. Br. 8).

Given the civil penalty criteria noted above, I conclude that no reduction in the settlement is warranted. The settlement is approved.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3023421	8/28/90	75.312	$ 20	$10	$10
3023422	8/28/90	75.316	$ 20	$10	$10
3023422	8/28/90	75.316	$ 20	$10	$10
3023347	9/24/90	75.505	$ 20	$10	$10
3023348	9/24/90	75.1704(2)(c)(2)	$ 20	$10	$10
3023350	9/24/90	75.403	$ 20	$10	$10
3023351	9/24/90	75.904	$ 20	$10	$10
3023410	9/24/90	75.1801	$ 20	$10	$10
3023411	9/24/90	75.1803	$ 20	$10	$10
3023412	9/24/90	75.1805	$ 20	$10	$10
3023413	9/24/90	77.501	$ 39	$23	$23
3023418	9/25/90	75.400	$ 20	$10	$10
3023420	9/25/90	75.400	$ 39	$23	$23
3023354	9/26/90	75.503	$ 20	$10	$10
3023355	9/26/90	75.400	$ 39	$23	$10

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 91-533

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3023423******	8/28/90	75.303(a)	$300	$ 78	$ 50
3023681*	12/26/90	77.1605(k)	$200		$134
3023416****	9/24/90	75.804(b)	$450	$275	$150
3023353****	9/25/90	75.220	$450	$275	$150
3023461****	9/26/90	75.316	$400	$275	$125
3023462****	9/26/90	75.303(a)	$400	$275	$125

(* Tr. IV 73) (Faith agreed to withdraw its contest of the citation.)

(**** Tr. VI 200-205) (The Secretary agreed to reduce the penalty based upon litigation strategy.)

(****** Tr. IV 743) (The Secretary agreed to vacate the associated section 104(b) withdrawal order.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to vacate Order No. 3023423.

SE 92-315

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395346*	12/2/91	§75.400	$85	$58

(* Tr II 257) (Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the civil penalty shown.

Docket No. SE 92-316

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395933	2/26/92	75.1808	$20	$20

Citation No. 3395933 is affirmed, and Faith is **ORDERED** to pay the penalty shown.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395936*	2/26/92	49.98	$20	$13
3396027*	2/26/92	75.403	$58	$42
3396028*	2/26/92	75.303(a)	$20	$13
3396029*	2/26/92	75.313-1	$20	$13
3396030*	2/26/92	70.210(b)	$20	$13

(*Tr. IV 748. Faith agreed to withdraw its contest of the citations.)

Faith is **ORDERED** to pay the penalties shown.

DOCKET NO. SE 92-343

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3396042	3/2/92	77.1104	$ 94	$40

3390641	3/2/92	75.1713-7(a)(2)	$ 94	$ 0
3396045	3/3/92	75.202(a)	$147	$40
3396047	3/2/93	75.208	$ 88	$40

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to vacate Citation No. 3396041.

The Secretary is **ORDERED** to modify Citation No. 3396045 by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citation No. 3396047 by deleting the S&S finding.

Settled Violations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3396046*	3/3/92	75.1313(c)	$ 88		$59
3395940***	3/02/92	77.505	$ 88	$50	$40
3396043***	3/02/92	77.807	$ 88	$50	$40
3396044***	3/02/93	77.513	$ 88	$50	$40
3396035**	3/02/92	77.400(a)	$ 88	$50	$40
3396036***	3/02/92	77.513	$ 88	$50	$40
3396039*****	3/3/92	75.203(e)	$147	$88	$65
3396040***	3/3/92	75. 202(a)	$147	$88	$65
3396081*****	3/3/92	75.220	$147	$88	$65
3396082*******	3/3/92	75.212(c)	$147	$58	$42
3396048*******	3/5/92	75.203(e)	$147	$58	$42

(Tr. III 532) (* Faith agreed to withdraw its contest of the citation.)

(Tr. IV 780) (** The Secretary agreed to delete the S&S finding.)

(Tr. III 532-535, Tr. IV 781, 783-784) (*** The Secretary agreed to modify the negligence finding to low.)

(Tr. IV 782-785) (***** The Secretary agreed to reduce the number of miners affected by the violation.)

(Tr. III 535-537, Tr. IV 785-786) (******* The Secretary agreed to modify the negligence finding to low and to reduce the number of miners affected by the violation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3396035 by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citations No. 3395940, 3396043, 3396044, 3396036, and 3396040, by reducing the negligence findings to low.

The Secretary is **ORDERED** to modify Citations No. 3396039 and 3396081, by reducing the number of miners affected by the violations.

The Secretary is **ORDERED** to modify Citations No. 3396082 and 3396048, by reducing the negligence findings to low and by reducing the number of miners affected by the violations.

Docket No. SE 92-372

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3396083****	3/4/92	75.212(c)	$ 88	$50	$40
3396084*****	3/5/92	75.400	$147	$94	$72
3396085*	3/9/92	75.212(c)	$ 50		$40
3396038*****	3/4/92	75.212(c)	$147	$94	$72

(Tr. IV 767) (* Faith agreed to withdraw its contest of the citation.)

(Tr. IV 764-765) (**** The Secretary agreed to reduce the penalty based upon litigation strategy.)

(Tr. IV 766-768) (***** The Secretary agreed to reduce the number of miners affected by the violation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3396084 by reducing the number of miners affected by the violations.

DOCKET No. SE 92-373

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883375	4/13/92	70.208(a)	$50	$40

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395800	5/01/92	75.403	$50	$40

(Tr. IV 642) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 92-375

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3396037****	3/02/92	77.516	$88	$50	$40

(Tr. IV 748-749) (**** The Secretary agreed to reduce the penalty based upon litigation strategy.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 92-463

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024224	5/28/92	75.208	$88	$75

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024225*	5/28/92	75.220	$88	$59

(Tr. II 273-274) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 92-464

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024223	5/27/92	77.402	$88	$59

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 92-488

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024222*	5/27/92	70.508(a)	$50	$40

(Tr. II 257) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 93-78

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024472	8/19/92	75.203(a)	$50	$ 0
3024476	8/27/92	75.1107-16(b)	$50	$30

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Citation No. 3024472.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3014473**	8/19/92	75.511	$88	$50	$40
3024474*	8/20/92	75.601-1	$88		$59

(Tr. II 377-378) (** The Secretary agreed to delete the S&S finding.)

(Tr. II 377) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3014473 by deleting the S&S finding.

Docket No. SE 93-79

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024477*	8/27/92	75.503	$50	$40
3024478*	8/27/92	75.1714(3)(e)	$50	$40

(Tr. II 374) (* Faith agreed to withdraw its contest of the citations.)

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 93-194

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024675**	11/16/92	75.306(a)	$128	$50	$40
3024737*	12/01/92	75.388(b)	$128		$85
3024745*****	12/01/92	75.316	$128	$94	$72

(Tr. II 328) (* The Secretary agreed to delete the S&S finding.)

(Tr. II 328) (** Faith agreed to withdraw its contest of the citation.)

(Tr. IV 750-752) (***** The Secretary agreed to reduce the number of miners affected by the violation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3024745 by reducing the number of miners affected by the violation.

Docket No. SE 93-195

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024705*	12/08/92	75.512	$ 50	$40	$40
3024706*	12/08/92	77.516	$ 75		$50
3024707*	12/08/92	75.515	$ 75		$50
3024708*	12/08/92	75.904	$ 50		$40
3024709*	12/08/92	75.601-1	$ 75	$58	$50
3024710**	12/08/92	75.900	$ 75	$50	$40
3024711***	12/14/92	75.313-1	$111	$75	$50
3024712***	12/14/92	75.318	$ 75	$50	$40
3024713*	12/14/92	75.1101-3	$111		$74
3024801*	12/14/92	75.316	$ 50		$40

(Tr. II 430-432) (* Faith agreed to withdraw its contest of the citation.)

(Tr. II 430) (** The Secretary agreed to delete the S&S finding.)

(Tr. II 430-431) (*** The Secretary agreed to modify the negligence to low.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3024710 by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citations No. 3024711 and 3024712, by reducing the negligence to low.

Docket No. SE 93-257

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024802******	12/14/92	75.364(a)(1)	$117	$50	$40

(Tr. II 432-433) (****** The Secretary agreed to vacate the associated section 104(b) withdrawal order.)

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Order No. 3024767.

Docket No. SE 93-300

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
9883495********	1/08/93	70.207(a)	$300	$50	$40

(Tr. II 257-258) (******** The Secretary agreed the violation was technical and should not have been specially assessed.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 93-348

Contested Citation.

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883544	2/18/93	70.201(c)	$50	$40

Faith is **ORDERED** to pay the penalty shown.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024880*	3/02/93	75.364(i)	$ 50		$40
3202181****	3/02/93	75.512	$ 50	$ 20	$13
3202182*	3/02/93	75.1101-23(c)(1)	$ 50		$40
3202183*	3/02/93	75.220	$ 88		$59
3202185*	3/02/93	75.220	$ 50		$40
3202186****	3/02/93	75.507	$ 88	$ 50	$40
3202187*	3/02/93	75.603	$ 88		$59
3202189**	3/03/93	75.606	$ 88	$ 50	$40
3202190**	3/03/93	75.400	$128	$ 94	$72
3202191***	3/04/93	75.340(a)(1)	$147	$103	$78
3202192*	3/04/93	75.516	$ 88		$59
3202193*	3/04/93	75.503	$ 50		$40

3202194*	3/04/93	75.523-3(b)(1)	$ 88		$59
3202196**	3/04/93	75.523-3(b)(1)	$ 88	$ 50	$40

(Tr. IV 752, 754, 756, 760) (* Faith agreed to withdraw its contest of the citation.)

(Tr. IV 757-759, 761-762) (** The Secretary agreed to delete the S&S finding.)

(Tr. Tr. 759-760) (*** The Secretary agreed to modify the negligence to low.)

(Tr. IV 753-754, 756) (**** The Secretary agreed to reduce the penalty based on litigation strategy.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citations No. 3202189, 3202190 and 3202196, by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citation No. 3202191, by reducing the negligence to low.

Docket No. SE 93-365

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883549	3/4/93	70.100(a)	$119	$90
3024810	3/16/93	75.1722(a)	$ 88	$59
3024814	3/17/93	75.220	$128	$86

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024808**	3/16/93	75.1101-23	$ 88	$ 50	$40
3202198*	3/16/93	75.361(b)	$ 50		$40
3202199*	3/16/93	75.1103	$ 88		$59
3202200**	3/16/93	75.400	$128	$ 50	$40
3024811*	3/17/93	75.342(a)(4)	$ 50		$40
3024812*	3/17/93	75.503	$ 50		$40

3024813*	3/17/93	75.1107	$ 88		$59
3024815****	3/17/95	75.372(a)(1)	$128	$100	$67
3024816*	3/17/93	75.360(b)(6)	$128		$82
3202241*	3/17/93	75.400	$ 88		$59
3202242*	3/17/93	75.503	$ 50		$40
3202243*********					
	3/17/93	75.1107-16(b)	$ 88	$ 70	$53
3202247***	3/22/93	75.1101-23	$128	$ 88	$65
3202306*	3/29/93	75.350	$ 88		$59
3202307*	3/29/93	75. 370(a)(1)	$ 88		$59

(Tr. II 435-436, Tr. IV 739, Tr. V 181) (* Faith agreed to withdraw its contest of the citation.).

(Tr. II 434-435, Tr. IV 738) (** The Secretary agreed to delete the S&S finding.)

(Tr. II 436-437) (*** The Secretary agreed to modify the negligence finding too low.)

(Tr. VI 206) (**** The Secretary agreed to reduce the penalty based on litigation strategy.)

(Tr. IV 740-741, Tr. V 182-183) (********* The parties agreed to reduce the penalty based on mutual litigation risks.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citations No. 3024808 and 3202200, by deleting the S&S findings.

The Secretary is **ORDERED** to modify Citation No. 3202247 by reducing the negligence to low.

Docket No. SE 93-366

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202244	3/17/93	75.220	$2800	$2128
3203325	3/17/93	75.203(a)	$3100	$ 0

Settled Order

Citation/ Order No.	Date	30 C.F.R	Assessment	Settlement	Penalty
3202285*********	3/29/93	75.360(g)	400	$175	$117

(Tr. IV 735-736) (********* The parties agreed to leave the order as written and to reduce the penalty based on mutual litigation risks.)

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Order No. 3203325.

Docket No. SE 93-411

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202184*	3/02/93	75.370(a)(1)	$50	$40
3202188*	3/02/93	75.360(f)	$50	$40

(Tr. II 258) (* Faith agreed to withdraw its contest of the citations.)

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 94-42

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202246	3/22/93	75.364(a)(1)	$360	$0
3024817	3/22/93	75.220	$ 88	$0

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3202246*******	3/22/93	75.360(a)(1)	$360	$183	$139

(Tr. IV 787-790) (****** The Secretary agreed to vacate the associated section 104(b) withdrawal order.)

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Citations No. 2302246 and 3024817, and to vacate Order No. 3202497.

Docket No. SE 94-75

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202543*	9/28/93	75.503	$50	$40

(Tr. II 259) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 94-96

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883661	10/14/93	70.208(a)	$50	$35
9883662	10/14/93	70.208(a)	$50	$35

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 94-256

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202337	6/07/93	75.313	$50	$0

The Secretary is **ORDERED** to vacate Citation No. 3202337.

Docket No. SE 94-257

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3202544******	9/28/93	75.1107-16(b)	$225	$50	$40
3202565******	9/28/93	75.1107-7(c)	$225	$50	$40

(Tr. II 374-375) (****** The Secretary agreed to vacate the associated section 104(b) order of withdrawal.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to vacate Orders No. 3202555 and No. 3202556.

Dismissal of Proceedings

Faith shall pay the assessed penalties within 30 days of the date of this decision. The Secretary shall modify and vacate the referenced citations and orders within the same 30 days. These proceedings are **DISMISSED**.

