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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), PETITIONER	Civil Penalty Proceeding Docket No. VINC 79-67-P A.O.No. 12-00336-02007F
v.	Squaw Creek Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Robert A. Cohen, Trial Attorney, Department of Labor, Office of the Solicitor, Arlington, Virginia, for the petitioner;
Thomas F. Linn, Esq., St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent on November 30, 1978, 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 alleged mine safety violations issued pursuant to the 1969 Federal Coal Mine Health and Safety Act. Respondent filed a timely answer in the proceeding, asserted several factual and legal defenses, and a hearing was held in Evansville, Indiana, on January 31, 1979. The parties filed proposed findings and conclusions and a brief, and the arguments contained therein have been considered by me in the course of this decision.

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 petition for assessment of civil penalty filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the

respondent for each 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 in the course of this decision.

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 vioation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Sections 109(a)(1) and (a)(3) of the 1969 Act, 30 U.S.C. 819(a)(1) and (a)(3), now section 110(i) of the 1977 Ac

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. The jurisdiction of the presiding Judge.

2. Respondent is a large coal mine operator and any civil penalty imposed will not affect its ability to remain in business.

3. During the period in question in this proceeding, the Squaw Creek Mine employed approximately 220 miners and daily coal production was 5,000 tons.

Discussion

The alleged violations and applicable mandatory safety standards in issue in this proceeding are as follows:

Notice 104(b) 1 FCW, April 20, 1977, issued by mine inspector Fred C. Wheatley, alleges a violation of 30 CFR 77.1710(g) and states as follows:

> A fatal fall of person accident occurred at 9 p.m., April 19, 1977. The victim was performing repair work on a 5 ton capacity overhead hoist in the Model 1360 Bucyrus Erie dragline at pit ID 001 while standing on top of drag

> drive gear housing where no work platform was provided approximately 16 feet above the floor level. No safety belt and line or other safety devices were being used.

The notice was modified on April 27, 1977, as follows:

> A review of the circumstances surrounding the violation described in 104(b) notice of violation No. 1 FCW dated April 20, 1977, indicates the violation occurred because of unwarrantable failure on the part of the operator. Therefore Notice No. 1 FCW dated April 20, 1977, is hereby modified as being issued under 104(c)(1) instead of 104(b).

The notice was terminated on April 28, 1977, and the termination notice states:

> Company safety rule No. 105(i) requiring safety belts and lines be used as designed has been amended to require safety belts and lines anytime when an employee is performing duties when working in an elevated position where a work platform is not provided, and has been distributed to all employees and posted in conspicuous locations throughout the mine.

30 CFR 77.1710(g) provides as follows:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> * * * * * * *
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Notice 104(c)(1) 2 FCW, April 20, 1977, issued by Federal mine inspector Fred C. Wheatley, cited a violation of 30 CFR 77.1708, and states as follows:

> A workman was fatally injured when he fell approximately 16 feet from the top of the gear case of the drag drum gear on the Model 1360 Bucyrus Erie dragline at the Pit ID 001. The victim was performing repair work on a five ton capacity overhead hoist where no work platform was provided and a safety belt and line or other devices to protection [sic] a person from falling was being used. The operator's program of instructions with respect to safe

> procedures to be followed was not thorough in that the safety rules only required that safety belts and lanyards be worn as designated. The designated areas were not defined and the safety program with respect to safety regulations and procedures to be followed at the mine was not posted in conspicuous locations throughout the mine. Mine management was informed of the provisions of section 77.1708 Title 30 Code of Federal Regulations and the necessity of a means to protect a person from falling where performing work from elevated positions where a safe work platform is not provided and the necessity to include a safe job procedure in the program of instructions with respect to safe job procedures on June 16, 1977.

The notice was modified on April 21, 1977, to correct the date shown on the continuation to the notice (June 14, 1977) to read June 16, 1976.

The notice was again modified on April 27, 1977, to reflect that it was being issued as a section 104(b) notice rather than a 104(c)(1) notice on the ground that a review of the circumstances surrounding the notice indicates the violation did not occur because of an unwarrantable failure by the operator.

The abatement time was extended on April 28, 1977, and the reasons given for the extension are as follows:

> The operator has amended the job safety rules to require all employees to use safety belts and lines when performing work from an elevated position. Copies of the amendment has [sic] been distributed to all employees and posted in conspicuous locations throughout the mine. A job safety program has been developed for performing work from an elevated position and has been posted at conspicuous locations throughout the mine. Said notice is hereby extended to allow time to monitor the training program to determine if the training program is adequate to satisfy the requirements of section 77.1708.

The notice was terminated on June 1, 1977, and the termination notice states that the company safety rules were modified to require all persons to use safety devices when there is a danger of falling. The modified safety rules were posted at conspicuous locations, and safety meetings were held with employees with regard to the use of such safety devices.

30 CFR 77.1708 provides as follows:

> On or before September 30, 1971, each operator of a surface coal mine shall establish and maintain a program

> of instruction with respect to the safety regulations and procedures to be followed at the mine and shall publish and distribute to each employee, and post in conspicuous places throughout the mine, all such safety regulations and procedures established in accordance with the provisions of this section.

Testimony Adduced by the Petitioner

MSHA inspector Fred C. Wheatley testified he went to the mine on April 19, 1977, to assist in the fatal accident report. The mine in question is a surface mining operation where the coal is exposed by removing the overburden for the purpose of loading and processing the coal by use of a large shovel and dragline. He examined the accident scene and everything was normal except for a portion of the overhead hoisting equipment which had been damaged and the overhead hoist was positioned over a large gear case. From information provided by people who were in a position to know, it was determined that the victim fell from the bull gear housing or cover, and he was positioned on the top of the housing approximately 16 feet from the main floor of the machine with another workman who was assisting him in making repairs to the hoist. Mr. Wheatley identified Exhibit P-3 as a sketch of the area where the victim was standing, and indicated that he climbed up to the area and took the measurements depicted on a sketch, Exhibit P-4. From statements of eyewitnesses, the victim was in the process of making repairs to the overhead hoist assembly that had been damaged at the time he fell. The victim was not utilizing a safety belt or any other safety device to prevent falling. There were no handrails or platforms in the immediate area (Tr. 8-19).

Mr. Wheatley testified that from information received during his investigation it was determined that the victim had previously been up on the gear box without using a safety belt and that a supervisor stated that he climbed up on the gear housing with two workman to assess the hoist damage and that they did not use safety belts or other safety devices. Mr. Wheatley was not able to determine whether mine management ever informed the victim that he had to wear a safety belt when proceeding to the top of the gear housing, and nothing was available to indicate that the victim had ever been instructed at any time to use a safety belt with a line attached. In his opinion, a safety belt with a line attached could have been utlized by the victim while performing his work and there was a place to attach a line to a safety belt directly overhead at the hoisting assembly which is installed on a track or rail. He also determined that the area from where the victim fell was an area where there was a danger of falling and from the 6-foot height of the year case, its shape, and the configuration of the machine, it was obvious that there was a danger of falling. While there was room for someone to place his feet to stand, the area was inadequate, in terms of size and shape, and the work being performed, for a platform (Tr. 19-25).

Inspector Wheatley testified that safety belts were located on the dragline and they were located on the main machine deck or floor in a steel drum, he examined the belts and all but one were packed in the original packaging, and it did not appear that any of them had been used. He determined that the victim was an experienced miner and had been assigned to the machine in question for 4 to 5 weeks as the second shift operator. Repair work on the machine would be part of his normal duties but he did not know if the operator would generally work without direct supervision. After completing his physical investigation at the accident scene, an accident investigation hearing was held on April 20, and subsequent to that, he decided to issue the violations in question (Tr. 25-28).

The respondent had a safety program in effect at the time of the accident, Exhibit P-7, and safety belts are mentioned and item 105, page 5, of the company safety rules provides that "safety belts and lanyards shall be worn as designated." However, he was unable to find any areas or machines where the requirement for safety belts were specifically designated as areas where safety belts would be required. In his view, the safety rule is inadequate for the purpose of informing a miner where safety belts must be worn because the lack of designations is no real requirement that belts be used. From statements made during his investigation, he could only find one person who stated that the use of safety belts with lanyards attached was discussed and this was in the case of a recently employed person during orientation. Experienced miners told him they had not been required to use belts and lines in installing the hoist that was damaged and being repaired at the time of the accident. The victims' immediate supervisor suggested a need for caution, but issued no instructions as to the use of safety belts and that the caution may have come not more than 3 hours before the accident occurred. On one previous occasion, an employee working on the construction of a coal hopper fell and was injured and the matter was discussed with mine management and a violation of section 1710(g) was issued and this occurred in June 1976. The use of a belt could have greatly reduced the severity of the accident fatality which occurred in the instant case (Tr. 28-42).

Mr. Wheatley identified Exhibit P-8 as a statement of the operator's policy regarding the use of safety belts published after the accident and he believes it makes it clearer. The safety program had been published in the form of a company safety rule book and a safety manual distributed to supervisory employees. He could find no posting of the company's safety program in conspicuous locations during his investigation. He could find no evidence that the accident victim had been instructed in the use of a safety belt either shortly before the accident or at any time (Tr. 43-46).

On cross-examination, Mr. Wheatley testified that he had seen the company safety rule book (Exh. P-7) prior to the accident. Conflicts

in the Federal safety regulations and company safety rules are resolved in favor of the Federal regulations and they are controlling, and the company safety rules incorporate applicable Federal and state safety laws by reference. He denied that he was informed that the words "as designated" used in safety rule 105(i) referred to "as designated by federal regulations." In his view, a violation of section 1710(g) occurs when a man is not wearing a safety belt where there is a danger of falling, and this is true regardless of whether the company requires the use of safety belts where there is a danger of falling (Tr. 47-57).

The question of whether or not there is a danger of falling depends on the particular location in any given situation, and in some situations, this may be at a height of 2 feet. It would also depend on how sure the footing is in a particular area, whether there is a firm hand hold, or whether grease, mud or ice are present, but other safety regulations cover those situations (Tr. 57-59).

Mr. Wheatley confirmed that he climbed on the gear housing during his investigation, got all the way to the top and was wearing a safety belt with no difficulty. There was a small amount of grease on the housing but it was not a contributing factor. The machine was in transit at the time of the accident and was not being used to dig coal (Tr. 63). While in transit, the machine became bogged down in loose fill and was shut down in order to construct additional firm footing, and in the process of coming out of the fill area, the crane broke loose from its mooring (Tr. 66).

Inspector Wheatley confirmed that the section 77.1710(g) violation was originally issued as a section 104(b) citation, but subsequently modified to show it was issued pursuant to section 104(c)(1) as an unwarrantable failure, and that the section 77.1708 violation was initially issued as a section 104(1)(1) notice, but subsequently modified to show it was issued pursuant to section 104(b) (Tr. 74-78).

Inspector Wheatley testified that he measured the distance of the fall and was assisted in this task by Mr. Thomas Beulow, an engineer, and possibly by Mr. Alan Cook, respondent's employee. Prior to his fall, Mr. Woods and his crew were engaged in repairing the hoist, but he could not recall whether Mr. Woods was instructed not to perform any work on the hoist and to leave it alone. The master mechanic and foreman were not present when Mr. Woods fell. When he (Wheatley) climbed to the top of the housing he observed a sledgehammer and one or two other tools there. Mr. Woods' location prior to his fall was established through interviews with witnesses, and the information he received indicated that a foreman and another worker had climbed up on the gear housing without safety belts shortly prior to the accident for the purpose of assessing the damage to the hoist and no work was performed at that time (Tr. 79-92).

Mr. Wheatley stated that the side opposite the one from which Mr. Woods fell had a guardrail for a portion of the way, and he did not require that a platform be constructed on the hazard as part of the abatement. He issued the section 77.1708 violation because the safety belt rule was not thorough and the mine safety regulations and procedures were not posted in conspicuous locations throughout the mine. The words "as designated" as used in the safety belt rule is not complete because of the lack of designations. He did not know that mine management had taken the position that the words "as designated" referred to the Federal regulations. With respect to the posting of the safety rules, he checked the bulletin boards near the changehouse, the one in the office, and the one in the shop, but he was not sure about others. He was looking for something that would suffice as a safety program, and simply posting the yellow company safety rule book would not suffice to meet the requirements of section 77.1708. However, he would have to conduct further research to determine what would suffice at the particular mine in question (Tr. 93-110).

Mr. Wheatley identified Exhibit R-10 as a booklet containing the Federal standards and the company rules. The booklet is customarily posted on the mine bulletin boards, but he was unable to find it posted on the three bulletin boards he examined. He could not recall examining the bulletin board on two case loading machines, or the ones at the tipple, the 7W dragline, the 191 shovel, or the 5760 shovel. He did recall examining other bulletin boards, but could not recall which ones. Although he inspected the dragline during its erection, he did not do so prior to the accident while it was being moved (Tr. 113-121).

Inspector Wheatley testified that he had some knowledge of the safety contact program at the mine but was not familiar with the use of exception reports (Tr. 123).

On redirect, Mr. Wheatley identified the accident report of investigation which was prepared and the cause of the accident is shown as "a failure of management to require workman to wear safety belts where there is a danger of falling" (Exh. P-10; Tr. 131). He testified that circumstances such as the work position, type of terrain or objects below, and the configuration of the general area would be considered in determining whether there is a danger of falling in any given instance. He does not believe that MSHA policy dictates that he designate mine areas where there is a danger of falling and he has never requested mine management to put up signs designating such areas (Tr. 132-134).

