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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. PITT 78-420-P A/O No. 36-00818-02013V
v.	Foster No. 65 Mine
LEECHBURG MINING COMPANY, RESPONDENT	

DECISION

Appearances: Anna Wolgast, Esq., Office of the Solicitor,
Department of Labor, for Petitioner
Henry McC. Ingram, Esq., R. Henry Moore, Esq.,
Rose, Schmidt, Dixon, Hasley, White & Hardesty,
Pittsburgh, Pennsylvania, for Respondent

Before: Judge Cook

I. Procedural Background

On July 31, 1978, a petition was filed for assessment of civil penalty against Leechburg Mining Company for alleged violations of 30 CFR 75.200, 75.202, 75.400, and 75.403. This petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820 (a) (1977), hereinafter referred to as the Act. An answer was filed by the Respondent on August 18, 1978.

A notice of hearing was issued on August 22, 1978, setting the hearing date for October 31, 1978.

On October 18, 1978, a motion for continuance was filed by counsel for MSHA. An order granting the motion for continuance was issued on October 20, 1978, rescheduling the hearing for January 3, 1979. An amended notice of hearing was issued on October 31, 1978, changing the hearing date from January 3, 1979, to December 5, 1978.

On November 20, 1978, the Leechburg Mining Company filed a motion to remand. A response of the Secretary of Labor in opposition to the motion to remand was filed by MSHA on November 27, 1978. The motion to remand was denied by an order issued on December 1, 1978.

Leechburg and MSHA filed posthearing briefs on January 25, 1979, and January 26, 1979, respectively. Leechburg filed a reply brief on February 9, 1979. MSHA did not file a reply brief.

II. Violations Charged

Order No.	Date	CFR Section
7-0032 (1 GFM)	October 6, 1977	30 CFR 75.200
7-0033 (1 JAB)	October 3, 1977	30 CFR 75.403
7-0035 (1 JAB)	October 6, 1977	30 CFR 75.400
7-0036 (1 JAB)	October 11, 1977	30 CFR 75.400
7-0038 (1 JAB)	October 12, 1977	30 CFR 75.202
7-0047 (1 JAB)	November 30, 1977	30 CFR 75.200

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 Jesse A. Bates, an MSHA inspector, and Gerald F. Moody, Jr., an MSHA inspector.

Leechburg called as its witnesses Harold F. Dunmire, President of the Leechburg Mining Company; Donald A. Myers, a section boss employed by the Leechburg Mining Company; Joseph Arduino, a mine foreman employed by the Leechburg Mining Company; George E. Rittenberger, a mine superintendent employed by the Leechburg Mining Company; Walter Vakulick, an assistant mine foreman employed by the Leechburg Mining Company; and Joel C. Dunmire, the safety director employed by the Leechburg Mining Company.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:
   a. M-1 is a computer printout listing past violations at Leechburg's Foster No. 65 Mine.

   b. M-2 is a computer printout providing the total production tonnage for 1976 through 1978.

   c. M-3 is a copy of the roof control plan in effect at the time of the subject violations.

d. M-9 is a copy of Order 1 GFM, October 6, 1977, 30 CFR 75.200.

e. M-10 is a termination of M-9.

f. M-11 is a copy of the inspector's statement accompanying M-9.

g. M-12 is a copy of Order No. 1 JAB, October 3, 1977, 30 CFR 75.403.

h. M-13 is a termination of M-12.

i. M-14 is a dust analysis report.

j. M-15 is the inspector's statement accompanying M-12.

k. M-16 is a copy of Order No. 1 JAB, October 6, 1977, 30 CFR 75.400.

l. M-17 is a termination of M-16.

m. M-18 is the inspector's statement accompanying M-16.

n. M-19 is a copy of Order No. 1 JAB, October 11, 1977, 30 CFR 75.400.

o. M-20 is a termination of M-19.

p. M-21 is the inspector's statement accompanying M-19.

q. M-22 is a copy of Order No. 1 JAB, October 12, 1977, 30 CFR 75.202.

r. M-23 is a modification of M-22.

s. M-24 is a termination of M-22 and M-23.

t. M-25 is the inspector's statement accompanying M-22.

u. M-26 is a copy of Order No. 1 JAB, November 30, 1977, 30 CFR 75.200.

v. M-27 is a termination of M-26.

w. M-28 is the inspector's statement accompanying M-26.

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x. M-29a is a drawing made by Inspector Moody in Arlington, Virginia.

y. M-29b is a drawing made by Inspector Moody.

z. M-30 is a sketch of the violation cited in M-26.

2. Leechburg introduced the following exhibits into evidence:

a. OX-1 is a map of Kittanning Coal, Foster Mine No. 65.

b. OX-2 is a copy of a MESA memorandum dated July 27, 1977.

c. OX-3 is a drawing representing the approximate face locations on October 6, 1977, in 6 right mains and 3 butt left.

d. OX-4 is a copy of the ventilation plan of the Foster No. 65 Mine, in effect at the time of the subject orders.

e. OX-5 is a map of a portion of the Foster No. 65 Mine.

f. OX-6 contains copies of mechanical loading reports.

g. OX-7 is a copy of a purchase order, dated October 20, 1977, confirming the order of a "Big Sam" Spray Applicator.

h. OX-8 is a summary of the cost of materials used in improving track haulage.

i. OX-9 is a copy of a 104(c)(1) notice admitted into evidence to correct exhibit M-1.

j. OX-10 is a letter from the Solicitor's Office of the Department of Labor enclosing a copy of the modification.

k. OX-12 is a drawing of the intersection cited in M-26.

l. OX-13 contains financial statements of the Leechburg Mining Company.

3. OX-11 is a document relating to the history of violations at the Foster No. 65 Mine. It was marked for identification at the hearing, and received into evidence by a posthearing order dated January 16, 1979.

4. OX-14 is an affidavit, mentioned at the hearing (Tr. 450-54), and received in the Office of Administrative Law Judges on December 12, 1978. The objection to its admission into evidence was sustained by an order dated January 16, 1979. The document has been ordered filed in a separate envelope and retained with the official file in this case in the event review is sought as to the decision in this case.

5. OX-15 is a copy of Leechburg's corporate income tax return for the year ending June 30, 1978. It was admitted into evidence by an order dated January 9, 1979.

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, Findings of Fact, and Conclusions of Law

A. Stipulations

The following stipulations were filed by the parties at 9:40 a.m. on December 5, 1978:

1. This proceeding is governed by the Federal Coal Mine Health and Safety Act of 1969, the Federal Mine Safety and Health Act of 1977, and the standards and regulations promulgated thereunder.

2. The Administrative Law Judge has jurisdiction over this proceeding.

3. Leechburg is the operator of the Foster No. 65 Mine and as such, is subject to the jurisdiction of the above-referenced Acts.

4. The MSHA inspectors who issued notices and orders which are the subject of this hearing were, at the time the notices and orders

were issued, duly authorized representatives of the Secretary of the Interior.

5. Copies of the notices and orders which are the subject of this hearing are authentic.

6. The computer printout listing past violations at Leechburg's Foster No. 65 Mine from January 1, 1970, to October 3, 1977, is an authentic copy of Office of Assessments' data contained in the computer at Denver, Colorado (Exh. M-1).

The computer printout providing the total production tonnage for 1976 through 1978 is an authentic copy of Office of Assessments data contained in the computer at Denver, Colorado (Exh. M-2).

The copy of the roof control plan is an authentic copy of the plan in effect at the time of the violations which are the subject of this case (Exh. M-3).

Respondent reserves the right to challenge the content of the three documents listed immediately above.

B. Occurrence of Violation, Gravity, Negligence and Good Faith

(1) Order No. 7-0032 (1 GFM), October 6, 1977, 30 CFR 75.200

(a) Occurrence of Violation

MSHA inspector Gerald F. Moody, Jr., arrived at Leechburg Mining Company's Foster No. 65 Mine at approximately 7:30 a.m. on October 6, 1977, to conduct a regular roof control inspection (Tr. 5, 6). He was accompanied on the inspection tour by Mr. Donald A. Myers, Leechburg's section boss. The inspector examined the face areas in No. 23 and No. 24 rooms in 1 Left off 6 Right section, where he observed the conditions cited in the subject withdrawal order. The condition was described by Inspector Moody as follows:

> The approved roof control plan was not being complied with in the face area of No. 23 room in 1 Left off 6 Right Section approximately 200 feet from survey station 12á35 in that the distance from the right rib to the adjacent row of temporary roof supports varied from six feet to six feet 10 inches for the entire length of the cut (20þ)

(Exh. M-9, Tr. 19).

The inspector also stated that:

> The approved roof control plan requires temporary roof supports to be installed not more than 5 feet from

> the rib and to be installed within 30 minutes after the mining sequence is completed. This completed cut was mined on the 4 p.m. to 12 midnight shift on October 5, 1977, and evidence (time, date, initials and foot prints) indicated that this area was entered and examined by the preshift examiner at approximately 6:40 a.m. on October 6, 1977, the operator should have known the violation existed since a preshift examination was made in this section.

(Exh. M-19, Tr. 19).

After the section foreman had two workmen set additional posts on the righthand side of the working place to reduce the spacing, the inspector measured the distance between the right rib and the first row of temporary supports, and contemporaneously sketched the conditions (Tr. 23, 24, M-29b). The four temporary supports in question measured 6 feet 10 inches, 6 feet, 6 feet 6 inches and 6 feet 10 inches, respectively from the right rib (Exhs. M-29a, M-29b). The Respondent did not dispute the accuracy of the inspector's measurements.

Based on these observations, the inspector issued Withdrawal Order No. 1 GFM for a violation of the approved roof control plan and 30 CFR 75.200.(FOOTNOTE 1) Minimum safety requirements for installing roof supports in 20-foot-wide cuts are described in Drawing No. 1 of the roof control plan applicable on October 6, 1977 (Exh. M-3). According to the inspector, that plan provides for at least 12 temporary supports to be installed in a 20-foot cut so that no distance greater than 5 feet exists between any two supports or between a support and the mine rib (Tr. 19, 22, 45-47).

Respondent contends that no violation of the roof control plan exists, arguing that the plan does not require the temporary supports in question to be within 5 feet of the right rib. The Respondent basis its argument on an analysis of the inspector's testimony, concluding that the portions of the roof control plan relied on by him do not support the 5-foot requirement.

First, the Respondent argues, the inspector's reliance on Safety Precaution 3(b) as a source of the 5-foot requirement is misplaced. Safety Precaution 3(b) states:

> Only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary supports are installed. Before any person proceeds inby permanently supported roof, a thorough visual examination of the unsupported roof and ribs shall be made. If the visual examination does not disclose any hazardous condition, persons proceeding inby permanent supports for the purpose of testing the roof by the sound and vibration method and installing supports shall do so with caution and shall be within 5 feet (less if indicated on drawings) of a temporary or permanent support. If hazardous conditions are detected, corrective action shall be taken to give adequate protection to the workmen in the area involved.

The subject matter of Safety Precaution No. 3(b) does not encompass the spacing of temporary supports. The 5-foot reference in it refers to a person's position with relation to a temporary support. I therefore agree with Respondent's contention that Safety Precaution No. 3(b) does not require the spacing of temporary supports to within 5 feet of the right rib.

Second, the Respondent argues that Drawing No. 1 of the plan (Exh. M-3) is not a source of the 5-foot requirement because it does not specifically require 5-foot centers for temporary supports. I disagree with the Respondent's argument.

The inspector testified that "the spacing on the temporary roof supports in the scale indicate that they will be within five feet of the rib" (Tr. 46). The inspector explained this by stating: "It is fairly obvious that the place being 20 feet wide, then three temporary roof supports set across the work place are evenly spaced at approximately five feet apart" (Tr. 47). I agree with this interpretation of Diagram No. 1 of the roof control plan (Exh. M-3). Although it can be argued that the plan is ambiguous, the ambiguity is resolved by the testimony of Respondent's own witness. Mr. Harold F. Dunmire, the president of the Leechburg Mining Company, testified that he was familiar with the roof control plan relative to the installation of

temporary roof supports. According to Mr. Dunmire, the minimum requirements require the installation of temporary supports on 5-foot centers, both laterally and inby (Tr. 72-73).

I therefore conclude that the roof control plan's minimum requirements mandated that the row of supports in question be not greater than 5 feet from the right rib. I also conclude that the temporary supports in question were placed from 6 feet to 6 feet 10 inches from the right rib, and that the requirements of the roof control plan (Exh. M-3) had not been fulfilled.

(b) Gravity

A sound vibration test revealed that the roof in the working place was not drummy (Tr. 11, 29). Sounding indicates the roof condition to a depth of approximately 4 feet (Tr. 54, 55, 388). There were no slips in the actual working place (Tr. 35, 43-44), although there were slips outby (Tr. 35, 36). Inspector Moody described the roof in the working place as "normal" (Tr. 35, 36), while the respondent's witnesses classified the roof conditions as ranging from "good" to "excellent" (Tr. 52, 55).

Mr. Dunmire and Mr. Myers testified that it was standard operating procedure to drill 6-foot test holes in the roof to determine whether the overlying strata was solid, or whether it contained any fissures or breaks (Tr. 56, 71). However, Mr. Myers admitted that test holes had not been drilled in the area between the right row of temporary supports and the right rib (Tr. 56). Test holes had been drilled in the general vicinity of the violation, and no slips were reported within 50 feet of the face of 23 room on October 6, 1977 (Tr. 58, 59). Additionally, the cut was less than 20 feet wide (Tr. 24).

Mr. Myers testified that he was responsible for instructing his crew to install temporary supports (Tr. 49), and that he had been instructed by the company with respect to the installation of temporary supports (Tr. 50). Mr. Myers also testified that the company had instructed him to install 16 temporary supports instead of the 12 posts required by the roof control plan (Tr. 51). He had been instructed to place the first row of posts 5 feet from the bolts, with the other rows of posts on 4-foot centers (Tr. 50). He had relayed these instructions to his crew (Tr. 51). He admitted that he had not counted the number of temporary supports in No. 23 room (Tr. 61-62). Inspector Moody's testimony indicates that only 12 posts were present (Tr. 23).

Mr. Myers testified that the presence of 16 temporary supports indicates added support (Tr. 59). However, both Mr. Myers and Mr. Moody testified that the spacing of the posts, not the number of posts, is the primary consideration in the roof support scheme envisioned by the roof control plan (Tr. 37, 60).

At least one worker, the preshift examiner, was exposed to the hazard (Tr. 21). Markings on the wall indicated that he had proceeded inby the permanent roof supports to examine the inadequately supported area at approximately 6:40 a.m. on October 6, 1977 (Tr. 15). Mr. Myers was aware that the preshift examiner had been in the area (Tr. 56, 57). The temporary supports had been installed prior to the preshift examiners entry into the area (Tr. 53).

Inspector Moody testified that he deemed the violation serious because all roof control violations are inherently serious (Tr. 16). He assumed that any resulting injury would be "disabling," not "permanently disabling" or "fatal" (Tr. 33-34).

Based on the foregoing, I find the violation to be a serious one.

(c) Negligence

It was Mr. Myers' responsibility to check the area to assure proper installation of the temporary supports (Tr. 53). He testified that he was able to ascertain how the right hand row of temporary supports had been improperly placed. The row of posts on the left hand side had been placed too close to the left rib (Tr. 63); i.e., approximately 3 feet from the left rib. The workers measured over from that line and placed the remaining rows on 4-foot centers, but they did not measure the distance between the righthand row and the right rib (Tr. 51-52). Thus, the improper spacing of the lefthand row of posts threw the last row out of line (Tr. 63).

Both Inspector Moody and Mr. Myers agreed that the condition was readily observable (Tr. 6, 54). This readily observable condition should have been observed by the preshift examiner and relayed to the operator (Tr. 15). The condition required only 12 minutes to correct (Tr. 12, 37, Exhs. M-9, M-10).

Based on the foregoing, I conclude that the operator demonstrated ordinary negligence.

(d) Abatement

The violation was abated in 12 minutes (Tr. 12, 17, 37). I find that the operator displayed good faith in achieving rapid abatement.

(2) Withdrawal Order No. 7-0033 (1 JAB), October 3, 1977, 30 CFR 75.403

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine at 7:25 a.m. on October 3, 1977, to conduct a regular inspection (Tr. 80). He was accompanied on the inspection by Mr. Joseph Arduino, the mine foreman (Tr. 80). The inspector traveled to the No. 27 room

off No. 1 entry 1 Left section off 6 Right Mains (Tr. 80-81, Exh. M-12). The inspector testified that he observed an area 40 feet long, extending from 40 feet outby the face of No. 27 room to 80 feet outby which was inadequately rock dusted (Tr. 80-81, 81-85, Exh. M-12). He subsequently issued the subject withdrawal order.

Mr. Bates testified that his initial determination of the extent of the inadequately rock dusted area was based on visual observation (Tr. 81-82). He stated that he observed the floor and the ribs, and that they were "dark" and "real dark," respectively (Tr. 81-82). Visual observation revealed very little rock dust on the floor and ribs (Tr. 82). The inspector testified that he caused samples to be taken from the floor and ribs, identified them, and sent them to the Dust Analysis Center in Mount Hope, West Virginia, to substantiate the violation (Tr. 82, 85-95). The result of the dust sample analysis revealed 38.3 percent incombustible material contained in the floor sample, and 27.1 percent incombustible material contained in the rib sample (Exh. M-14). The regulations require that all areas within 40 feet of all working faces be rock dusted so that the incombustible content of the combined coal dust, rock dust and other dust shall be not less than 65 percent. 30 CFR 75.402, 75.403.(FOOTNOTE 2)

Inadequate rock dusting cannot be proven by visual observation alone; samples must be collected and subjected to laboratory analysis. Hall Coal Company, Inc., 1 IBMA 175, 178, 79 I.D. 668, 1971-1973 CCH-OSHD par. 15,380 (1972). Respondent questions the validity of the test results contained in Exhibit M-14 (Tr. 82-95, Respondent's Post-Trial Brief, pp. 9-10). According to the Respondent:

No evidence was produced to established a complete chain of custody. See, McCormick on Evidence 212, pp. 527-8 (2d ed. 1972). A rather precarious method of identification was used in that, at the time of the Order, the samples were marked as being from the Foster 65 Mine, dated, and the inspector's name was attached (Tr. 86-8). The location within the mine was put on a card, which was not attached to the samples, and included in the package to the Mt. Hope Dust Anaylsis Laboratory (Tr. 88). No identifying serial number or any other clear identification was attached to the samples (Tr. 86). Only the results of the tests were returned to the inspector, not the samples (Tr. 89). The inspector was unable to testify as to the methods of testing employed and their probable accuracy (Tr. 90). There is no indication on M-14 as to who, if anyone, tested these particular samples. No one from the Dust Analysis Laboratory testified as to the testing procedures or their accuracy.

After citing NLRB v. Remington, 94 F.2d 862, 873 (2d Cir. 1938), Respondent then stated that Exhibit M-14 should be given little, if any, weight (Respondent's Brief, pp. 9-10).

Respondent's counsel had stipulated to the authenticity of the document (Tr. 92).

The Respondent's criticisms of the dust analysis report can only be considered as challenges as to the probative weight of the evidence, not its admissibility. Co-op Mining Company, 3 IBMA 533, 81 I.D. 780, 1974-1975 CCH-OSHD par. 19,162 (1974). According to the Interior Board of Mine Operations Appeals:

> [W]hen admitted into evidence, if such a report shows that the percentage of incombustible content does not meet the required standard, it establishes a prima facie case of a violation. Of course, the operator may attack the accuracy and the reliability of the report itself, the regularity of the test procedure, and offer any other evidence it has in rebuttal. But where no such challenge is made, or where the Judge finds such challenge does not meet or overcome the presumption of verity which attaches to the report, the Judge is left with a prima facie showing that a violation did, in fact occur. 3 IBMA at 539. (Citations omitted.)

Under the above decision of the Board of Mine Operations Appeals, the dust analysis report (Exh. M-14) is sufficient to establish a prima facie case for a violation of 30 CFR 75.403 because the report shows that the percentage of incombustible content does not meet the required incombustible content standard. The Respondent offered no

evidence at the hearing attacking the accuracy and reliability of the test procedure, and offered no probative evidence to rebut the report's findings.

The Respondent cannot claim prejudice from the decision to admit the report, or from a decision to accord it weight. The Respondent clearly knew of the report's existence because a copy of it was attached to the petition for assessment of civil penalty, filed on July 31, 1978, and received by the Respondent on August 7, 1978. The Respondent did not pursue the matter with a degree of diligence indicative of prejudice resulting from the report's receipt into evidence. The Respondent did not attempt to ascertain the identify of the person who prepared the analysis and report, and did not attempt to subpoena him under 29 CFR 2700.47.

In light of the foregoing, I find that MSHA has established a prima facie case for a violation of 30 CFR 75.403, and that the violation has been established by a preponderance of the evidence. 29 CFR 2700.48. It should be noted that Respondent in its brief did state that from the evidence elicited at the hearing there appeared to have been a nonserious violation of section 75.403 (Respondent's Brief, p. 8).

(b) Gravity

Inspector Bates testified that the faces in rooms 21, 23, and 25 were the working faces during the mining cycle (Tr. 105). He stated tht he saw at least six people working in the area at the time of the inspection (Tr. 97, 123), and that mining was going on in No. 21, 23, and 25 rooms (Tr. 103). He stated that, to the best of his knowledge, no one was working in No. 27 room at the time he issued the order (Tr. 124).

The inspector identified trailing cables as a possible source of ignition (Tr. 98, 103, 123). These cables were located in the outby crosscuts, and lead to the power center (Tr. 103). The source of ignition was at least 50 feet from the condition observed in No. 27 room (Tr. 104, 106, 123). He stated that the cables were energized (Tr. 123). He stated that he knew there was electrical power in the section because they were running and operating the equipment (Tr. 104). He admitted, under cross-examination, that an absence of electrical power on the section, if proven, would greatly reduce the hazard of fire and explosion (Tr. 107-08).

Mr. Arduino stated that the mining equipment was located in Nos. 21, 22, 23, and 24 rooms because he had intended to mine in those rooms (Tr. 150). However, his testimony conflicted with the testimony of Inspector Bates. Mr. Arduino testified that no mining activity was being conducted on the section at the time Inspector Bates issued the order because the power was shut off (Tr. 149). According to

Mr. Arduino, the "load center was down," meaning that the power would not stay on to distribute the power to the mining machinery (Tr. 149, 155). The electrical power had been shut off to permit work on the mine load center (Tr. 149).

It appears that the inspector may have been mistaken about the question of energized equipment,(FOOTNOTE 3) however, this point is not significant for two reasons. First it would appear that the equipment would become energized just as soon as the power center was repaired. As a matter of fact it was as soon as the order was terminated at 1 p.m. (Tr. 152). Therefore, the potential power source was always possible during that shift. However, the second reason why the issue is not significant is that the energized cable, the potential source of ignition identified by the inspector, was 50 feet from the area cited in the order (Tr. 104, 106, 123). Electrically energized equipment was not operating in No. 27 room (Tr. 124). Due to the remoteness of the potential ignition source from the inadequately rock dusted area, I conclude that the violation was of slight gravity.

(c) Negligence

The inadequate rock dusting was readily observable by visual observation. The floor was "dark" and the ribs were "real dark," with very little rock dust visible on the floor or ribs (Tr. 81-82). The preshift examination dates indicated that the face area of No. 27 room had been examined at least 10 times prior to the date of the order (Tr. 96-97, 127, 131). Some of those dates were September 18, 1977, September 20, 1977, September 21, 1977, September 22, 1977, September 23, 1977, September 26, 1977, September 27, 1977, October 2, 1977, and October 3, 1977 (Tr. 127). The order was issued on October 3, 1977. Some of the dates had initials associated with them (Tr. 131). Some of the initials were legible (Tr. 131). All of these initials were inby the last open crosscut (Tr. 132).

The fact that the violation was readily observable, coupled with the presence of a preshift examiner in the area on the date of the order, indicates that the Respondent should have known of the inadequate rock dusting.

I therefore conclude that the Respondent was guilty of ordinary negligence.

(d) Good Faith

It took over 1 hour to abate the violation, even though the rock dust was kept approximately 150-200 feet away (Tr. 150-51, 155-156).

The Respondent's witnesses sought to explain why the abatement process required such an inordinate amount of time. According to the Respondent, the rock dust was stored at the feeder location, 150 to 200 feet away from No. 27 room (Tr. 155). The feeder is the place where the shuttle cars dump the coal into the belt (Tr. 155). Normally, rock dust is transported to a needed area by shuttle car (Tr. 155). According to the Respondent, the shuttle cars could not be employed to transport the rock dust because the electrical power was off (Tr. 155). This necessitated hand carrying 10 or 20 50-pound bags of rock dust through an area 4 feet high (Tr. 151, 157).

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

(3) Withdrawal Order No. 7-0035 (1 JAB), October 6, 1977, 30 CFR 75.400

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine at approximately 7:25 a.m. on October 6 1977, to conduct a regular inspection (Tr. 163, 164). Mr. Joseph Arduino, the mine foreman, was the inspector escort (Tr. 163). Upon entering the 6 Right Mains section, they inspected the face areas and traveled outby to the return air course approximately 200 to 300 feet outby the loading point of 6 Right Mains section (Tr. 164). The inspector observed accumulations of loose coal and coal dust in No. 1 and No. 2 rooms off No. 1 entry of 6 Right Mains at station No. 23á70 (Tr. 164). He also observed accumulations of loose coal and coal dust in the No. 1 and No. 2 entries in the 3 Left section off of 6 Right Mains (Tr. 164).

The inspector measured these accumulations (Tr. 165). The accumulations in the No. 1 room measured approximately 1 to 24 inches in depth, 3 to 10 feet in width, and 20 feet in length (Tr. 164, Exh. M-16). The accumulations in the No. 2 room measured approximately 1 to 24 inches in depth, 4 feet in width, and 17 feet in length (Tr. 164-165, Exh. M-16). The accumulations in the No. 1 entry measured approximately 1 to 42 inches in depth, approximately 5 to 7 feet in width, and 19 feet in length (Tr. 165, Exh. M-16). The accumulations in the No. 2 entry measured approximately 1 to 42 inches in depth, 9 to 10 feet in width and 20 feet in length (Tr. 165, Exh. M-16). Inspector Bates then issued the subject order (Exh. M-16).

The inspector testified that the accumulations were not mixed with a visually observable amount of rock dust (Tr. 165). He did not take any samples(FOOTNOTE 4) (Tr. 166). The inspector testified that the area cited was in the return air course of the 6 Right section, which is connected with one of the designated escapeways (Tr. 166, 170-171, Exh. M-18). Mining in the area had ceased for five working days (Tr. 169, Exh. M-16). There was no activity in the area (Tr. 166). The accumulations were not located near any electrical equipment (Tr. 166). The inspector testified that he questioned the mine foreman to determine how long the accumulations had been stored in the subject areas (Tr. 166). The mine foreman estimated 3 to 5 days (Tr. 166). The inspector believed that the accumulations had been stored there for "at least five days" (Tr. 166). The mine foreman told the inspector that the accumulations had been put in the subject areas during the weekend (Tr. 167).

The subject order alleged a violation of 30 CFR 75.400. 30 CFR 75.400 states: "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."

"Active workings" means any place in a coal mine where miners are normally required to work or travel. 30 CFR 75.2(g)(4).

It is found that the four areas involved were "active workings" (Tr. 166, 171).

The elements of proof required to establish a prima facie case for a 30 CFR 75.400 violation are: (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. Old Ben Coal Company, 8 IBMA 98, 114-115, 84 I.D. 459, 1977-1978 CCH-OSHD par. 22,088 (1977). Proof of the mere presence or existence of an accumulation of combustible materials in active workings of the mine is not, by itself, sufficient to establish a violation. Old Ben Coal Company, 8 IBMA 98, 112, 84 I.D. 459, 1977-1978 CCH-OSHD par. 22,088 (1977). Proof of negligence on the part of the operator is not one of the elements of proof

of a violation of 30 CFR 75.400. The operator's negligence becomes involved only in determining, when necessary, the constructive knowledge of the operator as to the accumulation's existence. Old Ben Coal Company, 8 IBMA 196, 197-98, 1977-1978 CCH-OSHD par. 22,328 (1977).

Respondent contends that the issue presented is "whether the operator failed to clean up the accumulation, or failed to undertake to clean it up within a reasonable time after discovery" (Respondent's Post-Trial Brief, pp. 14-15). He does not contend that MSHA has failed to establish the first two elements of its prima facie case with respect to the subject violation. Therefore, the question which must be resolved before a violation of 30 CFR 75.400 can be found to have occurred is whether the Respondent failed to undertake clean up procedures within a reasonable time after discovering the accumulations.

Two Board decisions establish the standards by which "reasonable time" is measured. In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 459, 1977-1978 CCH-OSHD par. 22,088 (1977), the Board stated that:

> [W]hat 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.

In promulgating this standard, the Board observed that:

> The longer the accumulation remains without cleanup, the greater the threat of a mine fire or explosion. Likewise, the greater the mass and extent of the accumulation, the greater the chance it may contribute to a disaster because of the increased surface area of combustible material exposed to possible ignition sources.

8 IBMA at 110.

Having stated the standard of "reasonableness," the Board set forth some general guidelines for determining whether the operator was in compliance. The key phrase is "maintenance of a regular cleanup program." The Board stated that:

> With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine, or normal mining operation, it is our view

> that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shift, depending on the volume of production involved, might well satisfy the requirements of the standard.

8 IBMA at 111.

The Board gave a more elaborate statement of the cleanup duties imposed on operators by the Act in Old Ben Coal Company, 8 IBMA 196, 198, 1977-1978 CCH-OSHD par. 22,328 (1977) (on MSHA's motion for reconsideration of the Board's decision in Old Ben Coal Company, 8 IBMA 98), stating:

> A small accumulation is most probably suitable for elimination in the course of the operator's regular cleanup program. Proof of the absence of such a program, together with the presence of any accumulation might well alone support a citation for the violation of [30 CFR 75.400]. If the accumulation is of such size or combustibility as to present the possibility of a serious safety hazard, then, of course, the operator is required to take more urgent steps, other than the regular cleanup, in eliminating the hazard. (Emphasis added).

8 IBMA at 198.

The question presented is whether Leechburg's actions complied with the Board's criteria.

Inspector Bates testified that the accumulations involved were outby the loading point (Tr. 173, 178-81). However, Respondent's witnesses, Mr. George Rittenberger, Mr. Joseph Arduino, and Mr. Harold Dunmire, gave testimony indicating that the accumulations were inby the loading point, and thus within the ambit of the Respondent's cleanup program (Tr. 188-9, 195, 226-7, 240-3). This cleanup program is contained in the Respondent's ventilation plan (Exh. OX-4, at p. 5(a)), which states:

> Fine and loose coal is loaded by the continuous miner after each cut of coal is mined. The continuous miner is trammed along each rib to the face to load coal into shuttle car. Fine and loose coal that cannot be cleaned up by the continuous miner is shoveled or pushed to the face or toward the center of the working place after roof supports are provided. This coal is then loaded during the next mining cycle in the working place.

Respondent defines a "mining cycle" as the extraction of the coal, the installation of temporary and permanent supports, clean up

through the number of faces being developed, and the installation of crosscuts to establish the return air (Tr. 237). A "mining cycle" on one side of a section can consist of nine face areas wherever butt sections are being turned off main entries (Tr. 242-43).

Mr. Rittenberger testified that, at the time the subject order was written, mining was being conducted in entries 4, 5, and 6 of 6 Right Mains section (Tr. 198). Mining would have continued in those entries until the necessary crosscuts had been developed (Tr. 198) before moving back to the entries on the other side of the section. The development of each of these three entries required the operator to recycle through four "lifts of coal" in order to develop the crosscuts needed to establish the air for the intake (Tr. 228, 229). A "lift of coal" was defined by the Respondent as the extraction of coal from an entry for a distance of approximately 20 feet. In doing thus, the miner makes two passes at the coal, i.e., one on each side of the entry (Tr. 242).

After the establishment of the crosscuts, the feeder and the power center would have been moved up to advance the No. 3 and No. 4 entries of 3 Butt Left. After the advancement of the No. 3 and No. 4 entries of 3 Butt Left, the accumulations would have been removed from rock rooms No. 1 and No. 2, and the No. 1 and No. 2 entries of 3 Butt would have been advanced because the area would have been within reach of the cables (Tr. 198).

Mr. George Rittenberger illustrated the operation of the cleanup program in areas where entries are being developed (Tr. 202-203). After the completed advancement of the first three entries on a main (Nos. 1, 2, and 3) and the installation of crosscuts, the miner is moved to advance the remaining entries (Nos. 4, 5, and 6). While the miner is operating in Nos. 4, 5, and 6 entries, permanent roof supports are installed in the last recycled portions of Nos. 1, 2, and 3 entries (Tr. 202). The coal dust is then shoveled to the center of the entires (Tr. 202) and either lays in the last 20 or 30 feet of the center of the entry, or is pushed to the face by the scoop (Tr. 203). The accumulations are then removed by the miner during the next cycle of those entries (Tr. 202), which, according to Mr. Rittenberger, occurs not more than a week later (Tr. 201). However, he went on to state that it could, in a case such as this, be a maximum of a couple of weeks (Tr. 201).

Although the scoop can remove the accumulations instead of piling them at the face, the Respondent's normal cleanup procedure does not provide for removal in such a fashion (Tr. 203, 204). The Respondent contends that logistical considerations bar removal of accumulations with the scoop (Tr. 203-04), problems which would "slow down our coal production" (Tr. 204).

The turning off of butt sections from main entries adds a third part to the mining cycle as set up by the operator, extending the

amount of time required to complete one cycle (Tr. 206). The company president pointed out that you could have nine working faces on that side of the section (Tr. 243). This, of course, is in addition to faces in entries 4, 5, and 6 on the other side of the section.

A question then arises as to whether the cleanup program as contemplated in the ventilation plan was followed by the Respondent in the present case. The accumulations cited in the subject order were located in entries 1 and 2 of 3 Butt Left section off 6 Right Mains, and in the No. 1 and No. 2 rock rooms off No. 1 entry of 6 Right Mains at station 23á70. These locations are identified on Exhibits OX-3 and OX-5.

The pertinent language in the accumulations cleanup program (Exh. OX-4 at p. 5(a)), states that the fine and loose coal incapable of being cleaned up by the continuous miner is pushed to the face and "loaded during the next mining cycle in the working place." The program does not contemplate or authorize the prolonged storage of accumulations. It apparently refers to the "small, but inevitable aggregations of combustible materials that accompany the ordinary, routine, or normal mining operation." Old Ben Coal Company, 8 IBMA 98, 111, 84 I.D. 459, 1977-1978 CCH-OSHD par. 22, 088 (1977). And further, it must necessarily contemplate a reasonable lapse of time for the return of the cleanup equipment to the area of accumulation.

It is apparent from all evidence presented that the time lapse between the date of development of the accumulation and the time it was expected to be removed was unreasonable.

There are actually two different premises for this conclusion. First, it appears that the mining cycle had actually been completed in all four accumulation areas and therefore should have been fully cleaned up when the last mining had been completed during the prior weekend or shortly thereafter. Second, even if mining had not been finished in such areas the lapse of time involved here caused by the unusually large number of faces being developed in two separate groups, would have been unreasonable.

As relates to the first premise a review of the evidence reveals that the combustible accumulations would not have been removed in the course of the next mining cycle because mining for all practical purposes had been terminated in the subject areas. The rock rooms had been advanced to the desired depth (Tr. 252, 258), a conclusion which is confirmed by two of the Respondent's exhibits. Exhibit OX-3 represents the development of the mine in the vicinity of the intersection of 6 Right Mains and 3 Butt Left on October 6, 1977 (Tr. 187), the date of the subject order. Exhibit OX-5 represents the development of the mine as of June 1978 (Tr. 191), approximately 8 months after the issuance of the subject order. The areas cited are circled

in green on Exhibit OX-5 (Tr. 172). A comparison of the two exhibits reveals that the two rock rooms were no farther advanced in June 1978, than they were on October 6, 1977.

The same conclusion applies to the development of the No. 1 and No. 2 entries of 3 Butt Left section. A comparison of the two exhibits reveals that they had not been advanced between October 6, 1977, and June 1978. Therefore, the mining cycle had terminated in the subject areas on the date of the order.

The combustible accumulations cleanup program in effect at the mine on the date of the order contemplated the removal of the accumulations during the next mining cycle (Tr. 202-04, 206). The termination of mining activity in an area takes that area out of the mining cycle, and thus outside the regular cleanup program's reach. Since the mining cycle had terminated in the subject areas, the accumulations cited in the order would not have been removed in the course of regular mining activity (Tr. 222). The loose coal and coal dust should have been removed upon the termination of the mining cycle in the subject areas, a feat which could have been accomplished with the scoop (Tr. 255). If the scoop was inoperable, as Respondent contends (Tr. 217), removal could have been accomplished with the continuous miner.

As relates to the second premise, even if mining had not been finished in such four areas, the lapse of time involved here was unreasonable. Testimony of Mr. Rittenberger, the mine superintendent, Mr. Arduino, the mine foreman, and Mr. Dunmire, the company, president particularly at pages 198, 201, 223, 237-240, 243-246, and 257-258 of the transcript, shows the unusual amount of time that would lapse in this case.

Part of the reason for the long lapse of time was the manner in which a group of three entries were advanced for some distance before moving back across the section to another group of entries which also involved many different faces.

One of the statements which showed the long period of time involved was that of the mine superintendent at page 198 of the transcript as follows:

> Q. So, it could have been a later mining cycle that it was actually cleaned up?
>
> A. It would have been completed in the mining cycle of that area, yes, which would have been within a couple of weeks, not a longer period than that.
>
> Q. But, you are saying that it was cleaned up within the next mining cycle?

A. It was cleaned up due to the order out of cycle.

Q. Could you explain that further for us?

A. When we were doing our mining, we were working in 4, 5 and 6. We would have continued those entries up until we made the necessary crosscuts and advanced them to the limit that we could reach with our cables.

At that point, we would have moved the feeder and the power center up, advanced No. 3 and No. 4 entry of 3 butt left, at which point in time we would have gone over to clean up rock rooms 1 and 2, and advance No. 1 entry and No. 2 entry further in for another crosscut, because then we could reach it with the cable.

At the point in time we were setting here, we could not reach any further. We could not advance those faces any further.

The fact that the circumstances of this case were not normal was evident in the testimony of the company president as follows: "[B]ut what you are looking at here is not the norm for Leechburg Mining. It is a series of events that took place. It was unfortunate, but they led into this" (Tr. 257).

The evidence thus establishes that the Respondent permitted large volumes of combustible material (Tr. 164-65, Exh. M-16) to accumulate in the active workings of the mine for approximately 5 days (Tr. 166). Even a review of the testimony in a light most favorable to the Respondent reveals that the combustible material might not have been removed for "a couple of weeks" (Tr. 198).

I therefore conclude that the Respondent did not undertake to clean up the accumulation within a reasonable time after discovery, and that MSHA has established a violation of 30 CFR 75.400 by a preponderance of the evidence.

(b) Gravity

Little, if any, rock dust could be visibly detected in the accumulations (Tr. 165). Part of the depth of coal was dry to damp, the remaining depth of coal was dry (Tr. 168). Inspector Bates testified that he did not observe any mining machinery in the area (Tr. 175).

Inspector Bates testified that accumulations of coal dust in a coal mine pose a hazard because its presence can intensify an explosion (Tr. 168). He classified the occurrence of an event as

"probable," and contemplated that the resulting injury would be "disabling" (Tr. 170, Exh. M-18). He was unable to determine whether the workers were exposed to the hazard (Tr. 170).

The area was connected to a designated escapeway (Tr. 171). The accumulations were not in close proximity to any electrical equipment (Tr. 166).

Therefore, I find the violation to be of moderate gravity.

(c) Negligence

The mine foreman told Inspector Bates that the accumulations had been present for about 3 to 5 days (Tr. 166). The inspector estimated that the accumulations had been present for at least 5 days (Tr. 166). The operator should have known of the presence of the accumulations because the mine foreman was aware of their presence (Tr. 167).

Therefore, I find the Respondent demonstrated gross negligence.

(d) Good Faith

Mr. Arduino testified that the accumulations were removed on October 6, 1977, the date of the order. Abatement was achieved in the No. 1 and No 2 entries of 3 Left, using the miner and the shuttle car. It was accomplished in the No. 1 and No. 2 rock rooms by hand shoveling the accumulations onto a shuttle car. The continuous miner was not brought into the No. 1 and No. 2 rock rooms because the number of curves which the miner would have had to negotiate would have destroyed the miner cable (Tr. 219). Mr. Arduino testified that the scoop was not used in the abatement process because it was not functioning (Tr. 217, 233).

Inspector Bates was not notified of the abatement until October 11, 1977, 5 days after the issuance of the subject order (Tr. 219-220, Exh. M-17). Mr. Arduino testified that he was unable to explain the time lag between the abatement of the order and the notification of Inspector Bates (Tr. 219).

I find that the Respondent demonstrated good faith in achieving rapid abatement of the violation.

(4) Order No. 7-0036 (1 JAB), October 11, 1977, 30 CFR 75.400

(a) Occurrence of Violation

MSHA inspector Jesse Bates conducted a regular inspection at Leechburg's Foster No. 65 Mine on October 11, 1977 (Tr. 260, 261). He arrived at approximately 7:30 a.m. (Tr. 260). Mr. Joseph Arduino,

the mine foreman, accompanied the inspector during the inspection tour (Tr. 260). At approximately 12:15 p.m., he observed the continuous miner withdraw from the face area prior to the work crew's dinner break (Tr. 261). He observed accumulations of loose coal and oil soaked coal dust on the top and sides of the machine (Tr. 261, 262, 271, Exh. M-19). The area covered encompassed the conveyor reverse control switch and the left side of the electric motor (Tr. 261). The inspector made measurements (Tr. 264-5) showing that the accumulations of oil and coal dust covered a 54-square foot area on the machine's top, and 32 square feet on the sides (Exh. M-19, Tr. 264). It was impractical to measure the depth of the accumulation on top of the machine due to the low mining height (Tr. 261-62, 271).

The inspector estimated that the accumulations had existed for at least two shifts, based on the abnormal amount of accumulations on the machine (Tr. 262-63, 273). Mr. Arduino disagreed, stating that the accumulations were not an abnormal amount (Tr. 283-84).

Inspector Bates believed the normal cleaning procedure for the machine required the operator to clean it at the beginning of each shift (Tr. 276-77). Mr. George E. Rittenberger mentioned the existence of a continuous mining machine cleanup program (Tr. 292, 293), although the Respondent neither produced nor mentioned a writing embodying the plan. According to Mr. Rittenberger, the mechanics on the night shift are largely responsible for cleaning the equipment (Tr. 293). Section foremen are charged with supervising the removal of excessive accumulations (Tr. 293-94).

Mr. Arduino testified that the miner is normally cleaned once daily, on the 12 midnight to 8 a.m. shift (Tr. 284). It would have been clean at the beginning of the 8 a.m. shift if normal procedures had been followed (Tr. 285).

However, according to Mr. Arduino and Mr. Rittenberger, the continuous miner cited in the subject order had not been in operation prior to the order's issuance. They testified that the machine had been undergoing repairs (Tr. 282, 283, 285, 294-95, 296). According to Mr. Arduino, the midnight to 8 a.m. shift had not cleaned the machine because they were subjecting it to repair work (Tr. 295). Mr. Rittenberger testified that the maintenance crew had not washed the machine because their repair work required opening a permissible electrical box (Tr. 296). He further testified that his records revealed the machine was not returned to service until after 1 p.m. on the date of the order. However, the Respondent did not introduce those records into evidence to corroborate Mr. Rittenberger's claim. The mechanics who allegedly performed the repair work were not called as witnesses.

Inspector Bates' testimony reveals that the machine was in operation between the time he arrived on the section at 9 a.m. and the

time he issued the order at 12:15 p.m. (Tr. 261, 266, 267). He specifically testified that he saw the machine withdrawing from the face area at approximately 12:15 p.m. (Tr. 261). He specifically asked the operator when the machine had been washed, and got no response (Tr. 269, 270). He testified that no one was performing maintenance on it (Tr. 266, 268). No one told him that maintenance work had been performed on the reverse control switch during the morning (Tr. 270).

Having been afforded the opportunity at the hearing to assess the credibility of the witnesses, I conclude that Inspector Bates' testimony accurately reflects the events of October 11, 1977. I therefore find that the continuous mining machine cited in the order had been in operation between 9 a.m. and 12:15 p.m. on October 11, 1977, and that excessive accumulations of oil and coal dust had been permitted to accumulate on the machine.

The accumulations had been present on the machine for a long period of time while it was in operation. Mr. Arduino testified that his men had to scrape some of the oil from the machine (Tr. 283). Inspector Bates' testimony reveals that scraping is required only when the accumulations have been permitted to remain on the machine for such a prolonged period of time that the heat from the equipment has caused it to harden (Tr. 277-78).

MSHA's prima facie case consists of three elements. The elements for establishing a violation of 30 CFR 75.400 are: (1) the existence of an accumulation on electrical equipment in the active workings of a mine; (2) that the operator knew, or through the exercise of due diligence should have known, of their existence; and, (3) that the operator failed to clean up the accumulation within a reasonable time after discovery. Old Ben Coal Company, 8 IBMA 98, 114-15, 84 I.D. 459, 1977-78 CCH-OSHD par. 22,088 (1977).

The testimony of Inspector Bates and Exhibits M-19 and M-21 establish, by a preponderance of the evidence, the existence of accumulations on the continuous miner, a piece of electrical equipment in the active workings of the Foster No. 65 Mine. Loose coal and oil soaked coal dust had been permitted to accumulate on the machine (Tr. 261-62, 271, Exhs. M-19, M-21), covering 54 square feet on the top of the machine and 32 square feet on the sides (Tr. 264, Exh. M-19). Accumulations were present on both the conveyor reverse control switch and the left side of the electric motor (Tr. 261).

The Respondent should have known of the accumulations existence. Section foremen are charged with the duty of assuring the removal of excessive accumulations from electrical equipment (Tr. 293-94). The section foreman was on the section between 9 a.m. and 12:15 p.m. on October 11, 1977 (Tr. 262). In the exercise of his company imposed duty to inspect electrical equipment for accumulations, a duty of

which he should have been aware (Tr. 294), he should have known of the condition. The men had to scrape some of the oil and loose coal from the machine (Tr. 283), indicating that the accumulations had been present long enough for the heat from the machine to cause hardening (Tr. 277-78). Additionally, Mr. Arduino testified that the machine had probably last been cleaned on the 4-to-12 shift the previous day (Tr. 285-86). Therefore, the Respondent, through the exercise of due diligence, should have known of the existence of the accumulations on the miner.

The Respondent failed to remove the accumulations from the miner within a reasonable time after he should have known of their existence. "Reasonable time" is determined on a case-by-case evaluation of urgency in terms of the likelihood of the accumulation to contribute to a mine fire or an explosion. Mass, extent of combustibility and proximity to an ignition source are factors used to assess the "reasonable time" factor. Old Ben Coal Company, 8 IBMA 98, 115, 84 I.D. 459, 1977-78 CCH-OSHD par. 22,088 (1977). Accumulations were present around the conveyor reverse control switch and the electric motor on the left side of the machine (Tr. 261), potential sources of ignition (Tr. 263). A measurable depth of accumulations was present on the miner's top (Tr. 261-62). It covered 54 square feet on the top, and 32 square feet on the sides (Tr. 264, Exh. M-19).

The presence of these large accumulations, in close proximity to potential sources of ignition, on a machine operating in the face area (Tr. 261), coupled with the fact that the machine had not been cleaned for one and a half shifts (Tr. 262, 285-86), indicates a failure to remove the accumulations within a reasonable time after the operator should have known of their presence.

I therefore conclude that a violation of 30 CFR 75.400 was established by a preponderance of the evidence.

(b) Gravity

The inspector testified that the trailing cables and the motor could short circuit, causing the machine to catch fire (Tr. 263). Running over the cable can also produce a short circuit, resulting in a mine fire (Tr. 263). Six or more workers were exposed to the hazard, one of whom was the miner operator (Tr. 263-64, Exh. M-21). The miner was equipped with operable fire suppression sprays (Tr. 271).

I find the violation to be a serious one.

(c) Negligence

The Respondent demonstrated ordinary negligence in failing to comply with its unwritten program for cleaning accumulations from the

continuous miner. The machine was cleaned at least once daily under the plan, usually on the 12 midnight-to-8 a.m. shift (Tr. 284, 293). This responsibility was shared by the section foremen (Tr. 293-94).

The machine in question had been operating since at least 9 a.m. on October 11, 1977. It had not been cleaned by the midnight-to-8 a.m. shift, and had not been cleaned on the 8 a.m. shift as attested to by the abnormal amount of loose coal and oil-soaked coal dust on it at the time the order was written (Tr. 262, 285, 286). The extent of the accumulations exceeded the ordinary amount which would have been present had the plan been followed (Tr. 262).

I conclude that Respondent demonstrated ordinary negligence.

(d) Good Faith

The operator corrected the condition while the inspector was on the section (Tr. 272). Abatement was accomplished within about 30 minutes after the order's issuance (Tr. 273, Exhs. M-19, M-20).

I find that Respondent demonstrated good faith in securing rapid abatement of the violation.

(5) Order No. 7-0038 (1 JAB), October 12, 1977, 30 CFR 75.202

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine on October 12, 1977, between 7 a.m. and 7:30 a.m. to conduct a regular inspection (Tr. 299). He was accompanied on the inspection by Mr. Joel Dunmire, Leechburg's safety director (Tr. 299). He inspected the northeast mains track switch, the track haulage road and the roof above the track haulage road (Tr. 299). He observed loose, falling roof material between the previously installed roof bolts over the track haulage road from the northeast mains track switch to a point 200 feet inby the supply base (Tr. 300). In other words, rock had fallen from the roof onto the track haulage road (Tr. 300). The condition was present in a section of the track haulage road measuring a distance of approximately 3,500 feet (Tr. 300). The inspector, after administering a sounding test, noted that "the roof over the track haulage road in various locations needed to be scaled down from the northeast mains track switch to 200 feet inby the supply base at 5 Right, a total distance of approximately 3,500 feet" (Tr. 301, 305, 317-18, Exh. M-22).

The condition observed by the inspector was described as "spalling," which he defined as small "particles of roofing material becoming loose between the installed supports and falling loose or falling to the mine floor on the track haulage road" (Tr. 300, 319). Spalling is produced by thermal shock, or weathering, and occurs

when moisture laden warm air comes in contact with the cooler surfaces within the mine (Tr. 307, 308, 323). The Foster No. 65 Mine frequently experienced this problem during the hot summer months (Tr. 323).

Mr. George Rittenberger testified that the roof of the track haulage is comprised of dark shale over the Lower Kittanning coal seam, a material that often spalls during the hot summer months (Tr. 323). He testified that when spalling is observed, the affected area is scaled (Tr. 324), and that the day shift constantly examines the area for loose rock (Tr. 334). Experienced coal miners customarily check the roof, but scaling was noted only occasionally in reports filed prior to the order's issuance (Tr. 336-37, Exh. OX-6). Although he expressed the opinion that visual observation from an open track jeep was sufficient to determine the roof's status (Tr. 343), he pointed out a more regular inspection and removal procedure systematically conducted in some areas. He testified that more detailed inspections were carried out weekly or daily by the general foremen in areas of the track haulage where the danger of injury was greatest (Tr. 346-47). According to his testimony, the area of regular inspection extended from the mantrip unloading point to the supply station, a distance of approximately 600 feet encompassing none of the 3,500 feet cited by the inspector (Tr. 346-49). According to his testimony, there was no regular inspection procedure for the 3,500 feet cited in the order (Tr. 347, 348-49).

The inefficiency of scaling as a tool in spalling control was highlighted by Mr. Rittenberger's testimony. He stated that the problem would persist until full implementation of a new program could be completed (Tr. 345-46).

Mr. Joel Dunmire, Respondent's safety director, attempted to explain the absence of recorded references to spalling. He testified that since spalling is a normal condition, the fire boss would not have noted it in his book (Tr. 353-54). The fire boss usually makes notations in his book of roof conditions adversely affecting safety (Tr. 353).

Assistant mine foreman Walter Vakulick, testified that this crew scaled the track haulage on the 600-foot section running between the supply base and the end of the track (Tr. 357). This was done almost daily (Tr. 355). But the 600-foot stretch in question did not encompass the entire 3,500 feet cited in the subject order (Tr. 357, 346-49). The 3,500-foot section ran from the northeast mains track switch to a point 200 feet inby the supply base.

The testimony of Mr. Rittenberger and Mr. Vakulick reveals an ambiguity regarding how much, if any, of the 600-foot section, which was subject to regular inspection, was encompassed by the 3,500 feet cited in the order.

The history of spalling, and the attempts to alleviate it, at the Foster No. 65 Mine was recounted in the testimony of Mr. Harold Dunmire. Mr. Dunmire had served as mine superintendent of the Foster No. 65 Mine between June 5, 1975, and June 1, 1977. He became president of Leechburg on June 1, 1977. Mr. Dunmire testified that spalling was a problem at the mine when he arrived in 1975 (Tr. 362). His first attempts to control the condition involved removal of the loose material, an expensive procedure that was ultimately discarded in favor of resupporting the roof (Tr. 362). These methods also proved inefficient (Tr. 362-63).

In 1976, the Respondent learned of a guniting procedure. Guniting involves the high-pressure spray application of Fiber-crete, a mixture of cement and 1-inch steel fibers of minute size, to the spalling surfaces (Tr. 365). The Fiber-crete forms a seal insulating the roof from moist air (Tr. 365). According to Mr. Dunmire, the guniting procedure was not implemented by the Respondent in 1976 because "we were in no shape to enter into a program like that" (Tr. 363). The Respondent reconsidered purchasing guniting equipment in the summer of 1977, and ultimately purchased a machine on October 20, 1977 (Tr. 363, Exh. OX-7). Respondent uses the machine only on the track haulage (Tr. 365), and it has proved successful in combatting spalling (Tr. 367-68).

The question presented is whether the above facts establish a violation of 30 CFR 75.202, which reads in pertinent part: "Loose roof and overhanging or loose faces and ribs shall be taken down or supported."

The Respondent argues that this language is similar to the language of 30 CFR 75.400 which requires that the condition has existed and that the operator has failed to correct it in a reasonable time before a violation can be found. Thus, the Respondent argues, the crux of a violation under 30 CFR 75.202 is the failure to promptly take down or support, or undertake to take down or support, loose roof which is already in existence. The Respondent casts the critical issue as whether remedial action was taken promptly when the operator knew or should have known of the violation (Respondent's Post-Trial Brief, pp. 25-26).

Even assuming the accuracy of the Respondent's theory, I find the evidence sufficient to establish a violation of 30 CFR 75.202. The evidence establishes (1) the existence of loose roof material in various locations in the 3,500 feet of track haulage, (2) reason to know of the condition's existence, and (3) failure to take prompt and appropriate remedial measures within a reasonable time after the Respondent should have known of the existence of loose roof material.

The Respondent does not dispute the existence of loose roof material in various locations along the 3,500 feet of track haulage

cited in the subject order. The Respondent contends that remedial action was taken promptly after he knew or should have known of the conditions existence. The evidence does not support such contention.

The testimony establishes the presence of loose roof material in the track haulage area for a considerable time period prior to the order's issuance (Tr. 315). A preshift examination of the area had been made (Tr. 303).

The Foster No. 65 Mine had a history of spalling (Tr. 323, 362), with the safety director classifying it as "normal" (Tr. 353-54). Yet, in spite of a known history of spalling conditions at the mine, none of the employees charged with making inspections were required to note the condition in their reports. The fire boss was charged with the duty of conducting daily roof inspections (Tr. 353-54), but he was not required to note spalling in his record book (Tr. 353-54). In general, mine employees were not required to note spalling in their daily reports, although they occasionally noted the condition (Tr. 334, 336-37, Exh. OX-6).

The Respondent was aware of possible injuries resulting from falling roof material, but formulated and implemented a specific loose roof material inspection and removal procedure for only that portion of the track haulage presenting, in the Respondent's judgment, the greatest possibility of injury (Tr. 346-47, 348-49). A 600-foot stretch running from the supply base to the mantrip unloading point was regularly inspected (Tr. 346-49, 357). Conditions in the 600-foot section were so bad that scaling was required almost daily (Tr. 355). Yet in spite of this knowledge of the problem's extent, no regular spalling inspection and removal procedure was provided for the remaining portion of the track area cited in the order, except visual observations from open equipment traveling the track, even though the area served as the means of ingress for workers riding to the workplace in uncovered personnel carriers (Tr. 302-03).

Based on the Respondent's knowledge of both the history and extent of spalling problems at the Foster No. 65 Mine, and the Respondent's knowledge of the possibility of resulting injury from falling roof material, it cannot be said that the limited inspection and removal procedures employed at the mine were adequate.

The evidence also establishes the use of spalling control measures whose inadequacy was known to the Respondent (Tr. 345-46, 362-63) for at least 28 months prior to the order's issuance (Tr. 362). The inadequacy of scaling was known in 1975 (Tr. 362), yet it was still used in 1977. The Respondent learned of a potentially more efficient means of spalling control in 1976, but did not take serious steps to procure the more efficient system until the summer of 1977 (Tr. 363). The equipment had not been purchased on October 12, 1977 (Exh. OX-7), the date of the subject order. Therefore, the record

establishes the Responsent's knowing use of an inefficient spalling control procedures when a more efficient means was in existence.

I therefore conclude that the Respondent failed to take prompt and effective remedial action after he should have known of the spalling roof conditions in the 3,500 feet of track haulage.

(b) Gravity

Inspector Bates was unable to determine, at the time of the order's issuance, the precise number of workers exposed to the hazard of loose, spalling rock falling between the supports in the 3,500 feet of the track haulage area (Tr. 312, Exh. M-25). However, he estimated that at least two full crews per shift passed through the area (Tr. 303). Normally, there would be eight workmen per crew, making a total of 16 workers per shift who were exposed to the hazard (Tr. 303). Although these workers would normally travel in covered personnel carriers, the Respondent also used several open-type personnel carriers (Tr. 302-03). The passengers in the open equipment would have been exposed to loose roof material spalling between the supports (Tr. 303).

The inspector's personal knowledge of the mining industry led him to conclude that the condition was serious because he had known of several people receiving eye injuries from falling roof material in haulage areas (Tr. 304, 311). He was not referring to specific injuries at the Foster No. 65 Mine (Tr. 311).

I conclude that the violation was serious because workers could have received eye injuries from falling roof material while riding in open personnel carriers. I therefore find the violation to be of considerable gravity.

(c) Negligence

Mr. Rittenberger testified that workers had scaled the haulage area during the week previous to the order's issuance, but he had no written record of it (Tr. 331). He also testified that the day shift workers constantly scan the area for loose rock (Tr. 334), and that the area was checked more regularly than usual in high humidity (Tr. 335). This was done generally in open equipment traveling the track.

Inspector Bates testified that a preshift examination of the area had been made (Tr. 303). He expressed the opinion that the condition had developed over a period of time based on the amount of loose roof material that had fallen through the supports along the 3,500 feet of haulage road (Tr. 315). The inspector saw no one scaling prior to the order's issuance (Tr. 320).

Therefore, the Respondent demonstrated ordinary negligence in failing to discover and correct the loose roof material at various subject order.

(d) Good Faith

MSHA's exhibits establish that 1,300 feet of the cited track haulage area had been scaled within 24 hours of the order's issuance (Exhs. M-22, M-23). The order was terminated at 12:45 p.m. on October 17, 1977, after an inspection disclosed full abatement (Tr. M-24). The testimony of Mr. Rittenberger establishes that abatement was completed on Monday, October 17, 1977 (Tr. 339-40). He was unable to determine the precise number of manhours required to abate the order because much of the work performed between October 12 and October 17, 1977, went for the abatement of a notice written for clearance (Tr. 343-44). In addition to scaling, the Respondent installed approximately 200 additional roof bolts in the subject area (Tr. 344).

I therefore conclude that the Respondent demonstrated good faith in rapidly abating the violation.

Additionally, since the issuance of the order, the Respondent has purchased new spalling control equipment and is currently implementing a new spalling control plan (Exhs. OX-7, OX-8, Tr. 345-46, 364-68). A "Big Sam" Spray Applicator was purchased for $14,060.70 on October 20, 1977 (Exh. OX-7). The machine is used to apply Fibercrete to roof surfaces, sealing out moisture (Tr. 365). Between November 3, 1977, and August 3, 1978, the Respondent purchased 324,500 pounds of Fiber-crete at a total cost of $16,937,26 (Tr. 366, Exh. OX-8). The application of Fiber-crete has proved successful in spalling control efforts in the track haulage areas of the Foster No. 65 Mine (Tr. 366-68).

(6) Order No. 7-0047 (1 JAB), November 30, 1977, 30 CFR 75.200

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine at approximately 7:30 a.m. on November 30, 1977, to conduct a spot health and safety inspection (Tr. 372). Mr. Joel Dunmire, Leechburg's safety director, and Mr. George Rittenberger, the mine superintendent, accompanied the inspector on his investigation (Tr. 372). The inspector issued the subject order, alleging a violation of 30 CFR 75.200.

The order was issued for the alleged failure to comply with Drawing No. 1 of the approved roof control plan (Exh. M-3) in an intersection in No. 4 entry, 1 Right section off 6 Right Mains in

that one diagonal of the intersection measured 37.5 feet and additional roof support had not been installed (Tr. 372-73, Exh. M-26, Exh. M-30).

The inspector testified that one diagonal measured 37.5 feet and the other measured 25.5 feet (Tr. 372-73). The intersection was in a 20-foot-wide place (Tr. 373-74). Drawing No. 1 of the approved roof control plan requires both diagonals of an intersection in a 20-foot wide-place to measure 32 feet or less (Exh. M-3). If either diagonal exceeds 32 feet, the approved roof control plan requires the installation of additional support in the form of either posts or cribs (Exh. M-3).

The Respondent offered no evidence negating the existence of a violation, and concedes in his post-trial brief that a violation occurred (Respondent's Post-Trial Brief, pp. 31, 32).

I therefore find that a preponderance of the evidence establishes the Respondent's failure to install posts or cribs to reduce the diagonal length of a 20-foot-wide place to 32 feet in accordance with the approved roof control plan, and that such failure constitutes a violation of 30 CFR 75.200.

(b) Gravity

The inspector's visual observation and sounding of the roof revealed no defects. The roof did not sound drummy and there were no visual slips in the intersection (Tr. 381). The absence of visual slips and the sounding test indicated that the roof was satisfactory for at least 4 feet (Tr. 388). The inspector did not observe signs of stress on the roof or ribs, and observed no signs that the ribs were taking any weight (Tr. 383). Although he testified that he found no indications of possible roof fall developing (Tr. 383), he elected to classify the violation as serious (Tr. 380). Inspector Bates views all roof control violations as serious (Tr. 380, 384), but he admits to varying degrees of seriousness (Tr. 384-85).

The inspector did not test the torque of the roof bolts in the intersection because he did not deem it necessary (Tr. 386-87). The intersection in question was slightly staggered (Tr. 385-86). Although staggering often indicates poor mining practices (Tr. 386, 428), slight staggering can improve the roof's strength or stability (Tr. 385-86).

Mr. Rittenberger classified the roof conditions as "good" (Tr. 430). Inspector Bates refused to classify the roof conditions as "good" at the hearing, but he did so term it in his response to Interrogatory No. 83 (Tr. 381).

At least seven men were working on the section (Tr. 380, Exh. M-28).

The inspector testified that the 32-foot requirement in Diagram No. 1 of the approved roof control plan represents the maximum safe diagonal length, taking into account the stress of the overlying strata (Tr. 376).

Mr. George Rittenberger, the mine superintendent and a mining engineer (Tr. 185-86), testified that the intersection was as safe as one in full compliance with the roof control plan (Tr. 420). He testified that according to his calculations, embodied in Exhibit OX-12, the area of the cited intersection was less than the area of an intersection which fully complied with the roof control plan (Tr. 420-22). According to Mr. Rittenberger, the critical figure in roof support is the area to be supported (Tr. 420). Mr. Rittenberger calculated the area of the cited intersection as 956.25 square feet (Exh. OX-12, Tr. 420). He calculated that an intersection in full compliance would cover an area of 1,024 square feet (Exh. OX-12, Tr. 421). He testified that a comparison of the two figures revealed no perceptible difference in the area to be supported (Tr. 421-22).

I therefore conclude that the violation was of slight gravity.

(c) Negligence

Inspector Bates testified that the violation could be detected by visual observation (Tr. 383). The preshift examiner's dated initials were observed in the face areas of each working place in the section (Tr. 377). The inspector testified that he thought a current date was present on the face closest to the violation (Tr. 377).

The inspector estimated that the condition cited in the order had existed for at least one shift, and possibly longer (Tr. 377). Mr. George Rittenberger, the mine superintendent, testified that the violation probably occurred between 8 p.m., November 29, 1977, and 9:30 a.m., November 30, 1977 (Tr. 430-31). (See also, Exh. M-26). It was not a normal mine procedure to measure the diagonal distance at the intersections encompassed by Drawing No. 1 of the approved roof control plan (Tr. 427, Exh. M-3). Mr. Rittenberger stated that, to his knowledge, no one had measured the diagonal lengths at the intersection (Tr. 429). Temporary supports had not been placed on the previous shift to correct the condition because no one suspected that the diagonal length exceeded 32 feet (Tr. 429).

I find that the Respondent should have known of the violation existing in the intersection of No. 4 entry, 1 Right section off 6 Right Mains. The Respondent demonstrated ordinary negligence.

(d) Good Faith

The operator took immediate steps to abate the violation (Tr. 379, Exh. M-28). Three posts were installed to reduce the diagonal

width to 32 feet. It required approximately 5 minutes to correct (Tr. 387, 429).

I find that the Respondent demonstrated good faith in securing a rapid abatement of the violation.

C. History of Previous Violations

The history of violations at Respondent's Foster No. 65 Mine during the 2-year period preceding the issuance of the subject orders is summarized as follows (Exhs. M-1, OX-9, OX-10):

Violations	Year 1 10/29/75-10/30/76	Year 2 10/31/76-10/31/77	Totals
All Sections	62	45	107
Section 75.200	7	6	13
Section 75.202	2	1	3
Section 75.400	6	4	10
Section 75.403	5	10	15

(Note: All figures are approximations.)

The history reviewed below relates only to those violations for which a penalty has been paid.

One hundred seven violations of all sections were cited during the 2-year period prior to October 31, 1977, with 62 cited in year 1 and 45 cited in year 2. Thirteen violations of 30 CFR 75.200 were cited during the 2-year period preceding November 13, 1977, with seven cited in year 1 and six cited in year 2. Three violations of 30 CFR 75.202 were cited during the 2-year period preceding October 31, 1977, with two cited in year 1 and one cited in year 2. Ten violations of 30 CFR 75.400 were cited during the 2-year period preceding October 31, 1977, with six cited in year 1 and four cited in year 2. Fifteen violations of 30 CFR 75.403 were cited during the 2-year period preceding October 31, 1977, with five violations cited in year 1 and 10 cited in year 2.

D. Size of Operator's Business

The Leechburg Mining Company operates only one mine, the Foster No. 65 Mine (Tr. 440). Leechburg produced 255,758 tons of coal in 1975, 169,761 tons in 1977, and 142,140 tons in 1978 (Exh. M-2, Stipulation No. 6).

E. Effect of the Assessment of a Civil Penalty on the Operator's Ability to Continue in Business

The Respondent is subject to a maximum aggregate penalty assessment of $60,000 for the six subject violations. The Respondent,

through the testimony of company president Harold Dunmire, contends that a $60,000 penalty would jeoparize the Respondent's survival, considering the Respondents other financial obligations (Tr. 435-36). The Respondent anticipates difficulty in raising $60,000 within 30 days because the company's current financial posture renders doubtful the provision of the requisite monies by a lending institution (Tr. 445-46).

In addition to the testimony of company president Harold Dunmire, the Respondent offered a copy of the Respondent's tax return for the year ending June 30, 1978, and financial statements for the year ending June 30, 1978, in support of its position. The Respondent did not call an expert witness to assist in interpreting the tax return and the financial statements. Bearing in mind the limitations imposed by the lack of expert testimony, the following picture of the Respondent's financial condition was established by the evidence.

Leechburg Mining Company is owned by a small group of shareholders and is not part of a larger business entity (Tr. 437, 440). Eighty-two percent of the company's stock is held by the Mellon Bank on behalf of the Hick's estate (Tr. 438). The Bank administers the trust for the estate (Tr. 439). The beneficial interest in the trust is held by Lewis and Harry Hicks, the heirs of the Hick's estate (Tr. 438-39).

The company has approximately 80 employees (Tr. 432). It operates only one mine, the Foster No. 65 Mine (Tr. 440). The mine has two sections operating (Tr. 432). The company's coal production was lower during the year ending June 30, 1978 than during the year ending June 30, 1977, because of the United Mine Worker's strike in 1978 (Tr. 432-33). The company produces approximaely 900 to 1,000 tons of coal per day (Tr. 441). It is sold to Penelec at a price of $26.60 per ton, F.O.B. (Tr. 433, 441). The contract with Penelec expires on April 22, 1979. The company anticipates receiving a reduced price per ton after April 22 because the current prevailing market rate for coal is $22 to $25 per ton (Tr. 441).

The company has large obligations based on a settlement agreement with the Pennsylvania Department of Environmental Resources for reclamation of 130 acres of refuse area (Tr. 434). This reclamation is proceeding at the present time (Tr. 434). It costs $20,000 to $25,000 per month, and is projected to cost $1.3 million upon completion in 1981 (Tr. 435, 441-3, Exh. OX-13). According to Mr. Dunmire, the company lacks sufficient assets to fund this liability and must pay for it on a day-to-day, month-to-month basis out of net operating revenues (Tr. 434-35).

At a recent board of directors meeting, one director proposed closing the company, primarily in consideration of the obligations

to the Pennsylvania Department of Environmental Resources (Tr. 436). It was decided at that time to continue in business as long as sufficient revenue could be generated (Tr. 436).

Leechburg's U.S. Corporation Income Tax Return for the year ending June 30, 1978, shows a $257,236 loss for tax purposes (Exh. OX-15). The $257,236 loss was computed as follows:

Gross Income	
Gross receipts or Gross Sales	$3,883,699
Less: Cost of Goods Sold	3,534,850
Gross Profit	348,849
Interest	55,735
Gross Rents	5,810
Gross Royalties	5,082
Other Income	4,086
Total Income	419,562
Deductions	
Compensation to Officers	79,605
Salaries & wages (not deducted elsewhere)	9,901
Rents	690
Taxes	157,349
Interest	2,785
Depreciation	241,857
Depletion	662
Pension, Profit Sharing, etc. plans	73,107
Other Deductions	110,842
Total Deductions	676,798
Taxable Income	(257,236)
Tax	
Refunded	25,714

The financial statement for the year ending June 30, 1978 (Exh. OX-13), reveals the following information:

Balance Sheet

Assets	June 30, 1978	June 30, 1977
Total current assets	1,760,592	2,002,797
Mortgage Receivable	10,932	12,777
Annuity Contract	72,000	72,000
Fixed Asset-At Cost	1,948,592	1,762,846
	3,792,116	3,850,420
Liabilities		
Total Current Liabilities	649,903	446,694
Deferred Compensation	72,000	72,000
Commitments and Contingencies		

(note c)	--	--
Stockholders Equity		
Capital stock par value $5 per share- 20,000 shares authorized & issued	100,000	100,000
Capital contributed in excess of par value	38,675	38,675
Retained Earnings	2,931,538	3,193,051
	3,070,213	3,331,726
	3,792,116	3,850,420

Statement of Earnings and Retained Earnings	1978	1977
Revenues	3,954,413	5,484,939
Costs and Expenses	4,217,634	4,790,494
(Loss) earnings before income taxes	(263,221)	694,445
Income Taxes	(1,708)	88,243
(Loss) Earnings for Year	(261,513)	606,202
Retained earnings-beginning of year	3,193,051	2,686,849
Cash dividends paid	--	(100,000)
Retained earnings-end of year	2,931,538	3,193,051
(Loss) Earnings per share	($13.08)	$30.31

Statement of Changes in Financial Position	1978	1977
Working capital at beginning of year	1,556,103	971,440
Working capital at end of year	1,110,689	1,556,103
(Decrease) Increase in working capital	(445,414)	584,663

Cost of Operations (Years ended June 30)	1978	1977
	3,737,349	4,335,249

Fixed Assets & Accumulated Depletion & Depreciation

	Balance July 1, 1977	Additions	Deductions	Balance June 30, 1978
Fixed Assets	4,659,000	433,546	24,263	5,068,283
Accumulated Depletion & Depreciation	2,896,154	246,365	22,828	3,119,691

The land reclamation expenses are not covered in the financial statements (Tr. 443). Reclamation expenses currently run between $20,000 to $25,000 per month (Tr. 435). This translates into yearly expenses ranging between $240,000 and $300,000.

The financial statement (Exh. OX-13) reveals assets valued at $3,792,116 for the year ending June 30, 1978, a $58,308 decline from the $3,850,420 figure for the year ending June 30, 1977. Total current liabilities increased from $446,694 to $649,903 during the same time period, while retained earnings declined from $3,331,726 to $3,070,213 (Exh. OX-13).

Revenues declined from $5,484,939 in the year ending June 30, 1977 to $3,954,413 in the year ending June 30, 1978 (Exh. OX-13), while costs and expenses failed to decline at the same rate (Exh. OX-13). This resulted in a $261,513 loss for the year ending June 30, 1978, as opposed to the $606,202 profit for the year ending June 30, 1977.

It is impossible to determine, on the basis of the information supplied, whether the loss experienced in the year ending June 30, 1978, is attributable to such unforeseen and nonrecurring activities as the 1978 United Mine Workers' strike (Tr. 432-3), or whether it indicates long term financial problems. The Respondent offered no evidence, other than the deleterious effects of the strike, which would have explained the decline in revenues reflected in the financial statements, a decline responsible for the loss experienced during the year ending June 30, 1978. It appears, however, that the Respondent's financial posture, when viewed in light of total assets and retained earnings, is sufficiently secure to withstand the assessment of moderately appropriate civil penalties.

F. Conclusions of Law

1. The Leechburg Mining Company and its Foster No. 65 Mine have been subject to the provisions of the 1969 and 1977 Acts during the respective periods involved in this proceeding.

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

3. The violations charged in the six subject orders are found to have occurred as alleged.

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

VI. Proposed Findings of Fact and Conclusions of Law

Both MSHA and Leechburg submitted posthearing briefs. Leechburg also submitted a reply brief. Such briefs insofar as they can be

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considered to have contained proposed findings and conclusions have been considered fully, and expect to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VII. Penalty Assessed

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

Order No.	Date	30 CFR Standard	Assessment
7-0032 (1 GFM)	10/06/77	75.200	$ 600.00
7-0033 (1 JAB)	10/03/77	75.403	400.00
7-0035 (1 JAB)	10/06/77	75.400	850.00
7-0036 (1 JAB)	10/11/77	75.400	500.00
7-0038 (1 JAB)	10/12/77	75.202	700.00
7-0047 (1 JAB)	10/30/77	75.200	300.00
			$3,350.00

ORDER

The Respondent is ordered to pay the penalty assessed in the amount of $3,350.00 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Section 75.200 Roof control programs and plans:

"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 to 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. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their

representatives."

~FOOTNOTE_TWO
2. 30 CFR 75.402 states:

"All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted."

30 CFR 75.403 states:

"Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the percentum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required."

~FOOTNOTE_THREE
3. One factor which lends support to the statement that the power center was shut down is the circumstance under which the rock dust was hauled in to the site of the violation by hand instead of shuttle car because of the lack of power (Tr. 155). This added almost an hour to the time of abatement (Tr. 151) and required considerable extra work by the miners which could have been expended elsewhere.

~FOOTNOTE_FOUR
4. See, Coal Processing Corporation 2 IBMA 336, 345, 80 I.D. 748, 1973-1974 CCH-OSHD par. 16,978 (1973) (a violation of 30 CFR 75.400 may be based upon visual observation without need of measurements or samples).