David F. Barbour

David F. Barbour
Administrative Law Judge

Distribution:

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 2 0 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1215
Petitioner	:	A.C. No. 15-11072-03595
v.	:	
	:	#2 Mine
APPALACHIAN COLLIERIES,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Richard D. Cohelia, Safety Director, Appalachian Collieries Corp., Brookside, Kentucky, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging a violation by Appalachian Collieries (Respondent) of 30 C.F.R. § 75.388(b)(3), and 30 C.F.R. § 75.388(c)(2). Pursuant to notice, the case was heard in Johnson City, Tennessee, on May 24, 1995. Roger Pace testified for Petitioner. James Ford, and Michael Bates testified for Respondent.

Findings of Fact and Discussion

I. Violations of 30 C.F.R. § § 75.388 (c)(2) and 75.388(b)3

Roger Pace, an MSHA Inspector, testified that on June 17, 1994, he inspected Respondent's No. 2 mine. He indicated that on

both ribs in the No. 3 and No. 4 entries in the area of the working faces, he observed sealed auger holes at 45 degree angles. He also noted that boreholes had been drilled on both ribs. Pace measured the depth of these boreholes by manually pulling a tape measure from a spool, and pushing it in the boreholes. He indicated that the tape stopped at the back of the holes. The depth of each of the holes was measured at 14 feet. He issued a citation alleging a violation of 30 C.F.R. § 75.388(c)(2), which, in essence, provides that boreholes drilled in the rib at an angle of 45 degrees should be at least 20 feet deep.

In addition, Pace observed that three boreholes had been drilled in the advancing faces in the No. 3 and No. 4 entries. Using the same method as he used in measuring the 45 degree angle boreholes, he measured these holes at the faces to a depth of only 7 1/2 feet. He issued a citation alleging a violation of 30 C.F.R. § 75.388(b)(3) which, as pertinent, provides that boreholes shall be " . . . always maintained to a distance of 10 feet in advance of the working face." [1]

James Ford, a miner employed by Respondent, testified that he had drilled the boreholes in question the day prior to Pace's inspection. He indicated, in essence, that the holes had been drilled 20 feet deep. He based this opinion on the fact that the holes were drilled by a barrel comprised of two 10 foot long joints, 1-1/4 to 1-1/2 inches in diameter. He indicated that the holes that were being drilled "would sometimes fall in" (Tr. 53). He also said that the drill barrel could have been inserted into the boreholes about 5 or 6 feet. He stated that in order for the barrel joint to penetrate further, "You'd have to put it back to the drill and work it back out" (Tr. 62).

Ford indicated that subsequent to the issuance of the citation on June 17, four 6-foot long roof bolts, each having a diameter of a half inch, were welded together and then pushed

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[1]Both parties agree that this language stipulates that the boreholes be maintained to a depth of 10 feet.

into each of the cited boreholes. According to Ford, "[w]e had so much sticking out, the hole looked like two or three foot. So we had 20, 21 feet" (Tr. 69). Ford also indicated that there was mud in the drilled holes.

Respondent's witnesses have not specifically contradicted the testimony of Pace, that as measured by him, the depth of each of the boreholes was less than mandated by Section 75.388, supra. Michael Bates, Respondent's Safety Director, indicated that there was mud in the holes, and that operation of the drill causes the holes to become "real rough" (Tr. 80). However, there is no specific evidence that any mud or other obstructions were present in the holes measured by Pace to such a degree as to have impeached the accuracy of his measurements. Ford indicated that the holes being drilled on June 16, 1994, were 20 feet deep. However, he did not indicate that any of the holes were measured. Nor did he indicate the length of the portion of the 20 foot barrel, if any, that had not penetrated the holes. Ford testified that the holes were measured by inserting four 6-foot long bolts welded together in the holes, and they were 20 to 21 feet deep. This was based upon his opinion that the bolts protruded 2 to 3 feet from the holes. Ford did not testify as to the exact length of the welded bolts that had not penetrated the holes. Nor was this established by any other evidence. Bates indicated that once the heads were cut off, the four 6-foot long bolts that had been welded together, their length totaled 21 feet. He stated that he was present when these welded bolts were inserted into the three cited boreholes at the face, and that, "you had about a foot sticking out" (Tr. 79). However, Respondent's witnesses did not adduce any evidence as to the precise length of the four welded bolts, nor the amount of the bolts that had not penetrated. For these reasons, I find that Respondent's evidence is not sufficient to rebut the testimony of Pace. I thus conclude that Petitioner has met his burden of establishing that Respondent was in violation of Sections 75.388(b)(3), and (c)(2), supra, as cited.

I reject the argument advanced by Respondent that the two citations at issue were invalidly issued as they each cite a violation of the same standard. This argument is without merit, as two different subsections of Section 75.388, supra, were cited covering two different situations.

II. Significant and Substantial

Both citations at issue set forth findings of significant and substantial. According to Pace, boreholes are required to be drilled in order to detect the presence of water, low oxygen, or methane in adjacent sealed areas. He explained that the escape of any of these hazardous materials resulting from an inadvertent entry into a sealed area could cause serious injuries or fatalities. He opined that it was reasonably likely for methane to accumulate in the abandoned auger holes.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary

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

Hence, the Secretary must establish that there was a reasonable likelihood of an injury producing event, i.e., a fire, an explosion, or exposure to low oxygen contributed to by the lack of boreholes. An injury-producing event can occur only if there is a cut-through into an area containing low oxygen or methane in an explosive range. This event in turn depends upon the manner in which the cutting miner is being operated, its distance to the sealed area, and the presence in the sealed area of low oxygen and explosive methane. All these factors operate independently of the failure to drill boreholes of the proper length, the violative acts herein. I thus find that it has not been established that there was an injury producing event likely to have occurred as a result of the violations herein. I find that it has not been established that the violations were significant and substantial.

III. Penalty

I find that Respondent did drill boreholes the day prior to its being cited. There is no evidence that Respondent did not exercise ordinary care in ensuring the proper depth of the holes in question. I find that Respondent was negligent to only a low degree. I also find that should miners have been exposed to hazardous materials in an abandoned area as a result of inadvertent cut-through, and should these materials not have been detected beforehand due to inadequent length of the borehole, a fatality might have resulted. Therefore the gravity of these violations is high. I have considered the size of Respondent's operation, as indicated by the parties' stipulation filed subsequent to the trial, and conclude that a penalty of $1,000 for each of the two violations herein is appropriate to its size, and the factors set forth in Section 110(i) of the Act.

ORDER

It is ORDERED that Respondent pay a total penalty of $2,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 2 0 1995

IRVIN RODGERS, II, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 95-184-DM
	:	MSHA Case No. SE MD 95-01
FLORIDA ROCK INDUSTRIES, INC., Respondent	:	Diamond Hill Quarry
	:	Mine I.D. No. 08-00026

ORDER OF DISMISSAL

Before: Judge Amchan

This case is before me pursuant to section 105(c) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. The parties have filed a joint motion to withdraw their pleadings. Respondent has agreed not to seek recovery of its attorney's fees from Complainant. The parties agree that this withdrawal bars any future discrimination claims against Respondent, whether instituted by MSHA or Complainant. Further, the parties agree to relinquish any and all claims, including federal and state statutory or common law claims which accrued upon Complainant's termination from Florida Rock Industries.

I interpret this agreement to apply only to claims arising out of the November 22, 1994, termination of Complainant by Respondent. I do not interpret this agreement to apply to any future event which Complainant may deem to violate section 105(c) or any other legal right.

The parties' motion is **GRANTED**. This case is dismissed with the understanding that this order bars Complainant from filing any other action under the Federal Mine Safety and Health Act that seeks redress for his November 22, 1994, termination by Respondent.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 2 4 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-421 A.C. No. 05-00301-03765
v.	:	
MID-CONTINENT RESOURCES, INC., Respondent	:	Dutch Creek Mine

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Manning

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act") following a remand from the Commission. 16 FMSHRC 1218 (June 1994). The Commission vacated the conclusion of Administrative Law Judge John J. Morris that a violation of 30 C.F.R. § 75.400 was not of a significant and substantial nature ("S&S") and remanded this issue to the judge. For the reasons the follow, I conclude that the violation was S&S.

I. BACKGROUND

On May 1, 1990, Inspector James Kirk of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Order of Withdrawal No. 3412700 (the "Order") to Mid-Continent Resources, Inc. ("Mid-Continent") at its Dutch Creek Mine[1], pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2). The Order alleged that loose coal had accumulated along the 103 strike belt (the "belt") between the belt drive and the tailpiece at the stage loader. This belt transported coal from the longwall section to another belt, which transported the coal out

[1] The Dutch Creek Mine is now closed and sealed.

of the mine. The belt was about 3,000 feet long. In his decision, Judge Morris affirmed the violation, determined that it was caused by Mid-Continent's unwarrantable failure to comply with the safety standard, but found that the violation was not S&S. 15 FMSHRC 149, 152-60 (January 1993). The Secretary filed a petition for discretionary review of his S&S finding, which was granted by the Commission.

As stated above, the Commission vacated Judge Morris's conclusion that the violation was not S&S and remanded that issue for further analysis consistent with the its decision. 16 FMSHRC at 1224. On March 13, 1995, this case was reassigned to me for an appropriate resolution. I have reviewed the hearing transcript and exhibits and make the following findings of fact based on the evidence.

II. THE COMMISSION'S DECISION

In its decision, the Commission agreed with the Secretary that "the judge failed to address adequately the evidentiary record in determining that it was not reasonably likely that the hazard contributed to by the violation would result in an injury." 16 FMSHRC at 1222. The Commission stated that the judge's factual determinations concerning the violation "appear to be consistent with a finding of S&S, and he failed to reconcile those findings with his determination that the violation was not S&S." Id. The Commission's decision lists a number of instances where it believes the judge's decision is inconsistent.

The Commission also determined that "the judge failed to reconcile his finding that Dutch Creek is a gassy mine subject to five-day spot inspections with his determination that the violation was not S&S." 16 FMSHRC at 1222. The Commission noted that accumulations, in conjunction with a methane ignition in the face area, "could propagate and increase the severity of a fire or explosion." Id.

Further, the Commission concluded that the judge failed to take into account continued normal mining operations when he "discounted" Inspector Kirk's testimony that accumulations were in contact with rollers supporting the belt. Id. Finally, the Commission held that the judge erred "to the extent [he] suggested that spontaneous combustibility of coal is required for an S&S finding...." Id.

III. THE JUDGE'S DECISION

Judge Morris made a number of finding in concluding that Mid-Continent violated 30 C.F.R. § 75.400. As relevant here, the judge entered the following findings in his discussion of the violation:

7. [Inspector] Kirk saw accumulations of coal at the belt tailpiece, the stage loader area and up to the end of the conveyor belt. Outby coal was compacted underneath the belt. The belt rollers and belt were in contact with the coal.

* * * * * * * * * * * * *

19. The accumulations were mostly dry from the number 6 door inby to the tailpiece of the conveyor. Outby from the number 6 door towards the belt drive area the accumulations were moist or wet.

* * * * * * * * * * * * *

23. Fire is one of the hazards of coal accumulations.

24. The Dutch Creek Mine is a gassy mine subject to five-day spot inspections.

25. Potential ignition sources included the area where the rollers rubbed the coal as well as where the conveyor belt rubbed the framework of the conveyor. MSHA also found one area in the longwall that was not maintained. That area could also be considered as an ignition source.

26. Accumulations could be ignited by frictional contact. The amount of coal along the conveyor could be introduced into an ignition causing a more severe ignition.

27. Injuries from the described hazard could be serious and possibly fatal.

* * * * * * * * * * * * *

32. There were electrical cables for the shark pump and the normal electrical devices for the longwall. In addition, on May 1st there was a permissibility violation.

33. Mr. Kirk identified the pre-shift, on shift daily examination referring to the 103 longwall. The examinations, as reported, listed accumulations on the 103 longwall from April 25, 1990 to May 1, 1990. The condi-

> tions were reported and on one occasion the report noted that shoveling was undertaken.
>
> 34. In Mr. Kirk's opinion, the fire boss and the pre-shift inspection noticed that there were accumulations on the 103 longwall belt at the drive and inby. This was the area that Mr. Kirk cited.

15 FMSHRC at 152-54 (citations to transcript omitted).

In his discussion of the violation, Judge Morris credited Inspector Kirk's description of the location of the accumulations. 15 FMSHRC at 155. He also found that due to its low oxygen content and high-ash content, the coal "burns only with great difficulty." Id. He determined that the record established several ignition sources. In this regard, the judge stated:

> One location was where the conveyor rollers rubbed against the coal and also where the conveyor belt rubbed on the framework of the conveyor. Additional ignition sources could also include the electrical cables required to run the conveyor, the impermissible condition he cited as well as the electrical cables for the shark pump.

15 FMSHRC at 155. Finally, Judge Morris credited the testimony of Mid-Continent's witnesses that the belt had broken on the previous shift and that this break dumped about 50 tons of coal into the belt entry. 15 FMSHRC at 156-57. He rejected the testimony of Inspector Kirk that the belt was not broken but was spilling coal at the time of the inspection. 15 FMSHRC at 157.

In discussing whether the violation was S&S, Judge Morris determined that Mid-Continent's coal burns with great difficulty and will not spontaneously combust due to its low oxygen and high ash content. 15 FMSHRC at 159. He found that Mid-Continent must add fuel oil to its coal when it uses the coal in its coal-fired thermal dryers. Id. He further held that a major methane fire at the mine in the summer of 1990 failed to ignite adjacent coal pillars. Id. In a key paragraph, the judge made the following determinations:

> Mr. Kirk confirms [Mid-Continent's] evidence as to the ignitability of the ... coal. He testified that while the coal was in contact with the conveyor belt at four places, he didn't recall any hot areas. He also tested the friction points for heat. Mr. Kirk testified that the usual scenario is

> that the more friction the greater the heat. Thus, a smoldering fire then goes to full fire. However, Mr. Kirk agreed that if contact fails to heat the coals and the contact remains minimal, there would probably be no injury to an individual miner. Mr. Kirk describes the friction in four places as "light to heavy."

15 FMSHRC at 159 (citations to transcript omitted).

Judge Morris determined that the violation was not S&S because the Secretary failed to prove the third element of the Mathies test. He stated: "Due to the lack of ignitability of the loose coal I conclude there was not a reasonable likelihood that a fire would occur." Id.

IV. DISCUSSION WITH FINDINGS AND CONCLUSIONS

The Commission has established a four part S&S test, as follows:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). In establishing the third element of the Mathies test, the Secretary is not required to prove that the injury or illness contributed to by the violation is more probable than not. Rather, the issue is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Judge Morris determined that the first two steps of the Mathies S&S test were present. He found, however, that an injury was unlikely because the coal would not readily burn. In its brief on remand, Mid-Continent contends that the violation was not S&S because: (1) the coal is inherently incombustible and

difficult to ignite; (2) there were no potential ignition sources in the area; and (3) the section was not in production and would not have produced coal until the accumulations were cleaned up.

The coal mined at the Dutch Creek Mine is coking coal, which is a type of bituminous coal. In the coal seam where the accumulations were found, the coal contains about 23 percent volatile matter. (Tr. 336-37). The coal is not used as fuel for powerplants or industrial boilers, but is used in making steel.

In 1990, a methane fire occurred in a different coal seam at the mine. The fire consisted of a large flame about 30 to 40 inches in diameter up to twenty feet in length. (Tr. 357-59). It was a "roaring jet of flame" that took about six weeks to put out. Id. The rock around the flame was red hot. The coal at the mine is under about 3,000 feet of overburden and the coal is soft. The coal pillars regularly slough loose coal. Indeed, the coal in the pillars is frequently crushed as a result of the weight of the overburden. (Tr. 359). Although the area around the methane fire became quite hot, the coal pillars and coal sloughage did not ignite. Id. Judge Morris determined, based on this and other evidence in the record, that the coal is difficult to ignite.

I agree with his finding that the coal does not easily ignite. Nevertheless, the coal is bituminous coal that will burn and when it does it is capable of producing intense heat.[2] I believe that the fact that the coal does not easily ignite should be considered, but that the S&S determination must be based on analysis of all of the particular facts present at the mine, including, but not limited to, the ignition sources and the length of time that the accumulations existed.

There is no question that the belt break that occurred on the previous shift spilled up to 50 tons of loose coal into the entry. I find, however, that not all of the accumulations were caused by the belt break. Inspector Kirk determined that accumulations existed at a number of locations along the belt. As stated above, Judge Morris credited the inspector's description of the accumulations. 15 FMSHRC at 152-53. There were accumulations at the belt tailpiece near the stage loader. (Tr. 18). Approximately 100 feet outby the tail piece, coal was "compacted underneath the belt" and belt rollers were in contact with the coal. (Tr. 18-19). The accumulations were dry, ranged up to 12 inches deep, and were centered underneath the conveyor. (Tr. 19).

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[2] See, generally, definition of "coking coal" in Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms, at 233 (1968).

Additional accumulations were at the shark pump. (Tr. 19-20). Inspector Kirk was not sure of the depth, but the accumulations were about 50 feet long. (Tr. 20). The accumulations were black and dry. There were accumulations at the Nos. 10 and 11 doors. (Tr. 21). Belt rollers were in contact with the coal. (Tr. 21-22). At No. 9 door there was "a windrow approximately 260-foot long of coal, up to 18-inches deep." (Tr. 22). At the No. 6 door, coal accumulations were underneath the belt and the belt's rollers were turning in the coal. (Tr. 23). The coal was mostly dry at that location, but became very wet outby the No. 6 door towards the belt drive.[3] (Tr. 24).

In a number of these locations, Inspector Kirk observed coal that was "compacted" under the belt and in contact with the belt's rollers. It is unlikely that such accumulations were solely the result of a belt break. When a belt breaks, coal will be dumped onto the lower belt and along the sides of the belt at the breaking point. (Tr. 544-45). In addition, coal will be thrown off the belt at other locations as a result of the sudden release of tension on the belt. Id. MSHA Inspector William Denning observed the belt on May 2, a day after the order was issued. He testified that there was a windrow of coal along the side of the belt at one location that could have been dumped off the belt when it broke. (Tr. 687-88). He further testified that, in his opinion, not all of the accumulations were due to the belt spill. (Tr. 688). I do not believe that a belt break that causes coal to be dumped and scattered will create areas of compacted coal under the belt's rollers.

Preshift and onshift reports for the period between April 28 and May 1 indicate the presence of coal accumulations along the belt. (Ex. M-11). Some of these reports indicate that shoveling was occurring and others indicate that the condition was reported. Id. Anyone shoveling would have been close to the stage loader where coal is dumped onto the belt or at the drive where the coal is dumped onto the next belt. (Tr. 111, 117). Accumulations at those locations can create operational problems. Inspector Kirk reviewed these reports when he came out of the mine on May 1. (Tr. 43). I conclude that some of the accumulations observed by Inspector Kirk along the 3,000 foot long belt had existed for several days prior to May 1, the date the Order was issued. I base this conclusion on the fact that coal was compacted under the belt at some locations and preshift and

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[3] Judge Morris determined that the accumulated material at the belt drive was "at best incombustible rock and some coal." 15 FMSHRC at 159. Accordingly, he vacated the part of the order that cited the drive area. Id. I have not considered any accumulations outby the No. 6 door, including the drive area, in reaching my conclusion that the violation was S&S.

onshift reports indicate that accumulations had been present along the belt since at least April 28.

Although the belt was not operating continuously at the time the order was issued because it had broken, it had operated on the previous production shift and on production shifts during the days just prior to May 1.[4] As stated above, some of the accumulations between the belt drive and the stage loader were in contact with the belt and rollers supporting the belt. Coal dust may be created when a belt and belt rollers turn in accumulations of coal. (Tr. 105). Judge Morris determined that conveyor rollers rubbing against the coal constituted an ignition source. 15 FMSHRC at 155. He stated that "[a]ccumulations could be ignited by frictional contact." 15 FMSHRC at 154. He found that additional potential ignition sources included "electrical cables required to run the conveyor, the impermissible condition [Inspector Kirk] cited, as well as electrical cables for the shark pump." 15 FMSHRC at 155.[5]

The Dutch Creek mine is a gassy subject to five-day spot inspections. 15 FMSHRC at 154. If there were a methane ignition at the face during coal production, a fire could spread into the belt entry as a result of the accumulations. Loose coal and coal dust can cause a methane ignition to propagate and increase the force of an explosion. (Tr. 483).[6] Mid-Continent argues that methane ignitions at the face should not be considered because the longwall section was not producing coal at the time of the inspection. The evidence reveals, as discussed above, that some of the accumulations had existed for several days. Consequently, the record supports the Commission's determination that "[a]ccumulations, in conjunction with a methane ignition in the face area, could propagate and increase the severity of a fire or explosion." 16 FMSHRC at 1222.

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[4] The 103 longwall section produced coal on the graveyard shift (C-shift) only.

[5] Judge Morris did not consider the longwall equipment at the face to be potential ignition sources because the longwall section was not producing coal at the time of Kirk's inspection. 15 FMSHRC at 155. Although I believe that such ignition sources could have been considered because accumulations had existed for several production days, I have not included these potential ignition sources in my analysis.

[6] In 1981, fire caused by a methane ignition in a working face was carried down a belt entry by the coal and coal dust on the belt. (Tr. 486-87). Although that belt was ventilated by return air and the 103 strike belt was ventilated by intake air, the accumulations along the belt could be introduced into a methane ignition or explosion at the face.

Finally, the Commission asked the judge, on remand, to take into account continued normal mining operations when considering Inspector Kirk's testimony that the belt rollers he saw turning in the accumulations had not produced any hot areas. I cannot assume, as does Mid-Continent, that all of the accumulations would have been cleaned up as soon as the belt was spliced, before production resumed. I credit Mid-Continent's evidence that the accumulations at the location of the belt break and at the tailpiece would have been cleaned up. But the accumulations that were compacted under the rollers at other locations along the 3,000 foot long belt had existed for some time and, consequently, I cannot credit the testimony of Mid-Continent's witnesses that the belt would not have been operated until these accumulations were removed. Accordingly, taking into consideration continued normal mining operations, the fact that the inspector did not find any hot areas is not significant because such areas could have begun to smolder on subsequent production shifts. Inspector Kirk testified that these "friction points" could become hot once production resumed. (Tr. 104).[7]

Mid-Continent contends that any smoldering or smoking coal would have been detected by its carbon monoxide monitoring system and that no injuries would have occurred as a result. Mid-Continent offered evidence about its fire protection systems, which I credit. As the Seventh Circuit has stated, in considering a similar argument, "[t]he fact that [a mine operator] has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners." Buck Creek Coal, Inc. v. Secretary, 52 F.3d 133, 136 (1995). The fact that Mid-Continent installed these systems confirms "the significant dangers associated with coal mine fires." Id.

Although the coal produced at the Dutch Creek Mine will not ignite as readily as steam coal, it will burn. The accumulations will not ignite unless there is a "confluence of factors" to produce such an ignition. Texas Gulf, Inc., 10 FMSHRC 498, 501 (April 1988). Taking into consideration the ignition sources, the length of time that accumulations existed, the high levels of methane produced at the working face, and continuing normal mining operations, I find that the Secretary established the third element of the Mathies S&S test. Judge's Morris's findings with respect to the fact of violation support an S&S finding. Because the coal does not easily ignite, I cannot say that it was more probable than not that the violation would have resulted in an injury producing ignition or explosion. Nevertheless, there

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[7] Because the inspection occurred on a nonproduction shift and the belt was broken, it is not surprising that Inspector Kirk did not observe any hot areas.

was a reasonable likelihood that the hazard contributed to would result in an injury.[8]

V. CIVIL PENALTY

Judge Morris analyzed the civil penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and determined that a civil penalty of $400.00 was appropriate for this violation. 15 FMSHRC at 160-61. He determined that Mid-Continent is in Chapter 11 bankruptcy, is only a debtor-in-possession, and is no longer mining coal. He determined that it had a history of 604 paid violations from May 1, 1988 to April 30, 1990. He found that Mid-Continent was negligent but that the violation was not serious. Finally, he found that Mid-Continent rapidly abated the violation. I adopt his analysis of the penalty criteria except that I find that the violation was serious, for the reasons set forth in my S&S analysis. The Secretary proposed a penalty of $1,000 for the violation. I find that a penalty of $500 is appropriate, taking into consideration the penalty criteria.

IV. ORDER

Accordingly, I find that the violation described in Order No. 3412700 significantly and substantially contributed to the cause and effect of a coal mine safety hazard. Mid-Continent Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $500.00.[9]

Richard W. Manning
Administrative Law Judge

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[8] The fourth element of the Mathies S&S test has been met because it is reasonably likely that if an injury occurred, it would be of a serious nature.

[9] As stated above, Mid-Continent filed for bankruptcy under Chapter 11 of the Bankruptcy Act in 1992 (Case No. 91-11658 PAC, District of Colorado). Payment of the assessed penalty may be subject to the approval of the United States Bankruptcy Court. The Secretary is authorized to present the assessment as a claim in the bankruptcy proceeding.

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JUL 25 1995

JAMES D. WATERS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 93-261-DM
	:	MSHA Case No. SE MD 93-04
IMC FERTILIZER, INC.,	:	
Respondent	:	Carlsbad Facility

ORDER OF DISMISSAL

Appearances: David W. Strickler, Esq., and W.T. Martin, Jr., Esq., Law Offices of W.T. Martin, Jr., P.A., Carlsbad, New Mexico, for Complainant; Charles C. High, Jr., Esq., Kemp, Smith, Duncan & Hammond, El Paso, Texas, for Respondent.

Before: Judge Fauver

This is a discrimination action under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 **et seq**.

After the hearing, a decision on liability was entered on December 5, 1994.

A separate hearing on relief was held at El Paso, Texas, on May 9, 1995. On the second day of the hearing, the parties reached a settlement agreement that was approved by the judge.

Pursuant to the settlement agreement, the parties have moved to dismiss the case.

ORDER

WHEREFORE IT IS ORDERED that the parties' motion to dismiss is **GRANTED** and this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 25 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-1
Petitioner	:	A. C. No. 15-04455-03529
v.	:	
	:	Docket No. KENT 95-2
DEBY COAL COMPANY, INC.,	:	A. C. No. 15-04455-03530
Respondent	:	
	:	Prep Plant

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

These cases are before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion for settlement asserting that the subject 104(b) orders should be vacated, and that no penalty should be assessed for the subject 104(a) citations. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that these cases be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20006

JUL 25 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-214
Petitioner	:	A. C. No. 48-01180-03502 CGD
	:	
v.	:	
	:	
KIEWIT MINING GROUP	:	
INCORPORATED,	:	Black Butte & Leucite Hills
Respondent	:	Mines

ORDER ACCEPTING RESPONSE
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977.

On April 28, 1995, the Solicitor filed a motion to approve settlements for the two violations in this case. Each violation was originally assessed at $7,500 and settlements of $3,000 apiece are sought by the Solicitor. On June 8, 1995, an order was issued disapproving the settlement and directing the Solicitor to submit additional information to support her motion. On July 7, 1995, the parties filed an amended motion.

Citation No. 3245186 recites that information obtained during an accident investigation showed there was a violation of 30 C.F.R. § 77.404(c). Electric power was not deenergized in the termination compartment of a trailing cable for a dragline. The power was energized while welding was performed in the high voltage compartment. The violation, which resulted in a fatality, was found to significant and substantial. Negligence was originally determined to be high and the violation was issued as a citation under section 104(d). Subsequently, negligence was reevaluated as moderate and the (d) citation was changed to a section 104(a) citation.

A second citation, No. 3853680, was issued for this situation, finding a violation of 30 C.F.R. § 77.501. According to the citation, work was performed inside the termination box of the high voltage trailing cable in proximity to exposed energized wires. The circuit was not locked out and suitably tagged. The violation was found to be significant and substantial. Negligence was originally determined to be high and the violation was contained in a section 104(d) order. Subsequently, negligence was reevaluated as moderate and the violation was modified to one issued under section 104(a).

The parties have submitted a joint amended motion for settlement which sets forth the relevant circumstances as follows:

a. The maintenance that was being performed in the tub of the dragline involved welding of rack segments and rack pads in numerous compartments of the tub; electrical work was not being performed.

b. Respondent had a written lockout/tagout policy requiring that "[w]hen a piece of equipment or machinery is to be inspected, cleaned, repaired, or worked on by an individual, that piece of equipment must be immobilized by the individual prior to commencing work on the equipment." The lockout/tagout policy required that electrical equipment, such as the dragline, be locked out at the circuit breaker or electrical disconnect. Respondent's employees were trained on the requirements of its lockout/tagout procedure.

c. Before the welding work began, the dragline was deenergized and the electrical disconnect switch was locked and tagged out as required by the cited standards and Respondent's procedures. In addition, the fence surrounding the substation in which the electrical disconnect was located was locked.

d. Respondent's leadman and a welder were the two individuals directly involved in the welding work being performed in the tub of the dragline. The leadman had inspected the dragline's "termination compartment," i.e., the compartment in the tub where the trailing cables were connected to the dragline, and had determined that welding was not required

in that compartment. The leadman communicated this fact to the welder.

e. While the welding work in the tub progressed the electrical power to the dragline remained locked out. Eventually, based on the tasks that he had accomplished and his communications with the welder, the leadman determined that the required welding work had been completed. The leadman began his post-welding cleanup by removing tools and equipment from the tub and he instructed the welder to do the same.

f. The leadman then informed an electrician that the maintenance work had been completed in the tub, that the lock could be removed from the electrical disconnect, and that the dragline could be reenergized. After the electrician restored power to the dragline, the leadman and welder, who were in different compartments of the tub, had voice communications concerning the fact that the dragline's power and lighting had been restored.

g. Shortly thereafter, power to the dragline was tripped. Unknown to the leadman, the welder had entered the termination compartment and had come in contact with energized equipment.

I accept the representations and arguments advanced in the joint motion, which is exceptionally comprehensive and convincing. Accordingly, as suggested by the parties, negligence is reduced from high to ordinary.

In light of the foregoing, it is **ORDERED** that the amended settlement motion filed July 7 is **ACCEPTED** as a response to the June 8, 1995, order.

It is further **ORDERED** that the recommended settlements be **APPROVED**.

It is further **ORDERED** that the operator **PAY** $6,000 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 25 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-369
Petitioner	:	A.C. No. 46-04421-03724 A
v.	:	
	:	Amonate No. 31 or #31
JAMES M. STUTSO, III,	:	
Employed by	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-382
Petitioner	:	A.C. No. 46-04421-03726-A
v.	:	
	:	Amonate #31 or #31
JAMES L. BREWSTER,	:	
Employed by	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-395
Petitioner	:	A.C. No. 46-04421-03752-A
v.	:	
	:	Amonate #31 or #31
CHARLES R. HENSLEY,	:	
Employed by	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-396
Petitioner	:	A.C. No. 46-04421-03727-A
v.	:	
	:	Amonate #31 or #31
CARLOS H. HESS,	:	
Employed by	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISIONS

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
David J. Hardy, Esq., John Bonham, Esq., Jackson and Kelly, Charleston, West Virginia, for the Respondent Consolidation Coal Company;
J. Timothy Dipiero, Esq., Ditrapano and Jackson, Charleston, West Virginia, for the Respondent James L. Brewster.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondents pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977. The respondents were charged as agents of the corporate mine operator Consolidation Coal Company (Consol) with "knowingly authorizing, ordering, or carrying out" a violation of mandatory safety standard 30 C.F.R. 75.360, as stated in section 104(d)(1) "S&S" Order No. 3727399, issued by an MSHA inspector on March 3, 1993.

The respondents filed timely contests and answers denying the alleged violations and the matters were consolidated for hearing with several other section 110(c) civil penalty cases, and civil penalty cases filed against Consol. The hearing was convened in Beckley, West Virginia, on June 20, 1995.

Discussion

Prior to the taking of any testimony, the parties were afforded an opportunity to address pending motions for summary decisions and dismissals that were filed by counsel for the respondents. In support of the motions, counsel argued that the individually named respondents should not, as a matter of law, be held responsible for the alleged violations in question. Each of the motions are supported by the sworn affidavits of the respondents who state that they were not on duty on the section during the shifts immediately prior to, or at, the time of the incident of December 29, 1992, that resulted in the issuance of the violation in question.

The petitioner's counsel stated that MSHA has taken the position that it would not oppose the motions for summary decisions, and did not object to the dismissal of the cases (Tr. 18, 20). He also stated that the parties agreed to bear their own litigation costs in these matters (Tr. 20). Counsel Dipiero, speaking on behalf of all of the respondents, confirmed that this was the case, and that the respondents agreed to pay their costs (Tr. 20-22).

Conclusion

After further consideration of the motions and arguments advanced by the respondents, and taking into account the lack of opposition by the petitioner, the motions were granted from the bench (Tr. 20). My decision and ruling in this regard is herein **REAFFIRMED**.

ORDER

In view of the forgoing, the petitioner's proposed civil penalty assessments **ARE DENIED**, and these matters **ARE DISMISSED.**

George A. Koutras

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 2 6 1995

MADISON BRANCH MANAGEMENT,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 93-218-R
	:	Order No. 3976643; 3/1/93
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 93-219-R
ADMINISTRATION (MSHA),	:	Citation No. 3976644; 3/1/93
Respondent	:	
	:	Docket No. WEVA 93-220-R
	:	Citation No. 3976647; 3/4/93
	:	
	:	Job. No. 3
	:	Mine ID 46-05815
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-373
Petitioner	:	A.C. No. 46-05815-03520
v.	:	
	:	Docket No. WEVA 93-412
MADISON BRANCH MANAGEMENT,	:	A.C. No. 46-05815-03521
Respondent	:	
	:	Job No. 3
	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-415
Petitioner	:	A.C. No. 46-05815-03501HWZ
v.	:	
	:	Job No. 3
PROTECTIVE SECURITY SERVICES,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

Statement of the Case

These proceedings concern Petitions for the Assessment of Civil Penalties filed by the Secretary, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), against Protective Security Services (PSSI) and Madison Branch Management (Madison). The Secretary's case is based on alleged training and defective equipment violations related to the March 1, 1993, carbon monoxide death of PSSI employee Allen Garrett, a night watchman. PSSI is an independent contractor that provided security services at Madison's Job No. 3 surface mine.

These cases were remanded on June 12, 1995, after Madison petitioned the Commission for interlocutory review of orders denying the parties' motions for approval of settlement. Commission's *Remand Decision*, 17 FMSHRC 859. The parties' motions were denied because of outstanding issues of fact concerning what, if any, actions the respondents had taken to avoid the carbon monoxide hazard that resulted as a consequence of the alleged violations. These issues impact upon the degree of negligence and the gravity associated with the alleged violative conduct.[1] They also impact upon whether the civil penalties proposed by the Secretary, and accepted by the respondents, are adequate to "accomplish the underlying purpose of the civil penalty--to encourage and induce compliance with the Mine Act and its standards." 17 FMSHRC at 867.

In view of the parties prior Motions for Summary Decision and their responses to my June 19, 1995, Order on Remand evidencing that they have no further evidence to submit, I have determined that there are no factual disputes related to the fact of occurrence of the subject violations. The respondents' submissions have also resolved all factual issues concerning

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[1] Negligence and gravity are two of the six civil penalty criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i).

their actions to address the hazard posed by these violations Consequently, I am basing this decision concerning the appropriate civil penalties to be assessed on the record evidence. As noted below, the degree of negligence, gravity, and, the lack of evidence that the proposed civil penalties have had an adequate deterrent effect on the respondents, convince me that the penalties proposed by the parties are inadequate.

Background

Carbon monoxide is a colorless, odorless, non-irritating gas that has been labeled "the perfect asphyxiant." With the exception of ethyl alcohol (liquor), carbon monoxide is the most frequent cause of fatal accidental poisoning in this country. Hemoglobin is the substance in red blood cells that is responsible for transporting oxygen to body organs including the brain. Carbon monoxide has an affinity (bonding capacity) for hemoglobin that is 200 to 300 times that of oxygen. Therefore, a very small concentration of carbon monoxide effectively blocks the normal function of hemoglobin, thus depriving the body of oxygen. The concentration of carbon monoxide in the body is dependent on its concentration in the air and the duration of exposure. Carbon monoxide accumulates in body tissues with prolonged exposure. Standard automobile engine exhaust fumes contain approximately 13 percent carbon monoxide. A concentration of 0.4 percent of carbon monoxide in atmospheric air is lethal within one hour of exposure. As carbon monoxide levels in the body increase with exposure, symptoms range from slight headache to confusion, fainting, unconsciousness and ultimately death. Irvin M. Sofer, M.D., D.D.S. & William C. Masemore, *The Investigation of Vehicular Carbon Monoxide Fatalities*, Traffic Digest & Review, Nov. 1970, at 1-3.[2]

The facts surrounding the fatal accident in these matters are not in dispute. Allen Garrett was employed by PSSI as a part-time security guard at Madison's surface mine facility located near Lynco, in Wyoming County, West Virginia. Garrett was assigned to work on weekends and routinely reported to work

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[2] The publications on carbon monoxide poisoning cited in this decision were provided to the parties with the September 9, 1994, Notice of Hearing Site in these proceedings.

on Saturday nights at 10:00 p.m. Garrett was relieved by another security guard on Sunday mornings at 10:00 a.m. Garrett would report back to work on Sunday nights at 10:00 p.m. and work until 6:00 a.m. on Mondays, at which time Madison personnel reported to work to resume the week's mining activities. Garrett's security duties included preventing unauthorized mine entry, which Garrett accomplished by remaining on the haulage road in his parked vehicle for extended periods of time.

On Sunday, February 28, 1993, at approximately 10:00 p.m., Garrett arrived at Madison's No. 3 Mine in his vehicle, a 1986 Ford Bronco II. Garrett's shift was scheduled to end the following morning on Monday, March 1, 1993, at 6:00 a.m. At approximately 6:10 a.m. that morning, a truck driver reporting for work observed Garrett's vehicle parked at the top of the main haulage road. The truck driver approached Garrett to ask him to move his vehicle. He found Garrett unconscious, lying on the floor board between two bucket seats with his head toward the front of the vehicle. Garrett was immediately transported via ambulance to a local hospital where he was pronounced dead on arrival. The cause of death was carbon monoxide intoxication. At the time of Garrett's death the weather had been cold, approximately 25 degrees Fahrenheit, and it had been snowing.

Investigating authorities concluded Garrett fell asleep and succumbed to carbon monoxide poisoning between 12:48 a.m., when the last entry in Garrett's log book was made, and 6:00 a.m., when he was found by the truck driver. At the time Garrett was discovered, the engine in his vehicle was running, the dome light was on, and, the heater was running on high. The investigation revealed Garrett's vehicle had one large crack at the exhaust manifold located near the firewall and large cracks on the exhaust pipe on each side of the muffler.

As a result of Garrett's fatality, the Mine Safety and Health Administration (MSHA) issued 107(a) Order No. 3976643 to Madison for the imminent danger created by Garrett's vehicle. MSHA also issued 104(a) Citation Nos. 3976644 and 3976646 to both Madison and PSSI, respectively, for their alleged violations of section 77.404(a), 30 C.F.R. § 77.404(a). This mandatory safety standard requires, in pertinent part, that mobile equipment must

be maintained in safe operating condition. The Secretary proposed civil penalties of $2,000 against Madison and $3,000 against PSSI for these violations.

In addition, MSHA issued Citation No. 3976647 to Madison for an alleged violation of section 48.31(a), 30 C.F.R. § 48.31(a). This mandatory safety standard requires that hazard training must be provided to all miners. Section 48.31(a) requires hazard training to include instruction on "hazard recognition and avoidance" and "safety rules and safe working procedures." The Secretary proposed a civil penalty of $88 for this alleged violation.

The Secretary filed separate Motions to Approve Settlement with Madison and PSSI on March 31, 1994. The settlement terms included substantial reductions in the civil penalties proposed against Madison and PSSI. In support of the reduction in penalties with respect to PSSI, the Secretary stated:

> Although the Secretary asserts that the damaged exhaust system was the proximate cause of the fatality, the Secretary acknowledges the existence of other [mitigating] factors which contributed to the fatality (i.e. the windows being tightly closed, Mr. Garrett possibly haven fallen asleep). Secretary's Motion at 3.

Given my reluctance to blame the victim, the Secretary's motions were denied by Order dated April 7, 1994, because the Secretary had not demonstrated "adequate mitigating circumstances to justify the significant reductions in the proposed penalties."

On April 8, 1994, the Secretary filed Amended Motions to Approve Settlements that provided that Madison and PSSI would pay the full penalties initially proposed by the Secretary. The proposed settlement with respect to PSSI stated:

> . . . Protective Security agrees that they will designate an employee to be <u>responsible for inspecting and ensuring the safe operating condition of the exhaust systems of all vehicles used by employees</u> in the performance of their work duties at least once every ninety days. <u>Protective Security further agrees</u>

> that they will maintain (and produce when requested by MSHA or PSSI's contractors) documentation of such inspections. (Emphasis added). Secretary's Amended Motion at 3.

