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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. BARB 78-653-P A.O. No. 15-05046-02031V
v.	Alston No. 3 Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner;
Thomas F. Linn, Esquire, St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on August 24, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for three alleged violations of the provisions of mandatory safety standards 30 CFR 75.400, 75.316, and 75.402, set forth in three orders issued by Federal coal mine inspectors in April and May, 1977. Respondent filed an answer and notice of contest on September 7, 1978, denying the allegations and requesting a hearing. A hearing was held in Evansville, Indiana, on December 12 and 13, 1978, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding 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 this proceeding, and, if so, (2) the appropriate civil

penalty that should be assessed against the respondent for the alleged violations, 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 violation, 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.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Interim Commission Rules, 29 CFR 2700.1 et seq., 43 Fed. Reg. 10320-10327, March 10, 1978.

Stipulations

The parties stipulated to the following:

1. The jursidiction of the petitioner and the presiding Judge (Tr. 10).

2. Any civil penalty assessed by me in this matter will not adversely affect the respondent's ability to remain in business (Tr. 10).

3. Respondent is a large coal mine operator, and the mine in question, in April 1977, was a large mine producing 5,800 tons of marketable coal daily, employing 422 persons underground and 28 persons on the surface while operating 9 conventional units (Tr. 10, 14).

4. MSHA coal mine inspector Arthur L. Ridley was a duly authorized representative of the Secretary when he inspected the mine on April 4, 1977, and is a qualified coal mine inspector (Tr. 11).

Discussion

The petition for assessment of civil penalties in this docket seeks assessment for three alleged violations, namely:

104(c)(2) Order No. 7-0145, 1 ALR, April 4, 1977, 30 CFR 75.400.
104(c)(2) Order No. 7-0215, 1 DLW, May 24, 1977, 30 CFR 75.316.
104(c)(2) Order No. 7-0233, 1 TML, May 20, 1977, 30 CFR 75.402.

On motion by the petitioner, filed October 11, 1978, and granted by me on October 13, 1978, Violation No. 7-0233, May 20, 1977, 30 CFR 75.402, was withdrawn. On motion by the petitioner, Violation No. 7-0215, May 24, 1977, 30 CFR 75.316, was settled by the parties, and pursuant to Commission Rule 29 CFR 2700.27(d), the settlement was approved by me after affording the parties an opportunity to present arguments on the record in support of the settlement, and a discussion in this regard follows at the conclusion of this decision.

Section 104(c)(2) Order No. 7-0145, 1 ALR, issued on April 4, 1977, by Federal coal mine inspector Arthur L. Ridley, charging a violation of 30 CFR 75.400, states as follows:

> Loose coal and coal dust ranging in depths from 4 inches to 30 inches in depth had been permitted to accumulate in the headings and throughout the last open crosscut of 7 rooms along the return air side of the 5th east panel entries off the 1st north main entries beginning at a point approximately 1225 feet inby the #6 entry of the last main north parallel entries and in an inby direction for approximately 350 feet. There was an estimated 20 tons of loose coal and coal dust. Dust samples 1, 2 & 3 were taken. Responsibility of Steve McCloskey and Richard Berry section foremen.

Section 30 CFR 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Arthur L. Ridley testified that he was familiar with the subject mine which is located in Ohio County, Kentucky, near Centertown. It is a relatively large mine and employs 422 people underground and 28 on the surface, and at the time the violation issued, it was operating with nine conventional units. On April 8, 1977, the daily production was 5,800 tons. A conventional mining system is used in mining coal, and he gave a description of the mining procedure followed at the mine. He confirmed that he issued section 104(c)(2) Order of Withdrawal No. 1 ALR, citing 30 CFR 75.400 (Exh. P-1) and served it on Mr. Charles Short, the assistant mine foreman (Tr. 9-17).

