

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 29, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 94-23
Petitioner : A.C. No. 36-05466-03980
v. :
: Docket No. PENN 94-166
CYPRUS EMERALD RESOURCES, : A.C. No. 36-05466-03990
CORPORATION, :
Respondent : Emerald No. 1 Mine

DECISION

Appearances: Myrna A. Butkovitz, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll Corp.,
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Fauver

These are civil penalty cases under ' 105(d) of the Federal
Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq.

The principal issues are whether Respondent's placement of
coal refuse was a ~~A~~refuse pile@ under 30 C.F.R. ' 77.215, whether
the accident-reporting and investigating standard in ' 50.10 and
' 50.11 applied to a collapse of coal refuse on December 27,
1992, and, if violations are found, whether they were significant
and substantial and due to an unwarrantable failure to comply.

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 following Findings of Fact
and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent owns and operates Emerald Mine No. 1, which produces coal for sales in or affecting interstate commerce.

2. On April 2, 1993, MSHA received a ' 103(g)¹ complaint alleging dangers involved in a partial collapse of a refuse pile on that date.

3. On April 5, 1993, Federal Mine Inspector Walter Daniel investigated the complaint and issued an imminent danger order and three citations alleging safety violations.

4. During the investigation on April 5, 1993, Inspector Daniel received another ' 103(g) complaint alleging that there had been a failure of the same refuse pile on December 27, 1992. After investigating the complaint, Inspector Daniel issued five citations and orders alleging safety violations.

Impoundment Plan

5. Respondent has an MSHA-approved plan for disposing of the refuse from its coal preparation plant. Known as the Impoundment Plan (short for ~~A~~Slurry Impoundment Coal Refuse Disposal Facility~~@~~), it calls for four stages of construction of an impoundment embankment built up from refuse material. Stages II and III involve upstream construction, whereby refuse material is systematically placed over a slurry pond in compacted lifts according to certain construction standards. Stage IV involves downstream construction as well as upstream construction as the slurry pond is finally filled in and covered over. Stage IV is to be constructed to a final crest elevation of 1310 feet.

¹ Section 103(g) of the Act provides in part: ~~Whenever~~ a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.~~@~~

6. The Impoundment Plan provides that each layer of the impounding embankment:

should be compacted by either a sheepsfoot roller, rubber-tired construction equipment, or approved compaction equipment exerting a force of 10 tons or more. For uniformity of compaction, a minimum of two passes of the roller should be made for each layer. A complete roller pass is defined as the passing of a specified roller over the entire surface of the layer once, with a minimum overlap of one foot between successive trips of the roller. Subsequent lifts should not be placed until the layer under construction has been thoroughly compacted. . . .

7. The Impoundment Plan provides specific lift limitations for upstream construction in Stages II and III:

for upstream construction, the initial lift of coarse refuse over the settled fines of the previous stage should be approximately five to six feet thick to provide a working pad for earth-moving equipment. Subsequent lifts should be two feet thick or less.

8. Under the Impoundment Plan, Stage IV development is expected to be completed in the year 2002.

Respondent's Practice of Piling Refuse Material

9. Coal and refuse material were brought up from the mine to the preparation plant where the coal was washed and separated. The refuse was then moved by conveyor belt to a 500-ton refuse storage bin.

10. At the bin, refuse was loaded onto 35-ton dump trucks and under the Impoundment Plan the refuse was to be taken to the impoundment embankment for use in its construction.

11. At the time of the inspection in April 1993, the regular lay down area for the impoundment embankment was approximately southeast of the 500-ton bin and was at a crest elevation of about 1255 feet.

12. Coarse refuse deposited at the impoundment embankment is required to be placed in lifts and compacted pursuant to the Impoundment Plan. The Impoundment Plan provides specific lift limitations for upstream construction in Stages II and III:

for upstream construction, the initial lift of coarse refuse over the settled fines of the previous stage should be approximately five to six feet thick to provide a working

pad for earth-moving equipment. Subsequent lifts should be two feet thick or less.

13. At the time of the inspection in April 1993, a practice had existed for the last 18 years of depositing coal refuse on a refuse pile located southwest of the 500-ton bin. The refuse pile, which abutted the shore line of a large part of the slurry pond, was commonly referred to as the Ashort haul area. In inclement weather, or when the road to the impoundment embankment was considered to be too muddy, icy, or dusty to travel, refuse was hauled to the refuse pile rather than to the impoundment embankment. Thirty-five ton dump trucks were used to haul refuse from the 500-ton bin and dump loads along the edge of the refuse pile. Bulldozers spread the piles and pushed refuse over the edge of the refuse pile toward the slurry pond to make room for more refuse. This practice was followed for years before December 1992, and continued from December 1992 until a failure of the refuse pile on April 2, 1993. By the time of the inspection in April 1993, the practice of depositing coal refuse in the area southwest of the 500-ton bin had created a large refuse pile that was about 1,000 feet long, 60-80 feet high, and 300 feet wide.

14. The practice of pushing coal refuse over the edge of the refuse pile toward the slurry pond caused the toe of the refuse pile to extend over the slurry pond. The refuse pile lacked compaction. As more coal refuse was pushed over the edge, the weight of the refuse pile over the slurry pond increased and the angle of the slope became very steep. These conditions caused the refuse pile to be unstable.

15. The refuse pile was not part of the impoundment embankment and was not designed, constructed, or maintained in accordance with the requirements of the Impoundment Plan or the requirements of the refuse pile standards in 30 C.F.R. ' 77.215.

16. The refuse pile was not intended to be an impoundment embankment, nor was it intended to be a temporary stockpile. Although a small part of the refuse on the refuse pile was used at times to build up the impoundment embankment, the great majority of the refuse deposited on the refuse pile was pushed over the edge toward the slurry pond to make room for more refuse material.

17. Under the Impoundment Plan, as Stage IV construction advances, some of the area adjacent to the 500-ton bin is to be developed as part of the impoundment embankment. Any part of the refuse pile that will be affected by the growing impoundment embankment under Stage IV construction will have to be removed or regraded into two foot lifts before it can be incorporated into the impoundment embankment. The reason for this is that the

refuse pile does not meet the standards for the impoundment embankment under the Impoundment Plan.

December 27, 1992, Incident

18. On December 27, 1992, there was a failure of part of the refuse pile. A 35 foot-wide section of coarse refuse material broke off, caved in, and slid down toward the slurry pond. An employee was operating a bulldozer on the part of the refuse pile that failed. The bulldozer slid about 30 feet down the refuse pile toward the slurry pond and was partially buried in refuse material. Ropes were thrown down to the employee to help him climb up the steep slope of the refuse pile.

19. The bulldozer that slid down the refuse pile was covered by coarse refuse material midway up the cabin and the blade was buried in the coarse refuse.

20. Respondent knew that the refuse pile had collapsed and the bulldozer and driver slid down the refuse pile on December 27, 1992.

21. After the accident Respondent did not rope off or danger off the area where the refuse pile had collapsed.

April 2, 1993, Incident

22. On April 2, 1993, there was another failure of the refuse pile. An area about 350 feet long, 60 feet high, and 40 feet wide broke off, caved in, and slid into the slurry pond.

23. The steepness of the refuse pile slope, the instability of the refuse pile material, and the slurry foundation's inability to support the weight of the coarse refuse deposited on the refuse pile were the primary causes for the refuse failures in December 1992 and April 1993.

24. Over the years, including the period from December 1992 through April 2, 1993, coarse coal refuse was hauled by 35-ton trucks from the 500-ton bin to the refuse pile. The dump trucks deposited piles of coarse refuse along the land-side edge of the refuse pile. Bulldozers were used to spread the piles of coarse refuse and to push refuse over the pond-side edge of the refuse pile.

25. The coarse refuse piled on the refuse pile was not compacted or deposited in layers two feet or less.

26. The operator was aware of the fact that miners were bulldozing the coarse refuse material over the edge of the refuse pile toward the slurry pond.

27. The operator was aware of the fact that coal deposited on the refuse pile was not being compacted and was not being placed in lifts two feet or less. The operator knew that this practice had been in existence before December 1992, and continued through April 2, 1993.

28. From December 1992 through April 2, 1993, the majority of the coarse refuse hauled from the 500-ton bin was deposited on the refuse pile.

29. The lack of compaction of the refuse material deposited on the refuse pile and the failure to deposit the refuse material in lifts two feet or less contributed to the failures of the refuse pile in December 1992 and in April 1993.

30. Slope instability was one of the primary factors causing the failures of the refuse pile in December 1992 and April 1993.

31. The slope instability was caused, in major part, by the fact that the refuse pile was developed over the years by coarse coal refuse being dumped on the refuse pile, pushed over the edge, and allowed to settle on the fines of the slurry pond.

32. Over time, the foundation of the fines of the slurry pond could not bear the weight of the heavy coarse refuse deposited on the refuse pile.

33. The refuse pile was not constructed in a way to prevent the refuse material from shifting and ultimately sliding off.

34. The coarse refuse deposited on the refuse pile was not placed pursuant to any engineering plan and did not meet the engineering principles and requirements of either Respondent's Impoundment Plan or the refuse pile standards in 30 C.F.R. ' 77.215.

**MSHA's Investigation of
December 27, 1992, Incident**

35. During the inspection in April 1993, Inspector Daniel received a ' 103(g) complaint concerning a failure of the refuse pile on December 27, 1992. After investigating the complaint, he found that a 35-foot wide section of the refuse pile had broken away, caved in, and slid down toward the slurry pond. A miner was operating a bulldozer on top of the refuse section that broke away, caved in, and slid down toward the slurry pond. He and the bulldozer slid down the slope and came to rest near the slurry pond.

36. At the time of the refuse pile failure on December 27, the operator of the bulldozer was pushing coarse refuse material over the edge of the refuse pile toward the slurry pond.

37. Dump trucks traveled on the refuse pile, including the area that failed, in order to deposit loads of coarse refuse along the edge of the refuse pile.

38. Respondent knew that dump trucks were hauling coarse refuse from the 500-ton bin to the refuse pile and bulldozers were pushing material over the edge of the refuse pile. Respondent also knew that the trucks and bulldozers were operating on a refuse pile that was not stable and presented a serious risk of collapse.

39. Before the failure in December 1992, a report from the Pennsylvania Department of Environmental Resources noted that refuse material was being deposited on the refuse pile.

40. Before and after December 27, 1992 (until April 2, 1993), Respondent failed to take reasonable steps to prevent vehicles from depositing coarse refuse material on the refuse pile and pushing it over the edge toward the slurry pond. After the December 27 incident, Respondent continued the same practice that led to a second failure of the refuse pile on April 2, 1993.

ISSUES

1. Whether the incident on December 27, 1992, was an accident as defined in 30 C.F.R. ' 50.2 so that it had to be reported under 30 C.F.R. ' 50.10 and investigated under 30 C.F.R. ' 50.11(b).

2. Whether Respondent violated ' 50.10 and 50.11(b) and if a violation of 30 C.F.R. ' 50.11(b) occurred, whether it was properly designated significant and substantial.

3. Whether 30 C.F.R. ' 77.215(f) and (h) applied to Respondent's placement of refuse material southwest of the 500-ton bin and whether Respondent violated those standards.

4. If violations of ' 77.215(f) and (h) occurred, whether they were significant and substantial and due to an unwarrantable failure to comply.

5. If violations of ' 77.1608(b) occurred, whether they were significant and substantial and due to an unwarrantable failure to comply.

6. Whether the proposed penalties are appropriate under the criteria for penalties in '110(i) of the Act.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

As a result of its investigation of both the December 27, 1992, and the April 2, 1993, failures of the refuse pile, MSHA issued an imminent danger order and eight citations and orders alleging violations.

Order No. 3658637

Order No. 3658637 was issued under ' 107(a) on April 5, 1993, alleging an imminent danger due to the April 2 failure of the refuse pile. The order states in part:

. . . [A] section of the lay down area sheared off into the slurry pond. (Approximately 40 feet of material). The area that sheared off has been an area in which mobile equipment has been operating.

Citation No. 3658682

Citation No. 3658682 was issued under ' 104(a) on April 7, 1993, alleging a violation of 30 C.F.R. ' 50.10, concerning the December 27, 1992, incident as follows:

An accident occurred at the Emerald Mine No. 1, and the operator did not immediately contact the MSHA District or Subdistrict office having jurisdiction over its mine, in that, an unstable condition in the mine refuse pile in by the 500-ton bin at the edge toward the slurry pond failed causing approximately 35 feet of material to slide along with the bulldozer and the operator. The bulldozer slid down the material approximately 34 feet. There was 1 violation issued during the last inspection period 10-1-92 through 12-31-1992 of C.F.R. 50.10.

As modified, the citation alleges a non-significant and non-substantial violation with high negligence. The proposed penalty is \$400.

Section 50.10 provides:

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553.

The term Accident@ in ' 50.10 is defined in ' 50.2(h). Subpart (10) of ' 50.2(h) states that an Accident@ includes:

An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank.

The Secretary contends that the event on December 27, 1992, was a failure of a refuse pile and was therefore a reportable accident. Respondent contends that the incident was not a reportable accident because the collapsed refuse was in a temporary stockpile, not a refuse pile, and the incident did not jeopardize the integrity of the impoundment embankment and residents downstream of the impoundment.

I find that the failure of refuse material was in a refuse pile, not a temporary stockpile. The refuse pile was built up over many years and the great majority of the refuse was left as refuse or was pushed over the edge toward the slurry pond to make room for more refuse.

The definition of a reportable accident includes a failure of a refuse pile. It also includes an unstable condition at ... [a] refuse pile ... which requires emergency action in order to prevent failure ... ' 50.2(h)(10). There is no requirement that the condition must cause individuals to be evacuated, or that it must also affect the integrity of an impoundment. This is clear from a comparison with ' 77.215(e) which prohibits using a refuse pile to impound water. If ' 50.2(h)(10) were intended to cover only failures that affect an impounding structure, then failure of a refuse pile, which may not be used to impound water, would not be included in the definition of a reportable accident without words connecting a refuse pile failure to the integrity of an impoundment.

I therefore hold that the failure of the refuse pile on December 27, 1992, was a reportable accident.

Failure to notify MSHA immediately after an accident is a clear violation of the regulation. In JBA Industrial Fuel, Inc., 16 FMSHRC 1778 (1994), the operator delayed almost 12 hours before notifying MSHA of the accident. The judge found that the operator could have called MSHA's 24-hour phone number to comply with this regulation and upheld a violation of ' 50.10, stating that the requirement that an operator immediately report certain types of accidents to MSHA is an important part of mine safety and enforcement in terms of both accident investigation and assistance to injured or trapped miners. Id. at 1780.

Respondent knew that part of the refuse pile failed on December 27, 1992, and that a bulldozer, with its driver, slid

down the refuse pile toward the slurry pond and was partially buried. Respondent did not contact MSHA.

Respondent's failure to call MSHA cannot be dismissed as a mere difference of opinion as to what is a reportable accident. No witness for Respondent testified that at the time a reasoned decision was made that, in his or her best judgment, the failure of the refuse pile in December 1992 was not a reportable accident. John Meyers, preparation plant foreman, knew about the failure and did not notify MSHA. He presented no testimony indicating that he consulted with management or Respondent's safety director and received an opinion that contacting MSHA was not required under the regulations. Gary Bochna, Respondent's safety director, testified that although it was his responsibility to conduct accident investigations and complete accident reports, management never consulted him about whether the December 1992 failure was a reportable accident and he was not informed of the December 1992 failure until April 1993. Mr. Bochna acknowledged that under Respondent's policies, the December 1992 incident should have been reported to him.

I find that Respondent's failure to report the December 27 accident was due to high negligence and that the violation was serious. Considering all the criteria for civil penalties in ' 110(i), I find that a penalty of \$400 is appropriate for this violation.

Citation No. 3658696

Citation No. 3658696 was issued under ' 104(a) on May 26, 1993, alleging a violation of 30 C.F.R. ' 50.11(b) concerning the December 27, 1992, incident as follows:

An accident occurred at the Emerald Mine No. 1, and the operator did not investigate the accident, in that, an unstable condition in the mine refuse pile in by the 500-ton bin at the edge toward the slurry pond failed causing approximately 35 feet of material to slide along with the bulldozer and the operator. The bulldozer and the operator slid down the material approximately 34 feet. There was 0 violations issued during the last inspection period 10-01-92 through 12-31-92 of C.F.R. 50.11(b).

The citation alleges a significant and substantial violation with high negligence. The proposed penalty is \$3,000.

Section 50.11(b) provides:

Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation. No

operator may use Form 7000-1 as a report, except that an operator of a mine at which fewer than twenty miners are employed may, with respect to that mine, use Form 7000-1 as an investigation report respecting an occupational injury not related to an accident. No operator may use an investigation or an investigation report conducted or prepared by MSHA to comply with this paragraph. An operator shall submit a copy of any investigation report to MSHA at its request. Each report prepared by the operator shall include,

- (1) The date and hour of occurrence;
- (2) The date the investigation began;
- (3) The names of individuals participating in the investigation;
- (4) A description of the site;
- (5) An explanation of the accident or injury, including a description of any equipment involved and relevant events before and after the occurrence, and any explanation of the cause of any injury, the cause of any accident or cause of any other event which caused an injury;
- (6) The name, occupation, and experience of any miner involved;
- (7) A sketch, where pertinent, including dimensions depicting the occurrence;
- (8) A description of steps taken to prevent a similar occurrence in the future; and
- (9) Identification of any report submitted under ' 50.20 of this part.

On December 27, 1992, part of the refuse pile failed. About 35 feet of refuse material broke off, caved in, and slid down toward the slurry pond. A bulldozer was operating on the part of the refuse pile that failed. The bulldozer, along with the driver, slid down with the fallen material about 30 feet toward the slurry pond, and was partially buried. Respondent, through management personnel, including Ron Stotka and Jim Graznak, knew of the failure of the refuse pile shortly after it occurred. The foreman, John Meyers, participated in the efforts to assist the operator of the bulldozer in climbing up the steep slope.

Despite its knowledge of the failure of the refuse pile, Respondent did not investigate and develop a report of the failure and measures needed to prevent a recurrence until after MSHA's investigation, four months after the accident.

Soon after the failure, the only ~~investigation~~ into the failure was initiated by the miner representative for the United Mine Workers, not the Respondent. Tim Brown, acting safety committeeman, was asked by Mr. Prodan, UMW safety committee chairman, to look into the failure of December 27, 1992. In

response, Mr. Brown asked Mr. Meyers, preparation plant foreman, to accompany him to the area of the failure.

In the failure area, Tim Brown expressed his concern for the safety of the miners. Mr. Brown did not participate in the writing of an investigative report of the failure. Mr. Brown relied upon the oral comments of John Meyers that the practice of pushing piles over the edge would be stopped. However, the practice of pushing piles over the edge continued. The evidence shows an indifferent attitude by management, demonstrated by its failure to properly investigate the December accident, to develop a report, and to take reasonable measures to prevent future similar accidents. When asked whether he took preventive measures after the December 27, 1992, accident, Mr. Meyers, the preparation plant foreman, testified:

If my memory serves me right, I believe everyone was instructed here that there would be no more pushing over the side of the impoundment. In fact, I believe that there were -- I wouldn't want to swear to this, but it sticks in my mind that there were piles dumped along the haul road, more or less to barricade, to keep people out of there, but it didn't work. [Emphasis added.]

If Respondent had conducted a reasonable investigation with a report of steps to prevent future similar accidents, the failure of the refuse pile on April 2, 1993, could have been prevented and employees would not have continued the dangerous practice of operating trucks and bulldozers on an unstable refuse pile.

Respondent's accident report was not prepared until April 1993, and was prompted not by the accident but by MSHA's investigation on April 5, 1993.

The importance of the investigation and report required by ' 50.11(b) was addressed by the Commission in Steele Branch Mining, 15 FMSHRC 597 (1993). The Commission noted that ' 50.11(b) Requires operators to investigate all accidents and to develop a report of each investigation.@ Id at p. 601. The Commission took note of Athe purpose of the regulation which is to ensure that operators are in fact investigating accidents and injuries and are engaged in constant upgrading of health and safety practices. 42 Fed. Reg 65534 (December 30, 1977).@ Id. at 602.

Respondent violated the regulation by not investigating and developing a report of the December 1992 failure of the refuse pile including measures needed to prevent a recurrence, until prompted by MSHA four months after the accident. Respondent introduced into evidence a report of investigation dated

April 23, 1993. This report was prepared about four months after the accident occurred. The portion dealing with preventive steps was not completed until April 30, 1993. Respondent's delay demonstrates not only a violation of the regulation, but a high degree of negligence regarding the violation.

Respondent challenges the "significant and substantial" finding in Citation No. 3658696 on the ground that ' 50.11(b) is not a mandatory safety or health standard and therefore not within the scope of ' 104(d)(1). However, the citation was issued under ' 104(a), not ' 104(d). An allegation of a "significant and substantial" violation in a ' 104(a) citation is an allegation of gravity, not an assertion of jurisdiction to apply the sanctions of ' 104(d). Accordingly, I do not reach the issue whether the sanctions of ' 104(d) apply to a violation of Part 50.

I find that Respondent's violation of ' 50.11(b) was significant and substantial. Continued operations without investigating the causes of a failure of a refuse pile and the measures needed to prevent a recurrence could contribute significantly and substantially to another failure of the refuse pile with a risk of serious injury. In fact, another failure occurred little more than three months after the December failure.

I also find that the violation was due to high negligence. There was a serious failure of the refuse pile on December 27. An employee was operating a bulldozer on the refuse material that failed. The bulldozer, along with the driver, slid down a steep slope toward the slurry pond. The operator of the bulldozer was frightened by this accident. This was a serious accident. A reasonably prudent operator would have thoroughly investigated it and prepared a report of measures needed to prevent another failure of the refuse pile. Respondent did neither.

Considering all the criteria for civil penalties in ' 110(i) of the Act, I find that a penalty of \$3,000 is appropriate for Respondent's violation of ' 50.11(b).

Order No. 3768690

Order No. 3768690 was issued under ' 104(d)(1) on April 26, 1993, alleging a violation of ' 77.215(f) concerning the December 27, 1992, incident as follows:

The refuse being deposited on the mine refuse pile was not constructed in such a manner as to prevent accidental sliding and shifting of the material, in that, a section of the lay down area sheared off at the edge toward the slurry pond. The mine refuse failed causing approximately 35 feet

of material to slide along with the bulldozer and the operator. The bulldozer slid down the material approximately 34 feet. There were 0 violations issued during the last inspection period 01-01-93 through 3-31-93 of C.F.R. 77.215(f).

The order was initially issued as a ' 104(a) citation with Ahigh@ negligence, which was modified to Amoderate@ negligence and then back to Ahigh.@ The citation was modified to a ' 104(d)(1) order. The proposed penalty is \$8,000.

Section 77.215(f) provides:

Refuse piles shall be constructed in such a manner as to prevent accidental sliding and shifting of materials.

On December 27, 1992, part of the refuse pile failed. The shifting and sliding of the refuse material resulted from the unsafe manner in which the refuse pile was constructed. Over the years, refuse material was dumped on the pile and pushed over the edge toward the slurry pond. This was done without an engineering plan and without adherence to accepted engineering practices to prevent accidental sliding and shifting of materials. Accordingly, the refuse pile was plainly in violation of ' 77.215(f).

