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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. BARB 78-655-P A.C. No. 15-02709-02056 V
v.	
PEABODY COAL COMPANY, RESPONDENT	Camp No. 1 Mine

DECISION

Appearances: Gregory E. Conrad, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Thomas J. Frawley, Esq., Kohn, Shands, Elbert, Gianoulakis & Giljum, St. Louis, Missouri, for Respondent

Before: Judge Cook

I. Procedural Background

On August 24, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977), in the above-captioned proceeding. The petition alleged violations of 30 CFR 75.200 and 75.400. On October 2, 1978, Peabody filed an answer in conjunction with a motion to file a later answer, which motion was granted by an order dated October 13, 1978.

By order of October 16, 1978, the above-captioned case was consolidated with Docket Nos. BARB 78-6, 78-688-P, 78-690-P and 78-613-P and a notice of hearing was issued. However, Respondent filed a motion on October 25, 1978, wherein it requested that the above-captioned case be severed, requesting a separate hearing. This motion was granted by an order dated November 6, 1978.

The hearing commenced on December 12, 1978. Representatives of both parties were present and participated.

At the conclusion of the hearing, counsel for MSHA and counsel for the Respondent agreed that the hearing transcript could be mailed by the reporter by January 11, 1979. Counsel further agreed that the initial briefs would be filed simultaneously by February 19, 1979. On February 12, 1979, Respondent requested additional time until March 9, 1979, to file its initial brief. By an order dated February 13, 1979, the time for the filing of original posthearing briefs and any other proposals by way of findings of fact and conclusions of law was extended to March 9, 1979. The time for response was extended to March 23, 1979.

The Petitioner filed its posthearing brief on March 9, 1979. The Respondent filed its posthearing brief on March 12, 1979. The Petitioner and the Respondent filed reply briefs on March 23, 1979, and March 29, 1979, respectively.

II. Violations Charged

Order No. 7-0565 (1 MEM), November 21, 1977, 30 CFR 75.400.

Order No. 7-0563 (1 LWS), November 21, 1977, 30 CFR 75.400.

Order No. 7-0583 (1 LWS), December 1, 1977, 30 CFR 75.200.

III. Evidence Contained in the Record

A. Stipulations

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

B. Witnesses

MSHA called as its witnesses Mitchell E. Mills, an MSHA coal mine supervising inspector, and Louis W. Stanley, an MSHA inspector.

Respondent called as its witnesses Brent W. Roberts and Martin T. Lovell, safety managers at Respondent's Camp No. 1 Mine, and Jack Dan Matheson III, a belt foreman at Respondent's Camp No. 1 Mine.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

(a) M-1 is computer printout titled "Controller Information Report" compiled by the Office of Assessments containing information as to the size of the operator.

(b) M-2 is a computer printout compiled by the Office of Assessments containing the operator's history of violations for which assessments had been paid up to December 1, 1977.

(c) M-3 is a map of Respondent's Camp No. 1 Mine.

(d) M-4 is a copy of Order No. 7-0565 (1 MEM), November 21, 1977, 30 CFR 75.400.

(e) M-5 is a modification of M-4.

(f) M-6 is an abatement of M-4 and M-5.

(g) M-8 is the 104(c)(1) order underlying M-4, M-10 and M-13.

(h) M-9 is the 104(c)(1) notice underlying M-8.

(i) M-10 is a copy of Order No. 7-0563 (1 LWS), November 21, 1977, 30 CFR 75.400.

(j) M-11 is a termination of M-10.

(k) M-13 is a copy of Order No. 7-0583 (1 LWS), December 1, 1977, 30 CFR 75.200.

(l) M-14 is a termination of M-13.

(m) M-16 is a drawing produced by Inspector Louis W. Stanley depicting his recollection of the conditions cited in M-13.

(n) M-17 is a copy of the cleanup program for the Respondent's Camp No. 1 Mine.

(o) M-19 is an entry from the preshift examiner's report for the No. 3 Unit, dated November 25, 1977.

(p) M-20 is a preshift examiner's report for the No. 3 Unit, dated November 27, 1977, 10 to 11 p.m.

(q) M-21 is a preshift examiner's report for the No. 3 Unit, dated November 30, 1977.

(r) M-22 is a preshift examiner's report for the No. 3 Unit, dated December 1, 1977.

(s) M-23 is an entry from the belt examiner's book dated November 17, 1977.

(t) M-24 is an entry from the belt examiner's book dated November 18, 1977.

(u) M-25 is an entry from the belt examiner's book dated November 18, 1977.

(v) M-40 is a copy of the roof control plan for the Camp No. 1 Mine, dated August 5, 1977.

2. Peabody introduced the following exhibits into evidence:

(a) 0-2 is the belt examiner's book for the Camp No. 1 Mine, beginning with entries for October 6, 1977.

(b) 0-3 is the preshift examiner's book for the Respondent's Camp No. 1 Mine.

(c) 0-4 is a copy of the roof control plan for the Camp No. 1 Mine, dated April 6, 1976.

(d) 0-5 is a drawing produced at the hearing by Martin T. Lovell depicting his recollection of the conditions cited in M-13.

IV. Issues

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

V. Opinion and Findings of Fact

A. Stipulations

1. The Administrative Law Judge has jurisdiction over the subject matter in this proceeding (Tr. 7).

2. Peabody Coal Company and the Camp No. 1 Mine are subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 (Tr. 7-8).

3. The subject orders of withdrawal were duly served on an agent of the operator (Tr. 8).

4. The assessment of any penalties in this proceeding will not affect the ability of Respondent to continue in business (Tr. 8).

5. With respect to each of the alleged violations in this proceeding, Respondent, at a minimum, demonstrated good faith in attempting to achieve normal compliance after notification of the violations (Tr. 8).

6. Inspectors Louis W. Stanley and Mitchell E. Mills were duly authorized representatives of the Secretary at all times relevant to this proceeding (Tr. 8).

7. Each of the proposed exhibits to be submitted by Petitioner and Respondent are authentic documents which were prepared in the ordinary course of business by the person or persons designated therein by their signature (Tr. 8).

8. For purposes of assessment of any penalties, Peabody is a large operator (Tr. 8).

9. The Federal Coal Mine Health and Safety Act of 1969 has been amended by the Federal Mine Safety and Health Act of 1977 (Tr. 9).

10. The Respondent is subject to the Federal Mine Safety and Health Act of 1977 (Tr. 9).

11. November 21, 1977, was a Monday (Tr. 77-78).

12. Inspector Stanley's order of November 21, 1977 (Exh. M-10), gives sufficient notice of the alleged accumulation cited therein (Tr. 175).

13. Peabody Holding Company, Inc., became the controller of Peabody Coal Company, effective June 30, 1977 (Tr. 510-511).

B. Occurrence, Gravity, Negligence, and Good Faith

1. Order No. 7-0565 (1 MEM), November 21, 1977, 30 CFR 75.400

(a) Occurrence of Violation

On Monday, November 21, 1977, MSHA supervisory inspector Mitchell E. Mills visited the Respondent's Camp No. 1 Mine. He arrived at 6:15 a.m. (Tr. 20-23). Inspector Mills noted that he was accompanying MSHA inspector Louis W. Stanley on a supervisory inspection and also because of information he had received regar+ding a problem with "dirty belts" at the Camp No. 1 Mine (Tr. 20-22, 115). While on the surface, Inspector Mills consulted with management personnel and persons from the United Mine Workers of America, while Inspector Stanley examined the preshift reports and the belt examiner's reports (Tr. 23, 50-51).

Inspector Mills' knowledge of the information contained in those reports was acquired from Inspector Stanley (Tr. 50-51, 147-150).

Upon arriving underground, each inspector proceeded to a different area of the mine to begin his inspection. Inspector Mills inspected the area of the Third Main South belt, also called the Second South piggy-back belt (Tr. 239-240, 317). Ken Hazelwood and Brent Roberts accompanied him on the inspection tour (Tr. 29-30). He commenced his inspection at the tailpiece and ended his inspection at the header, walking the entire 3,500-foot length of the belt (Tr. 25, 73). The No. 7 Unit was moving, but the belt was not in operation and no coal production was occurring inby either the tailpiece or the header (Tr. 74-76, 98, 133-134, 240-243).

He observed readily noticeable accumulations of combustible material at two locations along the belt (Tr. 38, 44-45, 107). He measured the length and depth of the accumulations with a steel rule, with the assistance of either Mr. Hazelwood or Mr. Roberts (Tr. 45-46).

The first accumulation was observed at the old No. 7 Unit belt drive (Tr. 38, Exh. M-4, Point E on Exh. M-3). It consisted of loose coal and coal dust 16 to 24 inches in depth and 60 feet in length. He recalled from memory that it was 10 to 12 feet wide (Tr. 44, 74, 124). The depth of the accumulation indicated to the inspector that it had existed for approximately two shifts (Tr. 96).

The second accumulation was located in the middle of an intersection, one crosscut outby No. 3 Unit's intake overcast (Tr. 25-26, 89, Exh. M-4, Point C on Exh. M-3). The accumulation was 20 inches in depth and 20 feet in length. He recalled from memory that it was approximately 2 feet wide (Tr. 45, 74, 125, Exh. M-4). It consisted of approximately 80 percent coal, both fine and lump, and 20 percent rock (Tr. 45, 86-87, 114-115, 118). The inspector estimated that the accumulation had existed for approximately 2 weeks (Tr. 60, 96). The inspector's opinion as to both the cause of the accumulation and the duration of its existence was based upon a common set of observations. He testified that the belt had been running out of alignment as the result of a rock fall (Tr. 40-48). Thus, the top belt had been running to the right and the bottom belt had been running to the left. The top belt had been rubbing against the upright belt stand, while the bottom belt had been rubbing the rock and the coal (Tr. 87-88). The top belt was worn from rubbing against the stand, and, in fact, had rubbed halfway through a 2-inch pipe that was part of the belt stand. The bottom belt had rubbed through a piece of coal or rock. The belt was dragging the bottom and the bottom rollers were buried. It was the inspector's opinion that it would have required approximately 2 weeks for these conditions to develop (Tr. 57-60, 87-88, 99). Misalignment of the belt and slippage caused the spillage (Tr. 40-48, 62-63). This interpretation of inferences drawn from the facts was based on the inspector's experience in dealing with belts (Tr. 123).

Inspector Mills testified that he specifically asked Messrs. Hazelwood and Roberts if they thought the accumulations of coal were excessive, and that one or both of them responded in the affirmative (Tr. 43-44).

Inspector Mills identified Exhibit M-17 as containing the cleanup program in effect at the Respondent's Camp No. 1 Mine on November 21, 1977. The cleanup program, dated February 25, 1972, states:

> The places are cleaned by 14BU10-11BE loading machine.
>
> The ribs are hand shovelled.
>
> The float dust and coal spillage is shovelled by hand on all belt haulage.
>
> This work is being done by both coal run shifts.

Inspector Mills discussed the Respondent's cleanup program (Exh. M-17) at two points in his testimony. During direct examination, he testified that his observations caused him to conclude that the cleanup plan (Exh. M-17) was not being followed, especially with regard to the accumulation located one crosscut outby the No. 3 Unit overcast. He testified that the plan requires float dust and coal spillage to be shoveled by hand on all belt haulage during the coal run shifts (Tr. 61-62). The inspector set forth a more detailed interpretation of the cleanup plan during the course of examination by the Judge. He testified that the plan mandates daily inspection and reporting, in addition to systematic daily cleaning so that the belt remains clean at all times (Tr. 126-127).

The inspector had no actual knowledge of whether cleaning had occurred in the area of the No. 3 Unit intake overcast on November 17, 1977, or November 18, 1977 (Tr. 83-84). He never asked anyone whether any cleaning had been done in the area (Tr. 120). He did not recall discussing with either Mr. Roberts or Mr. Hazelwood their plans for cleaning the belt (Tr. 122). In addition, he did not ask anyone at the mine whether they intended to start the belt prior to cleanup (Tr. 122).

Inspector Mills issued the subject 104(c)(2) order of withdrawal at 10:30 a.m., November 21, 1977 (Exh. M-4), citing the Respondent for a violation of the mandatory safety standard set forth in 30 CFR 75.400. This section of the Code of Federal Regulations states the following: "Coal dust, including float coal dust deposited on rockdusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or upon electric equipment therein."

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

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

> 1. that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings, of a coal mine;
>
> 2. that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
>
> 3. that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

There can be no doubt that accumulations of combustible materials existed in the active workings of the Respondent's Camp No. 1 Mine at the two above-described locations along the Third Main South belt. Accordingly, it is found that MSHA has established the first element of its prima facie case. (FOOTNOTE 1)

The second element of MSHA's prima facie case, the requirement that the operator have actual or constructive knowledge of the existence of the combustible accumulations, has generated some controversy among the parties, as evidenced through their posthearing submissions. According to MSHA, the Old Ben decision addresses itself to two distinct types of accumulations: "usual" and "unusual." MSHA argues that depending upon the type of accumulation present in a given case, the operator's responsibilities and the legal prerequisites for MSHA's establishment of a prima facie case differ radically. MSHA takes the position that it must set forth affirmative evidence as to all three elements of its prima facie case only where the accumulations are "unusual" in nature. However, where "usual" accumulations of combustible materials have resulted from the ordinary course of the operator's mining activities, MSHA argues that "the Board appears to infer" that no knowledge requirement is present since it is "assumed" that the operator is aware of these inevitable accumulations. In such cases, MSHA argues that it satisfies its burden under Old Ben when it proves that the operator was not maintaining its regular cleanup program or that the cleanup program was deficient in that combustible materials were being permitted to accumulate without adequate attention to their cleanup (Petitioner's Posthearing Brief, pp. 3-4).

The Respondent takes vigorous issue with MSHA's assertions (Respondent's Reply Brief, pp. 1-2).

I disagree with MSHA's interpretation of Old Ben. The fact that an accumulation is "usual" or "unusual" does not alter MSHA's burden of going forward with the evidence. This is so because although the Board discussed both "usual" and "unusual" accumulations in its decision, it did not distinguish between them when it set forth the elements of MSHA's prima facie case. The fact that the three elements are described as "the precise elements of proof required under * * * 30 CFR 75.400 to make out a prima facie case * * * " further indicates that no such distinction was intended. (FOOTNOTE 2)

In effect, MSHA argues that a presumption exists that the operator knew or should have known of the accumulation's existence once it has been established that the accumulation accrued during the ordinary course of the operator's mining activities, and that the operator's

regular cleanup program was not being followed or was deficient in some respect. However, the Board in Old Ben did not specifically set forth such a presumption.

Although the Board did indicate that "[p]roof of the absence of [a regular cleanup] program, together with the presence of any accumulation might well alone support a citation for violation of Section 304(a)," Old Ben Coal Company, 8 IBMA 196, 198, 1977-1978 OSHD par. 22,328 (1977), Opinion and Order Denying Motion for Reconsideration of Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977) (emphasis in original), this statement does not strengthen the Petitioner's position in the case at bar. The statement merely indicates that the operator might be held strictly liable if he fails to maintain a regular cleanup program. In the case at bar, the Respondent had a regular cleanup program (Exh. M-17). Although Inspector Mills stated that the plan was not being followed (Tr. 61), the Respondent took a position refuting this characterization by arguing that the Respondent was confronted with unusual circumstances in its efforts to clean the Third Main South belt (Respondent's Reply Brief, pp. 2-3). It cannot be found that the Board intended to impose a strict liability standard where the operator maintains a regular cleanup program, especially where the parties have raised a genuine issue of material fact with respect to whether the plan was being followed.

For the reasons set forth below, I find that the Respondent knew or should have known of the existence of the combustible accumulations at the two locations along the Third Main South belt.

A substantial dispute has arisen between the parties with respect to the knowledge issue, particularly as regards the accumulation located in the intersection one crosscut outby the No. 3 Unit intake overcast. The Petitioner relies most heavily on the inspector's estimate that the condition existed for approximately 2 weeks in arguing that the Respondent both knew of the existence of the accumulation and failed to undertake cleanup procedures within a reasonable time after he knew or should have known of their existence. The Respondent disagrees, relying upon its belt examiner's reports (Exh. 0-2) to argue that the accumulations observed in the area of the No. 3 Unit overcast were systematically removed promptly upon discovery.

I find the evidence adduced by the Respondent sufficient to rebut the inspector's estimate that the accumulation had existed for approximately 2 weeks.

The inspector testified that running the belt while it was out of alignment was a partial cause of the accumulation (Tr. 48, 62-63). The belt had been knocked out of alignment by a roof fall occurring one crosscut outby the No. 3 Unit's intake overcast, i.e., the roof fall had occurred in the same location where the inspector observed

the accumulation (Tr. 40-41, 45). The fall had pushed the belt approximately 18 inches out of alignment (Tr. 65) causing it to rub both the belt stand and the coal (Tr. 57-58, 60). According to the inspector, either the area had not been cleaned after the fall or another fall had occurred (Tr. 45). He estimated that the accumulation cited in the order of withdrawal had existed for approximately 2 weeks, noting that 2 weeks would have been required for the belt stand to develop the amount of wear observed, and also to "make all of the belt cut on the opposite side and to wear the rubber off" (Tr. 60) (see also, Tr. 57-58).

Mr. Brent Roberts, the safety manager of the mine, was aware that damage had been suffered by the Third Main South belt as the result of a rock fall somewhere in the area of the No. 3 intake overcast (Tr. 301). Although he had no idea as to when the roof fall had occurred, he indicated that it had to have been quite a while before November 21, 1977 (Tr. 301). He indicated that the area had been cleaned after the fall, but that apparently more rock had fallen in, either as the result of a second roof fall or as the result of rock sliding into the side of the belt (Tr. 301). However, he did not know the date of the second occurrence (Tr. 301-302).

Additionally, the inspector testified that the operator was aware of the existence of these accumulations because of entries in the preshift examiner's books (Tr. 50-51). At the Camp No. 1 Mine, the operator has both a preshift examiner who makes the active coal production units and a belt examiner who makes the belt on each coal production shift (Tr. 51). The belt examiner makes entries in a belt examiner's book located outside the mine (Tr. 51). According to the inspector, the accumulations were noticeable, and anyone making an adequate preshift examination in the area would have noticed them (Tr. 107-108). Although there are substantial indications that the information relayed to Inspector Mills by Inspector Stanley as to entries contained in the belt examiner's book pertained to the Second Main South belt, and not to the Third Main South belt (Respondent's Posthearing Brief, pp. 20-21), the error has no bearing on the operator's actual or constructive knowledge of the accumulations' presence. The belt examiner's book (Exh. 0-2) indicates that the Respondent was aware of spillages in the area of the No. 3 overcast. The belt examiner's reports for each of the following days and shifts indicate a problem with coal spillage in the area of the No. 3 overcast: second shift, November 17, 1977 (Exh. 0-2, Tr. 80, 252-253, 329); second shift, November 18, 1977 (Exh. 0-2, Tr. 84, 252, 327-328); second shift, November 19, 1977 (Exh. 0-2, Tr. 251-252). Although, as a result of the information contained in Exhibit 0-2, the Respondent assigned men to clean the area on the November 18, 1977, and November 19, 1977, day shifts (Tr. 328-329), there is no indication that cleanup personnel were assigned to the area on the November 19, 1977, second shift.

The foregoing evidence is sufficient to rebut the inspector's opinion that the accumulation in the area of the No. 3 overcast had existed for 2 weeks. There is no indication that he asked any of the operator's employees when the roof fall had occurred, even though his testimony reveals two possible reasons for the accumulation's presence, i.e., either the area had not been cleaned or another fall had occurred (Tr. 45). In fact, he never asked anyone whether any cleaning had been done by the Respondent prior to issuing the order (Tr. 120). The fact that Mr. Roberts stated that the area had been cleaned after the first roof fall and that another roof fall or rock slide had occurred in the area, coupled with the fact that the Respondent had cleaned in the area of the No. 3 overcast during the week prior to the issuance of the order, indicates that MSHA has failed to establish by a preponderance of the evidence that the accumulation had existed for 2 weeks. It is, however, sufficient to establish by a preponderance of the evidence that the belt had been running out of alignment for approximately 2 weeks.

However, this does not end the inquiry, because an entry made in the belt examiner's book for the November 19, 1977, second shift (Exh. 0-2,Tr. 251-252), is sufficient to charge the Respondent with knowledge of the presence of a combustible accumulation near the No. 3 overcast. In this instance, the accumulation was 20 inches deep for a distance of 20 feet, but the most serious part of the accumulation related to the belt dragging in coal and rock and the rollers so deeply buried that they could not be seen (Tr. 71, 87-88, 98-99). The extent and nature of the accumulations show that the serious portion had to exist for more than one shift and also that the belt examiner did not report in the book the extreme seriousness of the accumulation. Knowledge of the belt examiner should be chargeable to the Respondent under the principles set forth in Pocahontas Fuel Company, 8 IBMA 136, 84 I.D. 488, 1977-1978 OSHD par. 22,218 (1977), aff'd sub nom. Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979). Furthermore, the Respondent, in its posthearing brief, acknowledges its awareness of this accumulation cited by the inspector (Respondent's Posthearing Brief, pp. 17-18).

The Respondent argues that it should not have been aware of the accumulation located at the old No. 7 Unit header. An individual was regularly assigned to clean this area (Tr. 319). According to Respondent, it should not have been aware of the accumulation because when the belt supervisor examined Exhibit 0-2 at the beginning of the day shift on November 21, 1977, he believed that the individual assigned to the No. 7 Unit was still stationed at the old No. 7 header location. Although the belt supervisor knew that the No. 7 Unit was moving, he understood that this individual would remain responsible for the old No. 7 header location even after the unit moved because of its proximity to the tailpiece of the Third Main South belt, at which point No. 7 Unit's new belt would empty and for which he was already responsible (Tr. 318, 323) (Respondent's Posthearing Brief, p. 17).

I disagree. The fact that the need for cleaning at the Old No. 7 Unit header had been noted on the day and second shift reports for November 19, 1977 (Exh. 0-2, Tr. 316), is sufficient to charge the Respondent with knowledge of the accumulation's presence. The inspector's estimate that the accumulation had existed for approximately two shifts is thus confirmed by the entries in Exhibit 0-2 (Tr. 96).

The final element of MSHA's prima facie case is whether the operator failed to clean up the accumulations, or failed to undertake to clean them up, within a reasonable time after discovery, or within a reasonable time after discovery should have been made.

As to the issue of "reasonable time," the Board in Old Ben stated:

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

8 IBMA at 115.

The Board further stated:

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

8 IBMA at 111.

A question is presented as to whether the two accumulations cited by Inspector Mills are the "small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation," or whether they are "unusual occurrences of excessive accumulations." In the former case, the Respondent discharges its duty through the maintenance of and adherence to a regular cleanup program incorporating from one cleanup after two or three production shifts to several cleanups per production shift, depending upon the volume of production involved. In the latter case, the Respondent is required to undertake effective cleanup procedures promptly upon discovery of the accumulations.

For the reasons set forth below, I conclude that part of the accumulations cited by Inspector Mills in his order of withdrawal were excessive accumulations requiring a prompt cleanup response by the operator within the meaning of Old Ben. As such, the Respondent was required to implement cleanup procedures outside the requirements of its regular cleanup program. As relates to the other part of the accumlations, it is evident that the regular cleanup program was not followed.

The Respondent seeks to avoid a finding that a violation occurred by arguing that it was confronted with "unusual circumstances" in its efforts to clean the Third Main South belt (Respondent's Reply Brief, pp. 2-3). I disagree. The problems experienced by the Respondent could have been remedied by simply realigning the belt.

The inspector testified that the accumulations occurred as a result of both running the belt while it was out of alignment and because of slippage (Tr. 48, 62-63).

The alignment and slippage problems were directly attributable to the roof fall that occurred along the Third Main South belt line approximately 2 weeks prior to the issuance of the order. The available evidence, such as the excessive wear on the belt stand, indicates that the belt had not been realigned after the fall. In addition, the alignment problem was aggravated by events occurring on both the No. 3 and No. 6 Units on or around November 14, 1977, approximately 7 days prior to the issuance of the order. According to Jack Dan Matheson III, the belt foreman at the Camp No. 1 Mine, a fall occurred on the No. 6 Unit and the No. 3 Unit was loading rock (Tr. 338). The Third Main South belt was involved in transporting the material outside of the mine (Tr. 338, 344). As the transporting of large rocks on the belt is, in itself, sufficient to "knock" the rollers and cause an alignment problem (Tr. 339-340), it can be inferred that the activities on or around November 14, 1977, aggravated the existing alignment problem on the Third Main South belt. Although

it may be unusual for two units to be running rock onto the belt simultaneously (Tr. 376), this fact does not provide sufficient justification for failure to implement prompt cleanup, especially when such activities aggravate a preexisting alignment problem.

The fact that the roof falls which caused or aggravated the alignment problem had been cleaned up is of no assistance to the Respondent. Although those occurrences were removed in time or distance from accumulations observed on November 21, 1977, the accumulations still remained outside the scope of Respondent's regular cleanup program. Failure to correct the alignment and slippage problems resulted in the presence of such extensive accumulations of combustible materials in the mine's active workings that they cannot be deemed "the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation." 8 IBMA at 111. As long as the Respondent permitted the alignment and slippage problems to persist, it was bound to remove the voluminous accumulations promptly upon discovery, subject, of course, to the proviso that cleanup occur within a reasonable time.

Respondent submits that a violation of 30 CFR 75.400 cannot be found as regards the accumulation located in the intersection located one crosscut outby the No. 3 Unit's intake overcast because it was in the process of alleviating the allegedly violative condition at the time the withdrawal order was issued (Respondent's Posthearing Brief, p. 18; Respondent's Reply Brief, p. 5). The belt was not operating and there was no coal production. Jack Matheson testified that he had assigned two men to clean the area on November 21, 1977, because it had been cited in Exhibit 0-2 on the second shift of November 19, 1977 (Tr. 333-334), and that he intended to keep the Third Main South belt shut off until the area had been cleaned (Tr. 331). In fact, Mr. Matheson went to the header of the Third Main South belt to insure that the belt was not in operation (Tr. 330-331, Respondent's Posthearing Brief, p. 18; Respondent's Reply Brief, p. 5).

