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SOL (MSHA) V. EASTERN ASSOCIATED COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),(FOOTNOTE 1) PETITIONER	Civil Penalty Proceedings Docket No. HOPE 78-77-P A/O No. 46-04500-02007V
v.	Wharton No. 11 Mine
EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT	Docket No. HOPE 78-76-P A/O No. 46-04332-02009V Docket No. HOPE 78-75-P A/O No. 46-04332-02008V Lightfoot No. 1 Mine

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, Department of Labor, for Petitioner
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Cook

I. Procedural Background

On November 16, 1977, petitions were filed in the above-captioned proceedings for assessment of civil penalties against Eastern Associated Coal Corporation for alleged violations of various provisions of the Code of Federal Regulations. These petitions were filed pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970), hereinafter referred to as "the 1969 Coal Act."(FOOTNOTE 2) Answers were filed on December 19, 1977.

A notice of hearing was issued on December 29, 1977. Motions were made by the Petitioner for approval of settlements in each of the cases. All of the dockets were continued pending determination as to the various motions to approve settlements. The motions in each of these dockets were denied and the cases reset for hearing. A hearing was held commencing October 10, 1978.

Both parties filed posthearing briefs on November 30, 1978. The parties were given until December 15, 1978, to file reply briefs, but none were filed.

II. Violations Charged

Docket No. HOPE 78-77-P

Notice No. 3 AJK, January 11, 1977, 30 CFR 75.316.

Docket No. HOPE 78-76-P

Notice No. 6 BJW, January 12, 1977, 30 CFR 75.400.

Docket No. HOPE 78-75-P

Order No. 1 BJW, January 14, 1977, 30 CFR 75.1306.

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, counsel for both parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

Petitioner called as its witnesses Henry J. Keith and Billy Joe Workman, who are employed as inspectors by the Mine Safety and Health Administration of the Department of Labor.

Respondent called as its witnesses Jerry Edward Lewis, who at the time of the citations was general mine foreman at the Wharton No. 11 Mine of the Respondent; Gary Gallaher, who was underground project engineer at the Lightfoot No. 1 Mine of the Respondent at the time of the citations; Larry Belcher, who at the time of the citations was a company mine inspector for the Respondent; and D. Aguilar, who at the time of the citations was assistant general foreman and acting mine foreman, at the Lightfoot No. 1 Mine.

C. Exhibits

(1) Petitioner introduced the following exhibits into evidence:

GX-1 is Notice No. 3 HJK, January 11, 1977, 30 CFR 75.316.

GX-2 is the termination of Exhibit GX-1.

GX-3 is the ventilation plan for the Wharton No. 11 Mine.

GX-4 is the history of violations of the Respondent.(FOOTNOTE 3)

GX-5 is a diagram of the face area of the Wharton No. 11 Mine.

GX-6 is Notice No. 6 BJW, January 12, 1977, 30 CFR 75.400.

GX-7 is the termination of Exhibit GX-6.

GX-8 is Order No. 1 BJW, January 14, 1977, 30 CFR 75.1306.

GX-9 is the termination of Exhibit GX-8.

(2) Respondent introduced the following exhibits into evidence:

OX-1 is a copy of the ventilation and methane map for the Wharton No. 11 Mine.

OX-2 is a copy of the Lightfoot No. 1 cleanup program.

OX-3 is a copy of a cleanup plan used at the Lightfoot No. 1 Mine.

OX-4 is a map showing part of the Lightfoot No. 1 Mine.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? 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.

V. Opinion and Findings of Fact

Docket No. HOPE 78-77-P

Inspector Keith visited the Eastern Associated Coal Corporation Wharton No. 11 Mine on January 11, 1977 (Tr. 35). He entered the No. 2 Butt left Section off the 1 East Mains from the direction of the No. 5 entry and proceeded to the No. 3 entry near the face. There, he noticed that the line curtain terminated at the outby corner of the last crosscut (Tr. 37-38). This last crosscut right had been undercut, drilled and shot with three cuts, but the coal had not been loaded out of the last cut at that time (Tr. 39, Exh. GX-5). Each cut was about 7-9 feet long (Tr. 39, 85). The No. 3 entry face area had been cleaned and there were indications that three cuts had been made (Tr. 39). It was agreed that this practice, called double heading, which entails mining the face and the crosscut at the same time is not a good practice (Tr. 44, 78). The inspector indicated that it makes it very hard to ventilate the face because the curtain across the crosscut has machinery running through it which would short circuit the air (Tr. 44). The inspector then noted that there were no line curtains to within 10 feet of the deepest penetration of the face area and in the crosscut (Tr. 39). In fact, the curtain was 47 feet

from the furthest penetration in the entry (Tr. 65). At this time a roof bolting machine was located outby the corner of the crosscut right and the two men who operate the machine were there (Tr. 42).

The inspector then went through the crosscut to the No. 2 entry (Tr. 40). In the crosscut to the right of the No. 2 entry, four cuts had been taken out and five cuts had been taken out of the face (Tr. 40-41). The crosscut had been cleaned, but the face of the No. 2 entry had one cut of coal remaining in it that had been shot down (Tr. 41). There was no machinery in either the crosscut or the face (Tr. 41), but there was one man on the left side of the No. 2 entry who was shoveling coal and coal dust towards the center of the entry (Tr. 41). The curtain terminated at the right corner outby the crosscut right (Tr. 42), which was 55 feet from the face (Tr. 70).

The inspector then proceeded through the crosscut between No. 1 and No. 2 entries and went to the face of the No. 1 entry (Tr. 42). He testified that the curtain terminated at the corner outby the crosscut right (Tr. 42). Four cuts had been made from both the face and the crosscut right (Tr. 43).

The inspector cited a violation of 75.316 for a violation of the approved ventilation plan (Tr. 48). In particular, the inspector referred to an addendum to the ventilation plan which it is found was in effect on the day in question. This is found at the second last page of Exhibit GX-3 and provides, in part, as follows:

> In addition to the mandatory provisions of Section 75.316-1, 30 CFR 75, the following provisions are designated applicable to the subject mine. Henceforth these provisions are mandatory requirements of the ventilation system and methane control plan for this mine:
>
> * * * * * * *
>
> 2. Section 75.302-1(a) - Properly installed and adequately maintained line brattice or other approved devices shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face in all working places has been advanced, unless otherwise specified by written permit.

Mr. Lewis agreed that the curtains had been taken down in most of the areas beyond the last crosscut at the time of the alleged violation (Tr. 79-80). He said that they had encountered a streak of rock in the coal which meant that the coal had to be shot extremely hard. The result was that coal was blown back 40-50 feet from the face. The miners then removed the curtain to clean the ribs, but neglected to get the curtain back up (Tr. 80). Mr. Lewis testified

that at the time of his examination when he first went to the face, there was not enough curtain in the No. 1 entry to reach the face, so they took the curtain from the right crosscut to have enough to reach the face. This left the crosscut right without a curtain (Tr. 80). He then went on to state: "But the curtain was to the face of No. 1. Although in the No. 2 entry, the curtain was still down. In No. 3 entry the curtain was still down. But the curtain was piled upon the outby rib of the crosscut" (Tr. 80).

Thus, Mr. Lewis agreed with the statements of the inspector as to the location of the line curtains except that he stated that a curtain was in the No. 1 entry, although it was not up in the crosscut right in that entry (Tr. 89-90, 93). He indicated that the line brattices in the Nos. 2 and 3 entries were up reasonably within 10 feet of the face when he was on the section earlier on the morning of the inspection (Tr. 100), and although the crosscut right of the No. 3 entry had a curtain, he did not know if it was within 10 feet of the face, though he did know that it was not hung in a good manner (Tr. 101). He testified, however, that when the inspector arrived in entry Nos. 2 and 3 as well as the crosscuts right, the brattice was not up, but was piled up outby the last open crosscut (Tr. 102).

Based on the above, it is found that a violation of the roof control plan did exist, thus constituting a violation of 30 CFR 75.316.

The operator should have known of the violation. The shift had bee working about 3 hours before the inspector arrived (Tr. 45-46). The section foreman should have noticed the violation during the shift. Mr. Lewis, the general mine foreman, indicated that while he understood that the regulations do not permit the curtains to be taken down, and while he never gave his permission to take them down, the miners under him do and did take the curtains down (Tr. 97). He indicated that it was normal procedure for the miners to take the curtains down to clean the entries (Tr. 102). He testified that while he realized that it was management's responsibility to see that the curtains were up, if management were not there for a while, the curtains would not be put up (Tr. 102). The general mine foreman had also particularly commented about having warned the miners "time and again not to double-head these places" (Tr. 44). This poor mining practice, described above, was part of the cause of the problem and should have been controlled better by management.

