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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

v.

BILL'S COAL COMPANY, INC.,
RESPONDENT

Civil Penalty Proceedings

Docket No. DENV 78-359-P
A/O No. 14-01116-02005 V

Docket No. DENV 78-437-P
A/O No. 14-01116-02007 V

Docket No. DENV 78-438-P
A/O No. 14-01116-02006 V

Docket No. DENV 78-493-P
A/O No. 14-01116-02009 V

Fort Scott Strip Mine

Docket No. DENV 78-439-P
A/O No. 14-01230-02002 V

Fulton Strip Mine

DECISION

Appearances: Judith N. Macaluso, Esq., Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, on behalf of the Petitioner;
O. B. Johnston III, Esq., and Donald Switzer, Esq., Vinita, Oklahoma, on behalf of the Respondent.

Before: Administrative Law Judge Stewart

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant to section 109(FOOTNOTE 1) of the Federal Coal Mine Health and Safety

Act of 1969, 30 U.S.C. 819 (1970), hereinafter referred to as the Act.

Petitioner filed a petition for assessment of civil penalty in Docket No. DENV 78-359-P with the Mine Safety and Health Review Commission on April 27, 1978. This petition was answered on May 30, 1978. On May 31, 1978, petitions for assessment of civil penalty were filed with the Commission in Docket Nos. DENV 78-437-P, DENV 78-438-P and DENV 78-439-P. Respondent filed its answer to these petitions on July 5, 1978. Docket No. DENV 78-493-P, the final petition involved herein, was filed on June 20, 1978, and answered on July 25, 1978. At the request of Respondent, the above cases were consolidated.

A hearing was held on September 13 and 14, 1978, in Tulsa, Oklahoma. At that hearing, Petitioner called two witnesses and introduced 66 exhibits. Respondent called two witnesses and introduced five exhibits. MSHA submitted a posthearing brief on November 15, 1978, and a reply brief on December 13, 1978. Respondent submitted its brief on December 4, 1978.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties entered into the following stipulations:

1. Respondent Bill's Coal Company owns and operates the Fort Scott Strip Mine and the Fulton Strip Mine.

2. In 1976 Bill's Coal Company produced 842,819 tons of coal. The Fort Scott Strip produced 559,140 tons.

3. All the violations that are involved in these proceedings were abated with normal good faith.

4. Bill's Coal Company is subject to the Federal Coal Mine Health and Safety Act of 1969.

5. The Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

Docket No. DENV 78-359-P

On September 6, 1977, Larry L. Keller, then a surface mine inspector with MSHA, visited the Fort Scott Strip Mine to conduct a safety and health inspection. At about 2:45 p.m., Mr. Keller issued 104(c)(1) Notice of Violation No. 1-LLK, citing 30 CFR 77.208(d).(FOOTNOTE 2) This mandatory standard requires that "[c]ompressed and liquid gas cylinders shall be secured in a safe manner." While in the tipple area of the mine, the inspector had observed an oxygen cylinder and an acetylene cylinder standing unsecured in their wheeled cart. The cart had chains attached to it to secure the bottles, but these chains were left unconnected. As a result, the bottles could fall from the cart.

The Respondent admitted in its answer that the condition existed in violation of section 77.208.

The operator was negligent in that it knew or should have known of the violation yet failed to take time corrective action. The violation had existed for a long enough time to have been discovered and corrected. The condition had arisen prior to the lunch period when a welder-mechanic changed one of the cylinders. Although the mine superintendent who examined the tipple area during the lunch period failed to observe it, the condition was obvious. The bottles were in an active walkway in plain view of Respondent's employees as they proceeded to the No. 1 or No. 2 belts or into the tipple operator's compartment.

In this instance not only were the cylinders unsecured but the hoses of the bottles were strung out across an active walkway. An accident was probable because a person walking by could accidentally jerk the hoses, hit the bottles, or in some other way knock the bottles out of the cradle. The caps were off the cylinders. In the event that the cylinders fell, it was probable that the valves would be knocked off causing sudden release of the gas. In addition, torches were being used nearby, presenting the chance of explosion.

