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SOL (MSHA) V. SEWELL COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

SEWELL COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. HOPE 78-330-P
A.C. No. 46-03467-02057-V

Meadow River No. 1 Mine

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Gary W. Callahan, Esq., The Pittston Company Coal Group, Lebanon, Virginia, for Respondent

Before: Judge Cook

I. Procedural Background

On April 18, 1978, a petition for assessment of civil penalties was filed by the Mine Safety and Health Administration (MSHA) against Sewell Coal Company for alleged violations of various sections of the Code of Federal Regulations. The 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 Mine Act). An answer was filed on May 4, 1978.

A notice of hearing was issued on May 17, 1978, setting the hearing for September 19, 1978. An amended notice of hearing was issued on July 21, 1978, changing the hearing date to August 29, 1978. On August 3, 1978, the Respondent moved to change the hearing date to October 24, 1978. The motion was granted by an order issued August 14, 1978. The hearings commenced on October 24, 1978, in Charleston, West Virginia, and began with the taking of testimony in a companion case.

The hearing in the present case commenced on October 26, 1978, at which time the parties proposed settlements relating to Order Nos. 7-0012 (1 HRB), January 27, 1977, 30 CFR 75.400, and 7-0024 (1 SEV), January 28, 1977, 30 CFR 75.400. Testimony was taken respecting

Order Nos. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3, 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3, and 7-0140 (1 HRB), February 15, 1977, 30 CFR 75.200. At the conclusion of the proceedings on October 26, 1978, the hearing was continued pending a telephone conference between counsel for the parties and the Administrative Law Judge to determine the date for the conclusion of the hearing. As a result of an agreement reached during the telephone conference, the proceeding was continued until November 20, 1978.

At the commencement of the proceedings on November 20, 1978, counsel for the parties proposed settlements pertaining to two of the remaining three orders. Testimony was taken respecting the remaining contested order.

The decision approving the settlements is included in this decision.

During the hearings on October 26, 1978, and November 20, 1978, counsel for the Respondent made various oral motions. Rulings on these motions are contained herein.

A briefing schedule was arranged at the conclusion of the proceedings on November 20, 1978. Briefs were due on or before February 1, 1979, and reply briefs were due on or before February 15, 1979. MSHA filed a posthearing brief on February 1, 1979. The transcript of the first portion of the case was filed on January 30, 1979, such delay having been due to the illness of the reporter. Consequently, a motion for late filing of briefs was filed on February 1, 1979, which motion was granted. Respondent filed its posthearing brief on February 26, 1979. On March 22, 1979, MSHA filed its second posthearing brief and a response to the proposed findings of fact and conclusions of law contained in the Respondent's posthearing brief.

II. Violations Charged

Order No.	Date	30 CFR Standard
7-0012 (1 HRB)	January 27, 1977	75.400
7-0024 (1 SEV)	January 28, 1977	75.400
7-0041 (1 SEV)	February 1, 1977	75.1100-3
7-0042 (2 SEV)	February 1, 1977	75.1100-3
7-0045 (2 HRB)	February 1, 1977	75.400
7-0140 (1 HRB)	February 15, 1977	75.200
7-0187 (1 HRB)	February 17, 1977	75.400
7-0209 (1 FLD)	March 7, 1977	75.400

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing and in their posthearing submissions, the parties entered into stipulations and reached agreement

on proposed findings of fact and conclusions of law which are set forth in the findings of fact, infra.

B. Witnesses

MSHA called as its witnesses Sidney E. Valentine and Henry R. Baker, MSHA inspectors.

Sewell called as its witnesses Sidney E. Valentine, the above-mentioned MSHA inspector; Fred D. Copen, the maintenance superintendent at the Respondent's Meadow River No. 1 Mine; Randolph R. Skaggs, a miner operator at the Respondent's Meadow River No. 1 Mine on the date of the order and currently the dispatcher at the mine; Darrell Pomeroy, the union conveyor belt examiner for Sewell Coal Company; and, Terry Casto, Sewell's safety inspector.

C. Exhibits

1) MSHA introduced the following exhibits into evidence:

a) M-1 is a computer printout of the history of violations for which penalties have been paid for the Respondent's Meadow River No. 1 Mine for the period beginning January 1, 1970, and ending February 17, 1977.

b) M-2 is a a copy of Order No. 7-0012 (1 HRB), January 27, 1977, 30 CFR 75.400.

c) M-3 is a termination of M-2.

d) M-3A is a special assessment information sheet.

e) M-4 is a copy of Order No. 7-0024 (1 SEV), January 28, 1977, 30 CFR 75.400.

f) M-5 is a termination of M-4.

g) M-5A is the inspector's statement relating to M-2.

h) M-5B is the inspector's statement relating to M-4.

i) M-6 is a copy of Order No. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3.

j) M-7 is a termination of M-6.

k) M-8 is a copy of Order No. 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3.

1) M-9 is a termination of M-8.

m) M-10 is a copy of Order No. 7-0045 (2 HRB), February 1, 1977, 30 CFR 75.400.

n) M-10A is a copy of the inspector's statement accompanying M-10.

o) M-11 is a termination of M-10.

p) M-12 is a copy of Order No. 7-0140 (1 HRB), February 15, 1977, 30 CFR 75.200.

q) M-13 is the roof control plan for the Respondent's Meadow River No. 1 Mine, in effect on February 15, 1977.

r) M-13A is a termination of M-12.

s) M-14 is a copy of Order No. 7-0187 (1 HRB), February 17, 1977, 30 CFR 75.400.

t) M-15 is a termination of M-14.

u) M-16 is a copy of Order No. 7-0209 (1 FLD), March 7, 1977, 30 CFR 75.400.

v) M-16A is a form filled out by the Pittston Company.

w) M-16B is an inspector's statement accompanying M-16.

x) M-17 is a termination of M-16.

2) The Respondent introduced the following exhibits into evidence:

a) O-1 is a statement prepared by the Pittston Company outlining their defense for Order No. 7-0045 (2 HRB), and submitted in conjunction with the proposed settlement of that order.

b) O-2 is a statement, similar to O-1, submitted in conjunction with the proposed settlement of Order No. 7-0209 (1 FLD).

c) O-3 is a copy of the cleanup program at the Respondent's Meadow River No. 1 Mine.

d) O-4 is a copy of a form filled out by a belt examiner at the conclusion of a shift.

e) O-4A is a copy of a form filled out by a belt examiner at the end of a shift.

f) O-4B is a copy of a form filled out by a belt examiner at the end of a shift.

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.(FOOTNOTE 1)

V. Opinion and Findings of Fact

A. Stipulations

1) At the commencement of the hearing, the parties entered into the following stipulations:

a) The Pittston Company produces approximately 12,036,974 tons of coal per year (Tr. 14).

b) The Meadow River No. 1 Mine produces approximately 154,797 tons of coal per year (Tr. 14).

c) At the Meadow River No. 1 Mine, there are approximately 181 miners underground and approximately 20 on the surface (Tr. 15).

2) In the posthearing brief filed on February 26, 1979, the Respondent submitted 24 proposed findings of fact. In a response to the proposed findings filed by MSHA on March 22, 1979, MSHA stated that it had no objection to 16 of the 24 proposed findings of fact. The 16 proposed findings of fact to which MSHA had no objection are as follows:

a) The Meadow River No. 1 Mine is operated by Sewell Coal Company.

b) The Meadow River No. 1 Mine is subject to the provisions of the 1969 Act under which the hearing was held.

c) The Administrative Law Judge has jurisdiction over this proceeding.

d) That Sidney E. Valentine was a duly authorized representative of the Secretary at all times relevant to the issuance of Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV). True and correct copies of the orders were served on Sewell Coal Company.

e) The following proposed findings of fact, to which MSHA had no objection, relate to Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV):

i) The water supply line that froze supplied water to both sprinkler systems in the form of a "T" unit (Tr. 41-42).

ii) The main line was 6-8 inches in diameter (Tr. 46).

iii) The temperature was -25 degrees Fahrenheit on the day of the violation (Tr. 69).

iv) On the day of the violation, about 50 percent of the mines in the area were closed because of cold weather (Tr. 73).

v) The water supply line had a drip valve to help prevent freezing (Tr. 72-73).

vi) On the day of the order, no mining was being performed in the mine (Tr. 35-36).

vii) No coal was being transported on the conveyor belt (Tr. 36, 70, 77).

viii) It is company policy not to mine coal when there is no water supply in the mine (Tr. 75).

ix) The violation was abated as quickly as possible (Tr. 29).

x) The inspector's concern centered on his perceived problem of a possible fire at the belt head (Tr. 38, 48-49).

xi) The belts had slippage rollers (Tr. 44-45, 67).

xii) The belts were not running continuously (Tr. 70).

B. Order No. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3; Order No. 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3

1) Motions to Dismiss

During the course of the hearings, counsel for the Respondent made two oral motions to dismiss. First, the Respondent argued that the case should be dismissed because the inspector cited the wrong mandatory safety standard (Tr. 55-60). The Respondent contends that since the conveyor belt drive units were equipped with sprinklers pursuant to 30 CFR 75.1101-6, the violation, if any, would have to be for failure to comply with 30 CFR 75.1101-7 through 75.1101-11. According to the Respondent's theory, the inspector erred in citing 30 CFR 75.1100-3 because sections 75.1100-3 and 75.1101-6 are mutually exclusive (Tr. 55). I disagree with the Respondent's theory. The pertinent language in 30 CFR 75.1100-3 states that: "All firefighting equipment shall be maintained in a usable and operative condition." (Emphasis added.) The all-encompassing phrase "All firefighting equipment" identifies the section as a general provision applicable to all firefighting equipment, including the sprinkler system at issue in the present case. Sections 75.1101-7 through 75.1101-11 are not incompatible with section 75.1100-3. Although those sections set forth particularized requirements for the installation and maintenance of water sprinkler systems, the requirements merely supplement, not supplant, the general requirement of section 75.1100-3 that all systems be maintained in a usable and operative condition. The Respondent's motion to dismiss for failure to cite the appropriate standard in the Code of Federal Regulations is, therefore, DENIED.

In his second oral motion, counsel for Respondent sought dismissal of one of the orders because, according to the Respondent, only one violation existed (Tr. 63). In support of this motion, the Respondent argues that the frozen water pipe is the sole alleged violation. I disagree. The two withdrawal orders allege separate violations. The alleged violation is not the mere existence of the frozen water pipe, but operating two separate belt drives in the absence of workable automatic fire suppression devices at each drive unit. The

motion is, therefore, DENIED. The fact that the frozen water pipe was related to both alleged violations will be considered in the assessment of an appropriate civil penalty if the violations are found to have occurred as alleged. Additionally, the validity of the order of withdrawal is not at issue in this civil penalty proceeding. See Jewell Ridge Coal Corp., 3 IBMA 376, 81 I.D. 624, 1974-1975 OSHD par. 18, 901 (1974); Eastern Associated Coal Corp., 1 IBMA 233, 79 I.D. 723, 1972 OSHD par. 15,388 (1972).

2) Occurrence of Violations

On February 1, 1977, MSHA inspector Sidney E. Valentine conducted an inspection at the Respondent's Meadow River No. 1 Mine. He issued two 104(c)(2) orders citing violations of 30 CFR 75.1100-3 as to inoperable water sprinkler systems for the No. 1 and No. 2 belt drives(FOOTNOTE 2) (Exhs. M-6, M-8). The orders stated that the water sprinkler system, installed as automatic firefighting equipment, for the two belt drive units were "not maintained in operating condition in that, the main water supply for the mine was frozen and water was not provided for the system" (Exhs. M-6, M-8). The orders also stated that "Mine management knew this condition existed and was trying to thaw the water supply," but continued to operate the belt conveyors in spite of the lack of water for the automatic firefighting equipment (Exhs. M-6, M-8).

The water supply line, a 6- to 8-inch diameter pipe (Tr. 46), was frozen where the pipe enters the mine (Tr. 27). The frozen line supplied water to both sprinkler systems in the form of a "T" unit (Tr. 41, 42). Although the supply line was equipped with a drip valve to help prevent freezing (Tr. 72, 73), it was unable to prevent freezing on February 1, 1977, as the temperature was -25 degrees Fahrenheit. On the day of the orders, approximately 50 percent of the mines in the vicinity were closed due to cold weather (Tr. 73).

The belt conveyor drives for the No. 1 and No. 2 belts are approximately 3 to 6 feet apart (Tr. 30). Two orders were issued because: 1) each belt drive is a separate piece of equipment, even though both sprinkler systems were rendered inoperable by the same frozen pipe (Tr. 30, 31, 41), and, 2) both belts were moving (Tr. 26, 36). Coal had not been mined that day, and coal was not being transported on the conveyor belts (Tr. 35, 36, 74).

The No. 1 and No. 2 conveyor belts dump onto a third belt, known as the slope belt (Tr. 79). All three belts operate on an automatic sequence start system (Tr. 70). Engaging the slope belt automatically starts a sequence, thereby starting the No. 1 and No. 2 conveyor belts

(Tr. 70). At the time the orders were written, the system was not equipped with either a switch or other device that would have enabled the operator to use the slope belt without activating the No. 1 and No. 2 conveyor belts (Tr. 80). The operator was using the slope belt at intermittent intervals to transport ice chips from inside the mine (Tr. 70). The transported ice had been chipped from frozen waterlines in order to provide the necessary access to the lines to thaw them out (Tr. 70).

The evidence in the record establishes that the No. 1 belt drive unit and the No. 2 belt drive unit were separate pieces of equipment (Tr. 29-30). Both pieces of equipment were operating at a time when the automatic fire suppression devices were inoperable (Tr. 34). I therefore conclude that the violations alleged in Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV) have been established by a preponderance of the evidence. 29 CFR 2700.48.

3. Gravity of the Violations

The inspector testified that if a fire occurred while the fire suppression equipment was inoperable, the miners would have been subjected to a smoke inhalation hazard (Tr. 26). The area was on intake air, but he did not know whether the air went to the face area (Tr. 26). He classified death or injury as "probable" (Tr. 28). At first, he estimated that approximately 30 miners were exposed to the hazard (Tr. 28). However, he admitted under cross-examination that he did not count them, and that the number could have been much lower than 30 (Tr. 42-43).

However, the inspector's testimony reveals that a fire hazard would have been present only if coal had been transported on the belt conveyors (Tr. 38). He stated that no fire hazard was present when the orders were issued (Tr. 38).

The evidence in the record confirms the inspector's opinion that no hazard was present. Coal was not being mined when the orders were issued, and coal was not being transported on the conveyor belts (Tr. 35, 36, 74).

According to the inspector, the problem was not something along the belt catching fire, but something at the belt drive catching fire due to friction (Tr. 37). Friction could have ignited both coal on the belt and any accumulations that happened to be present near the belt heads (Tr. 37-38). Although no coal was on the belts when the orders were issued, there was some coal beneath the belt drives (Tr. 37). It was not touching the belt drive (Tr. 37). However, the probability of friction was minimized by the presence of operable slippage rollers (Tr. 44, 69), devices which prevent ignition by preventing friction (Tr. 69). In addition, the belts were made of flame-resistant material (Tr. 51). The inspector found no problem

with the motor or with the wires leading to the motor (Tr. 50). Two fire extinguishers and 10 packs of rock dust were located at the belt heads (Tr. 71, 72). The fire extinguishers were operable (Tr. 46-47).

Based on the foregoing, I conclude that no gravity was associated with the two violations.

4. Negligence of the Operator

The No. 1 and No. 2 conveyor belts automatically engaged when the slope belt was activated (Tr. 70). The only way to stop the two subject belts while the slope belt was working was to unhook some wires (Tr. 80). The slope belt was used only intermittently on February 1, 1977, and only to transport ice out of the mine (Tr. 70, 79).

The assistant mine foreman knew that water was not available for fire protection at the belt head (Tr. 24, 28, 31). The belts should not have been operated while the waterline was frozen (Tr. 28). The operator should have known of the condition's existence because the mine foreman knew the waterline was frozen and that the belts were operating (Tr. 24-26).

Additionally, the fact that the operator was using the belts only to remove ice from the mine on an abnormally cold day, and the fact that the abnormally cold weather rendered the automatic fire suppression system inoperable, indicates a low degree of negligence. This is so because such conditions were not experienced routinely in the ordinary course of the operator's mining activity.

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

5. Good Faith in Securing Rapid Abatement

Order No. 7-0041 (1 SEV) (Exh. M-6) was issued at 9:15 a.m. and terminated at 4:05 p.m. (Exh. M-7). Order No. 7-0042 (2 SEV) (Exh. M-8) was issued at 9:20 a.m. and terminated at 4 p.m. (Exh. M-9). The inspector testified that the operator abated the violation as quickly as possible (Tr. 29).

Mr. Fred Copen, the Respondent's maintenance superintendent at the mine, testified that his men were working on the condition when the inspector arrived (Tr. 74). After they had chipped through the ice and reached the waterline, they used electric heaters to thaw the pipes (Tr. 74, 78).

I therefore conclude that the Respondent demonstrated the utmost good faith in securing a rapid abatement of the violation.

C. Order No. 7-0140 (1 HRB), February 15, 1977, 30 CFR 75.200

On February 15, 1977, MSHA inspector Henry R. Baker inspected the Respondent's Meadow River No. 1 Mine. At 9:25 a.m., he issued the subject withdrawal order for an alleged violation of the mandatory safety standard embodied in 30 CFR 75.200(FOOTNOTE 3) (Tr. 97, Exh. M-12). The Petitioner contends that the approved roof control plan for the Respondent's Meadow River No. 1 Mine (Exh. M-13), in effect on February 15, 1977, was not being observed in that the temporary roof supports had not been installed properly. The Respondent's affirmative defense asserts that installation of the temporary supports, spaced according to Diagram No. 1 of the roof control plan, would have required the Respondent to violate that provision of the plan which requires all posts to be installed on solid footing,(FOOTNOTE 4) and, since the area had been "dangered off," no violation can be found. The question presented is whether the parties have met their respective burdens of proof under the rule set forth by the Interior Board of Mine Operations Appeals in Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975). According to the Board:

> [S]ince [MSHA] has the burden of proof where the violation of a mandatory health or safety standard is in issue, it

~731

> must not only establish a prima facie case under [Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(d)] in a penalty proceeding, but under the regulation, it must also preponderate over any rebutting evidence adduced by the operator in order to prevail.

4 IBMA at 101, 102.(FOONOTE 5)

In a footnote to the above-quoted passage, the Board further stated:

> In penalty cases, the Government's statutory obligation to establish a prima facie case is limited only to establishing the existence of a violation. Such obligation does not relate to affirmative defenses, especially as they concern claims of mitigation based upon the criteria for assessing a penalty once it is determined that a violation occurred.

4 IBMA at 102, n. 4.

The evidence adduced at the hearing, to which the above-quoted standards must be applied, reveals the following: Inspector Baker testified that in the northwest mains section, the second open crosscut right outby the face off No. 6 entry had been holed into the No. 7 entry (Tr. 90-91, Exh. M-12). The inspector stated that the approved roof control plan (Exh. M-13) was not being complied with in that the first temporary roof supports, which had been installed after the completion of the continuous miner runs (Exh. M-12), were located 12 feet inby the last permanent roof support (Tr. 90-91, 94, 99, Exh. M-12). According to the inspector, this did not comply with Drawing No. 1 of the approved roof control plan, which indicates that the first temporary support should be installed not greater than 5 feet inby the last permanent support (Tr. 91, 92, Exh. M-13). The source of the spacing and timing requirements is paragraph No. 2, located adjacent to the scale drawing (Tr. 92), which states, in pertinent part:

> Temporary supports in row (A) shall be installed after the first run is completed and prior to the commencement of the second run. Temporary supports in rows (B) and (C) shall be installed within one hour after completion of the run and prior to bolting. Temporary supports shall be installed, on 5-foot maximum centers, to within five feet of the ribs and face or the nearest permanent support.

See also (Tr. 92, 93-94). The 12 feet was measured from the small blocks in the drawing, which indicate permanent supports, to the circles, which indicate the first row of temporary supports (Tr. 95, Exh. M-13, Drawing No. 1). The inspector obtained an accurate measurement of the distance by tying his cloth measuring tape to a hammer, and throwing the hammer into the first temporary support (Tr. 143-144).

The inspector noticed a slope in the floor of the No. 7 entry adjacent to the area where it had been cut through from the crosscut. He characterized this slope as a "slight offset," i.e., there was an offset from a high point in the No. 7 entry to a low point in the crosscut (Tr. 132, 148).

Although no one explained to the inspector why the temporary supports had not been installed (Tr. 95), he speculated that the presence of water in the subject area might have been the reason (Tr. 95). The water was located in the crosscut near the area where it had been holed through into the No. 7 entry (Tr. 96). Additional water was not running into the area at the time the violation was observed, but the inspector admitted that additional water could have been seeping in from the bottom of the mine (Tr. 135). He did not know the source of the water (Tr. 96). The inspector did not know the depth of the water (Tr. 96), as he had no way of accurately measuring the depth (Tr. 133). He further testified that the area had not been "dangered off"

(Tr. 95), but admitted that he could have missed the danger sign (Tr. 152).

According to the inspector, the presence of water would have had no bearing on the installation of temporary supports except that the person installing them would have had to wade into the water (Tr. 96). However, he admitted under cross-examination, that gob could have been present at the bottom of the slope underneath the water, and that such gob would be very loose (Tr. 133). A man wading into the water, not knowing either whether gob was present or the precipitousness of the slope, could have been exposed to danger (Tr. 134). Of major significance to the Respondent is the inspector's testimony, under cross-examination, that gob is not solid footing (Tr. 134). According to the inspector, the roof control plan requires posts to be set on solid footing. Attempting to place the temporary supports above anything other than solid footing would have violated the roof control plan (Tr. 134). The gob would have to be cleaned out before setting the posts into place (Tr. 134).

Mr. Randolph R. Skaggs testified as the Respondent's defense witness. Mr. Skaggs was the continuous miner operator who had holed through the crosscut from the No. 6 entry into the No. 7 entry (Tr. 154-155). However, he did not recall whether he had made the cut on the day the order of withdrawal was issued (Tr. 166-167). The continuous miner operator, on the shift previous to Mr. Skaggs' cut, had cut approximately 3 feet below the coal seam into the floor of the crosscut (Tr. 154, 170). A stream of water was coming from the face of the No. 6 entry. The water flowed into the subject crosscut, collecting in the depression in the mine floor caused by the operator on the previous shift (Tr. 170). The water prevented a person from seeing the bottom of the depression (Tr. 155).

According to Mr. Skaggs, he made one run, establishing a cut for air purposes (Tr. 155). He described the cut as 10-1/2 feet wide and approximately 13 feet deep (Tr. 155, 161-162, 169).(FOOTNOTE 6) He thereupon backed the miner out of the crosscut, bringing it to rest in

the No. 6 entry (Tr. 155, 170). The depth of the water prevented him from proceeding inby the last permanent support to install the temporary supports (Tr. 155-156) for the following reasons: The miner acts as a dam causing the water to collect at the lefthand rear portion of the machine (Tr. 155). While backing the miner out of the area, water flowing downhill will rush to the face area (Tr. 155). As the muddy water prevents one from seeing the bottom, it would have been dangerous to attempt installation of the temporary supports (Tr. 156). The muddy water prevents one from determining the condition of the bottom, i.e., whether it is uneven or whether loose material is present (Tr. 156).

He testified that after backing the miner out of the crosscut (Tr. 155), he dangered off the area. This was accomplished by using a piece of chalk to write the word "Danger" on a half-header and subsequently propping it at the mouth of the place using a rock (Tr. 157-159). A half-header measures approximately 18 inches by 7 inches (Tr. 158). This makeshift sign was intended as a temporary measure. However, Inspector Baker testified that he did not think that the makeshift danger sign could not have been in the location described by Mr. Skaggs without the inspector seeing it (Tr. 179-180). Mr. Skaggs had testified previously that the sign could have been removed by someone (Tr. 161). Additionally, the inspector read the preshift report before entering the mine, and did not see anything about the dangered-off area. He stated that it was possible that he could have overlooked it (Tr. 138).

According to Mr. Skaggs, the area could not have been timbered because the timbers could not have been placed on a firm foundation--there was too much gob in the face (Tr. 156-157). Mr. Skaggs did not know when the condition was abated (Tr. 165). However, when he returned to the area during his next working shift, the water had been pumped out, the area had been cleaned, and temporary supports had been installed (Tr. 165).

After having backed the continuous miner out of the crosscut and into the No. 6 entry, Mr. Skaggs and his helper proceeded to the No. 7 entry where the helper placed temporary supports at the mouth of the crosscut (Tr. 171-175). It is the Respondent's contention that these supports were the ones mentioned by Inspector Baker in

his order of withdrawal. The inspector had testified that the temporary supports could have been set from the No. 7 entry side of the crosscut (Tr. 132).

The foregoing evidence reveals that the Petitioner has not established a violation of the roof control plan in accordance with the description in the subject order of withdrawal and thus has not met the burden of proof rule set forth in the above-quoted passages from Zeigler Coal Company, supra.

The order of withdrawal essentially alleges that the roof control plan was not followed in that the crosscut had been holed into the No. 7 entry and the temporary roof supports had been installed 12 feet inby permanent roof supports (Exh. M-12). Thus, the order indicates that the alleged violation relates to the location of the temporary supports rather than to the lapse of time since the area had been last cut. The order, on its face, seems to infer that the person setting the temporary supports may have gone more than 5 feet out from under the permanent supports to set the temporary supports, which would have been a violation of the plan (Exh. M-13, p. 7, par. 5). The evidence presented by the miner operator clearly showed that such was not the case since those supports were set from the other end of the crosscut from a permanently supported area in the No. 7 entry.

After presentation of all of the evidence, it appeared that the only violation that could have occurred related to the question as to whether there was too much time that elapsed between the last cut of coal, and the time the inspector arrived at the area, without supports.

However, such an alleged violation was not described in the order. This order was written under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970). Section 104(e) of that Act required, inter alia, that orders shall contain a detailed description of the condition or practice which constituted a violation of any mandatory safety standard. The detailed description is particularly important so that the operator will know what the actual violation is and what must be done to correct the problem and not repeat the violation again. The actual wording of the order would not inform the operator that the time lapse was the actual alleged violation.

Since the evidence now shows that there was no violation as relates to the position of the temporary supports, it must be held that a violation of 30 CFR 75.200 has not been proved under this order.

Even if it were argued that the order can be interpreted to allege a violation of some time requirement as to the installation of temporary supports, it cannot be held that a violation has been proved.

As to the time requirements, Drawing No. 1 of the roof control plan requires, in pertinent part, that:

> Temporary supports in row (A) shall be installed after the first run is completed and prior to the commencement of the second run. Temporary supports in rows (B) and (C) shall be installed within one hour after completion of the run prior to bolting. Temporary supports shall be installed on 5-foot maximum centers, to within 5 feet of the ribs and face or the nearest permanent support. [Emphasis added.]

The above-quoted passage states that the temporary supports in row (A) must be installed after the completion of the first run and prior to commencing the second run. It is arguable that this language can be interpreted as excusing the installation of temporary supports after the completion of the first run as long as those supports are installed prior to beginning the second run. As only one run had been completed in the present case, it could be argued that the temporary supports did not have to be installed immediately following the completion of the first run as long as they were installed prior to the commencement of the second run, regardless of the amount of time elapsing between runs. However, this interpretation is contrary to the tenor of 30 CFR 75.200, which seeks to protect persons from roof and rib falls.

An interpretation of the roof control plan would require the installation of temporary supports, under the facts presented herein, within a reasonable time after completion of the run. The above-quoted passage from Drawing No. 1 reveals that the plan's minimum requirements envision the normal mining sequence in entries, rooms or crosscuts as consisting of two runs. In the course of normal mining operations, the temporary supports in row (A) would be installed immediately after completion of the first run so that the second run could be commenced as quickly as possible. Under such circumstances, it is readily apparent why the requirement that temporary supports be installed within 1 hour after completion of the run, is mentioned only in connection with the installation of temporary supports in rows (B) and (C). This warrants the conclusion that, where only one run is made, the row of temporary supports must be installed within a reasonable time after its completion.

The key question, for purposes of the present case, is what constitutes a reasonable time. Inferences drawn from the testimony of the witnesses reveal that the conditions existed at 4 p.m., February 14, 1977, 17 hours and 25 minutes prior to issuance of the order of withdrawal. Mr. Skaggs' testimony establishes that he made the subject run in the crosscut and had installed the temporary supports (Tr. 154, 156, 171-175), but he could not recall the day on which he made the run (Tr. 166-167). He could not recall whether he made the run in the morning or during the afternoon (Tr. 167-168).

He was working straight day shift around February 15, 1977 (Tr. 166), beginning work at 8 a.m. (Tr. 167). Inspector Baker testified that the area in question had not been cut on the morning of February 15, 1977, because it would have required 45 minutes to 1 hour to make the cut (Tr. 136). He had followed the day crew into the mine, and they "certainly didn't have time to make this particular mine site" (Tr. 136). Since the run could not have been made on the February 15, 1977, day shift, and since the miner operator who had made the run was working straight day shift, it can be inferred that the condition had existed for at least 17 hours and 25 minutes prior to the issuance of the order.

Whether it was unreasonable to permit the condition to exist for 17 hours and 25 minutes cannot be determined from the record. The plan does not specifically set forth a time within which the first row of temporary supports is required to be installed, and considering the general provisions of 30 CFR 75.200, there is no evidence to show that the conditions of the roof here indicated any particular time limit within which the temporary supports needed to be installed. The alleged inadequately supported area was 10-1/2 feet wide and approximately 13 feet deep (Tr. 155, 161), yielding an area of approximately 136.5 square feet. The record contains no evidence as to roof conditions in the crosscut. The record does show that the condition of the bottom of the area where the temporary supports had to be installed presented a precarious situation for any miners to make the required installation. It is clear that the water had to be removed first and the gob in the bottom had to be cleaned so that firm footing would result. Faced with this problem, the miner operator did place a danger sign in the area when the run was completed. This danger sign may have disappeared subsequently. In view of the fact that the roof control plan had no specific time limit for the installation of the supports in question, since we must apply a test of reasonableness of time, all of these surrounding circumstances must be considered. Under all of these circumstances, it cannot be inferred that the area remained without temporary supports for an unreasonable time after completion of the first run.

Therefore, I conclude that MSHA has failed to establish a violation of 30 CFR 75.200 by a preponderance of the evidence.

D. Order No. 7-0187 (1 HRB), February 17, 1977, 30 CFR 75.400

1. Motion to Dismiss

At the conclusion of MSHA's case-in-chief, the Respondent moved to dismiss on the grounds that MSHA had failed to establish a prima facie case for a violation of 30 CFR 75.400 within the meaning of Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977). A ruling will be made based upon the evidence in the record at the time the motion was made.

The Commission's Interim Procedural Rules do not set forth standards governing the disposition of motions to dismiss. However, standards are set forth in Rule 41(b) of the Federal Rules of Civil Procedure. Although Rule 41(b) is not applicable specifically to administrative proceedings, it provides a useful reference point in ruling upon the Respondent's motion. The rule reflects the most recent statement of the courts' collective experience in deciding such motions.

The Respondent contends that on the facts and the law, the Petitioner has not established a claim for relief. See generally, 5 J. Moore, Federal Practice, par. 41.13[1] at 41-170, 41-171 (1978). The motion must be denied if, upon the facts and the law in the record at that time, the existence of a violation is shown. See generally, 5 J. Moore, Federal Practice, par. 41.13[1] at 41-172, 41-173 (1978). In light of the remedial purposes of the Act, the motion should be granted only in "unusually clear" cases. See generally, Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 793, n. 19 (5th Cir. 1975); White v. Rimrock Tidelands, Inc., 414 F.2d 1336, 1340 (5th Cir. 1969).

The evidence in the record at the conclusion of the Petitioner's case-in-chief reveals the following: On February 17, 1977, MSHA inspector Henry R. Baker conducted an inspection at the Respondent's Meadow River No. 1 Mine. He observed accumulations of float coal dust (Tr. 318-319, 369, Exh. M-14), and thereupon issued Order of Withdrawal No. 7-0187 (1 HRB) for a violation of the mandatory safety standard embodied in 30 CFR 75.400 (Exh. M-14). He ascertained the substance was float coal dust by its texture and color (Tr. 320). He ran his hammer through the substance and observed that it was powdery (Tr. 320). The float coal dust was located primarily along the No. 1 belt conveyor and around the belt drive (Tr. 324). There was no problem along the No. 2 conveyor belt.

The No. 1 belt conveyor was on the left side of the mine slope bottom, and the No. 3 belt conveyor was at a right angle to the No. 1 belt conveyor and dumped coal onto the No. 1 belt conveyor. Both the No. 1 belt conveyor and the No. 2 belt conveyor dumped coal into a surge bin (Tr. 341). The No. 1 belt was on the left side of the bin, and the No. 2 belt was on the right side of the bin (Tr. 323). The bin was approximately 30 feet deep (Tr. 323). A feeder, located at the bottom of the bin, relayed the coal to the slope belt for transportation to the preparation plant on the surface (Tr. 319, 321-322). The coal on the No. 1 and No. 2 conveyor belts dropped vertically into the bin (Tr. 323). At least part of the float coal dust arose as coal falling into the bin struck the coal already stored there (Tr. 324). The inspector testified that Mr. Dennis Kyle, a mine foreman, mentioned during the inspection tour that due to the high velocity air currents coming up through the surge bin, a float coal dust problem existed in the subject area of the mine (Tr. 333). This conversation took place after the order was issued,

but before it was terminated, i.e., between 11 a.m. and 1:30 p.m. (Tr. 330-331). The inspector did not observe float coal dust rising from the bin (Tr. 326). He conducted no air velocity tests (Tr. 333). The mine was producing coal and the No. 1 belt drive was operating when the inspector observed the condition (Tr. 325-326).

Directly adjacent to the bin around the No. 1 belt drive, the float coal dust was 3 inches deep, and the farther away one went from the bin, the less in depth the float coal dust became until it was too shallow to measure (Tr. 319, 325-326, 333). It ran the entire length of the No. 1 belt and extended as far as the No. 3 belt conveyor drive, a distance of 300 feet (Tr. 325, Exh. M-14). It was under the belt and along the sides (Tr. 325). Accumulations were present also on the water pipes installed around the surge bin belt drive, and on the frame of the bin (Tr. 319). He did not measure the width of the accumulations, but they extended from rib to rib in places. He stated that with regard to the type of mining used, the entry is approximately 20 feet wide (Tr. 333-334). The area had been rock dusted at some point in time, but the float coal dust accumulations were atop the rock dust (Tr. 319-320, 337, 368). The condition was readily observable (Tr. 335). The accumulations were at least 1,000 feet from the face (Tr. 337).

A certain amount of float coal dust would accumulate during normal operations (Tr. 320, 326, 374-375). However, the accumulations were described by the inspector as abnormal (Tr. 374-375). According to the inspector, the condition should have been known to the operator because it could not have developed during one shift (Tr. 338, 342-343). The primary factor was the depth (Tr. 338-339). He expressed the view that it would have required two shifts for the condition to develop (Tr. 371). It should have been observed during the required examinations (Tr. 342-343), but it was not noted on the preshift examiner's report (Tr. 339).

The inspector identified the belt drive and the mine track system's trolley wire as potential ignition sources (Tr. 334, 339, 380-381). The mine track was described as a potential source of ignition at the surge bin (Tr. 339). Although the track system was relatively close to the No. 1 belt conveyor, it did not run parallel to it (Tr. 380). It ran in the opposite direction (Tr. 380). He stated that the trolley wire came to within approximately 35 to 50 feet of the No. 1 belt drive (Tr. 381). He stated that a remote possibility existed that arcing could have an effect upon the float coal dust at the No. 1 belt drive, even though it was 35 to 50 feet away from the possible ignition source (Tr. 381).

An explosion could have affected the entire mine. If an explosion had blown out the permanent stoppings, the ventilation system could have been interrupted, causing smoke and flames which could have scattered (Tr. 358-360). The mine did not have a history of

methane liberation (Tr. 335). The inspector did not detect any methane (Tr. 367). Float coal dust would have to be suspended in the air before an explosion could have occurred (Tr. 367). There was not a high quantity of dust in the air, a fact attributable to the ventilation (Tr. 367-368). A 10-pound fire extinguisher and a sprinkler-type fire suppression system were located at the belt head (Tr. 372). Part of it was operable and part of it was not (Tr. 372). There was at least one fire hose outlet present in this area (Tr. 377).

The inspector did not remember whether the coal falling into the surge bin was wet (Tr. 324). To the best of his recollection, the area in which the accumulations were observed was not wet in any places (Tr. 366).

The area had been rock dusted at some point in time (Tr. 319-320, 339). Float dust or coal dust was atop the rock dust (Tr. 319-320, 368). Based on the depth and extent of the float coal dust, the inspector expressed the opinion that no rock dusting had been done in the area during the day shift prior to his arrival on the scene (Tr. 379, 382). However, he had no personal, firsthand knowledge as to whether cleaning or rock dusting had occurred (Tr. 382). He did not know how often the belt areas were rock dusted at the Meadow River No. 1 Mine (Tr. 379).

The inspector did not recall any written procedure in effect at the mine for dealing with float coal dust (Tr. 378-379). He testified that the operator's cleanup program pertains to cleanup and rock dusting primarily on the section. The only written cleanup program he had seen pertained to the face area. He thought the belts were cleaned as needed (Tr. 339-340). He was certain that beltmen were assigned to maintain the belt areas, a duty which included cleanup as necessary (Tr. 340).

In his opinion, the belt area was an active working place in the mine. People worked in the area examining the belts and making repairs (Tr. 336).

The foregoing is a summary of the testimony in the record when the Respondent moved to dismiss.

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."

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

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22, 328 (1977), the Board of Mine Operations Appeals held that the mere presence of a deposit or accumulation of coal dust or other combustible materials in active workings of a coal mine is not, by itself, a violation.

The elements of MSHA's prima facie case, as set forth in Old Ben, 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.

8 IBMA at 114-115.

The Respondent argues that Old Ben imposes upon Federal coal mine inspectors a specific duty to make inquiries as to the cleanup program in effect at the mine, and a duty to determine when the regular cleanup would occur (Tr. 384). The Respondent further contends that inspectors must determine that the accumulation is unusual, that the operator willfully failed to record the accumulations in the preshift books, that the mine operator has been negligent in failing to clean up the area, and must establish that the lack of cleanup is unusual (Tr. 384). I disagree.

The key elements for establishing a prima facie case are that the operator failed to undertake cleanup operations within a reasonable time after he either knew or should have known of the accumulations' existence. According to the Board:

> Application of this time factor necessarily imposes a responsibility upon the coal mine inspectors to ascertain, before issuing a citation under 30 CFR 75.400, the time when the operator or its agents discovered, actually or constructively, the existence of the accumulation of combustibles. This may be done by the use of logical conclusions drawn from the circumstantial evidence. An easier method might be, however, simply asking the miners and foremen familiar with the mining operations in the

> active workings when and how the accumulation occurred and when and how, if at all, it was discovered. It is, of course, also important that the inspectors further ascertain what was done by the operator, if anything, after discovery of the accumulation. Did the operator immediately undertake to clean up the accumulation? Was it ignored completely? Was the operator aware of the accumulation, but, rightly or wrongly, decided that it should be handled routinely through the regular cleanup program? All of these questions need due consideration and resolution before deciding to issue a citation charging a violation of the subject standard. If the inspector does decide to issue such a citation, his determinations with regard to time of discovery and time of inauguration of cleanup by the operator, it seems to us, are key elements of, and should be included in, the factual description of the conditions and practices which are alleged to constitute a violation. In making these detailed factual evaluations, the inspectors, hopefully, will not lose sight of the controlling inquiry under section 304(a) of the Act - whether the operator is making every reasonable effort to minimizing the accumulations of combustible material.

8 IBMA at 113-114.

A cursory reading of this passage from the Board's decision in Old Ben could lead to the conclusion that it imposes upon the inspector the unqualified duty to direct specific inquiries to mine employees as to these areas before issuing a "citation."(FOOTNOTE 7) This question was resolved subsequently by the Board. On September 23, 1977, MSHA filed a motion for reconsideration of the Board's decision in Old Ben. In the course of its memorandum opinion denying the motion, the Board stated:

> [W]e refer counsel to our decision (8 IBMA 113-14) which sets out in very elementary terms the manner in which an inspector might go about collecting his evidence. We do not feel that this direction to the inspectors is unreasonable or that it will render the inspectors' job impossible. On the contrary, we strongly feel that this

> simply provides a useful guideline for the MESA [MSHA] inspector and, if properly utilized, would go a long way toward making the mines safer and the operators more aware of their obligations under the standard set forth in Section 304(a) of the Act. [Emphasis added.]

8 IBMA at 199.

The underlined portions of this passage indicate that the statements made at 8 IBMA 113-114 were merely suggested guidelines, not commands. Additionally, the Board had stated that inspectors could base their determinations of the operator's actual or constructive knowledge of the presence of combustible accumulations in active workings on logical conclusions drawn from circumstantial evidence. The evidence set forth above reveals a logical basis for the inspector's conclusion that the operator had constructive knowledge of the accumulations' presence. The evidence also reveals that the inspector gave an opinion as an expert that the accumulations, which were extensive, had existed for more than one shift. Based upon this, it appeared at that stage of the case that the operator had failed to clean up the accumulations within a reasonable time after it should have known of them.

Accordingly, on the facts and the law as set forth herein, the motion to dismiss is DENIED.

2. Occurrence of Violation

At the conclusion of Inspector Baker's testimony, which is set forth in Part V(D)(1), supra, Mr. Darrell Pomeroy, the union conveyor belt examiner for Sewell Coal Company, appeared as a witness for the Respondent. Although Mr. Pomeroy was not charged by the Respondent with the duty of removing accumulations, he was required to conduct examinations and report problems.

Mr. Pomeroy had examined the preshift books on the surface to determine whether any areas needed checking (Tr. 395, 405). He examined the belt examiner's report filled out by the belt examiner on duty during the prior shift (Tr. 395, Exh. O-4A). It noted spillage at the No. 2 tailpiece and noted the need for rock dusting at the No. 3 belt head (Tr. 405, Exh. O-4A). The report did not note any problems in the areas cited by the order of withdrawal. The belt examiner's report filed at the conclusion of the 4 p.m.-12 midnight shift, February 16, 1977 (Exh. O-4 also indicates the absence of problems in the area in question).

He viewed the area in question at approximately 8:10 a.m. on February 17, 1977 (Tr. 390-391). The slope bottom was well rock dusted (Tr. 391). The pipes in the area had been sprayed with water, but had not been rock dusted (Tr. 391). He testified that

the area adjacent to the surge bin was dry, but that the area was wet from 40 feet behind belt drive No. 1 "on up" (Tr. 392).

Mr. Pomeroy testified that the accumulations cited by the inspector had to have occurred between 8 and 11 a.m. because they were not present when he examined the area at 8:10 a.m. (Tr. 391, 407).

According to Mr. Pomeroy, the Respondent had a cleanup program in effect on February 17, 1977 (Exh. O-3). The cleanup program stated, in pertinent part, as follows:

> 2. Program for cleaning mine belts:
>
> On day shift we will have one man examining belts, three men will clean belts where needed now. After we get the belts fairly cleaned throughout the mine we will assign certain belts to certain belt cleaners each day.
>
> 1 belt examiner on evening shift
>
> 2 belt cleaners on evening shift
>
> 2 belt cleaners on owl shift
>
> Same prodedure [sic] will be followed on the evening and owl shift as is being done on the day shift.

According to Mr. Pomeroy, float coal dust is handled according to the severity of the problem. If the accumulation was such as to pose an immediate danger, either the safety director or the mine foreman would be contacted and the problem would be corrected as quickly as possible. If the problem did not pose an immediate danger, it would be noted in the belt book and alleviated during the next shift (Tr. 406-407). In short, the area was cleaned as often as conditions warranted (Tr. 415).

The cleanup man assigned to the area automatically carried out the cleanup procedure (Tr. 416). The area for which he was responsible covered the slope bottom, the area around the surge bin, the No. 1 and No. 2 belt heads, the area adjacent to the No. 1 and No. 2 belts, and the point at which the No. 3 belt dumped onto the No. 1 belt. The entire area encompasses not greater than 300 feet (Tr. 416). Rock dusting was used to handle float coal dust along the conveyor belt (Tr. 417-418).

The elements of MSHA's prima facie case have been set forth previously in this decision. In brief, Old Ben Coal Co, 8 IBMA 98, 84 I.D. 495, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), held that the mere presence of a deposit or accumulation of coal dust or

other combustible materials in active workings of a mine is not, by itself, a violation. MSHA must also establish that the operator knew or should have known of the presence of the accumulation, and that the operator failed to clean up, or undertake to clean up, the accumulation within a reasonable time after discovery was or should have been made.

There can be no doubt as to the presence of an accumulation of combustible material in the active workings as described in the testimony of Inspector Baker.

A question is presented as to whether the Respondent can be charged with knowledge of the accumulations' presence. The belt examiner's reports filed at the conclusion of the two previous shifts indicated an absence of problems in the subject area. The area was free of accumulations when it was inspected by the union belt examiner at 8:10 a.m. on February 17, 1977, pursuant to the cleanup plan.

However, there can be no doubt that a substantial accumulation of float coal dust developed in the subject area between 8:10 a.m. and 11 a.m., an accumulation sufficient in both depth and extent for the inspector to opine that it had existed for approximately two shifts (Tr. 371).

The testimony of both Inspector Baker and Mr. Pomeroy reveals that the bin area posed problems as to float coal dust (Tr. 333, 410). During the course of his conversation with mine foreman Dennis Kyle, the inspector learned that the high velocity air coming up through the bin itself was presenting a problem in the subject area (Tr. 333, 338). The air came from a leakage in the airlock doors between the bin and the entrance to the slope (Tr. 338). There was a high velocity of air in the subject area during the course of the inspector's examination (Tr. 368).

The testimony reveals that Respondent had been experiencing ongoing problems with float coal dust accumulations in the subject area of the mine as a direct consequence of high velocity air currents moving through the bin. Excessive float coal dust accumulations were a foreseeable consequence of this problem, and, as such, the Respondent must be charged with constructive knowledge of the presence of the float coal dust accumulation cited by the inspector in the subject order of withdrawal. This conclusion results partly from the fact that the extent and depth of the float coal dust was extreme and since the management personnel knew that an unusual problem existed at this place, it should have employed unusual methods to combat the problem.

As to the issue of reasonable time, the Board stated:

> As mentioned in our discussion of the responsibilities imposed upon the coal mine operators, what constitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

8 IBMA at 115.

The Board further stated:

> With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation, it is our view that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shift, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the-ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the unusual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the Act upon a coal mine operator to protect the safety of the miners.

8 IBMA at 111.

In a subsequent opinion, Old Ben Coal Company, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977) (denying Government's motion for reconsideration), the Board stated:

> 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 violation of Section 304(a). 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 by regular cleanup, in eliminating the hazard. [Emphasis in original.]

8 IBMA at 198.

The foreseeability of the problem, coupled with the testimony describing the operation of the cleanup plan, reveal that the cleanup plan in effect on February 17, 1977, was inadequate to deal with float coal dust accumulations in the subject area of the mine. The fact that a cleanup man had been assigned to a territory which encompassed the subject area does not, by itself, indicate that the plan was adequate (Tr. 416). In fact, the testimony of Mr. Pomeroy reveals that the cleanup man's activities were not adequately supervised. According to Mr. Pomeroy:

> Q. And who is it that does the cleanup on your shift?
>
> A. John McClung. He's a belt cleaner.
>
> Q. And the foreman directs him to do this?
>
> A. He don't have to direct him. It's just our procedure. He knows what he's supposed to do. That's his area.

(Tr. 415-416).

The inadequacy of the cleanup plan, the depth and extent of the accumulation, the explosive potential of float coal dust, and the proximity of the accumulation to potential sources of ignition, all indicate that the float coal dust accumulation cited by the inspector was present for more than a reasonable time.

Accordingly, it is found that the occurrence of the violation described in Order No. 7-0187 (1 HRB), has been established by a preponderance of the evidence. 29 CFR 2700.48.

3. Gravity of the Violation

During the course of the hearing, official notice was taken of the fact that float coal dust in underground coal mines is recognized as a serious problem because of the potential for explosions (Tr. 357). The evidence reveals that the accumulations were heaviest near the bin, tapering to a virtually unmeasurable depth the farther one proceeded from the bin. The area was dry up to a point 40 feet from the bin, the remainder of the area cited in the order of withdrawal was wet (Tr. 392). The accumulations were sitting atop rock-dusted surfaces (Tr. 319-320, 337, 368). It was at least 1,000 feet to the nearest working face (Tr. 337). The belt conveyor drive was identified as a possible ignition source (Tr. 334). The track trolley wire also was identified as a possible ignition source (Tr. 339, 380-381), but it was 35 to 50 feet away from the accumulations (Tr. 381). The inspector classified the probability of ignition from the trolley wire as remote (Tr. 381). There was not a great quantity of float

coal dust in the air, a fact attributable to the ventilation (Tr. 367-368). The mine did not have a history of methane liberation (Tr. 335), and the inspector did not detect any methane (Tr. 367). A 10-pound fire extinguisher and a sprinkler-type fire suppression system were located at the belt head (Tr. 372). Part of it was operable and part of it was not (Tr. 372). There was at least one fire hose outlet present in the area (Tr. 377).

The belt was in operation when the inspection was made (Tr. 326), and coal production was underway (Tr. 326). The inspector could not recall whether any miners were working in the general area (Tr. 335). However, he stated that an explosion would have endangered anyone in the immediate area (Tr. 343).

According to the inspector, a serious mine explosion could have affected the entire mine. The stoppings could have been blown out thus interrupting the ventilation. A major interruption of the ventilation system is very serious because it can scatter both smoke and flames (Tr. 358, 360).

On the basis of the foregoing, it is found that the violation was serious.

4. Negligence of the Operator

It is found, as set forth in Part V(D)(2), supra, that the Respondent had constructive knowledge of the accumulations' presence. This fact, coupled with the inadequacy of the cleanup plan, and the fact that management knew that the area in question posed a real problem, but obviously didn't use sufficient means to solve the problem quickly enough, reveals that the Respondent demonstrated considerably more than ordinary negligence.

5. Good Faith in Securing Rapid Abatement

The order of withdrawal was issued at 11 a.m. and terminated at 1:30 p.m. on November 17, 1977 (Exhs. M-14, M-15, Tr. 331). The Respondent commenced abatement procedures immediately, and assigned two section crews to the task (Tr. 365).

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

VI. Size of Operator's Business

The Pittston Company produces approximately 12,036,974 tons of coal per year (Tr. 14). The Meadow River No. 1 Mine produces approximately 154,797 tons of coal per year (Tr. 14). The Meadow River No. 1 Mine is operated by the Sewell Coal Company (Part (V)(A)(2)(a)), a member of the Pittston group.

VII. Effect on Operator's Ability to Continue in Business

The Respondent introduced no evidence indicating that an assessment in this case would adversely affect the Respondent's ability to continue in business. The Interior Board of Mine Operations Appeals has held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find, therefore, that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VIII. History of Previous Violations

30 CFR Standard	Year 1 2/17/75 - 2/16/76	Year 2 2/17/76 - 2/17/77	Total
All sections	411	628	1,039
75.200	41	49	90
75.400	44	101	145
75.1100-3	7	11	18

(Note: All figures are approximations.)

As relates to the Meadow River No. 1 Mine, the operator had paid assessments for approximately 1,039 violations of regulations in the 24 months preceding February 17, 1977. Approximately 411 of these paid assessments were for violations cited between February 17, 1975, and February 16, 1976. Approximately 628 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

The operator paid assessments for approximately 90 violations of 30 CFR 75.200 in the 24 months preceding February 17, 1977. Approximately 41 of these paid assessments were for violations cited between February 17, 1975, and February 16, 1976. Approximately 49 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

The operator paid assessments for approximately 145 violations of 30 CFR 75.400 in the 24 months preceding February 17, 1977. Approximately 44 of these paid assessments were for violations cited between February 17, 1975, and February 16, 1976. Approximately 101 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

The operator paid assessments for approximately 18 violations of 30 CFR 75.1100-3 during the 24 months preceding February 17, 1977. Approximately seven of these paid assessments were for violations cited

between February 17, 1975, and February 16, 1976. Approximately 11 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

In accordance with the ruling in Peggs Run Coal Company, 5 IBMA 144, 150, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975), no consideration will be given to any violations occurring subsequent to the respective dates of violations involved in this case.

IX. Conclusions of Law

1. Sewell Coal Company and its Meadow River No. 1 Mine have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act 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. MSHA inspectors Sidney E. Valentine and Henry R. Baker were duly authorized representatives of the Secretary of Labor at all times relevant to the issuance of the orders of withdrawal which are the subject matter of this proceeding.

4. The violations charged in Order No. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3, Order No. 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3 and Order No. 7-0187 (1 HRB), February 17, 1977, 30 CFR 75.400 are found to have occurred.

5. Petitioner has failed to establish a violation of 30 CFR 75.200 as relates to Order No. 7-0140 (1 HRB), February 15, 1977.

6. The oral motions made by the Respondent during the course of the hearing are denied as contrary to the law or the facts.

7. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

X. Proposed Findings of Fact and Conclusions of Law

MSHA and Sewell submitted posthearing briefs. MSHA submitted a response to the proposed findings of fact and conclusions of law advanced by Sewell in its posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

XI. Penalties Assessed

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

Order No.	Date	30 CFR Standard	Penalty
7-0041 (1 SEV)	02/01/77	75.1100-3	$ 300
7-0042 (2 SEV)	02/01/77	75.1100-3	300
7-0187 (1 HRB)	02/17/77	75.400	5,000
			$5,600

XII. Approval of Settlement

As mentioned in Part I, supra, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding in April of 1978. Subsequent thereto, the proceeding was set for hearing. At the time of the hearing, counsel for both parties proposed settlements as to penalty assessments to be paid by Respondent as to the four alleged violations involved.

During the hearing, stipulations were entered into as to the annual tonnage of the Respondent and the individual mine. These stipulations are contained in the transcript. Exhibit No. M-1 contains a history of violations for which the Respondent had paid penalty assessments relating to the Meadow River No. 1 Mine.

Exhibit Nos. M-2, M-3, M-3A, M-4, M-5, M-5A, M-5B, M-10, M-10A, M-11, M-16, M-16A, M-16B, M-7, 0-1, and 0-2, were filed in the case file in conjunction with the proposed settlements. These documents include orders issued by inspectors and Office of Assessments' narrative statements describing the alleged violations and the reasons given by that office for the special assessments recommended in each case. In addition, these exhibits contain statements by the inspectors as to the negligence of the operator, the gravity of the alleged violations, and the good faith of the Respondent relating to abatement of the alleged violations. These exhibits also contain a form filled out by the Pittston Company, similar to an inspector's statement, and two statements outlining the Respondent's defenses with respect to two of the orders.

During the course of the hearing, counsel for both parties set forth reasons on the record as to why the penalty assessments should be in the amounts agreed to rather than the amounts set forth originally by the Office of Assessments. Each individual order of withdrawal will be set forth separately below.

Order No. 7-0012 (1 HRB), January 27, 1977, 30 CFR 75.400

Proposed assessment: $6,000. Proposed settlement: $4,500.

Of significant consideration to a settlement, are the following statements of counsel made at the hearing:

> MR. O'DONNELL: All right. The first one is Section 104(c)(2) Order of Withdrawal No. 1 HRB, which has been given by the Assessments Office the number of 7-12 and issued January 27, 1977. It cites 30 CFR 75.400. The Office of Assessments proposed a penalty for this of six thousand dollars. The primary reason that the Office of the Solicitor is recommending that the penalty be reduced or a penalty be accepted of four thousand five hundred dollars is because we consider the six thousand dollar penalty to be excessive for the facts.
>
> Pittston has also suggested and would offer testimony, if there were a hearing, that the accumulations resulted from normal operations and that the thirty inches of accumulations were mostly in isolated locations and that there was a scoop that would go down on charge from continuous running and as a result it could not be used in the clean-up program as planned.
>
> We would point out that the ventilation was good and that the area was provided with operable fire suppression devices. There was a water hose and there were fire extinguishers and rock dust present. There were no permissible violations found by the inspector on that day and the section does provide two smokefree escapeways. The accumulations were mostly loose coal rather than float coal dust and no analysis was taken by the inspector and we are of the opinion that the four thousand five hundred dollars is a reasonable penalty for this alleged violation.

(Tr. 4-5).

Also of significant consideration to a settlement, are the following statements contained in MSHA's second posthearing brief, filed March 22, 1979:

> 104(c)(2) Order of Withdrawal No. 1 HRB (7-12) which issued on January 27, 1977, citing 30 CFR 75.400 (Government Exhibit No. M-2), the parties agreed to settle, subject to the approval of the Administrative Law Judge ("Judge") for a civil penalty in the amount of $4,500.00 (Tr. 4-1). The Assessment Office had proposed a civil penalty of $6,000.00,

which the Office of the Solicitor deems excessive considering that the ventilation was adequate and the area was provided with operable fire suppression devices and a water hose, fire extinguishers and rock dust. There were no permissible violations found by the issuing Inspector, who was in the hearing room when the settlement offer was submitted by both counsel to the Judge. The Mine Operator would, if a hearing were held, offer sworn testimony that the accumulation was the result of normal mining operations, and much of it was in isolated areas of the mine. The accumulation resulted when the battery on a mine scoop discharged after continuous operation, so the scoop could not then be used in the manner provided by the clean-up program. The accumulation was loose coal and not float coal dust. Government Exhibit No. M-1 was offered and received in evidence and it is a computer printout showing paid violations issued against the Meadow River No. 1 Mine from January 1, 1970, until February 17, 1977. The document shows 1,134 violations during that period, including at pages 12 through 15 thereof a total of 148 violations of 30 CFR 75.400. The Office of the Solicitor considers the violation serious, the result of normal negligence, that the Mine Operator is a large company and can afford to pay the penalty without having its business adversely affected, that there were a substantial number of prior similar violations, and abatement was done with a normal degree of good faith. The Office of the Solicitor deems a $4,500.00 civil penalty to be an adequate and reasonable penalty under the facts shown.

Order No. 7-0024 (1 SEV), January 28, 1977, 30 CFR 75.400

Proposed assessment: $7,500. Proposed settlement: $4,500.

Of significant consideration to a settlement, are the following statements by counsel:

MR. O'DONNELL: The original assessment in that proceeding, Your Honor, was seven thousand five hundred dollars and Mr. Callahan and I have agreed to settle this for four thousand five hundred dollars. My primary reason in that one is the same as before, that I consider seven thousand five hundred dollars to be excessively high concerning the facts that there were no injuries whatsoever and so on.

Pittston has offered this information which they consider to be mitigating circumstances, that the fourteen inches of accumulation was mostly in isolated places along the coal ribs, whereas the roadways were not excessively dirty. The roadways had been scooped and processed, but the coal hadn't built up along the ribs.

The entry would have been cleaned up on cycle, but the loader had been mechanically down prior to this time.

The section is relatively new in development and was clean. The clean-up is done mostly with a loader and with a shovel. However, the scoop was removed from the No. 3 and No. 1 units for clean-up when that scoop was operable. The section again provides two smokefree escapeways. The roadways and ribs are rock dusted and a water hose and other fire fighting equipment are provided. All the equipment except the loader was provided with operable fire suppression devices and they are of the opinion that the loose coal consisted mostly of material which was pushed into the face of the No. 3 entry. We would agree about the fire fighting equipment, and when I say "we" I mean MSHA, of course.

So we are of the opinion that four thousand five hundred dollars is a substantial penalty and that it is a reasonable penalty for this violation.

JUDGE COOK: is there anything you wish to add, Mr. Callahan?

MR. CALLAHAN: No, Your Honor.

JUDGE COOK: I notice, Mr. O'Donnell, just as a matter of information, on the second sheet of Exhibit M-4 there's mention of some hydraulic oil.

MR. O'DONNELL: Yes, there was an accumulation of hydraulic oil from a mechanical failure and repairs were made on the equipment. The hydraulic oil had been deposited on the mine bottom a short time prior to the issuance of the order of withdrawal.

MR. CALLAHAN: Your Honor, if I may add to that. There was a breakdown of a piece of equipment at that precise point and that's what had happened. It lost some hydraulic oil due to the breakdown.

JUDGE COOK: All right. So considering all these facts, Mr. O'Donnell, you feel that a penalty of forty-five hundred dollars is proper in this case?

MR. O'DONNELL: I do, Your Honor.

(Tr. 12-14).

Order No. 7-0045 (2 HRB), February 1, 1977, 30 CFR 75.400

Proposed assessment: $8,000. Proposed settlement: $5,000.

Of significant consideration to a settlement, are the following statements by counsel:

> MR. O'DONNELL: This would be the same day, February 1, 1977. And at this time Inspector Baker observed loose coal and coal dust ranging in the depths indicated in this Order of Withdrawal -- and he is here in the hearing room today, I might add, prepared to testify -- and the gravity would be lessened because of the lack of production in the mine. However, there were miners in the mine at that time.

(Tr. 305).

* * * * * * *

> MR. O'DONNELL: It is often the Solicitor's primary position in entering into this settlement that the eight thousand dollars proposed by the office of assessments is excessive, and we have agreed to accept five thousand dollars as the proposed assessment for this.
>
> We do consider it to be a serious violation, but we do feel that the fact the mine was not producing is important. And we recognize that there was, from a negligence point of view, a problem. They had these pipes and the men were working on them and they had this excessively cold weather. I believe the testimony was it was way, way below zero on this day. In fact, colder than I realized West Virginia got. And this, of course, caused them a problem as to manpower and on the whole, for these reasons, we feel five thousand dollars would be a reasonable settlement.
>
> JUDGE COOK: All right.
>
> Mr. Callahan, what is your position?
>
> MR. CALLAHAN: Your Honor, we have discussed this thoroughly with the Solicitor, and we have come to the agreement that that would be a fair and acceptable settlement for this violation.
>
> JUDGE COOK: Very well.

(Tr. 307-308).

Order No. 7-0209 (1 FLD), March 7, 1977, 30 CFR 75.400

Proposed assessment: $5,000. Proposed settlement: $3,000.

Of significant consideration to a settlement, are the following statements by counsel:

> MR. O'DONNELL: Now, concerning this alleged violation, the assessment office suggested a civil penalty of five thousand dollars for it.
>
> Pittston would show that it does a section cleanup on a regular basis, the loose coal being pushed into the face area and loaded out on cycle. If the face areas are not permanently supported with roof bolts, the cleanup cannot be done until the areas are supported. And that is their position in this case, that they had done all that they could until the roof was supported. It will be Mr. Dickerson's position they did not need to push it into the face. They could have cleaned it up without doing that. Pittston has offered a suggested penalty of three thousand dollars for that in lieu of the five thousand dollars suggested by the assessment office.
>
> Our primary position -- when I say our, I mean the Office of the Solicitor -- is that three thousand dollars is a reasonable penalty for that considering the quantity of coal involved and the fact that there was no, what we would consider to be a serious violation. And we feel, as we say, the chief difference I believe in the testimony between Pittston and ourselves would be in the manner of cleanup there; did they have to push it into the face or could they clean it up previously.

(Tr. 311).

* * * * * * *

> JUDGE COOK: All right. Now, Mr. Callahan, did you have anything else to offer, or do you have anything to say concerning this proposed settlement?
>
> MR. CALLAHAN: No, Your Honor, I have nothing further. I believe the record is fairly complete on this matter.
>
> JUDGE COOK: What is your position as to the settlement?

MR. CALLAHAN: As I stated, with both settlements, Your Honor, we believe the Solicitor and I have arrived at a fair and reasonable settlement.

We both agree the original proposed penalties were excessive due to the nature of the violation and that, although there may be conflict as to whether the violation occurred and as to the seriousness of the violation, given the amount we have agreed upon, we believe it is a fair and reasonable settlement.

(Tr. 316).

This information set forth in the record, along with the information provided as to the statutory criteria contained in section 110 of the 1977 Act, has provided a full disclosure of the nature of the settlements and the basis for the original determinations. Thus, the parties have complied with the intent of the law that settlements be a matter of public record.

In view of the reasons given above by counsel for the proposed settlements, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlements will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the settlement, as outlined in Part XII of this decision, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent pay the penalties assessed in the amount of $22,600, within 30 days of the date of this decision, which figure represents the sume of the agreed-upon penalty of $17,000 assessed pursuant to the settlement agreement, and the $5,600 penalty assessed in the contested portion of this proceeding.

IT IS FURTHER ORDERED that the petition herein is DISMISSED as it relates to an alleged violation of 30 CFR 75.200, Order No. 7-0140 (1 HRB), February 15, 1977.

John F. Cook
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. On February 26, 1979, the Respondent filed a posthearing brief as to the violations alleged in Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV). In its posthearing brief, the Respondent phrases the issue in this civil penalty proceeding as: whether the issuance of the orders of withdrawal was valid. Specifically, the Respondent contends that the orders are invalid in that the violations were not caused by an "unwarrantable failure" to comply with the mandatory safety standard embodied in 30 CFR 75.1100-3, as required by section 104(c)(1) of the Federal

Coal Mine Health and Safety Act of 1969 (1969 Coal Act). An order issued under section 104(c)(2) of the 1969 Act must be based on the criteria set forth in section 104(c)(1) of the 1969 Act.

However, the decisions of the Interior Board of Mine Operations Appeals establish that the propriety of the issuance of a withdrawal order is not an issue in a civil penalty proceeding. Jewell Ridge Coal Corp., 3 IBMA 376, 81 I.D. 624, 1974-1975 OSHD par. 18,901 (1974); Coal Processing Corporation, 2 IBMA 336, 342 80 I.D. 748, 1973-1974 OSHD par. 17,978 (1973); Eastern Associated Coal Corp., 1 IBMA 233, 236, 79 I.D. 723, 1972-1973 OSHD par. 15,388 (1972). However, evidence bearing upon whether the violation was caused by an "unwarrantable failure" to comply with the mandatory safety standard is also material to the negligence issue which must be addressed in a civil penalty proceeding. See Zeigler Coal Company, 7 IBMA 280, 84.I.D. 127, 1977-1978 OSHD par. 21,676 (1977).

~FOOTNOTE_TWO

2. 30 CFR 75.1100-3 states in pertinent part: "All firefighting equipment shall be maintained in usable and operative condition."

~FOOTNOTE_THREE

3. 30 CFR 75.200 states:

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

4. Safety Precaution No. 10 of the approved roof control plan (Exh. M-13 at p. 8), states: "All posts shall be installed tight and on solid footing and not more than two wooden wedges shall be used to install a post." (Emphasis added.)

~FOOTNOTE_FIVE

5. Section 7(d) of the Administrative Procedure Act, 5 U.S.C.

556(d), states, in pertinent part: "A sanction may not b imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative, and substantial evidence."

According to the Board, a withdrawal order issued or penalty assessed is a governmental action imposing a sanction of a kind contemplated by the above-quoted language. The Board interpreted the above-quoted language as requiring MSHA to establish a prima facie case in a proceeding involving a withdrawal order or a violation of a mandatory health or safety standard for which a civil penalty is sought to be assessed. Zeigler Coal Company, 4 IBMA 88, 99-100, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975).

The Board noted that the duty of establishing a prima facie case is not the same as bearing the burden of proof. Zeigler Coal Company, 4 IBMA 88, 100, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975). Burden of proof is governed by Rule 48 of the Interim Procedural Rules, 29 CFR 2700.48, which states:

"In proceedings brought under these rules, the applicant, petitioner or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence: Provided, That, whenever the violation of a mandatory health or safety standard is at issue, the Secretary shall have the burden of proving the violation by a preponderance of the evidence."

~FOOTNOTE_SIX

6. The testimony of both Inspector Baker and Mr. Skaggs reveal sharp differences as to the width of the cut in the inadequately supported area. Mr. Skaggs' statement that the cut was 10-1/2 feet wide is based on his assertion that he made only one run (Tr. 155). The continuous miner, a 120-L Jeffrey, makes a 10-1/2-foot cut (tr. 154).

Inspector Baker testified that the entry could not have been a single run in width, instead characterizing it as two runs in width (Tr. 137, 146-147). At one point, he stated that he did not know the width of the cut (Tr. 137), and that he did not measure the width of the cut (Tr. 142). However, he approximated its width as 18 to 20 feet at one point in his testimony (Tr. 142), while at another point, he admitted that the width could have measured 15 feet (Tr. 146).

In this instance of conflict in the testimony, I conclude that the testimony of the Respondent's witness is more credible and entitled to acceptance. This conclusion is warranted for two reasons: First, the inspector neither measured the width of the cut nor affirmatively ascertained that more than one run had been made. Secondly, Mr. Skaggs had an objective reference point for his statement, i.e., that one run had been

made and that the miner made a 10-1/2-foot cut on each run.

~FOOTNOTE_SEVEN

7. The use of the term "citation" in Old Ben can be misleading. Old Ben was decided under the Federal Coal Mine Health and Safety Act of 1969. The term "citation" had no specific meaning, as the 1969 Act referred to "notices" and "orders." However, under section 104 of the Federal Mine Safety and Health Act of 1977, the term "citation" is used to describe what had been referred to previously as a "notice."