In response to questions from the bench, Mr. Wheatley stated that it was never determined why Mr. Woods was not wearing a safety belt, but he believed he would have worn one had he been specifically instructed to do so. The work platform that was constructed at the

point from which Mr. Woods fell was subsequently constructed to facilitate the repairs on the hoist and there is no safety requirement for such a platform at that location. He attached a safety line at several places while climbing the housing during his investigation, but could not recall precisely where he attached it (Tr. 145-149).

William Yockey, mine safety committeeman and president of UMWA Local 1189, testified that at the time of the accident he was not aware of any mine area which was posted as requiring the use of safety belts. With regard to the posting of a company safety program, he indicated that there are times when none were posted on bulletin boards, but they could have been posted on one or two boards. He has observed a safety book posted in the shop and on the shovel where he worked. There are 19 or 20 bulletin boards, but he could not say whether one was posted on all of them. Sometimes people will remove them from the boards or they may blow away. He has observed men working in elevated areas at the mine without safety belts. He discussed the use of safety belts with the mine safety superintendent for the purpose of clarifying how they were to be used, but prior to that time no one ever specifically showed him how to use one (Tr. 156-161).

Mr. Yockey stated that a safety belt was available to Mr. Woods, but he believed that use of the belts was not emphasized enough at the mine. One supervisor might specifically designate someone to wear a belt while another one would not. If he were told to wear a belt he would do so, but if no one told him to wear it he would not. He could not recall any specific training that he received with respect to the use of safety belts, and indicated that a belt is not a complicated piece of equipment. However, there have been some questions as to whether the lanyard should be hooked on the front or back of the belt. He has been directed by mine foremen to use belts. As for the other men, some are afraid to climb and others are not and the use of a safety belt varies among these individuals (Tr. 162-166).

On cross-examination, Mr. Yockey testified that in any particular situation the question of whether or not a danger of falling exists depends on a number of different factors. He considered Mr. Woods to be a very safe worker with some 30 years' service. He surmised that Mr. Woods did not wear a belt because he was the type of person who did his job when it needed to be done, and as an experienced operator he needed little supervision, but would do what he was told (Tr. 167-169).

Mr. Yockey stated that no one ever told him not to wear a safety belt. He has received instructions on the Part 77 surface mining regulations. He has observed a safety book, Exhibit P-10, posted on three bulletin boards, and a safety book, Exhibit P-7, on some of the boards, but not all of them. Most of the boards are open, and he has reviewed posted material (Tr. 170-172).

In response to bench questions, Mr. Yockey stated that he has worked in elevated areas while repairing a boom without using a safety belt, and he has observed others working on elevated cranes, and haulage trucks which are 20 to 25 feet above ground, without using such belts. He personally does not like to wear a safety belt because it gets in his way while he is working. However, if instructed to do so, he would wear a belt. He does not believe it practical or feasible to designate every elevated area in a mining operation where a belt should be worn. He recalled two occasions where a foreman or master mechanic instructed him to wear a belt. During the time that he worked with Mr. Woods, he (Woods) wore a safety belt when making repairs on the shovel. He was not at the mine when the accident occurred (Tr. 176-183).

Mr. Yockey stated that there are occasions where common sense dictates that a safety belt be worn and he does not have to be told (Tr. 184).

Charles E. Stilwell, second shift dragline oiler, was working with Mr. Woods on the day of the accident and he was standing directly across from him on the gear housing when he fell. He was not wearing a safety belt and was not specifically instructed to wear one. Had he been so instructed, he would have worn one. He, Mr. Woods, and foreman Bob Siegel were on the gear housing earlier in the shift and were not wearing safety belts. Mr. Siegel did tell them to be careful. He had been up a third time with an electrician. He and Mr. Woods generally made repairs on the dragline and it was part of their job. On the day of the accident, Mr. Siegel told them that he was going to get the mechanic who would instruct them what to do, but he could not remember Mr. Siegel telling them not to go up on the housing. Mr. Woods asked him to go up and he did. He never wore a belt on the dragline because he was never at any place where he thought he needed one. Since the accident, he wears one if instructed to do so (Tr. 186-193).

On cross-examination, Mr. Stilwell detailed the movements of the dragline prior to the accident. During the movement of the machine, the 30-ton hoist came loose from the hoist cables and a 5-ton hoist electrical box became dislodged and was hanging over the machine. The machine was then shut down in order to assess the damage. One of the foremen then advised the crew to "let it go," and then the master mechanic arrived on the scene and instructed the crew to install a grease line on the machine. While preparing to do this, Mr. Woods was just finishing tying a rope on the five-ton hoist by himself in order to move it. Foreman Siegel arrived on the scene and assisted in moving the hoist, and then left to get the electricians and master mechanic Jim Binkley. Mr. Siegel informed the crew that the mechanic would instruct them what to do when he arrived and asked them to "be careful." Mr. Woods insisted on climbing up on the housing to try and straighten it out and Mr. Stilwell suggested they wait for

the mechanic. However, he decided to go with Mr. Woods since Mr. Woods was the leadman. Mr. Woods climbed up on the gear housing by means of a ladder on the front of the machine and he and Mr. Woods were using a torch while working on the gear housing and they were there about 10 minutes before Mr. Woods fell. Mr. Stilwell identified Exhibit R-1 as a sketch of the scene where he and Mr. Woods were positioned prior to the fall. While he and Mr. Woods were on the gear housing they used two or three handholds located on the inspection covers in climbing up to the housing. During the three times that he climbed the housing, he did not believe he was in danger of falling, and at no time was he instructed by the company to make repairs on the hoist. Mr. Siegel told them that the mechanic would instruct them further when he arrived at the scene and he believed that they were to leave the machine alone until he arrived, but Mr. Woods overruled him (Tr. 194-207).

Mr. Stilwell testified that when he and Mr. Woods were on the machine, the footing was secure and he was wearing goggles. Safety belts were provided on the machine and Mr. Woods must have known they were there. Mr. Woods was a safe hard worker. During the three times he was on the gear housing, he never considered using a safety belt because he did not feel uneasy. He has received miner training, has attended periodic safety meetings with the foremen, and has observed a safety book posted on the bulletin board in the tipple and preparation plant. A company safety book was also stored in the electrical room of the No. 1360 dragline on the day of the accident and he believes that the dragline operator and the groundman knew it was there. He receives safety contact training as part of the company annual training program and believes that he receives as much training as miners from other companies (Tr. 208-217). He was aware of the company practice of writing up employees for safety infractions and as far as he knows neither he nor Mr. Woods have ever been cited by the company for violating safety rules (Tr. 217-222).

Donald E. Allen, assistant superintendent, Broken Arrow Mine, testified he was at the Squaw Creek Mine on the day of the accident on April 18, 1977, where he was employed as assistant superintendent as a supervisor on the 1360 dragline. He described the movement of the dragline on April 18, and indicated that it first became bogged down in loose fill material and then broke a cable on the overhead hoist. His job was to get the machine into production and to acquaint the crew with dragline stripping procedures since they were all shovelmen. After the cable broke, he discussed the situation with Mr. Stilwell, Mr. Siegel, and Mr. Woods and he instructed Mr. Stilwell to tie off the hoist and leave it because he was not concerned with it. Four or five safety belts were on the machine at the time of the accident (Tr. 236-247).

Robert W. Siegel, pit foreman, Squaw Creek Mine, described the movement of the dragline on the day of the accident and the damage

which occurred to the machine while it was in transit. He advised Mr. Stilwell and Mr. Woods that he was going to get an electrician to deenergize the machine and they proceeded with their regular cleanup duties while he was gone. He and Mr. Woods then climbed up on the gear case to visually inspect the crane. As he climbed up, he felt they had good handholds and good footing. He did not feel there was a danger of falling when he mounted the gear case. He then left the area and returned and told Mr. Woods that he would summon the master mechanic to look at the machine, and that nothing else needed to be done. After finding master mechanic Binkley, he advised him to check out the machine to determine any needed repairs. He subsequently learned about the accident (Tr. 248-258).

Mr. Siegel testified that he was unaware that Mr. Woods and Mr. Stilwell were using a torch and hammer to attempt to make repairs on the crane until after the accident. When he mounted the gear case to inspect the damaged hoist, he saw no mud or grease that would interfere with his footing and he felt secure in his footing and it did not occur to him to use a safety belt because he felt he had adequate footing and handholds to reach the area. Safety belts were available on the machine and were stored some 10 to 15 feet from the gear case. There were four to six belts and Mr. Woods knew where they were located. The barrel where the belts were stored was labeled, and Mr. Woods was familiar with the use of the belts (Tr. 258-260).

Mr. Siegel testified that he partipates in the company safety program through personal safety contacts, safety meetings, and exception and observation reports of the employees. Safety contacts consist of a foreman personally contacting employees on a safety topic, and safety meetings involve written materials which are read to the men concerning accidents or new programs. He obtains safety literature from the safety department for use at the meetings and records are kept of the meetings and contacts. He identified Exhibit R-2 as a supervisor's safety contact book used by all supervisors and he explained the use of the books. If he finds that an employee has engaged in an unsafe work practice or has violated a safety rule on Federal regulation he files a safety observation and exception report. Repeat violations may result in disciplinary action against the employee and he identified Exhibit R-3 as the report form. He made a safety contact with Mr. Woods on April 18, 1977, and discussed footing and slips and falls with him. Previously, he had four other safety contacts with Mr. Woods and other employees. He has told employees to use a safety belt and has found an employee not using one when he should have. In that instance, he instructed the employee to get his safety belt and wear it. He has also advised employees at safety meetings and daily contacts that safety belts should be used where there is a danger of falling (Tr. 260-268).

Mr. Siegel testified that Mr. Allen instructed Mr. Woods to proceed with cleanup, and maintenance and repair on the machine

grease line and not to worry about the crane. The use of the torch, hammer, and pry bar by Mr. Woods in his efforts to make repair were contrary to instructions (Tr. 270).

On cross-examination, Mr. Siegel stated that Mr. Woods and Mr. Stilwell engaged in an unauthorized act in climbing up on the machine but Mr. Stilwell was not disciplined. However, they generally engaged in repair work as part of their duties. He was not aware that they were up on the gear housing prior to April 18. When they climbed up on April 18, he advised them to be careful as they climbed up and he did not believe they were in danger while standing on top of the gear housing. Had there been work done there he probably would have required men to use safety belts. However, he would have performed no work there until the whole situation was evaluated. He has written up employees for failing to wear safety belts but could not recall the last time he did that (Tr. 270-282).

Mr. Siegel stated that the dragline crew was relatively new to that equipment but were experienced miners. He believes Mr. Woods would have worn a safety belt had he been told to and the area from which he fell was elevated. While on the gear housing, he could hold on to the hoist itself and the side of the gear case. While up on the housing, they were holding on to the crane and he could stand without holding onto anything (Tr. 283).

In response to questions from the bench, Mr. Siegel testified that the practice of each man determining whether to use a safety belt in a given situation is a good practice because they have to use common sense to protect themselves and a supervisor cannot be there every minute to tell them to use a belt (Tr. 288).

Mr. Siegel stated that procedures involving the use of safety belts has not changed since the accident although the memorandum of instruction has been modified. Occasional safety talks on safety belts are held, but prior to the accident, no specific safety talks on safety belts were conducted at the mine (Tr. 292).

Robert E. Thomas, safety manager, Indiana Division, testified he has responsibility for safety over nine of respondent's mining operations, including supervision over the mine safety supervisors. His responsibilities include enforcement of Federal safety laws, company safety rules, safety training and orientation, safety management program, and accident investigations. Safety management includes safety observations, safety meetings, safety contacts, and exception reports. He partipated in the accident investigation and identified several photographs of the scene (Tr. 295-300).

Mr. Thomas testified that the company has a program of instructions concerning safety regulations and procedures used at the mine at the time of the accident. The foremen conduct training sessions

concerning safety standards and the program is audited and evaluated each month, and he meets with the mine superintendents to discuss the evaluations. Each new employee partipates in a safety orientation program and in an 8-hour retraining program. Annual retraining is required by the union wage agreement of 1974, and he described the 15 safety topics covered, which include instructions in Federal laws and regulations. He identified Exhibit R-7 as the safety management program manual used by the foremen in their safety training, safety contacts, and safety exception report program. Each foreman is required to have a 10-minute safety meeting each week, and daily safety contacts when they are assigned a job. Mass safety meetings are held prior to and after vacation periods and holdings. He also sends copies of accident reports to the mines to be used by supervisors and foremen in their safety discussions with the men. Special training is also conducted for welders, and all of the programs are constantly monitored. Safety topics have included the use of safety belts and lanyards when working at heights. Safety memos are posted on bulletin boards or used at meetings with the men (Tr. 300-314).

Mr. Thomas described the safety exception program. At the time of the accident, employees were required to use safety belts and lines where there was a danger of falling, and it was enforced through training topics such as Exhibit R-8, and employees who violated the requirement would be subject to an exception report and warned, and they could be dismissed. Safety rule 105(i), set out in Exhibit R-9, is the safety belt requirement. Rule 100(a) incorporates applicable State and Federal laws as a part of the company's safety rules, but they are not reproduced. Although he could not recall specifically telling anyone to wear a safety belt, he has discussed it with men on the job sites. Safety rules and Federal regulations are posted at the mine on the bulletin boards. They are usually posted on the boards at the shop and garage area, the washhouse, the preparation plants, large machines, and in places where there are large groups of people, including parking lots and different job sites. Items posted include memorandums, safety topics, accident reports, safety directives, safety books, etc. The materials are available for inspection by anyone and it is difficult to keep the documents on the bulletin boards (Tr. 315-321).

Mr. Thomas testified he saw Inspector Wheatley during the accident investigation and observed him climbing the gear housing, and with the safety belt and lines, he had a problem climbing and does not remember seeing him climb all the way to the top (Tr. 322-324).

