

CCASE:
SOL (MSHA) V. FREEMAN UNITED COAL MINING
DDATE:
19790726
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding

Docket No. VINC 78-49-P
A.O. No. 11-00599-2011V

v.

Orient No. 6 Mine

FREEMAN UNITED COAL MINING COMPANY,
RESPONDENT

DECISION

Appearances: Leo J. McGinn, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent

Before: Judge Cook

I. Procedural Background

On December 29, 1977, a petition was filed for assessment of civil penalty against Freeman United Coal Mining Company pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(a) (1970), for an alleged violation of the mandatory safety standard embodied in 30 CFR 75.400. An answer was filed on January 16, 1978.

A notice of hearing was issued on July 14, 1978. The hearing was held on September 26 and September 27, 1978, in Chicago, Illinois. Representatives of both parties were present and participated.

At the hearing on September 26, 1978, the parties submitted proposed settlement agreements as to all or part of the alleged violations in the following companion cases: Docket Nos. VINC 78-394-P, VINC 78-392-P, VINC 78-393-P, VINC 78-396-P, VINC 78-397-P. Settlement proposals were not submitted in either the present case or in Docket No. VINC 78-395-P. It was proposed that the record be consolidated as to all cases, but the Respondent preferred to maintain separate transcripts of the proceedings in both the present case and

Docket Nos. VINC 78-394-P and VINC 78-395-P. The record of the September 26, 1978, settlement negotiations was consolidated with the separate records of the remaining contested cases.

A schedule for the submission of post-hearing briefs was agreed upon at the conclusion of the hearing, but a delay in the receipt of transcripts and other problems experienced by counsel forced a revision of the briefing schedules. Under the revised schedule, briefs were due on or before February 6, 1979, and reply briefs were due on or before February 19, 1979. Respondent file its post-hearing brief on February 6, 1979. Petitioner filed no post-hearing brief. No reply briefs were filed.

II. Violation Charged

Order No. 6-0179 (1 LDC), November 1, 1976, 30 CFR 75.400

III. Evidence Contained in the Record

(A) Stipulations were entered into by the parties during the course of the hearing, and are set forth in the findings of fact, *infra*.

(B) Witnesses MSHA called as its witness Lonnie Connor, as MSHA inspector.

Freeman called as its witness Richard Gale Dawson, the chief belt maintenance foreman at the Orient No. 6 Mine at the time of the hearing, and shift mine manager on November 1, 1976.

(C) Exhibits

(1) MSHA introduced the following exhibits into evidence:

(a) M-1 is a copy of Order No. 6-0179 (1 LDC), November 1, 1976, 30 CFR 75.400.

(b) M-2 is a termination of M-1.

(c) M-3 is a 5 page document containing copies of Inspector Conner's notes.

(2) Freeman introduced the following exhibits into evidence:

(a) Exhibits 0-1-A through 0-1-F are copies of preshift reports.

(b) 0-2 is a map of the Respondent's Orient No. 6 Mine.

(3) Exhibit is a computer printout listing paid assessments for violations cited at the Orient No. 6 Mine.

(4) The exhibits listed below, although not pertaining to the mine which is the subject matter of the above-captioned proceeding, were ordered filed with the exhibits in the above-captioned case during the proceedings on September 26, 1978. These exhibits, pertaining to the companion cases listed in Part I, supra, are set forth as follows:

(a) Exhibit 1 is a computer printout listing paid assessments for violations cited at Respondent's Orient No. 3 Mine

(b) Exhibit 2 is a computer printout listing paid assessments for violations cited at Respondent's Orient No. 4 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 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

A. Stipulations

1. During the settlement proceedings on September 26, 1978, the parties entered into the following stipulations:

(a) The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year (Tr. 5, 11-September 26, 1978, Docket Nos. VINC 78-392-P, et al).

(b) The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year (Tr. 5, 11-September 26, 1978, docket Nos. 78-392-P, et al).

2. During the course of the hearing, the parties entered into the following stipulations:

~939

(a) Two shafts had been drilled (Tr. 95).