The bottles are 4 feet high, 8 inches in diameter, and under approximately 2,000 pounds of pressure. If a bottle fell and the valve was knocked off, the bottle would become a large, high-speed projectile. Accidents have happened in which fallen cylinders have "run wild" inside a building. They have been known to go through

8-inch concrete walls and have penetrated one-quarter-inch steel bulkheads. The evidence clearly establishes that the workers in the tipple were exposed to a risk of serious injury or death.

Respondent's Assessed Violations History Report (Govt. Exh. No. 1) indicates that it had 27 paid violations from December 20, 1976, through December 12, 1977, at the Fort Scott Strip Mine. No evidence indicates that a penalty in this case would adversely affect the operator's ability to continue in business.

Docket No. DENV 78-439-P

On November 8, 1977, Inspector Keller issued 104(c)(1) Notice of Violation No. 1-LLK, citing a violation of 30 CFR 77.410.(FOOTNOTE 3) This section requires that trucks must be equipped with an audible automatic backup warning device. The Respondent admitted in its answer that an independently-owned coal hauler truck, which was not equipped with such a warning device, came onto the premises of its Fulton Strip Mine. Respondent further admitted that the presence of this truck constituted a technical violation of section 77.410.

Petitioner has not shown that this violation was the result of Respondent's negligence. When Inspector Keller arrived at the mine that morning, Respondent's safety director, Homer Little, was in the process of conducting a company inspection of the mine. As part of this inspection, Mr. Little spot-checked a number of coal hauler trucks at the weighing scale for compliance with Federal regulations. Normally, the checking of trucks for compliance is the responsibility of a nonmanagement employee, the scale man. This employee was left to perform the safety checks when Mr. Little accompanied Mr. Keller during his inspection.

Mr. Keller subsequently discovered the inadequately equipped coal haulage truck. This truck had entered Respondent's property after Mr. Little left the weighing scale, and he was unaware that it was without a backup alarm until the absence was discovered by Mr. Keller. The violation was abated within 10 minutes when the vehicle was permitted to leave the property. The driver of the cited truck stated that he had not been at the mine for approximately 3 weeks. It was further developed by Respondent's Exhibits R-1 and R-2, and by admission of Inspector Keller, that Respondent had procedures which would normally insure that independent drivers complied with the relevant safety requirements. It was not established that under the circumstances that the operator knew or should have known of the violation

or failed to exercise reasonable care to prevent the occurrence of the violation.

The failure of the truck to have a backup alarm did not present a serious hazard under the circumstances at the mine. It is improbable that an accident would have occurred because of this failure. The trucks had little occasion to back up, once they were on mine property. They pulled up in forward gear, and, after being front-loaded, they pulled away in forward. Moreover, pedestrian traffic in the area was very light. At the time the notice was issued, there were no pedestrians in the area.

The operator had four prior paid violations at the Fulton Strip Mine, none of which were for violations of 30 CFR 77.410. A total of 1,841,420 tons of coal were produced at the Fulton Strip Mine in 1978. There is no evidence indicating that a penalty in this case would adversely affect the operator's ability to continue in business.

Docket No. DENV 78-437-P

On December 12, 1977, inspector Larry Keller and inspector-trainee Don Summers, arrived at Respondent's Fort Scott Mine to conduct a safety and health inspection. In the course of this inspection, Inspector Keller issued at least three notices of violation and 13 withdrawal orders, all of which were directed at conditions existing in the mine tipple. The mine tipple had ceased operation during the evening hours of Friday, December 9, when a drive motor of the No. 2 conveyor burned out. The tipple did not operate on December 10 and 11, during which time repairs were carried out.

A single violation is alleged in Docket No. DENV 78-437-P. Inspector Keller issued 104(c)(1) Notice No. 1-LLK, citing a violation of 30 CFR 77.205(b).(FOOTNOTE 4) He described the condition at issue as follows:

> The walkway extending along the #2 and #3 belts had the following stumbling and tripping hazards: two 20 1b, propane bottles, pulley and belt guard, log chain, rope, 2 shovels, angle iron, pry bar, drop light, grease gun and a coal accumulation great enough at the transfer point from #2 to #3 belt to render the walkway in that area inaccessible.

The inspector also alleged that the violation was of such a nature as could significantly and substantially contribute to the cause and

effect of a mine safety or health hazard, and that it was caused by an unwarrantable failure to comply with such standard.

In its answer, the Respondent admitted the presence on the No. 2 and No. 3 walkways of the items and materials listed by the inspector, but maintained that they were not extraneous and did not constitute a stumbling or tripping hazard in violation of section 77.205(b).

In support of this contention, the Respondent explained the presence of each of the items or materials as follows:

(a) The 20-pound propane bottles with torches were used throughout the winter months to melt ice from the conveyor idlers;

(b) The pulley and belt had been removed during the drive motor repair of December 10 and 11;

(c) The log chain and rope were used to hoist the drive motor to its mounting;

(d) The shovels were used to remove coal from the belts and to break ice;

(e) The pry bar and angle iron were used as a lever to move the No. 2 motor and to remove ice from the conveyor;

(f) The grease gun was used to lubricate pulley sheaves after work on the idlers was done; and

(g) The drop light was used to illuminate the walkway and the burnt out motor on the evening of December 9.

Section 77.205(b) requires that travelways be maintained clear of stumbling hazards and there is no express exception of this requirement during repairs. Some of these items, including the rope and tackle, the drop light, log chain and grease gun, were no longer needed in the repair process. The inspector saw no workers actively engaged in actual repair work at the time of his inspection.

Coal had accumulated in two areas--at the transfer point from the No. 2 to the No. 3 conveyor and at the drive end of the No. 3 conveyor. At the first of these areas, as much coal as the walkway could hold had accumulated. Although coal was no longer being transferred to the No. 3 belt, it had accumulated in passing. The accumulation at the drive of the No. 3 conveyor was far less than at the transfer point, but there were pieces of coal lying on the walkway.

The presence of the equipment, items and coal accumulations on the walkway created stumbling hazards in violation of section 77.205(b).

The evidence indicates that the operator was negligent in its failure to properly maintain the walkways. Even though the items and materials were readily observable and had been used, for the most part, during the weekend repair efforts, no mention was made of the condition on Monday morning in the onshift examination record book. The operator knew or should have known of the condition, yet failed to take steps to correct it.

The only access to conveyor belts No. 2 and No. 3 was along the walkways in question. Any employee assigned to work on these walkways would have been exposed to the stumbling hazard. Given the condition of the walkways, it was probable that a stumbling accident would occur.

The injuries threatened ranged from bruises to broken bones--the normal consequences of a fall. It was also possible that an individual might fall from the walkway to the coal pile below. The distance from the walkway to the coal pile was 25 feet in the vicinity of the coal accumulation at the transfer point from the No. 2 to No. 3 belts, the place where this more severe accident was most likely to occur.

Of the 27 paid violations at the Fort Scott Strip Mine between December 20, 1976, and December 12, 1977, two were for violations of 77.205, including one which was issued on December 12, 1977. No evidence indicates that a penalty in this case would adversely affect the operator's ability to continue in business.

Docket No. DENV 78-438-P

Two violations are alleged in Docket No. DENV 78-438-P. Both alleged violations were the subject of 104(c)(1) notices of violation issued by Inspector Keller in the course of the December 12 inspection at the Fort Scott Strip Mine.

The first of these was Notice No. 5-LLK which cited a violation of 30 CFR 77.1713(c).(FOOTNOTE 5) The inspector described the condition as follows:

> The on-shift examination records of the tipple area by certified persons during the day shift on 12-12-77 indicated no hazardous conditions had been found. The 4 notices of violation and the 14 closure orders issued at the tipple area this date indicated there were some hazardous conditions in that area which were not recorded.

Undisputed testimony established that an onshift examination of the tipple area was conducted on December 12, and there were no hazardous conditions noted in the examination record book. Respondent's contention that no hazardous conditions existed is rejected. The stumbling hazard discussed above in Docket No. DENV 78-437-P existed at the time of the onshift examination. In addition, the Respondent admitted the existence of three violations alleged in Docket No. DENV 78-493-P--Order Nos. 7-0032, 7-0033 and 7-0034. These violations involved the substantial accumulations of coal and the blockage of an escapeway. The inspector testified that the coal accumulations in these areas had existed for numerous operative shifts. As discussed below, there were also instances of unguarded machinery in the tipple. The failure to record these hazards in the examination record book was in violation of section 77.1713(c).

The operator's failure to record the existing hazards was negligence in that the conditions were visually apparent.

It is improbable that the failure to record the hazards which existed in Respondent's tipple increased the risk of accident and injury. The above-mentioned hazards were visually apparent. It is unlikely that entry in the examination book would have increased the awareness of Respondent's employees with regard to these hazards.

The second Notice, No. 2-LLK, cited a violation of 30 CFR 77.512.(FOOTNOTE 6) The inspector described the condition as follows: "The junction box located near the drive pulley of the No. 2 belt was not provided with a cover plate."

The Respondent admitted in its answer that the condition existed as alleged. It contended, however, that the absence of the cover plate was not in violation of section 77.512 because of the "testing" exception contained therein. Section 77.512 provides that cover plates shall be kept in place at all times except during testing or repairs.

The plate had been removed in order to allow replacement of the drive motor on the No. 2 conveyor. While the junction box was

unguarded, the belt had been operated for testing purposes only. As such, this condition did not constitute a violation of 30 CFR 77.512.

The history of prior paid violations at Respondent's Fort Scott Strip Mine has been noted above. No evidence indicates that a penalty in this case would adversely affect Respondent's ability to remain in business.

Docket No. DENV 78-493-P

Thirteen violations were alleged in Docket No. DENV 78-493-P. These alleged violations gave rise to 104(c)(1) withdrawal orders which were issued by Inspector Keller on December 12 at the Fort Scott Strip Mine. In its answer, Respondent included a Motion to Confess Partial Judgment with regards to three of the violations. This motion is the equivalent here of a motion for approval of settlement. The Respondent admitted the occurrence of these violations and tendered a check for payment in full of the civil penalty as originally assessed by MSHA. The three orders and corresponding civil penalties assessed and paid are as follows:

No. 12-LLK (No. 7-32) for a violation of 77.1104(FOOTNOTE 7) $2,200

No. 13-LLK (No. 7-33) for a violation of 77.213(FOOTNOTE 8) $2,500

No. 14-LLK (No. 7-34) for a violation of 77.205(b)(FOOTNOTE 9) $2,200

Inspector Keller issued Order of Withdrawal No. 12-LLK after observing accumulations of loose coal and coal dust in the draw-off tunnel, under the No. 1 belt conveyor from the tail pulley to the east side of the tipple building and along the No. 1 belt conveyor. Order of Withdrawal No. 13-LLK was issued by the inspector because no usable escapeway was provided from the closed end of the draw-off tunnel to a safe location on the surface. Coal had accumulated to a height of 4 feet on the trap door leading from the tunnel to

the surface, preventing escape. The last of these three orders, Order of Withdrawal No. 14-LLK, was issued by the inspector because he observed that both walkways along the coal dump hopper were full of loose coal and coal chunks. In addition, coal had accumulated around the ladder leading to the walkways to a height of approximately 4 feet.

The inspector found that each of these three violations was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and that each was caused by an unwarrantable failure to comply with the respective standard on the part of Respondent. All three conditions were abated within the time prescribed by the inspector.

In view of the above, the negotiated settlement of these three orders of withdrawal is hereby approved.

The remaining 10 orders were directed at the absence or inadequacy of guards in various places throughout the tipple and along the conveyor belts. In each of them, Inspector Keller cited either section 77.400(a) or section 77.400(c).(FOOTNOTE 10) Section 77.400(a) states that exposed moving machine parts, such as drive, head and tail pulleys, which may be contacted by persons, and which may cause injury to persons shall be guarded. Section 77.400(c) states that guards at the conveyor drive, conveyor head and conveyor tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

The inspector also found that each alleged violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and was caused by unwarrantable failure on the part of the operator.

In its posthearing brief, the Respondent asserted that the single overriding issue is whether the orders were directed at equipment

which was being tested and/or repaired. This is an oversimplification. The alleged violations considered below are separate and apart and must be treated as such.

As noted above, there were 27 paid violations at the Fort Scott Strip Mine from December 20, 1976, until December 12, 1977. There is no evidence which would indicate that a penalty would affect the Respondent's ability to continue in business.

The alleged violations are considered below in the sequence in which the corresponding orders were issued.

a. Order No. 1-LLK

Order No. 1-LLK cited section 77.400(c) and was directed at the following condition: "The belt drive pulley of the No. 3 horizontal conveyor had not been guarded." The Respondent admitted in its answer that the pulley was unguarded as alleged, but argued that no violation existed because its No. 3 conveyor belt was inoperative.

Larry Pommier, Respondent's chief engineer, testified that the No. 3 belt had been inoperative since late summer or early fall of 1977. Respondent had experienced icing problems with the belt during the prior winter, and, after unsuccessful attempts to correct the problems, had shut down the belt in anticipation of the oncoming winter. This testimony was uncontradicted. Since the belt was not operational and had not been used for a long period of time, the record does not establish a violation of section 77.400(c). Under the circumstances, the belt did not present the hazard which the regulation was intended to prevent.

b. Order No. 2-LLK

Order No. 2-LLK cited section 77.400(a) and was directed at the following condition: "The V-belts and pulleys of the No. 2 belt conveyor drive were not guarded. The guard had been removed and not replaced." The Respondent admitted in its answer that the guard was not in place. It had been removed to facilitate replacement of the No. 2 conveyor motor which had burned out on the evening of December 9, 1977.

Respondent asserted in its defense that the equipment had been operated for testing purposes only while in its unguarded condition. The conveyor system was not operated from the time the motor failed until the morning of December 12, 1977. At that time, two short test runs were made in order to check the newly-installed drive motor, as well as the alignment of the belt. Coal was carried on the belt during the second run in order to test the belt under normal operating tension.

Section 77.400(d) states: "Except when testing the machinery, guards shall be in place at all times while the machinery is being tested." Respondent established that the guard in question had been removed to facilitate repairs, and the belt was thereafter operated in an unguarded condition for testing purposes only. The absence of the guard in this instance did not constitute a violation of section 77.400(a).

c. Order No. 3-LLK

Order No. 3-LLK cited section 77.400(c) and was directed at the following condition: "The belt drive pulley of the No. 2 conveyor had not been guarded to prevent a person from reaching behind the guard and becoming caught between the belt and pulley. One side of the guard had been removed and not replaced and one guard was inadequate."

The Respondent admitted in its answer that the belt was unguarded as alleged. Chief Engineer Pommier testified that the guard on the south side of the belt had been taken off to allow replacement of conveyor idlers, as well as deicing of the belt. The guard had been removed to facilitate repair and other than test runs, the belt had not been operated without this guard. With respect to this side of the belt drive pulley, no violation existed.

The testimony of Inspector Keller and Inspector-Trainee Summers established that the guard on the north side of the drive pulley was inadequate, as alleged. This guard did not extend a sufficient distance down the belt to prevent a person from coming into contact with the pinchpoint between the belt and pulley.

The operator was negligent in its failure to adequately guard the belt drive pulley. The condition was readily observable and existed along a regularly traveled portion of the belt. The operator knew or should have known of its existence, yet failed to take corrective action.

It is improbable that a person would come into contact with this particular pinchpoint. No evidence exists on the record that a person could do so inadvertently. The testimony adduced as to the probability of the occurrence of an accident and injury related to the absence of the guard from the south side of the belt and the record did not establish that it would be likely for a person to be injured by inadvertently reaching behind the guard.

If a person were to be caught between the belt and pulley at the pinchpoint, loss or breakage of a limb or fingers might occur.

d. Order No. 4-LLK

Order No. 4-LLK cited section 77.400(c) and stated: "[T]he tail pulley of the No. 3 belt conveyor had not been guarded. The guard was laying on the walkway under about 12 inches of loose coal." The Respondent admitted in its answer that the tail pulley was unguarded, but asserted in its defense that the No. 3 belt was inoperative and that the guard in question had been removed for purposes of repair.

As noted above, the uncontradicted testimony of Larry Pommier, Respondent's chief engineer, established that the No. 3 belt had been inoperative since late summer or early fall of 1977. As such, the unguarded tail pulley did not present a hazard and was not in violation of section 77.400(c).

e. Order No. 5-LLK

Order No. 5-LLK cited section 77.400(c). Inspector Keller observed that: "The drive pulley and feeder chain of the salting machine located over the No. 2 belt converyor had not been guarded." Respondent admitted in its answer that this equipment was unguarded. The guard had been taken off to repair the drive pulley of the salting machine. The guard was in the vicinity, but it had not been replaced after repairs were completed.

This condition was a clear violation of 77.400(c). Respondent's argument that no violation existed because the belt was being tested is rejected. Although Respondent asserts in its posthearing brief that repairs were "recent," there is no evidence on the record which indicates the time at which the repairs had been carried out. Respondent failed to establish a connection between the testing and the absence of this guard.

Evidence indicates that the Respondent was negligent in its failure to guard this equipment. The absence of the guards was readily observable.

It is probable that an accident would occur. The pulley was located along a walkway and was accessible to passersby. The inspector estimated the pulley to be within 12 inches of the walkway. If such an accident were to occur, it is probable that a loss of fingers or a hand would result.

f. Order No. 6-LLK

Order No. 6-LLK cited section 77.400(c) and stated that "the drive pulley of the No. 1A belt conveyor had not been guarded." Inspector Keller testified that this drive pulley had never been guarded. The Respondent admitted in its answer that the equipment was unguarded, but asserted the absence of a guard did not constitute a violation because the tipple had been operational for testing

purposes only on December 12, 1977. This defense is rejected in this instance because no causal link was established between the absence of this guard and the operation of the belt for testing purposes.

The Respondent was negligent in its failure to guard this drive pulley because the condition was readily observable and had existed for a long period of time. It knew or should have known of the condition, yet it failed to take corrective action.

The pinchpoint between the pulley and belt was estimated by Inspector Keller to be 18 inches from the walkway between knee and waist height. Given the close proximity of the pinchpoint to the walkway, it was probable that an accident would occur. If such an accident were to occur, it is probable that the resulting injury would be disabling. Inspector Keller testified that it was likely that an individual caught at this pinchpoint would be dragged into the belt and killed.

g. Order No. 7-LLK

Order No. 7-LLK cited section 77.400(c) and stated that "the tail pulley of the No. 1A belt conveyor had not been provided with a guard." The Respondent had removed the guard because the pulley area could not be kept clear of coal otherwise. The Respondent admitted in its answer that the tail pulley was unguarded, but again asserted that the absence of a guard did not constitute a violation because the tipple operated on December 12, 1977, for testing purposes only. This defense is rejected because no causal link was established between the absence of the guard and the operation of the belt for testing purposes.

The operator was negligent in that it knew the absence of the guard, yet it failed to take corrective action.

Inspector Keller testified that an accident was probable because Respondent's employees were required to clean in the area. He knew of accidents where fatalities had occurred when a person caught a shovel in a tail pulley and was dragged into a belt. Larry Pommier testified that all cleaning in the area was accomplished with water under high pressure. Even so, the finding that an accident was probable is warranted because Respondent's employees had occasion to work in the area and the unguarded pulley was readily accessible.

It is probable that a disabling injury would occur if a person was caught between the belt and pulley.

h. Order No. 8-LLK

Order No. 8-LLK cited section 77.400(a). The inspector described the condition as follows:

The guard on the north end (face) of the rotary breaker was not adequate to prevent personal contact of the drive chain and the breaker drum itself. The guard was not of sufficient height and in addition had been damaged and repairs had been attempted by wiring the guard back in place.

The guard on the rotary breaker normally reached a height of more than 6 feet. However, the guard had been damaged so that on one side it reached a height of only 4 feet and extended out into the walkway. An attempt had been made to repair this damage with wire. The testimony of Inspector Keller and Inspector-Trainee Summers established that an individual could come into contact with and be injured by the rotary breaker where its guard had been damaged.

The Respondent was negligent in that it was or should have been aware of the damage to the guard, but failed to take adequate corrective measures.

An accident was probable in that the inadequately guarded breaker was adjacent to a walkway frequently traveled by Respondent's employees. Inspector Keller testified that a falling man could reach for support and contact the breaker.

If such an accident were to occur, the probable result would be a disabling injury. Loss of fingers, a hand or an arm might have resulted.

i. Order No. 10-LLK

Order No. 10-LLK cited section 77.400(c) and stated that "the tail pulley of the No. 1 belt conveyor had not been guarded." The Respondent admitted in its answer that this tail pulley was unguarded and Inspector Keller testified that a person could become caught between belt and pulley while performing his normal duties in the area.

The "testing" defense interposed by Respondent is again rejected. No connection was established between the testing of the belt on December 12 and the absence of the guard on the tail pulley.

The operator was negligent in that it knew or should have known that the pulley was unguarded. The condition was visually apparent. That accumulations of coal contacted and engulfed the pulley indicated that the condition existed for a long enough time that it should have been discovered by the Respondent. If a guard had been present, it would have prevented contact between the pulley and the accumulations.

It is probable that an accident would occur because of the absence of this guard. The pulley was adjacent to a walkway which

was used by Respondent's employees in the performance of their duties. The presence of a water pump on the walkway and coal accumulations in the area increased the likelihood that an accident would occur causing a miner to be caught in the belt. Larry Pommier testified that the pinchpoint between this pulley and the belt was inside a truss which was itself guarded. At the same time, Mr. Pommier testified that he was "not that familiar" with this tail pulley. Accordingly, Inspector Keller's testimony is given greater weight.

If an accident were to have happened, it is probable that a disabling injury would have occurred. Loss of fingers or a hand might have resulted.

j. Order No. 11-LLK

Inspector Keller issued Order No. 11-LLK, citing section 77.400(a). He stated that "the V-belt, clutch and pitman arms of the feeder drive located in the draw off tunnel had not been guarded." The Respondent admitted in its answer that this equipment was unguarded. Larry Pommier testified that they had been removed to allow for repair of the feeder and replacement of the clutch. Respondent argued that a violation of 77.400(a) did not exist because repairs had been made and the guards had been left off until testing could be accomplished. This defense must be rejected because the record contains no indication of the time when these repairs were effected. More specifically, there is no indication that the repairs were made in the period from December 10 through 12, and therefore, no causal link was established between the absence of guards and the testing carried out on December 12.

The operator was negligent in its failure to guard the machines. This condition was visually apparent and should have been known to the operator.