However, the fact that the Respondent was in the process of removing the accumulations at the time the withdrawal order was issued is not dispositive of the question of whether it had permitted the accumulations to exist by failing to commence cleanup procedures within a reasonable time after discovery. The Respondent's theory, when carried to its logical conclusion, would preclude the finding of a violation where it could be established that a dangerous accumulation of combustibles had existed for a month, as long as the operator was in the process of removing them at the moment the order of withdrawal issued. Such a position is patently erroneous because it conveniently overlooks the clear mandate of Old Ben that "cleanup should be accomplished within a reasonable time after discovery." 8 IBMA at 110.

In support of its position, Respondent cites the Board's decision in Zeigler Coal Company, 3 IBMA 366, 81 I.D. 598, 1974-1975 OSHD par. 18,675 (1974). In Zeigler, a notice of violation was issued for oil and grease accumulations on a coal drill. The drill had been taken out of service and was being cleaned at the time the violation was cited. In holding that no violation was present since the equipment was out of service and being cleaned at the time of the inspection and prior to the issuance of the notice, the Board observed that such facts warranted the inference that the operator intended to clean the equipment before it reentered service.

The circumstances of that case do not apply to the facts in the instant case. The principles of the later Old Ben decision, reviewed above, must be applied to the instant case. There is no indication that the coal drill involved in Zeigler had been in use for an unreasonable period of time after the accumulation was or should have been discovered by the operator. In the instant case, the evidence is to the contrary as relates to the operation of the belt in question.

The Old Ben case is instructive as to the type of corrective action the Respondent should have taken. After setting forth the elements of MSHA's prima facie case, the Board proceeded to apply the test to the facts presented. According to the Board:

> The operator's witnesses provided the only evidence explaining how and when the combustible materials had accumulated and what and when corrective action was taken. Mr. Steve Rowland, a graduate mining engineer, and a production foreman of Mine No. 24 for Old Ben, testified that the accumulations occurred during the shift preceding the morning shift of July 13, when the inspection took place, and that they were caused by a belt separation (Tr. 154); that there had been alignment and and tension problems with the belt (Tr. 157) and that the mine manager sent men to restore tension to the belt and realign it to prevent continued spillage, which was done (Tr. 158); that also, on the morning of the inspection, after checking the preshift examination reports, inspecting the beltline, and making the face areas, he immediately assigned the bobcat and shuttle car operators to shovel the side dumps along the belt (Tr. 156); and that the mine manager had told him that two belt shovelers had been sent to the 8th south belt in response to the preshift examination report which showed the belt dirty on the just-concluded shift (Tr. 156). Mr. Yattoni verified this by his testimony that he observed the two belt shovelers beginning their work at 185 station along the beltline as he walked in with the inspector (Tr. 114). [Emphasis added.]

8 IBMA at 117.

The pertinent language in the above-quoted passage reveals that the operator was not only in the process of removing the accumulations within a reasonable time after it knew or should have known of their existence, but also alleviating the cause of the spillage, i.e., the belt separation, tension and alignment problems. There is no indication in the present case that Mr. Matheson had instructed his men to correct the cause of the spillage through alleviating the slippage and alignment problems. Accordingly, there is no basis for an inference that Respondent would have implemented proper corrective action prior to starting the Third Main South belt.

The fact that the belt was not in operation on the morning of November 21, 1977, does not control the outcome of the case. Old Ben states that "reasonable time" must be determined by evaluating "urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion." 8 IBMA at 115. Such factors as "mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source" are relevant to this evaluation. 8 IBMA at 115. Accordingly, it is proper to look to the conditions that existed at the time the operator acquired knowledge of the accumulation's presence in determining whether it undertook cleanup procedures within a reasonable time.

The mass, extent and physical characteristics of the accumulation near the No. 3 Unit intake overcast are set forth above. It is unnecessary to repeat them. They are hereby found to be of sufficient mass, extent and combustibility to contribute to a mine fire or propagate an explosion. The remaining question is whether they were in sufficient proximity to an ignition source.

The accumulation either was observed or should have been observed by a belt examiner during the second shift on Saturday, November 19, 1977 (Exh. 0-2, Tr. 251-252). The shift started at 4 p.m. and ended at midnight (Tr. 245). The testimony of Mr. Brent Roberts is sufficient to establish that it is more probable than not that the belt examiner observed the condition between 4 and 8 p.m. (Tr. 252). In fact, the law requires the belt examination to be made as soon as the coal production shift starts (Tr. 150). 30 CFR 75.303. According to Mr. Roberts, it would be safe to assume that the belt was running on November 19, 1977, because entries in the belt examiner's book are made only during those time periods when the belt is running (Tr. 266). This is confirmed by Mr. Matheson's assertion that the belt examiner makes his examination of the belts during the coal production shift or during a shift on which the belts are running (Tr. 314).

Inspector Mills identified the potential hazard involved as a mine fire (Tr. 70), and stated that there was a good possibility that a fire could occur (Tr. 71). According to the inspector, heat-producing friction is caused both by the belt dragging in

coal and rock and by the belt rubbing the stand (Tr. 71). In fact, he made the point quite graphically by stating: "When a belt rubs a stand this long, its got to get hot. You'll find when they rub this long, sometimes they're so hot you can't touch them, even rollers that catch fire" (Tr. 71). The belt rollers were buried (Tr. 98-99). His opinion was based on 25 years' experience gained as a mine foreman (Tr. 19, 98).

The testimony of Respondent's witnesses confirms the inspector's assertions. According to Mr. Lovell, a belt running in coal is an ignition source (Tr. 425). Mr. Roberts' testimony on crossexamination reveals that a fire could have been caused by operating the belt before the accumulations were cleaned up (Tr. 279). Mr. Matheson's testimony on cross-examination reveals that if the accumulation had not been cleaned up, a belt fire could have occurred (Tr. 397).

The belt examiner is required to record his findings shortly after completion of his examination (Tr. 150-151). The Respondent's belt examiners recorded their entries toward the end of the shift (Tr. 316). The actual or constructive knowledge of an individual assigned by the operator to perform required examinations is imputed to the operator. Pocahontas Fuel Company, supra.

Accordingly, it is found that at the time the belt examiner observed the accumulation, it was in sufficient proximity to an ignition source to warrant prompt cleanup, and that this knowledge was imputed to the operator.

It is further found that the operator failed to implement cleanup procedures within a reasonable time in that it failed to implement cleanup until the next production shift, i.e., on the morning of November 21, 1977.

As relates to the accumulation at the old No. 7 Unit header (Point E on Exh. M-3), it is found that they were of sufficient mass, extent and combustibility to contribute to a mine fire. The accumulation was noted on the November 19, 1977, day and second shifts (Exh. 0-2, Tr. 316). The testimony of Mr. Matheson establishes that an individual was assigned regular cleanup duties at the old No. 7 header, and that Mr. Matheson expected him to clean the area even though the No. 7 Unit was moving. However, Mr. Matheson had no actual knowledge as to whether this individual actually had cleaned the area during the time in question (Tr. 319-324, 386). According to Inspector Mills, assuming that the belt had been activated prior to cleanup, the buried coal and friction would have provided an ignition

source (Tr. 111-112). The accumulation should have been cleaned up during either the day or second shift on Saturday, November 19, 1977, to comply with the regular cleanup program. The Respondent's belt foreman stated that absenteeism on Saturday evenings (second shift) is about 30 percent. However this does not relieve the Respondent from its responsibility. In accordance with the rationale set forth above, it is found that the Respondent failed to undertake cleanup within a reasonable time after discovery of the accumulations.

Accordingly, it is found that MSHA has established a violation of 30 CFR 75.400 by a preponderance of the evidence.

(b) Gravity of the Violation

The potential hazard involved was a mine fire (Tr. 70). There was a good possibility of a fire occurring (Tr. 71). Although the belt was neither running nor hot at the time the order was issued (Tr. 74, 87), it had been in operation on November 19, 1977, i.e., prior to commencement of cleanup. The belt was made of fire-resistant material, water lines ran parallel to it, and a fire sensor was in the area (Tr. 102, 249-250). There was no methane in the area (Tr. 103). The length of the belt was pretty well rock dusted (Tr. 103, 248). There was some rock dust atop the accumulation on the return side near the No. 3 overcast, but there was no rock dust atop the accumulation under the belt (Tr. 118). There was an available escapeway (Tr. 104).

The inspector associated a severe degree of gravity with the violation (Tr. 107). He identified approximately 25 people on the No. 7 unit as being exposed to the hazard, in addition to some belt cleaners and ventilation men (Tr. 72). A belt fire could have trapped them (Tr. 72).

Accordingly, it is found that the violation was serious.

(c) Negligence of the Operator

As set forth above, the operator was aware of the alignment and slippage problems that caused the spillages. Respondent permitted the alignment problem to persist for 2 weeks, although it required only 2 hours to correct (Tr. 65). Exhibit 0-2 establishes that Respondent acquired knowledge of the accumulations on November 19, 1977, and the inspector testified that the operator was aware of the accumulations' existence (Tr. 50). He indicated that a person making a proper preshift or onshift examination would have observed the

accumulations due to the following factors: The coal spillage in itself; the belt out of alignment; the dragging of the belt on the bottom without being on the bottom roller; and the rubbing of the stand (Tr. 58).

Accordingly, it is found that the Respondent demonstrated greater than ordinary, but somewhat less than gross negligence.

2. Order No. 7-0563 (1 LWS), November 21, 1977, 30 CFR 75.400

(a) Occurrence of Violation

MSHA inspector Louis W. Stanley conducted a spot inspection at the Respondent's Camp No. 1 Mine on November 21, 1977 (Tr. 160). While on the surface, he examined the fire boss' records and the belt examiner's records (Exhs. 0-2, 0-3, Tr. 161). Entries in the belt examiner's book (Exh. 0-2) made between November 17, 1977, and November 19, 1977, recorded accumulations along the Second Main South belt (Tr. 185-187). He was familiar with the system of reporting employed at the mine (Tr. 185). After relaying some of the information gleaned from the records to Inspector Mills (Tr. 188), he proceeded underground and inspected the Second Main South belt. The belt is approximately 4,500 feet long (Tr. 198). He was accompanied on the inspection by Mr. Martin T. Lovell, the safety manager at the Respondent's Camp No. 1 Mine (Tr. 161-162). Mr. Lovell accompanied him as far as the No. 31 crosscut (Tr. 412). Mr. Jack Dan Matheson III, the belt foreman, accompanied the inspector from the No. 31 crosscut inby for a distance of 15-20 crosscuts (Tr. 342-343).

An accumulation of loose coal was observed extending from the No. 7 crosscut inby to the No. 11 crosscut, a distance of approximately 280 feet (Tr. 177, Exh. M-10). It measured 4 to 8 inches in depth, and 3 feet in width (Tr. 177, Exh. M-10). Rock dust was observed atop the coal (Exh. M-10).

An accumulation of loose coal was observed extending from the No. 14 crosscut inby to the No. 19 crosscut for a distance of 300 feet (Tr. 178, Exh. M-10). It measured 16 inches in depth and 2 feet in width (Tr. 178, Exh. M-10). The belt was rubbing coal and stuck rollers were found at the No. 18 crosscut (Tr. 178). The accumulation was only on the backside of the belt (Tr. 198).

An accumulation of loose coal was observed extending from the No. 30 crosscut inby for approximately 220 feet (Tr. 179, Exh. M-10). It measured 20 inches in depth and 4 feet in width (Tr. 179, Exh. M-10). The belt was running in coal for 220 feet (Tr. 179). There were three stuck rollers, and two rollers were turning in coal from the No. 30 to the No. 34 crosscut (Tr. 179, Exh. M-10).

An accumulation of loose coal was observed extending from the No. 35 crosscut to the No. 44 crosscut, a distance of 540 feet. It measured 4 to 8 inches in depth and 3 feet in width (Tr. 179-180, Exh. M-10). The accumulation was found only on one side of the belt (Tr. 198).

An accumulation of loose coal was observed extending from the No. 44 crosscut inby for approximately 80 feet. It measured 18 to 24 inches in depth and 4 feet in width. The belt and four bottom rollers were running in coal. There was coal on both sides of the belt (Tr. 180, Exh. M-10).

An accumulation of loose coal was observed extending from the No. 46 crosscut to the No. 63 crosscut, a distance of approximately 1,020 feet. It measured 4 to 16 inches in depth and 2 to 4 feet in width. The belt was running in coal at the Nos. 56, 58 and 63 crosscuts (Tr. 180, Exh. M-10).

An accumulation of loose coal was observed extending from the No. 63 crosscut to the No. 68 crosscut, a distance approximately 300 feet. It measured 4 to 8 inches in depth and 3 feet in width (Tr. 180, Exh. M-10).

Float coal dust was deposited atop rock dusted surfaces from the No. 11 crosscut inby to the No. 63 crosscut, a distance of approximately 3,500 feet (Exh. M-10). Float dust was present the entire length of the belt from the drive to the tailpiece (Tr. 182, 222-223).

A ruler was used to measure the depth and width of the various accumulations (Tr. 181). The lengths were approximated by using the 60-foot centers as a guide (Tr. 181). The loose coal was defined by the inspector as ranging from 1 to 4 inches in diameter (Tr. 182).

Float coal dust was described by the inspector as possessing the property whereby it becomes suspended in the air when disturbed (Tr. 182). Although the inspector did not measure the float dust (Tr. 182), he did blow on it (Tr. 183). He stated that float coal dust is very difficult to measure unless an extreme depth is present (Tr. 183).

The belt was running during the course of the inspection (Tr. 183, 196, 436), which began at 7:30-7:35 a.m. (Tr. 412), until it was shut down at 8:20 a.m. (Tr. 196, 417). No coal production occurred during the course of the inspection. (FOOTNOTE 3)

These accumulations resulted from belt spillage which occurred during the normal process of mining (Tr. 184). According to Mr. Matheson, on or around November 14, 1977, a fall occurred on the No. 6 belt line, and the No. 3 Unit was loading rock (Tr. 338). Both units were located inby the Second Main South belt, and the belt had to be employed to transport the rock out of those areas (Tr. 338). The transporting of large rocks on the belt causes a belt alignment problem (Tr. 339-340). Alignment problems cause spillage problems (Tr. 202).

The Respondent had a written cleanup plan in effect on November 21, 1977 (Exh. M-17), which states in pertinent part: "The float dust and coal spillage is shoveled by hand on all belt haulage. This work is being done on both coal run shifts" (Exh. M-17, Tr. 189-190). However, the interpretation of this plan set forth by Inspector Stanley varies materially from the interpretation urged by the Respondent's witnesses.

According to Inspector Stanley, the cleanup plan was not being followed in that the spillage was not being shoveled onto the belts on both coal production shifts (Tr. 190). The inspector's interpretation of the plan was that the accumulations should have been cleaned up on each shift (Tr. 190). It should be recalled at this juncture that Inspector Mills, whose interpretation of the plan has been discussed previously in Part V(B)(1)(a), supra, interpreted the cleanup plan the same way.

The Respondent's witnesses disagreed with this interpretation. Mr. Brent Roberts, while agreeing that cleanup is required during the production shifts (Tr. 246, 274), stated that the plan refers to a continuous cleaning process which does not necessarily mandate one cleanup per shift (Tr. 274). According to Mr. Roberts, the fact that a spillage had existed for a couple of shifts would not necessarily make it an improper accumulation as long as work is being performed on it (Tr. 298). His interpretation of the plan was that it merely required work to be performed on the accumulation (Tr. 298).

Mr. Martin T. Lovell gave differing interpretations at various points in his testimony, one of which is in harmony with Inspector Stanley's interpretation and one of which is in harmony with Mr. Roberts' interpretation. According to Mr. Lovell, the cleanup plan requires work to be performed on both coal run shifts, but does not state that spillage has to be cleaned up within two coal run shifts (Tr. 455). However, during the course of examination by the Judge, he interpreted the cleanup program as requiring the cleanup of all accumulations by the end of each production shift in the absence of excessive amounts of spillage (Tr. 449-450). He defined an "excessive amount of spillage" as being "where the rollers or belt would be turning in coal" (Tr. 454). He thereupon stated, during cross-examination, that if a spillage or accumulation is caused by the normal process of mining, regardless of the extent of the accumulations, they are supposed to be cleaned up according to the cleanup plan (Tr. 455).

Based on the foregoing testimony as to the meaning of the cleanup plan in effect on November 21, 1977 (Exh. M-17), I conclude that the plan requires accumulations to be cleaned up by the end of each production shift, and that the plan encompasses those spillages caused by belt alignment problems resulting from the transportation of rock on the belt. This interpretation is buttressed by the fact that, to a certain extent, roof falls are normal at the Camp No. 1 Mine (Tr. 373, 376), thus requiring frequent use of the belts to transport the material produced by the falls.

The subject order of withdrawal (Exh. M-10) alleges a violation of 30 CFR 75.400. The text of this section of the Code of Federal Regulations and the elements of MSHA's prima facie case as set forth in Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par.

22,087 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), have been set forth in Part V(B)(1)(a), supra. Briefly, MSHA's prima facie case consists of three elements: (1) The existence of an accumulation of combustible materials in the active workings of a coal mine, or on electrical equipment therein; (2) that the operator knew or should have known of their existence; and, (3) that the operator failed to clean up, or failed to undertake to clean up, the accumulations within a reasonable time after he knew or should have known of their existence.

There can be no doubt that accumulations of combustible materials existed in the active workings of the mine as described above.

The extent of the accumulations was sufficient to give the operator knowledge of their presence (Tr. 188). According to Inspector Stanley, the condition had existed for at least 1 week prior to November 21, 1977 (Tr. 189). His opinion was based upon two sets of facts (Tr. 189). First, he had examined the examiner's reports on the surface (Tr. 186). The condition had been reported by the examiner in a series of entries made between November 17, 1977 and November 19, 1977 (Exh. 0-2, Tr. 186-187). Second, the presence and color of the float coal dust deposited atop the spilled coal indicated that it had been present for at least 1 week (Tr. 189). According to the inspector, a period of time is required for float coal dust to move down the belt line and settle on the coal (Tr. 213). A recent spillage would be shiny black, whereas one present for a longer period of time would have a brownish cast (Tr. 213-214). The float coal dust observed by the inspector had a brownish cast (Tr. 214). Additionally, the depths of the accumulations, and, in some instances, the presence of rock dust deposits atop the coal, also influenced his time estimate (Tr. 213). The accumulations should have been discovered during a proper preshift or onshift examination (Tr. 188-189).

The testimony of Respondent's witnesses is sufficient to corroborate the inspector's time estimate. First, a close examination of the entries in Exhibit 0-2, mentioned by Inspector Stanley in his testimony (Tr. 186-187), shows that they are not identical. Some are very specific, while some are very general in their descriptions. Mr. Matheson indicated that, in response to the entires in Exhibit 0-2, he had assigned from six to 10 belt cleaners daily to the subject belt (Tr. 336-337) between November 18 and November 21, 1977. As a permissible inference, one could infer that these men removed all of the accumulations along the belt on each day they were assigned to the area, a fact that would explain the differing descriptions contained in the belt examiner's book (Exh. 0-2). Under this interpretation, no two descriptions would be alike because they would not be referring to the same accumulation(s) on successive days. This appears to be the interpretation advanced by Respondent, as evidenced by Mr. Matheson's testimony regarding "fines." "Fines" were defined by Mr. Matheson as small particles that fall through the belt splices (Tr. 327).

He testified that he did not see any accumulation of fines along the 15 to 20 crosscut distance that he walked with Inspector Stanley (Tr. 346-347). According to Mr. Matheson, the absence of fines denoted that the belt had been shoveled previously because: "[t]he more fines you have, the longer its been since the belt has been shoveled" (Tr. 347). Unfortunately, the absence of fines has little probative value when viewed in light of the extensive accumulations observed by the inspector. Even assuming that the accumulations were intended to be removed at the end of two shifts, Mr. Matheson could not state that all accumulations were always removed within two shifts (Tr. 385).

The testimony of both Mr. Matheson and Mr. Lovell reveals that the belt examiner's reports do not always contain a complete record of the belt examiner's observations. Mr. Lovell had reached the conclusion that the belt needed to be shut down prior to the issuance of the order because, while walking the belt with the inspector, Mr. Lovell's observations caused him to conclude that the accumulations were "too much" (Tr. 443). Mr. Matheson had apparently reached the same conclusion. After walking 15 to 20 crosscuts, he went inby to the No. 3 overcast region of the Third Main South belt to reassign his men to the Second Main South belt. He did so because his personal observations revealed that the spillage problem was more extensive than what he had read in the belt examiner's book, and he therefore deemed it necessary to reassign his men to the area (Tr. 342-346). In light of the foregoing, Mr. Matheson's statements that belt examiners consistently record those things that need shoveling, and that such examiners always indicate when cleaning is necessary (Tr. 364-365), stand discredited to the extent they infer that the entries in the belt examiner's book accurately recorded the extensiveness of the accumulations along the Second Main South belt.

The presence of two additional factors serves to corroborate the inspector's time estimate. First, the above-mentioned activities that occurred on or around November 14, 1977, resulted in the loading of the rock that adversely affected the belt alignment, resulting in the spillage. The fact that the alignment problem can be traced to at least 1 week prior to November 21, 1977, corroborates the inspector's 1-week time estimate. Second, Mr. Matheson recalled assigning six to 10 belt cleaners per day to the Second Main South belt on the 14th, 15th, 16th, and 17th days of November 1977 (Tr. 337). Since cleanup personnel were assigned to an area based upon both the entries in the belt examiner's book and conversations with the belt walkers (Tr. 310), it can be inferred that the condition had been reported to Mr. Matheson on those days.

Accordingly, it is found that a large portion of the conditions cited in the subject order of withdrawal had existed for approximately 1 week prior to November 21, 1977, and that, based on the foregoing, the Respondent knew or should have known of their existence.

In light of the foregoing conclusion that most of the accumulations had existed for approximately 1 week, and in view of the requirement of the cleanup plan that accumulations be removed by the end of each production shift, it is found that the Respondent failed to clean up or undertake to clean up the accumulations within a reasonable time after it knew or should have known of their existence in that it failed to follow its written cleanup program. For the reasons previously set forth in this decision, the fact that the transportation of large rocks on the belt had caused an alignment problem that resulted in the subject spillages, does not excuse the Respondent's failure to adhere to the cleanup plan. The fact that the spillage occurred during the normal process of mining (Tr. 184) further places them within the scope of the plan.

This finding is bolstered by the testimony of Mr. Matheson. Instead of affirmatively stating that he always complied with the cleanup plan, he testified that he endeavored to comply with the cleanup plan to the "best of my ability" (Tr. 308). The inferences drawn from this guarded statement, coupled with the fact that the mine faced problems with dirty belts (Tr. 194, 282), further supports the conclusion that the cleanup plan was not followed during the periods of time pertinent to this proceeding.

The presence of cleanup men working on the belt at the time the inspection was underway does not aid the Respondent on the facts as presented herein. The inspector observed only two persons cleaning the belt, and they were observed at the No. 34 crosscut (Tr. 199, 214). Mr. Matheson had reviewed the belt examiner's book (Exh. 0-2) on November 21, 1977 (Tr. 314). Although he later concluded that the entries contained therein understated the spillage problem (Tr. 342-345), the information contained in the book caused him to assign, to the best of his recollection, eight to 10 belt cleaners to the Second Main South belt (Tr. 336). The fact that the information contained in the book caused Mr. Matheson to conclude that eight to 10 men were needed to alleviate the spillage, coupled with the presence of only two belt cleaners on the belt, prevents a finding that the Respondent was in the process of implementing effective cleanup procedures at the time of the order's issuance.

(b) Gravity of the Violation

The description of the extent, composition and location of the accumulations is set forth in Part V(B)(2)(a).

The Second Main South belt was running from the time the inspector started at 7:30-7:35 a.m. until it was shut down at 8:15-8:20 a.m. (see Tr. 183, 196, 206-207, 411-412, 417). Inspector Stanley testified as to the presence of stuck rollers, as set forth in Part V(B)(2)(a), supra. He felt the rollers, and some of them were warm to the touch (Tr. 195).

Mr. Matheson indicated that the belt had been in operation during the week prior to the order's issuance (Tr. 393). He also stated that, given the proper conditions, a belt fire can be started by one stuck roller or by the belt dragging in coal (Tr. 394, 396). Mr. Lovell stated that a belt running in coal presents an ignition source (Tr. 425).

The inspector stated that the area was rock dusted (Tr. 189), but indicated that the belt was not well rock dusted (Tr. 203). There was float coal dust atop the rock dust (Tr. 189). He identified the potential hazard as a mine fire (Tr. 195), and classified an occurrence as "probable" because friction could cause a fire (Tr. 195). The possible injury was death by smoke inhalation (Tr. 196). Approximately 50 miners were exposed to the hazard (Tr. 196). He stated that with respect to methane, in "this area it would be academic as far as being any sufficient amount" (Tr. 195). There were firesensing lines and a water line in the area (Tr. 203). The water line adjacent to the belt ran the entire length of the belt (Tr. 415). There were both primary and secondary escapeways (Tr. 204).

Accordingly, on the facts as set forth above, it is found that the violation was extremely serious.

(c) Negligence of the Operator

As set forth in Part V(B)(2)(a), supra, the Respondent knew or should have known of the presence of the combustible accumulations in the mine's active workings. This is based upon the entries in the belt examiner's book, the duration of the accumulations' existence, the extent of the accumulations as sufficient to give notice to the operator, and the fact that they should have been observed during a proper preshift or onshift examination. Also, the Respondent failed to undertake effective cleanup procedures within a reasonable time after it knew or should have known of the accumulations' presence.

Accordingly, it is found that the Respondent demonstrated more than ordinary but somewhat less than gross negligence.

3. Good Faith in Securing Rapid Abatement: Order Nos. 7-0565 1 (MEM), November 21, 1977, and 7-0563 (1 LWS)

The Second Main South and Third Main South belts had a combined length of approximately 7,000-8,000 feet (Tr. 209, 350). After regrouping his men, Mr. Matheson had approximately 35 people cleaning the Second Main South belt (Tr. 352, 420). By the end of the first shift, a major portion of the Second Main South belt, in Mr. Matheson's estimation approximately 95 percent, had been cleaned (Tr. 352). The Second Main South belt was rock dusted after it was cleaned (Tr. 352-353). The mine has only one rock dusting tanker, and it is possible to rock dust eight to 10 crosscuts with one tanker and do a good job (Tr. 353). There are approximately 70 crosscuts on the Second Main South belt (Tr. 353).

The Second Main South belt had been cleaned and portions of it had been rock dusted by 7 a.m. on November 22, 1977 (Tr. 194-195, 207, 209). The rock dusting was still under way when the inspector arrived (Tr. 209-210).

As regards the Third Main South belt, the accumulation near the No. 3 unit overcast had not been cleaned up by 6:30 a.m. on November 22, 1977 (Tr. 63). However, it was abated by 8:30 a.m. (Tr. 64-65).

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

4. Order No. 7-0583 (1 LWS), December 1, 1977, 30 CFR 75.200

(a) Occurrence of Violation

MSHA inspector Louis W. Stanley arrived at the Respondent's Camp No. 1 Mine at 6:20 a.m. on December 1, 1977 (Tr. 460). He went underground between 7:00 and 7:15 a.m. (Tr. 460). He was accompanied during the inspection by Mr. Martin T. Lovell, the safety manager at the Respondent's Camp No. 1 Mine (Tr. 519).

According to the inspector, the roof was inadequately supported at a point in the No. 1 entry in the Fourth East Panel off 2 Main South located 60 feet outby spad 4á20 (Exh. M-13, Tr. 464). The Fourth East Panel is also called the No. 3 Unit (Tr. 461). The No. 1 entry was being used as a supply road at the time, and people were observed riding under the inadequately supported roof (Tr. 464, 468, 485-486), even though a danger sign was located at the mouth of the cavity (Tr. 471). The road was 18 feet wide (Tr. 490-491). There were rocks hanging from the ceiling of the cavity, most of which were to the side (Tr. 478).

He thereupon issued the subject order of withdrawal (Exh. M-13), citing the Respondent for a violation of the mandatory safety standard embodied in 30 CFR 75.200, which states, in pertinent part: "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

A cavity existed in the roof of the No. 1 entry, a cavity caused by a previous roof fall (Tr. 464-465). Mr. Lovell confirmed the existence of the cavity (Tr. 520). It was approximately 35-40 feet in length (Tr. 465) and approximately 10 feet high (Tr. 487). Width estimates were made with reference to those roof bolts which had been installed in the cavity.

According to the inspector, only a portion of the cavity was completely lacking support. Two rows of bolts had been installed for a distance of 16 lineal feet and three rows of bolts had been installed for a distance of 20 lineal feet (Tr. 465, Exh. M-16). In the inspector's opinion, there should have been at least four rows of bolts for the entire length of the cavity (Tr. 466).

The blue lines on Exhibit M-16 represent the estimated widths of areas totally lacking supports, figures estimated with reference to the previously installed supports. Exhibit M-16 is not drawn-to-scale (Tr. 465-466). The previously installed supports were located toward the center of the cavity (dark circles on Exhibit M-16). On the lefthand side of the cavity, supports were lacking in an area approximately 4 feet in width and 16 feet in length (Exh. M-16, Tr. 484-485). On the righthand side of the cavity, supports were lacking in an area measuring 36-40 feet in length, and varying in width between 8 and 10 to 12 feet (Exh. M-16, Tr. 485).

The inspector measured the length of the cavity (Tr. 482). He estimated all widths visually, both as to the spacing between the roof bolts and as to the unsupported area, because the 10-foot height of the cavity, coupled with the presence of rock from the previous roof fall on either side of the entry, prevented his taking measurements (Tr. 465, 483-484, 487-488). At one point in his testimony, Mr. Lovell, who was present when the order was issued, stated both that the inspector's estimate of the distance of the cavity was reasonably accurate and that all of the inspector's dimensions seemed reasonably accurate (Tr. 520). Mr. Lovell further stated that Exhibit M-16 accurately reflects the roof bolts present at the time (Tr. 520). Furthermore, he did not dispute the fact that there was an area of unsupported roof (Tr. 534).

In light of the corroborating testimony of Mr. Lovell, coupled with the absence of any objections to the measurement procedure in either the testimony or in the Respondent's posthearing brief, it is found that the inspector's width and distance esitmates are sufficiently accurate for purposes of resolving the issues presented herein.

The inspector testified that he did not cite a violation of the roof control plan because the plan does not specifically cover rebolting in the situation presented herein (Tr. 494-495). He stated that the roof control plan in effect on the date of the order addressed the rebolting of roof cavities only as follows: "Header boards shall be installed between the roof bearing plate and the roof where cavities are rebolted. Conventional roof bolts may be used in these areas" (Tr. 498; Exh. M-40, p. 9, No. 32). However, he observed that the roof control plan normally requires bolts to be on 5-foot centers, and that normally four rows of bolts would be across an entry (Tr. 491-492).

Mr. Lovell indicated that the roof control plan covered the area. He thought it required conventional bolts to be set on 5-foot centers, but admitted that the plan was vague (Tr. 539).

It is unnecessary to address the ambiguities in the roof control plan, if it is indeed ambiguous, because the plan is not the basis for the violation presented herein. In Zeigler Coal Company, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973), the Board of Mine Operations Appeals held "that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of the mandatory safety standard of [30 CFR 75.200]." 2 IBMA at 222.

Accordingly, where the evidence presented is sufficient to establish that the mine's roof was not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of 30 CFR 75.200.

Mr. Lovell did not dispute the fact that an area of unsupported roof existed (Tr. 534, 542). However, for reasons set forth in the section of this decision discussing the gravity of the violation, he disagreed that the individuals riding in the mantrip would be required to travel directly under unsupported roof (Tr. 542). Yet, he did not dispute the fact that either the supported or the unsupported section of roof could fall (Tr. 540).

The question presented is whether the above-mentioned facts establish a violation of 30 CFR 75.200 by a preponderance of the evidence. Both witnesses agreed that unsupported roof existed in the area cited in the subject order of withdrawal. Inspector Stanley testified as an expert that the number of supports present was inadequate, stating that four rows of supports should have been installed. Rocks were observed hanging from the roof of the cavity, most of which were to the side. During the abatement process, some of the unbolted roof fell (Tr. 474). Miners were observed passing beneath the cavity, even though a danger sign was conspicuously located at its mouth. Even Mr. Lovell admitted that an area of unsupported roof was present, and he did not dispute the fact that the unsupported section of roof could fall.

Accordingly, it is found that a violation of 30 CFR 75,200 has been established by a preponderance of the evidence.

(b) Gravity of the Violation

The inspector identified the potential danger as fatal roof falls (Tr. 472). Possible injuries ranged from smashed fingers to death (Tr. 473). Ten miners were directly exposed to the hazard (Tr. 473). The inspector stated that an occurrence was probable, and, indeed, during the abatement process, some of the unsupported roof fell (Tr. 474).

There were fractures in the roof (Tr. 478, 541). According to the inspector, they were present in both the bolted and unbolted portions of the cavity (Tr. 479). The inspector stated that fractures are very dangerous in unbolted sections of roof (Tr. 479). Mr. Lovell indicated that cracks can add to the extent of a roof fall as relates to unsupported roof, depending upon the depth of the fracture (Tr. 541). The inspector stated that the danger sign indicated that the Respondent thought the condition was bad because it was unsupported (Tr. 490).

The 10-foot height of the cavity prevented the inspector from testing the roof for drumminess (Tr. 486).

The roof was not working (Tr. 478, 528). The term "working" refers to cracking and popping (Tr. 478).

According to Mr. Lovell, a mantrip, which is approximately 6 to 8 feet wide, could travel under the bolted portion of the cavity and still remain under supported roof (Tr. 529-530). During the course of the hearing, he produced a drawing to assist in illustrating his opinion (Exh. 0-5). His testimony referred to that portion of the cavity where two rows of bolts were present (Tr. 529).

According to Mr. Lovell, the roof control plan requires conventional bolts to be installed on 5-foot centers (Tr. 529), thus leading to the conclusion that each conventional roof bolt provides roof support within a 2-1/2-foot radius (Tr. 529-530, 542). Conventional bolts had been installed in the cavity (Tr. 529), with 5 feet between each bolt (Tr. 529). He therefore concluded that the two bolts provided support for a distance of 10 feet, as measured between the ribs. This figure was reached by adding the 5 feet between the two bolts to the 2-1/2 feet on the opposite side of each bolt (Tr. 529, 530). In his opinion, this was sufficient to allow the 6- to 8-foot wide mantrip to pass under supported roof (Tr. 530, 542).

A review of Mr. Lovell's background (Tr. 409) reveals that he does not posses the credentials necessary to accord great probative value to his theory. Indeed, he could not state that the presence of the bolts in the cavity would either impede a roof fall or lessen its severity (Tr. 540-541). Accordingly, his testimony on this point does not materially affect the gravity of the violation. The fact that the inspector testified that a person walking down the center of the travelway would be under the bolted portion of the roof (Tr. 482) cannot be interpreted as lending support to Mr. Lovell's theory of the facts presented herein. Indeed, the inspector saw people pass beneath the unsupported roof (Tr. 468).

On the facts as set forth above, it is found that the violation was extremely serious.

(c) Negligence of the Operator

The condition was readily visible (Tr. 471). The condition was listed on the preshift examiner's reports commencing November 25, 1977 (Exh. M-19, Tr. 469) and running through November 30, 1977 (Exhs. M-20, M-21, Tr. 469-470). The entry in Exhibit M-22 for December 1, 1977 (Tr. 470), was made after the issuance of the order (Tr. 546-550, 553-554). There was a danger sign immediately outby the cavity across the supply road (Tr. 471). It had been placed there between 12 midnight and 8 a.m. on November 30, 1977 (Tr. 532). The fact that more rock had to be removed from the area before the remaining bolts could be installed (Tr. 533) does not lessen the degree of negligence demonstrated by the Respondent.

Accordingly, it is found that the Respondent demonstrated a high degree of gross negligence.

(d) Good Faith in Securing Rapid Abatement

The order of withdrawal was issued at 7:50 a.m. on December 1, 1977 (Tr. 463, Exh. M-13), and was terminated at 11:00 am. on December 2, 1977 (Exh. M-14). The condition was abated by installing additional roof bolts (Tr. 474).

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

5. History of Previous Violations

The Respondent's history of previous violations, relating to the Camp No. 1 Mine, as contained in Exhibit M-2, during the 24 months prior to November 21, 1977, is summarized as follows:

30 CFR Standard	Year 1 11/22/75 - 11/21/76	Year 2 11/22/76 - 11/21/77	Totals
All sections	334	520	854
75.200	28	49	77
75.400	43	50	93

(Note: All figures are approximations).

The Respondent paid assessments for approximately 854 violations of all sections of Title 30 of the Code of Federal Regulations during the 24 months prior to November 21, 1977. Approximately 334 are shown during year 1, and approximately 520 are shown during year 2.

The Respondent paid assessments for approximately 77 violations of 30 CFR 75.200 during the 24 months prior to November 21, 1977, with approximately 28 during year 1 and approximately 49 during year 2.

The Respondent paid assessments for approximately 93 violations of 30 CFR 75.400 during the 24 months prior to November 21, 1977, with approximately 43 during year 1 and approximately 50 during year 2.

On June 30, 1977, Peabody Coal Company was transferred by Kennecott Copper Company to Peabody Holding Company (Tr. 510-511). Respondent contends that the change in ownership prevents including the violations prior to June 30, 1977, in the history of violations (Tr. 10-15, Respondent's Posthearing Brief, p. 25). Counsel for the Respondent was informed during the hearing that for the position to be considered, appropriate evidence would have to be placed in the record (Tr. 15). No evidence has been presented as to the structure of Kennecott Copper Company, Peabody Holding Company, and Peabody Coal Company, and their relationships with the subject mine. There is no evidence establishing that the change in ownership marks any change in company policy as to mine safety. The fact remains that Peabody Coal Company has been the operator of the Camp No. 1 Mine at all times relevant to this proceeding (Exh. M-2).

Accordingly, violations which occurred prior to June 30, 1977, will be considered in evaluating the Respondent's history of violations.

6. Appropriateness of Penalty to Size of Operator's Business

The Camp No. 1 Mine produced approximately 559,509 tons of coal in 1978 (Exh. M-1). Peabody Coal Company produced approximately 47,650,569 tons of coal in 1978 (Exh. M-1). Furthermore, the parties stipulated that the Respondent is a large operator for purposes of assessment of any civil penalties (Tr. 8).

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

The parties stipulated that the assessment of any penalties in this proceeding will not affect the Respondent's ability to continue in business (Tr. 8). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Peabody Coal Company and its Camp No. 1 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act during the respective periods involved in this proceeding.

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

3. The violations charged in the subject orders of withdrawal are found to have occurred.

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

VII. Proposed Findings of Fact and Conclusions of Law

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

VIII. Penalties Assessed

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

Order No.	Date	30 CFR Standard	Penalty
7-0565 (1 MEM)	11/21/77	75.400	$3,000
7-0563 (1 LWS	11/21/77	75.400	6,000
7-0583 (1 LWS)	12/01/77	75.200	8,000

ORDER

Respondent is ORDERED to pay the penalties assessed in the amount of $17,000 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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~FOOTNOTE_ONE

1 Both with respect to order No. 1 MEM and order No. 1 LWS, Respondent asserts that Old Ben requires MSHA inspectors to "inquire of Respondent's employees concerning the accumulations and their cleanup efforts" (Respondent's Posthearing Brief, pp. 19-21, 27-28). Respondent argues that the finding of a violation of 30 CFR 75.400 is dependent upon the inspector determining, prior to issuing a withdrawal order, when an accumulation should have been discovered and the nature of the operator's cleanup efforts (Respondent's Posthearing Brief, p. 21). However, the Old Ben case does not require the inspector to direct specific inquiries to the operator's employees in all cases. The Board's

Old Ben opinion merely requires the inspector to make a sound judgment as to how long the accumulation existed and whether the operator took an unreasonable amount of time in getting around to to cleaning up the accumulation. This can be accomplished through "the use of logical conclusions drawn from circumstantial evidence." 8 IBMA at 113. As the record in the present case reveals sufficient evidence from which the inspectors could reach conclusions as to both the duration of the accumulations' existence and the reasonable time for cleanup, it was unnecessary to direct specific inquiries to the Respondent's employees.

~FOOTNOTE_TWO

2 The question of whether an accumulation is "usual" or "unusual" has greatest significance with respect to the issue of whether the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or within a reasonable time after discovery should have been made, as set forth in both the Board's decision of August 17, 1977, and its subsequent memorandum opinion and order denying the Government's motion for reconsideration. 8 IBMA 109-111; 8 IBMA 198.

~FOOTNOTE_THREE

3 At several points in his testimony, Inspector Stanley expressed his belief that coal production was taking place during the course of his inspection (Tr. 201, 212). He observed coal on the belt periodically (Tr. 196), and opined that it had resulted from mining activity, as opposed to having been deposited on the belt by belt shovelers, based upon its length (Tr. 212). He observed that shoveling coal onto the belt produces "a spot here, another spot here * * * ," whereas loading it from the face area produces a longer stream (Tr. 212). He believed that it had come from the working sections inby (Tr. 219). However, he admitted under cross-examination an absence of knowledge as to whether any miners had reached the faces by 8:20 a.m. (Tr. 201).

In light of the testimony of both Inspector Mills and the Respondent's witnesses, I conclude that Inspector Stanley was mistaken in his belief, and that the coal he observed on the belt had not been mined from a face. The testimony adduced with respect to Order No. 1 MEM, Part V(B)(1)(a), supra, indicates that no production was under way in the working sections adjacent to the Third Main South belt, and that the Third Main South belt was not in operation on the November 21, 1977, day shift. The Third Main South belt was inby and discharged onto the Second Main South belt (Tr. 344-345). It was impossible to transport material to the surface via the Third Main South belt without employing the Second Main South belt (Tr. 345). These facts weigh against Inspector Stanley's belief because he thought the coal was coming from working faces inby his location on the Second Main South belt (Tr. 219). In fact, he had no actual knowledge as to whether the inby belt had been running that day (Tr. 219-220).

Additionally, Mr. Lovell saw no coal on the belt, and he had walked with the inspector for a distance of 33 crosscuts (Tr. 413). When he left the inspector at 8:15 or 8:20 a.m., it

was for the purpose of shutting down the belt (Tr. 417).

Additionally, although it would have been possible for the workmen to have commenced mining by 8:15 or 8:20, the testimony of Mr. Lovell reveals that it was highly improbable (Tr. 417-418).