Inspector Ridley testified he was at the mine to make a spot inspection, and while walking through the return area on the unit in question, he was looking about and saw a considerable darkness which caused him to investigate further. Upon further investigation, he found considerable accumulations of loose coal and coal dust that had been left in the headings of the rooms. He saw coal ranging from 4 to 30 inches deep. He also saw spotty sections of coal in the second open crosscut along about room Nos. 2, 3 and 4, and which was subsequently cleaned up. The areas involved were active workings. With regard to the width of the accumulations, there were places where it was rib to rib and there were places where it was not. He stayed from 4:30 a.m. (the time that he verbally issued the order of withdrawal) to 9 p.m. to make a determination as to how much coal was accumulated, and he estimated that he wrote the order on the surface no later than 5 p.m. The accumulation consisted of loose coal and coal dust, and he took samples with a sieve, a brush, and a scoop across the floor and in a depth of approximately 1 inch deep and sifted them (Tr. 18-27). Inspector Ridley identified Exhibit P-3 as the laboratory analysis of the samples he took to support his order, and he described the places where he took the samples and the method used in sampling, and he indicated that the samples were taken from the accumulations described by him in the order (Tr. 28-40).

Inspector Ridley testified that it was his opinion, based on advancement of the working faces, that the coal which had accumulated beyond the last room that had been worked out and the amount of time that it would have taken to produce the advancement, the accumulations came from normal production and had been in the mine in this condition for approximately 16 production shifts, i. e., 8 working days. He indicated that he had previously worked as an industrial engineer and explained how he computed the duration of the accumulations. He stated that he spoke with Mr. Short about the accumulations and Mr. Short stated that they had only existed for 1 or 2 days (Tr. 40-53).

Inspector Ridley believed that the accumulations could have been cleaned up in about 4-1/2 hours using the equipment available, namely, scoops and shovels. The accumulations were dry and he identified the mine cleanup program (Exh. P-11). He indicated that he believed the operator violated paragraph (A) of the cleanup plan which requires cleanup of the face of working places. At the time coal was being produced, the area was, in fact, the face of a working place. Failure to clean up was a violation of the cleanup plan which requires that the ribs and bottom be cleaned as the face advances. In his opinion, the cleanup program was not followed at the mine, and he found coal as much as 30 feet deep in different locations across the 350 feet. It was obvious that there had been no serious attempt by the loader to clean the rib floor (Tr. 53-60).

The nearest ignition point would have been on the working section. The area had previously been bolted, and unless there is evidence of

an adverse roof condition, it is possible to go back after an area has been roof-bolted. Weekly checks are conducted in return room entries (in the return side of the mine where the air is returning from the unit), in order to test for hazardous conditions. Checks are conducted of methane, velocities of air, and volume of air, in order to determine that the air is traveling with the proper push and velocity and any other condition that might exist in the mine. Although he has previously detected methane in the mine, none has been detected in the panel of the working faces in question. The working face was approximately 400 to 450 feet from the area nearest to where the accumulation began. Assuming the coal accumulations were the result of normal mining, there would be a time when the coal would be nearer the working face, since that was exactly where mining was being done and equipment was being operated. Certain men are required to travel in this area at least weekly, namely, a certified mine foreman examiner, and other employees may be in the area for brief periods of time, picking up materials (Tr. 60-63).

Inspector Ridley considered the condition which he observed on April 4, 1977, to be serious, since in the event an ignition should occur in the panel, with the accumulation of dust and so forth, it would propagate an explosion and would increase the hazard involved, depending on where it occurred. He believes that explosives are commonly kept at the mine in the return entries, and that traveling at its normal course of velocity, return air will not reach the face where the men are presently working. Permanent stoppings separate it from the fresh air and it goes into the return. In his opinion, the operator should have known of the condition since it is the general policy to maintain ventilation across the last faces, and an attempt had been made to open up the crosscut for ventilation and the section foreman should have been aware of the conditions (Tr. 63-66).

Mr. Ridley observed no rock dust in the area of the accumulations, and Foreman McCloskey offered no explanation as to the accumulations (Tr. 67). He abated the citation on April 4, and he believed the operator made every reasonable effort to remove the accumulations as soon as possible. He observed part of the abatement, and three men were used to clean up. The accumulations were removed from the mine and the area was rock-dusted (Tr. 68-73).

On cross-examination, Mr. Ridley testified that he took samples to within 30 to 50 feet of the face. He described the sampling process, and indicated that he did not take a band or parameter sample, but rather, took floor samples. The areas he cited had previously been rock-dusted to within 40 feet of the face. However, production had ceased in those areas for some 8 days and the areas where he found the accumulations were about 450 to 500 feet from the active faces. He described where he traveled on the day of the citation, indicated that he saw no equipment, no men, no power set-ups or

equipment running, and stated that he believed men would pass through the area on a weekly basis rather than daily. The area was not being preshifted daily, and while it had been worked out, he did not consider it to be abandoned (Tr. 73-84).

Mr. Ridley stated that although it is common to have some sloughing of ribs and top coal, in this instance, only a minor amount of the accumulations resulted from such an occurrence. A working section consists of that area inby the tailpiece of the belt to the working face. The subject worked-out rooms were not located within that area, that is, they were not between the loading place and the active face and therefore, this was not a working section. He did examine the weekly examination book for hazardous conditions, but it did not indicate the existence of accumulations (Tr. 84-88).

On the day that he issued the order, the miners who wanted to reach the active working faces, did not have to go through the area cited in the order. Due to the fact that the battery-operated scoop had to pick up a load and then travel about 500 feet in order to dump it, the long traveling distance was part of the reason that it took 4-1/2 hours to clean up the area. Since there was no one in the area of the worked-out rooms at the time he inspected it, and he had seen no evidence of people being in that area, there was no one to withdraw from that immediate area. The nearest ignition point, which was the explosive storage area, was approximately 250 to 300 feet away or approximately 175 feet back from the working face in the room neck of No. 6 entry, which is a return entry. The ultimate ignition point, therefore, would be approximately 325 feet away from the accumulations. There would be occasions when it would be unwise to go into an abandoned area or an unworked area. It is a reasonable assumption that the longer a particular area remains worked out and is not maintained for travel, the more the chance increases that there would be a danger there (Tr. 90-95). Although there may have been rock dust in the area, it was insufficient for him to detect it with his naked eye (Tr. 97).

On redirect examination, Mr. Ridley testified that under the definition which appears in 30 CFR 75.2(h), the area where he saw the accumulations would not meet the definition of an abandoned area because the particular area is required to be examined at least once weekly, is regularly traveled, and is required to be ventilated (Tr. 97-99).

On recross-examination, he testified that the area in which the alleged accumulations were found was ventilated, but he did not take an anemometer reading or a smoke tube reading, nor did he pick up any dust and drop it to watch the air move the dust. Despite the fact that he did not perform such tests, he still maintained that the air

was moving through the area and that there were no obstructions to prevent ventilation. No report of the accumulations had been made. If the area had been examined, then the accumulations should have been noted in the books. However, he has no reason to believe that someone may have intentionally disregarded the accumulations (Tr. 101).

In response to bench questions, he indicated that he believed the area had been ventilated because on the day that the violation issued, he had with him his flame safety lamp, which indicated that there was a sufficient amount of oxygen and/or ventilation and that the area was therefore safe to travel or work in. It is his opinion, if an area is traveled at least once a week, then it is an area regularly traveled for purposes of the standard (Tr. 103-105). However, he conceded that a flame safety lamp does not show air movement, and he did not know for a fact whether or not the last open crosscut in the worked-out rooms was walked or inspected (Tr. 106).

Respondent's Testimony and Evidence

Steve McCloskey, respondent's shift manager, testified that he was aware of the order issued by Inspector Ridley on April 4, 1977, and he indicated that on that day, he was approached by Charles Short, assistant mine foreman, and was told that a withdrawal order had been issued due to an accumulation of coal on the bottom and around the ribs of the No. 5 unit and that he should withdraw his equipment from the faces of his regular unit and take every available man that he had and go to the area and commence procedures for correcting the problem. He then went to this area with his men, who totaled approximately 11, including the mechanic. From the last open crosscut to where the coal had been found, was approximately 500 to 600 feet. Prior to the issuance of the order, no work had been done in that area on that day, and when he arrived on the unit, he saw no evidence of any recent activity in the area. It took approximately 1-1/2 hour's running time with the scoop to move the coal out, and the scoop was used rather than the loader, due to the fact of the distance from the area (Tr. 110-114).

Mr. McCloskey identified Exhibit R-2 as copies of the preshift reports covering the period March 17 to April 4, 1977, and he indicated that the area in question was not preshifted at anytime during this period of time, and as an explanation he stated that there were no men working in that area and to the best of his knowledge, no one would have any reason to go in the area and work or perform any duties of any kind. There is no law that he is aware of that requires an inspection of that particular area be conducted on a daily basis (Tr. 115-123). He also stated that the preshift reports do not show the presence of any accumulations, although it is normal and customary for preshift mine examiners to note the accumulations of hazardous materials on their preshift reports. In his estimation, 5 to 7 tons

of coal had to be loaded out of the area. The area had been cleaned, prior to his arrival, and he believed that some of the loose coal or loose material could have been the result of undercutting by a cutter operator or could have resulted from weakened coal falling off the ribs onto the floor. It is also possible that some top coal could have broken loose and consequently fallen to the bottom, and there also could have been places where the coal ribs had taken weight and some of them had popped off to the mine floor (Tr. 124).

Mr. McClaskey testified that abandoned workings need not be inspected, and he identified Exhibit R-3 as weekly examination reports of hazardous conditions of methane for the weeks of March 19, 26, 31, and April 2, all of which indicated no hazardous conditions for the areas in question. He indicated that an active working is one where men are required to work or travel daily (Tr. 125-127).

On cross-examination, Mr. McClaskey testified that the area cited by Mr. Ridley had not as yet been sealed, but that the No. 6 panel is presently sealed. He identified the ventilation plan provision (Exhibit P-6) which provides for the prompt sealing of all abandoned areas. He believed an "abandoned area" was one where regular work, such as extracting coal, is being performed. The area where the accumulations were found is not his responsibility, and Mr. Short is responsible for that area. He indicated that he was called into the area by Mr. Short to correct the problem of loose coal and coal dust. He managed the removal of the material. It is possible that a small amount of the accumulation could have resulted from normal mining operations. He has seen some rashing or sloughing (i.e., material that weathers and coal falls off in large lumps from the ribs) in the unit that he was working on, up in the headings as well as in the return rooms. The lumps of coal that he observed on April 4, 1977, ranged in size from fist-size to about half the size of a basketball (Tr. 127-147).

On redirect examination, Mr. McClaskey stated that he did not believe the law required abandoned areas to be examined, and he described the cleanup process. He stated that he did not observe the area before the order was issued or before Mr. Ridley arrived on the scene, but once there, he did not see any accumulations as deep as 30 inches as testified to by Mr. Ridley. In his view, an area was an "active working" only if someone was required to go there and perform regular duties on a daily basis (Tr. 148-157).

Inspector Ridley was called in rebuttal, and testified that he had the mine ventilation plan with him when he cited the violation, and he discussed the areas where he found the accumulations. He testified that while he noticed the beginnings of float coal accumulations, they had not yet developed into a violation, but he asked Mr. Short to include that condition in the rock dusting which was done to abate the citation (Tr. 184-187).

In response to further questions by respondent's counsel, Mr. Ridley stated that he saw no activity in the area, and he observed no evidence that weekly examinations had been conducted, that is, he saw no times, dates, or examiner's initials posted in the area at that time, but knows that they were being made thereafter in accordance with section 75.305 (Tr. 187-191).

Findings and Conclusions

Fact of Violation--30 CFR 75.400

Section 30 CFR 75.400 provides that: "Coal dust, including float coal dust deposted on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

The term "active workings" is defined by 30 CFR 75.2(g)(4) as: "[A]ny place in a coal mine where miners are normally required to work or travel."

Aside from the question of the presence of the cited accumulations, a threshold question to be decided is whether the area cited by the inspector can be considered to be an "active working" within the meaning of the cited safety standard.

Respondent's Arguments

In its posthearing brief, respondent argues that the mine area cited in the order in question was not an "active working" within the meaning of section 75.400, or as that term is defined in 30 CFR 75.2(g)(4) ("any place in a coal mine where miners are normally required to work or travel"). In support of this argument, respondent cites the testimony of Inspector Ridley on cross-examination indicating that the area was not an active working, thus contradicting his prior statement that he believed it was based on the fact that the area was required to be preshifted once every 8 hours. Respondent points out that the area had not been examined pursuant to section 75.303 since March 17, 1977, the last time a preshift examination was made in the cited area, and asserts that on April 4, 1977, the area cited was inactive or abandoned in the sense that all work had been completed in the area and there were no plans to return there to continue further work. In support of this conclusion, respondent cites the testimony of the inspector that he saw no one in the area, observed no power setups or equipment, that the area had been "worked out," that respondent was not required to inspect the area during preshift examination, and that he did not consider the area to be a working section. Finally, respondent argues that the area cited was in a set of rooms about 250 feet from the return air course which was parallel to the last open crossuct in which the alleged accumulations were located, that from the return air course inby to the active

workings was at least an additional 200 feet, and the weekly examination for hazardous conditions made at the time the order was cited did not include the area in question. In view of the foregoing, respondent concludes that the area cited was not one in which men were normally required to travel at the time the order was issued.

Petitioner's Arguments

Petitioner argues that respondent's interpretation of the term "active workings" as an area where miners are required to work or travel daily is erroneous, that the word "normally" as used in section 75.2(g)(4) is not ambiguous, and that the test must be whether any miner must normally anytime work or travel in the area and, if so, the area is an active working.

Regarding respondent's attempt to categorzie the area in question as an abandoned area, petitioner points out that the area had not been sealed in accordance with the existing ventilation plan requiring all abandoned areas to be sealed promptly. Since the area was unsealed at the time of the inspection, petitioner argues that it could not be deemed, under the ventilation plan, to be an abandoned area, and respondent's definition of an abandoned area as one where no regular duties such as extracting coal are any longer performed, is not a valid definition. Further, petitioner cites the legislative history of the 1969 Act where Congress expressed a concern for abandoned mine areas.

Petitioner agrees with the inspector's conclusion that the area cited was not a working section as defined by section 75.2(g)(3), but points out that Old Ben Coal Company, 4 IBMA 198, 215 (1975), requires loose coal to be kept free of active workings and did not rewrite section 304(a) of the 1969 Act (75.400), so far as to allow accumulations in all parts of a mine but the working section. Further, while it is true that the area in question did not require preshift or onshift examinations, it was required to be examined weekly under section 75.305. Consequently, petitioner asserts that the inspector was correct in finding that the area was an active working.

After full and careful consideration of the arguments presented, I conclude that petitioner's arguments in support of its position that the cited area in question was, in fact, an "active working" within the scope of the meaning of section 75.400 is correct, and its arguments are adopted as my findings and conclusions on this issue, and respondent's arguments to the contrary are rejected. The fact that the area cited had not been preshifted pursuant to section 75.303, that work had been completed there, and respondent did not plan to return to the area to continue further work, is not particularly relevant. Further, the fact that the inspector may have contradicted himself when characterizing the area is of no particular significance since the question of whether the area was, in fact, an

active working must necessarily be based on all of the evidence and facts adduced. Here, it is clear that the area had not been sealed and abandoned pursuant to respondent's own ventilation plan. Further, the area cited required weekly examinations pursuant to section 75.305. Consequently, it was an area where miners would normally be expected to work or travel when conducting such examinations. Further, as pointed out by petitioner, the legislative history cited reflects that Congress expressed a special interest in insuring that abandoned areas are maintained free of hazardous conditions. While it is true that the facts presented here do not support a finding that the area cited was, in fact, abandoned, it cannot be said that Congress ever envisioned a lesser concern for a mine area which is clearly an active working. Congress expressed that concern by enacting section 304(a), the statutory provision requiring that active workings be kept free of accumulations of combustible materials.

In Kaiser Steel Corporation, 3 IBMA 489 (1974), MSHA established that since an operator was required to inspect an air return twice a day, that return was, in fact, an "active working" subject to the requirements of section 75.400. The former Board of Mine Operations Appeals reversed the judge's finding that MSHA had not proven the return air course was an "active working" within the definition of 30 CFR 72.2(g)(4). Likewise, in Mid-Continent Coal and Coke Company, 1 IBMA 250 (1972), the Board found that an entry was an "active working" and therefore subject to the requirements of section 75.400, since miners were required to go into the entry for the purpose of inspecting a high-voltage cable, and as to the miner that conducted this inspection, the Board held that the accumulations of coal dust in that entry presented a potential hazard to him and that the entry in that case was a place of normal work and travel.

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

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

> (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;
>
> (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and

> (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

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 shifts, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the-ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the unusual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the Act upon a coal mine operator to protect the safety of the miners.

Based on the preponderance of the credible evidence adduced in this proceeding, I conclude and find that petitioner has established a violation of section 75.400 as charged by the inspector in his order, and that its evidence in support of the violation more than adequately meets the tests set down in the Old Ben case. Aside from a dispute as to the actual weight of the total accumulations eventually cleaned up and removed from the mine once the order issued, I cannot conclude that the respondent has rebutted the inspector's findings concerning the presence of the cited accumulations. The inspector's order describes the extent and location of the accumulations, and I find his testimony in support of his order

to be credible. The inspector testified that the loose coal came from prior normal operations, and from the distance which the mining cycle and face area had been advanced, he estimated that it had existed for approximately 8 working days, or 16 working shifts. Although one of respondent's witnesses suggested that the accumulations may have resulted from weakened ribs falling to the floor after the area had been worked out, he candidly admitted that it was just as likely that some of the accumulations could have resulted from normal mining operations. Further, mine management advised the inspector that the accumulations had existed for 1 or 2 days, and the shift manager was informed that the accumulations were present and should be cleaned up on the very day of the inspection. In the circumstances, I conclude and find that petitioner has established that loose coal and coal dust existed as described in the order and that respodnent failed to clean them up within a reasonable time after they should have been discovered.

During the course of the hearing, respondent's counsel took issue with the laboratory analyses report concerning the incombustible content of the samples collected by the inspector to support his order. The report was received over counsel's objections, and that ruling is hereby reaffirmed. The testimony of the inspector reflects that he followed the proper procedure in taking his samples, and respondent has failed to rebut that testimony or the information resulting from the laboratory analyses. I find that the action taken by the inspector regarding the sampling supports the conditions cited. See Co-op Mining Company, 3 IBMA 533 (1974); Coal Processing Corporation, 2 IBMA 336 (1973); Consolidation Coal Corporation, 4 IBMA 255 (1975).

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

The parties have stipulated that the 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 remain in business, and I adopt these stipulations as my findings in this regard.

Negligence

I find that the evidence adduced supports a finding that the respondent failed to exercise reasonable care to prevent the accumulations of coal and coal dust in the areas cited by the inspector, and that this failure on respondent's part constitutes ordinary negligence. The inspector's testimony regarding the duration of the existence of the accumulations is credible, respondent's own witness admitted that they existed for at least 2 days, and it is clear to me that they should have been discovered and cleaned up earlier.

Gravity

The evidence adduced reflects that the accumulations in question were approximately 400 feet from the working face where mining was taking place, and the belts were 350 feet away. The nearest ignition source was a storage area for explosives located in the room neck of the No. 6 entry some 200 to 250 feet away. The cited area was being ventilated, and since the inspector saw no tracks there, I have to assume that no equipment was operated in the area. Although petitioner's brief, at pages 5 and 6, make reference to the presence of "float coal dust," the citation as issued makes no such reference, the inspector did not believe the presence of "float coal dust" was a violation, and he indicated that he used a 20-mesh screen to take his samples. Since float coal dust, as defined by section 75.400-1(b), is dust that can pass through a 200-mesh screen, I cannot conclude that the evidence supports any finding that float coal was present.

The inspector found the accumulations some 200 feet from the return air course in whch he was walking. However, he indicated that he saw no one in the area, there were no power setups or equipment present, and he considered the area to have been "worked out" and not a "working section." Thus, it would appear that the area, by definition of "working section" as found in section 75.2(g)(3), was outby the loading point and working faces where normal mining activities took place, and there is no evidence that any mining activity was taking place in the cited area.

Based on the foregoing facts and circumstances which prevailed at the time the citation issued, I cannot conclude that the conditions cited were grave or posed a serious threat to the safety of miners, notwithstanding the inspector's belief that the violation was serious because the accumulation could propagate an ignition or explosion. I find that the evidence presented simply cannot support that conclusion. Any potential ignition sources were far removed from the accumulations, and petitioner obviously concurs in this evaluation of the totality of the situation since at page 14 it argues that the actual hazard and concern was the explosives stored some 200 to 250 feet away. Lacking any ready ignition sources, I fail to understand how the explosives, standing alone, posed any real threat. Further, there is no evidence that the storage of the explosives was not in compliance with any other standards or procedures, nor is there any evidence that the explosives were subjected to any hazardous conditions. In the circumstances, the inspector's finding that the violation was serious is rejected, and I conclude that it was not.