On cross-examination, Mr. Thomas stated that the company conducted an accident investigation and prepared a written report. He developed the report and although the report states that the accident was caused by the failure to use a safety belt and lanyard, he disagrees with the statement. He does not know why Mr. Woods fell. Had he worn his belt, it could have prevented the accident. Aside from

the accident, the area from which Mr. Woods fell is not normally considered an area where there is a danger of falling since it is easy to get to and the housing casing is 18 inches wide. He believed that very few people would realize that someone could fall from the housing while performing work there. He knows of no mining guidelines to determine potential fall areas on heavy equipment. There has been one previous accident involving a construction supervisor who was injured in 1975 while working at a height at the preparation plant and he was not wearing a safety belt. He received a letter from MSHA reemphasizing the use of safety belts and he solicited it because of a disagreement concerning an accident where an employee fell some 10 to 12 inches while washing down a bulldozer radiator. MSHA issued a citation, but it was subsequently vacated when it was learned where the man was actually standing (Tr. 329-339).

Mr. Thomas stated that there are a few areas in some of the respondent's mines where signs are posted requiring that safety belts be worn, i.e., sometimes on the drill mast. He is not aware of any specific company guidelines on when safety belts should be worn (Tr. 339-343).

In response to bench questions concerning a photograph of mine employee Cook standing on the gear housing (Exh. R-5) without a safety belt, Mr. Thomas stated that it is within Mr. Cook's discretion whether to wear a safety belt (Tr. 351). He believes that no one recognized the hazard at the time Mr. Woods fell (Tr. 353).

Alan W. Cook, assistant safety manager, Indiana Division, testified that his duties are similar to those of Mr. Thomas, with a particular emphasis on training, and he conducts and implements company safety programs. He was at the mine on the day of the accident for the purpose of conducting the accident investigation. He climbed the gear housing to assist inspector Wheatley in making his measurements, and he identified Exhibit R-5 as a photograph showing him on the housing. Mr. Wheatley did not tell him to wear a safety belt while standing on the housing, but later in the afternoon told him that no one was to go up on the hoist drum unless they use a safety belt and a lanyard. He observed Mr. Wheatley climb up the gear case and he was experiencing difficulty in tying off the line as he climbed up. He did not see him on top of the drum, however (Tr. 368-373).

Mr. Cook stated that after the violation was written, he and Mr. Wheatley checked two bulletin boards in the office and shower room although there were others on the mine premises. The boards normally contain safety rules and procedures. When he mounted the gear housing, he did not believe there was a danger of falling. He described the materials normally posted on mine bulletin boards, and he usually personally checks the boards (Tr. 375-379).

Mr. Cook identified two file boxes containing employee contact and exception reports filed since the program began in 1973. The files are kept at the Squaw Creek Mine and each mine has similar files. The files contain some 1,500 sheets of safety contacts, and approximately 1,800 more exception and observation reports. These records are maintained as part of the safety management program and accident prevention program. He identified safety contacts made with Mr. Woods and Mr. Stilwell (Exh. R-12). Safety contacts are a regular program at the mine. He also identified Exhibit R-13 as a record of safety training received by Mr. Woods in 1976. He personally has told employees to wear safety belts. He also identified Exhibit R-14, indicating that Mr. Woods received a copy of the company safety rules on January 23, 1973, and Exhibit R-15 as safety observations conducted on Mr. Woods prior to the accident, and it contains no notations of any unsafe acts on his part (Tr. 380-400).

Mr. Cook testified that there were possibly six safety belts located on the dragline in question in a barrell labeled "safety belts" (Tr. 401). He testified as to company policy concerning the use of exception reports (Tr. 405-407).

On cross-examination, Mr. Cook testified that he did not know whether a bulletin board was located on the dragline and he saw no safety manuals posted there on the day of the accident (Tr. 408). He did not know whether Mr. Woods received specific training on the use of safety belts (Tr. 412).

In response to bench questions, Mr. Cook stated that if he had to climb the gear housing, the question as to whether he would wear a safety belt would possibly depend on the kind of work he had to do (Tr. 420). The repairs made to the gear housing the day of the accident were unusual and it is not a place from which work is normally done (Tr. 425).

Inspector Wheatley was recalled by the court and stated that after listening to all of the testimony, he would still take the same action that he took when he issued the citations in question, given the circumstances available to him at the time. Some of the material introduced by the respondent during the hearing is new to him and some he had little knowledge of and the company safety programs was never brought to his attention. He examined the bulletin boards on April 20 and he saw nothing which indicated the posting of a safety program (Tr. 428-430). He did not attempt to locate all mine bulletin boards. He checked only the change room, office, and the shop and observed none of the materials there (Tr. 433).

Findings and Conclusions

Fact of Violation--30 CFR 77.1710(g)

Petitioner asserts that while it could be argued that section 77.1710(g) provides little guidance for an operator to determine if

there is a danger of falling, thus requiring the use of safety belts, the regulation is capable of enforcement under the factual situation presented in this case. In support of its position, petitioner argues that the use of an 18-inch wide narrow area elevated 16 feet above the dragline floor as a work area, created a condition where there was a danger of falling. Placed in a tenuous position on top of the dragline gear housing without the proper means of support from a work platform or by using a safety, would place a worker in obvious danger of falling, argues petitioner.

Petitioner points to the fact that respondent's Foreman Siegel indicated that he would have required the use of safety belts if he knew that work was being performed on top of the gear housing, and that respondent's accident report indicates that the use of safety belts should have been required. Petitioner takes the position that if safety belts are, in fact, required to be worn, the type of activity a worker is engaged in, should be irrelevant. Since a worker, such as the accident victim in this case, could change his work activity in a very short period of time, e.g., 1 minute, he could be merely observing the damaged overhead hoist and the next minute he could be attempting to repair it if safety belts are required then they should be worn on all occasions when a worker is exposed to high elevations.

Petitioner asserts that the obvious intent of section 77.1710(g) is to require miners to wear safety belts and that the failure of a miner to wear his belt when required, is, per se, a violation, notwithstanding my prior decision to the contrary in Peabody Coal Company, DENV 77-77-P, decided August 30, 1978, a decision which petitioner avers merely shifts the burden of the miners' protection to the individual employees and away from the mine operator.

Petitioner argues that the testimony in the instant case clearly establishes that respondent never actually required the use of safety belts as a uniform policy and that there was no attempt to enforce the requirements of section 77.1710(g) on the date of the accident. Further, petitioner asserts that the accident victim's attempts to repair the overhead hoist were not outside the scope of his responsibilities as the dragline operator, that repair work on the dragline was part of his normal duties, and he was never actually directed to stay off the gear housing by management. As a matter of fact, asserts petitioner, since Mr. Woods and his foreman had been up on the gear housing previously without wearing safety belts, it was only natural for him to assume that no safety belts would be required if he had occasion to go up on top of the gear housing for a second time to perform repair work.

With regard to respondent's general enforcement of safety belt requirements at the mine, petitioner cites the testimony of UMWA Local 1189 President William Yockey, who testified that it would

depend on the particular foreman who happened to be enforcing the policy, and that when required to do so by mine management, he would wear a belt. Also cited is the testimony of Mr. Stillwell, the dragline helper, who testified that Mr. Woods would have worn a safety belt if he was directed to do so by management. Therefore, argues petitioner, Mr. Woods' failure to use a safety belt cannot be considered as intentionally disregarding company policy, because there was no company policy requiring their use.

Respondent argues that the record supports a finding that it required the use of safety belts where there is a danger of falling, and that the rule regarding the wearing of belts was implemented through teaching and training methods and was subject to discipline for those employees failing to comply, and clearly identified safety belts were available on the dragline. Respondent cites the testimony of UMWA President Yockey who indicated that he does not generally wear a safety belt because he believes it interferes with his welfare, that it is not always practical to require the wearing of such belts when someone is working in an elevated position, but that he will wear such a belt if instructed by a foreman and required to do so.

Respondent argues that section 77.1710(g), by its specific terms, does not state that the operator is guilty of a violation if an employee does not wear a safety belt when he is required to do so, and that the question of when to or not to wear a belt is a matter of individual common sense and judgment. Citing North American Coal Corporation, 3 IBMA 93 (1974), and my previous decision in MSHA v. Peabody Coal Company, DENV 77-77-P, August 30, 1978, applying the North American ruling, respondent argues that it has complied with the requirements of section 77.1710(g) by providing safety belts, instructing the employees in their use, and requiring them to wear the belts when working in elevated areas. Further, respondent argues that two additional factors emphasize its lack of responsibility for the violation, namely, the fact that Mr. Woods was acting outside the scope of his instructions, and secondly, except for Inspector Wheatley, it was the opinion of the witnesses that a safety belt was not necessary under the circumstances of this case.

Respondent's safety rule regarding the use of belts and lanyards is contained in a 1972 company publication (Exh. R-9). Rule 105(i) at page 6 of that publication, states as follows: "Safety belts and lanyards shall be worn as designated."

Rule 100(a) provides that applicable state and Federal laws are incorporated by reference as part of the company's safety rules, and subsection (d) provides that since it is impractical to include rules to meet all contingencies in emergencies not provided for in the rules, employees are required to act under the advice and direction of their supervisor.

It is clear that at the time the citation issued, respondent's safety belt and lanyard rule left much to the imagination and that it was subject to several interpretations, several of which were forthcoming during the course of the testimony adduced in this case. While it is true that respondent has an elaborate and comprehensive safety program, replete with procedures, directives, pamphlets, booklets, files, etc., etc., I quite frankly and candidly am at a loss to understand why it failed to adopt a safety rule regarding the use of safety belts and lanyards so as to make it absolutely clear and understandable to a person of ordinary intelligence. Respondent's own safety manager did not understand the language "as designated" (Tr. 317-318), and it is obvious from the arguments presented during the hearing, that respondent obviously takes the position that since all applicable Federal mine safety regulations were incorporated by reference in Peabody's safety rulebook, an employee was accountable for understanding each and every regulation, including complying with the same. Such an explanation and rationale in defense of the violation is simply unacceptable. I am of the view that an operator, particularly one the size of Peabody Coal Company, with all of its resources, should have taken the initiative to insure that its workforce clearly understood its published safety belt rule. Only after the fatality occurred, did Peabody see fit to publish a company policy concerning the use of safety belts (Exh. P-8). The memorandum of April 21, 1977, issued a day after the accident, cites section 77.1710(g), company safety rule 105(i), and directs each supervisor to contact each of his employees and to read to him the following mine policy: "Any time an employee is performing one's duties in an elevated work area and where a work platform is not provided, a safety belt shall be worn and a lanyard shall be utilized."

Respondent's arguments that Mr. Woods acted outside the scope of his instructions and that in the opinion of several witnesses presented in its behalf, a safety belt was not necessary, are rejected and cannot serve as a basis for absolving respondent from any responsibility for the violation. Having viewed the witnesses, listening to their testimony, and viewing the photographs of the 18-inch wide gear housing in question, elevated some 16 feet above the dragline floor, I am convinced and I find that the area in question was, in fact, an area where there was a danger of falling and that safety belts or lines were required to be worn.

With regard to respondent's assertion that Mr. Woods was acting outside the scope of his instructions, even if that were true, it does not excuse the fact that he was not instructed to wear a belt while on top of the gear housing. As pointed out by petitioner, Pit Foreman Siegel indicated that had he known that Mr. Woods was going to perform work on top of the gear housing, he would have instructed him to wear a belt. On the facts presented in this case, I can only conclude that Mr. Siegel should have known from the situation presented that it was likely that Mr. Woods would again climb up on the housing.

As a matter of fact, that is precisely what happened in this case, not only once, but at least twice.

While it may be true that Mr. Siegel cautioned the men to "be careful," he did not specifically instruct or caution them with respect to the use of safety belts. Since it is clear that the foreman and the men had earlier climbed atop the gear housing to inspect the damage without wearing safety belts, the foreman should have known that it was likely that the men would again climb up to effect repairs and he should be specifically instructed them to use the safety belts provided. Although Mr. Siegel testified it did not occur to him to use safety belts because he felt he had adequate footing and had used handholds to reach the area atop the gear housing, it is clear to me, as indicated above, that an 18-inch wide area atop the gear housing where men are standing and working, is an area where safety belts should be required to be worn.

Although there is merit to respondent's suggestion that the question of when to or when not to wear a safety belt, is a matter of individual common sense and judgment, that proposition assumes that all individuals working at the mine are endowed with those attributes, and based on the fact that persons have been known to be killed or seriously injured by failing to wear safety belts or lines, I can only conclude that a mine operator must be held accountable and responsible to some degree for the protection of those who lack common sense and good judgment. This can only be accomplished by forceful and meaningful safety belt and lanyard rules, policies, training programs, and procedures. On the basis of the evidence adduced in this proceeding, I cannot conclude that respondent's program in this regard was adequate, nor can I conclude that respondent's requirements with respect to the use of safety belts was clearly articulated to all employees or emphasized or enforced with due diligence, and my reasons in this regard follow.

Mr. Yockey testified that there is no consistency with respect to the company safety belt rule, and that one supervisor may designate someone to wear a belt, while another would not. He candidly admitted that he would wear a belt only if told to by his supervisor, and he indicated that some men wear belts and others do not. The decision as to whether a belt should be worn is left to the individual employee. As Mr. Yockey indicated, if the employee is not afraid to climb, he does not wear a belt; if he fears climbing, he does. Mr. Yockey observed individuals working on elevated cranes without wearing belts.

Mr. Stilwell, who was with Mr. Woods on top of the gear housing when he fell, testified that he was standing directly across from Mr. Woods when he fell to his death and he was not wearing a safety belt and was not instructed to wear one. He had gone up on the gear housing earlier with Mr. Woods and Foremen Siegel, and no belts were worn by anyone. Since the accident, Mr. Stilwell wears a belt only if specifically instructed to do so.

With regard to any specific training concerning the use of safety belts, Mr. Yockey testified that aside from discussions as to how to install a lanyard, he could recall no specific training in the use of belts, although he did indicate that a belt is not a complicated piece of equipment. Mr. Stilwell said nothing about any safety training in the use of belts, and it is clear that he will only wear one if specifically required to do so, notwithstanding the fact that he witnessed one of his co-workers get killed by not wearing a belt. Mr. Siegel said he probably would have instructed Mr. Woods and Mr. Stilwell to wear belts had he known they were going to climb up on the gear housing to perform work. However, he did not believe it necessary to so instruct them when they all climbed up to inspect the gear housing, even though he saw fit to caution them as they were climbing up. He also endorsed the practice of permitting each individual to decide for himself when to wear a safety belt, and indicated that little has changed since the accident in question, and while occasional safety talks on safety belts are held, prior to the accident, no specific safety talks on the use of safety belts were conducted at the mine. Assistant Safety Manager Cook climbed on top of the gear housing after the fatal accident to assist Inspector Wheatley in taking certain measurements and he was not wearing a safety belt (see Exhibit R-5, a picture of Mr. Cook on top of the gear housing). He did not wear a belt because he did not believe he was in danger of falling, but he also indicated that if he had to climb up again, the question of whether he would wear a belt or not would depend on the kind of work he had to perform.

Although Mr. Siegel and Safety Manager Thomas both alluded to employee safety talks and exception reports, Mr. Siegel could not recall the last time he had written up an employee for failing to wear a safety belt, and Mr. Thomas could not recall specifically telling anyone to wear a safety belt, although he stated he discussed it with men on the job sites. Mr. Thomas also indicated that few mine areas are posted with signs advising as to the requirement for using safety belts, and is unaware of any specific company guidelines concerning when safety belts should be worn.

Respondent cannot escape liability and accountability for the failure of its employees to wear safety belts where the evidence adduced indicates that it did not effectively and forcefully enforce its safety rule in this regard. Respondent cannot fail to promulgate a clear and concise safety rule regarding the use of safety belts, fail to properly train and supervise its employees in their use, and then hide behind its lack of knowledge concerning an employee's dangerous working practice. It seems to me that it should not be a difficult task for mine management to identify those areas in a mine where an employee is normally and regularly expected to perform certain job tasks and if that area is elevated to a degree where there is danger of falling, a supervisor or foreman should see to it that an employee has and wears a safety belt. In this case,

while the dragline in question was equipped with safety belts stored in a barrell and clearly labeled, three employees, including a foreman, climbed to the top of the gear housing, not once, but twice, to inspect and then to perform work, and on neither instance did any of them wear safety belts.

On the facts and evidence adduced in this proceeding, I find that respondent has failed to establish that at the time the violation issued, it had a clear and understandable safety requirement designed to assure that all employees wear safety belts where there is a danger of falling, and that it enforced such a requirement with due diligence. To the contrary, I find that respondent's purported safety belt rule as set forth in rule 105(i) and as interpreted and applied at the mine in question, failed to adequately inform an employee of the requirement for wearing safety belts where there is a danger of falling. I also find that the practice of permitting each employee to decide for himself when to wear a belt, coupled with somewhat inconsistent supervisory practices regarding the wearing of such belts and a lack of a regular and consistent company policy in this regard, is an indication that respondent did not at that time, in fact, have a safety system designed to assure that employees wear safety belts where there was a danger of falling. While respondent's overall safety program seems adequate on paper, as attested to by the voluminous exhibits introduced in support of its position, I simply cannot find that its safety program met the tests laid down in the North American Coal Corporation case at the time the citation issued.

The prior Peabody case decided by me on August 30, 1978, concerned a driller helper who lost his balance while standing on top of a cable reel of a drill rig, and sustained multiple leg fractures when he caught his leg between the cable and cable reel. The evidence adduced in that proceeding established that mine management maintained a policy of requiring its employees to wear safety belts and that the policy was enforced with due diligence. Further, the evidence established that Peabody established and conducted training and instructional programs for its employees with regard to the use of safety belts, and had taken disciplinary action against employees for violations of company policy regarding the use of such belts. The evidence also established that the employee who was injured as a result of failing to wear a belt which was provided him, received such instructions and was aware of company policy regarding the use of safety belts. Further, it was established that the supervisor was some 3-1/2 miles from the accident scene when the man was injured, that when last observed by the supervisor the drill rig was operating properly, and there was no indication that repairs were needed or that a supervisor was required to be at the rig or had reason to know that the driller helper was on the rig without a safety belt.

I find that the facts presented in this case are distinguishable from those presented in the prior Peabody case which I decided, and

I believe it is clear from the discussion above with respect to my findings and conclusions concerning this matter, that respondent cannot avail itself of the North American decision, nor my interpretation and application of that decision in the prior Peabody case as a defense to the instant citation of section 77.1710(g). I find that petitioner has established a violation of section 77.1710(g) as charged, and respondent's arguments to the contrary are rejected.

Size of Business and the Effect of the Penalty on Respondent's Ability to Continue in Business

The parties stipulated that respondent is a large coal mine operator and that any civil penalty assessed by me in this matter will not adversely affect its ability to continue in business, and the stipulation is adopted as my finding in this regard.

History of Prior Violations

Although petitioner does not discuss respondent's prior history of violations in its posthearing brief, it did submit a computer printout for the Squaw Creek Mine reflecting a total of 45 paid violations for the period April 18, 1975, to April 18, 1977. One prior violation of section 77.7110(g) is noted as being issued in a section 104(b) notice of July 28, 1975, for which an assessment of $94 was made. In the circumstances, based on the evidence presented, I cannot conclude that the prior history for the mine in question is significant and warrants any increased civil penalty.

Negligence

Petitioner submits that the violation was caused by respondent's negligence and I agree. While the record in this case indicates that Mr. Woods was an experienced and conscientious worker with a good safety record, there is no explanation as to what caused him to lose his balance and fall to his death, nor is there any explanation as to why he would climb to the top of the gear housing without using a safety belt which was provided. One witness speculated that he did so to "get the job done," and he also stated that Mr. Woods climbed to the top of the gear housing contrary to instructions to "leave it alone" because he was concerned and conscientious and wanted to see what could be done to repair the damaged equipment. However, it is also clear that the foreman should have anticipated that Mr. Woods and Mr. Stilwell would again climb to the gear housing, since they had done so earlier and did not wear belts, although the foreman did caution the crew to be careful. In the circumstances, I find that the record supports a finding that respondent failed to exercise reasonable care to prevent the violation in that its supervisory personnel should have specifically advised Mr. Woods to wear a belt which was provided on the dragline while he was on top of the gear housing. Its failure to do so, coupled with the failure of mine

management to promulgate a clear and concise safety rule pertaining to the requirements for the use of safety belts, constitutes ordinary negligence.

Good Faith Compliance

Respondent abated the violation by publishing a clear statement of company policy with regard to the wearing of safety belts, instructing supervisory personnel to discuss the requirement with mine employees. I find that respondent demonstrated good faith compliance in abating the citation.

Gravity

It is clear from the evidence presented, that had Mr. Woods worn a safety belt, he probably would not have sustained fatal injuries. Petitioner suggests that the violation was serious, and I am in agreement with that assessment. In the circumstances here presented where it is clear that a safety belt could possibly have prevented the fatality, I can only conclude and find that the violation was serious.

Penalty Assessment

Petitioner recommends a civil penalty in the amount of $2,000 for the violation of section 77.1710(g). Taking into account the fact that safety belts were provided on the dragline in a clearly labeled container, and given the fact that Mr. Woods may have been instructed not to attempt further repairs on the machine, but did so anyway on his own, petitioner's recommended penalty does not appear to be unusually low. However, considering the fact that in this case, several employees climbed to the top of the gear housing without wearing safety belts and stood on an 18-inch wide area in full view of a foreman, and given the fact that I have found respondent's safety belt requirement to be somewhat anemic, not only in terms of its being clearly understood, but also in terms of inconsistent enforcement, I believe that a more substantial penalty is warranted. Accordingly, respondent's recommended civil penalty is rejected, and I assess a penalty of $3,500 for the violation.

Fact of Violation--30 CFR 77.1708

Petitioner asserts that while it has never contested the fact that respondent has a written safety program which is distributed to its employees, it was not in compliance with section 77.1708 on April 20, 1977, when Inspector Wheatley checked the bulletin boards since he looked on the bulletin boards in the change room, shop, mine office, and on the dragline, but was unable to locate any evidence of a posted safety program. Further, petitioner submits that respondent's safety rules (Exh. R-9) are totally inadequate for the

purpose of informing its employees when safety belts must be worn. Citing the language--"Safety belts and lanyards shall be worn as designated"--petitioner asserts that this could indicate to employees that belts need to be used only when specifically required either by posted sign or by oral request from a foreman. Since all operators must comply with the regulations as a minimum, petitioner asserts further that the inadequacy of respondent's safety rules cannot be corrected by merely adopting the Federal regulations.

Respondent asserts that petitioner has failed to establish a violation of section 77.1708, and that even petitioner's evidence supports a finding that respondent had a viable safety program and that there was posting in numerous places of documentary safety procedures and precautions. Respondent points to the testimony of UMWA Local 1198 President Yockey in support of its assertion that pamphlets and books relating to safety procedures had, in fact, been posted, and that while all of 19 or 20 bulletin boards throughout the mine did not always have materials on them, miners would from time to time remove materials for their own use. As to its safety program, respondent asserts that it has established procedures for taking corrective action against employees observed violating safety rules, that it had held safety meetings with employees, had posted its safety rules and pamphlets, conducted safety contacts with its employees, reproduced and distributed safety regulations and rules, training topics, memorandums, conducted safety audits and training, and, in fact, had a comprehensive safety program with instructions, procedures and practices.

Respondent argues further that the evidence establishes that the inspector conducted a most superficial investigation when he checked only three or four of the 19 or 20 mine bulletin boards and that he admitted that the safety materials produced at the hearing were new to him and that he had never seen them. Under the circumstances, respondent argues that petitioner has failed to establish a violation of section 77.1708.

Discussion

Inspector Wheatley gave two reasons for citing a violation of section 77.1708. He believed that respondent's safety rule regarding safety belts was not thorough, and he found that respondent's safety rules and regulations were not posted in conspicuous locations throughout the mine. In support of his citation for failure to conspicuously post the safety rules, the inspector testified that he checked the bulletin boards near the change house, the mine office, and the shop. He was not sure about other bulletin boards and indicated that while he was looking for something that would suffice as a safety program, simply posting a copy of the "yellow book" (respondent's health and safety rules, Exh. R-9) would not suffice to meet the requirements of section 77.1708. When queried as to what would

suffice, he indicated that further research would be required at the particular mine in question.

Section 77.1708 does not address itself to the quality of a mine operator's safety program. The standard merely requires three things, namely, the establishment and maintenance of a safety program, publication of the program, including distribution to the employees, and the posting of the program in conspicuous places throughout the mine. Insofar as section 77.1708 is concerned, the fact that the inspector did not believe the company safety rule pertaining to safety belts to be thorough, is immaterial. If MSHA desires to monitor the quality and adequacy of such training programs, it should promulgate a specific standard covering that matter. Here, the standard cited speaks to the establishment of a program and the posting and distribution of the program to mine employees.

On the facts and evidence adduced in this proceeding, it is clear that respondent had established an elaborate safety and health training program, and the evidence and testimony produced on this question attests to that fact. Petitioner concedes that respondent has a written overall safety program which was distributed to all employees, and its evidence produced in support of the cited violation has not convinced me otherwise. The thrust of petitioner's case is its assertion that on April 20, 1977, the company safety program was not posted on three or four mine bulletin boards examined by the inspector.

On the basis of the preponderance of the evidence adduced in this proceeding, I conclude and find that petitioner has failed to establish a violation of section 77.1708. Respondent presented credible evidence from its witnesses, including testimony by the president of the local union who was called as petitioner's witness, indicating that there are 19 to 20 bulletin boards scattered throughout the mine and that safety materials and pamphlets were, in fact, posted on these boards from time to time, but that some of the materials had been removed. The fact that the inspector found three or four boards with no materials posted, is not persuasive, particularly in the circumstances here presented where the inspector could not recall how many boards he checked, and candidly admitted that he quite frankly did not know what he was looking for in terms of a safety program. Here, respondent fully met the first two requirements of the standard cited since the evidence supports a finding that it had established an ongoing safety program which had, in fact, been published and distributed to employees. As for the conspicuous posting of the program throughout the mine, I have found that petitioner has failed to establish that this was not done and the basis for that finding is the cursory investigation conducted by the inspector covering three or four boards, the fact that he was somewhat confused as to what he was looking for, and the fact that respondent's evidence and testimony reflected that safety materials were, in fact, posted on many, or at least more than three or four bulletin boards.

ORDER

In view of my findings and conclusions made with respect to Citation No. 7-0021, April 20, 1977, 30 CFR 77.1710(g), respondent is ORDERED to pay a civil penalty in the amount of $3,500 within thirty (30) days of the date of this decision. With regard to Citation No. 7-0022, April 20, 1977, 30 CFR 77.1708, the petition for assessment of civil penalty, insofar as it seeks a civil penalty assessment for that alleged violation, is DISMISSED.

George A. Koutras
Administrative Law Judge