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SOL (MSHA) V. MAGMA COPPER
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceeding
Docket No. DENV 78-574-PM
A.O. No. 02-00151-05001

v.

San Manuel Mine

MAGMA COPPER COMPANY,
RESPONDENT

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Department of Labor, Office of the Regional Solicitor, San Francisco, California, for the petitioner
N. Douglas Grimwood, Esq., Phoenix, Arizona, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a petition for assessment of civil penalties filed by the petitioner against the respondent on September 25, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with 14 alleged mine safety violations issued pursuant to the Act and implementing safety standards. Respondent filed a timely answer in the proceeding and requested a hearing regarding the proposed civil penalties initially assessed for the alleged violations. A hearing was held in Phoenix, Arizona, on March 8, 1979. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed for each proven citation, based upon the criteria set forth

in section 110(i) of the Act. Additional issues raised by the parties are discussed in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.
2. Section 110(a) of the Act, 30 U.S.C. 820(a).
3. The rules and procedures concerning mine health and safety hearings, 29 CFR 2700.1 et seq.

DISCUSSION

Stipulations

The parties stipulated that the respondent is a large mine operator, has no history of previous violations, and that any civil penalties assessed by me in this proceeding will not adversely affect respondent's ability to remain in business. They also stipulated that the inspections referred to in the citations issued in this proceeding did, in fact, occur on the dates indicated and that the respondent received the citations (Tr. 4).

Withdrawal of Citation and Settlement

Petitioner's motion to withdraw Citation No. 371163, April 13, 1978, 30 CFR 57.15-3, was granted from the bench and this alleged violation is dismissed (Tr. 5). With respect to Citation Nos. 376625 through 376628, all issued on May 15, 1978, for violations of 30 CFR 57.4-23, petitioner moved to consolidate these into one violation and indicated that the parties have reached a proposed settlement in the amount of \$140 and submitted same for my approval. Arguments were heard on the record, and the motion and proposed settlement were approved (Tr. 192-196).

With respect to the remaining citations which are the subject of this proceeding, testimony and evidence was adduced by the parties

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in support of their respective positions and a discussion of the citations and the evidence adduced follows below.

Citation No. 371113, April 18, 1978, 30 CFR 57.12-32, states as follows:

Cover plates were not installed on electrical junction boxes on 2075 level in panel 27A Rse. Station (pony set) #13 and panel 27B, Rse. Station (pony set) #4. The boxes were located adjacent the pony set ladderways where they could be easily contacted and contained energized circuits (wiring). The pony sets were used frequently during shifts.

Section 57.12-32, provides: "Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Petitioner's Testimony

MSHA Inspector Warren C. Traweek testified that he inspected the mine in question during various stages in April and May of 1978. He described the mine as a multilevel underground operation primarily producing cooper, and the minerals are extracted by means of the "block caving" mining method. He confirmed that he issued the junction box citation (No. 371113) during course of his inspection and after discovering the cover plates missing. The junction boxes are used to control a system of block or light signals for controlling the haulage train (Tr. 5-9).

Inspector Traweek indicated that the failure to install the cover plates can result in serious injury or even death to an employee if he should happen to come in contact with the energized circuits inside the junction boxes. Although the boxes were immediately adjacent to the ladderway or passageway, and the area is frequently used during the shift that the block is in operation, he believed that the chances of an accident causing an electrical shock to occur was unlikely since the wiring inside of the junction boxes was well-insulated and welltaped. He believed the operator should have known about the condition because any time that a block is in operation, the area is traveled frequently by a supervisor who is assigned to there and his duties would include visits into the pony sets on a regular basis. When he pointed out the infraction, the operator immediately called an electrician or possibly two electricians. When the electrician arrived, he did not have the particular size of junction box cover; however, the plates were installed when he returned to the mine a week later, but the inspector did not know when they were actually installed (Tr. 9-12).

On cross-examination, Inspector Traweek stated that he did not notice whether the junction boxes were grounded, and therefore did

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not know whether that fact would have an effect on whether or not electricity could be conducted. Had the circuits been energized on April 18, 1978, which he believed they were, and had an employee touched such wiring, he could have been injured or killed. Had there not been any exposed wiring, it is unlikely or improbable that an employee would come into contact with an energized circuit; however, it would not be impossible. The junction box was open, and the wires appeared to be well-insulated and well-taped, but he would not stick his finger in there to see if they were or not. The employee who was working in the area was standing on a wooden platform which was wet and the wetness of the area would possibly cancel out the insulating effects of the wood (Tr. 12-17).

Inspector Traweek indicated that the lack of junction box covers would cause the insulated wires to become worn over a period of time, but he conceded that this would happen anyway in an underground mine environment (Tr. 17-18). Although he terminated and abated the notice when he returned to the mine on April 11, he does not know when the condition itself was abated earlier but believes it was accomplished rather quickly. He also indicated that the two junction boxes were physically located next to a vertical ladder, which would be the access way to the raise station. An individual climbing or stepping off the top of the ladder could contact the boxes with an elbow or an arm. On a given day, there would be at least two employees assigned to the panel and they would go up and down the ladderway numerous times during the day. In addition, their supervisor would probably be in the raise station from time to time (Tr. 18-20).

Respondent's Testimony

Onofre Tafoya, general haulage foreman, described the junction box in question and indicated that it is used as a signaling device for the motorman. The boxes are grounded to a main feeder that runs the length of the whole panel, and they are connected to another metal frame which is also grounded. The wires on the inside of the junction box are taped with rubber tape on the bottom, and with friction tape on the top. In the past, there have been problems with keeping the covers on the junction boxes because some of the men take them off. The condition of the wires inside the junction box was good, and they were tucked back up inside the cavity of the box. The only thing wrong with them was that the covers were not on them. The wooden staging or wooden floor near the junction boxes was damp in order to keep the dust down, and the floor is wet down when men work there (Tr. 20-23).

On cross-examination, Mr. Tafoya indicated that the entire box is frame grounded and that he assumed that if someone touched one of the live wires they would be shocked but not electrocuted, but he is not an electrician and this was his layman's opinion. The voltage on the box is 110, but he did not know the amperage (Tr. 24).

On redirect, he explained that the mine has experienced problems in keeping the cover plates on junction boxes generally and that the company has conducted studies as to how to solve the problem, including locking the covers (Tr. 28). The covers were put back on the junction box by the end of the shift in which the citation was issued (Tr. 29).

Robert L. Zerga, mine superintendent, testified he is an electrical engineer and was employed as superintendent at the time the citations issued. He testified with regard to the difficulties of maintaining covers on the boxes and stated that the mine had experienced serious problems with vandalism and tampering in that people like to remove the screws and take the box covers off. The foremen are instructed to be aware of missing junction box covers and a six-point check system whereby each man is responsible for locating and reporting unsafe conditions is also stressed. In the San Manuel Mine, there are approximately 1,800 draw points, and it is very difficult to catch anyone tampering with a junction box. Junction boxes can be located in various areas and it is extremely easy for a car-loader to tamper with one without anyone seeing him. He indicated that a wire that is fully insulated will not shock any one, even if he were standing on a wet surface (Tr. 30-32).

On cross-examination, Mr. Traweck stated that he did not know why anyone would want to remove covers from junction boxes. Although one may not receive a shock from an insulated wire, if the insulation were worn and defective, a shock is possible and he estimated that 100-300 junction box covers a year are replaced at the mine (Tr. 32-36).

Citation No. 371115, April 27, 1978, 30 CFR 57.3-22, states as follows:

A slab of loose concrete was observed in the back of panel 7A between #14 and #15 loading stations (pony sets) on the 2375 level. Employees travel through the area frequently. A test using a scaling bar was conducted to make the determination.

Section 57.3-22 provides:

Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Inspector Traweek testified that he observed the slab of concrete described in the citation in the roof between the Nos. 14 and 15 loading stations, and it was 2 feet by 3 feet, but he did not know its thickness. It had moved a few inches from its original position and the danger presented is that if the block was to fall or drop, individuals in the area could be injured or possibly killed. The chances of the slab falling was improbable, but unless the condition was corrected, it could deteriorate due to frequent blasting in the area which, in turn, caused ground vibration.

Mr. Traweek believed the operator should have known of the condition because anytime the level or panel is active, employees and supervisors, would be traveling throughout the drift or tunnel continuously. On a normal shift, two car-loaders and a supervisor would be working in the area. The concrete in and around the area was not in the best of condition, and he pointed out the condition to the operator's representative who was with him on the inspection. Since it was not the type of situation that the operator's representative could immediately correct himself, they left the area, and he did not know when the actual abatement was accomplished, but he believes abatement was achieved 2 or 3 days later by removing the block of concrete (Tr. 38-42).

On cross-examination, Inspector Traweek conceded that at the time he viewed the condition cited, the concrete block was not loose and he could not get it to move. However, sometime in the past when the block had broken and become displaced, it was loose and there had been movement. Had he known that it would take two men an hour to bar the piece of concrete down, he still would have issued the citation. Not all ground that is moved in a haulageway creates a hazard, but it does involve a judgment call (Tr. 42-45).

On redirect, Mr. Traweek stated that the concrete was located in such an area that if it did fall, it could fall on a person. He visually observed that it had moved sometime in the past, but he did not know when. Had he been able to move the concrete with a scaling bar, he may have issued an imminent danger order. He believed the concrete was loose at one time and might move again. The general area up and down the whole dip for quite a few feet was fairly bad (Tr. 45-46).

On recross, Mr. Traweek testified that he is familiar with the phenomenon known as "keying," and stated that it occurs when loose material or concrete is keyed in with other pieces of rock or concrete so that it is not displaced totally and forms like a keystone in an arch held in place by natural forces (Tr. 47-48).

In response to bench questions, Mr. Traweek stated that the entire drift tunnel is supported by concrete. He characterized the slab in question as loose in his notice because he believed that at

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some prior time it had shifted, but at the time he tested it with the bar, it was firm, and by deterioration, he meant the concrete had been in one piece but was breaking up (Tr. 49). He observed the condition after it was bated, and the concrete had been removed and was laying up against the lefthand side of the rib. The cavity was then keyed to the other material and was safe (Tr. 51).

Respondent's Testimony

Mr. Tafoya stated the haulageway tunnel is arch shaped and supported by 18-inch thick concrete with steel caps buried in it. Block caving causes ground movement and keying keeps broken ground in place. The areas are cleaned and scaled daily, and when informed of the concrete citation, he immediately phoned his haulage supervisor and told him to get it fixed promptly. Since he was interested in getting the notice abated before Mr. Traweek left the mine, he left for the surface of the mine, and after he arrived, he met the haulage foreman who told him that it was impossible to remove the piece of concrete. In order to remove the concrete, the foreman used a scaling bar as a long 5-foot chiesel and Mr. Tafoya used a doublejack, and while the foreman was holding the scaling bar, he hit it, and together they managed to chip away enough concrete in order to get the piece of concrete to go out one end. Although he and the foreman worked feverishly for an hour to abate the condition before Mr. Traweek left the level, when he tried to locate Mr. Traweek, he had left. However, the condition was abated within an hour and a half after it was observed by the inspector (Tr. 53-58).

Mr. Tafoya stated that the general area in which the piece of concrete was located was deteriorating, and they had to remove quite a few pieces of concrete by scaling and they had shored up with timber in other places, although the area from where the piece of concrete was removed was never shored up and the cavity from where it came from has remained the same and was as safe as it is now (Tr. 58-59).

In response to questions from the bench, Mr. Tafoya stated that although Inspector Traweek gave them a day in which to abate the condition, that is, until 8 a.m. the following day, he was anxious to have the condition abated before Mr. Traweek left the area, and it is normally his practice to have citations abated as rapidly as possible. Although he had to pry down the piece of concrete with a chisel and a doublejack or sledgehammer, he did not feel that the concrete was going to fall out unless the ground movement was going to become severe, which it did not (Tr. 60-61).

Citation No. 371116, May 9, 1978, 30 CFR 57.15-6, states as follows:

Protective clothing (gloves, etc.) was not provided or used during operations requiring contact with, or hand immersion in, Houghton, Houghto-clean 221 solvent.

Employees frequently contacted or immersed hands in the solvent during regular cleaning operations. Skin contact warning labels were attached to the solvent (manufacturer's) shipping/ storage barrels. 2075 level car shop.

Citation Nos. 371117, 371118, and 371119, May 9, 1978, 30 CFR 57.15-6

The conditions or practices described in these citations are identical to those cited in citation No. 371116, except for the fact that they allegedly occurred at different locations, namely, the 2075 level locomotive shop, the 2375 level car shop, and the 2375 level drill shop.

Section 57.15-6 provides:

Mandatory. Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever (1) hazards of process or environment, (2) chemical hazards, (3) radiological hazards, or (4) mechanical irritants are encountered in a manner capable of causing injury or impairment.

Inspector Traweck testified that he is familiar with the solvent known as Houghto-Clean 221, which is a cleaning solvent for machinery and machinery parts, and that he observed the solvent at the 2075 car shop, the 2075 locomotive shop, the 2375 level car shop and the 2375 level drill shop. He also observed employees who were working in the area engaged in activities which required them to immerse their hands in the solvent. These employees were working in maintenance-type shops such as overhaul, cleanup, repair, and underground--type shops and they would eventually have to wash parts in the solvent. None of the employees at the four locations were wearing protective equipment for their hands. According to the manufacturer's label, the danger of immersing one's hands in the solvent without gloves or protective equipment is skin irritation. He identified a label taken from one of the solvent drums (Exh. P-1). In addition to the warning that appears on the label, Inspector Traweck reached the conclusion that the solvent could irritate one's hands from a complaint of skin irritation from an employee who worked in one of the shops and from information supplied to him by the respondent, which was in the form of a description of the solvent containing warnings "avoid skin and eye contact, may cause irritation on prolonged exposure. In the event of skin contact, wash thoroughly with soap and water" (Exh. P-2, Tr. 63-72).

Inspector Traweck testified that in the four rooms which he inspected, three had no gloves or other protective equipment. In the 2075 locomotive shop, the shop foreman or possibly the shop leadman, indicated that he had protective gloves, but when he asked to see the

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gloves, he could produce only one glove that was dust-coated and had obviously not been used. He believed the respondent was aware of the conditions because of the manufacturer's label which was attached to each drum, the complaint of which it had knowledge, and because of the literature that the company had supplied him with as far back as 1975 and possibly earlier. He discussed the need for gloves with supervisory personnel, but their response was that the reason they did not have any gloves was because they have no need for any. He estimated that a number of employees are exposed to the solvent danger, but that only one employee at a time uses the solvent, and in different operations it would be necessary to clean the parts every day. He brought the condition to the attention of the safety engineer who was accompanying him on the inspection and when he went back to abate the notice, the gloves had been provided (Tr. 72-74).

On cross-examination, Mr. Traweek indicated that not all individuals are subject to skin irritation if exposed to the solvent. With regard to the person who complained about suffering skin irritation, he stated that the person had previously suffered welding flash burns which were irritated by exposure to the solvent. He asked employees about the use of gloves, and was told that they were difficult to use because the men had to handle small machine parts. He did not talk to the person who complained, nor did he inquire about the availability of barrier creams. In addition to the four shops or areas previously mentioned, he stopped at a fifth place and gloves were provided in that location. In the course of his inspection of the rooms, no one in any of the rooms told him that they were in fact using protective cream nor did any management personnel ever tell him that such cream was being used, and he did not see any protective creams (Tr. 74-83).

In response to questions from the bench, Inspector Traweek testified that although in only one of the four locations did he actually observe an employee with his hands immersed in the solvent, he did observe employees at the other locations engaged in activities that would ultimately require use of the solvent. He did not take a sample of any of the solvent or subject it to any chemical analysis, and the respondent voluntarily produced information for him regarding the danger involved subsequent to the issuance of his citation. He did not know when the conditions were actually abated, but it was possible that they were abated earlier than the time he had fixed for abatement. He believed the old advisory standard, 57.15-6, requiring the use of gloves to be a better standard than the one cited (Tr. 84-90).

Respondent's Testimony

Clifford O. Hamilton, maintenance planning foreman, testified that he is responsible for all plant cleaning solvents, oils, and lubricants, and that Houghto-Clean 221 was first used in 1975. Prior to that time Houghto-Clean 220 had been used with no complaints about

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skin irritation. Complaints were received when Houghto-Clean 221 began being used, and after receiving complaints, he took samples from the drum in question and sent them to the chemical lab at the plant and contacted the manufacturer. Magma Copper's lab could find nothing that would cause the degree of burning that was claimed by the complaining employee, and the manufacturer of the solvent stated that he felt that it was safe and that it should not have caused any burning to the degree of removing hair. The manufacturer thought that it had been contaminated with something. Data Sheets received from the manufacturer (Exh. R-1) concerning Houghto-Clean 221 indicate that when it comes in contact with the skin one should "wash with soap and water," and that "local effects upon skin may have a defatting effect on sensitive individuals" (Tr. 92-96).

The results of the Tests conducted on a sample of the solvent for a period of 16 hours showed no signs of skin irritation as a result of exposure. Gloves are stocked in the warehouse, and barrier creams have been available throughout the mine for as long as he has been employed there. Because of the citations, the respondent has made it mandatory that whenever the solvent is used, employees must wear gloves. However, employees complain about wearing gloves (Tr. 96-101).

On cross-examination, Mr. Hamilton stated that barrier creams are a warehouse item used throughout the mine, but he does not know whether any such creams were actually on hand in any of the four locations cited (Tr. 101-102).

Citation No. 371120, May 9, 1978, 30 CFR 57.4-2, states as follows:

The Houghton-Clean 221 solvent storage and use area in the 2075 level car shop was not provided with a sign warning against smoking or open flame. The solvent (manufacturer's) shipping/storage barrels had combustible liquid warning labels attached. Section 57.4-2 provides: "Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist."

Inspector Traweck testified that Houghto-Clean 221 was used in the 2075 car shop area, and there was no sign in the immediate vicinity of the solvent warning against smoking or open flame in and around where the solvent was being used. In his opinion, the solvent, if ignited, could cause a fire or explosion, and his conclusion is based initially on the manufacturer's warning label attached to each drum, which states "Caution. Combustible liquid." "keep away from light, heat, spark and open flame." In reaching his conclusion that the solvent could cause a fire or explosion if ignited, he also relied on documents provided him by the respondent (Exh. P-2), which state

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that the flash point (undiluted) is 190 degrees Fahrenheit. In addition, the research work in the National Fire Protection Code (Exh. P-6), led him to conclude that it is combustible (Tr. 109-113).

Inspector Traweek stated that he did not know the exact number of people exposed to the solvent hazards, but it would most likely be one individual at a time, although it could possibly be two. He believed that the respondent should have been aware of the existence of a hazard due to the manufacturer's label. He further believed that the respondent should have been aware of the lack of a sign since the shop is generally used on a daily basis on a generally busy shift and there are supervisory personnel such as a leadman or a foreman in the shop. When he returned to the mine to abate the citation, approximately 2 or 3 days later, the signs were in place (Tr. 114).

On cross-examination, Inspector Traweek testified that he issued the citation because he thought that the solvent was a combustible liquid under Class 3-a of the National Fire Protection Code. Class 3b combustibles have flash points above 200 degrees, and class 3a are between 140 and 200 degrees. He was accompanied on the inspection by Mr. Joe Questas, a mechanical foreman of some type, and by Mr. Ward Lucas, a safety engineer. He recalls a conversation with a man by the name of Meier, who was the foreman of another locomotive shop and who told him that solvent was used straight from the barrel without dilution. He recalls from his notes a conversation with Mr. Davis about the issue of protective clothing but he does not recall a conversation with Mr. Davis about the fact that the solvent was used in a solution with water in the place cited (Tr. 114-119).

In response to questions from the bench, Inspector Traweek stated that he did not take a sample of the solvent nor did he subject it to testing because he relied on the word of one of the shop supervisory personnel, and the manufacturer's label and letter that the product worked best undiluted. The solvent that he found in the area that he cited was not in a no-smoking posted zone. He did not observe anyone smoking in the area. It is general practice in the mine to transfer this particular solvent from 55-gallon drums into the cleaning bin itself, but he did not know the procedure that is followed in disposing of it (Tr. 121-124).

Respondent's Testimony

William J. Brinkman, chief industrial hygienist, defined the term "flash point" as the temperature at which a given liquid or solvent is warm enough so as to give off a sufficient concentration of vapors above its surface so as to support combustion if the vapors pass over an open flame. The fire hazard that is posed by a liquid is created by the evaporation of the liquid, i.e., by the fumes that are given off by the evaporation. A sample of the solvent was taken

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at the mine and he submitted it to Magma Copper's Technical Services Laboratory and they arrived at a flash point of 205 degrees Fahrenheit. The Houghton 221 solvent which is used at the mine is Class 3-b according to the standards of the National Fire Protection Agency (Tr. 125-129).

On cross-examination, Mr. Brinkman testified that he did not know where the sample that was tested came from, but he submitted it on July 6, 1978, the same day it was delivered to him. Any given amount is guaranteed by the manufacturer not to be below 190 degrees, but between 190 and 200 or above (Tr. 129-130).

Citation No. 376608, May 10, 1978, 30 CFR 57.11-12, states as follows: "The chain guard was not secured in place across the 3-D shaft compartment opening on the first deck (work deck) below the main head sheave deck. The hazard observed was over 100 feet above the ground on the 3-D head frame."

Section 57.11-12 provides: "Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

MSHA inspector Chester A. Pascoe testified that he issued the citation on the head frame which is used to support the head pulley or head sheaves over which the hoist rope travels down the shaft to be hooked to a hoisting device used for men and materials. He identified Exhibit P-7 as a photograph of such a typical head frame.

He observed an opening into the shaft compartments off the work deck, and it was not protected by a railing, barrier, or cover since the safety chain that had been provided to span the opening to keep people from falling down into it was down and buried in 2 to 3 inches of rope dressing and grease, etc., on the work deck floor. He considered this area to be a travelway because one has to cross the opening to get to the far side of the head frame in order to perform maintenance and inspections, etc. The purpose of the chain is to prevent a person from accidentally walking or falling off into the shaft compartment which is over a 2,000-foot drop and is similar to an elevator shaft. The chain is fixed between the pipe rails around the shaft compartments. The likelihood of someone falling into the opening is very improbable since the area is not frequently traveled and those persons who do frequent the area come there for a specific purpose. Maintenance and supervisory personnel usually travel through the area several times a year, and at any given time not more than one person is exposed to danger. The operator should have been aware of the condition since it is an obligation of a supervisor to inspect the work areas, and if this had been done, he would have discovered

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that the chain was down. When the condition was pointed out, a man was brought down immediately and the chain was dragged out of the grease and hung back up on the hook (Tr. 132-139). On cross-examination, Mr. Pascoe identified a reasonable sketch of the work deck area which he cited (Exh. R-2), and he indicated that people would have reason to be on the walkway of the A-frame to clean up, and on the day he was there, pipe and wood was lying on the walkway, and he observed people there who had come to abate another citation concerning the cleaning of head frames. In addition, a person or supervisor inspecting the head frame would also have reason to be there.

In the normal course of business, mechanics are assigned to the deck, which is approximately 100 feet in height, to work on cages, skips, etc. While he was in the area, there were no employees working around the openings, and he could not state whether anyone was assigned to work there on a regular basis. He did see foot prints on the rope dressing on the platform which indicated to him that people had been in the area. He did not believe that there would be any employees being transported up and down the hoisting compartment on a regular basis, and he did not know how frequently employees come up to the deck. He did not observe anyone performing any work in any place on the deck other than in connection with another citation that he had previously issued. While the hoist compartment is not a walkway, the walkway where people have to travel is. Employees who are there can tie off their safety belts on the handrails. Maintenance people would have occasion to come up to the deck to maintain guides and the majority of the work could be done from the top of the skip (Tr. 139-146).

In response to bench questions, Mr. Pascoe stated that the chain was installed, but one end was uncoupled and dropped down and the chain is a railing barrier or cover since it is permanently connected on one end and hooked on the other, and it was simply uncoupled (Tr. 147-148). Respondent's Testimony

Mr. Robert L. Zerga testified there are two means of access to the head frames, one up a hoist or elevator and the other up a ladderway. Persons employed as riggers would have occasion to use the deck. With respect to Exhibit R-2, he knows of no normal maintenance function that is performed at the far end of the grading. This is not the type of place to which an employee would stray, and there is nothing in the area of the platform that is normally inspected. Regarding cleanup of the deck, his basic policy is not to clean up

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the area unless it is to be used for some specific purpose, and persons working on the frame decks must be hooked up by tag lines (Tr. 150-154).

On cross-examination, Mr. Zerga stated that the only machinery on the platform in question is the skip compartment and skip guides, and there is nothing there that would normally be inspected. As far as any cleanup is concerned, the only things cleaned would be rope dressing or dust and dirt, and people would not go to the area to clean those materials unless materials were brought to the area on the skip, and that would be cleaned as a basic thing (Tr. 154-155).

Citation No. 377966, May 11, 1978, 30 CFR 57.12-20, states as follows: "The hoist systems office electrical control center was not provided with a 'like potential' (insulating mat). The control center was exposed to the elements (weather conditions)."

Section 57.12-20 provides:

Mandatory. Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

MSHA inspector Clarence Ellis, testified he has been so employed for about 3 years and formerly worked for Magma Copper as an underground mine supervisor. He is not an electrician but has taken most of the MSHA electrical courses and is taking correspondence courses from the Beckley Mine Safety Academy. Three years ago he trained for about 3 months with an electrical inspector. He inspected the hoist systems electrical control center on May 1, 1978, and described a typical load center as "a spot at any mining property where you would have a group of switches grouped in one spot." The location cited was basically a group of switches located outside at one spot in the open and the spot where an operator would stand to operate the switches was not provided with a wooden platform or insulating mat and a person would be standing on the earth when he touched the equipment. Such a situation presents an electrical shock hazard because the potential between the person touching the switching gear and the gear itself would be different. Normally, the potential should be the same. He defined the term "different potential" as follows:

Potential on -- in electrical people -- when electrical people are using the term potential, potential means a difference in voltage between two (2) points. You

might have, say on this desk if it was made of metal and that desk was made of metal, you might have two hundred and twenty (220) volts on this desk and one ten (110) on that desk and you would definitely have a difference in potential between the two. If the two were connected to two (2) separate grounding systems and you contacted both of them at the same time, you would receive a shock at that point if there were unplanned currents on the equipment at that time.

Inspector Ellis indicated that unplanned currents, or a short, would be required to result in the shock condition he described, and the resulting injury from any shock would depend on the voltage and amperage involved. Most people standing on the bare earth and receiving a shock would probably die. However, he had no idea of the amperage involved in the switching gear in question but was told by a Mr. Lucas from the company's safety department that it ranged from a low of 110 volts to a high of 480 volts. The KVA, or kilovolt rating of the transformers supplying the power to the load center would determine the actual amperage, but this can only be determined by a physical test. However, if one light bulb were burning in the building it is likely that at least one amp would be flowing through the switching gear. He doubted whether anyone could survive one amp of current. He believed that an insulating mat placed in front of the load center would insulate one from a shock hazard. However, the hazard would only be presented if the phase went to ground, and an insulating mat would insulate a person from the earth (Tr. 156-165).

Inspector Ellis testified that the chance of a shock hazard was small and that a hazard would only exist if the equipment malfunctioned at the precise time someone was touching it while standing on the earth without an insulation device. One person would be exposed to the hazard. He believed that the respondent should have been aware of the condition cited because it was located near a building where the mine superintendent and supervisors had offices and they would walk by the load center while going in and out of the building. An insulating mat was installed when the condition was pointed out (Tr. 166-167).

On cross-examination, Inspector Ellis testified that he did not determine whether there was in fact a difference in potential present but simply knew that there was such a difference in potential between the earth and the grounding system of the plant. When asked how he knew this he said--"It's just a matter of fact. %y(3)5C I know it is." However, he had no knowledge of the plant grounding system, but indicated that the resistance to the ground anywhere on the property was 25 ohms. He did not know the earth resistance and made no test to determine it (Tr. 168-170).

In response to questions from the bench, Inspector Ellis testified that he did not know the specific equipment supplied by the load center in question and did not go inside the office trailer house in question. The load center consisted of 7 or 8 switch boxes which he believed controlled more than the office. The switch boxes were of a square D-type, approximately 12 x 18 x 6 inches, with three fuses to each box. From his experience, someone touches every electrical switch box on mine property at least once a week. He did not recall precisely when the condition was abated (Tr. 172-173).

Respondent's Testimony

Mine superintendent Robert Zerga, an electrical engineer, testified that he is familiar with the electrical system in question and he identified Exhibit R-3 as a schematic of the electrical control center in question. He discussed the different safety features installed on the center and stated there was no electrical energized circuit with which a person could accidentally come in contact. Everything that can be touched is grounded to earth by means of copper grounding going to the central grounding system. He stated that in order for an electrical potential to occur, the ground wire would have to be lost and a current carrying conductor would have to come in contact with a metal enclosure. The system which was installed at the time of the citation is perfectly acceptable by the National Electrical Code, and he believed the citation issued because of a complete misinterpretation of the standard by the inspector. He described the plant grounding system, and he stated that the potential hazard described by Inspector Ellis would not exist provided the grounding system was intact (Tr. 176-181).

On cross-examination, Mr. Zerga testified that as long as the ground wire is intact, even though defective, it will function as a ground. The plant ground wire system is checked annually under Federal law and it was checked and found to be intact after the citation issued. He reiterated that two events would have to occur for a hazard to exist, namely, the loss of the ground and a short circuit, and this was a very small possibility (Tr. 181-182).

In response to bench questions, Mr. Zerga testified that one would approach the power center and simply pull a switch to turn it off and the switch is insulated from the power conductor. The control center provides power for the trailer house for lighting, a heater, and a fan for cooling in the summer (Tr. 183). Inspector Ellis indicated that the power center was waterproofed and well-insulated (Tr. 190).

Findings and Conclusions

Fact of Violation--Citation No. 371113, 30 CFR 57.12-32

I find that the preponderance of the evidence adduced in this case supports a finding of a violation of section 57.12-32 as charged in the citation. Although respondent's evidence indicates that mine employees are apparently tampering with the cover plates, that fact may not, in my view, serve as an absolute defense. The standard requires that cover plates be kept in place at all times except during testing or repairs, and respondent's evidence does not rebut the fact that the cover plates cited were not so maintained. The citation is AFFIRMED.

Gravity

Petitioner conceded that since the wires inside the uncovered junction boxes were insulated and taped, the chances of any electrical shock occurring under the conditions as they existed at the time of the inspection were small. Respondent's evidence establishes that the junction boxes in question were grounded and that the wires were well-insulated and that an electrician was immediately called and the covers were put back on the boxes by the end of the shift. While it is true that deterioration may occur if covers are left off the boxes over an extended period of time, there is no evidence as to how long the covers were off and there is no evidence that any of the wiring inside the boxes was in other than good condition and not well-insulated. In the circumstances, I conclude that the conditions as cited were nonserious.

Negligence

From the evidence and testimony presented by the respondent, it would appear that there is a problem in the mine with employee tampering and vandalism connected with the removal of electrical junction box covers. I fail to understand why an employee would want to jeopardize his safety and the well being of his fellow workers by engaging in such conduct. In any event, under the circumstances here presented, I find that the respondent did everything reasonable, short of stationing a supervisor at each junction box location, and petitioner has not established that the missing box covers should have been discovered earlier by supervisory personnel. Although the inspector testified that supervisors generally are in the area, he did not specifically establish by any credible evidence that the cover plates were missing early in the shift, or that any supervisor passed through the area and should have seen them. In the circumstances, I cannot conclude that the conditions cited resulted from any negligence on the part of the respondent.

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Good Faith Compliance

The record supports a finding that respondent exercised rapid abatement in achieving compliance and that fact is reflected in the penalty assessed for this citation.

Fact of Violation--Citation No. 371115, 30 CFR 57.3-22

The citation charges that a slab of loose concrete was observed at one of the loading station areas of the mine and that a scaling bar was used to test and determine that the concrete was loose. Section 57.3-22 requires examinations of the ground conditions to insure that proper testing and ground control practices are followed, that loose ground be taken down or adequately supported, and that ground conditions along haulageways and travelways be periodically examined and scaled or supported as necessary. In this case, the inspector admitted that the piece of concrete in question was not loose at the time he observed the condition and that he could not get it to move. He indicated the chance of the concrete falling was improbable and respondent's testimony indicates that the concrete slab had keyed in with other materials and was thus stabilized and that it took two men an hour or so of working to punch the slab out. Under the circumstances, I fail to understand how the inspector concluded that the concrete was loose and that he determined this by testing. The evidence adduced establishes exactly the opposite. I find that petitioner has failed to establish a violation as charged on the face of the citation and Citation No. 371115 is VACATED.

Fact of Violations--Citation Nos. 371116 through 371119, 30 CFR 57.15-6

I find that the petitioner has established a violation of section 57.15-6 as charged in the four citations. While the term "chemical hazards" may not be the best way to describe the hazards involved when employees use cleaning solvents without protective gloves, I conclude it is broad enough to cover the conditions cited in this instance. Although Safety Standard 57.15-9, which provides for the wearing of protective gloves by employees handling materials which may cause injury, appears to be a better standard for application on the facts presented here, that standard is not mandatory but simply advisory. This is a recurring problem that is best left to the scrutiny of the Secretary as part of his enforcement authority. I agree with the petitioner's arguments that substances strong enough to clean tools and machine parts will cause irritation and eventual harm to the naked skin and that the manufacturer's label and respondent's admissions that sensitive individuals would be susceptible to defatting of the skin or irritation, attest to that fact. The extent of such exposure, insofar as the degree of injury incurred, is a matter connected with the gravity of the situation presented and may not serve as an absolute defense to the citations. In addition,

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although respondent's evidence and testimony makes reference to the general availability of protective barrier creams and the fact that protective gloves are a normal warehouse stock item, respondent's evidence does not establish that these protective materials were, in fact, available at the locations cited and the inspector testified that he observed none on hand at the locations cited. All four citations are AFFIRMED.

Gravity

I find that the evidence adduced in support of the citations does not establish that the conditions cited posed any grave threat to the safety or health of any miners at the time of the citations. The inspector saw no one immersing his hands in the solvent, and while it would have been desirable to take a sample to determine by chemical analysis the actual chemical content of the solvent and the danger posed by its exposure to the skin, the inspector did not do so. At best, the evidence establishes that exposure to the solvent in question would cause "dishpan hands." Although it may be true that continued contact with the solvent over a period of time may result in greater harm, there is no evidence to establish the length of time the employees were exposed to the solvent, nor has there been any testing by MSHA of the solvent to determine how it may affect someone through continued and sustained exposure. Under the circumstances, I find that the conditions cited in the citations in question were nonserious.

Negligence

The evidence establishes, and I find, that the respondent failed to exercise reasonable care to prevent the practices cited which caused the violations. The testimony and evidence adduced establishes to my satisfaction that the respondent had received some early warning signs from at least one employee that the solvent in question was causing some problems, and notwithstanding the fact that the solvent caused some irritation to a preexisting condition unrelated to the use of the solvent, the respondent should have taken steps to insure that barrier creams or gloves were provided and made available to employees at the particular shop locations in question. Under the circumstances, I conclude that respondent's failure to exercise reasonable care in the circumstances constitutes ordinary negligence.

Good Faith Compliance

The record supports a finding that respondent achieved rapid compliance once the citations issued and this fact is reflected in the civil penalties assessed by me for these citations.

Fact of Violation--Citation No. 371120, 30 CFR 57.4-2

It is clear from the evidence presented that respondent failed to post the required sign warning against smoking or open flame. Section 57.4-2 requires the conspicuous posting of such signs in places or areas where there are fire or explosion hazards. The critical question presented, therefore, is whether the petitioner has established that the Houghto-Clean 221 solvent presented a fire or explosion hazard. In order to answer that question in the affirmative, there must be some evidence that the solvent in question was, in fact, combustible on the day the citation issued. Petitioner relies on several 1975 letters and the 1975 manufacturer's specifications in support of its conclusion that the solvent flashpoint and its use in an undiluted fashion on the day the citation issued renders it combustible. The fact that the solvent is generally used in undiluted form cannot serve as a basis for establishing that it was so used on May 9, 1978, when the citation issued. In addition, the fact that the 1975 specifications refer to the undiluted flashpoint as being 190 degrees Fahrenheit cannot serve as a basis for establishing that this was the case in 1978 at the time the citation issued.

In this case, the inspector relied on the 1975 letters and specifications regarding the solvent flashpoint and a label cautioning that the solvent was combustible and should be kept away from heat, spark, or open flame. However, he failed to take a sample of the solvent to determine its flashpoint or whether it was, in fact, combustible or being used in diluted form. Although the inspector recalled that someone had told him that the solvent was used in undiluted form and that this was the general practice, no credible testimony was produced by the Petitioner to support such a conclusion. I simply fail to understand why no one took any samples of the solvent to determine its physical properties on the day the citation issued. In my view, reliance on speculative information 3 years prior to the event in question, and reliance on self-serving statements by both parties with respect to whether the solvent in question was, in fact, combustible or hazardous, simply is not sufficient to establish that question. Since the petitioner has the burden of proof in this proceeding, it is incumbent on an inspector to at least establish that the solvent in question was combustible. Based on the evidence adduced by the petitioner in support of this citation, I cannot conclude that petitioner has established this fact by a preponderance of any credible evidence. Under the circumstances, I find that the violation has not been established and the citation is VACATED.

Fact of Violation--Citation No. 376608, 30 CFR 57.11-12

The evidence adduced establishes that the chain guard which was installed at the work deck of the head frame in question was not hooked across the opening, and respondent does not dispute this fact.

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Petitioner maintains that the "passage" or area cited by the inspector, as depicted in the sketch on Exhibit R-2, was regularly used and designated for persons to go from one place to another, even though travel was admittedly infrequent. Petitioner also maintains that the frequency of travel is relevant only to the penalty and not to the existence of the citation.

Respondent maintains that the petitioner has not established that the area cited, some 100 feet above the ground on a platform, was a travelway within the meaning of the cited standard or the definition of travelway as set forth in section 57.2. Respondent also points to the fact that the inspector observed no one performing maintenance on the platform, did not know whether employees were assigned there on a regular basis, and had no idea how frequently employees came up to the deck. Further, respondent maintains that it has established that: the only maintenance performed at the cited location is the changing of hoist guides and scrolls and that when this occurs employees are required to be hooked up with safety lines, that no normal maintenance is performed at either end of the platform cited, it is not the type of place where an employee would go to take a break, and that employees would not go on that platform any more often than most people would go to the top of the roof of their homes.

The term "travelway" is defined by section 57.2 as "a passage, walk or way regularly used and designated for persons to go from one place to another." Since the cited standard uses the word "travelway," petitioner must establish that the area cited was, in fact, a travelway within the meaning of the definition. After careful consideration of the evidence adduced and the arguments advanced by the parties, I conclude and find that the respondent, on the facts presented here, has the better part of the argument and petitioner has not established that the work platform some 100 feet above the ground and which is used infrequently, is a travelway. Here, Inspector Pascoe admitted that maintenance personnel went to the platform "several times a year" and the likelihood of anyone falling through the opening cited was improbable since the area is not frequently traveled. Further, he saw no one working there, did not know whether employees were assigned there on a regular basis, did not believe that employees were transported up and down the hoisting device on a regular basis, and indicated that the majority of any maintenance work on the platform could be performed from the top of the skip. Under the circumstances, I fail to understand how he could conclude that the work platform was a travelway regularly used and designated for persons to go from one place to another. I believe the intent of the standard is to protect miners, who on a regular and frequent basis, use designated travelways for movement to and from their regular duty stations or who use such travelways on a regular basis while moving in and about the mine. The facts on which this citation was issued suggest the inspector sought to protect someone working on the platform from falling through the unchained opening.

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Even so, the standard cited does not lend itself to the factual setting which prevailed on the day the citation issued. The standard required railings, barriers, or covers, and I fail to understand how a hooked chain can be considered as such. In the circumstances, it would appear that the standard is intended to apply to a working place rather than to a travelway, notwithstanding petitioner's assertion at page 6 of its brief that the use of a chain establishes an inference that an opening some 100 feet in the air at the edge of a platform is a travelway.

In view of the foregoing, I find that petitioner has failed to establish a violation of the cited standard. If the Secretary desires to afford protection to persons working on elevated platforms, he should promulgate a safety standard covering such situations rather than attempting to rely on a loosely worded and vague standard. It seems to me that the inclusion of the term "working place" as part of section 57.11-2 would cure the problem that I have with language which I believe simply does not fit the facts presented. The citation is VACATED.

Fact of Violation--Citation No. 377966, 30 CFR 57.12-20

The standard cited requires that dry wooden platforms, insulating mats, or other nonconductive materials be kept in place at power control switches where there is a shock hazard. Based on the preponderance of the evidence adduced, I find that petitioner has established a violation of the cited standard, and I agree with the arguments advanced by counsel on page 6 of his brief in support of the citation. Respondent's testimony and arguments in support of the citation go to the question of gravity rather than to the existence of a violation. Although the inspector who issued the citation failed to make a detailed evaluation of all of the prevailing conditions, i.e., voltage, amperage, grounding system in use, etc., these factors weigh on the seriousness of the violation rather than on the question of whether there was a violation.

The standard cited is intended to guard against shock hazards and while respondent's testimony established the extreme unlikelihood of an accident occurring because of the grounding system and other protective measures taken to prevent such an occurrence, the fact is that respondent concedes that a shock hazard would exist in the event of an unplanned surge of current or in the event of a loss in the grounding system. Further, I am not convinced that respondent has established that the absence of the required insulating material would make no difference if those events were to occur. I find that the petitioner has established through credible evidence and testimony that the use of the required insulating materials placed at the power control center location would, in fact, provided the required protection afforded by section 57.12-20. The citation is AFFIRMED.

Gravity

Although electrical shock hazards are serious as a general rule, on the facts and evidence adduced in this case, I cannot conclude that the conditions cited constituted a serious violation. The gravity of the particular condition cited must, in my view, be weighed on all of the conditions which prevailed at the time of the citation, including a realistic appraisal of the potential for an accident or hazard occurring. Here, petitioner concedes that the respondent has presented convincing evidence that there was little chance of the hazard described by the inspector occurring. The grounding system was intact and operational, and the other safeguards described by respondent's witnesses were in place and in the circumstances, I find that the condition cited was nonserious.

Negligence

I find that on the facts presented, respondent should have known of the potential hazard in the event of a loss of the grounding system and possible change in the current-carrying capacity of the system in question. Failure to provide the proper insulating material for persons who are required to approach and use the power center, particularly at its location outdoors, was a potential hazard of which I believe the respondent should have been aware. In the circumstances, I find that the respondent failed to exercise reasonable care to prevent the violation and that this amounts to ordinary negligence.

Good Faith Compliance

The record reflects that the respondent provided the insulation mat as soon as the infraction was cited and this demonstrates rapid good faith compliance which I have considered in assessing the penalty for this citation.

Size of Business and Effect of Penalties Assessed on Respondent's Ability to Remain in Business

The parties stipulated that respondent is a large mine operator and that any civil penalties assessed by me for the proven citations will not adversely affect its ability to remain in business. This is accepted and incorporated as my findings on these issues and the findings in this regard are reflected in the civil penalties assessed by me in this proceeding.

History of Prior Violations

The parties stipulated that respondent has no prior history of citations and I accept this stipulation as my finding on this issue and this is reflected in the civil penalties assessed by me in this proceeding.

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Dismissal of Citation

Petitioner withdrew its petition for assessment of civil penalty with respect to Citation No. 371163, April 13, 1978, 30 CFR 57.15-3, and the citation was dismissed from the bench.

Citation Nos. 376625 through 376628, issued on May 15 and 16, 1978, all cited violations of 30 CFR 57.4-23, for failure to maintain or inspect several fire hoses which were located at four different mine areas. The inspection tags attached to the hoses contained notations that they were last inspected in 1974 and 1975.

Section 57.4-23 provides: "Mandatory. Firefighting equipment which is provided on the mine property shall be strategically located, readily accessible, plainly marked, properly maintained, and inspected periodically. Records shall be kept of such inspections."

Settlement

On motion by the petitioner, Citation Nos. 376625 through 376628, for infractions of 30 CFR 57.4-23 were consolidated into one violation and petitioner's motion for approval of a settlement in the amount of \$140 for the violation was approved by me from the bench after arguments in support of the motion were heard on the record. Petitioner pointed out that the citations were issued because the fire extinguishers were not being inspected periodically as required by the standard. The standards for such inspections as set forth by the National Fire Protection Association, as interpreted by MSHA with respect to section 57.4-23 were at odds with the interpretation placed on that standard by the respondent. However, an agreement was reached as to the proper interpretation, and petitioner asserted that what should have been cited was a lack of a "procedure" for inspecting such fire extinguishers, and that theoretically, some 200 fire extinguishers could have been cited but that could prove to be "overkill" (Tr. 191-194). None of the extinguishers were defective, and the thrust of the citations was the fact that the inspection tags failed to reflect the frequency of inspections.

Conclusion

On the basis of the foregoing findings and conclusions, and after full consideration of the criteria stated in section 110(i) of the Act, respondent is assessed the following civil penalties for the citations which have been established:

Citation No.	Date	30 CFR Section	Assessment
371113	04/18/78	57.12-32	\$100
371116	05/09/78	57.15-6	75
371117	05/09/78	57.15-6	75

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371118	05/09/78	57.15-6	75
371119	05/09/78	57.15-6	75
377966	05/11/78	57.20-20	125

Citation Nos. 371115, 371120, and 376608 are VACATED, and the petition for assessment of civil penalty insofar as those citations are concerned, is DISMISSED. Citation No. 371163 is likewise DISMISSED on motion by the petitioner.

Consolidation of Citation Nos. 376625 through 376628, all charging a violation of 30 CFR 57.4-23, and all issued on May 16, 1978, is APPROVED, and the settlement proposed by the parties in this regard, whereby respondent agrees to pay a civil penalty in the amount of \$140, is APPROVED pursuant to 29 CFR 2700.27(d).

ORDER

Respondent IS ORDERED to pay the penalties assessed in this proceeding, including the settlement approved, as indicated above, in the total amount of \$665 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge