CCASE:
SOL (MSHA) V. EASTERN ASSOCIATED COAL
DDATE:
19790531
TTEXT:

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 Proceedings Docket No. HOPE 78-606-P A/O No. 46-01271-02021V
v.	Harris No. 1 Mine
EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT	Docket No. HOPE 78-610-P A/O No. 46-01809-02038V Wharton No. 2 Mine

DECISION

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

Before: Judge Cook

I. Procedural Background

On July 27, 1978, petitions were filed for assessment of civil penalties against Eastern Associated Coal Corporation (Eastern) for alleged violations of 30 CFR 75.200 and 30 CFR 75.307. These petitions were filed pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1977) (1977 Mine Act). Answers were filed on August 28, 1978.

A notice of hearing was issued on August 31, 1978. On September 27, 1978, Respondent filed a motion to remand "the instant case to the Office of Assessments, Mine Safety and Health Administration, for re-evaluation of the proposed penalty assessment under the guidelines and philosophies of the new Rules for Part 100, Title 30 of the Code of Federal Regulations." That motion was denied on October 11, 1978.

A hearing was held commencing November 7, 1978. Representatives of both parties were present and participated.(FOOTNOTE 1) On December 14, 1978, Eastern filed its posthearing brief. The parties were granted time until January 31, 1979, to file any additional briefs. On January 15, 1979, Eastern filed an additional statement as to certain exhibits received in evidence on January 5, 1979. MSHA filed no posthearing brief.

II. Violations Charged

Notice No. 3 DDT, April 8, 1977, 30 CFR 75.200.

Notice No. 2 OEB, November 27, 1977, 30 CFR 75.307.

III. Evidence Contained in the Record

A. Stipulations

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

B. Witnesses

MSHA called as its witnesses David D. Trump, an MSHA inspector, and Orville E. Boggs, an MSHA inspector.

Eastern called as its witnesses George T. Daniel, the general mine foreman at the Harris No. 1 Mine; James R. Browning, the assistant mine inspector for Eastern at the Harris No. 1 Mine; James A. Sexton, the foreman at the Wharton No. 2 Mine; and Jerry Edward Lewis, the general mine foreman at the Wharton No. 2 Mine.

C. Exhibits

(1) MSHA introduced the following exhibits into evidence:

M-1 is a computer printout of Eastern's history of violations (order of December 18, 1978).

M-2 is a copy of the roof control plan for the Harris No. 1 Mine (Tr. 16).

M-3 is a copy of Notice No. 3 DDT, April 8, 1977, 30 CFR 75.200 (Tr. 19).

M-4 and M-5 are the termination and modification of M-3 (Tr. 19).

M-6 is a copy of Notice No. 2 OEB, November 28, 1977, 30 CFR 75.307 (Tr. 89).

M-7 is a copy of the termination of M-6 (Tr. 89).

M-8 and M-9 are certified copies of MSHA records relating to test results for six bottle samples of air taken at the Wharton No. 2 Mine (order of January 8, 1979).

(2) Eastern introduced the following exhibits into evidence:

0-1 is a map of a part of the Harris No. 1 Mine (Tr. 73).

0-2 is a copy of interoffice correspondence of Eastern dated May 5, 1977 (Tr. 73).

0-3 is a copy of one of Eastern's Mine Atmosphere Analysis Reports for the Wharton No. 2 Mine (Tr. 131-132).

(3) Exhibit X-1 is a drawing made during the examination of one of the witnesses (Tr. 57-58).

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations(FOOTNOTE 2)

At the commencement of the hearing, counsel for both parties entered into the following stipulations (As relates to the tonnage

of production, Respondent stipulated generally to such figures rather than to their absolute accuracy) (Tr. 7):

1. The Harris No. 1 Mine produces approximately 630,277 tons of coal per year (Tr. 7).

2. Eastern Associated produces approximately 6,648,618 tons of coal per year (Tr. 7).

3. The Wharton No. 2 Mine produces approximately 94,106 tons of coal per year (Tr. 8).

4. Eastern Associated Coal Corporation is the operator of the mines involved in these cases and the coal produced from these mines is involved in interstate commerce (Tr. 7-8).

5. This Administrative Law Judge has jurisdiction to hear these cases (Tr. 7-8).

B. Occurrence of Violation, Gravity, and Negligence

After careful consideration of the entire record, and upon the basis of the reliable, substantial and probative evidence therein, I find and conclude that violations did occur as described below and that the assessment of a civil penalty is required. I find the facts to be as follows

HOPE 78-606-P

(1) Notice No. 3 DDT, April 8, 1977, 30 CFR 75.200

On April 8, 1977, Federal coal mine inspector David D. Trump made a regular inspection of the Harris No. 1 Mine (Tr. 19). The miners were already underground when he arrived and went to the production site (Tr. 20). He went to the No. 2 East section and observed crosscuts in the No. 2 entry near spad 3531 and the No. 1 entry near spad No. 3802. The corners of the crosscuts had been rounded off and by measurement were from 22-24 feet in width (Tr. 21). These widths were measured by a tape line (Tr. 24). Drawing No. 3 of the roof control plan (Exh. M-2) contains a sketch which indicates that the maximum

width of the entries should be 20 feet (Tr. 22, 23), although MSHA allows 12 inches more than the maximum 20-foot width (Tr. 33, 34). This excessive width of the crosscut corners was not caused by any sloughing (Tr. 21).

There were four separate crosscuts in the No. 2 entry and one in the No. 1 entry that had excessive widths (Tr. 43). The excessive width was not all the way through the crosscuts, but was only at the entrances of the crosscuts (Tr. 42).

The inspector also testified that Safety Precaution No. 20 of the roof control plan requires rib supports where the mining height is 72 inches or greater (Tr. 26).

Safety Precaution No. 20 of the roof control plan states:

> Where the mine height is 72 inches or greater, a row of line posts shall be installed on each side of the roadway on 6-foot maximum spacings. In areas where adequate anchorage can be maintained, rib bolts in conjunction with cap pieces or straps and installed on 5-foot maximum spacings may be used in lieu of the posts. Where rib supports are required, they shall be maintained to within 25 feet of the face.

He testified that he measured the area and determined that it was greater than 72 inches (Tr. 27). However, he did not recall if he measured the 72-inch height in all five locations (Tr. 32). He further testified that he did not know the number of the percentage of required posts that were missing or dislodged (Tr. 28, 56).

The inspector noted that an alternative to setting timbers in areas where the height is greater than 72 inches is bolting the ribs with cap blocks or straps (Tr. 55). The inspector testified that Eastern was not using rib bolts with cap pieces in this area (Tr. 27).

The inspector testified that he had checked the roof in the area of the excessive width and missing roof supports, and that the roof was loose and drummy (Tr. 28). This condition was diagnosed on the basis of a sound vibration test (Tr. 28). He also observed that the loose and drummy material was loose draw rock (Tr. 28). He determined that the thickness of the material was from 0 to 3 inches. This figure was reached after measuring some rock which had fallen (Tr. 29).

The inspector issued Notice of Violation No. 3 DDT (Exh. M-3), which stated in pertinent part:

> Drawing No. 3 roof control plan was not being complied with in that crosscuts (intersection) was from 22 to 24 feet

> in width. Starting at Spad No. 3531 and outby two crosscuts, and inby two crosscuts No. 2 entry. Also one crosscut inby spad No. 3802 No. 1 entry. Also rib support was missing and dislodged through the section, and No. 2 entry travel roadways. Persons was working in all areas of section at said time. The roof was loose and drummy between permanent support draw rock from 0 - 3 inches through section 2 east section (028).

The inspector asserted that the hazard associated with these two concurrent conditions was that a roof fall might be created from the resulting pressure (Tr. 29). According to his testimony, when excess width at the intersections of the entries and crosscuts was coupled with the lack of additional rib support where the coal was over 72 inches, there existed an increased danger of a roof fall (Tr. 30). Rib posts would have helped support the roof (Tr. 30).

Exhibit 0-1 is a map of a portion of the Harris No. 1 Mine. It contains markings which indicate, according to the testimony of the general mine foreman, the location of the alleged violations mentioned in Notice No. 3 DDT (Exh. M-3). The markings were identified at the hearing as follows:

Marking	Identification	Transcript Page
A	Spad No. 3531	67
B	Spad No. 3802	67, 68
C	One of the rounded-off intersections referred to by the inspector in the notice	68
D	Another rounded-off intersection	68
E	Rounded-off corners	69
F	Rounded-off corners	69
G	Entry No. 1	70, 71
H	Entry No. 2	71
I	Entry No. 1, Butt Section	71
J	Entry No. 2, Butt Section	71
Arrows	The arrows represent outby and inby certain spad numbers	72
Curved line to the right of "A" was not identified		70

During the hearing, the inspector explained how he measured the five intersections with excessive widths. As indicated on Exhibit X-1, the inspector measured the distance from location E to location G across the crosscut. It measured 20 feet. The distance from location G to location H measured from 22 to 24 feet (Tr. 54). Both location G and location H represent intersections between the curves and the ribs (Tr. 52, 53).

A question is presented as to whether the alleged excessive width at the crosscuts and inadequate rib supports are to be viewed as parts of a single violation of the roof control plan, or whether they consitute separate alleged violations. For the reasons stated below, I find that they must be viewed as separate alleged violations. This finding will have significance in determining the appropriate penalty to assess.

Adequate roof control plans are the joint work product of both the operators and the Secretary, as indicated by 30 CFR 75.200. That section states, in pertinent part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners.

Each operator is required to adopt a roof control plan suitable to the roof conditions and the mining system for all underground roadways, travelways and working places of each mine. 30 CFR 75.200-2. These roof control plans must be approved by the District Manager of the coal mine health and safety district in which the mine is located. 30 CFR 75.200-3, 75.200-4.

The independent significance of the rib supports and the width of the openings is highlighted by the regulations since these topics are addressed in separate sections. 30 CFR 75.200-5 lists the general information required in roof control plans. It specifically mentions rib supports, but is silent as to the appropriate width of the openings. It states, in pertinent part:

> A roof control plan shall include the following information:
>
> * * * * * * *

(f) A description of the sequence of mining and installation of supports including temporary supports. The description shall include:

> (1) Drawings on 8-1/2-inch by 11-inch paper or on paper folded to this size, showing the location of all roof, face, and rib supports for each method of mining employed at the mines. The scale shall be specified and not less than 5 feet to the inch nor more than 20 feet to the inch. A legend explaining all the symbols used shall also be included on the drawings. [Emphasis added.]

Widths of openings are addressed by 30 CFR 75.201-1, which states:

> (a) The method of mining shall provide widths of openings and pillar dimensions compatible with effective roof control. These widths and dimensions shall be incorporated into the roof control plan submitted for approval.
>
> (b) Where excessive widths result from poor mining practices, additional roof support shall be installed before any travel or other work is done in such area. If excessive widths of openings are a result of coal sloughing, additional support shall be installed and the mining system reevaluated to determine changes that are necessary to minimize such occurrences.

Therefore, it is clear that the regulatory scheme contemplates treating the two alleged infractions as separate violations, even though both are cited in the same notice, and even though the increased hazard of a roof fall is attributable to the concurrence of both infractions.

The next question which must be decided is whether MSHA has established its case by a preponderance of the evidence, as required under 29 CFR 2700.48. For the reasons stated below, I find that MSHA has established by a preponderance of the evidence that the five intersections cited by the inspector were not in compliance with Drawing No. 3 of the roof control plan (Exh. M-2) in that they exceeded the 20-foot requirement. I also find, for the reasons stated below, that MSHA has failed to prove by a preponderance of the evidence that the Respondent violated roof control plan Safety Precaution No. 20 in that insufficient evidence was presented that the mining height equaled or exceeded 72 inches in any locations where rib support was missing.

The record clearly establishes that the inspector measured the width of the five intersections (Tr. 33), and that these intersections

measured from 22 to 24 feet in width. Diagram No. 3 of the roof control plan (Exh. M-2) requires the crosscuts and entries at the intersections to be not greater than 20 feet wide, although MSHA allows 12 inches more than 20 feet at the entries (Tr. 33-34). Even assuming for purposes of argument that 21-foot widths at the intersections would not have been considered cause to issue a notice of violation, the fact remains that the widths at the five intersections in question exceeded 21 feet by 1 to 3 feet. Since the Respondent offered no rebuttal evidence establishing widths less than the figures cited by the inspector, I find that the openings measured from 22 to 24 feet in width, and that it failed to comply with the roof control plan's requirements (Exh. M-2, Drawing No. 3).

In reaching this conclusion, it has been necessary to decide two subissues: First, whether the inspector selected a proper method for measuring the widths; and second, whether he should have been required to state the width at each intersection measured.

The inspector described the method employed in determining the widths of the five rounded intersections (Tr. 38-54). During the course of the testimony, the inspector drew a rough sketch to illustrate the measurement method used. This sketch was subsequently marked as Exhibit X-1 and made part of the record (Tr. 58). Points A, B, C, and D on the sketch represent the rounded corners at the intersections. Points E, G, and H represent the points at which the rounded corners, or "curves," intersect the ribs. Point F represents the midpoint of one of the rounded corners or "curves." The inspector testified that he measured from point E to point G, and that the distance between the two points was 20 feet (Tr. 54). When he measured the five intersections, he measured from point G to point H, and recorded measurements ranging from 22 to 24 feet (Tr. 54). In other words, he selected a point at which the rounded corner intersected the rib (point G) and measured from that point to a correlative point on the opposite rounded corner where it intersected the rib (point H).

This method of determining the width of the intersections is a logical one. However, it appears equally logical to measure from the midpoint of one of the rounded corners (point F) to the midpoint of the rounded corner on the opposite rib. The inspector did not indicate why he chose to measure from point G to point H. In any event, the Respondent did not object to the measurement method at the hearing, and does not raise the issue in his post-trial brief. Therefore, it appears that the inspector's method of measurement was valid. This interpretation is supported by the evidence. The inspector was accompanied on the inspection tour by James R. Browning (Tr. 20-21, 80), the assistant mine inspector for Eastern Associated Coal at the Harris No. 1 Mine. There was no evidence indicating that either Mr. Browning or any other employee of the Respondent objected to the measurement procedure. If it had been defective, then the logical

thing for Mr. Browning to have done would have been to voice an objection. In addition, Exhibit 0-2, presented by Eastern, refers to the subject situation and states in part: "Management agreed the Roof Control plan had been violated, * * * "

Even Respondent's brief recognized that there had been a violation, however, Respondent considered it technical in nature (Resp. Brief, p. 2).

The second subissue addresses whether the inspector should have been required to state the precise width of each opening. The inspector testified that he measured the five intersections cited in the notice (Exh. M-3), and that they were from 22 to 24 feet in width (Tr. 21). But he did not associate specific widths with specific intersections. The Respondent did not interpose an objection to this at the hearing and it does not mention it in its post-trial brief (Resp. Brief, pp. 2-5). I am convinced that the Respondent would have stressed this point, at least in its brief, if it had considered it significant. For example, the Respondent, when addressing the issue of inadequate rib supports, stresses the fact that the inspector did not measure the mining height in all five locations to determine whether it equaled or exceeded the 72-inch requirement of Safety Precaution No. 20 (Resp. Brief, pp. 4-5). But it does not mention the inspector's failure to associate specific widths with specific intersections. Since the brief reveals that the Respondent was aware of the importance of precise measurements, it must be deemed to have knowingly waived any objection to MSHA's failure to establish a specific width for each of the five intersections.

With respect to the alleged violation of Safety Precaution No. 20 of the roof control plan, the inspector did not know the number or the percentage of required rib supports that were missing or dislodged (Tr. 28, 56). The operator is required to provide additional rib support in the form of timbers or rib bolts when the mining height equals or exceeds 72 inches (Tr. 26, Exh. M-2). The inspector testified that the area of the mine in question had a height of 72 inches or greater (Tr. 26), but he did not recall whether he had measured the height of the coal in the five locations (Tr. 32). George Daniel, the general mine foreman at the Harris No. 1 Mine for 2 years, testified that the area varies in height with approximately 60-70 percent being 72 inches or greater (Tr. 60). In other words, 30-40 percent of the area had a mining height of less than 72 inches and did not require the additional support mandated by Safety Precaution No. 20 (Exh. 2). This indicates a need for measuring the height of the coal, which the inspector did not do. Consequently, the inspector did not connect a 72-inch height with specific missing rib support. Therefore, it cannot be found that a violation of Safety Precaution No. 20 was proved by as preponderance of the evidence.

Gravity

MSHA established the Respondent's failure to comply with Diagram No. 3 of the roof control plan (Exh. M-2) in effect at the Harris No. 1 Mine. It was proved by a preponderance of the evidence that the roof control plan required 20-foot widths at the five intersections in question, and that the intersections measured from 22 to 24 feet in width. The wide spaces were not caused by sloughage (Tr. 21).

George T. Daniel, the general mine foreman at the Harris No. 1 Mine, testified that the corners of the intersection got rounded as "it's difficult to get the miner around the corner to turn the intersection with the roadways" (Tr. 61). It was, however, possible to get the miner around the intersections without enlarging the corner widths (Tr. 78, 79). According to Mr. Daniel, when the distance from the ribs to the bolts exceeds 5 feet, the roof control plan (Exh. M-2) requires the installation of another roof bolt with a cap block on it (Tr. 62). He further testified that this would be the procedure where the intersection was over 20 feet (Tr. 62). Extra bolts had been installed at the intersection cited by the inspector in his notice (Tr. 62, 63).

Mr. Daniel also testified that, to the best of his knowledge, the roof supports in the subject section were not bearing any weight, and that the ribs were not sloughing (Tr. 73). This was confirmed by the testimony of Mr. James R. Browning, the assistant mine inspector for Eastern at the Harris No. 1 Mine (Tr. 80, 81).

MSHA failed to establish by a preponderance of the evidence that the Respondent violated Safety Precaution No. 20 of the roof control plan (Exh. M-2). Safety Precaution No. 20 required rib supports where the mining height equaled or exceeded 72 inches. MSHA failed to establish that the mining height was greater than or equal to 72 inches in any place where rib supports did not exist.

The inspector testified that the probability of a roof fall was aggravated by the concurrent presence of these two conditions (Tr. 29). But the gravity of the violation must be assessed with reference to the finding that the only violation of the roof control plan was the failure to comply with the requirements of Diagram No. 3. The testimony with respect to the condition of the roof in the vicinity of the openings is at a standoff. The inspector testified that the roof was loose and drummy (Tr. 28). But the evidence also discloses an absence of sloughage (Tr. 21), an absence of weight on the supports (Tr. 81), and an absence of appreciable draw rock (Tr. 63). The testimony of Mr. Daniel reveals that the roof was good (Tr. 63). J & H Coal Company, 2 IBMA 20, 36 (February 1, 1973), affirmed a decision holding that standoffs in the testimony are to be resolved in favor of the operator. Since a standoff is present in the testimony

of the witnesses respecting the condition of the roof in the area of the excessively wide intersections, I conclude that the roof was in good condition. I also conclude that the existence of a good roof in the areas in question resulted in the improbability of a roof fall.

Negligence

As stated above, the rounded corners of the five intersections were created when the continuous miner had difficulty rounding the corners into the crosscuts (Tr. 21, 61). However, it was possible to get the miner around the corners without enlarging their widths (Tr. 78, 79). Extra bolts had been installed at the intersections cited by the inspector in his notice (Tr. 62-63).

The conditions were readily observable (Tr. 30, 31). The inspector testified that, in his opinion, management should have been aware of this condition because "management is usually on the section every day" (Tr. 30). It was the inspector's considered opinion that the condition had existed for approximately 1 week (Tr. 30). He admitted that he was unable to recall the number of entries being driven by the company, but he testified that if the Respondent had been driving five entries, it would have taken approximately 1 week to advance by the condition observed during the inspection (Tr. 30, 32, 33).

I find the Respondent demonstrated more than ordinary negligence under the facts as stated.

HOPE 78-610-P

(2) Notice No. 2 OEB, November 28, 1977, 30 CFR 75.307

MSHA mine inspector Orville Boggs arrived at the Wharton No. 2 Mine at 8 a.m. on November 28, 1977, for a general mine inspection (Tr. 88, 90). He went underground with Jerry Lewis, the general mine foreman at the Wharton No. 2 Mine. Mr. Lewis accompanied Inspector Boggs on the inspection (Tr. 90). They proceeded to the 2 South Section, arriving there between 8:30 and 9 a.m. (Tr. 90, 109, 121-122). The crews were already underground when they arrived (Tr. 90-91).

The inspector testified that he examined the face area (Tr. 91). He also testified that he asked both the continuous miner operator and the roof bolt crew if they had approved methane detectors, and they answered in the negative (Tr. 91). This was confirmed by the testimony of Jerry Lewis (Tr. 122). The inspector further testified that he asked the miner operator and roof bolt crew whether they had been checking for methane (Tr. 91-92). They stated that they did not have anything to test it with (Tr. 91-92). He then approached Mr. James A. Sexton, the temporary section foreman, and discovered that Mr. Sexton did not have an approved methane detector (Tr. 92). It is a general practice in the coal mining industry to supply two or

three persons on a section with methane detectors (Tr. 92-93). It is customary for the section foreman to have a methane detector (Tr. 93). Mr. Sexton had a flame safety lamp with him, but flame safety lamps are not approved methane detection devices (Tr. 95).

The roof bolter does not have a methane detector on it (Tr. 96). The continuous miner has a methane monitor, and, if the monitor is working properly, it will kick the power off the miner if the methane reaches 2 percent (Tr. 95-96, 109). On the day in question, the methane monitor on the miner was operable (Tr. 109).

Mr. James Sexton testified that he had been making methane examinations with a flame safety lamp (Tr. 110), which will indicate methane in the presence of 1 percent or more. It will not indicate less than 1 percent (Tr. 108-109).

Inspector Boggs testified that coal had been produced on the section in question during the shift on which the inspection was made (Tr. 138-139). He based his conclusion on the fact that he had seen shuttle cars running on the section.

Mr. James Sexton denied that the Respondent had been producing coal (Tr. 110). Mr. Jerry Lewis testified that the continuous miner had been cleaning up rock inby the last open crosscut (Tr. 134), so that the roof bolting crew could get the roof bolting machine into the face area (Tr. 134-135). Mr. Sexton admitted loading two buggies of coal, but denied that he had cut any out of the face (Tr. 161), prior to taking a methane test with an approved methane detector.(FOOTNOTE 3)

The inspector issued a notice (Exh. M-6), citing a violation of 30 CFR 75.307 and setting forth a time of 10:40 a.m. 30 CFR 75.307 states:

> At the start of each shift, tests for methane shall be made at each working place immediately before electrically operated equipment is energized. Such tests shall be made by qualified persons. If 1.0 volume per centum or more of methane is detected, electrical equipment shall not be energized, taken into, or operated in, such working place until the air therein contains less than 1.0 volume per centum of methane. Examinations for methane shall be made during the operation of such equipment at intervals of not

> more than 20 minutes during each shift, unless more frequent examinations are required by an authorized representative of the Secretary. In conducting such tests, such person shall use means approved by the Secretary for detecting methane.

The notice described the violation as follows:

> The necessary methane tests in the face areas were not being made in the 2 south section (022) in that a methane detector could not be found on the section. The section had been producing coal from the face areas for about two hours. Tests are required at the beginning of the shift before the electrical equipment is energized and every twenty minutes while electrical equipment is operating in the faces.

I find that a violation of 30 CFR 75.307 was present. The regulation requires methane tests to be conducted with an approved methane detector. A flame safety lamp is not an approved detector (Tr. 95). 30 CFR 75.304-3. Yet, prior to the inspector's arrival on the scene, there was not an approved detector on the section (Tr. 91, 92, 122). The Respondent had been using a flame safety lamp to conduct the methane tests (Tr. 110).

The evidence also establishes that electrically energized equipment had been energized prior to the administration of a methane test with an approved detector, and that the equipment was within the "working place." The term "working place" is defined by 30 CFR 75.2(g)(2) as "the area of a mine inby the last open crosscut." The testimony of Mr. Lewis established that the continuous miner, a piece of electrically energized equipment, had been operating inby the last open crosscut (Tr. 134), thus placing it within the "working place."

I therefore conclude that MSHA has established a violation of 30 CFR 75.307 by a preponderance of the evidence.

Gravity

The continuous miner, a piece of electrically energized equipment, had been operated in the working place before conducting a methane test with an approved methane detector (Tr. 107, 110, 134), although a test had been made with a flame safety lamp (Tr. 107). A flame safety lamp is not an approved detector (Tr. 95). 30 CFR 75.304-3. The lamp will not indicate the presence of methane at levels less than 1.0 volume per centum. The pertinent law requires that if "1.0 volume per centum or more of methane is detected, electrical equipment shall not be energized, taken into, or operated in, such working place until the air therein contains less than 1.0 volume per centum of methane." The continuous miner in this case was equipped with an operable methane monitor that would shut off the

power if the methane level reached 2 percent (Tr. 95, 109). The explosive mixture of methane is 5 to 15 percent (Tr. 161).

Mr. Lewis testified that he had never detected methane in any quantity with either a flame safety lamp or an approved detector in any part of the mine (Tr. 157). Mr. Sexton testified that he had not detected any methane on 2 South Section on the day in question with either a flame safety lamp or an approved detector (Tr. 111). The inspector was unable to detect any methane on the section.

MSHA and the Respondent submitted air sample analysis reports (Exhs. M-8, M-9, 0-3). These samples were taken in various air courses (Tr. 125, Exhs. M-8, M-9, 0-3). The samples did not show any record of methane which would materially add to the gravity of the violation (Tr. 127, Exhs. 0-3, M-8, M-9).

The fact that the inspector had no opinion concerning the gravity of the violation is not controlling (Tr. 93).

I therefore conclude that the gravity of the violation was not serious, however, there is always the chance of an unusual release of methane.

Negligence

As stated above, the Respondent operated electrically energized equipment in the working place prior to making a methane test with an approved methane detector. A test had been conducted with a flame safety lamp, but such a device is not an approved detector within the meaning of 30 CFR 75.307. For the reasons stated below, I find that the Respondent demonstrated gross negligence.

Mr. James A. Sexton was assigned the temporary post of section foreman on November 28, 1977, because the regular foreman was off (Tr. 106-107). His usual duties were those of general laborer or service foreman (Tr. 106-107). It is customary in the coal mining industry for a section foreman to have an approved methane detector (Tr. 92-93). Mr. Sexton's duties as a general labor foreman did not require him to carry one (Tr. 107). Mr. Sexton had served as section foreman in the past, but had been permanently reassigned to the post of general labor foreman after a realignment of the mines (Tr. 106). He was required to serve as temporary section foreman 12 to 18 times a year (Tr. 106).

Mr. Sexton did not realize that he had forgotten the approved methane detectors until he had reached his temporary duty station, 2 South Section (Tr. 107). At this point, he phoned the dispatcher and informed him that approved methane detectors were needed on the section (Tr. 107). This request was made not later than 8:30 a.m. (Tr. 107). Mr. Sexton proceeded to make his rounds using a flame

safety lamp (Tr. 107).(FOOTNOTE 4) The detectors had not been delivered when the inspector arrived on the section between approximately 8:45 and 9 a.m. (Tr. 109).

The testimony established a custom in the coal mining industry whereby methane detectors are supplied to 2 or 3 persons on a section (Tr. 92-93). Neither the continuous miner operator nor the roof bolting machine operator had detectors (Tr. 91), although normally they would be expected to have them (Tr. 92).

The roof bolter operator or his helper conduct methane tests, usually at 20-minute intervals, when working in the face area (Tr. 97). The miner operator and his helper are required to make such tests every 20 minutes when working the face area (Tr. 97). Section foremen must make those tests before the equipment is energized at the beginning of the shift (Tr. 97).

Electrically energized equipment had been operating in the working place prior to the approved detectors' arrival in that the continuous miner had been cleaning up rock inby the last open crosscut (Tr. 134), so that the roof bolting crew could get the roof bolting machine into the face area (Tr. 134-135). In addition, two buggies of coal had been loaded (Tr. 161).

The Respondent argues that West Virginia law permits the use of flame safety lamps in testing for methane (Tr. 118-119). Since methane tests were administered with a flame safety lamp (Tr. 107), the Respondent argues that the violation is not as severe as MSHA contends (Tr. 119).

West Virginia law does not approve the substitution of flame safety lamps for approved methane detectors. Flame safety lamps have been limited to a subsidiary role in the detection of methane under West Virginia law.(FOOTNOTE 5) State law requires the use of approved detectors.

I therefore conclude that Respondent deliberately permitted the operation of electrically operated equipment in the working place in 2 South Section prior to taking methane tests with an approved detector. This constitutes gross negligence.

C. History of Previous Violations

(1) Notice No. 3 DDT, April 8, 1977, 30 CFR 75.200

The following is a list of the approximate number of violations at the Harris No. 1 Mine between April 8, 1975, and April 8, 1977, for which Eastern paid penalties. The history is divided into two categories, first as to all sections of the Code of Federal Regulations, and second as to 30 CFR 75.200.

Number of Violations	4/8/75 through 4/7//76	4/8/76 through 4/8/77	Total
All sections	95	232	327
30 CFR 75.200	7	14	21

MSHA has failed to prove the number of inspection days during these periods.

(2) Notice No. 3 OEB, November 28, 1977, 30 CFR 75.307

The following is a list of the approximate number of violations at the Wharton No. 2 Mine between November 28, 1975, and November 28, 1977, for which Eastern paid penalties. The listing is divided into two categories, first as to all sections of the Code of Federal Regulations, and second as to 30 CFR 75.307.

Number of Violations	11/29/75 through 11/28/76	11/29/76, through 11/28/77	Total
All sections	399	144	543
30 CFR 75.307	2	0	2

MSHA has failed to prove the number of inspection days during these periods.

D. Size of Operator's Business

Eastern Associated Coal Corporation produces approximately 6,648,618 tons of coal per year (Tr. 7). The Harris No. 1 Mine produces approximately 630,277 tons of coal per year (Tr. 7). The Wharton No. 2 Mine produces approximately 94,106 tons of coal per year (Tr. 8).

E. Effect of Penalty on Operator's Ability to Continue in Business

Eastern did not offer evidence establishing that the assessment of penalties will adversely affect the operator's ability to continue in business. The Interior Board of Mine Operations Appeals (Board) has held that evidence relating to whether a penalty will affect the ability of the operator to stay in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find therefore, that penalties otherwise properly assessed in these proceedings would not impair the operator's ability to continue in business.

F. Good Faith in Attempting Rapid Abatement

(1) Notice No. 2 DDT, April 8, 1977, 30 CFR 75.200

The inspector allotted the Respondent 3 days to abate the violation because the method of abatement was novel (Tr. 34, 36, 64) (Exh. M-3). The Respondent succeeded in abating the violation on the same shift (Tr. 64), even though MSHA had sought specifically to devise an expensive and time-consuming method of abatement as a deterrent to excessive width violations (Tr. 36). I therefore conclude that the Respondent demonstrated good faith through the rapid abatement of the violation.

(2) Notice No. 2 OEB, November 28, 1977, 30 CFR 75.307

The parties disagreed on the issuance time of the notice. Inspector Boggs testified that the notice was issued at 10:40 a.m. (Tr. 142), while Messrs. Sexton and Lewis testified that it occurred between 8:45 and 9 a.m. (Tr. 109, 128-129). However, Inspector Boggs'

testimony establishes that the violation was abated within an hour of the issuance of the notice (Tr. 94). This is corroborated by the testimony of Mr. Sexton, who stated that the notice was issued at approximately 9 a.m., and that the detectors arrived between 9:45 and 10 a.m. (Tr. 109, 114). The notice was abated when the detector arrived (Tr. 114).

I find that the Respondent exercised good faith by abating the violation rapidly.

VI. Conclusions of Law

1. Eastern Associated Coal Corporation and its Harris No. 1 and Wharton No. 2 Mines have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act during the periods involved in these proceedings.

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

3. The violations charged in Notice Nos. 3 DDT and 2 OEB are found to have occurred as set forth in Part V, above.

4. All of the conclusions of law set forth in Part V (A) through (F) of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Respondent filed a posthearing brief, MSHA did not. On December 8, 1978, and January 2, 1979, MSHA filed supplemental statements in support of its motion to admit Exhibits M-8 and M-9 containing proposed findings of fact. On December 15, 1978, and January 15, 1979, Respondent filed additional statements as to Exhibits M-8 and M-9.

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

VIII. Penalty Assessment

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

~453

Notice No.	Date	30 CFR Standard	Assessment
3 DDT	04/08/77	75.200	$ 500(FOOTNOTE 6)
2 OEB	11/28/77	75.307	1,400

ORDER

Respondent is directed to pay the penalty assessed in the amount of $1,900 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

FOOTNOTES START HERE

~FOOTNOTE_ONE

1. At the time of hearing, counsel for both parties proposed settlements as to penalty assessments to be paid by Respondent as to all alleged violations involved in Docket Nos. HOPE 78-609-P, and HOPE 78-611-P (Tr. 98-99). Prior to the hearing, MSHA had filed a request for settlement approval in Docket No. HOPE 78-608-P (Tr. 4). Those matters were disposed of in a decision dated November 30, 1978.

~FOOTNOTE_TWO

2. In a letter dated November 27, 1978, counsel for the Respondent requested an amendment to the transcript for purposes of correcting an error. In a letter dated December 29, 1978, counsel for the Petitioner indicated that he had no objection to the requested amendment. Page 74, line 6, of the transcript reads: "have occurred in this mine, either on unsupported top." In accordance with the agreement reached between the parties, page 74, line 6, of the transcript is hereby amended to read: "have occurred in this mine, under supported top."

~FOOTNOTE_THREE

3. It is not necessary to determine whether coal had been produced for purposes of finding that a violation occurred. The fact that the continuous miner, a piece of electrically energized equipment, was operating inby the last open crosscut, prior to taking methane readings with an approved detector, is sufficient to establish a violation of 30 CFR 75.307.

~FOOTNOTE_FOUR

4. Inspector Boggs initially testified that he had asked Mr. Sexton whether he had conducted any methane tests, and that Mr. Sexton had answered in the negative, stating that he did not have a methane detector (Tr. 93). His testimony conflicted with Mr. Sexton's assertion that he had conducted tests, although not with an approved detector (Tr. 107). However, the inspector testified under cross-examination that, to the best of his recollection, Mr. Sexton had a flame safety lamp with him (Tr. 95). The inspector further testified that he thought Mr. Sexton had stated that he had not conducted tests with the lamp (Tr. 95). In view of the inspector's uncertainty, I conclude that Mr. Sexton did conduct methane tests with the flame safety lamp.

~FOOTNOTE_FIVE

5. West Virginia Code, section 22-2-14 (1977), states:

"It shall be the duty of the mine foreman, assistant mine foreman or fire boss to examine all working places under his supervision for hazards at least once every two hours during each coal-producing shift, or more often if necessary for safety. In all mines such examinations shall include tests with an approved detector for methane and oxygen deficiency and may also include tests with a permissible flame safety lamp. It shall also be his duty to remove as soon as possible after its discovery any accumulations of explosive or noxious gases in active workings, and where practicable, any accumulations of explosive or noxious gases in the worked out and abandoned portions of the mine. It shall be the duty of the mine foreman, assistant mine foreman or fire boss to examine each mine within three hours prior to the beginning of a shift and before any miner in such shift enters the active workings of the mine." (1958, c. 13; 1971; c. 89; 1977, c. 121.) (Emphasis added.)

~FOOTNOTE_SIX

6. MSHA initially proposed a $1,500 penalty for the violation. At the conclusion of the hearing, MSHA recommended a $2,000 penalty (Tr. 164). MSHA undoubtedly based this assessment on the assumption that violations of Safety Precaution No. 20 and of Diagram No. 3 could be proved by a preponderance of the evidence. As mentioned in previous sections, MSHA was unable to establish the requisite violation of Safety Precaution No. 20 that might have been a partial foundation for a $2,000 penalty. Although MSHA proved that the roof control plan had been violated in that five intersections had widths in excess of the 20-foot requirement contained in Diagram No.3 of the plan, MSHA was unable to establish a violation of sufficient gravity, or the requisite lack of good faith, needed to justify so large a fine.

Furthermore, Exhibit M-1 reveals that for the period of January 1, 1970, to April 8, 1977, only two other 104(c) violations for which penalties were paid occurred in the history of the Harris No. 1 Mine, in May and September of 1976. The one for May of 1976 was assessed at $375, and paid for $200. The one in September of 1976 was assessed for $115 and paid for $115. During that period, the maximum assessment with regard to violations of 30 CFR 75.200 was $200 and the maximum amount paid by Eastern was $200 and the maximum assessment for any sort of violation at the Harris No. 1 Mine was $2,000 (for a 104(a) order), and the maximum amount paid was $400 on that same violation.