On April 11, 1994, the parties were ordered to provide clarifying information in support of their proposed settlement. Specifically, the parties were ordered to explain whether security personnel continued to remain in their stationary vehicles with the motor and heater running after Garrett's March 1, 1993, death. The parties were also requested to state whether there were any alternative means of warmth and shelter available to security guards at Madison's Job No. 3 mine site. In addition, the Secretary was requested to address whether PSSI's reported vehicle inspection program and PSSI's admonitions, presumably on behalf of Madison, to security guards not to fall asleep or leave their vehicle windows tightly closed, were effective measures for reducing the carbon monoxide hazard presented by the cited violations.

On May 16, 1994, the respondents filed a Joint Response to the Order Requesting Clarification and the Secretary filed a Second Amended Motion to Approve Settlements. In response to the requested clarifying information, Madison stated, "there are no structures on the site of its Job No. 3 which can be accessed by security personnel to provide warmth and shelter." Parties' Joint Response at 7. Madison also stated that "security personnel did continue to use their vehicles for shelter and heat during the winter after March 1, 1993... ." *Id.*

PSSI responded that it has "voluntarily agreed to designate one employee to inspect exhaust systems of all automobiles used by employees once every ninety (90) days." *Id.* at 11. PSSI did not identify the employee, his qualifications to inspect vehicles, or, the method of inspection.

PSSI's response included an attachment that is instructions issued to its security personnel. These instructions provide in section 3.12:

> At no time will any employee be required to stay in a vehicle while on a job assignment without getting out of the vehicle at least every 20 minutes to be sure not

to be overcome by carbon monoxide fumes. In fact, you are required to get out of your vehicle at least every 20 minutes to check your job assignments. This will also help you stay awake.[3] (Emphasis added).

With respect to the information and comments solicited from the Secretary, the Secretary stated PSSI's purported vehicle inspection program, for which it provided no details, was "welcomed by MSHA" because "it demonstrates the operator's willingness to take measures to prevent a hazard without specific legal requirements to do so." Parties' Joint Response at 3. The Secretary did not explain whether instructing employees not to tightly close their car windows and not to fall asleep in their vehicles constituted adequate hazard training. *See Id.* at 4.

In view of the inadequacy of the parties' responses concerning the purported vehicle inspection program and hazard training, I issued Orders on June 8, July 22, and August 29, 1994, denying the parties' Motions for Approval of Settlement and the parties' Motion for Summary Decision. The question of the appropriate civil penalty to be assessed was set for hearing in order to resolve material issues of fact concerning the adequacy of the hazard training and the vehicle inspection program. *See* August 29th Order at 2; *see also Tazco, Inc.*, 3 FMSHRC 1895, 1898 (August 1981).

The August 29th Order incorporated by reference the July 22nd Order which enumerated the following five unresolved issues of material fact to be resolved at the hearing:

1. The nature of carbon monoxide intoxication and the correlation between the level of toxicity and the period of exposure;

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[3] These exculpatory instructions, when considered in context, seek to encourage employees to stay awake so that they can exit their vehicles every 20 minutes to avoid being overcome by carbon monoxide. As discussed *infra*, these instructions are contrary to the provisions of the cited section 48.31(a) training standard that require employees to receive training in "hazard avoidance" and "safe working procedures."

2. Given the characteristics of carbon monoxide, whether the risk of carbon monoxide intoxication to individuals who seek warmth and shelter in stationary vehicles for extended periods of time can be effectively alleviated by the methods proposed by the respondents;

3. Whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by section 5(a)(1) or section 5(a)(2) of the Occupational Safety and Health Act of 1970, 20 U.S.C. § 654(a)(1) and (a)(2);

4. The qualifications of the individual assigned by PSSI to inspect employee vehicle exhaust systems and the methods of such inspection; and

5. The requisite qualifications, equipment and procedures for performing an adequate vehicle exhaust system inspection.

The July 22nd Order noted that Dr. Irvin Sofer, Chief Medical Examiner of the West Virginia Department of Health and Human Services, would be called upon by the court as an expert witness. The parties were further informed that Dr. Sofer's testimony would include pertinent publications written by Dr. Sofer on the subject of carbon monoxide poisoning. By Order dated September 9, 1994, a hearing was scheduled for September 22, 1994, in Charleston, West Virginia. In preparation for hearing, the parties were provided the following articles co-authored by Dr. Sofer: Susan P. Baker, M.P.H., *et al.*, *Fatal Unintentional Carbon Monoxide Poisoning in Motor Vehicles*, American Journal of Public Health, , Vol. 62, No. 11, 1463 (November 1977); and, Sofer & Masemore, *The Investigation of Vehicular Carbon Monoxide Fatalities, supra*.

The hearing in these matters was stayed by the Commission on September 20, 1994, after Madison petitioned for interlocutory review. 16 FMSHRC 1934. On June 12, 1995, the Commission remanded these matters for appropriate disposition.

In its remand, the Commission, citing *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509-11 (April 1989), narrowly construed the respondents' abatement obligations given the restrictive language of the citations in issue. 17 FMSHRC at 865. Thus, the Commission concluded that abatement of the defective equipment violation of section 77.404(a) was accomplished by removal of Garrett's vehicle from mine property. *Id.* at 866. With respect to the training violation of section 48.31(a), the Commission determined that no further training was required for abatement as the citation only cited the lack of training of the deceased. *Id.* Consequently, the Commission decided that I erred to the extent that I declined to approve the proposed settlement because the parties had failed to provide facts demonstrating the requisite good faith of the person charged in attempting to achieve rapid compliance after notification of the subject violations. 17 FMSHRC at 867.

However, the Commission directed me to consider the adequacy of the proposed settlement amounts by affording the appropriate weight to the other statutory penalty criteria in section 110(i) of the Act "in light of the planned inspection program's contribution to compliance." *Id.* at 867-68. In addition, the Commission, citing legislative history, urged me to consider whether the proposed penalties "will accomplish the underlying purpose of a civil penalty--to encourage and induce compliance with the Mine Act and its standards." *Id. at 867.*

In light of the Commission's remand decision, on June 19, 1995, I issued an Order On Remand giving the parties an opportunity to resubmit settlement motions with supporting arguments and/or documentation. In the alternative, the order provided that the parties could request that these cases proceed to hearing.

Counsel for Madison replied on June 21, 1995, indicating that Madison became a Chapter 7 debtor under the U.S. Bankruptcy Code on May 19, 1995. Counsel indicated the June 19, 1995, Order was forwarded to the court appointed bankruptcy trustee.

PSSI responded through counsel on July 3, 1995. The response consisted of correspondence from George L. Mathis, President of PSSI wherein Mathis stated he was uncertain if PSSI

was financially capable of paying the $3,000 proposed civil penalty, not to mention an increased civil penalty.

Despite PSSI's repeated assurances throughout this proceeding, credited by the Secretary, that it had instituted a vehicle inspection program by designating an employee to perform exhaust system inspections every 90 days, PSSI now states that it requires security guards to certify that their vehicles are in proper working order without any affirmative efforts on the part of PSSI to inspect vehicles. PSSI's employee certification form continues to warn its employees that "if" employees remain in their vehicles, they should not stay in their vehicles for more than 20 minutes at a time and they should "get out of the vehicle on a regular basis for fresh air..." Employees are also cautioned to "leave windows partially open." I construe PSSI's response as a request for a disposition based on the record.

The Secretary replied on July 11, 1995, stating that neither the Secretary nor Madison had any additional information to submit in support of the proposed settlement. The Secretary stated that both the Secretary and Madison were requesting a decision based upon the record evidence.

Further Findings and Conclusions

It is well settled that an Administrative Law Judge of this Commission has the responsibility and authority to make *de novo* determinations concerning the propriety of the Secretary's proposed civil penalties by applying the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7th Cir. 1984). Consequently, in its remand the Commission, citing *Knox County Stone Co.*, 3 FMSHRC 2478, 2479-81 (November 1981) and relying on the provisions of section 110(k) of the Act, 30 U.S.C. § 820(k), directed me "to consider the weight to be given to each of the statutory penalty criteria in light of the planned inspection program's contribution to compliance."[4] 17 FMSHRC at 867-68.

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[4] Section 110(k) provides, in pertinent part, "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission."

Negligence

The lethal nature of exposure to automobile fumes is commonly known. In the instant case, Garrett's job duties, which involved his prolonged presence in a stationary vehicle, cannot be equated with those of cab drivers or truck drivers who drive about, thus dissipating any potential for carbon monoxide exposure. There is no evidence that PSSI or Madison, knowing that Garrett would remain in his stationary vehicle for 8 to 12 hour shifts in sub-freezing inclement weather and subject to fatigue, took any action to ensure that Garrett's vehicle was in safe operating condition. The respondents' failure to appreciate the danger posed to Garrett constituted a reckless disregard indicative of an exceptionally high degree of negligence.

Turning to the negligence associated with Madison's section 48.31(a) violation, while there are serious questions whether any hazard training short of warning security personnel not to stay in their stationary vehicles would be effective, the issue of the adequacy of hazard training as it relates to the degree of negligence is not in issue as Madison failed to provide any pertinent training to Garrett. Having exposed Garrett to the possibility of carbon monoxide intoxication, it was incumbent on Madison to provide him with proper training against such dangers. The failure to provide Garrett with any carbon monoxide hazard training given Madison's awareness of Garrett's long-term exposure in his stationary vehicle at Madison's mine site without any alternative means of warmth and shelter likewise demonstrates a high degree of culpability.

Gravity

Gravity as a section 110(i) penalty criteria relates to the seriousness of a violation. Gravity must be viewed in the context of the importance of the violated mandatory safety standard and the operator's conduct in relation to the Mine Act's purpose of ensuring that operators make every reasonable effort to prevent unsafe or unhealthful conditions. *Quinland Coals, Inc*, 9 FMSHRC 1614, 1622 n. 11 (September 1987); *see also Harlan Cumberland Coal Company*, 12 FMSHRC 134, 140-41 (January 1990) (ALJ Fauver). Here, the unsafe condition or practice was readily apparent. Yet the respondents failed to provide Garrett with the benefit of any meaningful vehicle inspection or hazard training

to address Garrett's potential exposure to carbon monoxide fumes. These omissions constitute violative conduct indicative of serious gravity.

Planned Vehicle Inspection and and Hazard Training Programs' Contribution to Compliance With the Cited Mandatory Standards

In its remand, the Commission noted the subject citations were narrow in scope and did not trigger a broad duty of abatement because they were limited to Garrett's defective vehicle and his lack of hazard training. However, good faith abatement is only one of several non-exclusive statutory guidelines to be considered when determining the appropriate civil penalty. Another fundamental consideration, discussed in the legislative history of section 110(i), is whether the amount of the proposed penalty is sufficient to encourage compliance with the cited mandatory standard.[5] Consequently, in penalty assessment, it is proper to evaluate the respondents' continuing operations to determine if the respondents are exposing others to the identical hazards contributed to by the cited violative conduct, particularly in this instance where that conduct contributed to a fatality.

In other words, the Act is a remedial rather than a revenue raising statute. The purpose of the Act is "to provide for the protection and health and safety of persons working in the coal mining industry of the United States..." 30 U.S.C. § 801 Note. The imposition of a civil penalty is a means intended to "effectuate the purposes of the Mine Act." 17 FMSHRC at 873.

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[5] Section 110(i) of the Act states that, "[i]n assessing civil monetary penalties, the Commission shall consider..." the six penalty criteria contained therein (emphasis added). Although application of these statutory guidelines is almost always adequate to determine the proper civil penalty, the language of section 110(i) does not preclude consideration of other relevant factors in extraordinary cases, particularly when such factors are consistent with the legislative history and assist the trier of fact in assessing penalties that are in the public interest.

The imposition of civil penalties for violations of mandatory safety standards that expose miners to hazards jeopardizing life and health without regard to whether or not these hazards continue to exist would be a futile gesture that would trivialize the Mine Act. In this regard, the Commission noted in its remand decision that the Commission and its judges have a duty "to protect the public interest by ensuring that all settlements... are consistent with the...Act's objectives." 17 FMSHRC at 867, *citing Knox County*, 3 FMSHRC at 2479.

Consistent with the above discussion, Congress specifically expressed its concern in the legislative history of section 110(i) of the Act that the objective of the imposition of a civil penalty must be to encourage compliance with the cited standard rather than raise revenue. Senate Subcommittee on Labor, 2d Sess., *Legislative History of the Mine Safety and Health Act of 1977*, at 632 (1978). The drafters of the Act stated, "a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." *Id.* at 629.

Therefore, given the purpose of the Act, if PSSI and Madison insist on exposing personnel to the potential of carbon monoxide poisoning, they must bear the burden of ensuring vehicles are in safe operating condition and of ensuring that personnel are properly trained in hazard avoidance. Unfortunately, as noted below, the post-fatality conduct of PSSI and Madison demonstrates the penalties proposed by the Secretary are inadequate to encourage the respondents' compliance with sections 77.404 and 48.31(a).

Despite PSSI's repeated assurances that it had initiated its own vehicle inspection program, in its latest July 3, 1995, submission, PSSI now reports that it has shifted the burden of exhaust system inspections to its security guards who are subjected to the hazards of carbon monoxide on a nightly basis. PSSI's attempt to superimpose its responsibility for ensuring that vehicles are maintained in safe operating condition on its employees subverts the basic legislative intent of the Act, which provides that it is the mine operator and its contractors that "have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices" in the

Nation's mines. 30 U.S.C. §§ 801(d), 801(e), 802(d); *see also Eagle Nest Incorporated*, 14 FMSHRC 1119 (July 1992). Thus, PSSI's attempt to shift the burden of vehicle inspection is an aggravating rather than mitigating factor with respect to its degree of culpability and the appropriate civil penalty.

Evaluation of Madison's reliance on PSSI's warnings to its employees to "partially" open car windows and not fall asleep as the method of achieving compliance with the hazard training requirements of section 48.31(a) raises interesting questions because automobiles are not primarily designed for the purpose of providing warmth and shelter. Automobile manufacturers caution against remaining in stationary vehicles for even short periods of time. For example, the *1991 Ford Motor Company Owner's Guide*, provided to the parties with my August 29, 1994, Order denying summary decision, warns:

> Carbon monoxide, although colorless and odorless, is present in exhaust fumes. Take precautions to avoid its dangerous effects.
>
> Never idle the engine in closed areas. Never sit in a parked or stopped vehicle for more than a short period of time with the engine running. Exhaust fumes, particularly carbon monoxide, may build up. These fumes are harmful and could kill you. (Emphasis added).

Moreover, the efficacy of open car windows as a life saving measure is questionable. In studies involving seven of 39 instances of carbon monoxide deaths in vehicles, Dr. Sofer and his colleagues found:

> Seven cars [of the 39 vehicles studied] had at least 1 window open for a distance of 1/2" to 4", which many people think is an adequate precaution against CO poisoning. Two of these cars were subjected to carbon monoxide tests while parked with the engine running and accumulated potentially fatal CO concentrations with the window in the same position as when the bodies were discovered. One of them, with the window open 1/2", built up a 0.1% CO level in 30 minutes. This level produces a fatal carboxyhemoglobin saturation in the

blood in 3-4 hours. The other tested car had a window open about 4", and exhaust fumes may actually have entered through this window as well as the trunk. Baker *et al.*, *supra* at 1465.

Madison has failed to demonstrate any effective training measures taken after Garrett's death to protect security guards from the hazards of carbon monoxide exposure. In fact, the training proposed by PSSI, and apparently endorsed by Madison, would accentuate the potential dangers from carbon monoxide exposure by suggesting ineffective remedial measures such as reminders to stay awake. Such training measures disregard the provisions of section 48.31(a) which mandate training in "hazard recognition and avoidance." Rather than achieve compliance, the training program advanced by the respondents ignores hazard recognition and pays lip service to avoidance. Such conduct is also an aggravating rather than a mitigating factor.

Ultimate Conclusions

PSSI has presented no objective evidence that it is financially incapable of paying an increased penalty in this matter. In view of the extremely high negligence and serious gravity associated with the violations in issue, as well as the failure to adequately remedy the hazards created by the cited mandatory standards to ensure that future fatalities do not occur, I would normally be inclined to impose significantly higher penalties in these cases.

However, I acknowledge that both the Secretary and the dissenting Commissioners on remand support the proposed settlement. Therefore, in an exercise of restraint, a civil penalty of $7,500 is assessed for PSSI's violation of section 77.404(a) cited in Citation No. 3976646. Similarly, civil penalties of $4,000 for Madison's violation of section 77.404(a) cited in Citation No. 3976644 and $1,500 for Madison's section 48.31(a) violation cited in Citation No. 3976647 are also hereby assessed in this matter. While these penalties represent significant percentage increases over the small initial proposed assessments, the penalties are mild given the circumstances

herein.[6] The small size of PSSI and Madison's bankruptcy have also been considered in the assessment of these penalties.

Finally, my statutory jurisdiction in this matter is limited to the appropriate civil penalty to be assessed. Imposition of remedial measures to prevent carbon monoxide death is beyond the scope of my authority. However, the paramount purpose of the Act is to prevent the existence of "unsafe and unhealthful conditions and practices." Potentially exposing employees to a deadly odorless, colorless gas, night after frigid night, in direct contravention of automobile manufacturer warnings, is an unsafe and unhealthful practice. Assuming *arguendo*, this practice does not violate the Act, the respondents have an affirmative duty to protect such employees from the hazards of carbon monoxide through meaningful vehicle maintenance and hazard training programs.

While not dispositive of these civil penalty proceedings, I note MSHA has reported that on Sunday, April 9, 1995, under apparent circumstances similar to the fatality of Allen Garrett, Melvin Brian Day, a security guard in a mine located in McDowell County, West Virginia, was found dead from asphyxiation in his vehicle. At the time he was discovered, Day s vehicle was parked on mine property with the motor running. *See Mine Regulation Reporter*, Vol. 8, No. 9, May 5, 1995, at 223. I urge MSHA to take appropriate enforcement measures to prevent similar loss of life.

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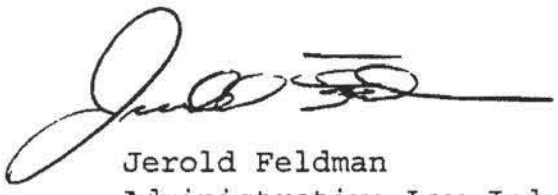
[6] It is not uncommon for the Commission to impose civil penalties considerably larger than those proposed by the Secretary when there are factors aggravating an operator's culpability. For example, the Court recently affirmed the Commission's increase in proposed penalties from $25,000 to $65,000 in a matter involving two fatalities. *W.S. Frey Company, Incorporated v. FMSHRC*, No. 94-1869, (4th Cir. June 13, 1995).

ORDER

In view of the above, 107(a) Order No. 3976643 and 104(a) Citation Nos. 3976644 and 3976647 issued to Madison Branch Management **ARE AFFIRMED**. Consequently, Madison Branch Management's related contests in Docket Nos. WEVA 93 218-R, WEVA 93-219-R and WEVA 93-220-R **ARE DENIED**.

Accordingly, **IT IS ORDERED** that Madison Branch Management pay a total civil penalty of $5,500 for the citations in issue. The Secretary may assert a claim for payment of this civil penalty in Madison's Bankruptcy proceeding. Upon receipt of payment, Docket Nos. WEVA 93-373 and Docket No. WEVA 93-412 **ARE DISMISSED**.

Citation No. 3976646 issued to Protective Security Services and Investigations, Inc., **IS AFFIRMED. IT IS FURTHER ORDERED** that Protective Security Services and Investigations, Inc., pay a civil penalty of $7,500 in satisfaction of this citation. Payment is to be made within 30 days of the date of this decision. Upon timely receipt of payment, the civil penalty proceeding in Docket No. WEVA 93-415 **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 2 7 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1312
Petitioner	:	A.C. No. 15-16666-03523
v.	:	
	:	Mine: No. 3
WILLIAMS BROTHERS COAL CO.,	:	
INC.,	:	
Respondent	:	

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, and James C. Hager, Conference and Litigation Representative, Phelps, Kentucky, for Petitioner; Hufford Williams, Vice-President, Williams Brothers Coal Company, Inc., Pro Se, for Respondent.

Before: Judge Amchan

This case involves eight citations with total proposed civil penalties of $733, arising out of inspections of Respondent's No. 3 Mine in Eastern Kentucky in the fall of 1993 and spring of 1994. A hearing in this matter was held on May 4, 1995, in Prestonsburg, Kentucky. As discussed below, I affirm six citations as non-significant and substantial (S&S) violations and assess civil penalties in the amount of $300. Two citations and the corresponding proposed penalties are vacated.

Citation No. 4004328: Inadequate Number of Boreholes Drilled into Previously Mined Area

In early October 1994, several days prior to the issuance of Citation No. 4004328, Respondent encountered adverse roof conditions in the area designated as section 1 of its mine (Tr. 51-52, Exh. R-1). It decided to move from one side of the

hill it was mining to another, and drilled new holes into the mine from the outside. Fifteen to 45 feet behind the new holes was an area, designated as section 3, which Respondent had mined and sealed 6 to 12 months previously, prior to moving to section 1 (Tr. 23, 52-53).

Respondent drilled one borehole into the side of the hill with a hand held hydraulic drill (Tr. 54-60). This borehole penetrated a crosscut of section 3. Williams Brothers then used a remote-controlled continuous mining machine to cut a hole 16 feet wide and 15 feet deep in the area in which it had drilled (Tr. 60-61).

Respondent let the opening air out overnight and the next morning sampled in the crosscut for methane and oxygen. Williams Brothers did not drill any more boreholes in this area but instead commenced mining in the entry into which it had originally drilled and three entries immediately to the right of this entry (Tr. 61-65, Exh. R-1).

On October 12, 1994, MSHA Inspector Gary Gibson issued Respondent Citation No. 4004328 alleging a S&S violation of 30 C.F.R. §75.388(c). Section 75.388(a) requires that boreholes be drilled when the working place approaches to within 50 feet of any area shown on surveys of the mine unless the area has been preshifted. Subsection 75.388(c) requires that boreholes be drilled in at least one rib at an angle of 45 degrees to the direction of advance, at least 20 feet in depth, and at intervals not to exceed 8 feet.

This regulation was promulgated to prevent explosions or inundations that might occur when mining proceeds into inaccessible areas that have not been subjected to a pre-shift examination. Such areas may contain dangerous accumulations of gases or water, 57 Fed. Reg. 20909 (May 15, 1992).

Respondent concedes that it did not comply with the letter of the regulation, but argues that its procedure fully accomplished the preventative purposes of the regulation. Williams Brothers submits that since it drilled into an area shown clearly on its mine map, once it penetrated the crosscut it was able to determine whether gas or water lay behind the other entries it intended to mine (Tr. 56-59).

I conclude that Respondent violated the regulation as alleged. Section 75.388(g) allows the use of alternative borehole patterns that provide equivalent protection to those specified in the cited regulation, if used under a plan approved by the MSHA District Manager. Since Williams Brothers did not get prior approval for its deviation from the standard's requirements, a violation is established.

Moreover, section 75.388(d) requires that when a borehole penetrates an area that cannot be examined, the operator must determine the concentrations of carbon monoxide and carbon dioxide, as well as the concentrations of methane and oxygen. Since Respondent concedes that it did not test for these two gases (Tr. 70), its precautionary measures prior to mining in section 3 were obviously not equivalent to the precautions required by the standard.

On the other hand, I find that the Secretary has not met his burden of proving that the violation was "S&S." The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is as follows:

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

Respondent's evidence indicates that it was not reasonably likely that an injury would occur from its failure to adhere to the requirements of section 75.388(c). Its contention that it could determine that there were no dangerous gases or accumulations of water behind the entries to the right of its borehole were not rebutted by the Secretary. I therefore affirm the citation as a non-S&S violation and assess a $50 civil penalty pursuant to the six criteria in section 110(i) of the Act, rather than the $75 proposed by the Secretary.

Citation No. 4218395: Inadequate Pre-Shift Examination Records

On April 25, 1994, MSHA representative Roger Williams examined Respondent's pre-shift examination book and determined that beginning on March 11, 1994, it did not indicate where methane measurements had been taken (Tr. 83-88). The book contained one daily entry stating that no methane had been detected (Tr. 88, Exh. R-2, page 1).

The regulation cited, 30 C.F.R. §75.360(g), clearly requires that the location and results of air and methane measurements be recorded in the preshift book. While I credit Respondent's assertion that other inspectors had accepted its method of maintaining the examination book, this does not negate the violation. Prior failure to enforce the standard does not preclude the Secretary from enforcing its terms in the instant case.

While the records of methane testing were not properly recorded, there is no indication that such tests were not made. I therefore conclude that the gravity of this violation is sufficiently low that a $25 civil penalty is warranted, rather than the $50 proposed by the Secretary.

Citation No. 4016435: Inadequate Lighting

At approximately 5:30 a.m., on April 13, 1994, MSHA representative Jerry Abshire observed a miner loading a coal truck with a front-end loader. It was still dark and the only artificial light in the area was that provided by the front-end loader. The light was insufficient for the miner to see anyone behind or to the side of him (Tr. 118-121).

Respondent contends that other sources of light were available to the miner if he felt the lighting in this area was inadequate (Tr. 133-34). I credit the testimony of Inspector Abshire and find a violation. However, since the only work that normally would be performed in the cited area is the loading of

one truck by one miner, I concluded that it was not reasonably likely that an injury would result from the inadequate lighting (Tr. 130).

I affirm the citation as a non-S&S violation of the Act and assess a $25 civil penalty, rather than the $88 penalty proposed. The lower penalty is warranted because Respondent provided additional lighting (Tr. 133) that the miner could have used without difficulty. Therefore, I deem Respondent's negligence with regard to this citation to be extremely low.

Citation No. 4016438: Absence of Insulation Mats at the Pumping Station

On April 13, Inspector Abshire found no insulation mat or wooden platform in front of the power switch for Respondent's water pumping station (Tr. 139-41). The ground in front of the switch was wet (Tr. 140-41, 144).

Williams Brothers contends that it normally keeps a wooden pallet in front of the switch, but that someone had moved it (Tr. 150). Respondent immediately replaced the pallet when Abshire issued Citation No. 4016438.

I find a violation of 30 C.F.R. §77.513, as alleged by the Secretary. This regulation requires the use of insulation mats or wooden pallets in front of switches where shock hazards exist. Since the area in front of the water pump switch was wet, I conclude such a hazard was presented by the absence of the pallet.

The Secretary alleges a "S&S" violation and proposes a $147 civil penalty. However, I find that the evidence does not show that there was a reasonable likelihood of injury due to the violation. Therefore, I affirm the citation as a non-S&S violation.

There is no showing that the switch was not properly grounded. Proper grounding would cause the circuit breaker to cut off power to the switch if it becomes energized (Tr. 149). Furthermore, exposure to this switch was limited to the miner

who turned it on and off once on a daily basis (Tr. 141). However, given the seriousness of an injury should one occur, I assess a $100 civil penalty.

Citation No. 4016440: Accumulated Float Coal Dust and Oil on Front-End Loader

Inspector Abshire also observed a front-end loader on April 13, which had accumulations of float coal dust, oil and silicone dust on its center, hinged portion (Tr. 158). Electrical wiring in this part of the loader could ignite the dust and oil (Tr. 186)[1].

I therefore find a violation of 30 C.F.R. §77.1104, as alleged by the Secretary. However, I do not find that the Secretary has shown a reasonable likelihood of an ignition and fire and therefore affirm the citation as a non-S&S violation. I assess a $50 civil penalty, rather than the $88 proposed.

Citation No. 4018041: Unsecured Ladder without back guards

Respondent maintains a storage shed at its mine that is about 40 feet long and 12 feet high. At one end of the shed are two offices with ceilings about 8 feet off the ground. Above the offices is 4 feet of storage space (Tr. 208-09).

On April 13, Inspector Abshire observed an aluminum ladder 10 feet 4 inches long, resting at an angle against the top of the door frame of one of the offices. This door frame was approximately 6 feet 10 inches above the floor (Tr. 207-210). This ladder was used about once a week to gain access to the storage area (Tr. 216).

Abshire issued Respondent Citation No. 4018042 alleging a violation of 30 C.F.R. §77.206(c). This regulation requires that steep or vertical ladders which are used regularly at fixed locations be anchored securely and provided with backguards.

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[1]I credit the testimony of the Secretary's witnesses, Abshire and Harris, over that of Respondent's Hufford Williams, on this issue (Tr. 162, 165, 168-70, 182-86).

It is uncontroverted that the ladder in question was not secured at either the top or bottom, although it did have rubber skid-proof feet (Tr. 210). The ladder also did not have backguards.

What has not been clearly established is whether the ladder was sufficiently "steep" to make the regulation applicable. As the cited standard does not define "steep," the issue becomes whether a reasonably prudent mine operator familiar with the protective purposes of the standard would have recognized that the ladder in this case violated its requirements, Ideal Cement Company, Inc., 12 FMSHRC 2409 (November 1990). I conclude that this has not been established. I therefore find that the Secretary has not established that the ladder in question was steep and I vacate the citation and the proposed penalty.

Citation No. 4018042: Failure to test the torque on a sufficient number of roof bolts

On April 13, 1994, Inspector Abshire looked at Respondent's records and determined that on the previous day it had checked the torque (tightness) of 14 roof bolts (Tr. 224-25). He then issued Williams Brothers Citation No. 4018042, which alleges a violation of 30 C.F.R. §75.204(f)(5). The cited regulation provides:

> In working places from which coal is produced during any portion of a 24-hour period, the actual torque or tension on at least one out of every ten previously installed mechanically anchored tensioned roof bolts shall be measured from the outby corner of the last open crosscut to the face in each advancing section.

Abshire calculated that Respondent would have had to check the torque on 88 roof bolts to satisfy the standard (Tr. 230-31). This calculation was based on the fact that Williams Brothers was mining in 11 entries at the time of his inspection.

Respondent contends that Abshire miscalculated the number of bolts it had to check because it only mined in four entries in the 24 hours prior to instant violation (Tr. 246). Moreover, it argues that it did not advance 60 feet in each of these entries within that 24-hour period, thus suggesting that checking the torque on 14 bolts may have satisfied the standard.

I conclude that Respondent did violate the regulation. The standard requires checking the torque in all working places from which coal has been produced in the past 24 hours[2]. Thus, even if some of the four entries in which Respondent had mined had been developed before this 24-hour period, the operator was required to check the torque of one-tenth of the bolts in these entries, not simply the portion of the entries in which it had advanced in the last 24 hours.

I credit Abshire's testimony that each entry was 80 feet in length from the outby corner of the last open crosscut (Tr. 227-28). As each entry would have had about 80 roof bolts, Respondent would have had to check the torque on approximately 32 to comply with the standard (80 bolts x 4 entries = 320 bolts; one-tenth of 320 bolts = 32)(Tr. 228-31).

Abshire's testimony is also supported by the fact that the 14 bolts checked on April 12 were an unusually low number. On the days just prior to that, Respondent checked 40 to 60 bolts (Tr. 226). As there is no indication that production was unusually low on April 11-12, 1994, this indicates that an inadequate number of bolts were checked for torque on April 12.

This violation was cited as a non-S&S violation of the Act and a $50 penalty was proposed. Applying the criteria in section 110(i), I conclude $50 is an appropriate penalty and I assess a civil penalty in this amount.

Citation No. 4218395: Use of Blowing Ventilation in Contravention of Respondent's Ventilation Plan

On April 13, Inspector Abshire examined the No. 10 entry being mined by Respondent. He found the line brattice on the right side of the entry, leading him to conclude that Williams Brothers had used blowing face ventilation when mining in this entry, rather than exhausting face ventilation as required by Respondent's approved ventilation plan (Tr. 256-258, Exh. G-9).

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[2]Working place is defined in §75.2 as the area of a coal mine inby the last open crosscut.

When using exhausting face ventilation, the line brattice is placed on the left hand side of the entry (Tr. 260, Exh. G-9, p. 2).

When Abshire inspected entry No. 10, Respondent's continuous mining machine was extracting coal in entry No. 7. It had mined in entry No. 10 the day previously (Tr. 279). Line curtains are sometimes moved after coal extraction, however, there is no substantial evidence as to why the curtain in entry No. 10 was hung on the right side (Tr. 279-84).

I conclude that the evidence in the record is insufficient to establish that Respondent used blowing face ventilation when cutting coal in entry No. 10. Therefore, I vacate Citation No. 4018044 and the corresponding proposed penalty.

ORDER

The following citations are affirmed as non-S&S violations of the Act. The following civil penalties are assessed:

Citation No. 4004328	$ 50
Citation No. 4016435	$ 25
Citation No. 4016438	$100
Citation No. 4016440	$ 50
Citation No. 4018042	$ 50
Citation No. 4018395	$ 25

Citation Nos. 4018041 and 4018044 and the corresponding proposed penalties are vacated. Respondent shall pay the $300 in total penalties within 30 days of this decision. Upon such payment this case is dismissed.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 2 8 1995

RNS SERVICES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 95-382-R
	:	Citation No. 3713378; 6/16/95
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 95-383-R
ADMINISTRATION (MSHA),	:	Citation No. 3713379; 6/16/95
Respondent	:	
	:	RNS Services Mine
	:	Mine ID No. 36-07266

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania for the Contestant; James Brooks Crawford, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Respondent.

Before: Judge Weisberger

History of these cases

These cases, which were consolidated for hearing, are before me based upon Notices of Contest filed by RNS Services, Incorporated (RNS) challenging the issuance of two citations by the Secretary of Labor (Secretary). On June 19, 1995, RNS filed a Motion to Expedite. A telephone conference call was convened to discuss this motion. After hearing arguments from both parties, the cases were scheduled for hearing on July 6, 1995. The parties each filed a pre-hearing memorandum of law on June 29, 1995. At the hearing, James E. Biesinger, Gary L. Boring, and Leo E. Makovsky testified for the Secretary. Neil Hedrick, and Robert J. Pavelko testified for RNS. The parties filed post-hearing briefs on July 24, 1995.

Findings of Fact

The following findings of fact are based upon the parties' stipulations and the evidence of record:

1. The No. 15 dumps site at issue, a 15 acre parcel, is operated by RNS.

2. A pile of material on the site, approximately 1,200 feet long, 500 feet wide and 90 feet wide, consists of refuse from a preparation plant that had been operated by Barnes and Tucker Coal Company, or its predecessor Barnes Coal Company. The preparation plant processed coal from the Barnes and Tucker No. 15 underground mine. Washing, screening, and sizing of coal were performed at the preparation plant.

3. The No. 15 mine ceased operations sometime prior to 1969. The No. 15 preparation plant ceased production sometime prior to 1968, and was demolished.

4. There are no buildings or other facilities on the site at this time. The No. 15 mine had operated in the "B" seam which contained metallurgical coal with a normal BTU value of between 13,000 and 14,000 BTUs.

5. In January 1995, RNS acquired the No. 15 site in from Lancashire Coal Company, a subsidiary of Inland Steel, which had acquired the site from Barnes and Tucker.

6. RNS supplies coal refuse to the Cambria Co-Generation Facility (Cambria) in Ebensburg, Pennsylvania, which generates electricity and steam. The material supplied by RNS to Cambria is broken and sized at Cambria's facility. RNS has a flat fee contract with Cambria to deliver coal refuse, and remove ash[1] from the Co-Generation Facility. RNS does not receive any payment from Cambria based on the quantity of coal refuse it delivers to Cambria.

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[1]The ash is a product of the burning of coal refuse at Cambria.

7. RNS has the following equipment at the site: A hydraulic excavator to remove material from the pile and load trucks, a water truck, a bulldozer, and a backhoe.

8. With the exception of a 4 inch grizzly to remove timbers from the pile, there is no screening, crushing, sizing or washing of the material at the subject site.

9. The material removed from the pile is loose, and is not being taken from its natural deposit.

10. Testing of material removed from the pile indicates that it shows the characteristics of coal.

11. The work being conducted at the No. 15 site by RNS is under a no-cost government financed reclamation contract with the Commonwealth of Pennsylvania. This contract calls for the removal of refuse from the site, and the provision of cover and revegitation.

12. The hazards at the site are associated with the collapse of the highwall. Also present are hazards associated with material falling off the highwall, as well as tripping and stumbling hazards. In addition, the material in the pile has the potential to burn or explode.

Violations

On June 16, 1995, MSHA inspector Gary L. Boring inspected the subject site. He issued a citation alleging the failure to record the results of daily inspections at the site. He also issued a citation alleging that RNS had not established a ground control plan. RNS does not challenge the factual assertions set forth in these citations, and agrees that the relevant mandatory standards were violated. However, RNS challenges MSHA jurisdiction over the subject site.

Discussion

Section 4 of the Federal Mine Safety and Health Act of 1977 (the Act) provides as follows:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which enter commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

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

> [C]oal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (c) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting form the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

The Secretary argues that he has jurisdiction under the Act under two theories. He first maintains that RNS was, in its work performed at the No. 15 refuse disposal site, "engaged in the work of preparing coal" under Section 3(h)(2)(i) of the Act. Under the latter section, "work of preparing the coal" is defined as "the breaking, crushing, sizing, cleaning, washing, drying,

mixing, storing, and loading of bituminous coal ... and such other work of preparing such coal as is usually done by the operator of the coal mine."

In the instant cases, with the exception of the removal of coal, none of the activities set forth in Section 3(h)(2)(i) of the Act are performed at the site. The sole activities performed at the site, those of the removal of material by a hydraulic excavator, the loading of the material on trucks, and the transporting of material to the Cambria facility are not activities set for in section 3(h)(2)(i), supra.

In this connection, the operation at issue is to be distinguished from the cases relied on by the Secretary, in which jurisdiction was found to exist over operations that performed breaking, crushing, and sizing of coal.[2] I thus conclude that the operation herein was not the work of preparing coal, and hence does not fall within the definition of a mine as set forth in Section (3)(h)(1), supra.

The Secretary also argues that the No. 15 refuse site meets the definition of "coal or other mine" under Section 3(h)(1) of

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[2] In Air Products & Chemicals, Inc., 15 FMSHRC 2428 (1993) the Commission held that the breaking, crushing, sizing and storing of coal were activities usually performed by an operator, and that accordingly the coal handling facility at issue was subject to the Act's jurisdiction. In Westward Energy Properties, 11 FMSHRC 2408 (1989), the Commission concluded that an operation in which coal mining waste was screened and crushed was subject to the Act's jurisdiction. In the same fashion, in Alexander Brothers Incorporated, 4 FMSHRC (1982), it was held by the Commission that an operation that included breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading was engaged in the preparation of coal and hence was subject to the Act. In Mineral Coal Sales Incorporated, 7 FMSHRC 615 (1985), the Commission held that a company that stored, mixed, crushed and sized coal was subject to the jurisdiction of the Act. In RNS Services Inc., 16 FMSHRC 1322 (Judge Melick) (June 1994), Judge Melick found jurisdiction to exist where the operation included activities of breaking, sizing, and cleaning of coal.

the Act in that "the area at issue constitutes lands ... structures, facilities ... or other property ... used in or resulting from the work of extracting such minerals form their natural deposits in non-liquid form ... ."

In the instant cases, it is clear that the material being removed was from a pile that was not in its natural deposit. Rather, the refuse material had been deposited on the ground after the completion of the coal preparation process. In this connection, Section 3(h)(i) of the Act refers to three different mining activities: extracting materials, milling minerals, and preparing coal or other materials. (Lancashire Coal Company v. Secretary of Labor, 3d Cir. 968 F.2d 388 (1992)).

The scope of the definition of "coal or other mine" in the Act with respect to extraction of minerals from their natural deposits includes "lands, excavations ... structures ... used in or to be used in, or resulting from the work of extracting minerals from their natural deposits ... ." The scope of the Act's definition with respect to coal preparation is limited to "lands ... or other property used in or to be used in the work of preparing coal or other minerals." The definitional language with respect to coal preparation does not include the phrase "resulting from," which is included with respect to extraction of material from a natural deposit. The language with respect to coal preparation is thus limited to lands, etc., "used in or to be used in" such work while the scope of the Act with respect to mining itself is broader, also including lands, "resulting from" the work of extracting such minerals.

In Lancashire, supra, the Court held that MSHA did not have jurisdiction over the demolition and reclamation work done at a coal silo,[3] part of an abandoned preparation plant. In Lancashire, supra, the Court took cognizance of the differences in the wording with respect to mining, and preparing, as

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[3]This coal silo is located on a parcel of land that, prior to January 1995, was part of the same parcel as the site at issue in the case at bar. The silo is approximately 50 feet from the pile at issue.

well as the legislative history. The court held that buildings resulting from the preparation of coal were not within the acts jurisdiction. In contrast, based on the wording of the Act, buildings resulting from the extraction of coal are within the Act's jurisdiction.

Thus, focusing on the different treatments in the Act between the activities of extraction and preparation of coal, I find that the pile at issue did not result from the initial extraction of coal, since the coal that was extracted had ben subjected to subsequent preparation. I find that the pile resulted from the preparation plant, and from the preparation of coal.

For all the above reasons, I find that the subject operation was not a mine as defined in the Act. I thus find that it was not subject to the Act's jurisdiction. Hence, the notices of contest are sustained, and the citations at issue, Nos. 3713378 and 3713379, are to be dismissed.

ORDER

IT IS ORDERED that Citation Nos. 3713378 and 3713379 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 5, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket Nos. LAKE 94-72, etc.
v.	:	Buck Creek Mine
BUCK CREEK COAL INC., Respondent	:	

ORDER DIRECTING PRODUCTION OF DECLARATION UNDER SEAL FOR *IN CAMERA* CONSIDERATION

The Secretary, by counsel, has moved for the stay of approximately 80 violations in these cases which he asserts "are subject to and within the scope of an ongoing criminal investigation into possible willful violations of federal law and mine safety standards at the Buck Creek Mine." In order to establish the commonality of issues and evidence between the civil matters before me and the criminal matters, the Secretary states that the Assistant U.S. Attorney "would be willing to provide the Administrative Law Judge a more descriptive declaration of the criminal investigation parameters provided that the Administrative Law Judge would order that declaration [be] viewed by him *ex parte* and under seal and the contents not disclosed to anyone but the Administrative Law Judge." Buck Creek opposes this request.

In his motion, the Secretary states that the citations and orders in question involve such violations as methane accumulation, unreported ignitions, and serious permissibility and face ventilation violations that were not recorded as existing in record books of examination and which cause serious safety risks at the mine. The Secretary has not, however, provided any information concerning the criminal investigation from which it can be determined whether there is a commonality of issues and evidence.

In view of tne fact that apparently no cnarges have been drafted nor indictments returned it is difficult to imagine what information the Secretary could provide in open court that would not compromise the ongoing investigation. Furthermore, as the Secretary points out, Federal Rule of Criminal Procedure 6(e)(2), prohibits a government attorney from disclosing matters occurring before the grand jury.[1] Therefore, while I conclude that the Secretary's motion does not establish a commonality of issues and evidence necessary to meet the threshold requirements for staying the requested 80 violations, I also conclude that there must be some way that the Secretary can meet this burden without revealing the criminal case.

The Secretary proposes that this can be accomplished by viewing the U.S. Attorney's sealed declaration *in camera*. In one of the leading cases on the issue of viewing matters *in camera*, *In Re Taylor*, 567 F.2d 1183 (2d Cir. 1977), the court stated that "[*i*]*n camera* proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process, *i.e.* notice setting forth the alleged misconduct with particularity and an opportunity for a hearing." *Id.* at 1187-88(citations omitted). The court went on say that "the nature of the Government interest must be balanced against the private interests that are affected by the court's action" in determining whether *in camera* proceedings are appropriate. *Id.* at 1188.

In that case, the court determined that the government's interest in the secrecy of the grand jury proceedings was minimal because Taylor was seeking only "a limited and discrete disclosure of the factual basis" for denying him the right to his chosen counsel, rather than seeking to review the entire government case, and, furthermore, once Taylor appeared before the grand jury whatever he was asked would no longer be a secret. *Id.* at 1188-89. On the other hand, the same court has also held "that where an *in camera* submission is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure." *In Re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994)(citation omitted).

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[1] Federal Rule of Criminal Procedure 6(e)(2) provides that "[a] grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury . . . ."

Applying the balancing test in these cases, I conclude that the only way to determine whether there is a commonality of issues and evidence between the criminal and civil matters is to view the U.S. Attorney's declaration *in camera*. Unlike *Taylor*, the government's interest in the secrecy of the grand jury proceedings is significant and requiring the declaration to be made in public would involve much more than a limited and discrete disclosure. Against this interest, Buck Creek's only legitimate reason for having the information disclosed would be to more precisely articulate its objection to the stay request. In such a case, I conclude that "any resultant limit on their ability to rebut the government's submission [is] of marginal importance and not violative of due process." *John Doe, Inc.* at 636.

Accordingly, it is **ORDERED** that the Secretary provide me on or before July 12, 1995, with the sealed declaration of the Assistant U.S. Attorney to be viewed *in camera* for the purpose of ruling on the motion to stay. I will not disclose the contents of the declaration to anyone unless the U.S. Attorney agrees to its disclosure or I am directed to do so by competent higher authority.

T. Todd Hodgdon
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 17, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket Nos. LAKE 94-72, etc.
v.	:	Buck Creek Mine
BUCK CREEK COAL INC., Respondent	:	

ORDER
GRANTING MOTION FOR STAY OF PROCEEDINGS
AND
DENYING MOTION TO COMPEL

The Secretary has requested that 80 orders and citations in 34 civil penalty dockets involving the Respondent be stayed for 90 days because "they are subject to and within the scope of an ongoing criminal investigation into possible willful violations of federal law and mine safety standards at the Buck Creek Mine." The Respondent has filed a motion to compel the production of notes prepared by MSHA inspectors concerning the 80 orders and citations that the Secretary seeks to have stayed. Buck Creek opposes the motion to stay and the Secretary opposes the motion to compel. For the reasons set forth below, the motion to stay is granted and the motion to compel is denied.

Motion for Stay

Initially, all proceedings concerning the orders and citations issued to Buck Creek were stayed for 90 day periods by orders dated September 8, 1994, and February 15, 1995. On April 25, 1995, the Commission issued a decision concluding that "the record does not contain evidence sufficient to support a finding that the criteria for a stay have been met" and lifted the February 15 stay. *Buck Creek Coal Inc.*, 17 FMSHRC 500, 503 (April 1995). As a result of that decision, the Secretary filed a new request for stay of approximately 275 orders and citations, or about one-half of the total, pending against Buck Creek. This

request was denied on May 31, 1995, because the Secretary had not met the criteria for stay set out in the Commission's April decision. *Buck Creek Coal Inc.*, 17 FMSHRC 845 (Judge Hodgdon, May 1995). The Secretary now requests that 80 orders and citations be stayed.

In its April decision, the Commission set out five factors that should be considered in determining whether a stay should be granted: (1) the commonality of evidence and issues in the civil and criminal matters; (2) the timing of the stay request; (3) prejudice to the litigants; (4) the efficient use of agency resources; and (5) the public interest. *Id.* at 503. The Commission emphasized that "the first element listed above, commonality of evidence, is a key threshold factor" that must be established in the record. *Id.* It was at this threshold that the Secretary failed before the Commission and failed in its request denied on May 31.

The Commission did not discuss how the Secretary might establish a nexus between the civil and criminal matters. Obviously, when charges have been drafted and indictments returned it would be easy to compare the charges and indictments with the citations and orders. However, when the investigation is still ongoing, there are numerous reasons why the government may not want to reveal to the public, and particularly to those being investigated, exactly what the investigation involves. Among these reasons are the protection of witnesses and evidence, the possibility of attempted obstruction of the investigation, the possibility of flight by those being investigated, the bringing to bear on the investigation of other outside influences, as well as the protection from unfavorable publicity of those who are ultimately exonerated.

With regard to the Respondent's assertion that the Secretary has not explained how citations alleging moderate negligence can support a criminal indictment, it is noted that the determination of an inspector when writing a citation is not even binding on the Secretary for whom he works. Since the Secretary, as well as an administrative law judge and the Commission, can modify a citation and increase the level of negligence, it would be surprising indeed to conclude that the U.S. Attorney is precluded from filing a criminal charge for a violation solely because the MSHA inspector had determined that it involved moderate or lower

negligence. Furthermore, even if the inspector's characterization were binding on the government, that does not mean that there could not be a commonality of evidence or issues between the citation and a criminal charge.

The same can be said about Buck Creek's latest argument that in taking the depositions of MSHA inspectors, the inspectors have stated that the citations that they issued were not involved in the criminal investigation and that they did not find any evidence of wilful or knowing violations. Those inspectors not involved in the criminal investigation presumably would not know what it involves and whether an individual inspector believes that he found evidence of wilful or knowing violations would in no way preclude the U.S. Attorney from reaching a different conclusion.[1]

In this case, I find that the Secretary has made a good faith effort to limit his stay request to the minimum number of orders and citations necessary to protect the integrity of the criminal investigation. While his motion does not establish a commonality of evidence and issues between the civil and criminal matters, since nothing concerning the criminal investigation is revealed, the nature of the orders and citations that he seeks to have stayed gives some indication as to what is being investigated. In view of the fact that a grand jury is apparently now looking into these matters, which adds an additional responsibility on the government to maintain secrecy, *see* Federal Rule of Criminal Procedure 6(e)(2), I might be inclined to grant the requested stay based solely on the submissions in the Secretary's brief.

However, the Secretary has gone a step further and offered an explanation of the criminal investigation from the Assistant U.S. Attorney handling the case, to be reviewed *in camera*, to meet the threshold requirement for a stay. Having concluded that this is appropriate, Order Directing Production of Declaration

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[1] One might well ask why the Respondent was asking these types of questions if its interest in conducting discovery is to resolve the civil cases. Indeed, the fact that such questions are being asked points out why the Secretary wants to stay the civil proceedings.

under Seal for *In Camera* Consideration, July 5, 1995, I have viewed the declaration *in camera* and determine that there is a commonality of evidence and issues between the civil and criminal matters. Accordingly, I find that the Secretary has met the threshold requirement for demonstrating that a stay should be granted.

Turning to the other criteria for granting a stay, I conclude that they also indicate that the granting of the Secretary's stay request is appropriate. Since the grand jury has already begun investigating these matters, it would appear that indictments may be imminent which the courts have held favors staying proceedings. *See Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

Buck Creek has alleged no specific prejudice that it will suffer as a result of granting the stay other than arguing that it will disrupt its discovery. In view of the fact that Buck Creek can still conduct discovery on at least 420 other orders and citations and the fact that "courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable to them in the parallel criminal case. *E.g. United States v. One 1964 Cadillac Coupe de Ville*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966), *citing Campbell*," *Buck Creek* at 504, I find no prejudice to the Respondent.

In addition, granting the stay will not result in an inefficient use of agency resources or be against the public interest in expeditious resolution of penalty cases because of the limited number of cases being stayed. It would appear highly unlikely that the remaining cases can be heard within the next 90 days, thus there would be no effect on agency resources. Furthermore, it is possible that the disposition of the criminal matter will also dispose of the civil matters. *See e.g. Southmountain Coal, Inc. et al*, 17 FMSHRC 1081 (Judge Melick, June 1995).

Accordingly, it is **ORDERED** that Order No. 3843585 in Docket No. LAKE 94-8; Order Nos. 3843374, 3843376 and 3843377 in Docket No. LAKE 94-21; Citation No. 3843525 in Docket No. LAKE 94-41;

Order No. 3843511 and Citation Nos. 3843584 and 3843587 in Docket No. LAKE 94-42; Citation Nos. 3843532, 4055892 and 4055893 in Docket LAKE 94-50; Order No. 3843667 in Docket No. LAKE 94-72; Order No. 4055899 in Docket No. LAKE 94-81; Citation No. 3843958 in Docket No. LAKE 94-111; Citation Nos. 4262051 and 4262257 in Docket No. LAKE 94-600; Citation No. 4262267 in Docket No. LAKE 94-601; Citation Nos. 4259169, 4259170, 426270, 4262307, 4262308, 4262313 and 4262314 in Docket No. 94-602; Citation Nos. 4056454 and 4261722 in Docket No. LAKE 94-603; Citation No. 4261725 in Docket No. LAKE 94-604; Citation No. 4259243 in Docket No. LAKE 94-605; Citation No. 4262486 in Docket No. LAKE 94-606; Citation Nos. 4262128 and 4259175 in Docket No. LAKE 94-669; Citation Nos. 3037100, 3847801, 4050834, 4261721 and 4262130 in Docket No. LAKE 94-677; Order Nos. 4259813, 4259814, 4262068, 4262080, and 4262275 and Citation Nos. 3843968, 4261879, 4262303, 4262304, 4262305 and 4262334 in Docket No. LAKE 94-708; Order Nos. 4259171, 4261728, 4262075 and 4262317 in Docket No. LAKE 94-709; Order No. 4261735 and Citation Nos. 4261928 and 4261929 in Docket No. LAKE 94-710; Citation No. 3843979 in Docket No. LAKE 94-745; Order No. 4262078 in Docket No. LAKE 94-746; Citation Nos. 3037098, 4050835 and 4261934 in Docket No. LAKE 95-24; Order Nos. 4259848, 4262374, and 4262375 and Citation Nos. 4260432, 4262277, 4262278 and 4262279 in Docket No. LAKE 95-49; Citation No. 4260037 in Docket No. LAKE 95-50; Citation No. 4260428 in Docket No. LAKE 95-51; Citation No. 4262497 in Docket No. LAKE 95-52; Citation Nos. 4262541 and 4386058 in Docket No. LAKE 95-74; Citation No. 4262561 in Docket No. LAKE 95-87; Order No. 3843970 in Docket No. LAKE 95-94; Citation No. 4260192 in Docket No. LAKE 95-111; Citation No. 4259854 in Docket No. LAKE 95-173; Citation No. 4259597 in Docket No. LAKE 95-185; Order No. 4260193 in Docket No. LAKE 95-206; Order Nos. 4260185, 4260191 and 4262565 in Docket No. LAKE 95-214; and Citation No. 4260035 in Docket No. LAKE 95-232 are **STAYED** for 90 days from the date of this order.[2]

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[2] The dockets listed are civil penalty dockets. In those cases where a notice of contest was filed concerning one of the orders or citations listed, the contest docket is also stayed.

Motion to Compel

In view of the staying of the above orders and citations, the Respondent's motion to compel the production of the inspector's notes for those orders and citations is moot. Accordingly, the motion to compel is **DENIED**.

T. Todd Hodgdon
Administrative Law Judge
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