Because of the absence of guards on this equipment, an accident was probable. One employee per shift was required to work in the area, and the walkway around the equipment had only a 16-inch clearance.

If an accident occurred, the probable result would have been the loss of fingers or a hand.

Penalties

In consideration of the findings of fact and conclusions of law in this decision based on stipulations and evidence of record, the following assessments are appropriate under the criteria of section 109(a) of the Act.

Docket No. DENV 78-359-P	
Notice of Violation No. 1-LLK (9/6/77)	$ 1,000
Docket No. DENV 78-439-P	
Notice of Violation No. 1-LLK (11/8/77)	75
Docket No. DENV 78-437-P	
Notice of Violation No. 1-LLK (12/12/77)	1,000
Docket No. DENV 78-438-P	
Notice of Violation No. 5-LLK (12/12/77)	100
Docket No. DENV 78-493-P	
Order of Withdrawal No. 3-LLK (12/12/77)	1,000
Order of Withdrawal No. 5-LLK (12/12/77)	1,000
Order of Withdrawal No. 6-LLK (12/12/77)	1,500
Order of Withdrawal No. 7-LLK (12/12/77)	1,500
Order of Withdrawal No. 8-LLK (12/12/77)	1,000
Order of Withdrawal No. 10-LLK (12/12/77)	1,000
Order of Withdrawal No. 11-LLK (12/12/77)	1,000

ORDER

The civil penalty proceedings with respect to Notice of Violation No. 2-LLK (December 12, 1977), Order of Withdrawal No. 1-LLK (December 12, 1977), Order of Withdrawal No. 2-LLK (December 12, 1977), and Order of Withdrawal No. 4-LLK (December 12, 1977), are hereby DISMISSED.

It is ORDERED that the settlement negotiated by MSHA and Respondent with regard to Order of Withdrawal No. 12-LLK (December 12, 1977), Order of Withdrawal No. 13-LLK (December 12, 1977), and Order of Withdrawal No. 14-LLK is hereby approved.

With respect to the remaining notices of violation and orders of withdrawal, it is ORDERED that payment in the amount of $10,175 be made within 30 days of the date of this decision.

Forrest E. Stewart
Adminstrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Section 109(a)(1) of the Act reads as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard * * * shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

~FOOTNOTE_TWO
2. 30 CFR 77.208(d) reads as follows:

"Compressed and liquid gas cylinders shall be secured in a safe manner."

~FOOTNOTE_THREE
3. 30 CFR 77.410 reads as follows:

"Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

~FOOTNOTE_FOUR
4. 30 CFR 77.205(b) reads as follows:

"Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

~FOOTNOTE_FIVE
5. 30 CFR 77.1713(c) reads as follows:

"After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine

or any area of the mine which he has inspected together with a report of the nature and location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard."

~FOOTNOTE_SIX

6. 30 CFR 77.512 reads as follows:

"Inspection and cover plates on electrical equipment shall be kept in place at all times except during testing or repairs."

~FOOTNOTE_SEVEN

7. 30 CFR 77.1104 reads as follows:

"Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

~FOOTNOTE_EIGHT

8. 30 CFR 77.213 reads as follows:

"When it is necessary for a tunnel to be closed at one end, an escapeway not less than 30 inches in diameter (or of the equivalent, if the escapeway does not have a circular cross section) shall be installed which extends from the closed end of the tunnel to a safe location on the surface; and, if the escapeway is inclined more than 30 degrees from the horizontal it shall be equipped with a ladder which runs the full length of the inclined portion of the escapeway."

~FOOTNOTE_NINE

9. See footnote 4.

~FOOTNOTE_TEN

10. 30 CFR 77.400 reads as follows:

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

"(b) Overhead belts shall be guarded if the whipping action from a broken line would be hazardous to persons below.

"(c) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

"(d) Except when testing the machinery, guards shall be securely in place while machinery is being operated."