Accordingly, it is found that Eastern's degree of negligence is more than ordinary since it knew of the conditions in the area and the continuing nature of the actions of the miners, but it is somewhat less than gross negligence.

The No. 11 Mine at the time of this violation was not a gassy mine. The inspector testified that while the depth of the entries

inby the line curtains was such that they could not have been driven on one shift, at least the last cuts in each of the affected areas were made during the shift on which the inspection was being made (Tr. 66-67).

The inspector testified that at the time of the inspection, he did not consider the problem of methane to be extremely hazardous because the mine had not progressed too far underground (Tr. 46, 57). He indicated, however, that he thought that the method of mining employed in this mine put dust into suspension which could be injurious to the people inhaling it (Tr. 46, 57). Mr. Lewis, the general mine foreman at this mine at the time of the alleged violation, also testified that this was not a gassy mine (Tr. 77). Mr. Lewis testified that dust from the cutting was not a problem because the cutting machine cuts into the fire clay under the coal seam rather than in the coal, so there is no dust (Tr. 103). He testified that the only dust problem is when you shoot the coal, and he indicated that went out with the smoke (Tr. 103). However, any impurities that were in the area might have been added to by this lack of ventilation (Tr. 47). In addition, there could be a fire hazard raised by having dust in suspension (Tr. 47).

There were approximately eight men working on this section that could have been affected by the absence of proper ventilation (Tr. 45).

Based on the above, it is found that this violation was serious.

With regard to the abatement of the violation, Mr. Lewis testified that it took approximately 45 minutes to abate (Tr. 77). The inspector testified that Eastern complied with what was asked of them in abating the violation. Accordingly, it is found that Eastern demonstrated good faith in abating the violation after notification of it.

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Inspector Workman visited the Lightfoot No. 1 Mine on January 12, 1977. He examined the preshift examiner's books and determined that the 005 2 Butt Right Section had been dangered off for loose coal and coal dust (Tr. 118). When the inspector arrived on the section at about 10:30 a.m., the miners were engaged in coal production (Tr. 119). The mining machine and shuttle cars were in the No. 1 entry and the bolting machine was in either the No. 2 or No. 3 entry (Tr. 126-127). He noticed that lying on the ribs were half-headers, short boards approximately 18 inches by 6 or 8 inches, that had "Dangered off" written on them (Tr. 119-120). He found accumulations of coal in the Nos. 1, 2 and 3 entries ranging from 1 to 18 inches (Tr. 118-119). The inspector established that "approximately" all of the accumulation was 18 inches in depth, that is, approximately 90 percent (Tr. 120). He indicated that he had taken six measurements in

the three entries (Tr. 128-129). The extent of the accumulations ran from the face to a point approximately 85 feet outby in each entry (Tr. 120). Of this accumulation, approximately 90 percent was loose coal, the remainder was coal dust and float coal dust (Tr. 121).

From the conditions the inspector observed, he estimated that mining had continued for at least two shifts, since it had last been cleaned, because of the range of the accumulations (Tr. 122-123). He also testified that when he arrived on the section, at least one cut of coal had been made in the No. 1 entry since the shift started (Tr. 122, 126). A cut of coal is about 18 feet in length (Tr. 147-148).

Mr. Gallaher, who at the time of the notice, was underground project engineer for the Respondent, testified that the previous shift, the third shift, was not a production shift (Tr. 140). He further testified that on the second shift, "ÕtÊhey did lose a drive shaft on the scoop used on that section for cleanup" (Tr. 140). The scoop was repaired sometime during the third shift and brought outside to carry supplies to the section (Tr. 140-141). Mr. Gallaher testified that the scoop was required on cleanup, but that if the scoop were not available, one would take a shovel and turn the coal out for the miner to pick it up (Tr. 144, 154). That was how the citation was eventually abated, the loose coal and coal dust was thrown out in the middle of the roadway where it could be picked up by the miner when it got back on cycle (Tr. 125). It took about 2 hours to abate the violation (Tr. 143). The cleanup program for the mine was set forth in Exhibit OX-2 as follows:

LIGHTFOOT NO. 1 EACC

CLEAN-UP PROGRAM

1. Each place is bolted first to insure safety of workers.

2. Loose material along the ribs is shoveled into the roadway as necessary.

3. This material is then pushed into the face area by the scoop or loaded by the miner as miner advances to next cut.

4. Rock dust is maintained to at least forty feet from the working face.

The working cycle at this mine is from right to left.

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,087 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board of Mine Operations Appeals (Board) held that the presence of a deposit or accumulation of coal dust or other combustible materials in active workings of a mine is not, by itself, a violation.

In that case, the Board held that MSHA must be able to prove:

> (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;
>
> (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
>
> (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

There can be no doubt that there was an accumulation of combustible material in the active workings as described above. Further, in view of both the fact that the area had been written up in the preshift examiner's report and dangered off, and in view of the extent of the accumulation, there is no doubt that the coal mine operator was aware, or should have been aware of the existence of the accumulation. The section foreman certainly should have observed the condition during the 3 hours that expired on the shift before the notice was issued. The fact that the danger boards had been set side and that the miners had been at work in actual coal production during the first shift after the danger boards were removed and while the accumulation still remained, further bolsters this finding. The question that remains is whether Eastern failed to clean up the accumulation within a reasonable time after discovery was or should have been made.

As to the issue of "reasonable time," the Board stated:

> As mentioned in our discussion of the responsibilities imposed upon the coal mine operators, what constitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

8 IBMA at 115.

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The Board further stated:

> With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation, it is our view that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shifts, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the unusual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the Act upon a coal mine operator to protect the safety of the miners.

8 IBMA at 111.

The extent of this accumulation and the opinion of the inspector, coupled with the testimony regarding the usual cleanup procedure for the mine, and the fact that the scoop was not operable at a stage during the prior second shift, all indicate that the accumulation was present for longer than was reasonable. The additional opinion given by the preshift examiner in dangering off the area of the accumulations followed by the setting aside of the danger signs and the commencement of coal production is further indication of this.

The Respondent's underground project engineer recognized that the regular cleanup cycle had not been followed prior to the issuance of the notice (Tr. 142). An effort to clean up the area should have been undertaken before coal production was commenced on the shift in question.

In view of the facts set forth above, it is found that MSHA has proved all elements necessary to establish a violation of 30 CFR 75.400.

The inspector testified that when you have loose coal and coal dust in areas where there is travel, there is a danger of fire (Tr. 123). He did not recall any bad cables in the area, however (Tr. 123), and Mr. Gallaher testified that he was not aware of any problems with cables on that section at that time (Tr. 140). The inspector also indicated that the mine was damp and there were spots on the roadway where there was water, but that it was not damp in the face area (Tr. 121). Mr. Gallaher attested to the dampness and indicated that there were 8 or 9 inches of water in places (Tr. 135). However, the inspector established the fact that there was no standing water in the 85-foot area where the accumulations were located in this case

(Tr. 132). The inspector, Mr. Gallaher, and Mr. Belcher, the company mining inspector, testified that there was no methane present at the time the citation was issued (Tr. 124, 131, 135, 163). The potential sources of ignition on the section were the energized electric face equipment, oil on the machinery and the welder kept for repairs on the section (Tr. 123-124). However, the welder would have been near the belt tailpiece which was at least 300 feet from the working face (Tr. 140, 142). Mr. Gallaher was not aware of any mechanical problem at that time that would have necessitated its use (Tr. 140). Based on all of the above factors, particularly the potential sources of ignition, such as the energized electric face equipment, and the extent of the accumulation, it is found that the violation was serious.

It is found as shown above, that the operator knew or should have known of the violation. In view of the fact that the area had been dangered off and the operator proceeded to mine without regard to that fact, it is found that the violation was the result of gross negligence. The alleged inexperience of the preshift examiner (Tr. 146) did not justify the failure to heed the danger signs.

It is further found that once notified of the violation, the operator demonstrated good faith in abating the violation (Tr. 125).

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On January 14, 1977, Inspector Workman visited the Lightfoot No. 1 Mine to make a regular safety inspection (Tr. 167). During the course of that visit, he entered the 004 Mains Section and proceeded up the belt entry (Tr. 168). Following the inspection of the face area, he went up the No. 3 entry, which is a fresh air intake and primary escapeway, and found approximately four cases of explosives and detonators stored within 12-1/2 feet of the 7,200 high-voltage cable and approximately 15 feet from the travelway (Tr. 168, 184, Exh. GX-8) in an area 600 or 700 feet outby the working area (Tr. 169, 217). The explosives and detonators were stored in a wooden container with a lid on it (Tr. 168-169). The container was located in a crosscut about 12-1/2 feet from the mouth of the crosscut. The high-voltage cable was hung across the mouth of the crosscut (Tr. 187). The other end of the crosscut was blocked by a permanent stopping (Tr. 170, 185).

There was no dispute as to the location of the explosives and detonators. Accordingly, it is found that a violation existed in that 30 CFR 75.1306 requires that explosives and detonators be located "at least 25 feet from roadways and power wires, %y(3)5C."

The inspector indicated that one of the hazards inherent in the placement of the powder box was the 7,200-volt cable that ran past it. The detonating caps stored in the box are set off by an electrical charge (Tr. 171, 209). This detonation could be activated by stray

current from a power cable (Tr. 171). However, in order for there to be a stray current, there would have to be a break in the cable (Tr. 255). The cable in question was a new cable that had been installed about a month before this incident (Tr. 207). This cable has a metal shield which is covered by a rubber coating. A person can touch it and not receive a shock (Tr. 189). In addition, there is a ground-checking system which continuously monitors the system. If a hole was made in the armor shielding, the system is designed to deenergize itself (Tr. 171, 189, 207-208). There was no reason to believe that this system was hooked up improperly (Tr. 256). In addition, stray current would have to have a path of conductivity to set off the detonators (Tr. 255). The powder box is constructed out of wood which is a nonconducting material (Tr. 209, 224), and the detonators were separated from the powder by a 4 inch wooden divider (Tr. 206). The section where the powder box was located was dry and rock dusted and there was no water present on the box itself (Tr. 207, 259-260). Further, the detonators can not be set off if the wires are shunted on them (Tr. 214). All detonator wires that come from the factory are shunted by a small lead fitting holding the wires together on each dotonator (Tr. 214-215). There was no testimony that any of these shunting devices was missing from any of the detonators. There were no loose detonators lying around in the powder box (Tr. 221-222, 261).

In addition to the cable, the inspector indicated that there was a potential hazard, because of the proximity to a travelway of a scoop with its batteries coming in direct contact with the powder box (Tr. 172). It was pointed out that the crosscut had a stopping at one end which would cut down on traffic (Tr. 185-186). No one would have any reason to g o into the crosscut other than to get explosives (Tr. 186, 193). However, as pointed out by the inspector, equipment failure could cause a person to lose control of the machinery (Tr. 184). If this were to happen, however, certain safety devices, such as a panic bar designed to deenergize the machine in the event of a problem, would serve to lessen, though not eliminate this danger (Tr. 188, 217, 225).

The Administrative Law Judge also took judicial notice of a West Virginia Statute, section 22-2-32, relating to underground storage, which requires that explosives must be stored at least 15 feet from roadways and power wires, rather than the 25 feet required by Federal law (Tr. 199-200).

Accordingly, it is found that this violation was only moderately serious.

Mr. Aguilar, the acting mine foreman at the time of the incident, testified that on the day prior to the issuance of the order, he had the explosives' box moved from another location to the crosscut where it was at the time of the inspection (Tr. 204, Exh. 0-4). The last

time he saw it, it was at least 25 feet from the roadway and up against the stopping at the rear of the crosscut (Tr. 205). Subsequently, however, and prior to the shift on which the inspection was conducted, it was brought out of the mine to be refilled (Tr. 206). There is no clear showing that Eastern management knew that the box had been placed too near the roadway or the power cable, however, since the violation was not cited until about 4 hours after the shift began, it should have been seen by management personnel. Accordingly, this violation is found to be the result of ordinary negligence.

The inspector testified that the time for the abatement was one-half hour. This included withdrawing the men from the area and moving the powder box further into the crosscut. This latter action took approximately 3 minutes Tr. 180). It is found that Eastern demonstrated good faith in abating the violation.

Appropriateness of Penalty to Size of Operator's Business

Eastern is a large coal company (Tr. 20). It was stipulated that the company's coal production for 1976 was 8 million tons (Tr. 20).

Effect on Operator's Ability to Continue in Business

Counsel for Eastern stated that he was willing to stipulate that the company would be able to continue in business even if there were an assessment in this case (Tr. 20). Furthermore, the Interior Board of Mine Operations Appeals (Board) has held that evidence relating to whether a penalty will affect the ability of the operator to stay in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971 OSHD par. 15,380 (1972). I find therefore, that penalties otherwise properly assessed in this proceeding would not impair the operator's ability to continue in
business.

History of Previous Violations

As relates to the Wharton No. 11 Mine, the operator had paid assessments for approximately 82 violations of regulations in the 24 months preceding the violation of January 11, 1977. Of these, five were violations of 30 CFR 75.316, the violation cited in these proceedings. As relates to all mines of the operator, during the year 1975, it paid assessments relating to approximately 58 violations of 30 CFR 75.316; as relates to the year 1976, the number was approximately 88 violations of 30 CFR 75.316.

As relates to the Lightfoot No. 1 Mine, the operator had paid assessments for approximately 157 violations of regulations in the 24 months preceding the violation of January 12, 1977. Of these, 22 were violations of 30 CFR 75.400. There is no history shown in

this mine for violations of 30 CFR 75.1306. As relates to all mines of the operator, during the year 1975, it paid assessments relating to approximately 276 violations of 30 CFR 75.400; as relates to the year 1976, the number was approximately 346 violations of 30 CFR 75.400. As relates to all mines of the operator during the year 1975, it paid assessments relating to approximately 14 violations of 30 CFR 75.1306; as relates to the year 1976, the number was approximately 19 violations of 30 CFR 75.1306. In accordance with the ruling in Peggs Run Coal Company, 5 IBMA 144, 150, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975), no consideration will be given to any violations occurring subsequent to the respective dates of violations involved in this case.

VI. Conclusions of Law

1. Eastern Associated Coal Corporation and its Wharton No. 11 Mine and Lightfoot No. 1 Mine have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act during the respective periods involved in these proceedings.

2. Under the Acts, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to these proceedings.

3. The violations charged in Notice No. 3 AJK, January 11, 1977 (30 CFR 75.316), Notice No. 6 BJW, January 12, 1977 (30 CFR 75.400), and Order No. 1 BJW, January 14, 1977 (30 CFR 75.1306), are found to have occurred.

4. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

MSHA and Eastern submitted posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

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Notice No. 3 AJK January 11, 1977 30 CFR 75.316 $1,350.00

Docket No. HOPE 78-76-P

Notice No. 6 BJW January 12, 1977 30 CFR 75.400 $1,500.00

Docket No. HOPE 78-75-P

Order No. 1 BJW January 14, 1977 30 CFR 75.1306 $ 900.00

ORDER

Respondent is directed to pay the penalties assessed in the amount of $3,750.00 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1 The Secretary of Labor, Mine Safety and Health Administration (MSHA), has been substituted as the petitioner in lieu of the Mining Enforcement and Safety Administration of the Department of the Interior (MESA) as a result of the enactment of the Federal Mine Safety and Health Amendments Act of 1977, P.L. 95-164, November 9, 1977.

~FOOTNOTE_TWO

2 On March 9, 1978, most provisions of the Federal Mine Safety and Health Amendments Act of 1977 became effective. That Act provides for a different effective date as to certain specifically named provisions not pertinent to this proceeding. The Amendments Act of 1977 changed the title of the 1969 Act, as amended, to read "Federal Mine Safety and Health Act of 1977." That Act will be referred to in this decision as "the 1977 Mine Act."

Section 301(a) of the Amendments Act provides that:

"Except with respect to the functions assigned to the Secretary of the Interior pursuant to section 501 of the Federal Coal Mine Health and Safety Act of 1969, the functions of the Secretary of the Interior under the Federal Coal Mine Health and Safety Act of 1969, as amended, and the Federal Metal and Nonmetallic Mine Safety Act are transferred to the Secretary of Labor except those which are expressly transferred to the Commission by this Act."

With respect to this transfer of functions, section 301 of the Act of 1977 continues in subsection (c)(3), in part as follows:

"The provisions of this section shall not affect any proceedings pending at the time this section takes effect before any department, agency, or component thereof, functions of which are transferred by this section, except that such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Secretary of Labor or the Federal Mine Safety and Health Review Commission."

~FOOTNOTE_THREE

3 The history of violations was marked for identification as Exhibit GX-4. The Respondent was then given 14 days after the close of the hearing on October 11, 1978, to file objections to the document (Tr. 250). No objections were filed as to such document. Therefore, the document marked as Exhibit GX-4 for identification is received in evidence.