For the reasons stated here and in the discussion of Citation No. 3658639, below, I find that the violation was significant and substantial and was due to high negligence and therefore unwarrantable within the meaning of ' 104(d)(1) of the Act.

Respondent knew that the refuse pile was developed without an engineering plan to prevent accidental sliding and shifting of refuse materials. Its risk-taking in this regard was more than ordinary negligence. Continued operations without abatement of the violation was reasonably likely to result in serious injury.

Considering all the criteria for civil penalties in ' 110(i), I find that a penalty of \$8,000 is appropriate for this violation.

Citation No. 3658639

Citation No. 3658639 was issued under ' 104(a), on April 5, 1993, alleging a violation of 30 C.F.R. ' 77.215(f) concerning the April 2, 1993, incident as follows:

The refuse being deposited on the mine refuse pile was not constructed in such a manner as to prevent accidental sliding and shifting of the material, in that, a section of

they lay down area sheared off into the slurry pond. The area that sheared off has been an area in which mobile equipment has been operating. This citation was one of the factors that contributed to the issuance of imminent danger order No. 3658637 dated 04-02-93. There was 0 violations issued during the last inspection period 10-01-92 through 12-31-92 of C.F.R. 77.215(f).

The citation initially alleged **Amoderate@** negligence but was modified first to allege **Ahigh@** negligence and then **Areckless disregard@**. The proposed penalty is \$8,500.

Slope instability was one of the primary factors causing the failure of the refuse pile. This was caused, in major part, by the fact that the refuse pile was developed over the years by coarse coal refuse being dumped on the refuse pile, pushed over the edge, and allowed to settle on the fines of the slurry pond. Over time, the foundation of the fines of the slurry pond could not bear the weight of the heavy coarse refuse deposited on the refuse pile.

On April 2, 1993, a substantial amount of refuse material shifted, caved in, and slid into the slurry pond. The area that failed was about 350 long, 60 feet high, and 40 feet wide. The refuse pile had been constructed over the years without an engineering plan to prevent the refuse material from shifting and sliding. This was plainly a violation of ' 77.215(f).

I find that the violation was significant and substantial in that continued use of vehicles on the unstable refuse pile was reasonably likely to result in a failure of the pile with serious injuries.

I also find that the violation was due to high negligence. Respondent knew that the refuse pile was not being constructed in accordance with the engineering requirements for an impoundment embankment, i.e., in its Impoundment Plan. This is clear from Respondent's acknowledgment that before the refuse pile could be incorporated into the impoundment embankment, the refuse material would have to be regraded and compacted. The regrading and compacting would not be necessary if the material had been properly graded and compacted in the first instance. Respondent also knew from the December 27 failure of the refuse pile that the refuse pile was not being **Aconstructed** in such manner as to prevent accidental sliding and shifting of materials@ as required by ' 77.215(f). After the December incident, Respondent continued the same practice of depositing refuse on the pile and pushing it over the edge toward the slurry pond. I find that its continued violation was due to high negligence. However, I do not find that its conduct amounts to **Areckless disregard@** for the safety of its employees as alleged in the citation. The citation

will be modified to change **Areckless disregard** to **Ahigh negligence.**

Considering all the criteria for a civil penalty in ' 110(i), I find that a penalty of \$8,500 is appropriate for this violation.

Citation No. 3658640

Citation No. 3658640 as amended was issued under ' 104(d)(1) on April 5, 1993, alleging a violation of 30 C.F.R. ' 77.215(h) concerning the April 2, 1993, failure as follows:

The refuse being deposited on the mine refuse pile was not constructed in compacted layers and not exceeding 2 feet in thickness and shall not have any slope exceeding 2 horizontal to 1 vertical (approximately 27N) in that, the refuse was not constructed in compacted layers and did exceed the 2 feet in thickness, and the slope exceeded 2 horizontal to 1 vertical approximately 27N. This citation was one of the factors that contributed to the issuance of Imminent Danger Order No. 3658637 dated 04-02-93. There was 0 violations issued during the last inspection period 10-01-92 through 12-31-93 of CFR 77.215(h).

The regulation requires that refuse piles shall be constructed in compacted layers not exceeding 2 feet in thickness and shall not have any slope exceeding 2 horizontal to 1 vertical (approximately 27N). . . .@ The evidence plainly shows a violation of this regulation.

The citation alleges a substantial and significant violation due to high negligence, and therefore an unwarrantable violation. The proposed civil penalty is \$8,500.

The refuse material hauled from the 500-ton bin to the refuse pile was routinely dumped on the refuse pile. It was not compacted and was not constructed in lifts two feet or less. Most of the refuse was simply pushed by bulldozers over the edge of the refuse pile to make room for more refuse. The refuse pile was not compacted and constructed in lifts so as not to exceed a 27 degree slope. The slope was much steeper.

I find that the violation of ' 77.215(h) was significant and substantial. The safety hazard contributed to was a failure of the refuse pile. Continued use of vehicles on the unstable refuse pile was reasonably likely to result in a failure of the pile with serious injuries.

I also find that the violation was due to high negligence, and therefore was unwarrantable under ' 104(d)(1) of the Act. Respondent knew that the refuse pile was not being constructed properly and that it posed a high risk to the miners working on it. Its conduct was aggravated and showed a serious disregard for safety.

Considering all of the criteria for civil penalties in

' 110(i), I find that a penalty of \$8,500 is appropriate for this violation.

Citation No. 3658683

Citation No. 3658683 as amended was issued under ' 104(a)(d)(1) on April 7, 1993, alleging a violation of ' 77.215(h) concerning the December 27, 1992, incident as follows:

The refuse being deposited in the mine refuse pile was not constructed in compacted layers and did exceed 2 feet in thickness and also the slope exceeding horizontal to 1 vertical approximately 27E resulting in an unstable condition in the mine refuse pile inby the 500-ton bin at the edge toward the slurry pond. The mine refuse failed causing approximately 35 feet of material to slide along with the bulldozer and the operator. The bulldozer slid down the material approximately 34 feet. There was 0 violations issued during the last inspection period 10-01-92 through 12-31-92 of C.F.R. 77.215(h). This citation will be terminated when the 107(a) Order no. 3658637 is terminated.

The citation was initially issued under ' 104(a), alleging a significant and substantial violation with Ahigh@ negligence. The negligence was modified to Amoderate@ and then back to Ahigh.@ The citation was modified to a ' 104(d)(1) citation. The proposed penalty is \$7,000.

For the reasons stated as to Citation No. 3658640, above, I find that Respondent violated ' 77.215(h) as to its manner of developing the refuse pile. The violation concerning the December 27 failure of the refuse pile was significant and substantial, due to high negligence, and was therefore an unwarrantable violation.

Considering all the criteria in ' 110(i), I find that a civil penalty of \$7,000 is appropriate for this violation.

Order No. 3658698

Order No. 3658698 was issued under ' 104(d)(1) on May 26, 1993, alleging a violation of ' 77.1608(b) concerning the December 27, 1992, incident as follows:

The ground where refuse dump trucks were dumping failed and the trucks did not start dumping a safe distance back from the edge of the refuse bin, in that, an area of the mine refuse pile inby the 500-ton bin at the edge toward the slurry pond failed causing approximately 35 feet of material

to slide along with the bulldozer and the operator. The bulldozer and the operator slid down the material approximately 34 feet. There was 0 violations issued during the last inspection for 10-01-92 through 12-31-92 of C.F.R. 77.1608(b).

The order alleges a significant and substantial violation due to high negligence and an unwarrantable failure to comply. The proposed penalty is \$9,500.

Section 77.1608(b) provides:

Where the ground at a dumping place may fail to support the weight of a loaded dump truck, trucks shall be dumped a safe distance back from the edge of the bank.

During the investigation in April 1993, Inspector Walter Daniel received a ' 103(g) complaint alleging a failure of the refuse pile on December 27, 1992. His investigation revealed that on December 27 a part of the refuse pile, about 35 feet wide, had broken away, caved in and slid down toward the slurry pond. A miner was operating a bulldozer on the part of the refuse pile that failed. The bulldozer was pushing coarse refuse material over the edge of the refuse pile. When the refuse pile failed, the bulldozer slid with the collapsed material about 35 feet down the slope and was partially buried. The driver was pulled up the slope with a rope.

As found above as to violations of ' 77.215(f), the refuse pile was unstable and constructed in violation of ' 77.215(f), which requires that refuse piles be Aconstructed in such manner as to prevent accidental sliding and shifting of materials...@

Dump trucks traveled on unstable parts of the refuse pile, including the area that failed, in order to deposit coarse refuse. Before the failure in December 1992, a report from the Pennsylvania Department of Environmental Resources noted that refuse material was being deposited on the refuse pile.

I find that Respondent violated ' 77.1608(b) by having dump trucks drive on a refuse pile that might fail to support the weight of a loaded dump truck. I also find that the violation was significant and substantial in that it was reasonably likely that, if unabated, the violation would result in serious injury.

I also find that the violation was Aunwarrantable@ under ' 104(d)(1) of the Act. An Aunwarrantable@ violation has been determined by the Commission to be aggravated conduct constituting more than ordinary negligence. This may be established by showing that the violative condition or practice was due to Areckless disregard,@ Aintentional misconduct,@

Aindifference, @ or a Aserious lack of reasonable care. @ Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987); Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-194 (1989); Virginia Crews Coal Co., 15 FMSHRC 2103, 2106-2107 (1993).

Respondent knew of the longstanding practice of dump trucks dumping coarse refuse on the refuse pile. Statements made by management that they attempted to Aencourage @ operators to dump the material closer to the 500-bin is a plain indication of their awareness of the danger of dumping on the refuse pile. Despite awareness of this danger, no reasonable steps were taken to prevent dump trucks from dumping on an unstable refuse pile. The fact that Respondent was aware of the practice, anticipated the danger, and took no reasonable steps to prevent danger to the miners constitutes high negligence and therefore an unwarrantable violation.

Considering all the criteria in ' 110(i), I find that a penalty of \$9,500 is appropriate for this violation.

Citation No. 3658700

Citation No. 3658700 was issued under ' 104(a) on June 1, 1993, alleging a violation of 30 C.F.R. ' 77.1608(b) concerning the April 2, 1993, incident as follows:

The ground where refuse dump trucks were dumping failed, and the trucks did not start dumping a safe distance back from the edge of the refuse bank, in that, an area of the mine refuse pile in by the 500-ton bin at the edge toward the slurry pond failed causing approximately 40 feet of material to slide, the area sheared off has been an area in which mobile equipment has been operating. There was 0 violation issued during the last inspection period 10-01-92 through 12-31-92 of C.F.R. ' 77.1608(b).

The citation alleges a significant and substantial violation due to reckless disregard for safety. The proposed penalty is \$9,500.

The regulation requires that Awhere the ground at a dumping place may fail to support the weight of a loaded dump truck, trucks shall be dumped at a safe distance back from the edge of the bank. @

Dump trucks were dumping loads of coarse coal refuse along the edge of the refuse pile. The refuse pile was not stable. The trucks were driven on the part of the refuse pile that failed on April 2. Photographs of the slide area show the presence of tire tracks to the edge of the area that broke away. An area

about 350 long, 50 feet high, and 40 feet wide broke off, caved in, and slid into the slurry pond.

I find that loaded dump trucks were operated in an area that might fail to support the weight of a loaded dump truck. Therefore, there was a violation of the standard.

Because of the instability of the refuse pile, it was reasonably likely that a failure of the refuse pile would occur and cause a dump truck to roll over or fall with collapsed refuse material, resulting in serious injury. The violation was therefore significant and substantial.

Respondent knew in December 1992 that part of the refuse pile had failed and caused a bulldozer and driver to slide down the slope, partially burying the bulldozer. However, Respondent took no reasonable steps to prevent dump trucks from dumping on the unstable refuse pile. By failing to take corrective action after the December incident, the operator demonstrated high negligence. The violation was therefore ~~unwarrantable~~ within the meaning of ' 104(d)(1). However, I do not find that the facts sustain a finding of ~~reckless disregard~~ for safety. Accordingly, the citation will be modified to change ~~reckless disregard~~ to ~~high~~ negligence.

Considering all the criteria for civil penalties in ' 110(i) of the Act, I find that a penalty of \$9,500 is appropriate for this violation.

Imminent Danger

The immediate dangers presented by the violations found as to Citation No. 3658639, Citation No. 3658640, Citation No. 3658700, and Order No. 3658698 combined to create an imminent danger within the meaning of ' 107(a) of the Act on April 5, 1993.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.

2. Respondent violated the safety standards as alleged in the following citations and orders (Citation Nos. 3658639 and 3658700 being modified to delete ~~reckless disregard~~ and substitute therefor ~~high negligence~~):

<u>Citation or Order</u>	<u>30 C.F.R.</u>
Citation No. 3658682	' 50.10
Citation No. 3658696	' 50.11(b)

Order No. 3768690 ' 77.215(f)
Citation No. 3658639 ' 77.215(f)
Citation No. 3658640 ' 77.215(h)
Order No. 3658683 ' 77.215(h)
Order No. 3658698 ' 77.1608(b)
Citation No. 3658700 ' 77.1608(b)

ORDER

WHEREFORE IT IS ORDERED that:

1. The term **Areckless disregard@** in Citation Nos. 3658639 and 3658700 is deleted and the term **Ahigh negligence@** is substituted therefor. With the modifications, all citations and orders are **AFFIRMED**.

2. Within 30 days of the date of this Decision and Order, Respondent shall pay civil penalties of **\$54,400**.

William Fauver
Administrative Law Judge

Distribution:

Myrna A. Butkovitz, Esq., Office of the Solicitor, U.S.
Department of Labor, 3535 Market St., 14480 Gateway Bldg.,
Philadelphia PA 19104 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll Corp., One Oxford
Centre, 301 Grant St., 20th Floor, Pittsburgh, PA 15219-1410
(Certified Mail)

/lt