(b) As indicated in the core report, the material from those shafts contained a high degree of rock and other materials of that type, such as shale (Tr. 95).

(c) The material from the shafts was stockpiled underground (Tr. 95).

(d) In addition to the coal which the belt hauled from the production areas, some material from the shafts was placed on the belt to be disposed of outside the mine (Tr. 95).

(e) The 18th north belt is a 36 inch wide belt (Tr. 98).

(f) The belt is a rope suspended conveyor using polyvinyl chloride belting material (Tr. 98).

(g) The belting material is a "scandura conveyor belting" with a U.S.B.M. approval No. 28-1, which specifies that this material is fire resistant and will not support combustion (Tr. 98).

(h) Fire protection is provided along the conveyor with a two inch water line provided with fire hose outlets as required, and a "fire sensing direction ÕsicÊ system" along the entire belt line (Tr. 98).

(i) At every drive assembly there are provided 300 feet of fire hose, carbon dioxide fire extinguishers, and numerous sacks of rock dust (Tr. 98).

(j) In accordance with the Code of Federal Regulations, this conveyor line is contained and isolated from the intake and return escapeways (Tr. 98-99).

(k) There was not present in this belt entry any high voltage electric wires (Tr. 98-99).

B. Occurrence of Violation

MSHA inspector Lonnie Connor conducted a regular health and safety inspection at Respondent's Orient No. 6 Mine on November 1, 1976 (Tr. 6). He issued the subject order of withdrawal at 6:20 p.m., citing the Respondent for a violation of the mandatory safety standard embodied in 30 CFR 75.400 (Tr. 16, Exh. M-1). The order of withdrawal states:

Coal and coal dust have accumulated alongside and under the 18th north-east conveyor belt from a point 100 feet out by the 1st section tail pulley to the tail pulley of the 3rd section of belt, a distance of 3,700 feet. The accumulations range from 2 to 18 inches in depth, and the bottom of the belt and the return rollers were rubbing the accumulations for 700 feet. The belt was recorded dirty on the preshift examiner's book (Exh. M-1).

The 18th north east conveyor belt is approximately 6,000 feet long (Tr. 49), and consists of three sections (Tr. 11, 49). It is a 36 inch belt (Tr. 30, 98), but had worn down to a 31-32 inch width at points (Tr. 47). The inspector walked the west side of the belt line in its entirety (Tr. 10, 30-31). The only places on the east side of the belt that he specifically checked were the drives and tail pieces (Tr. 31).

There was a 24 inch high accumulation of coal dust around the tailpiece of the first section (Tr. 11). According to the inspector, belt shovelers had shoveled coal dust away from the tail pulley itself and had piled it along side the ribs of the entry (Tr. 11).

The second section of the drive had coal dust accumulations packed both in and under the drive, and around the rollers of the drive (Tr. 11). The inspector testified that the dust was packed around the bottom rollers of the drive for 3 to 4, and possibly 5 inches, although he admitted that he did not measure it (Tr. 12). He did not check the rollers for heat, and did not notice any heat source in the area (Tr. 12, 17). He described the accumulations as "damp and wet" at that location (Tr. 12).

Proceeding in from the second section drive, he found accumulations of various depths all along the second section of belt (Tr. 13, 27). These accumulations extended from the head to the tailpiece (Tr. 32). For a distance of 650 feet, they measured 18 inches deep or more in spots (Tr. 32). The remainder measured 2 to 4 inches in depth (Tr. 32). The bottom rollers of the belt were rubbing the accumulations (Tr. 13). Generally speaking, the accumulations were dry, but there were some wet areas along the beltline (Tr. 35). The second section tailpiece was also packed with accumulated coal dust (Tr. 13). The tailpiece was described as "dirty" (Tr. 27).

The third section of the belt had accumulations of coal and coal dust around it. The third section drive also had some coal dust around it. Coal dust had been shoveled out from around the tailpiece and had been stacked around it (Tr. 28).

The accumulations were located mostly on the west side of the belt (Tr. 13). The measurements were made with a tape measure

~941

(Tr. 13). Although the inspector did not recall how many measurements he had taken, he stated that the measurements were interspersed along the beltline (Tr. 13).

The accumulations consisted of lumps of coal with some rock in it (Tr. 14). The pieces of coal were large (Tr. 43). The rock that was intermixed with the coal along the west side of the belt was large rock that had been cut as part of the mining cycle (Tr. 43). This was described as normal because "ÔtÊhere is no pure coal. It all has rock intermixed with it %y(3)5C" (Tr. 43-44). The inspector further testified that the amount of rock observed in the accumulation was insufficient to render the accumulation inert "as a whole" (Tr. 45).

The coal dust was not float coal dust, but a fine coal dust that could pass through a 100 mesh screen (Tr. 14). The inspector testified that coal was being run at the time (Tr. 17), although he did not know how much coal had been mined on that shift (Tr. 46). Although the belt was running, the inspector did not recall whether anything was being carried on the belt (Tr. 47).

The inspector had checked the preshift examiner's books prior to going underground (Tr. 14). He testified that two recordings in the preshift examiners books stated that the belt was dirty (Tr. 16). The preshift examination conducted between 5 and 8 a.m. on November 1, 1977, recorded the belt as dirty from the first section tail to the second section tail (Exh. O-1-C, Tr. 15). According to the inspector, Mr. Tom Gentry, the mine manager, had recorded in the book that he did not have the necessary people to correct the condition (Tr. 16).

The inspector testified that a written cleanup plan was in effect at the mine on November 1, 1977, and that he had seen it on a previous occasion (Tr. 17). He did not recall the Respondent as having any provisions in the cleanup plan for cleaning the conveyor belt system (Tr. 18). However, he was aware that the Respondent had a practice of assigning belt shovelers as needed to the different areas that needed cleaning (Tr. 18). He testified that the practice at the Orient No. 6 Mine was to do very little shoveling (Tr. 48). Although they usually patrol the belt "maybe once a shift," they mostly station themselves at the drive or tailpiece and cleanup spills caused by the failure of the belts to stop in sequence (Tr. 48).

According to the inspector, a great deal of spillage occurs along this belt because it had worn, reducing the width to 31 or 32 inches at points (Tr. 47). Due to this narrowness, the belt should be cleaned by assigning people to continuously work on it (Tr. 47). He stated that one man could handle 6,000 to 7,000 feet of belt in the absence of the spillage problem, but that it would require 2 or 3 men on each shift to keep this particular belt clean (Tr. 49). The inspector saw one man shoveling, and he was located in the middle of the second section of the belt (Tr. 19).

Mr. Richard Gale Dawson, the Respondent's shift mine manager on November 1, 1976 (Tr. 73-74), testified that he walks each belt line weekly, and that he had probably walked the 18th north east belt line more than 50 times as of November 1, 1976 (Tr. 86). His experience, both as a belt foreman and from walking the belt, indicated that it would require 2 men to properly clean it (Tr. 86). Two men would be sufficient, in the absence of a personal communication from the belt examiner that the belt was especially dirty (Tr. 87). According to Mr. Dawson, the examiner makes an entry in the preshift report anytime the belt needs cleaning, but this does not necessarily indicate that a hazard exists (Tr. 87). If it is of such a nature as to present a hazard, the examiner normally informs Mr. Dawson (Tr. 87). He testified that on November 1, 1976, no one told him anything regarding the nature and extent of the accumulation cited by the inspector (Tr. 87).

The preshift mine examiner's report for October 31, 1976, covering the shift examination from 9 p.m. to 12 midnight (Exh. O-1-A) contains a notation covering the second section of belt showing a dirty tail (Tr. 78). According to Mr. Dawson, this notation indicated a spill at the transfer point involving approximately 12 feet (Tr. 78). He stated that a belt cleaner had been assigned to clean this section of belt (Tr. 78).

The preshift mine examiner's report for November 1, 1976, covering the 5 a.m. to 8 a.m. examination (Exh. O-1-C) states: "18 north belt dirty from 3177 to second belt drive west side" (Tr. 81). This covers a distance of 750 feet (Tr. 81-82). No one was assigned to clean the area (Tr. 110).

The northeast section of the mine did not operate between 8 a.m. and 4 p.m. on November 1, 1976, and no coal was produced on this section during that 8 hour time period (Tr. 82-83).

During the preshift examination conducted between 1 p.m. and 4 p.m. on November 1, 1976, the examiner recorded a dirty belt in the first section of tail and the second section of tail (Exh. O-1-D, Tr. 84). According to Mr. Dawson, the entry indicated that approximately 2,200 feet of belt was involved (Tr. 85). However, he was unable to state why the belt was reported dirtier in Exhibit O-1-D than in Exhibit O-1-C because the belt had not been in operation during the intervening shift (Tr. 85). Mr. Dawson testified that the entry in Exhibit O-1-D caused him to assign additional personnel to clean the belt (Tr. 85-86).

In describing the accumulations, Mr. Dawson stated that some of them had been shoveled from the second section drive and thrown along side the rib (Tr. 89). He described the drive area as being extensively wet, as standing in water (Tr. 89). The material between the drives was characterized as damp (Tr. 103).

He characterized the material along the west side of the drive as primarily refuse material from two shafts being drilled approximately 700 feet from the belt tail, (Tr. 89, 90, 99), although he admitted seeing some large chunks of coal and some small particles of coal (Tr. 99). The drilling process had produced refuse consisting primarily of shale, with some limestone and a small amount of lime rock (Tr. 91). He stated that such material would be wet (Tr. 91). The parties stipulated that in addition to the coal which the belt hauled from the production areas, some material from the shafts was placed on the belt to be disposed of outside the mine (Tr. 95).

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (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 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.

For the reasons set forth below, I find that accumulations of combustible material were present in the mine's active workings, as described in the subject order of withdrawal.

There is a conflict in the testimony as to the composition of the material along the 18th northeast conveyor belt. The testimony of Mr. Dawson characterizes the material as primarily shale, limestone and lime rock, while the testimony of Inspector Conner characterizes it as coal and coal dust. Having had the opportunity to assess the credibility of the witnesses, I conclude that the inspector's testimony correctly identifies the composition of the material. The inspector recalled the sinking of the two shafts, that some of the material had been stockpiled in crosscuts, and he

~944

believed that some of it had been loaded out (Tr. 39-40). He was aware that some of the material from the shafts was included in the areas observed along the belt line, and was able to give a detailed description of its color (Tr. 40). The fact that he was aware of the presence of this material during the course of the inspection, and that he was able to identify it, indicates that he correctly identified the accumulation as principally coal and coal dust.

Although the accumulations were described as damp to wet in certain areas, there is no indication that the accumulations were sufficiently wet in all areas to prevent combustion under any circumstances. In fact, the inspector stated that most of the material was dry (Tr. 35).

Accordingly, it is found that accumulations of combustible materials existed in the mines active workings, as described in the subject order of withdrawal (Exh. M-1).

The preshift examiner's reports contain references to accumulations along the 18th northeast conveyor belt, but they do not contain entries indicating that the accumulations were as extensive as those reported by the inspector. However, the discrepancy between Exhibits O-1-C and O-1-D as to the extent of the accumulations reveals that the reports are a less than accurate indicator of the duration of their existence. Exhibit O-1-C is the entry which preceded Exhibit O-1-D, and the former entry records a less extensive accumulation problem than does the latter. Yet, the belt was neither in operation nor was any coal produced during the intervening time period. In light of this discrepancy, I accept the inspector's estimate that the accumulations existed for a number of shifts (Tr. 22). An individual conducting a proper preshift or onshift examination should have discovered the accumulation's presence. Accordingly, it is found that the Respondent knew or should have known of their existence.

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.

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 shift, 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 the accumulation and the opinion of the inspector, coupled with the testimony regarding the usual cleanup procedure for the mine, indicate that the accumulation existed for more than a reasonable time. The fact that some of the accumulations had been piled along the ribs, coupled with the fact that only one belt shoveler was working on the accumulations when the inspector walked the belt, indicate that the Respondent was not securing effective removal of the accumulation at the time the order was issued.

Two or three shovelers should have been assigned to continuous cleanup duties along the belt. Although Mr. Dawson's experience indicated the need for 2 shovelers to maintain the area in an acceptable condition, (Tr. 87), he did not always assign 2 shovelers to the subject belt (Tr. 86).

Although the entry in the preshift report for the examination conducted between 5 a.m. and 8 a.m. on November 1, 1976, (Exh. O-1-C) revealed an accumulations problem along the subject belt, no one was assigned to clean the belt on the November 1, 1976, 8 a.m. to 4 p.m. shift (Tr. 110). The mine manager is supposed to abate items reported by the examiners (Tr. 111). The entry in the preshift report for the examination conducted between 1 p.m. and 4 p.m., on November 1, 1976 (Exh. O-1-D) indicated to Mr. Dawson that 2 shovelers were required to alleviate the problem. Even though he may have assigned an additional shoveler to the belt, the fact remains that only one belt shoveler was working in the area at the time the order was issued. In the words of Inspector Connor: "That one man that I saw shoveling on the belt could not have cleaned the accumulations in a week of shoveling" (Tr. 22).

In view of the facts as set forth above, it is found that MSHA has both established a prima facie case for a violation of 30 CFR 75.400 and preponderated over the rebutting evidence adduced by the Respondent. Zeigler Coal Co., 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975). Accordingly, it is found that the violation occurred as alleged.

C. Gravity

The violation was observed by the inspector during a production shift (Tr. 114), although no coal had been produced (Tr. 115). The belt was running (Tr. 12), but the inspector could not recall anything being carried on it (Tr. 47).

Some rollers were surrounded completely by accumulations (Tr. 12), but the inspector did not know how many rollers were turning in the accumulation (Tr. 38). He did not recall whether any rollers were broken (Tr. 38). He did not check the rollers for heat, (Tr. 12, 17), and did not notice any heat source in the area (Tr. 12).

According to the inspector, the mine is gassy, liberating in excess of 600,000 cubic feet of methane in 24 hours (Tr. 7). However, there was no methane present in the belt entry (Tr. 37). The explosive range for methane is 5 to 15 percent, with 9 percent as the optimum (Tr. 27). The belt entry was isolated, as far as the inspector could ascertain (Tr. 37). Mr. Dawson described the belt as isolated (Tr. 97). The inspector classified the violation as a serious one (Tr. 20). In his opinion, serious physical harm could have befallen a miner because if a mine fire were to occur or if an explosion were to occur the accumulations could possibly propagate and extend an explosion (Tr. 20).

The most probable ignition sources were described as friction or electricity (Tr. 37-38). Friction could have been caused by the rollers rubbing rock and coal (Tr. 20, 38-39). The drive was classified as a possible ignition source because the drive bearings could overheat and cause combustion (Tr. 21). However, there was no indication that overheating of the drive bearings was likely to occur. The inspector did not recall seeing any cables or electrical wiring in contact with the coal dust (Tr. 39).

If an ignition had occurred, some smoke would have reached the face area (Tr. 21), but the majority of it would have entered the return air course (Tr. 22).

Most of the accumulations were dry (Tr. 35). There were some wet areas, as set forth in Part V (B), supra.

~947

The inspector observed a small amount of rock dust underneath the accumulations (Tr. 36).

The belting material was a "scandura conveyor belting" with a U.S.B.M. approval No. 28-1, which specifies that this material is fire resistant and will not support combustion (Tr. 98). Fire protection was provided along the conveyor with a two inch water line provided with fire hose outlets as required, and a fire sensing system along the entire belt line (Tr. 98). Three hundred feet of fire hose, carbon dioxide fire extinguishers and numerous sacks of rock dust were provided at every drive assembly (Tr. 98). In accordance with the Code of Federal Regulations, the conveyor line was contained and isolated from the intake and return escapeways Tr. 98-99). No high voltage electric wires were present in the subject belt entry (Tr. 98-99).

Accordingly, on the facts as set forth above, it is found that the violation was serious. D. Negligence of the Operator

It is found, as set forth in Part V (B), supra, that the Respondent knew or should have known of the violation. Of particular significance are the following findings:

The Respondent did not assign individuals to clean the subject belt during the 8 a.m. to 4 p.m. shift on November 1, 1976, even though the entry in the preshift report (Exh. 0-1-C) indicated that the belt was dirty. As mentioned in Part V (B), supra, the entry in Exhibit 0-1-D reveals a more extensive accumulation problem than does the entry in Exhibit 0-1-C, even though the belt was not in operation and no cleaning occurred during the intervening shift. These facts indicate that either the area was not subjected to a proper preshift examination or that the examiner failed to accurately record his observations in the preshift reports. However, the actual or constructive knowledge of a preshift examiner is imputed to the operator. Pocahontas Fuel Company, 8 IBMA 136, 84 I.D. 488, 1977-1978 OSHD par. 22,218 (1977) aff'd sub nom. Pocahontas Fuel Company v. Andrus, 590 F.2d 95 (4th Cir. 1979).

In view of the foregoing, it is found that the Respondent demonstrated considerably more than ordinary negligence.

E. Good Faith in Securing Rapid Abatement

The order of withdrawal was issued at 6:20 p.m. on November 1, 1976 (Exh. M-1). Mr. Dawson proceeded immediately to the 18th north east conveyor belt area after learning of the closure order (Tr. 87). Mr. Dawson walked the beltline, and thereupon assigned a crew to

~948

remove the accumulations by telling the face foreman that he wanted more individuals to shovel (Tr. 88). The order was terminated at 7:45 p.m. on November 2, 1976.

Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

F. History of Previous Violations The history of previous violations at the Respondent's Orient No. 6 Mine during the 24 months prior to October 28, 1976, is embodied in the following chart:

Violations of 30 CFR	Year 1 10/30/74-10/29/75	Year 2 10/30/75-10/28/76	Totals
All Sections	190	169	359
Section 75.400	32	28	60

(Note: All figures are approximations)

The operator had paid assessments for approximately 359 violations of all regulations falling under 30 CFR within the 24 months preceding the violation of October 29, 1976. Approximately 190 of those violations occurred between October 30, 1974 and October 29, 1975, while 169 occurred between October 30, 1975 and October 28, 1976.

The operator had paid assessments for approximately 60 violations of 30 CFR 75.400 during the 24 months preceding October 29, 1976. Approximately 32 of those occurred between October 30, 1974 and October 29, 1975, while approximately 28 occurred between October 30, 1975 and October 28, 1976.

G. Appropriateness of Penalty to Operator's Size

The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year. (Stipulations embodied in transcript of the September 26, 1978 settlement proceedings, pp. 5, 11, Docket Nos. VINC 78-392-P, et al). The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year. (Stipulation embodied in transcript of the September 26, 1978 settlement proceedings, pp. 5, 11, Docket Nos. VINC 78-392-P, et al).

H. Effect on Operator's Ability to Continue in Business

Counsel for the Respondent concedes in his post-hearing brief that assessment of the maximum penalty would have no effect on the Respondent's ability to continue in business (Respondent's Post-Hearing Brief, p. 23). Furthermore, the Interior Board of Mine

Operations Appeals has held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Freeman United Coal Mining Company and its Orient No. 6 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the Federal Mine Safety and Health Act of 1977 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 this proceeding.

3. The violation charged in Order No. 6-0179 (1 LDC), November 1, 1976, 30 CFR 75.400 is 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

Freeman United Coal Mining Company submitted a post-hearing brief. MSHA submitted no post-hearing brief. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has 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 this case.

VIII. Penalty 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 a penalty is warranted as follows:

Order No.	Date	30 CFR Standard	Penalty
6-0179 (1 LDC)	11/01/76	75.400	\$ 3,000

~950

ORDER

The Respondent is ORDERED to pay civil penalty in the amount of \$3,000 as assessed in this proceeding within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge