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Commission Decisions

May 1 - 31, 1980

MAY

The following cases were Directed for Review during the month of MAY:

Secretary of Labor, MSHA v. Capitol Aggregates, Inc., DENV 79-163-PM, etc. (Judge Moore, April 14, 1980)

Ronald H. McCracken v. Valley Camp Coal Company, WEVA 79-116-D. (Judge Melick, April 18, 1980)

Review was Denied in the following cases during the month of MAY:

Secretary of Labor, MSHA v. The Valley Camp Coal Company, WEVA 79-111, HOPE 79-318-P. (Judge Merlin, March 28, 1980)

Hecla Mining Company v. Secretary of Labor, MSHA, WEST 79-251-M. (Judge Carlson, April 1, 1980)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., & Cowin and Company, Inc., BARB 77-266-P, BARB 76X465-P. (Judge Koutras, April 1, 1980 Order)

Secretary of Labor, MSHA v. Morton Salt Division, Morton-Norwich Products, Inc.; Frontier-Kemper Constructors, CENT 80-59-M. (Judge Kennedy, April 14, 1980 Order)

Secretary of Labor, MSHA v. Cowin and Company, HOPE 76-210-P through HOPE 76-213-P. (Judge Broderick, March 27, 1980 Order)

Secretary of Labor, MSHA v. Duval Corporation, WEST 79-194-M. (Judge Morris, March 4, 1980)

Heldenfels Brothers, Inc. v. Secretary of Labor, MSHA, DENV 79-575-PM, DENV 79-576-PM. (Judge Stewart, April 8, 1980)

Secretary of Labor, MSHA v. Leeco, Incorporated, KENT 79-112. (Judge Koutras, April 14, 1980)

Island Creek Coal Company v. Secretary of Labor, MSHA and UMWA, WEVA 79-242-R. (Judge Cook, April 22, 1980)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 1980

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. LAKE 80-25
	:	80-26
v.	:	80-27
	:	80-36
PEABODY COAL COMPANY	:	80-77

DECISION

The primary question before us is whether the administrative law judge erred in summarily assessing a penalty for an alleged violation of 30 CFR §75.400. 1/ For the reasons discussed below, we hold that he erred. We therefore vacate the judge's decision assessing a penalty, and remand the case for further proceedings consistent with this opinion.

On May 3, 1979, a Mine Safety and Health Administration ["MSHA"] inspector issued to Peabody Coal Company a withdrawal order under section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978) ["the Act"]. The order alleged the existence of loose coal and coal dust from 4 to 20 inches in depth for a distance of about 900 feet in violation of 30 CFR §75.400.

This penalty litigation began when MSHA issued to Peabody a notification of proposed assessment of penalty under section 105(a) for the alleged coal accumulations violation, and Peabody filed a notice of contest under section 105(d) of the Act. 2/ Under Commission Rule 27(a), 29 CFR §2700.27(a), the Secretary then filed with the Commission a proposal for a penalty. Peabody filed an answer in effect denying it had violated the prohibition in 30 CFR §75.400 against accumulations of

1/ That section provides:

§75.400 Accumulations of combustible materials.

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.

2/ Section 105 provides in part:

(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance ... of an order issued under section 104 ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, ...) and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's ... proposed penalty, or directing other appropriate relief....

80-5-10

loose coal and coal dust. In its response to the administrative law judge's pre-hearing order, Peabody reiterated this denial. It admitted that some "spillage" had occurred, but specifically denied that the spillage constituted an "accumulation" within the meaning of the standard, as interpreted by the Commission in Old Ben Coal Co., 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD ¶24,084 (1979). Before an evidentiary hearing was scheduled, motions to approve a settlement were filed. The Secretary proposed that the judge approve a penalty settlement in the amount of \$550 for the alleged violation of 30 CFR §75.400; the Secretary in separate motions also proposed settlements for several alleged respirable dust violations involved in the consolidated dockets. 3/

In a document entitled "Decision and Order," issued on March 5, 1980, the judge granted the motions to approve a settlement for the four respirable dust violations, but disapproved the proposed settlement of \$550 for the alleged violation of 30 CFR §75.400. The judge did not find that Peabody admitted or was specifically called upon to deny, that the depths of the spillage were those alleged in the withdrawal order. The judge did not accord the parties an opportunity to be heard, and immediately assessed a penalty of \$1,000. Peabody filed a petition for discretionary review, which we granted on April 14, 1980. 4/

Section 105(d) of the Act, together with section 5(b) of the Administrative Procedure Act, 5 U.S.C. §554(c) (1976), 5/ and the Commission's rules, require that unless a case is settled or the respondent defaults, an administrative law judge must afford the parties an opportunity for a hearing on disputed issues of material fact. Commission Rule 63(b), 29 CFR §2700.63(b); 6/ also cf. Commission Rule 64, 29 CFR §2700.64. 7/ Because Peabody denied that an "accumulation" had

3/ The coal dust accumulation case (Docket No. LAKE 80-77) is consolidated with four respirable dust cases (Docket Nos. LAKE 80-25, 80-26, 80-27, and 80-36).

4/ Peabody filed on April 18, 1980, a motion to withdraw its petition for discretionary review. We need not rule on that motion because we now grant Peabody all the relief it sought in its motion.

5/ Section 5(b) provides:

The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

6/ Rule 63(b) provides:

Penalty proceedings. When the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

7/ Rule 64 provides in pertinent part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.

(cont.)

occurred, and the judge did not find that the depth of the spillage was admitted, a disputed issue of material fact remained unresolved. Accordingly, the judge erred in not granting the parties an opportunity to be heard on at least that issue. A remand is therefore necessary. 8/

Peabody's petition for discretionary review also raises several questions concerning the judge's order of March 25, 1980, in which the judge denied Peabody's motion for reconsideration. We do not pass upon the merits of these issues, for we find that the judge had no jurisdiction to enter that order. Inasmuch as the judge's decision of March 5 constituted "his final disposition of the proceedings" within the meaning of section 113(d)(1) of the Act, the judge's jurisdiction terminated on that date. Commission Rule 65(c), 29 CFR §2700.65(c). 9/ He therefore had no power to rule on the motion to reconsider. Secretary on behalf of Pasula v. Consolidation Coal Co., 1 FMSHRC 25, 1 BNA MSHC 2030, 1977 CCH OSHD ¶23,465 (1979). See also Penn Allegh Coal Co., March 1979 FMSHRC No. 3, 1979 CCH OSHD ¶23,439 (1979), in which we cautioned that the issuance of multiple opinions "threatens the smooth functioning of the Commission's review process." 10/

n. 7/ cont.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

8/ We need not pass upon whether other disputed issues of material fact remain. We leave that to the administrative law judge to resolve on remand.

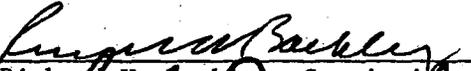
9/ Rule 65(c) provides in pertinent part:

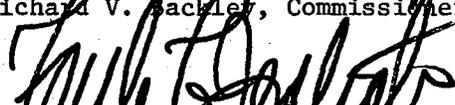
(c) ... The jurisdiction of the judge terminates when his decision has been issued by the Executive Director [of the Commission].

10/ In that order, we stated:

The filing by the judge of multiple opinions impedes the efforts of the aggrieved parties to timely comply with the requirements for petitions, encourages the hasty drafting of inferior petitions, and thus impairs the usefulness of this crucial document to the Commission. Moreover, the judge's action may create confusion as to the status of the issues, the deadlines for filing and granting of petitions and the exercise by the Commission of its power to direct review on its own motion. In short, the judge's action threatens the smooth functioning of the Commission's review process.

Accordingly, we remand this case to the judge for proceedings consistent with this opinion. We also strike the judge's order of March 25, 1980, denying the motion for reconsideration, and his subsequent orders of April 8 and 15, 1980.


Richard V. Backley, Commissioner


Frank V. Vestron, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1980

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. DENV 79-163-PM
 : DENV 79-240-PM
CAPITOL AGGREGATES, INC. :

DECISION

The question in this case is whether the administrative law judge had authority to stay the effect of and reconsider his final decision. We hold that he did not.

On January 8 and 9, 1980, an evidentiary hearing was held before an administrative law judge. At the end of the hearing, the judge ordered the parties to file any post-hearing briefs within thirty days after receipt of the transcript. The transcript was received by the judge on February 8. When, after two months had passed and the parties had still not filed briefs, the judge transmitted his decision to the Executive Director, who promptly issued it on April 14.

The judge was later informed that, although the parties had ordered transcript copies from the reporting company, neither party had received them. On April 22, the judge issued an order purporting to stay the effective date of his April 14 decision until he had received affidavits from the parties and a statement from the reporting company, and, possibly, until he had considered the parties' briefs on the merits. The judge was careful to caution the parties that he may lack the authority to issue such a stay. After receiving affidavits of counsel and a statement from the reporting company, the judge announced that his stay would remain in effect until he had an opportunity to study the briefs on the merits. He then set a briefing schedule and suggested that the parties direct their arguments to his April 14 decision.

80-5-13

On May 14, the thirtieth day after the issuance of the judge's decision, Capitol Aggregates filed a petition for discretionary review of the judge's decision; the petition was filed to protect its right to discretionary Commission review if the judge lacked the power to stay his decision. On that same day, the Commission directed review of the judge's decision on its own motion; the issues for review included whether the judge had the authority to stay the effect of and reconsider his decision. On May 20, 1980, the petition for discretionary review, which raises issues concerning the correctness of the judge's April 14 decision, was granted.

The judge's decision of April 14 constituted his "final disposition of the proceedings" within the meaning of section 113(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978), and Commission Rule 65(a), 29 CFR §2700.65(a). Commission Rule 65(c), 29 CFR §2700.65(c), which codifies Commission case law, states that "[t]he jurisdiction of the judge terminates when his decision has been issued by the Executive Director." The judge therefore had no authority to stay the effect of his decision or to reconsider it. Peabody Coal Co., 2 FMSHRC _____, 1 BNA MSHC _____, 1980 CCH OSHD ¶ _____ (No. Lake 80-25, May 16, 1980). Cf. Penn Allegh Coal Co., March 1979 FMSHRC No. 3, 1979 CCH OSHD ¶23,439 (1979) (issuance of multiple opinions "threatens the smooth functioning of the Commission's review process"). 1/ The judge's order of April 22, 1980, is therefore vacated.

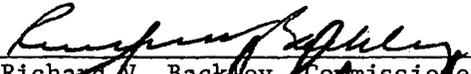
1/ Rule 65(c) codifies Secretary on behalf of Pasula v. Consolidation Coal Co., 1 FMSHRC 25, 1 BNA 2030, 1979 CCH OSHD ¶23,465 (1979). In his order of April 22, 1980, the judge questioned the continuing vitality of Pasula. The judge noted that a judge had in another case reconsidered his final decision and that the Commission had not directed review. The judge also interpreted our decision in Valley Camp Coal Co., 1 FMSHRC 791, 1 BNA MSHC 2083 (1979), as holding that the judge there should have, and thus may have, reconsidered his decision.

In view of Rule 65(c)'s clarity, and its obvious purpose of codifying the Pasula precedent, the continuing vitality of Pasula is plain. That a contrary decision of another judge went unreviewed should not have cast doubt on the matter. A failure to direct review of a judge's decision inconsistent with Commission case law does not necessarily indicate that the Commission concurs in that judge's decision. A judge's decision may also go unreviewed because it does not raise an issue deserving plenary Commission review, or raises one in a posture unsuitable for efficient resolution by the Commission. It is partly for this reason that Commission Rule 73 states that "[a]n unreviewed decision of a judge is not a precedent binding upon the Commission." Finally, Valley Camp does not hold that the judge in that case should have reconsidered his final decision. That decision holds only that adequate cause to excuse a late filing had been shown.

Our rules and precedents should not be construed to mean that an administrative law judge can do nothing if he discovers that he erred in his decision or that the case should be returned to him for other reasons. The judge may, by a letter placed in the record, inform the Commission of the circumstances and suggest that his decision be directed for review and the case remanded to him. Commission Rule 65(c) also states in some detail the procedure to be followed to correct clerical errors and mistakes in a judge's decision.

Finally, we conclude that, with the case in this posture, Commission review of the other issues should not be undertaken. The judge sought to give the parties an opportunity to file briefs, and Capitol Aggregates evidently wishes to file a brief with the judge. We consider it prudent to permit the administrative law judge to first consider the parties' arguments. In this way, the new decision of the judge may be more sharply focused upon the issues of concern to the parties, and may so squarely resolve them that discretionary review by the Commission may not be sought again.

Accordingly, the judge's decision of April 14 is vacated, and the case is remanded for further proceedings.


Richard V. Backley, Commissioner


Frank F. Jettab, Commissioner


A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR.
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May 28, 1980

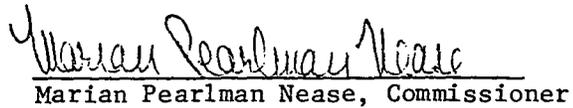
RONALD H. McCracken :
 :
 v. : Docket No. WEVA 79-116-D
 :
 VALLEY CAMP COAL COMPANY :

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by Mr. McCracken is granted. The case is remanded to the administrative law judge for a ruling on Mr. McCracken's claim that newly-discovered evidence warrants re-opening of the record and further proceedings.


Richard V. Backley, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

80-5-18

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
52C3 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

5 MAY 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VINC 78-457-P
Petitioner : A.O. No. 11-00598-02040V
v. :
: Eagle No. 2 Mine
PEABODY COAL COMPANY, :
Respondent :

DECISION

Appearances: Inga Watkins, Attorney, Office of the Solicitor U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Thomas Gallagher, Esquire, St. Louis, Missouri, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner on August 17, 1978, against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two violations of mandatory safety standards, namely, 30 C.F.R. §§ 75.200 and 75.202. The alleged violations were served on the respondent by MSHA coal mine inspector Harold Gulley in two section 104(c)(2) orders issued on August 1 and 29, 1977, pursuant to the 1969 Act. Petitioner seeks an assessment of civil penalties for the alleged violations in the amount of \$10,000 for each citation, for a total assessment of \$20,000.

Respondent filed a timely notice of contest denying that it has violated the cited mandatory safety standards and requested a hearing. The hearing was initially scheduled for February 13, 1979, but was continued on motion by the respondent and by agreement of the parties because of the unavailability of respondent's sole witness. In addition, the parties engaged in discovery, and petitioner responded to certain interrogatories served on it by the respondent and they are a matter of record. The case was subsequently redocketed for hearing at St. Louis, Missouri, March 25, 1980, and although petitioner's counsel advised me by telephone late Friday, March 21, 1980, that the parties had engaged in settlement negotiations,

the parties were directed to appear at the hearing as scheduled and were informed that they would be given an opportunity to argue any proposals for settlement on the record.

The parties appeared at the hearing on March 25, and at that time informed me that their prior settlement negotiations were finalized and they sought leave to present them on the record for my consideration pursuant to Commission Rule 30, 29 C.F.R. § 2700.30. After reminding the parties of the fact that the hearing notice in this matter was issued by me more than sixty (60) days in advance of the scheduled hearing of March 25, 1980, and after advising them that I considered petitioner's notification to me by telephone that the parties were in the midst of settlement negotiations to be untimely, they were permitted to present their proposed settlement and supporting arguments on the record for my consideration.

Discussion

The citations at issue in this proceeding and the conditions and practices cited by MSHA inspector Harold Gulley are as follows:

Citation No. 7-0161, August 1, 1977, citing a violation of 30 C.F.R. § 75.200, states:

The roof control plan was not being followed on section 008, 3 north off 3 mains east in that the entries were to [sic] wide. No. 5 entry 23 feet in width, No. 2 crosscut outby face between No. 4 and 5 entries 24 feet in width, No. 4 entry 60 feet outby face 26 to 30 feet in width, No. 3 entry 27 feet in width. Sketch 1 in roof bolting plan development entries states 20 feet width in entries and crosscuts.

Citation No. 7-0199, August 29, 1977, citing a violation of 30 C.F.R. § 75.202, states:

Overhanging ribs were observed in rooms and crosscuts Nos. 1 thru 6 and first crosscuts outby face (No. 1 room, 52 to 86 inches) (No. 2 room 71 inches) (Crosscuts between No. 1 and 2 room 49 inch) (crosscuts between 2 & 3, 76 inches) (No. 3 room 53 inch and crosscut between 3 & 4 room 65 inch) (No. 4 room 51 to 71 inch undercut and crosscut 4 & 5, 48 inch) No. 5 and 6 room and crosscuts 6 inch to 55 inches undercut.

The parties stipulated to the following (Tr. 5):

1. Respondent is a large coal mine operator and the Eagle No. 2 Mine is a large mining operation.

2. Respondent is subject to the 1969 Federal Coal Mine Health and Safety Act, as well as the 1977 Amendments thereto.

3. MSHA inspector Harold Gulley was, at all times relevant to this proceeding, an authorized representative of the Secretary, the citations were properly served on the respondent, and the conditions and practices described on the face of the citations did not constitute an imminent danger.

4. The proposed civil penalty assessments and settlement amounts will not adversely affect respondent's ability to remain in business.

The parties propose a settlement in the amount of \$2,000 for Citation No. 7-0161, issued on August 1, 1977, and \$3,500 for Citation No. 7-0199, issued on August 29, 1977. In support of the proposed settlement disposition of the citations, petitioner's counsel indicated that Inspector Gulley was present in the courtroom and concurred in the proposed disposition of the matter. Counsel summarized his testimony if it were necessary for him to testify in the matter, and counsel also introduced for the record Exhibits M-1 through M-12, which are copies of the citations, inspector's statements, notes, the applicable mine roof-control plan, sketches of the entries in question, the termination notices, and a computer printout of the prior history of violations issued at the mine in question.

Respondent introduced copies of its Exhibits, R-1 through R-8 pertaining to one citation, and R-1 through R-4, pertaining to the second citation. These documents consist of notes, sketches, preshift reports, photographs, and the mine ventilation and roof-control plans. In addition, respondent's counsel summarized its position with respect to the merits of the citations, as well as certain factual and legal defenses he would advance in defense of the citations, and he concurred in the proposed settlement disposition of the matter.

In further support of the proposed settlement, petitioner's counsel asserted that the initial proposed civil penalty assessments resulted from an application of a "special assessment" procedure and policy which is no longer being followed by MSHA. The initial assessments of \$10,000 for each of the violations in question resulted from a finding that the citations were "unwarrantable failure" citations, and coupled with the fact that respondent is a large operator, the civil penalty would "automatically be in the range of \$5,000 to \$10,000 unless there were other strong and mitigating factors" (Tr. 6). Counsel stated that this policy is no longer followed by MSHA, and counsel requested that I consider the matter de novo. Further, counsel asserted that MSHA's Office of Assessments is in agreement with the proposed settlement of the two citations in question and that the inspector who issued the citations is also in agreement with MSHA's proposed disposition of the citations (Tr. 26, 29).

In addition to the foregoing, MSHA's counsel presented arguments with respect to the circumstances surrounding the issuance of the citations in

question, and in particular presented information with respect to the statutory criteria set out in section 110(i) of the Act.

Good Faith Compliance

MSHA asserted that respondent exercised rapid compliance in achieving abatement of the conditions cited (Tr. 8, 11).

Gravity

With regard to Citation No. 7-0161, 30 C.F.R. § 75.200, MSHA stated that while the roof areas where the widths of the entries were in fact driven to excessive widths as noted in the citation, the roof areas themselves were not loose (Tr. 7). However, if called to testify, the inspector would state that the hazard created by the condition would pose a risk of a roof fall created by a strain placed on the roof by the excessive widths in the entries in question (Tr. 8).

With regard to Citation No. 7-0199, charging a violation of 30 C.F.R. § 75.202, MSHA asserted that while the conditions cited were serious, most of the overhanging ribs were outby the face and were fairly solid (Tr. 10-11). Respondent's arguments regarding this citation reflect that the overhanging ribs would have been taken down during the shift in which the citation was issued, that this procedure was in accord with the approved mining plan, that the ribs in question were "tight," and in fact had to be drilled and shot down (Tr. 12-13).

Negligence

With regard to both citations, MSHA advanced the argument that the conditions cited were visually obvious, that preshift or onshift examinations were required to be conducted, and that the conditions cited existed for at least one shift prior to the time they were cited (Tr. 6-7, 10).

Respondent advanced the argument that corrective action had begun to correct the wide entry violation prior to the issuance of the citation alleging a violation of section 75.200, and that with respect to the alleged violation of section 75.202, its evidence would show that in the course of the normal mining cycle, the overhanging ribs cited would have been taken down during the shift in which the citation issued, and that this procedure was in accord with respondent's approved ribcontrol plan (Tr. 8, 10-13).

History of Prior Violations

Petitioner's evidence reflects that a total of 504 violations were issued at the mine during the 2-year period prior to the issuance of the citations in question, that 24 of these were for violations of section 75.200, and 19 were for violations of section 75.202 (Tr. 14-15). Considering the size and scope of respondent's mining operations at the

mine in question, petitioner argued that while these citations were serious, respondent's overall prior history of violations is not extraordinarily bad (Tr. 16).

Conclusion

Taking into account the fact that the citations in question were issued over 2-1/2 years ago, that the initial assessments were arrived at through the application of a "special assessment" procedure and policy which is no longer in use, and the fact that MSHA's Office of Assessments is in accord with the proposed settlement, I conclude and find that the proposed settlement is reasonable. Further, I am persuaded by the arguments presented by counsel with respect to the factors of negligence, gravity, and good faith compliance, as supported by the documentary evidence presented in support of these statutory criteria, that the agreed-upon payment of \$5,500 for the two citations, which have been vigorously contested by the respondent, is in the public interest and will effectuate the deterrent purposes of the Act and the mandatory safety standards in issue in this proceeding.

ORDER

Pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the proposed settlement is APPROVED and respondent is ORDERED to pay civil penalties in the amount of \$5,500 in satisfaction of the two citations in issue in this proceeding, payment to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this matter is DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

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

Thomas Gallagher, Esq., Peabody Coal Company, P.O. Box 235, St. Louis,
MO 63166 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 79-83-M
Petitioner : A.O. No. 44-02422-05002
v. :
: Curles Neck Pit Barge
LONE STAR INDUSTRIES, INC., : and Dredge
Respondent :

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
David S. Smith, Esq., Kilcullen, Smith & Heenan,
Washington, D.C., for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Two citations are involved in this proceeding. The parties have agreed to settle one of them and have submitted a motion to approve the settlement agreement. With respect to the other citation, the parties have filed a joint stipulation of facts and have submitted the matter for decision based upon those facts. The stipulation was submitted to Administrative Law Judge Michels. Upon his retirement, the case was assigned to me.

THE SETTLEMENT AGREEMENT

On April 21, 1980, Petitioner filed a motion to approve a settlement agreement and dismiss the proceeding with reference to Citation No. 301581 which charged a violation of 30 C.F.R. § 56.14-1. The initial assessment was \$60 and the parties propose to settle for \$20.

In support of the motion, Petitioner states that the condition--alleged failure to guard a coupling for a crusher drive motor--was not serious in that it was largely guarded by location. It appeared

highly unlikely that the coupling would contact any of the crusher mechanisms. The settlement agreement is in accordance with a decision of Judge Koutras in Docket No. VINC 79-21-PM. Having considered the statutory criteria in section 110(i) of the Act, I conclude that the settlement agreement should be approved.

STIPULATIONS

The parties have stipulated as follows:

1. Citation No. 301578 was issued to Respondent by Federal mine inspector Charles W. Quinn on February 13, 1979, charging a violation of 30 C.F.R. § 56.11-2.

2. The citation states in part: "There was no handrail on the water side of the catwalk from land to the No. 12 plant. Employees entering this area are exposed to this unsafe condition."

3. Inspector Quinn's "Inspector's Statement" reads in part: "Handrail provided for one side of the catwalk but not the water side."

4. The structure characterized as a "catwalk" is made of wooden planks and is supported on both sides by dolphins or pilings.

5. The specific area where the inspector required handrails to be placed in the subject citation is about 45 feet long and is used by the company as a dock where persons and supplies are loaded and unloaded from Respondent's tug boats. This structure is utilized, on a daily basis, by Respondent's "puffer tugs" as the only available docking facility for such tugs, due to the placement of sand barges ("sand scows") around the dredge for loading purposes. At the time of the inspection, handrails existed at all areas other than those used for access to boats.

6. A photograph attached to the stipulation shows a tug boat approaching the area at low tide.

As may be observed from the water line on the dolphins or pilings, at high tide the bow of the tug boat rises to approximately the same height as the handrails which have been installed.

7. On at least one occasion subsequent to installation of the handrails pursuant to the inspector's citation, they have been knocked down by an approaching tug boat.

8. The part of the dock in question also serves as a walkway for persons who work on a dredge which is used as a preparation facility or plant.

9. Persons who work in the vicinity routinely wear life preservers.

10. Respondent abated the condition in good faith although it expressed its position that the regulation cited is not applicable to the facility in question.

11. There is no history of prior safety violations at the operation.

12. A handrail was provided on the side of the dock away from the water.

13. The dock was icy at the time the citation was issued.

14. There is no history of any accident or injury at the area in question.

15. Five to six men use the dock as a walkway on a daily basis to get to and from the processing dredge. Cleanup and maintenance people use the dock as a walkway from time to time.

The stipulation is accepted and I find the facts set out therein.

REGULATION

30 C.F.R. § 56.11-2 provides: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided."

ISSUES

1. Whether the facility involved herein is an elevated walkway within the meaning of the regulation.
2. If so, whether the facts show a violation of the regulation.
3. If so, what is the appropriate penalty for the violation.

CONCLUSIONS OF LAW

1. The area covered by the citation in question was an elevated walkway subject to the safety standard set out in 30 C.F.R. § 56.11-2.

DISCUSSION

Part 56 contains health and safety standards for sand, gravel and crushed stone operations. Section 56.11 applies to travelways,

and section 56.11-2 applies to, among other things, elevated walkways. A walkway is a passage for pedestrians. The stipulations and findings of fact state that the area in question "serves as a walkway for persons who work on a dredge which is used as a preparation facility or plant" and "cleanup and maintenance people also use the dock as a walkway from time to time." The fact that the area is also used as a dock for loading and unloading tugboats does not negate its character as a walkway.

The photograph showing the area at low tide clearly indicates that the walkway is higher than the water level. The stipulation states that at high tide, the bow of the tugboat rises to approximately the same height as the handrails. It is clear that during at least some of the time the area is used as a walkway, it is elevated. The hazard which the standard seeks to address is the hazard of falling from a walkway. This hazard exists even if the water level is at or near the height of the walkway. The use of the facility for loading and unloading does not lessen the hazard for those using it as a walkway. The fact that boats are apt to knock down the rail does not excuse its absence.

2. The parties agree that a handrail was not provided for the area in question on February 13, 1979. Therefore, a violation of 30 C.F.R. § 56.11-2 was shown.

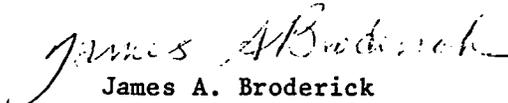
3. The violation was moderately serious. The facts do not show that Respondent was negligent.

4. Based on my finding that a violation occurred and on a consideration of the criteria set out in section 110(i) of the Act, an appropriate penalty for the violation is \$90.

ORDER

Therefore, IT IS ORDERED that Respondent pay the following penalties within 30 days of the date of this decision:

Citation No. 301581	-	\$ 20
Citation No. 301578	-	\$ 90
		Total \$110


James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

David S. Smith, Esq., Attorney for Lone Star Industries, Inc., Kilcullen,
Smith & Heenan, 1800 M Street, N.W., Washington, DC 20036

Barbara K. Kaufmann, Attorney, Office of the Solicitor, U.S. Department of
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Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 30, 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MESA),	:	Docket No. VA 79-83-M
Petitioner	:	A.O. No. 44-0242205002
v.	:	
	:	Curles Neck Pit Barge
LONE STAR INDUSTRIES, INC.,	:	and Dredge
Respondent	:	

ORDER CORRECTING DECISION

On May 27, 1980, Respondent filed a motion to correct the decision entered herein on May 5, 1980, which found as the appropriate penalty for the violation charged in citation No. 301578 to be \$90. This finding was based in part on the stipulation of facts submitted by the parties which stated that the MSHA assessment office assessed a \$90 penalty for the violation. In fact the assessed penalty was \$78. Petitioner does not oppose the motion.

Therefore, IT IS ORDERED that the decision issued herein on May 5, 1980 IS CORRECTED to find that the appropriate penalty for the violation charged in citation No. 301578 is \$78.

Respondent is ORDERED to pay the following penalties for the violations covered by this docket number within 30 days of the date of this decision:

Citation No. 301581	\$20
Citation No. 301578	<u>78</u>
Total	\$98

James A. Broderick
James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

David S. Smith, Esq., Attorney for Lone Star Industries, Inc., Kilcullen, Smith & Heenan, 1800 M Street, N.W., Washington, DC 20036

Barbara K. Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

5 MAY 1980

SECRETARY OF LABOR, : Complaint of Discharge,
MINE SAFETY AND HEALTH : Discrimination or Interference
ADMINISTRATION (MSHA), On its : and Civil Penalty Proceeding
Own Behalf and On Behalf of :
TIMOTHY P. SCOTT : Docket No. LAKE 80-78-D
Complainants :
v. : No. 60 Mine
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Miguel Carmona, Esq., Office of the Solicitor, U.S.
Department of Labor, Chicago, Illinois, for Complainants;
John Vernon Head, Esq., Pittsburgh, Pennsylvania, for
Respondent.

Before: Administrative Law Judge Melick

This case is before me upon the complaint of the Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Timothy P. Scott alleging discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter referred to as the "Act"). MSHA also petitions on its own behalf for a civil penalty to be assessed against the Consolidation Coal Company (Consolidation) under section 110(a) of the Act for the alleged discriminatory acts. An evidentiary hearing was held on April 1, 1980, in Wheeling, West Virginia.

The issue in this case is whether Consolidation discriminated against Scott in violation of section 105(c) of the Act and, if so, what is the appropriate relief to be awarded Scott and what are the appropriate civil penalties to be assessed against Consolidation for such discrimination. Section 105(c)(1) of the Act provides in part that no person shall in any manner discriminate against, or cause discrimination against, or otherwise interfere with the exercise of the statutory rights of any miner or representative of miners because of the exercise by such miner or representative of miners of any statutory right afforded by the Act.

The essential facts are not in dispute. At all times relevant Timothy Scott was a scraper (pan) operator for Consolidation at its No. 60 Mine. Scott was also an authorized representative of miners and in this capacity spent 21-1/4 hours on March 5, 6 and 7, of 1979, accompanying an MSHA inspector in a regular inspection of the mine in accordance with section 103(f) of the Act. Under section 103(f) an authorized representative of miners such as Scott, is entitled to accompany an MSHA inspector in the course of his inspection (commonly referred to as a "walkaround"). It also provides that "such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." In commenting on the provisions of section 103(f), the Senate Human Resources Committee in its report on Senate Bill 717, the bill which was the basis for the 1977 Act, stated that: "to encourage such miner participation, [in walkaround activities] it is the committee's intention that the miner that participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties." Senate Report No. 181, 95th Congress, 1st Session reprinted in U.S. Code Congressional and Administrative News 3428-3429 (1977). Within this framework it is clear that if Scott suffered a loss of pay as a result of his statutorily protected walkaround activities then he suffered discrimination under section 105(c)(1).

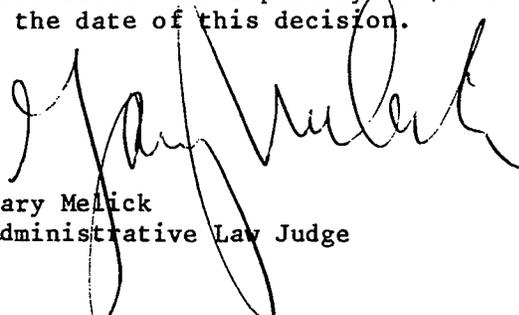
Scraper operators such as Scott are paid in accordance with the National Bituminous Coal Wage Agreement of 1978 (Wage Agreement) at the grade 3 rate, then \$64.61 per day, when performing classified work, and for vacation pay, extra days, graduated days, floating days, holiday pay, and 4 hour show-up time. Under the Wage Agreement, however, the scraper operators are paid at a grade 5 level, then \$71.97 per day, when the machines are "engaged in the removal of overburden as an integral part of the overburden removal process." Consolidation compensated Scott for the 21-1/4 hours spent in walkaround activities at the grade 3 rate claiming that the Wage Agreement requires that grade 5 pay need only be awarded when the specified overburden removal is actually performed by the employee. It cites a number of arbitration decisions which it claims supports its position. MSHA and Scott contend that he should have been paid at the grade 5 rate and maintain that he was therefore discriminated against in violation of section 105(c) of the Act.

Scott testified without contradiction that on the morning of March 5, 1979, he was told that he was to perform overburden removal work (grade 5 work) and in preparation for such work began his preshift examination of the scraper at around 7 a.m. Later notified of the MSHA inspection, he began his walk around activities at 7:30 that morning and continued thereafter in that capacity for a total of 21-1/4 hours on March 5, 6, and 7. It is undisputed that other scraper operators performed overburden removal work during this period of time and were in fact paid for this work at the grade 5 rate. At least one of these operators performed that work for the same 21-1/4-hour period at issue herein and was paid for those hours at the grade 5 rate.

Clearly there is no way to determine the amount of time Scott would have spent in grade 5 overburden removal work had he not performed his walkaround duties. Whether such work is actually performed is subject to a great many variables including weather conditions, equipment functioning, availability of operators and work priorities. Moreover from the records of other members of Scott's work crew, it is apparent that the amount of time spent by each in overburden removal varied widely during this time. Some of the operators performed no grade 5 work and at least one performed grade 5 work for the entire 21-1/4-hour period at issue. Therefore while it is impossible to determine precisely how much time Scott would have spent working at the grade 5 level, it is apparent that he could have spent the entire 21-1/4-hour period engaged in such work.

Under the circumstances I find that Scott was unfairly penalized in performing his walkaround duties as a representative of miners because he was therefore deprived of the opportunity to perform overburden removal work at the grade 5 rate of pay. In order to assure that Scott is not unfairly penalized for having performed his duties as a representative of miners, I find that he must be compensated in an amount equivalent to the grade 5 rate for the maximum time worked in that mine by any other single employee in the capacity of a grade 5 scraper operator during the time Scott was engaged in his walkaround activities. To provide him anything less would discourage his participation in these important functions, contrary to law and the clear intent of Congress. Since the evidence indicates that at least one other scraper operator employed at this mine performed the grade 5 work during the entire 21-1/4-hour period at issue, Scott is entitled to the grade 5 pay differential for the entire period. I therefore order Consolidation to pay Scott within 30 days of this decision the amount of \$21.47 (the hourly differential in pay between grade 3 and grade 5 of \$1.01 x 21-1/4 hours) plus interest computed at the rate of 10 percent per annum from the date he would ordinarily have received that pay to the date on which it is actually paid.

Since I have found that Consolidation did discriminate against Scott I must, in accordance with section 105(c)(3) of the Act, determine the appropriate civil penalty to be assessed under the relevant criteria set forth in section 110(i) of the Act. The operator is large in size but has no history of discrimination violations under section 105(c) of the Act. I find that the violation herein was serious because of its potential chilling effect on miner participation in walkaround and other health and safety related functions. I find only slight negligence however, because I believe the operator was acting in the good faith belief that it was awarding Scott the appropriate rate of walkaround pay. Thus only a nominal penalty is warranted. I therefore order that a penalty of \$1 be paid by Consolidation within 30 days of the date of this decision.



Gary Mellick
Administrative Law Judge

Distribution:

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John V. Head, Esq., Counsel, Consolidated Coal Company, Consol Plaza,
Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

6 MAY 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEVA 80-38
v. : A/O No. 46-04774-03010
: Kessler No. 3 Mine
KESSLER COALS, INC., :
Respondent :

DECISION

Appearances: Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
C. Lynch Christian III, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), hereinafter referred to as the Act.

On November 26, 1979, Petitioner filed with the Mine Safety and Health Review Commission a petition for assessment of civil penalty in this case. Respondent filed its answer to the petition on December 26, 1979. The hearing in these matters was commenced on April 15, 1980, in Charleston, West Virginia.

Citation No. 0637464 issued by the Federal mine inspector on April 11, 1979, citing a violation of 30 C.F.R. § 75.509 stated that "Work was being performed on the continuous miner on 2 Right section (001-2) while the continuous miner was energized."

At the hearing, Petitioner stated on the record that there was insufficient proof that the continuous miner was energized and moved that the citation be vacated. The motion was granted and the citation was vacated from the bench.

ORDER

The vacation of the citation is affirmed. The proceeding is dismissed.



Forrest E. Stewart
Administrative Law Judge

Distribution:

Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

7 MAY 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 79-79-M
Petitioner : A.C. No. 30-01267-05005
v. :
: Fulton Plant
NORTHERN AGGREGATES, INC., :
Respondent :

DECISION AND
ORDER OF DISMISSAL

Apearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department
of Labor, Rm, 3555, 1515 Broadway, New York, New York, for
Petitioner;
Paul A. Germain, Esq., Germain & Germain, Syracuse, New York,
for Respondent.

Before: Administrative Law Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., hereinafter referred to as the "Act." At hearings commencing February 20, 1980, in Syracuse, New York, Petitioner moved to dismiss this proceeding on the grounds that the operator, Northern Aggregates, Inc. (Northern), did not file its notice of contest to the proposed assessment of penalty within 30 days of its receipt. Petitioner asserts that under section 105(a) of the Act, such failure to timely contest the proposed assessment caused the citation and proposed assessment to become a final order of the Commission not subject to review by any court or agency. Section 105(a) provides in relevant part, as follows:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty * * *. If, within 30 days from the receipt of the notification, issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation

or the proposed assessment of penalty, * * * the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency * * *.

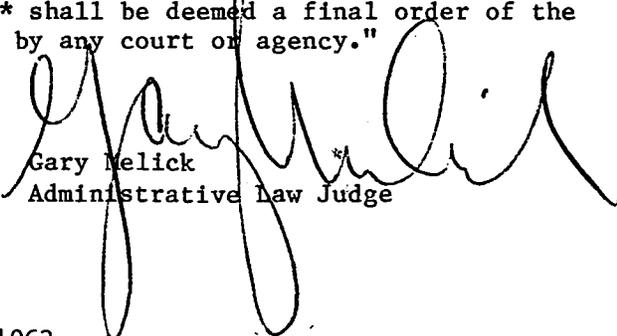
The parties have stipulated, and therefore there is no dispute, that Northern received the proposed assessment of penalty in this case on May 19, 1979, and that it filed its notice of contest on August 9, 1979, more than 2-1/2 months later. Northern contends, however that under the Commission's Rules of Procedure, 29 C.F.R. § 2700.63 and 29 C.F.R. § 2700.9, the administrative law judge has the discretionary authority to permit late filing for good cause. Rule 2700.9 does provide for good cause extensions of time but it also requires that a request for an extension of time be filed 5 days before the expiration of the time allowed for its filing. Since no such request was made in this case Rule 2700.9 would in any event be inapplicable. Rule 2700.63 requires that before the entry of any order of default or dismissal for failure of a party to comply with an order of a judge or the rules, an order to show cause must first be directed to the party. Northern has in this case however failed to comply with a statutory filing requirement as distinguished from a requirement in the rules or under a judge's order. Rule 2700.63 (as well as Rule 2700.9) is therefore inapplicable to this proceeding.

Since there are no provisions for consideration of good cause for late filing under section 105(a), but only a precise statutory directive that upon failure to timely file a notice of contest the citation and the proposed assessment of penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," it is apparent that the Petitioner's motion to dismiss must be granted as a matter of law. I have no jurisdiction to consider the merits of the case or to even consider whether good cause existed for the late filing. Similar provisions under section 10(a) of the Occupational Safety and Health Act 29 U. S. C. § 659(a), have been interpreted similarly. */ Secretary v. American Airlines, Inc., BNA 2 OSHC 1326 (1974), CCH/OSHD 18,908 (1974-1975).

Under the circumstances, the citation and proposed assessment dated May 14, 1979, and received by the operator on May 19, 1979, became the final order of the Commission 30 days after its receipt by the operator. Since a jurisdictional defect cannot be waived it is immaterial that the Secretary erroneously initiated these proceedings before the Commission. Consolidation Coal Co., 1 IBMA 131 at 137 (1972). This case is therefore dismissed for lack of jurisdiction.

*/ 29 U. S. C. § 659(a) provides as here relevant:

"If, within fifteen working days from the receipt of the notice * * * the employer fails to notify the Secretary that he intends to contest * * * the citation and the assessment * * * shall be deemed a final order of the Commission and not subject to review by any court or agency."


Gary Melick
Administrative Law Judge

Distribution:

Jithender Rao, Esq., Office of the Solicitor, U.S. Department of Labor,
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Paul A. Germain, Esq., Germain & Germain, 314 East Fayette Street,
Syracuse, NY 13202 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

7 MAY 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-144-PM
Petitioner : A.C. No. 30-01267-05003
v. :
NORTHERN AGGREGATES, INC., : Docket No. WILK 79-145-PM
Respondent : A.C. No. 30-01267-05004
: Fulton Mine

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department of Labor, Rm, 3555, 1515 Broadway, New York, New York, for Petitioner;
Paul A. Germain, Esq., Germain & Germain, Syracuse, New York, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 *et seq.*, hereinafter referred to as the "Act"). In the case designated WILK 79-144-PM, Petitioner filed a proposal for assessment of civil penalties on September 10, 1979, and the Respondent, Northern Aggregates, Inc. (Northern), filed its notice of contest on September 20, 1979. In case No. WILK 79-145-PM, Petitioner filed its proposal for assessment of civil penalty on September 14, 1979, and Northern filed its notice of contest on September 20, 1979. The cases were consolidated for hearing which was held in Syracuse, New York, on February 20 and 21, 1980.

The issues in these cases are whether Northern has violated the provisions of the Act and implementing regulations as alleged in the petitions for assessment of civil penalties filed herein, and, if so, the appropriate civil penalties to be assessed for the alleged violations. In determining the amount of a civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

I. Docket No. WILK 79-144-PM

The following eight citations charge violations of mandatory safety standard 30 C.F.R. § 56.14-1 which requires that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Citation No. 210526 specifically charged that the return idler rollers on the main feed belt were not guarded. These rollers were located only 2 to 3 feet from the ground floor. MSHA inspector Robert Kinterknecht saw loose material and a partially filled wheelbarrow and shovel directly below an exposed roller. It is reasonable to conclude that a worker was cleaning up this loose material. He would have been directly below the belt and would have been exposed to the hazard. The operator's witness admitted that the rollers were unguarded and admitted that ordinarily two employees would be in that vicinity twice a day for 5 to 6 minutes to clean up around the belts. He claimed, however, that the same general area had been inspected before by another inspector who said nothing about the exposed rollers while citing an exposed tail pulley only 18 to 20 inches away. I do not, however, consider the failure of a previous inspector to have cited this condition, standing alone, as having any probative value.

Citation No. 210527 charged that the tail pulley on the "piggy-back" belt was not guarded. The tail pulley was at ankle or knee height from the ground. The south side of the tail pulley was exposed and the operator conceded that employees would be on that side of the pulley once a week to grease it. The operator contended, however, that a previous guarding violation on the north side of the pulley had been abated by a previous MSHA inspector and the inspector did not cite the south side. The contention is without merit and no reduction in the operator's negligence is warranted.

Citation No. 210532 charged that the idler rollers were unguarded the entire length of the feed conveyor. The two strands of No. 9 wire (about the thickness of a ballpoint pen) suspended by angle irons being used as a guard was felt to be inadequate to prevent someone from slipping or falling into the rollers or getting an arm or sleeve caught in the rollers. The operator admitted that the catwalk alongside the rollers was used by employees to grease, maintain, and inspect the operation of the belt, but asserted that this area had previously been cited by an MSHA inspector for having been unguarded and that that citation was abated by the same method found by inspector Kinterknecht to be a violation. While, if true, this assertion could have some bearing on the case I find that Northern has failed in its proof. Cf. Secretary v. Standard Building Material Co., 1 FMSHRC 702 at p. 703. (June 1979). In the absence of any corroborative evidence such as a copy of the earlier citation or testimony or an admission from the former inspector, I can give but little weight to the hearsay allegations. Inspector Kinterknecht had, moreover, checked MSHA's records and found no evidence to support the assertion. Since the wire did provide some protection however, a slight reduction in penalty is warranted.

Citation No. 210534 alleged that the idler rollers on the secondary conveyor were not guarded and were exposed to people walking on an adjacent catwalk. The operator claimed that the two strands of No. 9 wire had been accepted as abating an earlier violation but failed to prove his claim. Since the wire provided some protection however, a slight reduction in the penalty is warranted.

Citation No. 210539 charged that the idler rollers in the wash plant house were not guarded. The rollers were located along a walkway on the floor. The operator admitted that one side of the roller was easily accessible, but claimed that the other side was not easily accessible and would expose only one employee once a week while he greased the rollers. I find the extent of the hazard to be accordingly slightly reduced.

Citation No. 210556 charged that the tail pulley on the sand conveyor from the wash plant to the stockpile was not guarded. The pulleys were 2 to 3 feet from the base of the catwalk and the belt was running at the time of the inspection. Ross Fox, the operator's representative, admitted that an employee would be in the area periodically to check the belt.

Citation No. 210555 charged that the idler rollers on the sand conveyor from the wash plant to the stockpile were not guarded. The full length of the sand conveyor was inadequately guarded with only two strands of No. 9 wire. The pinch points on the conveyor were about waist-high and adjacent to a catwalk where employees would pass. The operator claimed that the use of the No. 9 wire had been approved by the previous inspector, but failed to prove his claim. Since the wire provided some protection however, a slight reduction in the penalty is warranted.

Citation No. 210569 charged that the takeup pulley was unguarded under the feeder conveyor. The operator pointed out, however, that this was not in fact an area in which anyone worked. The backhoe was used to clean under that area and the backhoe operator would not be exposed to the hazard. I accept this testimony, but in light of the inspectors testimony that the pulley was in an area in which contact could be made, I find that a violation nevertheless occurred. Under the circumstances, the likelihood of injury was less than thought by the inspector and some reduction in the penalty is therefore warranted.

With respect to each of these previous violations, Kinterknecht testified that the particular hazard presented by the violations was the potential breakage, crushing or loss of limbs or breaking one's neck after being caught by the shirt sleeves and dragged into a pinch point. The inspector concluded that the operator should have noticed these violations on making his routine daily inspections. Few employees would have been exposed to the hazards and even then only infrequently. I accept the inspector's testimony in this regard.

Citation No. 210554 charged a violation of 30 C.F.R. § 56.14-6 (guards shall be securely in place) in that the guard was broken over the drive pulley on the electric motor operating the sand conveyor thereby exposing

an area of about 6 inches by 2 feet. Contact could be made with the drive pulley and V-belt while the motor was running. The operator alleged that no one had brought the problem to his attention before this time, but I find that he was nevertheless negligent since he should have seen the broken guard on his daily inspection of the plant. It was readily visible. Resulting injuries could have been permanently disabling caused by a crushed or broken arm.

The following four citations relate to violations of mandatory standard 30 C.F.R. § 56.9-2 (requiring that equipment defects affecting safety be corrected before the equipment is used).

Citation No. 210565 alleged that the backup alarm on a front-end loader was not working. Inspector Kinterknecht observed trucks dumping in the area in which the front-end loader was operating and saw others parked nearby. He opined that someone could have been run over because the operator could not see behind him, thereby causing disabling or fatal injuries. The machine operator told Kinterknecht that the alarm had not been working for a couple of days. In any event, the operator should have observed the defect in making his daily rounds. Northern did not deny the violation but alleged that it then had a procedure for correcting defective equipment whereby the equipment operator would write up a work order for any malfunction. There is no evidence that such a work order was filed with respect to this incident. Under the circumstances, I give but little weight to the alleged corrective procedures and no reduction of negligence.

Citation No. 210571 alleged that the backup alarm in dump truck No. 53 was not working. Kinterknecht could not recall whether any other personnel were in the area in which the truck was operating, but noted that the driver could not see behind him while backing up and that management should have known of the defect when making its daily rounds. The truck driver told Kinterknecht that he did not know of the malfunction. Since the malfunction could have occurred only moments before, I feel some reduction in negligence is warranted.

Citation No. 210572 charges that the backup alarm on the Terex front-end loader was not working. Kinterknecht observed that two other trucks were waiting in the pit area while another truck was being loaded and that the drivers of these trucks were standing around talking to each other. It was likely that the front-end loader could have run over someone, thereby causing injury or death. The alarm had been working a few days before. There is no evidence as to when it first malfunctioned. Some reduction in negligence is therefore warranted.

Citation No. 210573 alleges that the backup alarm on the No. 68 dump truck was not working. Although Kinterknecht could not recall precisely where it was operating, he testified that wherever it was operating, either at the stockpile or at the pit, there were always trucks around, thereby creating a potential hazard to the drivers. Management should have known of this condition based on its routine daily examinations.

Citation No. 210568 charged a violation of 30 C.F.R. § 56.9-22 which requires that berms or guards be provided on the outer bank of elevated roadways. The evidence shows that the area in question was actually a ramp variously described as from 12 to 20 feet long, 14 feet wide, and 5 to 7 feet high at the highest point. The evidence shows that it would only be used in the event of a breakdown in the primary crusher. It was a backup hopper used by payloaders only infrequently. It was likely that a truck might run off the outer edge of the bank and turn over, thereby causing fatal injuries. The condition should have been known to the operator from his daily routine inspections of the plant area.

Citation No. 210570 charged a violation of 30 C.F.R. § 56.9-71 (requiring that traffic rules, including speed, signals, and warning signs be standardized at each mine and posted). It was specifically charged that there were no speed or warning signs posted anywhere in the mine area. Employees could have been seriously injured in an accident because of excess speed and obstructed vision.

Citation No. 210540 charged a violation of 30 C.F.R. § 56.12-32 (requiring that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairs). The operator admitted that the junction box cover was missing as charged and that the junction box was energized, but claimed that the switch was not then in use and that exposure was unlikely. The operator conceded, however, that screens were stored in the switchhouse and employees entered the area to remove the screens. Fatal injuries were probable because the area was dark and a person could stumble into the junction box. The operator should have observed this condition since it was plainly visible. A slight reduction in gravity is warranted, inasmuch as Kinterknecht was not aware that the junction box was not then in use as a switch.

Citation No. 210561 also charged a violation of 30 C.F.R. § 56.12-32 alleging that the junction box on an air compressor was not covered. Although no wiring was exposed, the insulation could be knocked off or the electrical tape and "quick connectors" could become undone by vibration from the compressor. Permanent disability or fatal injuries could result from contact with exposed wiring. It was probable that such injuries could occur. The operator should have seen the defect on his daily routine inspection of the area.

Citation No. 210575 charged a violation of 30 C.F.R. § 56.12-2 (requiring that electrical equipment and circuits be provided with switches or other controls). The citation alleged that in the same room as the compressor there was a light without a switch. In order to turn the light off, one had to unscrew the bulb from the socket. Injuries such as burning or shock were probable and employees would be exposed to that bulb two or three times a day. The operator should have known of this condition on his daily rounds.

Citation No. 210559 charged a violation of 30 C.F.R. § 56.12-34 (requiring guarding of portable extension lights and other lights that by their location present a shock or burn hazard). The citation alleged that a bare light bulb in pump house No. 2 was not guarded. It was at face level upon entering the building. Injury was probable to the one or two employees who might enter the premises. The operator was negligent in that the problem was plainly visible.

Citation No. 210533 charged a violation of 30 C.F.R. § 56.11-2 (requiring that toeboards be provided where necessary). The citation alleges that a toeboard was not installed around the platform on the No. 1 tower. Maintenance was performed at this location about 30 feet above ground level. With people walking beneath the platform, it was probable that they would be struck with falling rocks or tools. Resulting injuries could result in lost work days as a result of bruised shoulders or arms. The operator should have known of this condition. The operator conceded that no toeboard existed on the platform at the time of the inspection, but claimed the catwalk had just recently been extended and that they had insufficient time to erect the toeboard. The operator conceded, however, that the catwalk had been extended in the spring of 1978 and no explanation was given as to why toeboards had not been installed as of September 27, 1978, the date of the inspection.

II. Docket No. WILK 79-145-PM

Citation No. 210576 charges a violation of section 109(a) of the Act alleging that the citations that had been issued during the inspection on September 27, 1978, had not been posted on the mine bulletin board. Inspector Kinterknecht had informed the operator on September 27, 1978, the date the citations had been issued, that those citations had to be posted. The operator conceded that he failed to post the citations. The condition was abated immediately.

With respect to all the violations in both cases discussed herein, the Government concedes that the cited conditions were corrected within the time specified for abatement. It is also stipulated that the operator's business is small in size. I observe that the operator's history of previous violations prior to September 27, 1978, was minimal and therefore is given minimal consideration with respect to the violations cited on September 27, 1978. I note, however, that a more significant series of violations occurred on September 27, 1978, that have become final as of this date and for which I have given consideration in assessing penalties for violations that were cited on dates subsequent to September 27, 1978. There is no contention in these cases that the operator's ability to continue in business will be affected by the penalties.

Upon consideration of the entire record and the foregoing findings and conclusions, and in light of the criteria set forth in section 110(i) of the Act, I find that the following penalties are warranted:

I. Docket No. WILK 79-144-PM

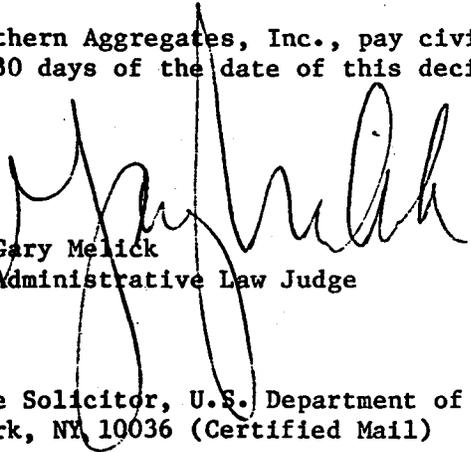
<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
210526	09/27/78	56.14-1	\$195
210527	09/27/78	56.14-1	195
210532	09/27/78	56.14-1	150
210533	09/27/78	56.11-2	122
210534	09/27/78	56.14-1	150
210539	09/27/78	56.14-1	150
210540	10/18/78	56.12-32	95
210554	10/18/78	56.14-6	150
210555	10/18/78	56.14-1	150
210556	10/18/78	56.14-1	150
210559	10/18/78	56.12-34	114
210561	10/18/78	56.12-32	114
210569	10/18/78	56.12-34	100
210565	10/18/78	56.9-2	150
210568	10/18/78	56.9-22	150
210570	10/18/78	56.9-71	150
210571	10/18/78	56.9-2	125
210572	10/18/78	56.9-2	125
210573	10/18/78	56.9-2	150
210575	10/18/78	56.12-2	114

II. Docket No. WILK 79-145-PM

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
210576	11/28/78	109(a)	\$ 72

ORDER

Therefore, it is ORDERED that Northern Aggregates, Inc., pay civil penalties in the amount of \$2,871 within 30 days of the date of this decision.


Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

7 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	
	:	Docket No. CENT 79-29
Petitioner	:	A.C. No. 23-00402-03005
v.	:	
	:	Docket No. CENT 79-221
PEABODY COAL COMPANY,	:	A.C. No. 23-00402-03011
Respondent	:	
	:	Power Mine

DECISION

Appearances: Robert S. Bass, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Thomas Gallagher, Esq., St. Louis, Missouri, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This matter involves two proceedings filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter, MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), to assess civil penalties against Peabody Coal Company (hereinafter, Peabody) for violation of a mandatory safety standard. The cases were consolidated prior to hearing. The petitions allege a total of five violations of 30 C.F.R. § 77.1607(aa), failure to properly trim trucks which are loaded higher than their cargo space. A hearing was held in Kansas City, Missouri, on February 6 and February 7, 1980. Lester Coleman

testified on behalf of MSHA. Larry Womble, Fred Gallo, and Ron Kelly testified on behalf of Peabody. Both parties waived their rights to file briefs, proposed findings of fact, and conclusions of law. Instead, they made oral arguments at the conclusion of the taking of testimony.

This matter involves the alleged violation of 30 C.F.R. § 77.1607(aa), failure to properly trim haulage trucks which are loaded higher than their cargo space. Three citations were issued for this alleged violation on November 27, 1978, and two orders of withdrawal were issued for the same alleged violation on February 27, 1979. MSHA contends that, at all times, large chunks of coal were found above and near the edge of the cargo area. Peabody does not dispute the testimony concerning the size and location of the coal chunks but contends that there are no published guidelines or standards for trimming haulage trucks and, therefore, the industry standard of loading the trucks until the coal seeks its "angle of repose" applies.

ISSUES

Whether Peabody violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalties which should be assessed.

APPLICABLE LAW

30 C.F.R. § 77.1607(aa) provides as follows: "Railroad cars and all trucks shall be trimmed properly when they have been loaded higher than the confines of their cargo space."

Section 110(i) of the Act provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. The Commission has jurisdiction of this proceeding;
2. Respondent is an operator within the meaning of the Act;
3. Respondent's mine is a mine within the meaning of the Act;
4. Any objections to the foundation of exhibits to be offered are waived;
5. The only issue of fact is whether or not respondent properly trimmed its haulage trucks on the dates in question;
6. The only issues of law are whether the standard applies to respondent and, if so, did respondent violate the standard;
7. The coal on all five haulage trucks was no more than 3 feet above the confines of the cargo areas.

SUMMARY OF THE EVIDENCE

In response to an anonymous written complaint, MSHA inspector Lester Coleman was directed to make an inspection of Peabody's Power Mine, a surface mine, concerning an allegation of coal falling off haulage trucks due to overloading. On November 27, 1978, he arrived at the mine. On the haulage road between the pit and the dumping area, he stopped and inspected three 100-ton haulage trucks. On each truck, he observed that coal was

piled higher than the confines of the cargo area. The highest point of the coal was in the center of the cargo area and was described as a "graveyard hump." On each truck, he observed large chunks of coal weighing up to 30 pounds at various places above the confines of the cargo area. None of the trucks had any "freeboard" or unloaded areas around the edge of the cargo area. He concluded that the three trucks were not properly trimmed since any of these large chunks of coal could fall off the truck and strike miners or small vehicles using the roadway. He described the haulage road as well-maintained, but it crossed two railroad tracks and two paved county roads. The haulage road went over hills and around curves. The only person who might be struck by falling coal was the miner who worked on foot in the dumping area. He issued three citations for a violation of 30 C.F.R. § 77.1607(aa).

On February 27, 1979, Inspector Coleman returned to the Power Mine for a regular inspection. On this occasion, he stopped two haulage trucks and found the same conditions concerning large chunks of coal piled above the confines of the cargo area with no "freeboard." Thereupon, he issued two orders of withdrawal pursuant to section 104(d)(2) of the Act.

Inspector Coleman admitted that he did not observe any chunks of coal on the haulage road during either of his inspections. There were chunks of coal on the back of the truck beds. Although the inspector's statement covering Citation No. 390749 indicates that persons on foot in the pit area where coal is loaded may be exposed to falling coal, he conceded that he did not visit the pit on November 27, 1978, and did not know if there were

persons on foot there. He never witnessed any coal falling off haulage trucks at this mine. He believed that the haulage trucks vibrated "heavily." He conceded that such vibrations were not visible. He believed that the failure to trim the trucks should have been detected by the pit foreman.

Inspector Coleman testified that compliance with the regulation in controversy required the operator to leave an area of "freeboard" if large chunks of coal are piled higher than the confines of the cargo area or to remove or break up the large chunks of coal if there is no "freeboard." He conceded that there were no written MSHA guidelines to support his opinion concerning "freeboard" and the removal or breaking up of large chunks of coal.

Larry Womble, a health and safety supervisor for Peabody, testified that he accompanied Inspector Coleman on his inspection. He confirmed that the coal was heaped in the center of the cargo space and sloped downward until the coal came to rest on the edge of the cargo space. He described this as the "angle of repose" of the coal. The peak in the center of the cargo area was estimated to be approximately 3 feet above the cargo space in all the trucks. The loader operators at the pit load the truck from front to rear until coal rests on the outer edges of the cargo body. No miners work on foot in the immediate loading area. At no time, did he observe any coal falling off the trucks. He testified that the haulage road was approximately 6 miles long and was 50 to 70 feet wide. The width of the road resulted in 7 to 20 feet of clearance between passing vehicles. He knew of no accidents caused by coal falling from a truck. Prior to August 1978, the Power Mine had 332 mandays of inspection prior to the issuance of the first

citation for a violation of 30 C.F.R. § 77.1607(aa). He did not agree with the inspector's interpretation of the regulation. He did not believe that it was feasible to use a loader to remove large chunks of coal or trim the load.

Fred Gallo, assistant superintendent of the Power Mine, testified that he observed the same conditions of the haulage truck as were described by Inspector Coleman and Larry Womble. It had been Peabody's practice to leave no "freeboard" in loading its haulage trucks. He believed that compliance with Inspector Coleman's interpretation of the regulations was costing Peabody 5 to 8 tons on each load. He testified that the loading equipment was not sufficiently mobile to remove large chunks of coal from the truck. It would be extremely hazardous to place a miner on the truck bed to trim the load manually. He believed that Peabody was following the industry standard in loading its trucks. He did not believe that Peabody's loading procedures presented a danger to anyone.

While Mr. Gallo testified that a loader could tamp large pieces of coal and break them up, this procedure would "destroy the load" because it would push coal to the side away from the loader. However, he conceded that if a large piece of coal was sticking up out of the load, such a piece could be picked out by the loader. To his knowledge, this process of picking out large chunks of coal was not known to exist anywhere in the industry.

Ron Kelly, safety manager for Peabody's West Central Division, testified that he requested and obtained a computer printout of all falling material accidents in 1978 from MSHA. He received this printout (Exh. R-9) and

found only two reports of accidents involving coal falling off a haulage truck. In Mr. Kelly's 11 years of coal mine safety experience, he never heard of an accident at Peabody involving falling coal from a haulage truck. In his opinion, the Peabody practice of loading haulage trucks did not present a hazard to anyone.

MSHA introduced in evidence descriptions of large chunks of coal prepared by Inspector Lester Coleman at the time of his inspection. These chunks of coal were estimated to be 24 inches by 18 inches and 20 inches by 16 inches (Exh. G-4). MSHA also introduced a computer printout of the history of Peabody's Power Mine for the 10-year period prior to November 27, 1978, and February 27, 1979. That document showed one prior violation of 30 C.F.R. § 77.1607(aa) (Exh. G-5). Peabody presented evidence that the height of the top of the cargo area on its haulage trucks varied from 11 feet 4 inches to 14 feet 7 inches (Exhs. R-7, R-8). Peabody also introduced in evidence MSHA's admission that there are no written memoranda, guidelines, opinions, or other written instructions concerning the construction, application, or implementation of 30 C.F.R. § 77.1607(aa) (Exh. R-10).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that on November 27, 1978, and February 27, 1979, MSHA inspector Larry Coleman inspected a total of five haulage trucks at Peabody's Power Mine and found each of them to be in violation of 30 C.F.R. § 77.1607(aa). It is undisputed that each of the trucks was loaded with coal higher than the confines of the cargo space. It is also

undisputed that there were large chunks of coal weighing up to 30 pounds each on the slope above the confines of the cargo space and no area of freeboard around the edge of the cargo area which would have prevented any chunk of coal from falling out of the cargo area. Under these facts, MSHA alleges a violation of 30 C.F.R. § 77.1607(aa) in failing to properly trim the trucks. The regulation on its face applies to "all trucks." Peabody asserts that these facts fail to establish a violation of the above regulation because there are no published guidelines or standards concerning the regulation and, therefore, MSHA must accept the industry standard of loading the trucks until the coal reaches its "angle of repose." Peabody further asserts that the inspector's requirement of allowing "freeboard" or, in the alternative, removing large chunks of coal above the confines of the cargo area is infeasible. In conclusion, it is Peabody's position that a haulage truck is "trimmed properly" when the coal reaches its "angle of repose."

The "angle of repose" is defined as follows: "[T]he maximum slope at which a heap of any loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope." Dictionary of Mining, Mineral, and Related Terms, Bureau of Mines, U.S. Department of the Interior (1968). In essence, Peabody argues that a haulage truck may be loaded to its maximum slope where no loose coal will slide down the slope. Acceptance of this argument would render the regulation in controversy meaningless since there would be no duty to properly trim any load. Moreover, it ignores the fact that this heap of coal will not remain stationary. The undisputed evidence shows that the haulage trucks at the Power Mine traverse hills, curves and railroad tracks. It

is also undisputed that the trucks vibrate while in transit. While it is true that there is no direct evidence of any chunks of coal falling off any of the involved trucks, MSHA is not required to await the occurrence of an accident before promulgating regulations to prevent such accidents. The documentary evidence offered by Peabody establishes at least one personal injury accident when a miner was struck by coal falling from a haulage truck. Peabody's proposed construction of 30 C.F.R. § 77.1706(aa) that haulage trucks may be loaded to their "angle of repose" is rejected. Rather, the regulation, on its face, permits loading haulage trucks above the confines of their cargo space only if they are "trimmed properly."

The term "trimmed properly" is not defined in the Act or regulations. "Trim" is defined as "to free of excess or extraneous matter by or as if by cutting." Webster's New Collegiate Dictionary (1979). Hence, the term "trimmed properly" as used in 30 C.F.R. § 77.1607(aa) means that excess coal must be removed from trucks which are loaded higher than the confines of their cargo space to prevent such coal from falling off the trucks. The evidence of record indicates that there are several ways to properly trim a truck, to wit, leaving an area of "freeboard" around the cargo area to confine falling chunks of coal, removing large chunks of coal from the top of the pile above the cargo area, and breaking up large chunks of coal. Therefore, Peabody's assertion that it is not feasible to comply with the regulation is rejected.

I conclude that MSHA has established five violations of 30 C.F.R. § 77.1607(aa) by Peabody in that the haulage trucks were not "trimmed properly." This is so because in each instance, coal was loaded higher than

the cargo area with large chunks of coal weighing up to 30 pounds on top of the pile with no freeboard to confine such coal within the cargo area.

Since violations have been established, the next issue is the amount of the civil penalties to be assessed for such violations. Section 110(i) of the Act sets forth six criteria to be considered in determining the amount of the civil penalty.

Peabody's prior history shows 49 violations in the 2 years prior to November 27, 1978, and 66 violations in the 2 years prior to February 27, 1979. Of those numbers, only one violation was of the regulation in controversy here.

Peabody is a large operator. The assessment of civil penalties herein will not affect its ability to continue in business.

Peabody was negligent in failing to properly trim its haulage trucks when such a procedure was mandated by the regulation in controversy. Under all the facts of this case, Peabody's negligence amounts to ordinary negligence.

In determining the gravity of the violations, consideration must include the following: (1) the likelihood of injury; (2) the number of workers exposed to such potential injury; and (3) the severity of potential injuries. In the instant case, the likelihood of injury as a result of coal falling from a haulage truck is slight. Only one worker was exposed to such a risk. Considering the fact that a 30-pound chunk of coal could fall from a

distance of more than 15 feet, the severity of potential injuries is moderate. Hence, the gravity of these violations is in the range of slight to moderate.

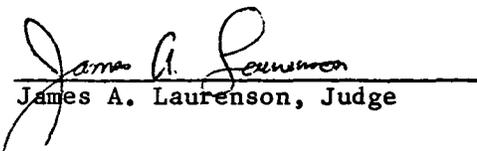
After notification of the first three violations, Peabody promptly abated those violations. However, it resumed its prior practice of not trimming the trucks and two withdrawal orders were issued 3 months later. While these facts do not demonstrate good faith compliance, I find that Peabody challenged these violations on the good faith belief that its trucks were properly trimmed.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that civil penalties should be imposed for the violations found to have occurred as follows:

<u>Citation or Order No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
390749	11-27-78	77.1607(aa)	\$ 200
390750	11-27-78	77.1607(aa)	200
390751	11-27-78	77.1607(aa)	200
792415	02-27-79	77.1607(aa)	200
792416	02-27-79	77.1607(aa)	200
		Total	<u>\$1,000</u>

ORDER

Wherefore, it is ORDERED that respondent pay the sum of \$1,000 within 30 days of the date of this decision as a civil penalty for five violations of 30 C.F.R. § 77.1607(aa).


James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6210/11/12

9 MAY 1980

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Order
	:	
v.	:	Docket No. PENN 80-16-R
	:	Order No. 0618634
	:	May 25, 1979
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Renton Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	
v.	:	Docket No. PENN 80-18
	:	A.O. No. 36-00807-03029V
	:	
	:	Renton Mine
	:	
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	

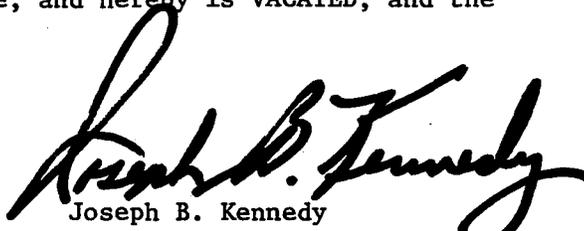
DECISION AND ORDER

The captioned consolidated contest/penalty proceeding came on for a prehearing/settlement conference on May 8, 1980, in the United States Courthouse in the District of Columbia.

On the basis of concessions made by the mine inspector in the course of prehearing disclosure, counsel for the operator, at the invitation of the Presiding Judge, moved to vacate the subject unwarrantable failure closure order and to dismiss the proposal for civil penalty.

After hearing argument from counsel for both parties, the motion was granted. The Presiding Judge found a mine foreman's statement of intent at some future time to use a mining method violative of the operator's approved roof control plan is legally insufficient to support a charge of violation of the plan under 30 C.F.R. 75.200.

Accordingly, it is ORDERED that the bench decision be, and hereby is, ADOPTED and CONFIRMED as the final decision in this matter. It is FURTHER ORDERED that the Order No. 618634 be, and hereby is VACATED, and the proposal for penalty DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Michel Nardi, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Barbara K. Kaufmann, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

13 MAY 1980

_____)		
SECRETARY OF LABOR,)		
MINE SAFETY AND)		
HEALTH ADMINISTRATION)		
(MSHA),)		CIVIL PENALTY PROCEEDING
)	
Petitioner,)		DOCKET NO. WEST 79-250-M
)	
v.)		A/O NO. 02-01746-05003
)	
SIERRA READY MIX AND CONTRACTING)		Mine: Sand and Gravel Operation
COMPANY,)		
)	
Respondent.)		
)	
_____)		

DECISION

Before: Administrative Law Judge Vail

Statement of the Case

The proceeding arose upon the filing of a petition for the assessment of civil penalty (now called a proposal for a penalty, 29 CFR 2700.27) for five alleged violations of Mandatory Safety Standards contained in 30 CFR Part 56. The violations were charged in citations issued to Respondent following an inspection of the Sierra Ready Mix Sand and Gravel operation in Cochise County, Arizona on February 13 and 14, 1979.

Pursuant to notice, a hearing on the merits was held in Tuscon, Arizona, on February 8, 1980. Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, San Francisco, California appeared as Counsel for the Petitioner. Peter Ranke, Comptroller for the Respondent, attended the hearing solely for the purpose of requesting a continuance thereof stating the reason being that the Respondent had not received adequate notice of the date of hearing.

The request for a continuance of the hearing was denied for the reason that two written notices of hearing had been mailed to the Respondent advising it of the date, time, and place of hearing as well as several telephone conversations held between Mr. Ranke and an employee of the Judge's office in Denver, Colorado. The original notice of jurisdiction dated January 2, 1980 was sent to the Respondent advising him that the case had been assigned to the undersigned in the Denver, Colorado office. A subsequent Notice of Hearing setting the date, time, and place was sent to the Respondent on January 18, 1980. An Amended Notice of Hearing was mailed to the Respondent on January 18, 1980 more specifically advising it of the room number where the hearing was to be held. Several telephone conversations were held with Mr. Ranke prior to the hearing and also with a representative of Congressman Udall's office regarding the hearing. Mr. Ranke maintains he did not receive the two notices of hearing and that he did not have time to secure an attorney or prepare his witnesses. These arguments are rejected as the two notices were mailed to the address stated on the Respondent's letterhead used in filing an Answer to the Petition. This is also the town where the plant is located. Further, the Petition was mailed to the Respondent on August 27, 1979 and Notice of Jurisdiction on January 2, 1980 affording the Respondent adequate time to secure an attorney and prepare his defense in this matter. On the date set for the hearing, the counsel for the Petitioner appeared with her witnesses ready to proceed with the hearing. For all of the above reasons the request for a continuance was denied and the Petitioner presented its case.

The record establishes that the area of Respondent's plant inspected on February 13 and 14, 1979 involved the wash plant located in the north part

of Sierra Vista, Arizona. There were three employees located at that location and according to Exhibit "A" of the proposal for assessment of civil penalties, the size of the Respondent is determined to involve 63968 tons or man hours per year.

Findings of Fact

1. Citation No. 378663, issued on February 13, 1979, alleged a violation of mandatory standard 30 CFR 56.9-7 which requires emergency stop devices or cords along the full length of unguarded conveyors with walkways. Mine inspector Thomas Aldrete testified that he was the inspector who viewed the Respondent's premises on the dates involved herein and that regarding Citation No. 378663, he observed a walkway, approximately 10 feet long, next to the main feed conveyor belt which was not guarded or supplied with a stop cord. He issued the above citation. The violation was abated by having a stop cord installed.

2. Citation No. 378665, issued on February 13, 1979, alleged a violation of mandatory standard No. 30 CFR 56.12-32 which requires that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs. Inspector Aldrete testified that a vibrator motor junction box cover was missing on the main feed conveyor for the wash plant. This violation was abated by installing a cover on the junction box.

3. Citation No. 378667, issued on February 13, 1979, alleged a violation of mandatory safety standard 30 CFR 56.09-7 which requires emergency stop devices or cords along the full length of unguarded conveyor with walkways. Inspector Aldrete testified that in this situation the

walkway along the conveyor to the scale shed was not equipped with an emergency stop cord. This citation was abated by installing a stop cord.

4. Citation No. 378669, issued February 13, 1979, alleged a violation of 56.12-28 which requires that continuity and resistance of grounding systems be tested immediately after installation, repair, and modification, and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative. Inspector Aldrete testified that no records could be found by the Respondent at the time of his inspection of the electrical continuity checks. The violation was abated by a continuity and resistance of grounding check being performed on February 20, 1979 and record made thereof.

5. Citation No., 378672, issued on February 14, 1979, alleged a violation of mandatory standard 30 CFR 56.5-50 which restricts the noise level to which employees may be exposed. Inspector Aldrete testified that an employee operator of a tractor was exposed to 161.4 percent noise of the permissible time limit value allowable. This violation was abated by the installation of a lexan windshield, extension of the exhaust pipe of the fan loader on top of the cab of the tractor, and installation of acoustical material on the floorboards.

Appropriate Penalties

The Respondent, in its letter dated September 13, 1979, contested the above described citations and assessments. However, Respondent failed to submit evidence to refute the testimony of the Petitioner's witnesses. I find that the violations existed. In considering the amount of the penalty, I have determined that the operator is small in size (having only three

employees at the site involved) that it has a history of one prior violation, and that the penalties would have no affect on its ability to remain in business. Each of the cited violations was promptly abated.

Citation Nos. 378663 and 378667 each charge one violation of 30 CFR 56.9-7 (requiring that unguarded conveyors with walkways be equipped with emergency stop devices along their full length). I find that the likelihood of injury here was probable in that an employee could easily slip or fall against the conveyor and be caught in the rollers. Resulting injuries could be serious, involving potential disability. Negligence existed in that the operator should readily have seen the unguarded conveyor. A penalty of \$24.00 for Citation No. 378663 and \$34.00 for Citation No. 378667 is appropriate.

Citation No. 378665 charges one violation of 30 CFR 56.12-32 (requiring inspection and cover plates on electrical equipment and junction boxes be kept in place except during testing or repairs). A vibrator motor junction box cover was missing on the main feed conveyor exposing the electrical wires inside which could allow the wires to rub on the outer rim of the open junction box and possibly tear the insulation. This could eventually cause the junction box and frame work nearby to become energized, which could result in serious and possibly fatal injury due to electrical shock to an employee coming in contact with this. Negligence existed in that the operator should have seen that this cover was off. A penalty of \$30.00 is appropriate.

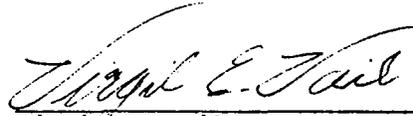
Citation No. 378669 charges one violation of 30 CFR 56.12-28 (requiring continuity and resistance test of the grounding system and a record kept thereof). The hazard involved here is that any modification, repair, or installation of a new electrical motor requires that the electrical system

be checked for continuity of grounding and resistance for if it is improper, employees can be exposed to electrical shock and serious or fatal injury. Negligence existed in that the operator should have performed this function and kept proper records thereof. A penalty of \$30.00 is appropriate.

Citation No. 378672 charges one violation of 30 CFR 56.5-50 (relating to exposure of employees to noise in excess of specified amounts). I find that the employee checked for noise level on the front end loader was exposed to excessive noise levels. The operator abated this condition with appropriate modifications and the negligence was slight. A penalty of \$18.00 is appropriate.

ORDER

WHEREFORE, it is ordered that Respondent pay the penalty of \$136.00 within 30 days of the date of this decision.



Virgil E. Vail
Administrative Law Judge

Distribution:

Mr. Peter Ranke, Controller, Sierra Ready Mix and Contracting Company, P. O. Box 520, Sierra Vista, Arizona 85635.

Mildred Wheeler, Esq., United States Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO, 80204

13 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND)	
HEALTH ADMINISTRATION (MSHA),)	
	Petitioner,)	Civil Penalty Docket
v.)	DOCKET NO. WEST 79-69-M
)	MSHA CASE NO. 05-01027-050051
SCHNEIDERS READY MIX, INCORPORATED,)	
	Respondent.)	Mine: Schneiders Pit and Plant

APPEARANCES:

Phyllis K. Caldwell, Esq., Office of the Regional Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294
for the Petitioner,

Frank J. Woodrow, Esq., 144 South Uncompahgre Avenue, P.O. Box 327, Montrose, Colorado 81401
for the Respondent.

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

The Petitioner seeks to assess a penalty against the Respondent for its alleged violation of 30 CFR § 56.14-1¹. The Petitioner attached as an exhibit to the proposal for penalty citation number 328084, issued September 13, 1978, in which it is stated that the troughing rollers on the main feeder conveyor belt were not guarded and an employee was injured when his arm was pulled into the rollers.

By way of answer the Respondent admits that an employee of the Respondent was injured on August 17, 1978, but alleges that the injury involved was caused by the intentional misconduct of the employee and not by a dangerous condition or by unprotected equipment.

¹Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Pursuant to notice a hearing was held on the merits on March 19, 1980, at Montrose, Colorado. At the conclusion of the hearing the parties agreed that they would not prepare any post hearing submissions for filing and that written decision would be issued after the transcript of the proceeding was filed. The transcript having been received, I issue the following decision.

ISSUE

Did the conveyor and rollers constitute equipment with exposed moving machine parts which might be contacted by persons and might cause injury and thus constitute a violation of 30 CFR § 56.141?

FINDINGS OF FACT

The following findings of fact are uncontroverted:

1. At all times relevant to these proceedings and in the course of its business the Respondent conducted a gravel and rock crushing operation.
2. One structure referred to as the feeder house had a hopper next to a loading ramp (Exhibit 2) and the rock and gravel material were fed through the hopper onto a conveyor belt in the feeder house.
3. The conveyor belt unit within the feeder house compartment allowed clearance of a maximum of 2 1/2 to 3 feet (Tr. 12, 13) where an individual could walk around three sides of the conveyor belt and it was approximately 6 feet from the level of the floor to the ceiling.
4. The end of the conveyor belt unit under the feeder or hopper is approximately 3 feet above the level of the floor and after traveling an incline distance of approximately 5 1/2 feet the conveyor is approximately 5 feet 4 inches above the floor level and is approximately at ceiling level 6 feet above the floor at the point that the conveyor leaves the feeder house compartment.

5. On August 17, 1978, an employee of the Respondent was injured when his left hand and arm were pulled into the operating conveyor belt and a supporting roller approximately 5 feet 4 inches above the floor level in the feeder house.

6. After the citation was issued on September 13, 1978, the Respondent installed a guard made of plywood approximately 1/2 inch thick, 2 feet wide, and 6 to 8 feet long, and installed it onto the conveyor belt unit.

DISCUSSION AND CONCLUSIONS OF LAW

There is no evidence to support the allegations of the Respondent that the injury to Lee A. Pinover, the employee of the Respondent, was caused by the intentional misconduct of Mr. Pinover. The only witness to the incident was Mr. Pinover himself since no other personnel were present in the feeder house at the time of the injury. I found the testimony of Mr. Pinover entirely credible.

Mr. Pinover testified that he had spent several minutes in the area of the conveyor belt using a large square shovel to clean up rocks from the concrete floor. When he attempted to scrape off an accumulation from the conveyor frame his shovel became lodged in the framework and when he reached with his left hand to free the shovel, his hand got caught between the roller and the conveyor belt. His hand and arm were pulled through the roller and belt up to his shoulder. Although Mr. Pinover screamed and shouted for help (Tr. 46) no one could see or hear him due to the noise and the fact that the person who could shut off the conveyor belt was not within sight of Mr. Pinover. With his left arm caught, Mr. Pinover reached for a switch box on the wall and started pushing buttons in order to turn off the power. His arm was caught for

a minute or so before the belt finally stopped. It was turned off by the crusher operator after he discovered Mr. Pinover's predicament (Tr. 78).

Even if Mr. Pinover had not gotten caught in the conveyor belt and roller, a dangerous condition was shown to exist for anyone working around the conveyor because of the exposed moving machine parts which might be contacted by persons and might cause injury. Any person working with a shovel cleaning up around the conveyor had only 2 1/2 to 3 feet of room as working space at the side or end of the conveyor. Because of this condition the conveyor belt should have been guarded in order to protect those persons who might get caught in the conveyor or rollers.

The foreman and part owner of the Respondent testified that it did not occur to him to install guard material on the conveyor even after Mr. Pinover was injured because he did not consider the condition a hazard. He testified further that he had been around equipment all his life and "you just don't get into these situations." (Tr. 69.) The injured employee, Mr. Pinover, was 15 years old at the time of the accident and 16 years old at the time of the hearing, although the Respondent may not have known of Mr. Pinover's age when he was hired part-time (Tr. 53). Mr. Pinover stated at the time of the hearing that he was 6 feet 3 inches tall and weighed 230 pounds and that he had grown some since the accident. Whether or not the 15 year old employee was careless and caused his own injury is not relevant. The question is whether or not there were exposed machine parts which might be contacted by persons and which might cause injury. The precise purpose of installing

the guard is to prevent the accidental injury to persons near the machinery such as occurred to this employee. Therefore, I conclude that the Respondent did violate 30 CFR § 56.14-1 as set forth in citation number 328084.

PENALTY ASSESSMENT

Stipulation as to size, history and ability to continue.

The parties stipulated to the following: (1) The company size is 11,054 man hours per year, (2) the history is eight assessed violations in the previous 2 years during three inspection days, and (3) the penalty assessed will not effect the operator's ability to continue business. I therefore conclude that the Respondent's gravel and rock crushing business is a small sized operation and that there is a history of a small number of violations.

Gravity

The gravity of a safety violation must be measured by: (1) the likelihood that it will result in injuries, (2) the number of workers potentially exposed to such injuries, and (3) the severity of potential injuries Cleveland Cliffs Iron Company v MSHA, et al, Docket No. VINC 79-68-M, December 3, 1979.

The number of workers exposed is not large in that only one person would be working in the cleanup area. Only seven persons worked in the entire gravel and rock crushing operation. However, the severity of potential injuries likely to result is high. I conclude the violation was moderately severe.

Negligence and Good Faith

I find the operator was negligent. The operator did not consider that there was a hazard present and thus did not install guards until after the citation was issued on September 13, 1978, even though a

serious injury occurred to a worker on August 17, 1978. The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation by promptly installing plywood guards along the conveyor unit.

Based on the testimony and exhibits introduced at the hearing and considering the criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977, I conclude that a civil penalty of \$800 should be imposed for the violation found to have occurred.

ORDER

It is ordered that the Respondent pay a penalty of \$800 within 30 days from the date of this decision.



Jon D. Boltz
Administrative Law Judge

Distribution:

Phyllis K, Caldwell, Esq. Office of the Regional Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

Frank J. Woodrow, Esq., 144 South Uncompahgre Avenue, P.O. Box 327, Montrose, Colorado 81401

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

14 MAY 1980

SECRETARY OF LABOR,
MINE SAFETY AND
HEALTH ADMINISTRATION
(MSHA),
Petitioner,
v.
FMC CORPORATION,
Respondent.
CIVIL PENALTY PROCEEDING
DOCKET NO. WEST 79-167-M
A/O NO. 48-00152-05006
Mine: FMC Mine

DECISION

APPEARANCES:

James H. Barkley, Esq., Office of the Regional Solicitor,
United States Department of Labor, 1585 Federal Building,
1961 Stout Street, Denver, Colorado 80294
for the Petitioner,

Clayton J. Parr, Esq., Martineau, Rooker, Larsen and
Kimball, 1800 Beneficial Life Tower, 36 South State
Street, Salt Lake City, Utah 84111
for the Respondent.

Before Judge Jon D. Boltz

Statement of the Case:

Petitioner seeks an order assessing civil penalties against the
Respondent for Respondent's alleged violations of 30 CFR 57.9-321 and 30
CFR 57.21-782. These penalties were proposed pursuant to proceedings
provided for by provisions of the Federal Mine Safety and Health Act of
1977, 30 U.S.C. § 801 et seq.

1/ "Mandatory. Dippers, buckets, scraper blades, and similar movable parts
shall be secured or lowered to the ground when not in use."

2/ "Mandatory. Only permissible equipment maintained in permissible
condition shall be used beyond the last open crosscut or in places
where dangerous quantities of flammable gases are present or may enter
the air current."

The Respondent is charged in Citation 336428 with having violated 30 CFR 57.9-32 in that its roof bolter was parked with the boom elevated. In addition, Respondent is charged in Citation No. 336443 with failure to maintain its loading machine in a permissible condition in violation of 30 CFR 57.21-78.

The Respondent contends that standard 57.9-32 is not applicable to the roof bolter because that equipment is used to drill holes and set roof bolts and not used for "loading, hauling, and dumping" consistent with the heading of section 57.9. Also, Respondent contends that it did not violate section 57.21-78 because the loading machine in question had been tagged and was voluntarily taken out of service for repairs prior to the inspection and issuance of the citation by Petitioner's mine inspector.

Pursuant to notice, a hearing was held on the merits in Salt Lake City, Utah on February 20, 1980. The transcript of the proceedings was filed with my office on March 7, 1980. Respondent filed its post-hearing brief on April 4, 1980. Petitioner waived the filing of a post-hearing brief.

Issues:

1. In regard to Citation No. 336428, the issue is whether the roof bolter is the type of equipment contemplated in 30 CFR 57.9-32, and, if so, whether its "movable parts" were properly secured or lowered to the ground when not in use.

2. In regard to Citation No. 336443, the issue is whether the Respondent's loading machine, which was tagged out of service and thus not "permissible equipment" at the time of the inspection, had been used by the Respondent in such condition prior to the inspection.

CITATION 336428

Findings of Fact:

1. During the course of a regular inspection of Respondent's coal mine on December 21, 1978, a MSHA inspector observed an unattended roof bolting machine in a working area of the mine. (Tr. 14).

2. The roof bolter is an electrically powered machine used for installing roof bolts in a mine and roof bolts are used as a means of support for the roof. (Tr. 12).

3. A boom approximately 8 feet long is mounted on the roof bolter so that the operator can move the "drill around and drill holes at various angles in the mine." (Tr. 13).

4. Attached to the boom is the "rack" (Tr. 20) which is about 6 feet long and contains the drilling and bolting machinery.

5. The rack may be rotated from the boom to a vertical position in order to install roof bolts.

6. The MSHA inspector observed the roof bolter with the boom raised approximately 4 feet off the floor of the mine (Tr. 13) with the rack in a horizontal position. (Tr. 20).

7. In order to abate the citation issued, the rack was rotated to a vertical position and placed on the ground. (Tr. 74).

8. If the boom suddenly fell from its raised position 4 feet above the ground, it would drop only 1 foot (Tr. 21, 22) due to a stop built into the roof bolter.

Discussion:

The provisions of 30 CFR 57.9-32, cited as having been violated, are not applicable to the roof bolting machine in this case.

The above regulation is included under the general heading of 30 CFR 57.9, entitled "Loading, Hauling, Dumping." These general words suggest the intent of including situations in which earth, minerals, or other matter is moved, loaded, hauled, or dumped.

The words "dippers, buckets, and scraper blades" contained within section 57.9-32 suggest equipment used to move earth. (Tr. 25). However, the roof bolter is equipment used simply to drill holes and set roof bolts and does not have the function of moving earth materials. Additionally, by the design of the machine utilized by the Respondent, the boom cannot be lowered any nearer than 3 feet above the ground.

"In the construction of laws...and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of...things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to...things of the same general kind or class as those specifically mentioned". Black, *Interp. of Laws*, 141; Goldsmith v U.S., C.C.A.N.Y., 42 F. 2d 133, 137 (2d Cir. 1930).

Thus, the general words "and similar movable parts" contained in section 57.9-32 should be construed as applying only to the specifically mentioned words "dippers, buckets, scraper blades", all of which are used for the purpose of "loading, hauling, and dumping." This would not include the function of the roof bolting machine in question.

CITATION 336443

Findings of Fact:

9. During the course of inspecting Respondent's mine on January 17, 1979, a MSHA inspector observed a loading machine not in use or operating, in a crosscut, with a tag or sign on the equipment stating "danger--do not operate" or words to that effect. (Tr. 90).

10. A "loading machine" is used at the working face of the mine to load blasted material into shuttle cars which transfer the ore back to a dumping point. (Tr. 87).

11. The Respondent's mine was a gassy mine (Tr. 93, 94) in that there was methane gas present.

12. At the time the loading machine was examined by the MSHA inspector it could not be safely operated within a methane atmosphere due to loose junction or control boxes which could cause live electrical wires to be exposed to the methane atmosphere. (Tr. 95, 96, 97, 98, 99).

13. At the time of the inspection, the junction or control boxes on the loader were warm (Tr. 103), and the inspector concluded that the loader had recently been used in the condition in which it was found.

DISCUSSION

Petitioner has the burden of proving by a preponderance of the evidence that the loader was not maintained in a permissible condition and was used beyond the last open crosscut or in places where dangerous quantities of flammable gases were present or might enter the air current. The preponderance of evidence is defined as the greater weight of evidence or evidence which is more credible and convincing to the mind. Button v Metcalf, 80 Wis. 193, 49 N.W. 809 (1891). It is also defined as that evidence which best accords with reason and probability. U.S. v McCaskill, 200 F. 332 (Cir. 1912). Petitioner's evidence falls short of a preponderance.

The MSHA inspector testified that he had no intention of writing the citation because the loader had been "tagged out", but when he discovered that the electrical boxes on the loader were still warm, this indicated to him that the machine "had been operating recently." (Tr. 91). Thus, he

concluded that the machine had been operated while not in a permissible condition in violation of 30 CFR 57.21-78. The Petitioner also argues: "[w]e essentially think they (Respondent's employees) saw him (the MSHA inspector) coming and tagged it (the loader) out, but it had been operating up to that point in time." (Tr. 157). Since the MSHA inspector had not witnessed the loader in operation, in violation of the cited regulation, it was necessary to prove the case by circumstantial evidence. Petitioner's evidence of violation of the regulation is speculative and insufficient. Respondent freely admits that it did operate the machine during the previous shift, before the citation was issued (Tr. 159), and that the machine was not in a permissible condition when the inspector saw it. (Tr. 160).

However, because the equipment was tagged out of service by the Respondent before the inspection took place, I conclude that the Respondent recognized the deficiencies in the machine and took it out of service, requiring repairs before it could again be utilized. Had the equipment not been posted with the "danger--do not operate" tag and removed from service I might conclude otherwise, but in this case I do not believe that the evidence presented by the Petitioner outweighs that presented by the Respondent. The evidence presented by the Respondent shows that the loader was operated during the shift that ended at 7:00 a.m. on the date of the inspection. There is no credible evidence upon which to base a conclusion that the loader was used after that time, up until the inspection was made at about 9:55 a.m. The Respondent alleges that the equipment was "tagged out" during the last shift, and the Petitioner alleges that the loader continued to be used in its impermissible condition up until the time that the inspection was made. Although the MSHA inspector testified that the electrical junction boxes on the loader were still warm when inspected,

there is no evidence to show how long it takes after the loader is used before those electrical junction boxes are cold.

FINDINGS OF FACT

I find the facts to be as stated in paragraphs 1 through 13 of this decision.

CONCLUSIONS OF LAW

1. The provisions of 30 CFR 57.9-32, cited as having been violated, are not applicable to the roof bolting machine in this case and Citation No. 336428 should be vacated.

2. The Petitioner failed to prove by a preponderance of the evidence that the Respondent operated its loader while it was not in a permissible condition, in violation of 30 CFR 57.21-78, and thus Citation No. 336443 should be vacated.

ORDER

Based on the foregoing findings of fact and conclusions of law, Citations No. 336428 and 336443 and any penalties proposed therefore are vacated.


Jon D. Boltz
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of Regional Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

Clayton J. Parr, Esq., Martineau, Rooker, Larsen and Kimball, 1800 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

15 MAY 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 79-75
Petitioner : A/O No. 09-00053-05003
: :
v. : Clinchfield Mine & Mill
MEDUSA CEMENT COMPANY, :
Respondent :

Appearances: Natalie Nelson, Attorney, U.S. Department of Labor,
Atlanta, Georgia, for the petitioner;
Tom W. Daniel, Esquire, Perry, Georgia, for the
respondent.

Before: Judge Koutras

DECISION

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent on August 27, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 56.9-2. Respondent filed a timely answer contesting the citation, and a hearing was held in Macon, Georgia, on February 26, 1980. Posthearing briefs were filed by the parties, and the arguments presented therein have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801, et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

ISSUES

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed,

and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

DISCUSSION

The section 104(a) Citation, No. 096981, April 3, 1979, cites a violation of 30 C.F.R. § 56.9-2, and states as follows: "On the D-562 road grader, the right steering control arm block was badly worn and needed to be replaced. There was too much play for safe operation."

Mandatory safety standard 30 C.F.R. § 56.9-2, provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

Stipulations

The parties stipulated to the following (Tr. 5-7):

1. The size of the respondent company and the mining operation at the Clinchfield Mine & Mill stated in terms of annual man hours. The mine employs approximately 200 people and the respondent company employs approximately 1,500 and operates four cement plants, including the operation in question.

2. Payment of the penalty assessed by MSHA will not adversely affect respondent's ability to remain in business.

Testimony adduced by the parties.

Petitioner

MSHA inspector Steve Manis testified that he conducted an inspection at the mine in question April 3 through 5, 1979. Upon inspection of the road grader in question, he observed that on the righthand side, the steering arm block connected to the drag length was completely worn out.

He confirmed his observations by instructing the operator to move the steering wheel and by hand-inspecting the steering drag length, he observed that the bearings around the pins that fit into the steering block mechanism were worn, and that the bushings in the steering block were completely worn out. As an experienced grader operator, it was his opinion that if the pin had broken or fallen out, a loss of steering on the right-hand side would occur, the wheel would become detached from the drag length bar and the wheel would go in either direction.

The inspector indicated that the grader is primarily used to keep the main haulage roads smooth and free of rocks and to grade the roads and pit area, and it travels across a railroad crossing and a highway when it travels to the plant area. The principal hazard which would result in the event the steering mechanism failed would be the inability of the operator to stay out of the way of trucks, cars, and other equipment, and the operator of the grader or any other vehicle would be exposed to such a hazard. In addition, loss of steering around an embankment or near the high walls would also expose the grader to the possibility of going over such an area, and various injuries could result from any faulty steering (Tr. 11-19).

Inspector Manis testified that when he called the condition of the grader to the attention of mine management, the grader was immediately taken to the shop for inspection and repairs. Later that day he was informed that repairs had been made and he went to the shop and confirmed this fact. He observed the old parts, and confirmed that new parts had been installed, and upon hand-testing the drag length found no movement. Upon observation of the old parts, he saw that they were badly worn, that the pin was almost completely worn out, and that the bushings and bearings around the pin were completely worn away. After noting his observations, he issued the citation the next day, April 4, 1979, citing a violation of section 56.9-2, which requires that all equipment defects be corrected before the equipment is put into operation for that day or for that shift (Tr. 20-23).

Inspector Manis indicated that the condition cited was visible upon inspection, and that it should have been detected during the daily inspection or during a regularly scheduled maintenance or servicing period. The wear on the steering mechanism was not an "overnight" problem and it may have taken a month or two for the condition to develop. He discussed the citation with mine management during a conference and no questions were raised (Tr. 24).

On cross-examination, Inspector Manis identified a copy of his citation, and his "inspector's statement" (Exhibit R-1). In explanation of his conclusion that "there was too much play for safe operation" of the steering control arm block, he indicated that it was so badly worn that under certain conditions it could fall off. In his opinion the driver could not safely operate the vehicle in the condition it was in, particularly when he has to steer around other equipment. The roads where the grader operates is wide enough for two vehicles to pass, but he has never

observed a road grader at the mine getting out of the way of a truck (Tr. 24-31). He explained the operation of the steering mechanism and stated that steering loss would not occur to the left wheel in the event the right-hand block fell off. While the left wheel would still turn left or right, steering the grader would be difficult because of the loss of control over the right wheel. He has never driven a grader with a broken block, and could not state with any certainty whether it could be guided by the use of only the left wheel. Although he is not a mechanic, he indicated knowledge as to the mechanics of the steering mechanism on the grader and how it operates (Tr. 31-36). He believed that loss of steering would result on the right wheel if the block in question fell out, and that the grader would be unable to maneuver quickly in an emergency. The grader was on the main haul road coming towards the pit when he observed it, and it was approximately one mile from the shop. He permitted the grader to be driven to the shop, but had he believed the condition were worse, he would have issued an imminent danger withdrawal order, but that was not the case (Tr. 37-40).

In response to questions from the bench, Inspector Manis stated that at the time the citation issued, section 56.9-1, requiring inspection of equipment each shift and the reporting of any defects found was an advisory standard and not mandatory. He made no check of any inspection books and could not recall checking any records regarding the grader. He believed the condition of the loose steering mechanism could have resulted in an injury if it was left unattended. The operator exercised good faith in rapidly abating the citation and immediately took the grader to the shop. He could think of no grader equipment defects which would not affect safety. The travel speed of the grader depends on whether it is actually grading roads or moving from location to location. When the blade is down, it moves at slow speed, and the machine in question operates only on mine property and not on public roads. The grader in question is an older grader and is not required to be equipped with roll-over protection or seat belts. The grader was in operation at the time he stopped it for an inspection (Tr. 46-54).

Respondent's testimony and evidence

Shep Bass, motor grader operator, testified that he was operating the grader smoothing off the dump when Inspector Manis stopped him to inspect the machine. He did not have any steering or operating problems with the grader that day. Although he has operated the grader on prior occasions, Mr. Bass did not operate the grader the day before the inspection took place, and he is required to fill out an inspection form at the end of every shift regarding the safety condition of the grader (Tr. 55-57).

On cross-examination, Mr. Bass testified that he inspects the grader when he greases the steering block mechanism about once a week. The last time he greased the grader was a week prior to the citation. At that time, he noticed that the steering link was somewhat worn (Tr. 58).

In response to bench questions, Mr. Bass testified that the steering block mechanism is readily observable. If the steering arm falls off, there are wheel tilts to control the grader. As an operator, he is not that concerned about worn steering because the grader cannot operate over 15 miles per hour, and it is never operated on hills, but only on the haul road and dump. He operates the grader alone and there are no helpers around. Although there is no pedestrian traffic, there are truck drivers in the area (Tr. 58-61).

Virgil Jones, diesel mechanic, testified that he replaced the defective steering mechanism block on the day in question. As a demonstration, Mr. Jones identified a new block, the pin, and the bushing, and he explained how they are assembled and operate. He indicated that the block which was replaced had part of the bearing race still intact, but that the needle bearings were worn. While installing a new steering mechanism block, he observed that the top pin and the bushings were in good condition. The bushings were partially off of the bearing race. Although some of the needle bearings were missing, the needle bearings that were intact were worn. It is his opinion that if the steering block mechanism fell off or disintegrated, he could safely operate the grader because of its low rate of speed and tilt controls. If the steering block mechanism becomes loose, the operator can use the tilt controls to regulate the inner and outer plate of the wheel. An operator can use the tilt controls to throw the wheel to the left and take pressure off of the right wheel. In short, the two controls act as a dummy guide, and the grader can operate on one wheel. Approximately a week before the citation issued, he performed maintenance on the left wheel and observed the worn block on the right side, and since he had ordered parts they were readily available to replace the worn block. However, he did not believe it was worn to the point where it created a safety hazard or was about to fall off or break apart, and in his view, the grader could operate in a safe condition (Tr. 63-69).

In response to bench questions, Mr. Jones testified that he was with Inspector Manis when he conducted the equipment inspection, and that Mr. Manis told him that he had a "sloppy bushing." The grader was then taken to the shop, and Mr. Jones repaired it. After making the necessary repairs, he observed that the pin had very little wear and tear on it. The pin would have to be at least one-eighth of an inch before it was in danger of breaking. He indicated that the grader could operate with one wheel missing by means of the tilt controls, and he would have no reservations in operating the grader in the condition it was in at the time it was cited (Tr. 70-74).

John Fowler, quarry supervisor, testified that he was present when the motor grader was inspected. Inspector Manis told him that he had a "sloppy bushing," and parts were available to repair the bushing which did have "some play in it." He identified photographs of the grader in question, as well as the bushing (Exhibits R-2 through R-6) (Tr. 75-81). He stated that company policy requires that defective operating equipment be reported to a supervisor immediately, and equipment operator's are required to fill out a daily operator's report, Exhibit R-7, and to submit it at the end of every shift. They are also required to shut the machine down (Tr. 81-84).

On cross-examination, Mr. Fowler testified that the equipment report (Exhibit R-7), has been in use for the past 12 years, and maintenance files are maintained on all equipment. Employees are required to indicate on the report that a part needs repair (Tr. 84-85).

In response to bench questions, Mr. Fowler testified that respondent has an equipment checkup system. Although there is no specific steering box section, employees should note any steering defects on the report. Steering is one of those areas of normal operation and normal check. During his employment, there have been cases where motor grader operators do not fill out nor submit the required report to mine management (Tr. 85-87).

Richard P. Kistler, plant manager, expressed the opinion that the citation is improper because it is based on conjecture that the condition would lead to an unsafe act. There was some wear on the top bushing and assembly, but the bottom pin and bush assembly was tight and there was no danger of the parts falling apart. Although conceding there was some wear on the parts, he believed the operator could stop the motor grader instantly. The normal operating speed for the motor grader with the blade down is 3 to 5 miles per hour, and the normal speed for the grader with the blade up is 10 to 12 miles per hour. Company policy dictates that in the event an employee observes a worn steering condition, that employee must cease operating the motor grader, inform his supervisor, and correct it. Management, as well as all employees, are involved in an extensive safety program (Tr. 91-96). Mr. Kistler identified the photograph, Exhibit R-2, and indicated that the grader which was cited is the one depicted "on the right-hand side" (Tr. 101).

Billy Barrett, employed as an administrative assistant by the respondent, testified that he took the pictures identified as Exhibits R-2 through R-6, and that they were taken during the latter part of January, 1980. He identified Exhibit R-2 as the Cleveland motor grader which was cited, and indicated that the roll bar shown has been on the grader for six to seven years (Tr. 106).

Inspector Manis was called in rebuttal and stated that while the photograph (Exhibit R-2) is a grader, similar to the one he cited, he was unsure as to whether it is in fact the specific one which he cited (Tr. 113-115). He did recall that the pin he observed was badly worn, that it was loose between the pin and the block, and that there was no bushing between the pin and the block (Tr. 115-116). As for the "burnt" block area, he did recall that the pin may have had burned places on it (Tr. 119).

Virgil Jones was recalled, and identified Exhibit R-2 as a photograph of the grader cited, and he stated that the roll protection was installed during late 1974, that only one grader was at the mine, and that he has performed maintenance on it since 1972 (Tr. 121). He again identified the pin he removed and stated that the burned bottom portion resulted when he cut it out with a torch. He no longer had the bottom portion of the pin which he cut out in April, 1979, because it was destroyed in the cutting process, but he explained how it fit into the block and sleeve (Tr. 123). He confirmed that the play was between the pin and the block (Tr. 124).

Arguments presented by the parties

Petitioner

In its posthearing brief, petitioner asserts that the testimony of inspector Manis establishes that the grader steering drag link pin bearings were completely worn and defective, and that in such a condition a loss of steering could occur on the right side. If this were to occur, the resulting loss of steering would cause the right wheel to turn abruptly, thereby exposing the grader operator to a hazard of being struck by an oncoming vehicle or cause him to strike a pedestrian. Further, petitioner argues that the inspector verified the loose defective steering mechanism by observation and by manually manipulating the worn part, and that once repairs were effected and new parts installed, the steering arm had no movement with the new parts in place.

Since the defect in question was in the steering mechanism, petitioner argues that it is obvious that such a defect could affect the safe operation of the grader as it might cause the operator to travel into the path of oncoming vehicles or pedestrians.

Respondent

Respondent argues that the worn condition of the steering control arm block in question was not such as to render the part defective and that both the grader operator and the mechanic were aware of the worn condition, did not believe it was worn badly enough to warrant replacement, and could have replaced it at any time since the part was in stock. Respondent takes the position that all machinery in use will wear and that the question of whether the degree of wear is such as to require the replacement of a part is a subjective judgment to be made not only by an inspector, but also by the grader operator and the mechanic. Respondent asserts that it was the collective judgment of the operator and mechanic that the wear to the part did not render it defective.

Assuming that the worn part in question can be considered to be defective, respondent argues that the resulting condition was not dangerous. In support of this conclusion, respondent argues that the use of the grader in question is confined to mine property and it is primarily used for dressing the roads and leveling some of the spoil piles. Even assuming that the alleged defect caused the particular bushing to disintegrate and fall off, respondent maintains that the grader could still be driven and the steering of the left front wheel would be sufficient to control its direction. Further, respondent argues that if the grader was in the process of grading, it could be stopped almost instantly by use of both the brakes and the braking power of the blade. Finally, respondent asserts that the mechanic testified that even though the bushing has nothing to do with the attachment of the wheel, the grader could even be operated and driven with one of the front wheels missing.

Findings and Conclusions

Respondent is charged with a violation of section 56.9-2, a rather broad and general standard which provides that "[E]quipment defects affecting safety shall be corrected before the equipment is used." In order to support a violation of this standard, MSHA must first establish by a preponderance of the evidence that the cited piece of equipment was somehow defective or contained a defective part. It next must establish that the asserted defect affected the safe operation of the equipment or exposed miners to a safety hazard.

In this case, the asserted defect is described by the inspector on the face of his citation as a "badly worn right steering control arm block" on a road grader used on the surface for maintaining the mine roads and pit areas. The inspector concluded that the "badly worn" part needed to be replaced because "there was too much play for safe operation." It seems obvious to me from the inspector's testimony in support of his citation that his principal concern was the fact that in his judgment the grader in question could not be safely operated with a worn steering mechanism. The inspector believed that the condition of the "worn" control arm in question was such as to present a hazard to the grader operator in that in the event of a steering failure, he would be unable to maneuver out of the way of oncoming traffic. He was also concerned over the fact that a loss of steering near an embankment would expose the operator to the risk of going over the embankment.

I have carefully reviewed and considered the testimony presented by the parties in support of their respective positions in this case, and I conclude and find that the respondent has the better part of the argument, both as to its interpretation of the application of the cited standard as well as the facts and evidence adduced through the testimony of the witnesses who testified in this proceeding. I conclude and find that MSHA has not established that the worn control arm in question was defective to the point where it presented a real safety hazard. In short, I believe MSHA's theory of the case seems to be that any wear and tear on a steering control arm should be corrected immediately so as to preclude further deterioration which may at some future time cause a problem. If I were to accept this theory of interpretation of the cited standard, the subjective judgments of an inspector would dictate ipso facto when a change-out is required on any piece of equipment. In order to prevail on this subjective interpretation of the standard, I believe that an inspector must first establish a nexus between the asserted defect and its affect on the safe operation of the equipment cited. I cannot accept the theory that any worn part in and of itself affects safety. If this is the intent of the standard, then I believe that MSHA should promulgate a precise standard that requires that all worn parts be replaced. On the evidence presented in this case, I can only conclude that MSHA has failed to establish by a preponderance of the evidence that the worn control arm bushing in question adversely affected the safe operation of the grader, and my reasons for this conclusion follow.

Although Inspector Manis alluded to his past experience in operating equipment, he candidly admitted that he has never operated a grader with a broken bushing of the type in question and could not state with any degree of certainty whether the grader could be controlled by use of the left wheel only. Further, while he exhibited some degree of knowledge with respect to the mechanics of steering mechanisms, it is clear that he is not a qualified mechanic. Therefore, I believe that his conclusions with respect to the loss of steering in the event the loose and worn control arm in question failed completely is conjecture. This is not to say that he is not qualified to state his opinion in this regard. However, on the basis of the testimony presented by the respondent from the operator of the grader, and the experienced mechanic who serviced and operated the grader over a period of years, I conclude that the respondent has rebutted the conclusions by the inspector and has established that the extent of the worn part cited did not render the grader unsafe.

I find Mr. Jones' testimony regarding the steering mechanism of the grader to be credible and I accept his explanation that any loss of steering caused by a defective control arm would not adversely affect the control of the grader and cause it to expose an operator to a hazard of striking other vehicles or run over an embankment. There is absolutely no evidence that the grader was otherwise defective, that it had faulty brakes or was otherwise in such a condition as to render it unsafe to operate. Further, respondent has established to my satisfaction that the grader in question was equipped with roll-over protection at the time the citation issued, and I conclude that the inspector's theory in issuing the citation in the first place was an effort on his part to force the respondent to replace a worn part which in the final analysis was a "preventive maintenance" item. In short, I conclude that the inspector believed that any worn part is on its face defective and therefore should be replaced. The problem with this is that the standard as written does not require the replacement of worn parts per se.

In support of its case, petitioner cites a recent decision by Judge Merlin rendered from the bench on October 22, 1979, in MSHA v. Phelps Dodge Corporation where he affirmed a violation of section 55.9-2, on the basis of the testimony of two inspectors who found that loose lug nuts on a truck wheel could cause the wheel to come off and thus directly affect braking. While it is true that Judge Merlin found a violation of the cited standard, his decision was based on the particular facts of that case as supported by the credible testimony of two mine inspectors. However, Phelps Dodge involved a truck which had all of its wheel lugs loose, and that condition was shown to have directly affected the braking of the truck. The testimony presented in that case established that all of the wheel lugs were loose, and based on the inspectors testimony that should the wheel come off, proper braking might not occur. Judge Merlin concluded that this condition obviously rendered the truck unsafe to operate. Further, Judge Merlin was also influenced by the fact that respondent's own mechanical foreman conceded that loose wheel lugs presented a serious hazard. In the instant case, I conclude that respondent's testimony and evidence satisfactorily rebuts the inspector's conclusions as to the unsafe condition of the grader in question.

Although it is not a matter of record in this case, the attention of the parties is invited to a recent article which appeared in the Mine Safety & Health Reporter, published by BNA, Vol. 1, No. 22, April 9, 1980, discussing a 197-page Bureau of Mines Study entitled "Analysis of Mobile Mining Equipment Pivot Pin Wear." While I am not particularly influenced by this article, I take note of the fact that it specifically alludes to the fact that the cited study apparently concludes that the wear of the large pins which hold pivot joints together on mobile surface-mining equipment is not a hazard to miners as had been suspected. The article also states the the Bureau of Mines has concluded that pivot pins "are not currently a suitable target for regulatory standards," and that the Bureau has concluded that "setting standards for the maximum allowable wear of pin systems is impractical because the amount of permissible wear for pins is affected by so many variables, including pin composition and operating temperatures."

In summary, on the basis of all of the evidence and testimony adduced in this proceeding, I cannot find or conclude that MSHA has established a case. Accordingly, the citation issued in this matter is VACATED, and this case is DISMISSED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 20 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 79-123
Petitioner	:	A.O. No. 36-05018-03022F
	:	
v.	:	Cumberland Mine
	:	
U. S. STEEL CORPORATION,	:	
Respondent	:	

DECISION AND ORDER

After intensive prehearing preparation, this matter came on for a prehearing conference in the U.S. Courthouse, Washington, D.C. on May 16, 1980. The first order of business was a consideration of the operator's motion to dismiss the charge that the operator failed to mark and identify shuttle car trailing cable plugs as required by 30 CFR 75.601. On the basis of a statement for the record by Inspector Davis, the Presiding Judge found this was a marginal, nonserious, no fault violation and suggested that in the interest of expedition the matter be settled with the payment of a \$100 penalty. The parties agreed and so moved.

The next order of business was a lengthy discussion and consideration of the charge that a qualified electrician's failure to lock out a trailing cable plug as required by 30 CFR 75.511 was the effective cause of the electrocution of another miner. On the basis of an independent evaluation and de novo review of (1) the parties' investigative reports, (2) the statements of experts for both parties, (3) an examination of the relevant physical evidence, and (4) a review of the time-line analysis of pertinent events (copy attached as Appendix), the Presiding Judge found this was an extremely serious violation that resulted from the gross negligence of Kenneth R. Blystone, a qualified electrician employed by the operator in the 3 Butt Section of the Cumberland Mine on January 2, 1979.

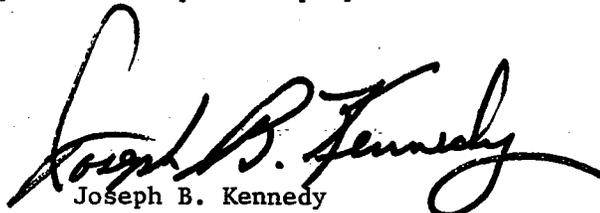
It appeared that under the stress of knowing the shift was about to end with no production and two shuttle cars down, Mr. Blystone lost his composure and ability to think clearly. This led to a hasty decision to bypass the Femco ground sentinel monitor without disconnecting the trailing cable plug for the number 105 shuttle car. As a consequence, when the circuit breaker closed and energized the cable another electrician, Mr. Feather, who was splicing the cable, received a fatal shock.

On the basis of the facts appearing in the record and upon a consideration of the applicable law, the Presiding Judge further found the employee's negligence was imputable to the operator. See, National Realty and Construction Co. v. OSHRC, 480 F.2d 1257, 1266 (D.C. Cir. 1973); Pocohantas Fuel Co. v. Andrus, 8 IBMA 136 (1977), aff'd 590 F.2d 95 (4th Cir. 1979); Secretary v. Ace Drilling Co., 2 FMSHRC ___, PITT 75-1-P, decided April 24, 1980; Secretary v. Warner Co., 2 FMSHRC ___, PENN 79-161-M, decided April 28, 1980; Prosser, Law of Torts, §§ 31, 32, pp. 145, 158 (4th ed. 1971). More specifically, the Presiding Judge concluded the Assistant Maintenance Foreman's failure to exercise the high degree of care imposed by the Act in supervising the conduct by his subordinates of hazardous work under conditions of stress that were or should have been known to him warrants imputation of the subordinate employee's negligence to the operator without diminution.

After taking into account (1) MSHA's statement that the facts did not warrant action against the individual involved under section 110(c) or (d) of the Act, (2) the operator's extensive efforts to insure against any repetition of the circumstances giving rise to this violation, (3) the operator's overall safety record, and (4) the absence of any request or showing of need for an evidentiary hearing, the Presiding Judge recommended the matter be settled with the payment of a penalty of \$7,000. The parties agreed and so moved.

Whereupon each of the motions to approve settlement was granted by a decision from the bench and the operator directed to pay the penalties agreed upon within ten days.

The premises considered, it is ORDERED that the bench decision be, and hereby is, ADOPTED and CONFIRMED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, \$7,100 on or before Tuesday, May 27, 1980 and that subject to payment the captioned proposal for penalty be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Attachment: Appendix

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APPENDIX

TIME LINE ANALYSIS

Location: 3 Butt, 006 Section, Cumberland Mine
Room 11, Nos. 2 and 3 Entries
Day Shift, Tuesday, January 2, 1979
Fatal Accident Occurred at 3:25 p.m.

1:00 p.m. - Shuttle Car (S/C) 105 located in No. 3 entry developed
to trouble with its trailing cable.

2:00 p.m. Kenneth R. Blystone, age 58, a qualified electrician with
18-1/2 years experience removed the S/C 105 trailing
cable plug from the Load Center (LC) receptacle in the
#3 entry of the 006 Section and locked it out with his
padlock. ~~He did not danger tag the plug.~~

Blystone and George Cook, Jr., an electrician trainee
(Grade 4), with 3 years' experience made a splice
in the S/C 105 trailing cable.

Blystone then gave Cook the key to unlock the padlock
on the S/C 105 trailing cable plug.

Cook unlocked the lock from the S/C 105 trailing cable
plug and placed the lock along with the key on top of
the LC.

Cook then inserted the S/C 105 trailing cable plug into the
LC receptacle, and tried to energize the circuit breaker in
the LC several times without success.

Each time Cook threw in the circuit breaker the Femco ground sentinel system kicked it back out. This meant the short in the S/C 105 trailing cable was not corrected.

Cook, at the direction of Blystone, then removed the S/C 105 trailing cable plug from the LC and Blystone ran additional tests in an effort to locate the trouble. ~~Blystone did not lock out the S/C 105 trailing cable plug while running these tests.~~

- 2:00 p.m. - 106 S/C trailing cable shorted out. ~~This can was marked~~
to ~~S/C 110.~~ Blystone removed the S/C 106 trailing cable plug
2:15 p.m. from the LC receptacle and locked it out using the lock that
Cook had removed from the S/C 105 trailing cable plug and
placed on top of the LC. (This padlock was Ken Blystone's
lock that he had on his belt at the time he locked out the
S/C 105 trailing cable). Blystone failed to lock out the
S/C 105 trailing cable plug that Cook had removed from the
LC receptacle. Instead Blystone placed a danger tag in the
S/C 105 trailing cable plug. Blystone could have locked out
the S/C 105 trailing cable plug with a lock from his tool box.
- 2:15 p.m. - Blystone notified William Jiblits, Assistant Maintenance
to Foreman of the breakdown of the two S/C's. Jiblits directed
2:30 p.m. Ted Chapman, a Grade 4 electrician trainee with 3 years'
experience, and Joe Julian, another Grade 4 electrician trainee
with 3 years' experience, to leave the 2 Butt section and

go to the 3 Butt section to assist Blystone. In the meantime, Blystone and Cook gave first priority to working on the S/C 106 trailing cable splice, because the brakes were bad on S/C 105 and had to be repaired before it could be used.

2:30 p.m. - Julian and Chapman arrived on the 3 Butt section and Blystone to directed them to help him troubleshoot the problem on the

3:00 p.m. S/C 105 trailing cable while Cook continued to work on the S/C 106 trailing cable problem. At 2:50 p.m., Jibblits directed William Feather, a qualified electrician with 1 year 3 months' experience in this classification, to leave the 2 Butt section and proceed to the 3 Butt section to help Blystone. At the time Feather arrived at the No. 2 entry of the 3 Butt section, Blystone, Julian and Chapman had cut a 10-foot section out of the S/C 105 trailing cable. When Feather took over from Blystone, at approximately 3:00 p.m., the S/C 105 trailing cable had been cut apart and one end had the cable insulation peeled back. Blystone then left to return to #3 entry to work with Cook on the S/C 106 trailing cable problem.

3:00 p.m. - Blystone proceeded to help Cook put a splice in the S/C 106 to trailing cable in the #3 entry. A short time later, Chapman

3:30 p.m. came over from the #2 entry and told Blystone he thought Feather had found an opening in the S/C 105 trailing cable. Blystone told Chapman to stay with Cook, while he went over to assist Feather and Julian. Blystone determined there was

an opening in the S/C 105 trailing cable and then returned to the #3 entry to help Cook and Chapman splice the S/C 106 trailing cable. At approximately 3:25 p.m., the splice in the S/C 106 trailing cable was completed. Leaving Cook at the splice, Blystone and Chapman proceeded to the load center in the #3 entry. There the plug for the S/C 106 trailing cable was lying locked out. Beside it was the plug for the S/C 105 trailing cable with the danger tag on it, ~~that had been placed there by Blystone earlier.~~ Ignoring ^{or forgetting} the danger tag, Blystone picked up the S/C 105 trailing cable plug and plugged it into the No. 1 receptacle thinking it was the S/C 106 trailing cable plug. The Femco ground check monitor circuit light indicated an open circuit. The plug was then removed by Blystone and inserted in LC receptacle No. 2 with the same result. At this point Blystone became agitated, and thinking the problem might be in the LC, told Chapman to depress the ground check monitor test switch to the unit check position and activate the circuit breaker while he observed the lights on S/C 106. (Safe practice requires that all plugs be removed from the LC before bypassing the Femco Ground Sentinel II ground monitor). When the test switch is depressed, the ground sentinel system is bypassed, and the circuit breaker and trailing cable become energized. As instructed by Blystone, Chapman depressed the test switch and activated the circuit breaker. As soon as Chapman saw the circuit

breaker close, he released the test switch and energized the trailing cable. At this point, Julian and Feather were both holding the exposed S/C 105 trailing cable. Feather was holding the cable on both sides of the splice, while Julian was taping a phase lead connection they had completed. Three of the five remaining conductors were folded back along the cable. When Chapman depressed the Femco test switch and activated the circuit breaker the trailing cable became energized. When Julian felt the surge of power he screamed, and when the power hit Feather it knocked him unconscious. Cardio-pulmonary resuscitation was started immediately and continued until arrival at the Waynesburg Hospital, where Feather was pronounced dead on arrival.

The floor of the no. 2 entry, 11 crosscut, varied from damp to wet and muddy. Feather was wearing leather boots and was not wearing gloves. A padlock in the closed position was found on Feather's belt. Feather never knew whether or not anyone had locked out and tagged the S/C 105 trailing cable. No faults were found in the LC when subsequently tested by Inspector Davis.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6210/11/12

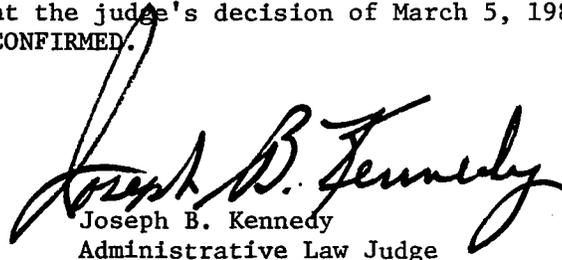
21 MAY 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 80-36
Petitioner	:	A.O. No. 11-01008-03029
	:	
v.	:	Baldwin Mine
	:	
PEABODY COAL COMPANY,	:	Docket No. LAKE 80-27
Respondent	:	A.O. No. 11-00598-03037
	:	
	:	Eagle No. 2 Mine
	:	
	:	Docket No. LAKE 80-26
	:	A.O. No. 11-00585-03028
	:	
	:	Mine No. 10
	:	
	:	Docket No. LAKE 80-25
	:	A.O. No. 11-00725-03037
	:	
	:	River King No. 1 UG

DECISION AND ORDER

Despite the operator's withdrawal of its petition for discretionary review in the captioned matters on the ground they were settled and paid, the Commission joined them with an unrelated matter in issuing its suspension order of April 14, 1980 and decision of May 16, 1980. Secretary v. Peabody Coal Company, Dkt. LAKE 80-25, et al., 2 FMSHRC _____. For this reason, the finality of the decision approving settlement of these matters was suspended pending the decision in the unrelated matter. The Commission having now remanded the unrelated matter apparently intended to life suspension of all the matters cited in the captioned to its decision.

Accordingly, it is ORDERED that the judge's decision of March 5, 1980, be, and hereby is, REINSTATED and CONFIRMED.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 2 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	
	:	Docket No. LAKE 80-15-M
	:	A.O. No. 11-00132-05005
	:	
v.	:	Plant No. 6
	:	Florence Quarry & Mill
MISSOURI GRAVEL COMPANY, Respondent	:	
	:	

DECISION AND ORDER

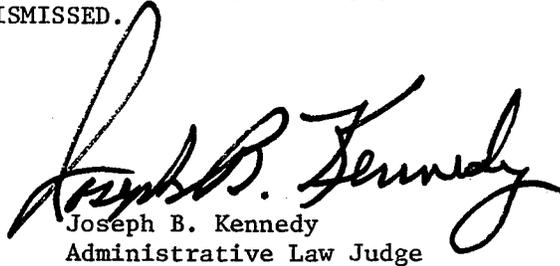
These seven allegedly nonserious, low negligence violations were initially assessed at \$536.00. It is now proposed to reduce the assessment to \$522.00.

Based on an independent evaluation and de novo review of the information furnished, I conclude that six of the seven violations should be settled at the amounts proposed. The seventh violation involves a failure to provide an audible backup alarm on a caterpillar tractor operating in an area where personnel were working or traveling. The potential for a fatal or seriously disabling injury was therefore real and not remote or speculative. For these reasons, I find the amount proposed for settlement, \$72.00, is unacceptable and should be increased to \$100.00. 1/

Accordingly, it is ORDERED that to the extent indicated the motion to approve settlement be, and hereby, is GRANTED. It is FURTHER ORDERED

1/ The findings in this Decision and Order are based on the information submitted in support of the parties' motion. The penalties found warranted constitute an exercise of the predictive, discretionary power conferred by Congress under section 110(i), (k) of the Act to assess penalties designed to deter future violations and insure voluntary compliance. Should the disposition proposed be unacceptable, the parties may request a settlement conference or evidentiary hearing.

that on or before Friday, June 13, 1980, the operator pay a penalty of \$550.00 in settlement of these matters and that subject to payment the captioned proposal for penalty be DISMISSED.


Joseph B. Kennedy
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

22 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PERRY R. BISHOP, Complainant	: Complaint of Discharge, : Discrimination or : Interference : : Docket No. KENT 79-161-D : : No. 4 Surface Mine : :
v.	:
MOUNTAIN TOP FUEL, INC., Respondent	: : : :
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceeding : : Docket No. KENT 80-98 : Assessment Control : No. 15-10188-03006 : : No. 4 Surface Mine : :
v.	:
MOUNTAIN TOP FUEL, INC., Respondent	: : :

DECISION

Appearances: Thomas P. Piliero, Esq., Office of the Solicitor,
U.S. Department of Labor, for Complainant and Petitioner;
Herman W. Lester, Esq., Pikeville, Kentucky, for
Respondent.

Before : Administrative Law Judge Steffey

Pursuant to an order providing for hearing, consolidating issues, and requiring furnishing of documents issued February 28, 1980, a hearing in the above-entitled proceeding was held on March 18 and 19, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves a complaint of discharge filed on August 7, 1979, by the Secretary of Labor and MSHA on behalf of Perry R. Bishop against Mountain Top Fuel, Incorporated, in Docket No. KENT 79-161-D.

The complaint alleged that respondent had violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 and asked that Mr. Bishop be reinstated to his former job, be awarded back pay from the time of his discharge on February 14, 1979, and be given other relief.

Subsequently, the complainant filed a motion for dissolution of the order of temporary reinstatement which had been issued on June 19, 1979, and reaffirmed on July 3, 1979, by Chief Administrative Law Judge Broderick after a hearing

MSHA v. Mountain Top, Docket Nos. KENT 79-161-D, et al.

held on June 29, 1979, with respect to the issue of whether the Secretary had properly found that the complaint was nonfrivolous.

The reasons that a motion for dissolution of the order of temporary reinstatement was filed was that Mr. Bishop had secured a job elsewhere and did not any longer wish to be reinstated at respondent's No. 4 Surface Mine.

I issued an order on October 24, 1979, granting the motion for dissolution of the order of temporary reinstatement. Complainant still seeks an award of back pay and all other relief previously sought in his complaint.

Respondent's petition for review of the order of temporary reinstatement was dismissed as moot by the U.S. Circuit Court of Appeals for the Sixth Circuit upon agreement of the parties that the action was moot in view of the dissolution of the order of temporary reinstatement.

I also issued an order on February 28, 1980, consolidating for hearing and decision in this proceeding the civil penalty issues raised by the Secretary's filing on February 14, 1980, of a Petition for Assessment of Civil Penalty in Docket No. KENT 80-98 alleging that respondent had violated section 105(c)(1) of the Act by refusing to reinstate Mr. Bishop to his job pursuant to the order of temporary reinstatement and seeking to have a civil penalty assessed for that alleged violation.

The order of February 28, 1980, also provided for the hearing in this consolidated proceeding to be held in Pikeville, Kentucky, on March 18, 1980.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 375-395):

My decision in this proceeding will be based on the findings of fact which I am first going to make. An explanation of my credibility determinations will be given after the findings of fact.

These findings of fact will be given in numbered paragraphs and I shall give the numbers at the beginning of each paragraph.

1. Complainant, Perry R. Bishop, began working for respondent, Mountain Top Fuel, Inc., on September 22, 1977. Mr. Bishop at first drove a truck for respondent for a period of nine or ten months. Then Mr. Bishop became the operator of a front-end loader which was used to remove overburden at respondent's No. 4 Surface Mine. Thereafter, respondent, at Mr. Bishop's request, transferred Mr. Bishop to the position of operating a Michigan 275 front-end loader which was used to clean the final five or six inches of overburden off the coal seam and for loading the coal into trucks which haul an average of 25 tons each.

2. On February 14, 1979, Mr. Bishop reported for work as usual at about 6:45 a.m. for a nine-hour shift beginning at 7 a.m. The temperature on February 14 was below freezing. Mr. Bishop checked

the fluid levels in the Michigan front-end loader and noticed that the brakes were inoperative. The brakes were operated by an air system which is subject to malfunctioning in below-freezing temperatures because of condensation which forms in the air lines and freezes so as to prevent air pressure from moving the brake drums. An alcohol container is built into the system which is designed to mix alcohol with the condensation and prevent ice from forming in the brake lines. Mr. Bishop did not check the alcohol level on February 14.

3. The first work done by Mr. Bishop on February 14 consisted of tramping his end loader from a location near the mine office to a coal stockpile situated about 2,000 feet from the office. Mr. Bishop loaded three trucks with the stockpiled coal. About one-half truck load of coal remained in the stockpile. Mr. Bishop then trammed his loader down to the pit area where another pile of coal had been prepared by the preceding evening shift. Mr. Bishop loaded two additional trucks from that pile of coal and once again about a half truck load of coal remained after those two trucks had been loaded in the pit area.

4. About 15 minutes were required to load the three trucks at the stockpile area. Mr. Bishop trammed the Michigan loader to the pit area between 7:15 and 7:30 a.m. Mr. Bishop loaded the two trucks in the pit area between 7:30 and 8 a.m. and began cleaning rocks and dirt off the top of the coal seam at about 8 a.m. About 9 a.m. a sixth truck driven by Mr. Billy Cool arrived in the pit area. Although Mr. Bishop could have loaded Mr. Cool's truck with the half-load of coal at the stockpile plus the half-truckload of coal in the pit area or by using coal which had already been uncovered between 8 and 9 a.m., Mr. Bishop continued to remove overburden from the coal seam instead of loading Mr. Cool's truck.

5. While Mr. Cool was waiting to get his truck loaded, he ate a sandwich and some other food, cleaned his windshield and lights, and went to the bathroom. Since truck drivers get paid for the number of loads hauled, rather than for the number of hours worked, Mr. Cool grew impatient about further waiting and decided to go home. As he was passing the mine office on his way home in his truck, he saw Mr. David Childers near the mine office and stopped to complain about having to wait from 15 minutes to 30 minutes to get a load of coal. Mr. Childers, who is vice-president, part owner, and foreman, persuaded Mr. Cool to return to the pit and asked Mr. Michael Adkins to load Mr. Cool's truck.

6. Mr. Childers then drove down to the pit in his truck and asked Mr. Bishop why he had not promptly loaded Mr. Cool's truck. Mr. Bishop's sole excuse for not loading the truck was that he was still cleaning off coal as he had been instructed to do it and that he couldn't have loaded the truck so as to satisfy Mr. Childers' instructions any sooner than he had done it.

Mr. Childers saw that Mr. Bishop had already cleaned off about ten loads or 250 tons of coal and couldn't understand why Mr. Bishop had not promptly loaded Mr. Cool's truck. Mr. Childers had had other complaints from truck drivers who were upset about having to wait for coal to be loaded. Mr. Childers had previously emphasized to Mr. Bishop the importance of loading trucks promptly. Therefore, Mr. Childers told Mr. Bishop that he was discharging Mr. Bishop at that time, which was about 9:30 a.m., for failure to load coal trucks promptly.

7. Since Mr. Bishop had parked his truck that morning at a place about ten miles from the mine site and had ridden to the mine with another employee, it was necessary for Mr. Childers to use his own truck to transport Mr. Bishop to the place where Mr. Bishop's truck had been left.

8. Counsel for MSHA on May 18, 1979, called Mr. Childers and advised him that he was shortly expecting to file a statement with the Commission which would result in the issuance of an order of temporary reinstatement which would require respondent to reinstate Mr. Bishop to his position as operator of the end loader. At that time MSHA's counsel asked Mr. Childers if he would voluntarily reinstate Mr. Bishop so as to make it unnecessary for MSHA's counsel to ask for an order of temporary reinstatement. Mr. Childers' response was that he did not intend to reemploy Mr. Bishop voluntarily, but Mr. Childers stated that he had partners whose opinions he would like to obtain before giving counsel a final answer. Therefore, Mr. Childers stated that he would provide MSHA's counsel with a final answer on Monday, May 21, 1979. When MSHA's counsel thereafter called Mr. Childers on May 21, Mr. Childers stated that respondent would not voluntarily reemploy Mr. Bishop.

9. Chief Administrative Law Judge Broderick issued on June 19, 1979, an order of temporary reinstatement. Respondent did not comply with the order on June 22, 1979, when Mr. Bishop appeared at respondent's mine. An MSHA inspector then issued on June 22, 1979, Citation No. 713218 alleging a violation of section 105(c) of the Act because of respondent's failure to reinstate Mr. Bishop on June 22, 1979. Citation No. 713218 gave respondent until June 25, 1979, within which to comply with the order of temporary reinstatement. On June 25, 1979, Mr. Bishop and the inspector returned to respondent's mine. When respondent still declined to reemploy Mr. Bishop, the inspector issued on June 25, 1979, an order of withdrawal for failure of respondent to abate Citation No. 713218 within the time provided. As indicated in the first part of this decision, an action in the Sixth Circuit concerning the order of temporary reinstatement was dismissed as moot after Mr. Bishop found a job elsewhere and requested that the order of temporary reinstatement be dissolved because Mr. Bishop no longer wished to be reemployed at respondent's mine.

10. Counsel for MSHA filed on February 14, 1980, in Docket No. KENT 80-98 a Petition for Assessment of Civil Penalty seeking to have a penalty assessed for the violation of section 105(c) alleged in Citation No. 713218 described in Finding No. 9 above. By order issued February 28, 1980, I granted the motion of MSHA's counsel for consolidation of the Petition for Assessment of Civil Penalty for hearing and decision with the issues raised by the complain filed in Docket No. KENT 79-161-D.

11. At the commencement of the hearing on March 18, 1980, MSHA's counsel asked that I assess a penalty if I found that respondent violated section 105(c)(1) in discharging Mr. Bishop. He also asked that I assess a penalty for respondent's having laid off all men on the second shift on May 18, 1979, in order to avoid having to reinstate Mr. Bishop.

12. As Finding No. 6 above indicates, respondent did not violate section 105(c)(1) when it discharged Mr. Bishop.

13. The evidence does not support MSHA's claim that respondent violated section 105(c) when it laid off the second shift on May 18, 1979. And Mr. Piliero, MSHA's counsel, agreed that was a fact this morning in his summation. The evidence shows that respondent was having difficulty in selling its coal as fast as it was being produced and that respondent decreased its work force to achieve economy in its operations. The decision to reduce the number of employees at respondent's mine had been made 2 weeks prior to May 18, 1979, at one of respondent's weekly meetings and that reduction in force was made effective on May 18, 1979.

14. The claims made by respondent to explain its reduction in employees are supported by the production data submitted in response to MSHA's questions. During the four quarters of the year 1978, respondent employed from 21 to 23 persons and produced from 10,378 tons in the first quarter of that year to 38,421 tons in the second quarter of that year. The large production shown in the second quarter was accompanied by a much larger number of hours worked than were reported in any other quarter. During the year 1979, respondent produced 27,922 tons in the first quarter and 24,954 tons in the second quarter with 21 employees. The third and fourth quarters show that the coal production dropped to 21,013 tons in the third quarter and 20,867 tons in the fourth quarter after respondent had reduced its number of employees to 13 and 11, respectively.

15. Respondent's president testified that when two 9-hour production shifts are worked, more equipment is down for repairs than when one shift is worked and that production time is wasted by the time lost in overlapping of the two shifts of miners leaving and arriving at the mine site and that a one-shift operation is more economical from a cost standpoint than a two-shift operation.

16. Respondent's president testified that the choice of the reduction in employees was made on the basis of both seniority and efficiency and for that reason some of the men retained would have had less seniority than Mr. Bishop if he had still been working for respondent on May 18, 1979, when the reduction in personnel occurred. Therefore, respondent said that Mr. Bishop would have been laid off on May 18, 1979, if he had still been working for respondent when that reduction in force occurred. For example, the elimination of the miners working on the night shift required the transfer of the night-shift supervisor to the day shift. The need to retain that valuable employee required the subsequent layoff of a person who had been working on the day shift.

17. On an annual basis respondent's No. 4 Mine produced 94,756 tons in 1979 according to Exhibit C or 101,623 tons annually if one uses the figure in the Assessment Order in Docket No. KENT 80-98. Assuming that the mine produced coal on an average of 250 days each year, the daily average tonnage would have ranged from 379 tons to 406 tons per day.

That concludes my findings.

There are several reasons for the credibility determinations which have resulted in my making findings which support my conclusion that Mr. Bishop was discharged for reasons other than the protected activities set forth in section 105(c)(1) of the Act. I am going to list the aspects of the testimony which have caused me to rule in favor of respondent. The items I shall discuss are listed as they occur to me and not with the intention of giving any item as being more important than another.

Mr. Bickford, who was responsible for repairing the brakes on the Michigan end loader stated that when he examined the alcohol container at the end of the day on February 14, 1979, the day of Mr. Bishop's discharge, he found that the container was empty. Mr. Bishop agreed that it was his responsibility to check the alcohol level in that container from time to time and yet he admitted that he had not checked the container on February 14 or for several days prior to February 14. Mr. Bishop agreed that it was important and necessary to drain water out of the air tanks to prevent freezing. Mr. Bishop also was aware of the importance of the alcohol in preventing freezing. He contributed to the malfunctioning of the brakes by not properly doing the maintenance work for which he was responsible.

Mr. Bishop's claim that the brake pedal remained flat on the floor board did not withstand cross-examination. Mr. Bickford testified that the brake pedal was held up by a spring and that it would not remain in a depressed condition even if there was no air pressure at a given time. When Mr. Bishop was cross-examined

about that claim, he did not deny that the spring existed but contended that the brake pedal sometimes would stick. When he was asked if he tried to raise the pedal to see if it was stuck, he said he did raise it, but it fell back to the floor. The logical conclusion from those admissions is that the brake pedal was not stuck in the down position or it would have remained upright when pulled up manually.

Mr. Bickford testified that the brakes on the end loader would not work on February 14 because of a freezing problem and that another mechanic corrected the problem by making a bypass around the frozen area. Mr. Bickford did not recall having been working on a water pump as alleged by Mr. Bishop on February 14 when Mr. Bishop asked him to check the brakes on the end loader and Mr. Bickford said that his answer to Mr. Bishop about repairing brakes on the end loader would not have been given in terms of what Mr. Childers might assign for him to do on that day.

Mr. Cool insisted that there was enough coal already prepared to provide a load for his truck and that he would not have driven away after waiting from 15 to 30 minutes to be loaded if the only coal available had still been intact in the coal seam and unavailable for immediate moving. Even though Mr. Cool's testimony may be motivated by self-interest, there is no way to explain Mr. Cool's displeasure at having to wait for a load of coal unless Mr. Bishop was taking an unreasonable amount of time in loading Mr. Cool's truck. Mr. Cool had been driving trucks for 17 years and said that he generally obtained a load of coal within four or five minutes. Even though the brakes were bad on the end loader on February 14, Mr. Bishop had loaded three truckloads at the beginning of his shift in a period of 15 minutes. There is nothing in the record to show that Mr. Cool's complaint about undue waiting was without merit or justification.

Mr. Bishop does not deny that several months before his discharge he turned over a truck hauling rock in order to avoid hitting a road grader driven by Mr. Childers. On that occasion Mr. Bishop claimed the truck's brakes were defective, but Mr. Childers claims they were in operating condition immediately after the truck was pulled back upon its wheels. Even though some rock fell from the truck to the place where Mr. Childers would have been sitting if he had not jumped out of the grader before the rocks landed, Mr. Bishop says that Mr. Childers did not become upset over the incident. Mr. Childers' ability to remain calm was demonstrated by the way he conducted himself in that instance and I believe his forbearance in that case shows that he is not a person who would be likely to discharge an employee who simply reports defective brakes on two occasions. In other words, we do not have in this case a long list of alleged safety complaints or evidence indicating that Mr. Childers was indifferent about safety matters.

Mr. Bishop's complaint filed with the Mine Safety and Health Administration was introduced as Exhibit 1 in this proceeding. Mr. Bishop states in that complaint, "I wish to make a discrimination complaint against Mountain Top Fuel. I was fired by David Childers (the boss) when I told him I couldn't work as fast as he ordered me to because the end loader I was running didn't have brakes on it." Mr. Bishop's own testimony in this proceeding does not support the wording of his complaint.

There is no evidence in the record to cast any doubt on Mr. Childers' claim that he drove the Webco truck to test its brakes after Mr. Bishop had stated that its brakes were defective. It seems quite credible that Mr. Childers would have made, as he claimed, a similar effort to check the brakes on the end loader when Mr. Bishop complained about its brakes being defective about five days before Mr. Bishop was discharged. At that time Mr. Childers says he instructed Mr. Bickford to repair the brakes and that Mr. Bickford reported to him that the brakes had been repaired. Therefore, Mr. Childers assumed that the brakes were operative on February 14, 1979, when he discharged Mr. Bishop because Mr. Bishop did not mention the defective brakes to Mr. Childers at the time Mr. Childers asked for an explanation of Mr. Bishop's failure to load Mr. Cool's truck. One of the least convincing aspects of Mr. Bishop's case has always been that he would fail to mention the defective brakes to Mr. Childers on February 14 until after Mr. Childers had discharged him and he was being driven by Mr. Childers down the mountain in Mr. Childers' truck.

MSHA's counsel says that Mr. Bishop's having asked Mr. Bickford to fix the brakes on February 14 is sufficient to show that Mr. Bishop was discharged for having engaged in a protected activity under section 105(c)(1), that is, for having made a safety-related complaint. I do not think the facts in this case support that argument. While it may be said for some purposes that knowledge of an agent may be attributed to the principal, there was a time element here which cannot be satisfied by that argument. Neither Mr. Bishop nor any other witness has been able to show that Mr. Childers knew of a defective brake claim on February 14 when Mr. Bishop was discharged.

Before I can make a finding that Mr. Bishop was discharged for having made a safety-related complaint, I must be able to cite evidence clearly showing that there was a pattern of activity by the complainant which so annoyed the respondent that the respondent discharged the complainant for that pattern of conduct rather than for the reason respondent gave for discharging the complainant. Two complaints about defective brakes to Mr. Childers a few days before the discharge simply are insufficient to show that Mr. Childers really discharged Mr. Bishop for complaining about brakes rather than for failing to load coal trucks promptly.

The next part of this decision will be related to Docket No. KENT 80-98.

Docket No. KENT 80-98

I have already made findings regarding the civil penalty issues insofar as the finding of occurrence of a violation is involved. Finding No. 9 above shows that respondent refused to comply with the order of temporary reinstatement while it was in force. Section 105(c)(3) of the Act provides that, "Violations by an person of paragraph (1) shall be subject to the provisions of Sections 108 and 110(a)." Paragraph (1) referred to in the foregoing quotation, among other things, prohibits any person from interfering with the exercise of a miner's statutory rights under the Act. Respondent violated paragraph (1) in refusing to comply with the order of temporary reinstatement. Section 110(a) requires that a civil penalty be assessed for a violation of any provision of the Act. Section 110(i) requires that penalties be assessed after giving consideration to the six criteria set forth in section 110(i).

The first criterion is respondent's history of previous violations. It has been stipulated by MSHA's counsel that respondent has not previously violated section 105(c) of the Act. Therefore, I find that there is no history of previous violations to be considered in this instance.

The second criterion is the appropriateness of the penalty to the size of respondent's business. As indicated in Finding Nos. 14 and 17 above, respondent's No. 4 Mine once employed a total of 23 miners and now employs 11 miners to produce about 379 tons of coal per day. On the basis of those data, I find that respondent operates a small mine and that any penalty assessed should be in a low range of magnitude insofar as the size of respondent's business is concerned.

The third criterion is the question of whether payment of penalties would cause respondent to discontinue in business. Respondent has introduced no financial data to show that payment of penalties would have an adverse effect on its ability to continue in business. In the absence of any evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business.

The fourth criterion is whether the operator was negligent in violating the Act. The evidence shows that respondent deliberately refused to reinstate the complainant. In the preliminary hearing on the issue of whether the complaint was frivolous, respondent stated that it was paying into an escrow account the money it would otherwise have paid Mr. Bishop if he had not

been discharged on February 14, 1979. I agree with Chief Judge Broderick's statement at the preliminary hearing that payment of wages into an escrow account will not satisfy the purpose of the temporary reinstatement provisions of the Act because the purpose of temporary reinstatement is to provide the discharged miner with income while the merits of his complaint are being determined. It may seem harsh to assess a penalty in a case in which respondent's position has been upheld on the merits, but Congress has already balanced those considerations and has provided for temporary reinstatement. The deliberate refusal to comply with the order of temporary reinstatement and the refusal to abate Citation No. 713218 is tantamount to gross negligence because management knew they were obligated to comply with the order but steadfastly refused to do so.

The fifth criterion is the question of the gravity of the violation. MSHA's counsel has stipulated that respondent's refusal to reinstate Mr. Bishop did not expose any miners to the likelihood of injury. If the criterion of gravity is intended to refer only to the physical exposure to danger, I believe that the criterion of gravity is inapplicable in this instance. On the other hand, if gravity is interpreted from the standpoint of the loss of a family's income by the operator's refusal to reinstate a complainant, the gravity of the violation could be considered as being a serious one. Also, if one thinks of gravity from the standpoint of the damage done to the miner's faith in the Act if the Commission's orders can be ignored with impunity, the violation would be serious from that viewpoint. I think that all aspects of the violation have to be considered and I find that the violation was serious under the aspects I have just explained.

Finally, the sixth criterion is the demonstrated good faith of respondent in attempting to achieve rapid compliance after notification of the violation. The evidence shows that respondent exerted no effort to comply with the order of temporary reinstatement after Citation No. 713218 was issued. It was respondent's refusal to attempt to achieve compliance which caused the inspector to issue Withdrawal Order No. 713219. Since that order was labeled by the inspector as a "non-area closure order," it had no adverse effects upon respondent's coal-producing activities.

My consideration of the six criteria would require assessment of a maximum penalty of \$10,000.00 except for the important fact that respondent is a small company and has no prior history of violating section 105(c). Taking into consideration the other matters I have discussed above, requires assessment of a penalty of \$1,500.00

ULTIMATE FINDINGS AND CONCLUSIONS

(1) Complainant failed to prove that he was discharged on February 14, 1979, because of any activity protected under section 105(c)(1) of the Act; therefore, the complaint filed in Docket No. KENT 79-161-D should be dismissed.

(2) Respondent violated section 105(c) of the Act by refusing to comply with the order of temporary reinstatement issued June 19, 1979, as confirmed on July 3, 1979, and respondent should be assessed a penalty of \$1,500.00 for that violation.

(3) Respondent, as the operator of the No. 4 Surface Mine, is subject to the Act and to the Regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) The complaint filed on August 7, 1979, in Docket No. KENT 79-161-D is dismissed.

(B) Respondent, within 30 days from the date of this decision, shall pay a civil penalty of \$1,500.00 for the violation of the Act referred to in paragraph (2) above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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22 MAY 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-7
Petitioner : Assessment Control
v. : No. 15-09827-03002
MIDDLE KENTUCKY CONSTRUCTION, INC. : Crapshooter No. 2
Strip Mine

DECISION

Appearances: Darryl A. Stewart, Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Byron W. Terry, Field Safety Director, for
Respondent.

Before : Administrative Law Judge Steffey

Pursuant to notice of hearing issued February 22, 1980, a hearing in the above-entitled proceeding was held on April 3, 1980, in Evansville, Indiana, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of the evidence presented by the parties, I rendered the bench decision which is reproduced below (Tr. 57-65):

This hearing involves a Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-7 on May 21, 1979, by the Mine Safety and Health Administration seeking to have civil penalties assessed for two alleged violations of 30 CFR 77.1710(e) by Middle Kentucky Construction, Incorporated.

The issues in this proceeding, of course, are whether a violation of section 77.1710(e) occurred, and, if so, what civil penalty should be assessed after consideration of the six criteria in section 110(i) of the Act. The parties have entered into stipulations with respect to some of the criteria, but the first matter to be considered and really the largest issue in this case is whether a violation occurred.

Section 77.1710 provides that employees working in a surface coal mine shall wear protective clothing. And subsection (e) of that section provides that the employees will wear suitable protective footwear. There is a practically identical provision in the underground portion of the regulations which is section 75.1720, subsection (e) which has the same language as section 1710 has. Namely, that the miners will wear suitable protective footwear.

The two citations involved in this proceeding are Citation Nos. 399710 and 399711. Both of them were issued the same day and the only difference between them is a mechanic, in one instance, was not wearing what the inspector felt to be suitable protective footwear, and in the other instance a person who lubricates equipment and does other maintenance work was not wearing what the inspector felt was suitable protective footwear.

In his testimony, the inspector indicated he believed the term, suitable protective footwear, had to be interpreted in accordance with the job that a given miner is doing. In these two instances, the inspector felt that it was quite likely and, in fact, that it was probable a mechanic or a maintenance man might have something fall on his feet which could crush them. And, that he felt that these two gentlemen involved in the two citations should have been wearing steel-toed shoes. The operator's contention in this case is that he agrees that the term, suitable protective footwear, should be interpreted to deal with the situation confronting the individual miner and that he stresses the fact that in this instance the men, both the mechanic and the maintenance worker, were working around equipment which is subject to having diesel fuel and other greases or greasy substances accumulate on the floor or spill on the ground and that it's quite possible for these individuals to slip.

And that he felt that the greater danger to the employees was that they would slip and hurt themselves rather than that something would fall on their feet, because, for example, he says that any heavy piece of equipment that might be used by a mechanic, such as a part of an engine or transmission, would be lifted by a crane and that the men themselves would not be handling heavy equipment or parts.

There is a considerable amount of merit to the operator's contention that the phrase, suitable protective footwear, in the instances here involved could well indicate that the men ought to wear equipment that would keep them from sliding on floors or places that are slippery, but there's also a considerable amount of merit to the inspector's contention that even though he agrees that it's helpful to have nonslipping soles on the shoes that the men wear in such an area, that it's also important that they be protected from falling objects. And, of course, even a big wrench or a big hammer could easily fall on a person's foot with enough force to cause him to miss a day's work that he wouldn't have missed otherwise had he had on the steel-toed shoes.

So, the regulations are designed to protect people against all dangers and while there's a considerable amount of merit to the operator's argument in this case, I think that the inspector's contention that steel-toed shoes are required is also a reasonable interpretation of the phrase, suitable protective footwear, and, therefore, I find a violation of section 77.1710(e) did occur.

The inspector presented as Exhibit 8 a picture of a sign which indicates that the operator does require that hard hats and steel toes be worn in the area involved in this proceeding.

The spokesman for the operator in this proceeding indicated that the company is extremely safety minded and it was their intention for people to wear steel-toed shoes in this area, and the inspector agreed this is a company which should be at the top of the list for those who encouraged and insisted on safety-minded activities at its mine.

The facts did show also that the gentlemen involved in these two citations, the mechanic and the maintenance man, did not specifically obtain the operator's permission to wear shoes which may have protected them from slipping but did not have steel toes on them.

The former Board of Mine Operations Appeals in North American Coal Corp., 3 IBMA 93 (1974), held with respect to a similar provision in section 75.1720, that if any operator had erected a sign advising people to wear safety goggles and the individual miner did not wear the safety goggles, even though they were provided by the company, that no violation of the section there involved should be found to have occurred.

The Commission in United States Steel Corp. v. MSHA, in a decision issued September 17, 1979, 1 FMSHRC 1306, held that that North American case decided by the Board should be limited to the language of that standard which was, as I said, 30 CFR 75.1720.

The effect of that is that I don't think the Commission would favorably look upon a holding in this instance that the fact that these two gentlemen had failed to comply with the operator's clearly exhibited sign as shown in Exhibit 8, that steel toes were required, is a reason to find that no violation occurred.

We now come to the six criteria, as to which there have been some stipulations. First, it has been agreed that Middle Kentucky Construction, Incorporated, is subject to the jurisdiction of the Act and the regulations promulgated

thereunder. It was also stipulated that the inspector involved was properly a representative of the Secretary and has the authority to make the inspection involved in this case. As to the criterion of whether the payment of penalties would cause the operator to discontinue in business, it was stipulated that payment of penalties would not cause the operator to discontinue in business. It was also stipulated that Middle Kentucky is a small company and, therefore, I find that any penalties should be in a low range of magnitude.

The inspector's Exhibits 3 and 6 show that the operator made a normal good faith effort to achieve rapid compliance and it was so stipulated; therefore, any penalties assessed should take, and will take, that mitigating factor into consideration.

The inspector's Exhibits 2 and 5 show that the inspector did not think the operator could have known or predicted the occurrence of the two workers failing to wear safety-toed shoes. And that finding by the inspector is consistent with the operator's testimony to the effect that neither the mechanic nor the maintenance man obtained the operator's permission when they came to the mine without safety-toed shoes. Therefore, the evidence shows that the operator was nonnegligent in the occurrence of the two violations.

The only criterion left to be considered then is that of gravity. The inspector agreed that it was important that the men wear shoes that would keep them from slipping and they apparently were doing so. So, that would have been some protection from one of the hazards to which they are exposed in their work. The inspector's illustration of an accident that occurred to him when he was not wearing safety-toed shoes many years ago before the effective date of this Act and also one given by the operator's spokesman show that safety-toed shoes may or may not be sufficient to keep a person from having an injury, but they at least are some protection and it's better to have some protection than none.

The specific point that is being made here is that a heavy object may fall on one's toes where the safety toe is helpful, as in the illustration given by the inspector, but in the one given by the operator's spokesman the object fell just past the area covered by the safety-toed shoe and therefore injured the miner's arch at a point that was not protected by the steel toes. Of course, the inspector pointed out that some operators require a steel protective plate over the arch as well as over the toe and that, of course, would have been protection in the situation given by the operator's spokesman.

But the inspector does not feel that requiring a steel plate over the arch is within the confines of protective footwear as it's now interpreted by the inspector. So, I think in this instance that we can find that considering the type of work these two miners were doing and the possibilities that still exist for injury that the violation was only moderately serious.

There was some testimony in this case about the fact that the operator requires the miner who violates the regulation which the company is trying to enforce to pay the penalty, if one is assessed, for his failing to carry out the company's and the Government's safety regulation.

That may be effective in bringing about more consistent conscientious adherence to the safety regulation than we would have without the provision, but I don't believe that the Act contemplates that I am to take the financial circumstances of a given miner into account in assessing a penalty. As the Commission stated in the United States Steel case cited above, it is well settled that operators are liable for violations without regard to fault. So, I don't think in the assessment of a penalty I should transfer from respondent to an individual miner application of the criteria of negligence or gravity or whether the payment of penalties would affect an individual's financial condition. I don't think those are matters that I should consider in light of the way the Act was drafted and should be enforced. Consequently, I'm not taking those matters into consideration.

Nevertheless, I think that there are many extenuating circumstances about this case and the conditions under which the employees were working and the fact that the inspector does not think that the operator was negligent which indicates that a small penalty should be assessed in this instance. Therefore, a penalty of \$15.00 will be assessed for each violation.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling \$30.00 which are allocated to the two violations as follows:

Citation No. 399710 10/31/78 § 77.1710(e)	\$15.00
Citation No. 399711 10/31/78 § 77.1710(e)	15.00
Total Penalties in Docket No. KENT 79-7	<u>\$30.00</u>

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

MSHA v. Middle Kentucky, Docket No. KENT 79-7 (Contd.)

Distribution:

Darryl A. Stewart, Attorney, Office of the Solicitor, U.S. Department
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Middle Kentucky Construction, Inc., Attention: Byron Terry, Safety
Director, Crapshooter Mines, P.O. Box 53, Jetson, KY 42252
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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22 MAY 1980

McCOY ELKHORN COAL CORPORATION,	: Application for Review
Applicant	:
	: Docket No. KENT 80-122-R
v.	:
	: Order No. 721484
SECRETARY OF LABOR,	: December 5, 1979
MINE SAFETY AND HEALTH	:
ADMINISTRATION (MSHA),	: No. 4 Mine
Respondent	:

DECISION

Appearances: Fred G. Karem, Esq., Lexington, Kentucky, for Applicant;
William F. Taylor, Esq., Office of the Solicitor, U.S.
Department of Labor, for Respondent.

Before : Administrative Law Judge Steffey

Pursuant to an order issued February 20, 1980, a hearing in the above-entitled proceeding was held on March 28, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 260-275):

This proceeding involves an Application for Review which was filed by McCoy Elkhorn Coal Corporation on December 31, 1979, in Docket No. KENT 80-122-R. The Application seeks review of Order No. 721484 issued under sections 107(a) and 104(a) of the Federal Mine Safety and Health Act of 1977. The order alleges a violation of 30 CFR 75.703. The civil penalty issues which will be raised when and if MSHA files a Petition for Assessment of Civil Penalty were consolidated with the issues raised by the Application for Review and evidence was received at the hearing concerning the six criteria which must be considered if a violation under section 75.703 is found to have occurred. This decision will sever the civil penalty issues for future decision when I have received the Petition for Assessment of Civil Penalty. That may be several months after this decision is issued. The Applicant has raised several factual issues in its Application for Review but the primary issue, of course, in any case where an order is issued under section 107(a), is whether an imminent danger existed at the time the order was issued. In order to apply the law to any case, it's necessary to make some findings of fact and I shall now make those findings.

Findings of Fact

1. McCoy Elkhorn Coal Corporation operates three coal mines which have been numbered 1, 3 and 4. The No. 4 mine is the one which has primarily been discussed in this proceeding. That is the mine in which the imminent danger order was issued. The No. 4 mine operates on two production shifts and has a maintenance shift on the third shift. The mine utilizes conventional mining methods and uses a cutting machine, loading machine, two shuttle cars, a conveyor belt, and two roof bolting machines. The average daily production from the No. 4 mine is approximately 600 tons. The production from the No. 3 mine is also 600 tons and the No. 1 mine produces approximately 1,200 tons of coal a day. The total production, therefore, of the three mines is, depending on how well coal is running, 2,400 to 3,400 tons per day. McCoy Elkhorn is an affiliate of General Energy which seems to own some other coal mines and may do some oil exploration.

2. Inspector Charles Chafin on December 5, 1979, made an inspection at the No. 4 mine. He was accompanied underground by Mr. Michael Norman who is McCoy Elkhorn's Safety Director. When Inspector Chafin arrived on the section he first made an inspection to determine whether the equipment had frame grounds. To do that, it was necessary to pull the shuttle car, which in this instance was the right-drive shuttle car, up beside the loading machine. By doing that, he could check with his ohmmeter to determine whether there was continuity of the frame ground on both pieces of equipment.

At that time it was agreed by both Inspector Chafin and the company's electrician, who was Mr. Reed, that the frame ground was inoperable on either the shuttle car or the loading machine. Therefore, the inspector checked the frame of the right-drive shuttle car and determined that it was not energized. Then he had the right-drive shuttle car operator, who was Mr. James Stotridge, to back the right-drive shuttle car up approximately 40 feet outby the loading machine. At that point, Inspector Chafin knew that either the loading machine or the right-drive shuttle car had a defective frame ground. He did not know which had the defective frame ground, so he instructed the mine personnel to get the disconnect, which is also called a cathead in this case, and bring it up to the right-drive shuttle car so that he could check the continuity of the ground wire in the trailing cable.

He determined when he was able to place his ohmmeter on the shuttle car and also upon the ground wire on the shuttle car, that there was not continuity in the ground wire of the

shuttle car's trailing cable. At that point, he told Mr. Norman, the Safety Director, that the shuttle car should stay parked where it was until the trailing cable had been further checked.

3. While the men were in the process of bringing the cathead or disconnect for the trailing cable up to the right-drive shuttle car, Inspector Chafin also pulled, or had someone pull, the left-drive shuttle car over to the loading machine and made a check for frame-ground purposes on those two pieces of equipment and it was established that they both did have operable frame grounds. By process of elimination, Inspector Chafin knew that the right-drive shuttle car was the one which had a defective trailing cable or defective frame ground.

4. The right-drive shuttle car operator, Mr. James Stotridge, got off of the right-drive shuttle car as soon as he had pulled it back from the loading machine and proceeded to assist the electrician in bringing the cathead or disconnect up to the right-drive shuttle car so it could be inspected by Inspector Chafin.

5. After the inspector had determined that the ground wire was defective in the trailing cable, the electrician and Mr. Stotridge began to look for the defective place in the cable and they found it before the inspector and Mr. Norman had gotten out of shouting distance. The result was that the inspector came back and looked at the place which they had located which was a soft area in the permanent splice. A cut was made into the permanent splice. It was determined that the ground wire was separated approximately one inch which meant there was no continuity and the trailing cable would not have performed its intended purpose of grounding the machine in case of an electrical fault. The inspector, at that point, asked the personnel to cut the defective permanent splice out of the trailing cable and asked them for the splice so that he could use it as the subject of a memo to the head of the Mine Safety and Health Administration for the purpose of trying to get the maker of the splice, the Southern Mine and Cable Service Company, to improve on the quality of its splices since the inspector had encountered several other defective splices made by the same company. All mine personnel indicated to the inspector that they should ask their supervisor, Mr. Charles, the Superintendent of the mine, about taking the splice.

6. Mr. Reed, the electrician, then proceeded to install a new permanent splice. He then checked the trailing cable to determine that there was continuity on the

ground wire and the equipment was reenergized even though there was no use made of that right-drive shuttle car on December 5 for production of coal. Coal was produced on the section that day, but because of the mining development at that point only the left-drive shuttle car was utilized for transporting coal.

7. When Inspector Chafin and Mr. Norman reached the surface of the mine, they went into the mine office where Mr. Charles, the Superintendent, was waiting for them and the inspector was carrying the defective permanent splice. The inspector either asked or told Mr. Charles that he was going to take the cable back to the MSHA Office for the purpose of demonstrating what a poor splice the Southern Mine and Cable Service had installed in the cable to the right-drive shuttle car. Mr. Charles took exception to giving the inspector the splice because Mr. Charles stated that he wanted to show the splice to Southern Mine and Cable Service Company, so that he could ask them to improve on their splices. Mr. Charles had been using that company's services for approximately 5 years to repair his trailing cable and had not previously been dissatisfied with its work. Also, if one looks at the defective permanent splice which is Exhibit 2, it is actually impossible to determine whether the splice was actually defective at the time it was made. As the inspector testified, and as others also testified, the ground wire in the splice probably separated under strain. If it separated under strain, then it could have been made properly in the first place, but still would have looked defective, and would have been defective, at the time it was found to have a separated ground wire on December 5, 1979.

In order to apply the foregoing findings of fact to the law as it exists at the present time, I think I should give the definition of imminent danger which was set forth by the Seventh Circuit Court of Appeals in Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, (1974). In that case, the court said that an imminent danger exists when the condition is of such a nature that a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. That definition was also adhered to by the Fourth Circuit Court of Appeals in Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (1974). Of course, the court in each of those cases was affirming the former Board of Mine Operations Appeals which had originally formulated a very similar definition in a case known as Eastern Associated Coal Corp., 2 IBMA 128 (1973).

In United States Steel Corp., 3 IBMA 50 (1974), the former Board held an imminent danger must be based on the facts existing at the time the order was issued. Another well known case the former Board decided in dealing with the question of imminent danger occurred in Old Ben Coal Co., 6 IBMA 256 (1976). In that case, the inspector had seen a miner riding on a man trip with his feet dangling over the side of the car and the inspector said that it was an imminent danger for a man to ride with his feet dangling off the car. The miner got off the car. The inspector then wrote an imminent danger order. The Board affirmed the judge's decision in that case which had held that since the imminent danger had to exist at the time the order was issued, the inspector's order was invalid because the imminent danger did not, in fact, exist after the miner got off the car.

I think the Old Ben case applies very strongly to the facts we have in this case. We have a situation in which Inspector Chafin was very concerned about whether this right-drive shuttle car should continue to be used. The inspector said that if it were to continue to be used with the lack of a proper frame ground on it, that it could become energized, and if it did become energized, either the operator in getting off of it could be electrocuted, or any other miner who might touch the frame of the machine could be electrocuted.

The inspector's concern was justified, but the difficulty that I have with the order is that the inspector says he issued it when he determined that the frame ground wire was separated. Now, we have a diagram in this case which is Exhibit 6, which was drawn by the inspector and that shows without any doubt and the testimony also shows without any doubt that when the inspector determined that there was no continuity in the ground wire, there was no power on the shuttle car whatsoever. Not even the power of a battery was involved because the determination of continuity of the ground wire is based on the ability of the ohmmeter to test the existence of an operable grounding mechanism. Since the inspector issued the imminent danger order verbally at a time when there was no power on the machine, there could not have been an imminent danger at that moment.

Now it is true, just as in the case where the miner's feet were dangling off the car, that there could have been an imminent danger at the time the operator of the shuttle car moved it back from the loading machine, but the inspector didn't know at that point that the right-drive shuttle car was the piece of equipment which had the defective permanent ground and the inspector didn't say that he issued the imminent

danger order at that point. He couldn't have, because he didn't know for certain that the lack of a frame ground might not be on the loading machine, and he didn't issue one for the loading machine and the shuttle car. He only issued it on the right-drive shuttle car. So it is the equivalent of the foot-dangling situation as I see it. The inspector was concerned about the existence of a frame ground and the possibility of someone being electrocuted and he was justified in being concerned, but he did not issue the imminent danger order at the time the hazard may have existed because the inspector was not certain that there was a lack of a frame ground until after the shuttle car had been deenergized.

In the arguments today, I think the attorneys may have overlooked one of the points that most concerned the inspector, and that concern was discussed in the Eastern Associated case, supra, which was appealed to the court, wherein the Board of Mine Operations Appeals had inserted the clause; "if normal operations designed to extract coal in a disputed area proceed". That proviso was not in the definition that Congress placed in the Act, but all the courts which considered the issue agreed with the Board that the proviso was legitimately inserted because, unless the miners were going to keep mining coal, there wouldn't be exposure to hazards. Here the inspector said that he was concerned that if he issued only a citation, that they might put this defective trailing cable back on the right-drive shuttle car so that the strain would continue on the trailing cable and produce an energized frame which might have caused someone to be electrocuted.

Well, in this case we have all sorts of facts that just simply do not support the inspector's concern in this instance because first of all, there's nobody that challenges the company's testimony through all its witnesses that the right-drive shuttle car was not going to be used that day. So, if normal mining operations had continued, that shuttle car would not have been used. In addition to that, before the inspector left the area, the defective ground wire having been discovered, the trailing cable had been severed and the defective splice had physically been removed. Therefore, he could have left the area knowing that the trailing cable could not be used again until it had been properly repaired.

There are some other aspects of the case which have been argued by the parties and I think that there is some merit in most of them. One of them is whether the inspector ever made it clear that he had really issued an imminent danger order. The inspector said, and Mr. Taylor argues, that the inspector told them that the right-drive shuttle car

was parked and was not to be moved until the trailing cable had been corrected. Mr. Norman says that he asked the inspector if that statement was meant to be an order or a citation, and apparently the inspector did not give him a candid reply. That is, the inspector left the company in doubt as to whether he had found existence of an imminent danger.

I'm not holding in this case that an inspector has to use the exact definition that I just discussed in the Court of Appeals cases, nor am I saying that he has to use the exact language in the Act, but, when he was asked whether he had issued an imminent danger order, I think he was obligated to make it perfectly clear that he either had or had not. I don't think there should be any doubt about it. Yet, every witness who testified here today on behalf of the Company, without exception, and those witnesses were put out of the hearing room until they testified, all said they thought they had been issued a citation and not an imminent danger order.

Whatever language the inspector uses, he must make sure that the company knows that he has issued an imminent danger order. Although the imminent danger had ceased to exist in this case before a violation was cited, miners who are in doubt about the inspector's action may continue to work and expose themselves to an imminent danger without actually realizing that they have been ordered to withdraw from the mine except for purposes of correcting the imminent danger.

In Kaiser Steel Corporation, 3 IBMA 489 (1974), the former Board of Mine Operations Appeals stated that an inspector's manual does not have the force of regulations. I think the inspector correctly said in this case that he was not obligated to follow the exact provisions of the inspector's manual, a portion of which is Exhibit B in this case, which does say or at least suggests, that the inspector when he issues an imminent danger order should place a closed poster on the controls of the equipment if equipment is involved. Now, the inspector explained his reason for not doing that in this case by saying that he actually issued an imminent danger order on the trailing cable and not the right-drive shuttle car, and that if he had tried to put a danger poster, closed poster, on the trailing cable, that it would not have stayed on it even if he had done so. Regardless of whether the inspector has to follow the manual, as I have indicated, I think he has to make it clear to the company's personnel that he has issued an imminent danger order. If the inspector had put a closed poster on the trailing cable or had laid one down there by it, no one would have been likely to have claimed in this case that there was doubt as to whether he had issued an imminent danger order.

Also the inspector's order states that a violation of section 75.703 existed at this mine in that the frame of the right-drive shuttle car was not frame grounded. So it is a little hard when you read that order to put out of your mind the fact that you have only a trailing cable that has been cited and not also a right-drive shuttle car. The inspector said his primary concern was that someone would use the right-drive shuttle car, that its frame would become energized, and that someone would touch the frame and be electrocuted. There is no reason why the inspector could not have put his closed poster on the right-drive shuttle car because that would have kept anyone from using the very piece of equipment about which he was concerned. It's true that his order says the area covered by the withdrawal order was the trailing cable to the right-drive shuttle car; even though that is stated, the fact remains that he was concerned about someone using the right-drive shuttle car. So, it is difficult to separate the trailing cable from the right-drive shuttle car since the imminent danger has to relate to the shuttle car as well as relate to the trailing cable.

Mr. Taylor has indicated that he feels that this Order No. 721484 complies with all the provisions of section 107(a), as well as subparagraph (c) because the order contains the detailed description of the conditions or practices which cause and constitute an imminent danger. The former Board of Mine Operations Appeals held in Armco Steel Corp., 8 IBMA 88 (1977), that an inspector is required to write an imminent danger order so that the person who receives a copy of it will know exactly what constitutes the imminent danger. I am not at all sure that the inspector made it clear in this case because, you see, he issued the imminent danger order verbally before he knew for certain about the separation of the ground cable and yet, the order itself states "when checked with an ohmmeter the Ground Conductor was separated approximately one (1) inch in a vulcanized splice made by Southern Mine and Cable Service." Now, you see that separation was not known at the moment he issued the order, so it is not a part of the imminent danger at that point. I think one other problem here was that the inspector was intent on, and I think he was properly motivated, but he was intent on trying to get Southern Mine and Cable Service to do a better job on their splices. In trying to fight that battle and show documentation of it in the order he was issuing, the inspector lost sight of what he really wanted to cite as an imminent danger. Now perhaps not any one of these items by itself would be sufficient for me to hold that the inspector's order was invalid, but I think when you add all these problems up, that the company had a legitimate complaint here about whether it had been properly treated.

In Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975), the court held that an inspector should be upheld unless he has severely abused his discretion. The court, in that case, said the operator of a coal mine is primarily interested in production and that he may, in some instances, give less emphasis to safety than he should because giving attention to safety regulations may cut down on the amount of coal he can produce. So the court said when an inspector is in the mine he is concerned about mine safety and he is the one who may have to disagree with management, as to enforcement of safety regulations. So the court gave the inspector, as it should, an edge any time we have a real close point about whether there was an imminent danger or wasn't. Any time there is doubt, the inspector should be upheld unless he has clearly abused his discretion. I think in this case there are just too many areas where the inspector's order was unclear as orally issued and, when written, was based on facts not known when the order was orally issued.

I agree whole heartedly that the inspector was properly motivated and I congratulate him on being concerned. It is certain that he accomplished his objective in seeing that this equipment was repaired and that it was not used in a condition that could have caused someone to be electrocuted. But I'm required to follow the precedents the former Board has laid down, until the Commission disagrees with the Board, or the Commission reverses me for misunderstanding the precedents, but I think in this instance, there was not an imminent danger on the facts that existed at the time the inspector issued the order. Therefore, I find that the order is invalid and should be vacated.

WHEREFORE, it is ordered:

(A) Order No. 721484 dated December 5, 1979, is vacated and the Application for Review in Docket No. KENT 80-122-R is granted.

(B) The civil penalty issues are severed from the issues raised by the Application for Review and the civil penalty issues will be decided on the basis of evidence received in this proceeding when I receive a petition for assessment of a civil penalty for the violation of section 75.703 alleged in Order No. 721484. 1/

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone 703-756-6225)

1/ Even after an imminent danger order has been vacated, the violation cited therein may become the subject of a civil penalty proceeding (Eastern

Distribution:

William F. Taylor, Attorney, Office of the Solicitor, U.S. Department
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1/ (Continued from p. 9

Associated Coal Corp. 1 IBMA 233 (1972); Zeigler Coal Co., 2 IBMA 216
(1973); and Zeigler Coal Co., 3 IBMA 64 (1974)).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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23 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. LAKE 80-247
Petitioner	:	A.C. No. 33-01069-02027V
v.	:	
	:	Sunnyhill No. 9 North Underground
PEABODY COAL COMPANY,	:	Mine
Respondent	:	
	:	
	:	Application for Review
PEABODY COAL COMPANY,	:	
Applicant	:	
v.	:	Docket No. VINC 77-91
	:	
	:	Order No. 1 WS;
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	January 27, 1977
	:	
Respondent	:	Sunnyhill No. 9 North Underground
	:	Mine

DECISION

Before: Judge Charles C. Moore, Jr.

On May 5, 1978, I issued a decision in Docket No. VINC 77-91 in which I ruled that MSHA had failed to prove a violation of 30 C.F.R. § 75.400. I based that ruling principally upon the decision of the Interior Department's Board of Mine Operations Appeals in Old Ben Coal Company, 8 IBMA 98 (1977). On December 12, 1979, the Federal Mine Safety and Health Review Commission reversed the Board's Old Ben decision (Commission Docket No. VINC 74-11) and on the same date reversed my decision in Peabody and remanded it for further proceedings consistent with the Commission's Old Ben decision. Thereafter, on April 4, 1980, the Secretary of Labor filed the penalty proceeding which has been assigned Docket No. LAKE 80-247.

The Secretary has moved for summary decision in both cases and Respondent has opposed this motion and moved to dismiss the penalty case. For the reasons set forth below, I grant Peabody's motion to dismiss the civil penalty case and grant the Secretary's motion for a decision affirming the unwarrantable failure order which was the basis of both cases.

As to the affirmance of the withdrawal order, I rely on my decision of May 5, 1978. On page 3 of that decision I stated that but for the Board's Old Ben decision "I would probably have found the aforementioned coal dust accumulations to have constituted an 'unwarrantable failure' violation * * *." The word "probably" caused the above to be an understatement. The record clearly shows the existence of the accumulations and the inspector estimated that because of the extent of the accumulations the operator should have been aware of them for at least a week prior to the inspection. That is enough to support a finding of unwarrantability. This estimation was not rebutted and, as noted in the opinion, even Old Ben's witness thought that a notice of violation would have been justified if the accumulation had not been cleaned up. The fact that the inspector did not find any notation of an accumulation when he examined the preshift inspection reports does not rebut his estimate that the accumulations had existed for at least a week. There is no need for further evidence or for further briefing. The order of withdrawal is affirmed.

As to Docket No. LAKE 80-247, an earlier civil penalty petition, Docket No. VINC 78-320-P, sought civil penalties for the same alleged violation involved in Docket Nos. LAKE 80-247 and VINC 77-91. After my May 5, 1978, decision in Docket No. VINC 77-91, Peabody moved to dismiss Docket No. VINC 78-320-P because I had already ruled that no violation had been established. The motion to dismiss was filed on July 10, 1978, and MSHA did not oppose the motion. I granted the motion to dismiss on August 2, 1978, and MSHA did not seek review. */

Respondent's motion to dismiss the first civil penalty proceedings prayed for dismissal with prejudice (see Exhibit "D" of petition for assessment of civil penalty in Docket No. LAKE 80-247). The August 2, 1978, ruling granted dismissal for the reasons set forth in the motion (vacation of the underlying order) and for the Secretary's failure to oppose the motion. The question is how to construe an involuntary dismissal which does not indicate on its face whether it was granted with or without prejudice after the moving party requested dismissal with prejudice.

*/ In the interim between remand of Docket No. VINC 77-91 to me on December 12, 1979, and the filing of the second civil penalty case, Docket No. LAKE 80-247 on April 4, 1980 (I actually had some advance notice that the penalty suit would be filed but I do not recall when that notice was received), the parties had been negotiating a settlement of the review proceeding. I gathered that the Government felt that it had won its principal point in the Old Ben case and that since the penalty case in Peabody had already been dismissed there would be little point in devoting much effort toward the remand. I was led to believe that Peabody felt the same way and that the matter would be resolved but I did not know whether the parties intended that Peabody withdraw its petition for review or that the Government withdraw its opposition to that petition. In any event those negotiations broke down and the second penalty suit was filed.

Rule 2700.1(b) of our Rules of Procedure states that where "any procedural question [is] not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act, the Commission or any Judge, shall be guided so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure." Neither the Act nor the Procedural Rules nor the Administrative Procedure Act contain provisions governing the construction of an order of dismissal. Rule 41 of the Federal Rules of Civil Procedure, however, entitled "Dismissal of Actions," states in paragraph (b) pertaining to involuntary dismissals: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule [exceptions that are not applicable], * * * operates as an adjudication upon the merits." As I read this rule, with certain exceptions that are not pertinent, any involuntary dismissal, that is, where one party asks for the dismissal of the other party's case, if granted, is with prejudice unless the court states otherwise in its dismissal order. That was also my understanding at the time the dismissal order was issued. My dismissal of the case was therefore with prejudice and the doctrine of res judicata applies.

The statement in footnote 1 on page 2 of the Secretary's second petition for civil penalty implies that there was some duty on the part of Peabody to serve its motion to dismiss in the first penalty case on counsel who were representing the Department of Labor in Docket No. VINC 77-91. Of course there was no such duty on Peabody, but there was a duty upon the Secretary to oppose the motion to dismiss if he disagreed with the motion and to seek review of the order of dismissal if he disagreed with that order. The Secretary did neither and cannot now be heard to complain because counsel involved with one docket number were not served with papers in a different docket number.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

29 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	
	:	<u>Docket Nos.</u> <u>Assessment Control Nos.</u>
	:	
v.	:	BARB 79-327-P 15-09969-03002
	:	Processing Division
	:	
THE HOKE COMPANY, INC., Respondent	:	PIKE 79-113-P 15-05447-03004
	:	Murray Strip Mine

DECISION

Appearances: Darryl A. Stewart, Esq., and George Drumming, Jr., Esq.,
Office of the Solicitor, U.S. Department of Labor,
for Petitioner;
Byron W. Terry, Safety Director, Owensboro, Kentucky,
for Respondent.

Before : Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 22, 1980, a hearing in the above-entitled proceeding was held on April 3, 1980, in Evansville, Indiana, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves two Petitions for Assessment of Civil Penalty filed by the Mine Safety and Health Administration. The Petition in Docket No. BARB 79-327-P filed March 26, 1979, seeks to have civil penalties assessed for five alleged violations of the mandatory health and safety standards by The Hoke Company. The second Petition was filed on May 17, 1979, in Docket No. PIKE 79-113-P by MSHA and seeks assessment of a civil penalty for an alleged violation of 30 CFR 71.107 by The Hoke Company.

On March 20, 1979, counsel for MSHA filed a Motion for Approval of Settlement reached by the parties with respect to Docket No. PIKE 79-113-P. The motion states that respondent has agreed to pay the full amount of a \$34.00 penalty proposed by the Assessment Office for the single violation of section 71.107 involved in Docket No. PIKE 79-113-P.

The Settled Case

Docket No. PIKE 79-113-P

The Assessment Order in the official file indicates that the respondent produced 384,560 tons of coal on an annual basis and that 190,935 tons annually are produced at the Murray Strip Mine which is involved in

Docket No. PIKE 79-113-P. On the basis of those production figures, I find that respondent operates a medium-sized business and that any penalties which might be assessed should be in a moderate range of magnitude.

There is no evidence in the file or in the Motion for Approval of Settlement pertaining to respondent's financial condition. In the absence of any evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business.

Respondent does not have a large number of previous violations and that factor should be considered as a mitigating circumstance when determining penalties.

The specific violation of section 71.107 involved in this settled case was alleged in Citation No. 9948403 which stated that respondent had failed to submit a respirable dust sample or a reason for not sampling one employee within the time period for submitting the required sample. Respondent abated the violation very quickly by submitting a Miner's Status Change Notice card showing that the sample had not been submitted for the miner concerned because he no longer worked for respondent.

In such circumstances, the violation was nonserious, but the violation was a result of a rather high degree of negligence. Respondent abated the violation within a much shorter time than was allowed for abatement in the citation. Considering the conscientious effort made by the respondent in achieving rapid compliance, I find that the Assessment Office proposed a reasonable penalty of \$34.00 for the alleged violation of section 71.107 and that respondent's agreement to pay the full amount proposed by the Assessment Office should be approved.

The Contested Case

Docket No. BARB 79-327-P

Citation No. 400126 9/19/78 § 77.400

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 38-41):

The contested part of this proceeding, as I previously indicated applies only to the Petition for Assessment of Civil Penalty filed in Docket No. BARB 79-327-P. The issues in any civil penalty case are whether there were any violations of the mandatory health and safety standards, and, if so, what penalties should be assessed based on consideration of the six criteria set forth in section 110(i) of the Act. Three of those criteria can be given a general evaluation in most cases. As I indicated in my opening remarks in this case, the company has not at this point, and I take it, will not present any financial information and in the absence of such information, I find that the payment of penalties will not cause the company to discontinue in business.

It has been stipulated that the company is subject to the Act and to the regulations promulgated under it. It has also been stipulated that the size of the preparation plant is such that it processes approximately 125,000 tons annually and that the controlling company produces about 384,000 tons on an annual basis. Those findings support a finding fact that the company is moderate in size and that any penalties to be assessed should likewise be in a moderate range of magnitude.

Exhibit 17 in this proceeding is a listing of violations for which penalties have been paid by the company. According to that exhibit, the company has not previously violated any of the mandatory health and safety standards alleged in this proceeding. It has been my practice to increase the penalty somewhat when there is evidence before me showing that respondent has previously violated the same section of the regulations which is alleged by MSHA in the case currently being considered. Since respondent has not previously violated the sections being considered in this proceeding, the criterion of history of previous violations will not be used to increase or decrease any penalty which may be assessed under the other criteria (Tr. 56).

Turning now to the criteria of negligence and gravity and good faith effort to achieve rapid compliance, I find that the first citation before us in this proceeding, No. 400126 dated September 19, 1978, and alleging a violation of section 77.400(c), I find in connection with that particular citation that there was a violation of section 77.400(c) because that section does refer to the fact that the guard should extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught in the belt and pulley.

Considering the criterion of negligence, there has been testimony that the company was aware of the provision I've just referred to and that it considered the guard that was on the pulley extended far enough to the rear of the pulley to keep a person from falling into it. It is also indicated by the record that other inspections had been made and apparently the guard that was on the pulley was considered to be adequate by inspectors other than the one who wrote this citation now before us. In view of that fact, I find that there was a very low degree of negligence in the occurrence of the violation.

From the standpoint of gravity, I think that the violation was only moderately serious because it is a fact that the evidence shows, particularly Exhibits A and A1 through A4, that there was a facility around the tail pulley which would keep a person from just walking into it upright and the only way that a person would be near this particular pulley would be for him to stoop under this construction that surrounded the tail pulley and then he would probably be on the alert just because of his going into an area like that.

But the fact remains that it would be possible for someone to have his clothes caught in this place and he could be injured in this pulley from the rear. So, based on the fact that there was moderate seriousness and a low degree of negligence, I find that a penalty of \$15.00 should be assessed for this violation of section 77.400(c).

Citation No. 400127 9/19/78 § 77.206(a)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision (Tr. 55-56):

With respect to the alleged violation in Citation No. 400127, I find that a violation occurred because the operator's witness and the inspector both agree that three rungs in the ladder were broken. The inspector does not contest the fact that the operator was not using the portion of the facility that is here involved at the time the citation was written and consequently it was not being inspected at that time. So, there is not as great a degree of negligence in that area as there would have been if this were a place where the people were frequently traveling up and down this ladder. Additionally, the operator's testimony shows that there was a ladder and Exhibit B2 shows that there was a ladder on the opposite side of this particular area cited by the inspector and it is alleged that the other ladder was being used instead of the one that was cited by the inspector. Additionally, the ladder has only four rungs and is approximately 5 feet high; therefore, the likelihood of serious injury as a result of any of the rungs breaking if someone had used the ladder is less likely than it would be if a great height were involved. Consequently, I find that there was moderate seriousness in connection with the violation. I think that extenuating circumstances in this instance also justify finding that a penalty of \$15.00 is adequate.

Citation No. 400128 9/19/78 § 77.205(e)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision (Tr. 75-76):

My decision with respect to Citation No. 400128 is that, as all testimony indicated there was a violation of section 77.205(e). The company, I think, was a little more negligent in this instance than it was in the previous violations, because, even though there was not normally any use of this particular elevated walkway, there having been only three uses of it between the time this violation was written in September of 1978 and the present time, it was known to the company that there had been an open section left where another walkway might have been tied into this walkway at a future date. And, it was known that there was a gap of three feet

in the handrails. So, I think that since the facility was constructed with this gap in it that the company should have put in a more stable handrailing than a rope, assuming that the rope was there at the time the citation was written. Additionally, there should have been an enclosed handrailing at the end where the storage silo existed.

As for the gravity of the violation, there is agreement of both the company's witness and the inspector that if a person were to fall from this area, it could be a fatal accident. Therefore, I find that the violation was serious, and, in view of this large degree of negligence in this instance, I find that a penalty of \$150.00 is appropriate.

Citation No. 400129 9/19/78 § 77.206(a)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision (Tr. 94-95):

I have taken additional testimony from Mr. Terry to be sure that I didn't improperly assess too much in connection with the alleged violation of section 77.205(e), and after further consideration, I find that there was at least a period of time when the company was using the walkway and I still adhere to the ruling that I made previously in the amount of penalty that I previously assessed.

Turning to the one as to which we just had testimony, which is Citation No. 400129 alleging a violation of section 77.206(a), that section provides that ladders shall be of substantial construction and maintained in good condition. I find that a violation of section 77.206 occurred because the ladder was rusted, was made of light materials, and did have an extensive area at the top which made it difficult and dangerous to use. There is evidence from the operator's witness which showed that at the time the citation was written the silo was not being used because the company did not have orders that required the screening operation that was involved in that portion of the facility for which the citation was written. But the company's witness had indicated that the facility was used at some point in time and, therefore, I feel that the ladder should have been inspected and it should have been put in a proper and safe condition at the original time the facility was used. I find that there was a rather high degree of negligence in their failure to do so at that time. It would have been difficult to negotiate this ladder. Of course, as the company's witness has indicated, the likelihood of someone going on up the ladder was somewhat remote but it would have been possible for someone to need to do some maintenance work and it would have been possible for someone to have tried to negotiate the ladder. He could have fallen because of the inadequate construction. Therefore, I find that the violation was serious and since it was a serious violation with a high degree of negligence, I think a penalty of \$150.00 is appropriate for this violation.

Citation No. 400130 9/19/78 § 77.1707(b)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision (Tr. 106-107):

The final alleged violation in this case was contained in Citation No. 400130 alleging a violation of section 77.1707(b). I find that a violation of that section did occur. The provision that was violated lists twelve items which are supposed to be included in first-aid equipment at a preparation plant and at mines. The paragraph that caused Mr. Terry and his company to have less than the full amount of equipment provided for in paragraph (b) was the section which contains somewhat ambiguous phraseology which is subject to an interpretation that a company would not have to have a full complement of first-aid equipment unless there were ten or more employees at the preparation plant. I can see easily why a company might arrive at that conclusion and, consequently, I find that there was a low degree of negligence in their failure to have the equipment at this particular preparation plant.

Insofar as gravity is concerned, as the inspector has pointed out, the violation could be associated with considerable gravity if someone were to be seriously injured and not have the appropriate first-aid equipment immediately available, but in view of the company's good faith in trying to comply with the regulation, I find that there were extenuating circumstances in this instance and that a penalty of \$20.00 is appropriate for this violation of section 77.1707(b).

Summary of Assessment and Conclusions

(1) Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreement, the following civil penalties should be assessed:

Docket No. BARB 79-327-P

Citation No. 400126 9/19/78 § 77.400(c)	\$ 15.00
Citation No. 400127 9/19/78 § 77.206(a)	15.00
Citation No. 400128 9/19/78 § 77.205(e)	150.00
Citation No. 400129 9/19/78 § 77.206(a)	150.00
Citation No. 400130 9/19/78 § 77.1707(b)	<u>20.00</u>
Total Penalties in Docket No. BARB 79-327-P	\$350.00

Docket No. PIKE 79-113-P

Citation No. 9948403 1/5/79 § 71.107	(Settled).... \$ 34.00
Total Settlement and Contested Penalties in This Proceeding	\$384.00

(2) Respondent, as the operator of the Murray Strip Mine and Processing Division, is subject to the Act and to the mandatory safety and health standards promulgated thereunder.

WHEREFORE, it is ordered:

(A) The parties' request for approval of settlement is granted and the settlement agreement submitted in this proceeding in Docket No. PIKE 79-113-P is approved.

(B) Pursuant to the parties' settlement agreement and the bench decision rendered in the proceeding in Docket No. BARB 79-327-P, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling \$384.00 as set forth in paragraph (1) above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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The Hoke Company, Inc., Attention: Byron W. Terry, Safety Director,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 29, 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 79-191-M
Petitioner : A/O No. 11-01023-05001
v. :
: Hastie Quarry & Mill
HASTIE MINING COMPANY, :
Respondent :

DECISION

Appearances: Michele Fox, Esq., Office of the Solicitor, U.S.
Department of Labor, Chicago, Illinois, for
Petitioner;
Donald Hastie, Partner, Hastie Mining Company,
Cave In Rock, Illinois, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Pursuant to notice, the above case was heard on the merits in
Evansville, Indiana, on April 16, 1980. Following the conclusion
of the hearing and arguments by the parties' representatives, a
bench decision was issued which is set out in its entirety below:

BENCH DECISION

Judge Broderick:

Alright. The following is my decision in the
case of Secretary of Labor versus Hastie Mining Com-
pany, Docket Number LAKE 79-191-M. Appearances were
entered by Michelle Fox of the Office of the Solici-
tor of Labor, Chicago, Illinois, for the petitioner.
And by Donald Hastie, a partner in the Hastie Mining
Company, Cave-In-Rock, Illinois for Respondent.
Pursuant to notice a hearing on the merits was
held today April 16, 1980 in Evansville, Indiana.
George LaLumondiere and Jack Lester, both of whom

are Federal Mine inspectors, testified on behalf of Petitioner. Donald Hastie testified on behalf of Respondent. Exhibits were introduced by both parties. The parties have been given the opportunity to argue their respective positions and each has waived its right to file written proposed findings and briefs. The following are my findings of fact:

FINDINGS OF FACT

Number one, Hastie Mining Company is the operator of a mine, a surface mine in Hardon County, Illinois, known as the Hastie Quarry and Mill. Number two, the subject mine produces flurspar [fluorspar] from its quarry. Number three, the products of the mine enter interstate commerce. Number four, on March 22, 1979 there were five miners working at the subject mine. Three working partners and two paid employees. Number five, respondent is a small mine operator. Number six, respondent has no previous history of violations of the Federal Mine Safety and Health Act or the regulations promulgated there under. Number seven, on March 22, 1979, the subject mine was inspected by Mr. George LaLumondiere, a mine inspector and a duly authorized representative of the Secretary of Labor. Number eight, on March 22, 1979, respondent was using a Caterpillar 950 front-end loader which did not have roll over protection. Number nine, on March 22, 1979, a citation was issued by the inspector, being Citation number 366434 charging a violation of 30 CFR 56.9-88. The termination due date on the citation was April 24, 1979. Number ten, respondent continued using the front-end loader after the issuance of the citation. Number eleven, on April 27, 1979, an order of withdrawal was issued by Federal Mine Inspector, Jack Lester, being order number 365195 under section 104(b) of the Federal Mine Safety and Health Act for failure to abate the forementioned citation. Number twelve, respondent has continued to use the 950 Caterpillar front-end loader without having roll over protection after the issuance of the order of withdrawal. Number thirteen, respondent uses the front-end loader in its surface quarrying and mining operation. It also uses it to clear waterways from an old abandoned mine works of sediment and mud. If this work was not done the water would come into the quarry where respondent's operation was being conducted. Number fourteen, it would not be possible to use the equipment in question, namely, the Caterpillar 950 front-end loader with roll over protection

in the addits from which the mud and sediment is cleared since the addits are only eight feet high. Number fifteen, a new cab providing roll over protection for the Caterpillar 950 front-end loader would cost approximately \$5,431.62 for the part or parts and would require approximately thirty-two manhours to install it. The Fabick Machine Company of Marion, Illinois which does this kind of work would charge \$30.00 an hour for the labor required in this installing of the cab. After the initial installation, it would take approximately four manhours to remove the cab and five to six manhours to reinstall it. The price quoted above includes a heater and defroster. Number sixteen, respondent has two additional front-end loaders which he uses in his operation, both of which are equipped with cabs including roll over protection. The following are my conclusions of law:

Conclusions of Law

30 CFR 56.9-38 promulgated pursuant to the Federal Mine Safety and Health Act provides in part as follows:

"Excluding equipment that is operated by remote control, all self-propelled track type or wheeled-- and I'm omitting some words--"front-end loaders"-- and I'm omitting additional words--"as used in metal and nonmetal mining operations with or without attachments shall be used in such mining only when equipped with, 1) roll over protective structures (ROPS) in accordance with the requirements of paragraph (b) through (g) of this standard as applicable." Subsection C of this standard provides as follows: "All self-propelled equipment described in paragraph (a) of this standard manufactured prior to the effective date of this standard and after June 30, 1969, shall be equipped with ROPS meeting the requirements of paragraphs (d) through (g) of this standard as appropriate." Paragraph (d) of the standard provides a description of the equipment meeting the requirements of the standard, describing it in accordance with certain recommended practices of the Society of Automotive Engineers. Subsection (e) provides that all self-propelled equipment shall be deemed in compliance with the standard if the ROPS meet the standards of the State of California, the U.S. Army Corps of Engineers or the Bureau of Reclamation or the MSHA Coal Mine Regulations or the Occupational Safety and Health Administration Regulations.

Subsection (f) states that any alterations or repairs of the ROPS shall only be done under the instructions of the ROPS manufacturer or under the instructions of a registered professional engineer. Subsection (g) provides that the ROPS shall have certain information permanently affixed to the structure.

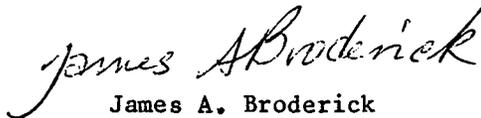
Conclusion of law number one, the respondent, Hastie Mining Company, is and at all times pertinent to this case was subject to the Federal Mine Safety Health Act of 1977; number two, as an Administrative Law Judge with the Federal Mine Safety and Health Review Commission, I have jurisdiction over the parties and subject matter of this proceeding; number three, on March 22, 1979, respondent was in violation of the mandatory safety standard contained in 30 CFR 56.9-88 because its 950 Caterpillar front-end loader, serial number 81J7909 was not equipped with roll protection; number four, the violation found to have occurred in Conclusion of Law number three was a serious violation because it could result in serious injury to a miner. This conclusion is reached despite the fact that respondent has so far in its operation had no lost time injuries. Number five, respondent was aware that its front-end loader was required to have roll over protection and was aware that it was in violation of the safety standard, but declined to provide it because of the difficulty that would be created in the operation described as clearing underground waterways; number six, respondent failed to comply with the terms of the citation and therefore an order of withdrawal was issued. This indicates a failure to recognize the serious nature of a Federal Mine Inspector's duties in enforcing the provisions of the Mine Safety Act and its regulations. I previously found that the violation here was serious. I found that the respondent was aware of the violation before it was cited. I must find and state for the record that, by far, the most serious part of this case, so far as I'm concerned, is the failure, one, to abate the violation after the citation was issued; more importantly, the failure to comply with the order of withdrawal. This is a very serious violation of the letter and spirit of the Federal Mine Safety and Health Act of 1977. I am sympathetic with the plight of the operator in this case. It obviously would be a costly thing for it to comply with the standard, but neither the Federal Mine Inspectors or the Secretary of Labor

nor the Administrative Law Judge or the Review Commission has any right to determine that a legal regulation issued pursuant to the Federal Law can be ignored or excused or thwarted because of cost to a mine operation. I would, although it's not a matter within my jurisdiction, remind the respondent, operator in this case, that failure to comply with validly issued orders of a Federal Inspector under this Act can result in much more serious consequences than a civil penalty and would urge that the operator consider seriously its obligations under this law. Primarily, because of my finding concerning the seriousness of the respondent's failure to comply with the order, I am assessing a civil penalty in this case in excess of that recommended by the Assessment Office and recommended by the Solicitor's counsel. And I will order, as a result of the violation which I found and considering the criteria set out in section 110(i) of the Act by which I am bound, I am assessing a penalty of \$500.00 in this case. I explained earlier that following this hearing a written order will be issued. It will order the respondent, Hastie Mining Company, to pay within thirty days of the issuance of that decision \$500.00 as a civil penalty for the violation which I have found occurred in this case. I explained also the right of the party to petition the Federal Mine Safety and Health Review Commission in Washington for a review of my decision. And that will conclude the record in this case. Thank you very much.

ORDER

The foregoing bench decision is hereby AFFIRMED.

Respondent Hastie Mining Company, is ORDERED to pay \$500 as a civil penalty for the violation found herein within 30 days of the date of this written decision.



James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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29 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	
	:	Docket No. SE 79-88-M
	:	
	:	Assessment Control
v.	:	No. 31-00435-05003
	:	
B. V. HEDRICK GRAVEL AND SAND COMPANY, Respondent	:	B. V. Hedrick Pit and Plant
	:	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Thomas C. Newman, Corporate Safety Director,
Swannanoa, North Carolina, for Respondent.

Before : Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 27, 1980, a hearing in the above-entitled proceeding was held on April 8, 1980, in Asheville, North Carolina, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 81-86):

This proceeding involves a Petition for Assessment of Civil Penalty filed in Docket No. SE 79-88-M on September 4, 1979, by the Mine Safety and Health Administration, seeking to have a civil penalty assessed for an alleged violation of 30 CFR 56.12-34 by B. V. Hedrick Gravel and Sand Company.

This proceeding raises the issues that are raised in all civil penalty cases, namely, whether a violation occurred, and, if so, what penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

I think that I should make some findings of fact upon which my conclusions will be based.

(1) On May 22, 1979, Inspector John Kerr made an examination of the facilities of the respondent and at that time he wrote Citation No. 105415 citing respondent for a violation of section 56.12-34, alleging that "low

hanging lights in the shop, refreshment stand at the laboratory were not guarded."

(2) The citation was written at 10:00 a.m. and at 4:30 p.m., Inspector Kerr wrote an action to terminate, stating that the low hanging lights were provided with guards.

(3) Inspector Kerr was accompanied on his inspection by Mr. David West, who is the mine superintendent at the plant and also by an inspector trainee, whose name is William J. Lowe. Inspector Kerr testified that he explained to Mr. West the location of the incandescent lights that were involved in his citation.

(4) Inspector Kerr drew a diagram of the area involved in his citation, which was received in evidence as Exhibit 3. Inspector Kerr explained that on the left side of that diagram there is a square which shows a shop area and that three of the light bulbs are in an office inside of that shop and the other light bulb was at a refreshment stand, which is shown also on the left side of Exhibit 3. Inspector Kerr stated in his citation and explained in reference to Exhibit 3 that the refreshment stand about which he was talking was situated near a laboratory.

(5) Mr. Lowe also testified in this proceeding and confirmed the testimony of Inspector Kerr by stating that he was with Inspector Kerr and that Inspector Kerr had correctly shown in Exhibit 3 the location of the places where they had found light bulbs which were approximately six feet four inches off the floor and which constituted a possible burn or shock hazard to tall people who might run into them or to people who might carry something on their shoulder and hit such a light bulb.

(6) Inspector Kerr stated that the light bulbs were in areas where the plant superintendent and other supervisors would have had reason to walk and they should have been aware of the fact that there were light bulbs sufficiently low to constitute a hazard without having guards on them.

Those are the primary findings of fact that I wish to make, but we still have to have a finding of whether a violation occurred. In that connection, respondent's witness in this proceeding was Mr. Newman, who is respondent's safety director, stated that he had been unable to determine after discussing Citation No. 105415 with Mr. West, just exactly where these light bulbs were located. And it was

his position that after he had walked around the area and the shops and in the refreshment stand that none of the light bulbs would have been close enough to the floor that he would have hit them if he had walked under them while wearing a safety helmet and that he also is 6 feet 1 inch in height.

I am supposed to base my findings of fact upon the preponderance of the evidence and I find that the testimony of an inspector and trainee who were present at the time Citation No. 105415 was written should be given greater weight than the testimony of Mr. Newman in this instance, because Mr. Newman was working from an adverse circumstance, in that he was not present on May 22, when the citation was written, and he necessarily was working and making an investigation on the basis of the abatement of the citation which had been written on a previous day when he was not present.

Therefore, I find that there was a violation of section 56.12-34, which provides that portable extension lights and other lights that by their location present a shock or burn hazard shall be guarded.

Having found a violation it is necessary for me to assess a penalty based on the six criteria. We have had some stipulations which first of all indicate and agree that the respondent is subject to the jurisdiction of the Commission and to the Act and Regulations promulgated thereunder. It has been stipulated that the payment of a penalty would not cause the company to discontinue in business. It has been stipulated that the company is a moderate-sized company, and it was stated that the company produces approximately 1 million tons of rock and sand a year, but that production figure, while apparently quite high at face value, reflects a digging operation as opposed to a crushing operation, and, therefore, the quantity of the production is not as indicative of a large company as would be the case if we had a crushing operation in connection with the production operation.

It was also shown that since these guards were placed on the lights within the period provided for by the inspector, that there was a good faith effort to achieve rapid compliance.

The remaining two criteria relate to the gravity of the violation and to negligence. Those are the ones that we primarily use for determining just how large a penalty should be assessed. In view of the fact that these lights were six feet four inches off the floor at a minimum, only tall people would have been likely to run into them and even then that is somewhat debatable, depending on the conflicting testimony of the witnesses on height, but I find that the light bulbs would not constitute a really serious hazard that would be likely to kill anyone who might happen to bump into one of them.

As to negligence, apparently the inspector considered a light bulb at seven feet off the floor as not a hazard and does not have to be guarded, so, we have a situation where there might have been at least a doubt in respondent's mind as to whether these light bulbs were low enough to require guarding, and, consequently, I find that there was a low degree of negligence associated with the violation.

In view of the fact that we have a moderate-sized operator, have a good-faith abatement, and have a moderately serious violation with a low degree of negligence, I think that a penalty of \$15.00 is reasonable under the circumstances.

WHEREFORE, it is ordered:

Within 30 days after the date of this decision, respondent shall pay a penalty of \$15.00 for the violation of 30 CFR 56.12-34 alleged in Citation No. 105415 dated May 22, 1979.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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30 MAY 1980

CONSOLIDATION COAL COMPANY, : Contest of Order
Contestant :
v. : Docket No. WEVA 80-13-R
:
SECRETARY OF LABOR, : Order No. 808268
MINE SAFETY AND HEALTH : September 5, 1979
ADMINISTRATION (MSHA), :
Respondent : Blacksville No. 1 Mine

DECISION

Appearances: Samuel Skeen, Esq., Pittsburgh, Pennsylvania, for Contestant;
Eddie Jenkins, Esq., Office of the Solicitor, U.S. Department
of Labor, Arlington, Virginia, for Respondent.

Before: Judge Edwin S. Bernstein

STATEMENT OF THE CASE

This is a proceeding for review of an order issued under Section 104(b) of the Federal Mine Safety and Health Act of 1977 (the Act) on September 5, 1979, for an alleged failure to abate a citation.

The case was heard on the merits in Pittsburgh, Pennsylvania, on February 22 and 27, 1980. Following the hearing, the parties submitted briefs.

APPLICABLE STATUTE

Section 104 of the Act reads in applicable part:

(a) If, upon inspection or investigation, the Secretary
* * * believes that an operator * * * has violated this Act,

or any mandatory health or safety standard, rule, order, or regulation * * * he shall * * * issue a citation to the operator. * * *. [T]he citation shall fix a reasonable time for the abatement of the violation. * * *

(b) If, upon any follow-up inspection * * * an authorized representative of the Secretary finds (1) that a violation described in a citation * * * has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall * * * promptly issue an order requiring the operator * * * to immediately cause all persons * * * to be withdrawn from, and to be prohibited from entering, such area * * *.

FINDINGS OF FACT

The parties stipulated and I find:

1. Consolidation Coal Company (Consol) is the owner and operator of the Blacksville No. 1 Mine.

2. Consol and the Blacksville No. 1 Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 and I have jurisdiction over this proceeding.

3. Mr. Ellis Mitchell, the inspector who issued the subject citation and order, was a duly authorized representative of the Secretary of Labor.

4. Copies of the citation and order are authentic copies and were properly served.

On August 30, 1979, Ellis Mitchell, an MSHA inspector, accompanied by Jim Bowman, a safety representative of the United Mine Workers of America, and Robert Gross, a Consol escort, inspected the 2 West 036 section of the

Blacksville No. 1 Mine. Mr. Mitchell found that the roof in an area approximately 50 feet long was unsupported. The area consisted of a segment of an entry, or passageway, 1/ approximately 46 by 14-1/2 feet, which had been mined by a borer miner, and an adjacent area in an intersection which was approximately five feet long and of irregular width. The intersection area had been mined first by a borer miner and then rounded off on its corners by a ripper miner (sometimes known as a Heliminer). The intersection itself was a four-way intersection, approximately 6-1/2 to seven feet in height, and was heavily traveled. At one entry to the intersection was a power center and at another was an intake escapeway. The entry in question was little traveled and was about four to 4-1/2 feet in height. Both the intersection and the entry had been developed in 1970, although the area was still in an "advance" stage of mining. On August 30, 1979, there were no posts, roof bolts or other roof supports in the 50-foot area described above. All witnesses agreed that on that date there was some cracking in the roof, some falling coal, and lengths of coiled cables in the entry.

Mr. Mitchell issued Citation No. 808265 on August 30, 1979, for an alleged violation of 30 C.F.R. § 75.200. The citation read:

In the 2 West, 036 section currently in the construction stages and idle this shift the roof in the old borer entry was not supported for a distance of about 50 feet, coal roof was cracked and spalled entire distance, beginning just to the right of the power center. The trailing cable to the auxiliary fan was placed in this unsupported area by miners who traveled under this roof.

1/ Mr. Mitchell testified that this area could be described either as an entry or a crosscut depending upon the direction in which mining was proceeding. I will refer to it as an entry for the sake of clarity.

Mr. Mitchell directed that the condition be abated by 1300 hours that day. He served the citation at 1019 hours. Mr. Mitchell testified that he found the roof to be sagged down, deteriorated with fallen coal and cracked. He stated that he did not sound the roof because he felt that a visual inspection was sufficient. He also noted that all of the roof's rock dust had fallen. He testified that the existence of a cable in the entry indicated that men had been in the area recently. As was his practice, before fixing an abatement time, he discussed the matter with officials of the operator. Although the manner of abatement was not discussed, Mitchell testified that he assumed that the operator would abate either by installing posts or installing a barricade at each end of the area, and that he would have accepted either method.

Mr. Bowman confirmed Mr. Mitchell's testimony about the August 30 inspection. He indicated that neither he nor Mr. Mitchell entered the area in question, but that they inspected from each end by use of the spot lights on their hats. He confirmed that the floor was hooved 2/ and that the entry was not a heavily traveled route.

Mr. Gross disagreed that the roof was hazardous when he observed it with Mr. Mitchell on August 30, 1979. He acknowledged that the roof had deteriorated a little, that there was spalling, and that there were some cracks, but he concluded that this was normal for a ten-year-old entry, and that the

2/ "Hooving" is a condition in which the floor buckles or becomes raised in the center. This results from pressure transmitted from a roof to walls and through the floor. Mr. Bowman stated that this is normally a sign of good roof, since it shows that the roof pressure is being dissipated. However, he added that this is not always the case.

roof was safe. He stated that most of the cracks were small pressure cracks and that only large cracks are dangerous. He testified that a roof crack one-quarter inch thick and three or four feet long would not alarm him. He stated that he did not discuss the method of abatement with Mr. Mitchell, although he told Mr. Mitchell that bolts could not be installed because the height was too low in the entry to accommodate a roof-bolting machine.

Mr. Gross expected that the citation would be abated by barricading both ends of the area and he was surprised to find a barricade at one end only when he returned on August 31, 1979. He then told the section foreman to barricade the other end also. This was not done.

Mr. Mitchell did not return to the area until 1725 hours on September 5, 1979. At that time, he was accompanied by Richard Green, a union representative, and James Turner, a Consol inspector-escort. They found that at the intersection side of the entry, two posts had been installed between the floor and the roof and a board had been wired between them with a warning written in yellow chalk. The warning sign faced the intersection. There was no such barrier or sign at the other end of the area. No other roof supports had been installed. The cable had been removed from the area, however, and near the other intersection at the back entrance of the area, the men found recently deposited human feces.

Mr. Mitchell was outraged that after six days only one barricade at one end had been installed. He testified that the two posts and sign would not prevent entrance into the area from that side. He believed that the human feces at the back entrance indicated that miners had been in the area

recently. Although initially he would have accepted the installation of a barricade at each end as abatement, upon reinspection on September 5, he refused to allow this method of abatement.

Mr. Mitchell issued a Section 104(b) order which read:

In the 2 West, 036 section only two posts had been set near the power center in the intersection with a danger board hung between them. The other end of the unsupported loose roof was not dangered off or barricaded to prevent travel in this direction. Evidence of travel in the entry just inby this area was observed and miners could travel through under unsupported roof.

After Consol installed 19 additional posts in the area, Mr. Mitchell terminated the withdrawal order at 2132 hours on September 5, 1979.

Mr. Green confirmed Mr. Mitchell's testimony that on September 5, 1979, when they visited the area together, they found loose coal and cracks on the roof in the area, human feces in the area and a barricade at only one end.

Mr. Turner testified that Mr. Mitchell had become angry about another violation en route to the area on September 5, 1979. He testified that when they arrived at the area, Mr. Mitchell stated "[t]hey still haven't set any God damn posts." Mr. Mitchell denied making that statement. According to Mr. Turner, Mr. Mitchell sounded the roof and said "[t]his is a bad top." Mr. Turner stated that six months earlier, when the entry had been an air passageway, he had walked the area weekly and had no concern about the roof. He stated that had Mr. Mitchell allowed the installation of a second barricade, this could have been done by three or four men in 45 minutes. The installation of the 19 posts took five men about four hours.

Charles Bane, Consol's assistant superintendent, also visited the area on September 5, 1979, following Mr. Mitchell's inspection at 1725 hours. He confirmed that Mitchell was upset and refused to allow the construction of a second barricade. Bane acknowledged that there was some deterioration and spalling in connection with the roof in the area, but he denied that the roof was unsafe.

At the hearing, Consol moved to dismiss the citation and also moved to dismiss the withdrawal order. I reserved decisions on both motions.

I. Was the Citation Proper?

I find that Citation No. 808265 was properly issued because on August 30, 1979, Consol violated its roof-control plan in the 2 West 036 section as alleged.

Paragraph 2(c) at page 16 of that plan (Revised Plan No. 3, dated February 5, 1969), reads: "Where slips or clay veins are encountered, where the shale roof is exposed, or whenever hazardous roof is encountered during advance and persons must pass thereunder, the areas shall be bolted immediately or otherwise made safe."

It is undisputed that the area was in an advance stage of mining. It is also undisputed that on August 30, 1979, when Mr. Mitchell made his inspection, lengths of coiled cables were found in the entry. This indicates that persons had been in the entry recently and supports the conclusion that, although this entry was not heavily traveled, persons were required to pass under the unsupported roof.

I also find that a hazardous roof existed in the 2 West 036 section during Mr. Mitchell's August 30, 1979, inspection. Mr. Mitchell testified that he found cracking and spalling in the roof; that all of the roof's rock dust had fallen in the area; and that, although the roof was hooved, the roof generally was sagged down and in a deteriorated condition. Mr. Bowman also stated that the roof was not good. He testified:

The top had some head coal where it was flaked off, and there also were cracks within this head coal that was still remaining there. It was just a bad situation there as far as my experience in the mine. If people are going to be there, it should have had some additional support.

Mr. Gross disagreed that the roof was in poor condition, although he admitted that the roof had deteriorated.

I find the testimony of Mr. Mitchell and Mr. Bowman to be more persuasive, and I conclude that on August 30, 1979, when Mr. Mitchell made his inspection, the roof in the 2 West 036 section was in a hazardous and unsafe condition.

At that time, Consol was also in violation of the requirements of page 5 of its roof-control plan. There, the plan stated that before an intersection is started a row of roof bolts must be installed (bolts "A" on a diagram) and after the crosscut is driven, an additional line of bolts perpendicular to the "A" row of bolts (bolts "B" on the diagram) "should be installed as soon as is practicable after machine has created intersection." A textual comment in paragraph 2(a) on page 16 of the plan adds: "All four-way intersections shall be bolted as soon as is practicable; bolts 'A' as shown on the sketches

pages 5 and 6, should be installed prior to the creation of the intersection and the remaining 'B' bolts installed as soon as is practicable thereafter." According to the diagram on page 5, at least one bolt of each line must extend in each direction past the intersection and into the adjacent entries or crosscuts. In failing to place bolts at 4.5-foot intervals past the intersection and into the entry, Consol again violated the requirements of its roof-control plan.

I do not agree with Consol that because the citation described the area as "the old borer entry," it precludes a finding that a violation also existed in the intersection. In my view, the term "entry" is broad enough to cover a distance approximately four feet into the intersection. Mr. Mitchell testified that the word "entry" can refer to an area extending into the intersection, and I accept that less restrictive meaning of the term. Furthermore, I believe that Consol had sufficient notice of the area referred to in the citation. 3/

II. Was the Withdrawal Order Proper?

Section 104(b) of the Act provides that if, upon a follow-up inspection, the Secretary's representative finds (1) that a violation described in a citation has not been totally abated within the period of time originally

3/ As the Commission stated in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Jim Walter Resources, Inc., and Cowin and Company, Docket Nos. BARB 77-266-P and BARB 77X465-P, 1 FMSHRC Decs. No. 8 at 1827 (1979), a notice which is insufficiently specific may not be invalid if it allows the operator "to identify and thereby abate the allegedly violative condition."

fixed or as subsequently extended, and (2) that the period of time for abatement should not be further extended, he shall promptly issue a withdrawal order with respect to the area covered by the citation. In the light of this statutory mandate, I find that the withdrawal order issued by Inspector Mitchell on September 5, 1979, was proper.

The time specified for abatement of the citation was two hours and 41 minutes. In fact, the Secretary's inspector did not return to reinspect until six days later, on September 5, 1979. At that time, the violation was still not abated, and no extension of time had been requested. Abatement would consist of bringing conditions in the affected area into compliance with Consol's roof-control plan. As indicated above, there were two violations. There was a violation of Section 2(c) at page 16 of the plan in the entry, and there was a violation of page 5 of the plan (elaborated upon in Section 2(a) at page 16) in the intersection. By installing a barricade between the entry and the intersection, Consol partially complied with page 5 of the plan in that it added some support to the roof, i.e., the two weight-bearing posts on which the barricade sign was hung. However, in failing to install additional roof bolts as required and described on page 5, it failed to comply with the plan.

With respect to the violation at Section 2(c) on page 16 of the plan, there also was partial but insufficient compliance. That portion of the plan required the areas described to "be bolted immediately or otherwise made safe." Although no bolting was done, a barricade was erected at one side of the entry. Inspector Mitchell stated that he would have accepted

barricades at both ends of the entry as abatement of the citation. This barricading would have prevented people from entering the unsupported area. As indicated by the human feces near the unbarricaded end of the entry, people traveled in that area. MSHA contended that in barricading only one end, Consol failed to abate the citation. I agree.

Finally, I find that the period of abatement should not have been extended. The testimony indicated that two barricades could have been erected in less than two hours. The actual abatement, which consisted of installing 19 roof bolts, was performed by five men in about four hours. Consol had been afforded six days to abate the violation. Clearly, that time was sufficient and no reason was given for extending it. In fact, such an extension would hardly be justifiable in view of the uncorrected dangerous condition.

III. Was it Unreasonable for Inspector Mitchell to Refuse to Allow Abatement by Barricading on September 5, 1979?

Although it does not affect the validity of the withdrawal order, I believe that Inspector Mitchell acted unreasonably in not allowing Consol to abate the citation by barricading the entry on September 5, 1979. The inspector stated that he would have accepted such abatement prior to that time, and I do not think he should have restricted Consol's options on that date. These actions by the inspector were a manifestation of his anger at Consol's delay in correcting the roof condition. His actions took on a punitive aspect, as he was apparently attempting to punish Consol by making abatement more difficult. I can understand his exasperation, but I also believe he misconstrued the nature of a withdrawal order.

Orders issued under Section 104(b) are intended to motivate an operator to abate a violation. By refusing to allow an operator access to that portion of his mine which is affected by a citation, the operator is given an added incentive to correct the condition. The order is not intended to punish the operator. The Act provides for civil penalties which may be assessed against operators who refuse to abate violations, but this is done in a separate proceeding. As indicated by Section 110(i) of the Act, one factor which may be taken into account in assessing such a penalty is the good faith exhibited by the operator in abating the violation. Inspector Mitchell's decision to insist upon a particular method of abatement at such a late date constituted a misuse of his authority to issue withdrawal orders. Admittedly, Consol could have proceeded to erect the second barrier and taken its chances on the inspector's resolve. However, as a practical matter, an operator runs the risk of having its operation closed down by attempting such challenges at the mine, rather than later in a proceeding provided for by the Act.

In conclusion, while I do not condone the inspector's misuse of his authority, I find that upon consideration of the facts of record and the criteria set forth in the Act, the withdrawal order was properly issued and I affirm both the citation and the withdrawal order.



Edwin S. Bernstein
Administrative Law Judge

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