History of Prior Violations

Petitioner introduced a computer printout of the prior history of violations pertaining to the Alston No. 2 Mine (Exh. P-10). That

history reflects a total of 712 paid violations for that mine during the period January 1, 1970, to April 4, 1977. During that same period of time, the printout reflects 71 violations of the provisions of section 75.400. No evidence was produced with respect to respondent's overall prior history of violations, and my findings on this issue are therefore limited to the prior history of the mine in question as reflected in the printout. Based on the overall history of the mine encompassing a 7-year period for which an average of some 100 citations yearly were assessed and paid, and taking into account the size of the mine, I cannot conclude that the history of prior violations is significantly large. However, with respect to respondent's prior track record concerning citations for section 75.400, I find that it is not good, and that it appears that coal and coal dust accumulation violations at the mine have been consistently occurring. It seems clear that in enacting the civil penalty provisions of section 109 of the 1969 Act, now section 110(i) of the 1977 Act, Congress intended that a penalty assessed pursuant to section 109 of the Act should be calculated to deter similar future violations and to induce compliance. Robert G. Lawson Coal Company, 1 IBMA 115, 117, 79 I.D. 657, 1971-1973 OSHD par. 15,374 (1972). Further, it has also been held that repeated violations justify a higher penalty than theretofore assessed as a method of deterring future violations of the same standard. Old Ben Coal Company, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975). Accordingly, I have taken this into account in the civil penalty assessment made by me in this matter.

With regard to the matter concerning the corporate changes which took place concerning Kennecott Copper's sale of stock to the Peabody Holding Company, and the effect of that transaction on the respondent's prior history of violations, petitioner points out that the arguments advanced by respondent in this regard are inappropriate in this proceeding because the violation took place on April 4, 1977, prior to the stock transfer of July 1, 1977. In this regard, I take note of the fact that this issue was raised by the respondent in a recent proceeding, MSHA v. Peabody Coal Company, BARB 78-606-P, decided by me on March 26, 1979. In that case, I rejected the defense advanced by the respondent, and to the extent that it is reasserted in this proceeding, it is likewise rejected, and my findings and conclusions previously made on that issue are herein incorporated by reference.

Penalty Assessment

Petitioner asserts that a civil penalty in the amount of $5,000 is reasonable for the violation. Taking into account the prior history of section 75.400 violations at the mine, the size of the respondent, and the fact that the cited accumulations existed over a long period of time without being cleaned up, petitioner's recommendation does not appear to be totally excessive. However, considering my gravity findings, and the fact that the conditions were cleaned

up promptly once the order issued, I believe that a civil penalty of $4,000 is warranted, and that this should prompt mine management to give more attention to the requirements of section 75.400.

Proposed Settlement

With regard to section 104(c)(2) Order of Withdrawal No. 1 DLW (7-215), May 24, 1977, citing 30 CFR 75.316, the parties proposed a settlement in the amount of $2,500. Petitioner's Assessment Office recommended a civil penalty of $5,000 for this violation. Arguments in support of the proposed assessment were presented on the record and petitioner argued that while the violation was serious, the Assessment Office's finding that "a shift of the roof or ribs could occur and cause a roof fall which in the return air would not be separated from the belt entry in such a manner as to seriously jeopardize the health and safety of the workmen in the section" is "nonsense" since the ventilation plan permits the brattice curtain to be hung on a very light wood frame and if the roof fell on such a frame, it would smash the frame just as much as if the frame were hung on the unauthorized two boards which were, in fact, used by the operator when the inspector observed it. After consulting with the inspector who issued the order, and who was present in the hearing room and agreed that the Assessment Office was mistaken as to the facts when it proposed its assessment, petitioner's counsel asserted that the ventilation was not affected by the improperly hung curtain. Under the circumstances, this fact, coupled with the mistaken evaluation of the gravity presented by the conditions cited, and the fact that the condition was abated the same day the order issued, counsel asserted that petitioner considers $2,500 to be an appropriate civil penalty for the violation and respondent stipulated that payment in that amount would be made (Tr. 4-8).

In view of the foregoing, I find and conclude that the proposed settlement should be approved, and pursuant to Commission rule 29 CFR 2700.27(d), it is ordered that the settlement reached by the parties be approved.

ORDER

In view of the aforesaid findings and conclusions made in this proceeding, including the approval of the proposed settlement proposed by the parties, IT IS ORDERED:

1. Respondent shall pay a civil penalty in the amount of $4,000 for a violation of section 75.400, as set forth in Citation No. 7-0145, April 4, 1977, payment to be made within thirty (30) days of the date of this decision.

2. Respondent shall pay a civil penalty in the amount of $2,500 for a violation of section 75.316, as set forth in Citation No. 7-0125, May 24, 1977, within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge