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SOL (MSHA) V. SWOPE COAL
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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 Proceedings Docket No. HOPE 78-644-P A/O No. 46-05186-02009 V
v.	Docket No. HOPE 78-645-P A/O No. 46-05186-02010 V
SWOPE COAL COMPANY, RESPONDENT	Docket No. HOPE 78-646-P A/O No. 46-05186-02011 V Docket No. HOPE 78-664-P A/O No. 46-05186-02012 S No. 1 Mine

DECISION

Appearances: David Barbour, Esq., Office of the Solicitor, MSHA, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Charles Tutwiler, Esq., Welch, West Virginia, for Respondent

Before: Forrest E. Stewart, Administrative Law Judge

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, the Act), 30 U.S.C. 819 (1970).

On July 28, 1978, MSHA filed three petitions to assess civil penalties for violations of mandatory safety standards. The fourth petition herein was filed on July 31, 1978. A total of seven violations of mandatory standards was alleged. Respondent filed answers to all four petitions on January 2, 1979.

The hearing in these matters was held on March 7, 1979, in Charleston, West Virginia. The Petitioner called five witnesses and

introduced 21 exhibits. The Respondent called one witness and introduced four exhibits. A posthearing brief was submitted by Petitioner on May 25, 1979. Respondent submitted its brief on June 20, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LIABILITY OF SWOPE COAL COMPANY

The primary issues are whether Respondent violated the mandatory safety standards alleged and the penalty that should be assessed for violations under the criteria set forth in section 109(a)(1) of the Act. (FOOTNOTE 1) In addition, Respondent asserts that:

> [I]t is not liable for the alleged violations in that it was not the "operator" of the No. 1 Mine at the time the assessments were made or at any other time, and has never been such operator, and as such does not come within the statutory definition of an operator as set out in Chapter 22, Title 30, 802(d), which is as follows:
>
> "Operator' means any owner, lessee, or other person who operates, controls or supervises a coal mine;

By a lease dated May 1, 1952, Bankers Pocahontas Coal Company, leased 300 acres of coal land, more or less, to W. B. Swope. W. B. Swope, in turn, on June 1, 1976, by written lease, subleased a portion thereof, being the No. 1 Mine, to Day Camp Coal Company. Petitioner argues that Swope Coal Company was the operator because it continued to exercise control over the mine and was named as the operator in the legal identity report for the No. 1 Mine signed by W. B. Swope after the sublease to Day Camp Coal Company.

It is undisputed that after the clearing away and removal of coal and topsoil in May 1976, the miners at the No. 1 Mine were not

in the employ of Swope Coal Company. (FOOTNOTE 2) Nevertheless, the record establishes that Swope Coal Company remained active in some aspects of the mining operation, including assistance to Day Camp Coal Company in the marketing of coal and procurement of equipment.

Prior to the date of the lease, Respondent had obtained a permit from the State of West Virginia to face up and remove coal from in front of the highwall. This permit, West Virginia Permit No. D9553, was issued in November or December 1975, in the name of Swope Coal Company, No. 1 Mine. In January 1976, W. B. Swope, Inc., received a charter from the State of West Virginia and on May 16, 1976, Respondent applied to MESA for a mine identification number which was received on June 15, 1976, being No. 46-05186.

Section 107(d) of the Act requires that each operator of a coal mine shall file with the Secretary the identity of the person who controls or operates the mine.(FOOTNOTE 3) Any revisions in such name or addresses are required to be promptly filed with the Secretary.

On June 14, 1976, Swope Coal Company, through its president, W. B. Swope, filed a legal identity report with MESA. (FOOTNOTE 4) This report, which was signed by W. B. Swope, named Swope Coal Company as the operator of the No. 1 Mine. It named W. B. Swope as president of Swope Coal Company and as agent for service of process. Significantly, it was filed with MESA 2 weeks after the effective date of the contract between Day Camp Coal Company and Swope Coal Company. This report remained in effect and unchanged through December 5, 1977. Each of the inspectors relied upon it when citing Swope Coal Company as operator.

Mr. Swope testified that he sent a letter to Mr. Krese, MESA's district manager, on July 15, 1976. The body of this letter reads as follows: "I wish to advise you that W. B. Swope Coal Co. has leased the Swope #1 Mine situated, Little Day Camp near Premier, to Day Camp Coal Company and they have been advised to contact your office for transfer of the ID number."

Mr. Swope received no answer to this letter and there is no indication that it was received by MESA. Moreover, the letter fails to indicate whether Respondent retained partial or total control over the mine and, consequently, whether it remained as an operator.

30 CFR 82.20 specifies how legal identity and changes thereof are to be filed: "Each operator of a coal mine shall file notification of the legal identity and every change thereof with the appropriate * * * District Manager by properly completing, mailing or otherwise delivering Form 6-357 "Legal Identity Report."'

In the preamble to the regulations concerning legal identity reports published in the Federal Register, the Assistant Secretary of the Interior noted that the information required under Part 82 was "to be used daily by the enforcement personnel" and that the information required would "enable the Secretary to properly carry out his enforcement functions in the administration of the Act." F.R. Vol. 37, No. 238, December 9, 1972, pp. 26308-26309. The regulations became effective March 15, 1973, and were in force at the time the alleged violations occurred. Swope gave MSHA every outward indication it was the operator by filing a legal identity report as required under 30 CFR 82.11 after the Day Camp lease went into effect. If Respondent later had second thoughts and believed that Day Camp was the operator, it failed to follow the procedure set forth in section 82.20 for advising MSHA of the change. Its letter to District Manager Krese of July 16, 1976, did not meet the requirements of

Section 82.20. Any letter stating that a lease has been entered into does not properly advise MSHA of anything substantive concerning the identity of an operator of a mine since it is possible for total or partial control of the mine to remain with the lessor and consequently for the lessor to remain the operator. Thus, Swope itself indicated to MSHA that it was the operator and continued to be so up to and through the period of the alleged violations.

The first change in the legal identity report was effected after the occurrence of the four violations at issue herein. On December 5, 1977, a revised report signed by "Lonnie Wood * * * Mine Foreman" was filed in MSHA's Pineville, West Virginia, office. Swope Coal Company was listed as operator, and W. B. Swope with the title of president, remained as agent for service of process. The only change from the earlier report was the listing of three different corporate officers.

The identity report was revised again on November 29, 1978. Swope Coal Company was again listed as operator. The report, signed by "Sammy R. Bell * * * Gen. Manager" listed a different agent for service of process and three new corporate officers.

Two letters which were introduced at the hearing provided additional evidence that the mine was operated under the name "Swope Coal Company." These letters dated June 7, 1979, were addressed to Mr. Krese under a Swope Coal Company letterhead. As noted above, the effective date of the lease between Swope Coal Company and Day Camp was June 1, 1976. The first letter was filed with MESA purportedly in compliance with section 107(d) of the Act. The letter was signed by Harold Burks as superintendent of the No. 1 Mine for Swope Coal Company. In the body of the letter, he referred to himself and to Henry Honosky "as the operating officials of Mine No. 1, Swope Coal Company." The second letter was written under a Swope Coal Company letterhead and was signed by W. B. Swope as operator of the Swope Coal Company No. 1 Mine. In the body of the letter, he referred to Mr. Honosky as a "Partner."

Swope Coal Company represented itself as the operator of the No. 1 Mine to MESA and mining operations were carried out under the Swope Coal Company name. MSHA, for its part, relied upon these representations. Given this reliance, Respondent should not be allowed now to deny its status as an operator of the No. 1 Mine in the absence of clear evidence to the contrary.

In addition to holding itself out as operator, Swope Coal Company exercised enough control over the No. 1 Mine to be characterized as an "operator" within the meaning of the Act. The term "operator" is defined in section 3(d) of the Act to mean "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine * * * ." The concept of "control" must be construed broadly in order to best effectuate the purposes of the Act. A person may be

considered an operator even though it does not supervise miners or direct the day-to-day operations of a coal mine.

Swope Coal Company, through its agent and president, W. B. Swope, entered into a contract with Day Camp Coal Company. In return for the payment of royalties, (FOOTNOTE 5) Day Camp was granted mining rights to the No. 1 Mine. Under the terms of the contract, Respondent retained substantial control over the No. 1 Mine.

Respondent retained the rights to enter the mine at all times to inspect any part thereof to ascertain the condition of the mine, the methods practiced, the amount of coal removed, or for any other lawful purpose. Day Camp was required by the terms of the contract to employ only the best and most improved methods of mining so as to maximize the amount of coal recovered. Day Camp could not remove pillars without Respondent's consent. Respondent's consent was also required before Day Camp could assign or sublet its interest in the mine. Finally, Respondent had the right to cancel the contract immediately if Day Camp violated any of the contract's clauses.

Swope's relationship with Day Camp Coal Company was not limited to that of lessor-lessee. Mr. Swope testified that he helped Day Camp Coal Company to market the coal it mined. He was also instrumental in providing some of the mining equipment used by Day Camp. Mr. Swope purchased the equipment and then immediately sold it to Day Camp. Day Camp purchased the equipment from Swope with money borrowed from a local bank. Mr. Swope endorsed the note in order to induce the bank to make the loan to Day Camp. After Day Camp folded, (FOOTNOTE 6) the machinery was repurchased by the bank at public auction. Mr. Swope then purchased the equipment from the bank.

Throughout this entire period of time, the State identification number, as well as the "Certificate for Approval of Mine Openings (for use of underground mines)," remained in the Swope Coal Company name. Day Camp Coal Company did not have a State operating certificate in its own name. Swope Coal Company was also responsible for State bonding and land restoration requirements.

Inspector Bowman testified that he observed Mr. Swope at the mine on two separate occasions--October 6 and 27, 1977. Mr. Swope testified that he went to the mine on October 27 because he was asked to help resolve the problems which had caused the mine to shut down. His presense at the mine on these occasions and his expressed purpose in

being there further supports the contention that Swope Coal Company exercised control over the No. 1 Mine.

Day Camp as lessee, and its miners, as employees, were at the No. 1 Mine to perform work which promoted the direct financial interests of Swope. Swope should not be allowed through its sublease arrangement to relieve itseslf from all responsibility for the miners who labored, in part, on its behalf. Such a release from responsibility would not promote health and safety of those miners or of others who now find themselves in a similar situation.(FOOTNOTE 7) Swope's apparent argument that actual supervision of miners or day-to-day direction of operations is a prerequisite to being an "operator" under the Coal Act is undermined by the recent case of Republic Steel Corporation, No. 79-4-4 (April 11, 1979), where the Commission found that a mine owner can be held responsible for violations of the 1969 Act created by its independent contractors even though none of the owner's employees were exposed to the violative conditions and it could not have prevented the conditions.

In addition to the legal issues, there are practical reasons why Respondent should be responsible for the safety of the miners in the No. 1 Mine. Republic also said that "A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted." While there is no direct evidence to indicate that in this case the lease and the use of different names was for the purpose of escaping responsibility, the possibility exists. There is even a greater possibility of the use of such a private contractual relationship to escape responsibility in cases such as this where the lessee merely hires miners and mines coal than in cases such as Republic where the independent contractor is hired to sink shafts, erect tipples, and perform tasks beyond the capabilities of the operator.

Swope Coal Company was the legal, as well as generally recognized operator, of the No. 1 Mine. The Respondent held itself out as the operator of the No. 1 Mine, did business as Swope Coal Company, and exercised sufficient control to be considered an operator. As such, Swope Coal Company may be assessed civil penalties under section 109 of the Act.

VIOLATIONS AND STATUTORY CRITERIA

Each of the alleged violations contained herein occurred at the Swope Coal Company No. 1 Mine, located in Premier, West Virginia. At the time the alleged violations occurred, approximately 10 miners were employed at the No. 1 Mine and it produced coal at the rate of 100 tons per day. The parties stipulated that each of the violations herein was abated in good faith and that there was no applicable history of prior paid violations. The record contains no indication that the assessment of civil penalties in these proceedings will adversely affect the ability of the Respondent to remain in business.

Day Camp Coal Company failed to exercise reasonable care to prevent or to correct the conditions or practices which caused each of the violations herein, and they were known or should have been known to exist. Although Swope Coal Company exercised sufficient control to bring it within the definition of "operator" under the Act, the record does not establish that it was concerned with the day-to-day mining operations to the extent that the negligence of Day Camp Coal company or its personnel was imputed to Respondent.

Docket No. HOPE 78-644-P

Two separate violations of mandatory safety standards were alleged in Docket No. HOPE 78-644-P. They were observed by Federal coal mine inspector James Bowman in the course of a regular inspection of Respondent's No. 1 Mine on October 6, 1977. In both instances, the inspector issued a 104(c)(1) order of withdrawal.

Inspector Bowman issued Order No. 1 JFB after he observed three concurrent conditions or practices which he believed to be in violation of 30 CFR 75.200. First, the approved roof control plan was not being followed in the main 001 section in that miners had proceeded inby permanent roof supports. The roof bolting machine had been placed up against the face, 10 feet beyond support. There were no jacks on the roof bolting machine and no temporary supports had been set in the area.

Section 75.200 requires in pertinent part that "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." The roof control plan in effect that the No. 1 Mine permitted only those persons engaged in installing temporary supports to proceed beyond the last permanent roof support until such temporary supports were installed. In this instance, miners had been proceeding beyond permanent supports to make chalk marks on the roof for placement of roof bolts. This practice presented a clear violation of section 75.200.

The inspector also observed that cleanup had occurred under unsupported roof in the face area of the No. 4 entry and in the last open crosscut. The roof control plan requires that roof be supported during or immediately upon completion of the loading cycle. The cleanup under unsupported roof was in violation of section 75.200.

Finally, the inspector observed that mining continued in the No. 4 entry within 100 feet of an outcrop without the additional support called for in the roof control plan. An "outcrop" is that area where a seam of coal comes out to the surface. The roof control plan required that roof bolts shall not be used as the sole means of roof support when underground workings approach and when mining is being done within 150 feet of an outcropping. Supplemental supports were to consist of at least one row of posts limiting the roadway width to 16 feet. The failure to provide additional supports in this area as required by the roof control plan was a violation of section 75.200.

The section foreman was on the section constantly throughout the shift and should have known that miners were proceeding beyond permanent supports for other than proper purposes. The failure to install temporary supports at the conclusion of the mining cycle and to provide additional supports in the area near the outcrop were visually obvious. The inspector was told by Bill Burks, mine superintendent, that they did not have sufficient supplies on hand at the mine to permit either the temporary or permanent posting as required.

These conditions could have resulted in a fatality. It was probable that an accident would have occurred because of the conditions. The first condition threatened those miners inby the permanent supports. The latter two conditions endangered eight men, the entire crew on the section.

Inspector Bowman issued Order of Withdrawal No. 2 JFB after observing accumulations of coal in violation of 30 CFR 75.400. He observed these accumulations extending a distance of approximately 250 feet in four entries and part of the last open crosscut. Along the ribs, the coal ranged in depth from 6 to 20 inches. In the roadways the coal had accumulated from 1/4 to 4 inches. The coal was comprised mostly of coal dust. It was wet in the middle of the roadways, dry inby the last open crosscut and extremely dry along the ribs. The inspector approximated the extent of the accumulations using the mine map. He measured depth with a ruler.

The inspector believed that the area had never been cleaned after mining. The accumulations were too extensive to be the result of normal spillage during mining. No effort was made to clean up the coal when it was discovered by the inspector or while he was there. He estimated that the accumulations had been present for more than a month. The condition was visually obvious and existed for an extended period of time, yet management failed to take corrective action.

This was a serious violation. It was probable that an accident would occur because of the accumulations. There were ignition sources in the area of the accumulations. An energized cable with six poorly-made temporary splices was lying in loose coal in the outby areas. Battery-operated equipment presented additional ignition sources. The violation endangered all those working in the mine and particularly those working in the face areas. If a fire or explosion were to occur, the probable result would have been serious injury or a fatality.

Docket No. HOPE 78-645-P

Two separate violations of mandatory safety standards were alleged in Docket No. HOPE 78-645-P. The first of these was observed by Federal coal mine inspector Leighton Farley on May 24, 1977, in the course of an accident investigation. The inspector issued 104(c)(1) Notice of Violation No. 1 LCF, citing 30 CFR 75.1704. MSHA had received a complaint on May 23, 1977, which alleged that five men had been trapped in the mine because an escapeway was blocked.

The inspector's examination of the escapeway involved revealed that timbers had been broken, the top had deteriorated, and part of the roof had fallen. Mining had continued for one and a half shifts without two separate escapeways. The inspector discussed the condition with a mine foreman, Lacey Justice, who stated that he had discovered the rock fall during a preshift examination on May 17 or 18. He and Bill Burks, the manager of the mine, decided to continue mining in the area for 2 days and only thereafter to move the section back 200 feet where they could maintain two separate escapeways. This failure to maintain a second escapeway was in violation of section 75.1704 which requires that two separate and distinct travelable passageways be maintained in a safe condition to ensure passage at all times of any persons. The decision to operate without two separate escapeways was a conscious one on the part of mine management.

Because the second escapeway was blocked, five men were forced to use their self-rescuing devices and travel through smoke to reach the face. It is probable that the lack of a second escapeway could result in serious injury or a fatality.

The second alleged violation included under this docket number was observed by Inspector Bowman in the course of the regular inspection conducted on October 6, 1977. The inspector found six poorly-made temporary splices in a trailing cable which was conducting electricity to a loading machine operating in the main 001 section. He issued 104(c)(1) Notice of Violation No. 9 JFB, citing 30 CFR 75.603. This section reads in pertinent part as follows:

> One temporary splice may be made in any trailing cable. Such temporary splice may be used only for the next 24-hour

> period * * * . Temporary splices in trailing cables shall be made in a workman-like manner and shall be mechanically strong and well insulated. Trailing cables or hand cables which have exposed wires or which have splices that heat or spark under load shall not be used.

It is clear that the condition in question was in violation of section 75.603. There were a total of six temporary splices in the cable. In addition, the outer jacket of some splices were worn and unraveled to the extent that bare wires were exposed. Some splices were also wet and filled with mud. The wires were joined with square knots. The condition and wear on the splices indicated that they had existed for at least several days.

The number of splices and the unworkmanlike manner in which they were made were visually obvious. The condition existed for at least several days. The section foreman and Curtis Kirk, the chief electrician, were in the section throughout their shift. Mr. Kirk had replaced a permanent splice on the cable on the day before the inspector arrived.

This was a hazardous condition. * * * is probable that the condition would cause an accident to occur. When the inspector first found the cable, it was energized. There was no short-circuit protection and the cable wires were exposed. The inspector testified that he knew of instances in which this type of cable burned from end to end. Because the cable was lying in dry coal dust in places and was an ignitions ource, it presented a fire or explosion hazard. The cable also presented a shock hazard because in some places it was lying in water. The roadway outby the last open crosscut was wet. At one time or another, it was likely that the splice would be in direct contact with this water. Frequent contact with the cable was necessary in this area in order to allow passage of vehicles. An individual might also suffer an electrical shock if he stood in water nearby. Every miner on the section was endangered by these hazards. If any of these accidents were to occur, the probable result would be serious injury or fatality.

Docket No. HOPE 78-646-P

The two violations included in this docket number were observed by Federal coal mine inspectors on October 27, 1977, in the course of a regular inspection.

Inspector Bowman issued 104(c)(2) Order of Withdrawal No. 1 JFB after he observed that the Respondent had mined within 30 feet of abandoned areas without first drilling test holes. He cited 30 CFR 75.1701 which, in pertinent part, requires the following:

> Whenever any working place approaches within 30 feet of abandoned areas in the mine as shown by surveys made and

> certified by a registered engineer or surveyor, or within 200 feet of any other abandoned areas of the mine which cannot be inspected and which may contain dangerous accumulations of water or gas, or within 200 feet of any workings or adjacent mine, a borehole or boreholes shall be drilled a distance of at leat 20 feet in advance of the working face of such working place and shall be continuously maintained to a distance of at least 10 feet in advance of the * * *

Before entering the mine, the inspector had examined an up-to-date mine map which indicated that mining was being done within 30 feet of an abandoned area. The abandoned area was comprised on one side of old works and on the other of mined-out areas. Neither area could be inspected because the old works had been sealed off and the roof in the mined-out area was falling in. The section foreman, Lacey Justice, admitted to the inspector that test bore holes had not been drilled. The operator did not have the equipment at the mine to drill as required. When using conventional equipment and taking a 10-foot cut, a test hole must be drilled 10 feet beyond the cut for a total of 20 feet. The Respondent had on hand a single auger which could be used to drill up to 10 feet only.

The requirement to drill bore holes was set out in the ventilation plan for the No. 1 Mine. The operator was aware of the close proximity of abandoned areas. When questioned by the inspector, Mr. Justice stated that the holes had not been drilled because they did not have the the necessary drill bits or augers.

This was a hazardous condition. The danger presented was the inundation of the area with water or gas. It was possible that water had accumulated in the abandoned areas against the coal seam which they were mining. Methane or black damp, oxygen-deficient air, might also have accumulated there. The probable result of inundation would be serious injury or fatality.

Inspector George Smith issued 104(c)(2) Order of Withdrawal No. 1 GLS (October 27, 1977), citing 30 CFR 77.502, after observing conditions which led him to believe that the required examination of electrical equipment was being carried out either inadequately or not at all. Section 75.502 provides the following:

> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditins. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

The inspector observed violations of sections 77.505, 77.506, 77.501, 77.507, and 77.521, all of which relate to surface electrical

equipment. The number of these violations indicated that the examination of electrical equipment was not being carried out. The inspector was also unable to find any record of electrical examinations. Curtis Kirk, Respondent's chief electrician, admitted that he had not been making or recording examinations.

Mine management should have known of the requirement to make and record examinations, yet it failed to do so. Given the number of violations present, it is probable that the failure to make and record examinations would cause an accident. Unless an examination of electrical equipment is carried out, the miner has no way of knowing whether a hazardous condition exists or not.

Docket No. HOPE 78-664-P

A single violation is alleged under this docket number. Inspector Herbert M. McKinney issued Order of Withdrawal No. 1 CDH-HM on May 23, 1977, citing 30 CFR 75.201. Section 75.201 reads as follows: "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls caused by excessive widths of rooms and entries or faulty pillar recovery methods."

The inspector issued this order in the course of an accident investigation. Two miners had been injured by a roof fall while they were spot-bolting in the area of pillar Nos. 1 and 2 in the Day Camp Branch Portal. The method of pillar recovery being used posed a hazard to the miners working there in a number of respects. The block of coal in question had been partially split. Five places had been started off this split without setting the necessary turnposts and breaker posts. A six-way intersection was thereby created. The roof was supported with roof bolts and very few posts. In addition, the roadway exceeded 20 feet, the maximum width approved by MSHA. In places, it was as wide as 24 feet. These practices were clearly in violation of section 75.201.

Mine management should have known that the method which was used to remove the pillar was hazardous. The inspector was of the opinion that management was attempting to mine as much coal as possible without going to the expense of setting additional supports.

The method of extraction used created a hazardous condition and resulted in serious injury to a miner. That miner suffered a broken back.

ASSESSMENTS

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

Docket No. HOPE 78-644-P	Penalties
Order of Withdrawal No. 1 JFB (October 6, 1977	$ 750
Order of Withdrawal No. 2 JFB (October 6, 1977	$ 750
Docket No. HOPE 78-645-P	
Notice of Violation No. 1 LCF (May 24, 1977	$ 375
Notice of Violation No. 9 JFB (October 6, 1977)	$ 350
Docket No. HOPE 78-646-P	
Order of Withdrawal No. 1 JFB (October 27, 1977)	$1,250
Order of Withdrawal No. 1 GLS (October 27, 1977)	$1,250
Docket No. HOPE 78-664-P	
Order of Withdrawal No. 1 CDH-HM (May 23, 1977)	$1,500

Proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

ORDER

The Respondent is ORDERED to pay the amount of $6,225 within 30 days of this decision.

Forrest E. Stewart
Administrative Law Judge

ÄÄÄ
~FOOTNOTE_ONE

1 Section 109(a)(1) of the Act provides:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

~FOOTNOTE_TWO

2 Respondent has used different names. Counsel for Respondent stated that "there is no such entity as Swope Coal Company." W. B. Swope, Inc., was chartered by the State of West Virginia, in January 1976. However, the State mining permit and

the MSHA identification number were issued in the Swope Company name and remained in that name at all times pertinent to these proceedings. Inspector James Bowman testified that "Swope Coal Company" was the only name he had ever heard used in reference to the mine. When inspector Herbert M. McKinney was at the mine in May 1977, he observed a sign on the main office building which read "Swope Coal Company No. 1 Mine Office." Although the charter name of the corporation was W. B. Swope, Inc., the corporation was known by and did business under the name of Swope Coal Company.

~FOOTNOTE_THREE
3 30 CFR 82.11 states in pertinent part:

"(a) Not later than 30 days after the effective date of this part, the operator of a coal mine shall, in writing, notify the Coal Mine Health and Safety District Manager * * * of the legal identity of the operator * * * ."

30 CFR 82.12 states in pertinent part:
"Within 30 days after the occurrence of any change in the information required by section 82.11, the operator of a coal mine shall, in writing, notify * * * the District Manager * * * of such change."

30 CFR 82.13 sets forth the results of a failure to notify the District Manager:

"Failure of the operator to notify the Bureau of Mines [subsequents, MSHA] in writing of the legal identity of the operator or any changes thereof within the time required under the Act will be considered to be a violation of section 107(d) of the Act and shall be subject to penalties as provided in section 109 of the Act."

~FOOTNOTE_FOUR
4 The functions of the Mining Enforcement and Safety Administration (MESA) have been transferred to the Mine Safety and Health Administration (MSHA) pursuant to the provisions of the Act and these names were used interchangeably in the record.

~FOOTNOTE_FIVE
5 Under the terms of the lease, Swope received a royalty of 10 percent of the gross sales price of the coal produced from the mine.

~FOOTNOTE_SIX
6 After Day Camp Coal Company became defunct, Respondent leased the mine property to Abco Mining Development Company.

~FOOTNOTE_SEVEN
7 MSHA argued that the concept of control need not require a finding of a singly responsible party, but that the exercise of any measure of control may make a party liable as an operator regardless of actual direction of day-to-day operations at the mine. Thus, in this instance, it was argued that Swope and Day Camp share joint and several liability and that, Day Camp being

defunct, it was perfectly proper for MSHA to proceed solely against Swope.