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SOL (MSHA) V. PEABODY 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

v.

PEABODY COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. BARB 78-474-P
A.O. No. 15-02079-02021V

Ken No. 4 Underground Mine

DECISION

Appearances: Leo J. McGinn, Trial Attorney, Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for the
petitioner;
Thomas Gallagher, Esquire, St. Louis, Missouri, for the
respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on June 19, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for five alleged violations of the provisions of certain mandatory safety standards. Respondent filed an answer and notice of contest on July 3, 1978, denying the allegations and requesting a hearing. A hearing was held in Louisville, Kentucky, on May 15, 1979, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i)

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of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated to jurisdiction, and that the respondent is a large mine operator. The mine in question produces 5,500 tons of coal per day and employs a total of 320 men.

DISCUSSION

Section 104(c)(2) Order No. 1 TML, December 20, 1976, citing 30 CFR 75.402, states:

Rock dust was not being applied up to and within forty feet of the working places (faces) in the Nos. 1 thru 6 entries on the roof, ribs and floors and connecting crosscuts beginning at the unit ratio feeder and extending inby for approximately 150 feet on the No. 3 unit 8 H.W. (I.D. 023) responsibility of the 1st and 2nd shift foreman. Samples were taken.

Petitioner's Testimony and Evidence

MSHA inspector Thomas M. Lyle, testified that he conducted a routine spot inspection of respondent's mine for a period of 15 actual inspection days, from December 20, 1976, to March 4, 1977. The mine is located in the Kentucky No. 9 seam, has a coal height of approximately 56 inches, and conventional mining is conducted on six active units operating on two production shifts and a maintenance shift. Conventional mining equipment is used for the noncontinuous miner-type activities such as cutting, drilling, shooting and loading.

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Inspector Lyle issued his order upon observing that the floors of all six entries were black. The ribs and roof were spotty, and wet dust had been sprayed on in streaks. The area involved consisted of the No. 1 through No. 6 entries and the crosscuts beginning at the unit ratio feeder and extended for approximately 150 feet. The unit ratio feeder was approximately 170 feet away from the face, was located at the belt dumping on the belt, and for some 150 feet in by from this point no rock dust had been applied. He walked up and down and examined each of the entries, and walked by the 8 or 10 crosscuts and looked at them. Coal was being run at the time he walked the entries and crosscuts, and he saw no evidence of any dry rock dust being applied, but the roofs and ribs appeared spotty and had been sprayed with a slurry solution of rock dust and water, which does not take the place of regular rock dust, and it will dry out (Tr. 8-21).

Inspector Lyle testified that the mine is usually dry rock dusted and he had never previously found it in such a condition. The lack of rock dust was readily observable and obvious, and anyone could see it visually. He took band samples in the usual prescribed manner and the laboratory results are reflected in Exhibit G-6. The three band sample results indicated 31, 30.7, and 32.4 percent incombustible rock dust content at the places sampled. The law requires 65 percent in intake air and 80 percent in the return. He took samples to substantiate the violation, although he is not required to do so since the area cited was obviously black through visual observation. He was accompanied during his inspection by assistant mine manager Ken Large who admitted that the condition of the section with regard to rock dusting was the worst he had ever seen (Tr. 21-26). The possible results of allowing the condition to go on, is that if a cutting machine had been at the face of coal and hit a pocket of methane gas and ignited, an explosion could occur since there was no dry rock dust on the roof, ribs and floor of the mine.

With respect to the spots of wet dust that had been applied, the inspector stated that this would not have any effect on the seriousness of an explosion or an ignition, and indicated that it would not in any way suppress an explosion if there had been an ignition at the face. Once there is an ignition, the float coal dust will not stick because the area becomes very slick, thus the explosion is enhanced. In the event an ignition or explosion were to occur in the area during the production shift, approximately 12 men could have been involved in such an explosion. The condition was such that the operator either knew or should have known that it existed since the men advanced approximately 50 to 60 feet per shift during the normal mining cycle and there were approximately two or three shifts involved. He examined the preshift books, but could see no indication that the conditions had been reported and noted. The foreman on the shift was responsible for examining the area on preshift and onshift examinations to see whether or not rock dust had been applied. The lack

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of rock dusting is visibly obvious since an area which has been rock dusted is less black than an area which has not been rock dusted. The mine floor was entirely black, and the roof and ribs were spotty where they had been sprayed with the wet dust (Tr. 26-34).

On cross-examination, Inspector Lyle confirmed that his notes stated that:

[R]ock dust was not being applied up to and within 40 feet of the working faces in Nos. 1 through 6 entries on the roof, ribs, floors and connecting crosscuts beginning at the unit ratio feeder and extending inby for approximately 150 feet on the No. 3 unit, I.D. 0288 Northwest. Samples were taken to substantiate this.

He explained the procedures he followed in taking his band samples, and reiterated the hazards presented when inadequate rock dust is applied. He also described the areas where he took his samples (Tr. 38-53).

Inspector Lyle testified that he found several other violations on the section on the No. 3 unit, which he told Mr. Large and the section foreman about. He wrote a citation for a violation of 75.301-1 for insufficient air at the working face where it is either being cut, mined or loaded; 75.301 for insufficient air in the last open crosscut on the return side; 75.304 for inadequate onshift examination; and a section 75.401 float dust violation. He is not sure exactly how long he was on the unit, but he was there for a few hours (Tr. 53-54).

In response to questions from the bench, Inspector Lyle testified that the previous four citations he issued on December 20, including a fifth one for an inadequate line curtain, 75.302-1, were all section 104(b) notices. One was issued at 6:15 p.m. and was abated at 6:25 a.m.; the second issued at 6:20 p.m., and was abated at 6:30; the third issued at 6:31 p.m. and was abated at 6:45; and the fourth was issued at 6:40 p.m. and abated at 7 p.m. The order in issue here was issued at 7 p.m., therefore, all of the previously-mentioned conditions and citations had been abated prior to the issuance of the order (Tr. 54-57). He further testified that wet rock dust is normally used to comply with section 75.401 in areas of less than 40 feet of face in order to keep the dust down. Assuming that an operator used wet dust to totally rock dust an area such as the roof, ribs, and floor, and after doing that it appeared white, Mr. Lyle testified that he would not accept that as being in compliance with 75.402, even though the incombustible content may be high and even though it completely whitens the area (Tr. 57-58).

Respondent's Testimony and Evidence

Myron D. Stewart, employed by respondent as a face foreman, testified that on the day in question while he was at the face of the mine, Mr. Large accompanied Inspector Lyle to the face where he met them and the inspector took an air reading. He does not know what the air reading was since Inspector Lyle did not tell him, and he confirmed that the inspector issued a 104(c)(2) order that day for lack of rock dusting. According to Mr. Stewart, rock dusting had been done that day, but it did not meet the inspector's approval since the inspector had stated that wet dusting is not permissible (Tr. 68-71).

Mr. Stewart identified a sketch he made of the rooms in question, and in describing the procedure for using a wet duster, he indicated that a wet duster is used because it covers evenly, men do not have to breathe the dust that is accumulated by throwing it in by hand, and that such dusting can be done during the production shift. In Mr. Stewart's experience of using a wet duster, it covers evenly rather than spotting since it is liquid in form and it adheres to the roof and ribs. In his opinion, one of the advantages of a wet duster in terms of safety to miners is that they do not have to breathe in the air as when it is being applied by hand. With regard to the ability of dry dust as opposed to wet dust to cover an area, in his opinion, wet dust covers better. Mr. Stewart also stated that Exhibit R-2, which is an onshift production report for the period of December 17 to 20, indicates that rock dusting was permissible on the unit, and if it were not, the report would have so indicated (Tr. 73-80).

In order to abate the order, the area was rock dusted by hand, and then wet dusted. He was with Mr. Lyle the entire time that he was on the section, and he never heard Mr. Large make any remarks with regard to the condition of the rock dusting on the section, either in his presence or in Mr. Lyle's presence (Tr. 80-83).

On cross-examination, Mr. Stewart testified that he first saw Mr. Lyle at the face, and that coal was being produced at that time. Mr. Stewart did not learn that an order had been issued for a violation of 75.402 until he arrived outside of the mine that night. He stopped production in order to comply with the inspector's request to apply more rock dust, and although he did not know that an order had actually been issued, he ordered that the area be re-rock dusted since he had been instructed to comply with the requests of MSHA inspectors in order to make the section a better or more safe place to work. He believes that the samples that were allegedly taken by the inspector are a fabrication because no samples were taken while he was on duty that night (Tr. 84-92).

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Mr. Stewart further testified that the distinction between wet dusting and dry rock dusting is that the former adheres and covers a wide area and it can be applied during the production shift, while approximately 50 percent or more of dry rock dust falls off as it is applied by hand. The wet-dusting apparatus is located on the coal drill, and after the drilling is done, the slurry pump sprays the ribs and roof. According to Mr. Stewart, rock dust is required to be maintained through the active areas within 40 feet of the face in order to comply with section 75.402 (Tr. 89-95).

Mr. Stewart stated that the color of the roof, ribs and floor within 20 feet of the working face was white. With respect to the inspector's testimony that from 150 feet out to the face, it was dark in color, Mr. Stewart stated that it could not have been since the three entries had been driven approximately a week before and they had been rock dusted a long time ago; thus it was all white throughout the six entries and all the crosscuts 150 feet outby to the face. However, the feeder location would not be completely white because when the cars dump coal, they spill a small amount, thus making the area a little dirty; however, that is shoveled and cleaned up. Mr. Stewart vividly recalled the condition at the time, although he did not take any notes. Although he did not see a red tag being put up at 7 o'clock when the order issued, he knew where rock dusting had to be done in order to abate the order since the inspector stated that they would have to go back to the feeder and rock dust over what had been done before since it did not meet his approval (Tr. 98-101).

Mr. Stewart indicated that the ribs, roof and floor had been rock dusted before the order issued because that is the normal procedure as the mining cycle advances. Wet rock dust was used on the ribs and roof, and dry rock dust was used on the floor, and that is the procedure that was followed in the mine at the time the order issued. Dry rock dust is not applied to the roof or ribs any place in the mine unless a shuttle car hits a rib and knocks it off, and if they had to use dry rock dust, production would have to stop (Tr. 101-111). He had never previously been cited for using wet rock dust (Tr. 112).

In response to bench questions, Mr. Stewart testified that he was with the inspector the entire time only after he reached the face. Since the inspector had to walk through the areas cited to reach the face, it is possible that he stopped and took samples. It was possible that Mr. Large and Inspector Lyle had some conversations while they were walking to the face area, and Mr. Stewart would not have been aware of this (Tr. 113-115).

Kenneth R. Large, mine accounting engineer, testified that on December 20, 1976, he was acting mine manager on the second shift

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and that he and Mr. Lyle met in the office after which they went to the 8 Northest unit where they first encountered Section Foreman Stewart at the face. They then went across the room and the inspector pointed out several things that needed to be done, all of which were taken care of immediately and then they went down to the last set of rooms that had been worked out. Inspector Lyle stated that he would not accept the wet dusting because it was inadequate, and he indicated that it was unacceptable from the "rosco" to the face, and from the feeder, which was three breaks, but, he did not indicate the reasons why he would not accept wet dusting. He then indicated that he was going to issue an order, which he did when he went outside the mine. Rock dusting had been done to about 20 feet to the face, and Mr. Large did tell Inspector Lyle that the area could have been dusted better, but he did not state to Inspector Lyle that it was in the worst condition that he had ever seen the section in, although the inspector had indicated such in his notes (Exh. G-7). There were several black places, some of which resulted from dust that had been applied over loose coal and then had fallen off, probably because some cars had hit the ribs and knocked it off. He and Mr. Lyle were on the section for approximately 1-1/2 to 2 hours; he was with Inspector Lyle the entire time, and Inspector Lyle never left his presence. He did not see Inspector Lyle take any band samples, and while he carried a plastic brief case with him which was approximately 3 to 4 inches by 1 to 2 feet, in his estimation, Inspector Lyle did not have on his person the equipment necessary to take a band sample (Tr. 117-127).

On cross-examination, Mr. Large testified that from the first open break outby the face to the "rosco," the six entries were adequately dusted; however, the first open break had just gone through and it had not been dusted. At the face, the area was black, but outby from the ratio feeder inby, it was all white. The two entries closest to the "rosco" would have been dry dusted because the break had been opened only since they moved in the set of rooms. Two of the breaks were already there and had been dry rock dusted. The floor had been rock dusted but one probably could not tell whether the roof and ribs were wet dusted because frequently when dry dust has been applied, it will sweat and one cannot tell if it is dry dusted or wet dusted. Wet dust is usually applied at the face, and one of its characteristics after it is applied is that it becomes hard and then caked. When the men pull out a set of rooms, the third shift will come in and move everything out and dry dust it. Wet dust suppresses the dust, and Mr. Large did not know why it would not serve the same purpose as rock dust in relation to suppression of fire or explosion. In his opinion, the purpose of 75.401 is to abate dust at the working face and the purpose of 75.402 is to prevent propagating an explosion. Although wet dusting is used at the face to suppress dust for the health and convenience of the workers, it is necessary to add dry rock dust afterwards because after it gets older, it will deteriorate (Tr. 127-137).

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Mr. Large testified that he did not see the inspector red tag the area, although that is the normal procedure when production is shut down. Although he was involved in the abatement of other violations at the time, he told someone else to take care of abating them (Tr. 138).

Inspector Lyle was recalled in rebuttal, and testified that wet dusting is routinely done in the mine at the face area to suppress dust and that after the wet dust is applied, it is routine practice at the mine to dry rock dust the areas. In his opinion, the distinction between the purpose of wet dusting and dry rock dusting is that when wet rock dust is applied to the roof and ribs; it will dry and become a caked surface, and if an ignition should occur in the mine, it will not disperse into the atmosphere to suppress the ignition. The application of a wetting agent or wet dust does not satisfy the requirements under 75.402. The difference between the definitions of "rock dust" and "wet dust" is that rock dust would go through a 20-mesh per linear-inch sieve since it is dry, while wet dust will not, and wet dust will always become dry and adhere and form into a cake, while dry dust will not form into a cake. He referred to the appropriate Inspector's Manual references with respect to the acceptable uses of wet rock dust (Tr. 141-146).

Inspector Lyle further testified that he took the samples indicated in the normal manner in which he was trained to do so and that no one observed him taking them. Although Mr. Large accompanied him in the mine on the section, they were not together all of the time since Mr. Large was involved with abating other violations that he had issued, and during the time he was not with Mr. Large, he took the samples. He had the necessary equipment for taking the samples in his brief case which is approximately 24 inches long and 18 inches wide and a small plastic bag. The equipment that he uses to take the samples is about 8 inches by 8 inches and folds up. The handle to the brush is cut off and the screen part drops down inside the tray and the little scoop also fits inside the tray so that the equipment contains itself. He also had other equipment with him on that day such as anemometers or smoke tubes (Tr. 147-149).

In response to bench questions, Inspector Lyle stated that it was customary in the mine to use the wet rock duster in the face area at less than 40 feet, but that in all areas up to 40 feet, dry rock dust is used with it with a Bantam duster. Respondent had been shortcutting and using the wet rock-dust solution to rock dust areas that are supposed to be dry rock dusted. The total weight of the samples taken was approximately 1 pound, and he followed the standard procedure and did red tag the section when he issued the order before going to the surface. Mr. Large and the section foreman were on the section, and he informed them that he was issuing a 104(c)(2) order for inadequate rock dusting, 30 CFR 75.402, and he was told that the cited condition would be remedied. He then hung his closure tag, returned to the surface, and went back the next day and abated the order (Tr. 154-157).

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Section 104(c)(2) Order No. 1 TML, February 16, 1977, citing 30 CFR 75.200, states:

There has been a violation of the approved roof control plan dated October 1976, No. 4 unit 11 N.W. (I.D. 027) in that the connecting crosscut between the Nos. 4 and 5 entries had been holed through (cleaned up and rock dusted) creating an intersection and had not been bolted (pinned) on the right side facing the No. 4 entry face and had been advanced, cut, drilled, shot and preshift examined, permitting workmen to advance inby the unpinned intersection to the working face. Responsibility of Jim Greer and E. A. Conn, foremen.

Petitioner's Testimony

Inspector Lyle confirmed that he issued the order during a production shift after coming to a point between the Nos. 4 and 5 entries, where the connecting crosscut had been opened up creating an intersection. The No. 4 entry had roof bolts installed just off the rib, but the rest of the crosscut in the area on the open end was not bolted, nor was it timbered or supported with any other means of permanent supports. The crosscut had a total of three bolts, and he examined the roof outby the bolted area and saw no evidence at all of pinning. The roof control plan had been violated, namely, page 6, item 13. The face was at the top of entry No. 4, and based on the markings of the preshift examiner and the location of the face, he realized that a cut of coal had been taken, advanced from the adjacent entry, and then holed through into the No. 4 entry. The precise violation of the roof-control plan was the fact that persons had gone inby into an unpinned section. Under the roof-control plan, the crosscuts are approximately 20 feet in width, and roof bolts are to be installed 3 feet from the rib line on 5-foot centers across; thus, approximately 15 or 16 feet of roofing was left without support. In his opinion, this would be a serious violation because roof falls constitute "the number one killer in coal mines." Most of the falls in the No. 9 top in the Western Kentucky area occur in the crosscuts across the intersection, except when crosscuts are completely staggered. Unstable roof conditions are characteristic of mines in the Kentucky No. 9 area, which is the area in which the Ken No. 4 Underground Mine operates. The main roof at Ken No. 4 is composed of gray shale with rock bands, and the immediate roof is dark shale slate which tends to crack and break up, and it will slough and fall off. If a roof fall did occur, it would fall in the crosscut and out into the No. 4 entry, and would most likely directly fall on one person, although all workers on a section would be exposed to the hazard (Tr. 158-171).

With respect to the question of negligence, Inspector Lyle stated that the operator either knew or should have been aware of the condition since roof bolting is done during the normal mining cycle, and

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the preshift examiner and the person who made the onshift examination should have noted the condition. Knowing that it was unbolted, men should not have gone in by unless they were going in to install temporary supports or to make a gas check. Given the physical distances involved, and the physical setup, he would estimate that the condition existed from the previous shift. He arrived at this conclusion from reviewing the condition and from the statements that Mr. Greer made to him that he had informed the foreman on the previous shift about it the day before (Tr. 171-174).

On cross-examination, Inspector Lyle testified that as he was crossing the unit, accompanied by Mr. Conrad Bowen, he observed the unpinned intersection, which was approximately 16 feet by 9 feet. The entry itself was pinned, but the area that was unpinned was at the edge of the crosscut. He did not observe any workmen in the area cutting, drilling, shooting, or preshift examining. Assuming the mining cycle had holed through the previous day, Mr. Lyle did not know whether the area would have been supported and then advanced beyond the place where the coal allegedly had fallen since there could have been a breakdown (Tr. 174-181).

In response to questions from the bench, Inspector Lyle stated that he did not see any coal being cut in the entry, but coal was being run on the section, and there was no cutting machine in the Nos. 4 or 5 entries. Bolting had been accomplished beyond the area which involved the citation, and he received no explanation as to why the particular location cited was not bolted, but he ventured a guess that "they just forgot to bolt it" (Tr. 181-183).

Respondent's Testimony

James Greer, assistant mine manager, testified that he was the section foreman on February 16, 1977, and he confirmed the existence of an unpinned roof area, but stated that it was on the left rib by the break between Nos. 3 and 4, and not between Nos. 4 and 5. There were approximately three bolts missing, but the rest of the intersection was pinned. He testified that Mine Manager Bowen had just discovered the unpinned roof area and he was just ahead of the inspector looking for possible violations. Mr. Bowen instructed him to bring in the roof bolter when Inspector Lyle arrived on the scene. The preshift report and a fire boss report of the 17 Northwest section for February 15 and 16 showed no indications of any unpinned areas.

Mr. Greer denied telling Mr. Lyle that he had informed the previous shift foreman about the unpinned intersection. In explaining the fall of coal in the entry and the three missing roof bolts, Mr. Greer stated that could have been an overhang that the cutting machine or the drillman had either cut or shot off. In his opinion, it is possible for an overhang to have been present and left up and still advance the entry, and this could explain why Mr. Lyle thought

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that the entry had been advanced. The fall of coal was directly across from the crosscut at the face of No. 3 (Tr. 181-194).

On cross-examination, Mr. Greer stated that he did not see any "No bolt" signs in the area. He considers a drummy top to be stable, especially when one takes tests holes with a roof bolter and no cracks are shown. However, there is a difference between a drummy top and sound top; the sound is heavier on a sound top than on a drummy top and a drummy top is more likely to fall than a sound top (Tr. 194-208).

In response to questions from the bench, Mr. Greer testified that production was not stopped at the mine at the time the inspector cited the condition, nor was any closure sign put up. With respect to the inspector's testimony that he believed that the alleged violation occurred between the Nos. 4 and 5 entries, Mr. Greer stated that no one supplied such information to the inspector, that he confused the entries, and this was very easy to do. Thus, he and the inspector are actually talking about the same alleged condition and the same area of unsupported roof (Tr. 210-211).

Conrad Bowen, assistant mine superintendent, testified that he accompanied Inspector Lyle while he was on the section; however, he did not stay in Inspector Lyle's presence all the time. Mr. Bowen found three bolts missing on the left rib going in the No. 3 entry and he instructed Mr. Greer to install them. Although he first testified that he did not see any "No bolt" signs, he later stated that there was such a sign. When he discovered the bolts were missing, Mr. Greer was approximately in the next intersection behind him, together with Mr. Lyle. With respect to the condition of the mine top, Mr. Bowen stated that he has "seen a lot worse" and that the subject mine has the best No. 9 coal that he has ever seen. It was he, rather than Inspector Lyle, who discovered the unpinned area.

Mr. Bowen stated that according to the roof-control plan, it is not permissible to advance 10 feet inby a crosscut until it is opened for ventilation, and in his opinion, the fall was left there until the crosscuts went through and the unpinned area resulted when a sump machine was cutting a breakthrough. Once the breakthrough is made, and the feeder is in the next entry, the inby corner is cut off when one comes back through with a shuttle car. Sometimes, an outby corner is cut off in the next entry in order to allow the shuttle car to turn the curve easier. Since the intersection was pinned all the way through except for three bolts, he believes that it must have been cut from both sides (Tr. 213-220).

On cross-examination, Mr. Bowen testified he tries to proceed ahead of an inspector so that if he sees any violations, he can have them abated before the inspector sees the conditions. He did not conceal the condition from Inspector Lyle, but rather, gave instructions

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for the bolter to be brought in since they had an area with unsupported roof, and this was done in the inspector's presence. He did not believe that the condition was a violation since the "No bolt" signs were posted. If it had been a violation, the fire boss would have, in all likelihood, written it up in the preshift book. Since the signs were posted, Mr. Bowen did not write up the condition. Although the inspector described the unpinned dimensions as 16 feet by 9 feet, Mr. Bowen believed the area was 5 feet 5 inches by 8 feet, and if there were three bolts missing, approximately 15 feet of roof area was unsupported (Tr. 220-226).

In response to questions from the bench, Mr. Bowen testified that he did not feel that the unsupported roof was a violation because it was marked so that miners could see that it was unsupported, and, in the regular mining cycle, when the pinner comes in, he can pin it. No one is to work in an area past a sign or marker designating an unsupported roof, with the exception of pinnermen. The signs used to designate nonbolted areas are approximately 10 to 12 inches long and approximately 4 inches wide, and they are not red-tagged, dangered-off signs, but rather simply state "No bolts." Mr. Greer stated that he is familiar with provision 13(a) of the roof-control plan which requires that a conspicuous sign be suspended from the roof, but that the provision did not come into effect until after the order was written. (The term "conspicuous sign" means a stick with fluorescent tape on it.) According to Mr. Bowen, however, on the day the citation issued, there was present a sign to warn people that this was an unbolted area, but he did not point the sign out to Inspector Lyle nor does he know whether Mr. Lyle saw the sign (Tr. 226-230).

Petitioner's Rebuttal Testimony

Inspector Lyle stated that approximately eight or nine roof bolts were missing from an area approximately 16 by 9 square feet. He did not see any conspicuous signs displayed, although such were required. If three roof bolts along one rib were missing in an entry or crosscut which otherwise was adequately pinned according to the roof-control plan, he would most likely have issued a 104(b) notice for a violation of the roof-control plan rather than the 104(c) notice that he issued. He informed the mine manager and face foreman of the order, and prior to the time he examined the roof, he had not been informed by anyone from management of the condition. If Mr. Bowen had seen the condition prior to his observation of it, he did not realize it, and he confirmed he did not shut production down in the entire area and that he remained on the site until it was abated (Tr. 231-236).

On cross-examination, Inspector Lyle confirmed the dimensions of approximately 16 feet by 9 feet, and stated that the 16-foot dimension would be from one rib of the crosscut in the direction of the other and the 9 feet would be in the same direction as the crosscut. The ribs in a crosscut are approximately 20 feet across. He observed the

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unpinned area from under the bolted area in the entry, and there were approximately eight bolts missing (Tr. 237-242).

In response to questions from the bench, Inspector Lyle stated that a sign previously referred to by one of the witnesses should have been at the edge of the unpinned area, rather than out in the area, but that he did not see such a sign. It is acceptable mine practice to put up a white sign with red lettering on it that says "No bolts" whenever there is unsupported roof. The presence of a sign would not mean that there was no violation or that there was no hazard because the Ken No. 4 Underground Mine had a roof-bolting plan which required that all areas in the mine be bolted. If subnormal conditions exist in a mine, then it is necessary to take steps other than the normal precautionary measures, e.g., install longer bolts, cribs, crossbars, etc. The discrepancy in the entry numbers can be attributed to how the crosscuts are numbered from left to right or right to left, and when he asked about the entry, he was told that it was the No. 4 entry, and the area he circled in his notes was intended as an approximation. He does not know how many bolts it took to abate the citation, since he did not count, but including the time it took to move the equipment over, it took about an hour to correct the condition (Tr. 244).

Section 104(c)(2) Order No. 1 TML, February 28, 1977, citing 30 CFR 75.301, states:

The quantity of air reaching the last open crosscut between the intake and return pillars in the developing entries of the No. 5 unit, 2 nd S.W. was only 7,900 cfm during the production of coal when measured with an approved anemometer and smoke tube. Responsibility of Don Ramsey, foreman.

Inspector Lyle testified he was accompanied on his inspection by Mine Manager Bowen and Section Foreman Ramsey. He issued the order at 9:50 a.m. after he had observed and written up other violations, then proceeded to the track entry, and then to the No. 1 intake entry where he measured the air. According to his measurements, the air in the intake in the connecting crosscut between the Nos. 5 and 6 entries on the return pillar sides was 11,780 cubic feet per minute. When he took the readings described in the order, he was in the connecting crosscut between the Nos. 5 and 6 entries on the return pillar side. When he reached the crosscut, he took three air readings with his anemometer and found the air to be below 9,000 cubic feet of air. The first reading, which was taken along the center of the crosscut, measured 6,840 cubic feet per minute, the second reading was 5,700 cubic feet per minute, and the third reading was 7,125 cubic feet per minute. The variations in the anemometer readings are explainable by the fact that coal production was going on at the time and curtains were being fanned and moved around so that air was moving up and down. At

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the time he took the readings, there was measurable dust in the air in the crosscut, but he did not know how much. He was particularly interested in the air at the mine because there was a continuing problem with maintaining sufficient minimum air requirements, and he had previously written several violations at the mine regarding the sufficiency of air. Further, an inspection team from Arlington had visited the Ken No. 4 Underground Mine and had stated in their report that the mine was operating on marginal air.

In addition to taking readings with the anemometer, Inspector Lyle testified that he took three smoke tube readings of the area. He obtained a reading of 7,600 cubic feet of air on the first smoke tube reading, 7,410 cubic feet of air on the second, and 7,885 cubic feet of air on the third which he cited as 7,900 cubic feet (and which was the highest air reading). No one assisted him in taking either the smoke tube readings or the anemometer readings. Section 75.301 requires that the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries in the last open crosscut and any pair or set of rooms shall be 9,000 cubic feet of air per minute (Tr. 249-260).

Inspector Lyle considered the violation to be serious because the low air readings had to affect the air at the working face. He cited a violation at the No. 5 face for low air readings some 20 minutes earlier. Methane could build up and not be swept away, and the mine was under a section 103(i) inspection requirement. He believed the operator was aware or should have been aware of the condition because of the continuing ventilation problems and mine management had discussed the possibility of putting in additional raise holes to improve ventilation. The unit was subsequently abandoned after abatement was achieved because of ventilation problems (Tr. 260-269).

On cross-examination, Inspector Lyle confirmed that the air reading on the intake side was 11,780 cfms (Exh. G-19). He also confirmed that he took three air readings in all, and when he took the first reading, he informed respondent that according to his anemometer, the amount of air present was low. The first reading was taken in a traverse fashion, i.e., he went from one rib to the other rib in a back and forth manner. With respect to the second reading, which was taken approximately a quarter of the way in between the crosscut, he took it in the traverse style. When he took the third reading, he backed up to past half of the entry, to the center part of the area. After he took the three readings and calculated that he did not have sufficient air, he then took three smoke tube readings. He performed the calculations on paper (Exh. G-20), the same day that he took the readings, rather than at a later date. The correction factor that he used on his anemometer was 20 percent, and he calculated the area of the intersection with a tape line (Tr. 274-288).

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In response to questions from the bench, Inspector Lyle testified that he had indicated on Exhibit G-19 that there were 11,780 cfms of air coming in the intake. After the line curtain was installed, the highest reading that he came up with was 7,885 cubic feet. He does not know what was causing the low air reading at that point because at the time he was taking air readings in the last open crosscut, the operator was working on the problem. When the air came up to above 9,000 cfms, he abated the notice. He did not find any significant amounts of methane; and had he found such, he would have issued an imminent danger order (Tr. 289-293).

Respondent's Testimony

Donald Ramsey testified that he was working as the foreman on the 2 Southwest, No. 5 unit, on the day shift on February 28, 1977, and first met with Inspector Lyle at the transformer where the inspector was checking for violations, after which they then went to the face area where coal was being loaded, and the loader operator appeared and told him that he had torn down part of the check curtain and that he needed a hammer to repair it. His helper was coming across from behind him with a hammer and he helped him repair the curtain. During this time, Inspector Lyle was in a stationary position taking an air reading in the last open crosscut, approximately 80 feet away on the other side of the loader, but he was not taking a traverse reading. The curtain was down, but was repaired within 2 or 3 minutes, after which time Inspector Lyle advised him that he did not have enough air, and in Mr. Ramsey's opinion, the air reading that Inspector Lyle based that statement on was taken when the curtain was down (Tr. 294-300).

At the time Mr. Lyle ordered the unit closed, there were 8 to 12 men working in by the last open crosscut, and the check curtain was down for approximately 5 minutes. Some of the common causes of check curtains being torn down are blasting or shooting coal down, which, in turn, tears them down, and people walking under them. The general rule is that if someone tears down a check curtain, he puts it back up, and the loader operator that he encountered was looking for a hammer (Tr. 302-308).

On cross-examination, Mr. Ramsey stated that although he does not remember going to the intake with Inspector Lyle, he remembers walking across crosscut Nos. 4, 5 and 6, but he does not remember whether any violations were cited at the time. He confirmed that a 104(b) notice was issued the same day, citing a violation of 75.302-1 for failure to provide a line brattice on the face of the No. 5 entry where coal was being loaded, but he remembers it being the No. 6 unit rather than the No. 5, and recalls that the line curtain was down several times that morning. He accompanied Inspector Lyle across face Nos. 4, 5 and 6 and although the inspector states in his order that he took both anemometer and smoke tube readings at the face, he does not recall any

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smoke tube readings having been made by the inspector at unit No. 5, although he remembers that the inspector took two anemometer readings at the face (Tr. 308-315).

Mr. Ramsey indicated that after Inspector Lyle informed him that the air content was low, he went to the intake entry and took his own air reading, after which he returned to the No. 5 unit, where the inspector was. Mr. Ramsey did not take an anemometer reading in the No. 5 crosscut because he did not think it was necessary since he knew he did not have sufficient air because the loader had torn the curtain down. Although it took 2 to 3 minutes to rehang the line curtain, and the inspector told him that he then had sufficient air, Mine Manager Brown decided to close the unit down because it was slowing production to keep 3,000 cubic feet of air at the face and putting 9,000 cfms out in the other area. He did not question Mr. Brown's decision to shut down the unit, and he does not recall how long the unit was abandoned (Tr. 316-329).

Inspector Lyle was recalled in rebuttal and testified that after he issued the order, he continued to take air readings in the last open crosscut. He then walked around to the return side in order to check to see if they had their stoppings up as required by the ventilation plan which calls for permanent stoppings up to and including the third open crosscut outby the face. He walked back up to the No. 5 entry and checked to see if they had a block curtain up in the back part of the entry. He continued to take air readings and when the air increased to 9,600 cfms, he abated the order at 10:30 a.m., after which time the unit was abandoned. The line curtain had been replaced when he started taking his first air readings. In his opinion, the cause of the low air was not the check curtain, but resulted by the operator trying to course the air through the mine around falls because the mine was in dire need of an air shaft or the boring of a hole of some kind to provide better ventilation (Tr. 336-338).

In response to questions from the bench, Inspector Lyle stated that the other two citations that he issued (Exhs. G-21 and G-23) were both abated prior to the subject order. Although Mr. Ramsey testified that they were loading coal in both entry Nos. 5 and 6, Inspector Lyle testified that this was not true since it was not permissible to have two loaders on a section loading in the same entries or adjacent entries. It was actually the No. 3 entry that was being loaded and the No. 5 entry is the one he cited. Inspector Lyle also stated that he asked Mr. Ramsey what the number was of that particular entry and Mr. Ramsey told him that it was No. 5. He further stated that he took his air readings between Nos. 5 and 6 on the return side and that there are no other entries past the No. 6 entry (Tr. 339-340).

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Section 104(c)(2) Order No. 1 TML, March 1, 1977, 30 CFR 75.301-1

The quantity of air reaching the No. 5 entry (crosscut to the left) working face where coal was being loaded by T. C. Williams with a Joy loading machine was insufficient enough to measure with an approved anemometer or smoke tube during the loading cycle on No. 6 unit (ID 029) 3rd S.S. Responsibility of Pat Sturgill, foreman.

Petitioner's Testimony

Inspector Lyle testified that in addition to the subject order, he issued other notices of violation that day. He issued the subject 104(c)(2) order for failure to maintain sufficient ventilation while loading coal, and there was no curtain present while the loading was being done. He started to take air readings, but could not get his anemometer to work on either one of the rib lines or out in the entry, despite the fact that the anemometer was functioning. He then tried four or five times to take a reading with a smoke tube but could not get any measurement of smoke traveling and he then concluded that there was not sufficient ventilation or perceptible air movement to be measured with an anemometer or a smoke tube. While he was taking the tests, the men had stopped loading (Tr. 343-348).

Inspector Lyle considered the violation to be serious, and he had previously written a notice for failure to use water to keep the dust down to minimum and allowable limits. Since there was no curtain to course the ventilation into the working face and there was no perceptible air movement, if methane had been encountered, along with excessive dust, a serious methane ignition and dust explosion could have resulted. In his opinion, the operator should have been aware of the condition because a foreman is present on the section at all times and it is his duty to operate the unit and to insure that a minimum of 3,000 cubic feet of air is maintained at the face whenever coal is being cut, mined or loaded. It was visibly obvious that there was not a sufficient amount of air (Tr. 350-352). When he first walked into the entry, the loader operator was there with the loading machine, and no wing curtain was installed. Had a face ignition occurred, he estimates that at least 12 men would have been exposed, since there are approximately 12 men on a section (Tr. 353).

Respondent's Testimony

Mr. Pat Sturgill, day shift section foreman, 3 Northeast section, testified that the wing curtain was taken down in order to clean the ribs approximately 4 or 5 minutes before Inspector Lyle walked past the area. He does not know specifically whether Inspector Lyle saw Mr. King tear down the curtain, but he does not know how Inspector Lyle could not help but see it. To the best of his recollection, Inspector Lyle did not tell him that he was issuing a citation

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because a loader was loading without a wing curtain being installed until the curtain was torn down for the loader to back up and clean the roadways and the ribs. The purpose of tearing the wing curtain down that day was to clean the ribs, which is a normal practice. If the wing curtain is left up while a man is shoveling behind it, he cannot be seen, and he has to throw the debris far out so that the loader can pick it up on its next cycle. The curtain was down for 5 or 6 minutes, and Mr. Lyle took an air reading while the curtain was down. When the loader finished cleaning up the rib area, the curtain was hung and another air reading was taken by the inspector (Tr. 358-366).

On cross-examination, Mr. Sturgill stated that Inspector Lyle never informed him that he was issuing the violation, and Mr. Sturgill believes that since the curtain is normally supposed to be up, except when the ribs are being cleaned, that the inspector happened to see the curtain down and then cited the condition, not realizing that they were in the process of cleaning the ribs. He does not believe that the requirement in 75.301-1 of maintaining 3,000 cfms is unreasonable, but in his opinion, it is not a hazard if an operator is loading coal at the face and is unable to measure any perceptible air movement because the ribs would probably have been cleaned by shovel if he had found methane on his section (Tr. 367-378).

Inspector Lyle was called in rebuttal and stated that he never saw a wing curtain being taken down, and he disagreed that it is necessary to take down curtains in order to clean faces or ribs. It is permissible to move a curtain to the other side so long as the requisite amount of air is maintained according to the law, and he is unaware of any permitted exceptions. In order to abate the cited condition, a curtain was obtained and extended into the area up to within 10 feet of the face, after which he took air readings (Tr. 379-384).

In response to questions from the bench, Inspector Lyle testified that the notice he issued at 11:25 for lack of a line brattice, and the notice he wrote at 11:30, pertained to the No. 5 entry crosscut to the left where coal was being loaded. There is a relationship between the two notices, since without the line brattice or wing curtain, the required 3,000 cubic feet of air could not be coursed in where coal was being loaded. In effect, the failure to have the line brattice generated two citations, i.e., the notice and the order, both of which stemmed from the same condition. He confirmed Mr. Sturgill's testimony that wing curtains are frequently taken down to facilitate the cleaning of the ribs, rather than taking the risk of having the curtain torn down. However, he does not know of any inspector in the District 10 Office that would allow this practice (Tr. 385-389).

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Section 104(c)(2) Notice No. 2 TML, March 1, 1977, 30 CFR
75.301-1

The quantity of air reaching the end of the line brattice where coal was being cut with a Joy cutting machine by Mike Foster was measured to be only 1,748 cfms with an approved anemometer and smoke tube in the No. 2 entry working face crosscut to the left on the No. 6 Unit (ID 029) 3rd S.E. Responsibility of Pat Sturgill, foreman.

Petitioner's Testimony

Inspector Lyle testified that some time after he had issued the 104(c)(2) order for the inadequacy of air with the loading machine, he proceeded back across the run and observed the Joy cutting machine being operated in the face, cutting coal while the line curtain was 20 feet out by the face area where the machine operator was cutting. He then issued a 104(b) notice to the operator for having an inadequately-installed line brattice which did not reach up to and within 10 feet of the working face where coal was being cut, mined or loaded. After taking air readings, he then issued the 104(c)(2) order for a violation of section 75.301-1, since the air measurement was only 1,748 cfms. He took three anemometer readings and two smoke tube readings which he recorded. The anemometer readings were 1,260 cfms, 1,300 cfms and 1,380 cfms. The smoke tube readings were 1,764 cubic feet per minute and 1,731 cubic feet per minute. He put the figures together and averaged them out to be 1,748 cubic feet per minute, while the statutory requirement is 3,000 cubic feet per minute (Tr. 410-412).

With respect to the seriousness of the violation, Inspector Lyle testified that he would classify it on the same level as the other violations previously dealt with. If there was a pocket of methane gas, without the proper amount of air, there could be an ignition or a mine explosion. He reiterated his previous statement that the mine was somewhat lacking in air and was in dire need of much better ventilation. The inspector took methane readings, but he did not find any methane. As far as negligence is concerned, he believed that the operator should have known of the condition since he had issued an order for another similar violation 30 to 40 minutes earlier. Mr. Sturgill, the section foreman, was accompanying him when he issued the subject order and took the measurements (Tr. 413-415).

On cross-examination, Inspector Lyle stated that there was confusion in the mine when he issued the order, since the operator and his employees were not very happy about the order and they were arguing, but he is not certain whether Chester Waters was with him. The cutting machine operator had probably taken his second cut out, but he does not know how far down the entry had been advanced (Tr. 417-421).

Respondent's Testimony

Mr. Sturgill testified that he and Inspector Lyle were leaving the area of the previous violation and were heading towards No. 1. There was a coal drill in No. 4, drilling coal and Inspector Lyle took a reading in that area and got a measurement at the coal drill of 8,000 cubic feet. The machine stopped at the face and Inspector Lyle measured and got a reading of 1,700 cfms, and advised him that he would have to hang a wing curtain across the machine in front of a particular roof bolt and he told the inspector "that is in front of the cutterman right here and I've stopped the face" (Tr. 428). After the curtain had been hung over the cutter, the inspector took another air reading which proved to be sufficient and then told him to proceed. They held the curtain up and the cutter proceeded to cut coal. According to Mr. Sturgill, it was foolish and dangerous to hold the curtain up since the cutter bar could have pulled the men holding the curtain into the cutting machine by catching the curtain, and he feels that he should have pulled the cutter out and gone to another place (Tr. 422-431).

Mr. Sturgill further testified that on the day the notice issued, the wing curtain was positioned in the correct position, i.e., in back of the cutting machine and that the air was sufficient because he was not working at the face of the entry, but at the face of the crosscut. The regulation requires that there be 3,000 cubic feet of air at the back of the equipment, 10 feet from the working face. After Inspector Lyle told Mr. Waters to hang a wing curtain across the cutter bar, Mr. Waters and the inspector had a few words about the inspector's order, and Mr. Waters told the inspector that he was just nitpicking. In his 30 to 31 years' experience in mining, he has never before hung a wing curtain over a cutting machine that was running. After Inspector Lyle left, he did not return the wing curtain over the cutting machine, but rather tore it down and continued on with the cutting (Tr. 431-434).

On cross-examination, Mr. Sturgill testified that despite the depiction of the cutter in Exhibit R-10 as occupying approximately 80 feet of the entry, the cutter was not in the middle of the entry. No crosscut at all had been driven at the time since the cutter was in the process of taking its first cut. He agrees that 3,000 cfms are required at the working face, however, he maintains that he had 8,000 cfms in the crosscut where he was working and stated that the reason the inspector got a measurement of 1,700 cfms is because he did not measure where the cutting was actually being done, i.e., at the working face, but rather, he measured above where the cutting was being done inby (Tr. 434-440).

Mr. Chester Waters, mine manager at the Ken No. 4 Underground Mine, testified that on March 1, 1977, he was the assistant mine foreman on the day shift, that he was present on the section during Inspector Lyle's entire inspection, and that he went ahead of

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Mr. Sturgill and Mr. Lyle. The wing curtain was up within 10 feet of the working face. He took an air measurement in excess of 5,000 cfms, and since he believed he was in compliance with the law, he gave the cutter operator the go-ahead to commence operation with the first cut. Inspector Lyle and Mr. Sturgill then approached the cutting machine, and Inspector Lyle informed him that he did not have the wing curtain to within 10 feet of the face, and he then went around the cutting machine and marked the roof bolt where he wanted the wing curtain advanced. At the time, the inspector was referring to the face of the entry, but the actual working face was the crosscut. Mr. Waters testified that he told Inspector Lyle that he was nitpicking and that they were not in violation of the law. In order to abate the condition, the wing curtain was advanced to the location indicated by Mr. Lyle so that the proper amount of air was achieved. However, in Mr. Waters' opinion, the abatement was done in a dangerous way since holding the curtain up restricted the visibility of the cutter operator. In his more than 20 years in the mining industry, he has never before or since that time, seen a curtain held up while the cutter operator cuts coal. In his opinion, this practice is not safe since no men should be around the cutter except the operator, because of the possibility of being crushed and injured by the cutter. He believes that there was a sufficient amount of air and the correct position of the wing curtain that day was where it was located when Inspector Lyle first observed it, i.e., within 10 feet of the working face or the crosscut which they were working (Tr. 441-448).

On cross-examination,

Mr. Waters testified that he took one air reading with an anemometer that he had borrowed from Mr. Sturgill, and using a tape line he calculated the measurement in his head. After Inspector Lyle verbally issued his order, he remained on the scene until it had been abated, after which time, he left with Inspector Lyle (Tr. 451-452).

Inspector Lyle was recalled in rebuttal and stated that although he has no reason to doubt that Mr. Waters did take an air reading, his notes indicate that Mr. Waters did not have an anemometer. The working face is wherever coal is being cut, mined or loaded. He took his air reading at the end of the line curtain, just inby the end of the line curtain. He arrived at the calculation of 1,700 cfms based on the location of the line curtain as being 3 feet from the rib and the approximate distance of the roof as being 5 feet high. He does not think that it is possible that he took his air reading on the other side of the cutter up in the corner of the entry since had he gone around and taken a reading where there was no curtain to direct the air, he would not have been able to record any reading because the air would have to have come out the end of the curtain which was 3 feet wide, 3 feet out from the rib, and 5 feet high, and then dispersing with a 20-foot-wide area. In addition, the air would have to get by

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the cutting machine itself as well as go over the top of the cutting machine. According to the inspector, the only place that it would have been possible for him to have come up with a correct air reading would have been at the line curtain where he distinctly recalls having taken the reading (Tr. 452-460).

With respect to whether or not he directed management to have a line curtain over the cutting machine, Inspector Lyle testified that, as a policy, he does not direct management to do anything. He simply, writes a notice of violation that requires that management abate a violation of the law. In order to abate the violation, the line curtain was extended up to within 10 feet of the crosscut to the left, and to his knowledge, it was never extended over the cutting machine (Tr. 460-461).

The original notice citing the line curtain as being more than 10 feet from the face concerns the same line curtain as in the subject order which was issued for lack of air at the same working face. When the first 104(b) notice was abated and the line curtain was extended up to within 10 feet of the face, the air came up. Had the curtain been extended over the cutting machine up to the problem area, it would have been in by the working face (Tr. 461-463).

Findings and Conclusions

Order No. 1 TML, December 20, 1976, 30 CFR 75.402

Fact of Violation

Respondent argues that the inspector issued this citation because of his dissatisfaction and dislike for the method of wet rock dusting utilized by the respondent in its mine. Respondent asserts that it had rock dusted the roof and ribs to within a few feet of the working face and had dry rock dusted the floors to approximately within 20 feet of the working face (Tr. 19-20, 71-72, 121, 150-151).

With regard to the samples taken by the inspector, respondent asserts that since the inspector took only three band samples over an area described as being inadequately rock dusted and which encompassed six entries in width and a length or distance of 150 feet, their reliability as true indications of the rock-dusting condition on the section is open to serious question. Further, respondent argues that the inspector's judgment was colored by the fact that he did not believe that wet rock dusting met the requirements of section 75.402, and that he therefore did not take true representative rock-dust band samples in the section. Finally, respondent asserts that although the inspector testified that he was not accompanied by a company representative the entire time he was on the section, one of respondent's witnesses (Large) testified he accompanied the inspector the entire time that he was on the section and did not observe him take a rockdust band sample, and a second witness (Stewart) testified that the

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inspector was in his presence continuously from the time he came to the face until he left the section and that he never observed him take a rock-dust band sample.

In support of the citation, petitioner relies on the testimony of the inspector, including his description of the procedures used to take the band samples, the laboratory results of the sampling, and the detailed notes and sketch of the scene made by the inspector at the time the citation was issued. As for the use of wet rock dust, petitioner argues that the definition of "rock dust" set forth in 30 CFR 75.2(d) differs both in composition and in usage from the wet dust which the respondent believed was adequate to comply with section 75.402.

With regard to the inspector's sampling, petitioner asserts that no witness offered by the respondent could testify to more than the fact that they did not personally see the inspector take the samples, and that the inspector repeatedly testified, as was admitted by the respondent's witnesses, that they did not accompany him at all times while he was inspecting the section.

Respondent is charged with a violation of section 75.402, which states that:

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

The statutory definition of the term "rock dust" is found at 30 CFR 75.2(d), and it is defined as follows:

"Rock dust" means pulverized limestone, dolomite, gypsum, anhydrite, shale, adobe, or other inert material preferably light colored, 100 per centum of which will pass through a sieve having 20 meshes per linear inch and 70 per centum or more of which will pass through a sieve having 200 meshes per linear inch; the particles of which when wetted and dried will not cohere to form a cake which will not be dispersed into separate particles by a light blast of air; and which does not contain more than 5 per centum of combustible matter or more than a total of 4 per centum of free and combined silica (SiO₂), or, where the Secretary finds that such silica concentrations are not available, which does not

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contain more than 5 per centum of free and combined silica;

* * * .

The June 1974 edition of the Inspector's Manual, published by MSHA's predecessor MESA, and which contains guidelines for inspectors and the coal mining industry, contains the following information pertaining to the use of wet rock dust in a mine:

Application of rock wet dust. So long as the percentages of incombustible content specified in 75.403 are maintained, rock dust may be applied wet in the following manner: Wet rock dust shall be limited to rib and roof surfaces in face areas; It shall not be used for redusting mine surfaces; in such applications, only limestone or marble dust which meets the specifications contained in Section 75.1(d) shall be used; the application shall be at the rate of not less than 3 ounces (weight) of dust per square foot of surface, and shall be by a mixture of not more than 6 to 8 gallons of water with 100 pounds of dust, whether by premixed slurry or by mixing at the nozzle of a hose to assure that the mixing is not too fluid and that sufficient dust adheres to the surfaces. After the wet rock dust dries, additional dry rock dust shall be applied to all surfaces to meet applicable standards. Wet rock-dusting of ribs and roof does not eliminate the necessity for dry rock-dusting the floor.

In one of the earlier cases litigated under the 1969 Act, Valley Camp Coal Company, 1 IBMA 243, 246 (1972), the former Interior Board of Mine Operations Appeals observed as follows when commenting on the intent of the statutory rock dust requirements found in sections 304(c) and (d) of the Act:

The above sections should be construed as a whole. Their purpose is to provide an incombustible atmosphere in most underground areas of the mine so that, if ignition occurs, the dust will not propagate an explosion. When read with this community of purpose and subject matter, sections 304(c) and 304(d) require operators to rock dust every crosscut as well as other areas of the mine beyond 40 feet of working faces, unless such areas are naturally too high in incombustible dust content to propagate explosions, too wet to propagate an explosion, inaccessible, unsafe to enter, or have been excepted from the requirements by the Secretary or his authorized representative in accordance with section 304(c). Section 304(d) does not define the level of incombustibility that is "too high to propagate an explosion," but, when read as a whole, this level is defined by section 304(d).

It seems obvious from the evidence presented that the wet rock dust applied by the respondent did not meet the definition set forth in section 75.2(d), which states that such rock-dust particles be of such a consistency "which when wetted and dried will not cohere to form a cake which will not be dispersed into separate particles by a light blast of air." As a matter of fact, respondent's own witness, Face Foreman Stewart, when testifying that it is impossible to take a rib or roof sample with a brush in an area which had been wet dusted, indicated that one would have to chip off some of the rock dust with a hammer.

On the evidence adduced here, I find that the inspector's interpretation with respect to the use of wet rock dust as a means of compliance with section 75.402 is correct. The wet rock dust apparently being used by the respondent obviously did not meet the statutory definition, and respondent has presented no credible evidence to the contrary, nor has respondent offered any statutory or regulatory authority which authorizes the use of wet rock dust to gain compliance with section 75.402. Although I recognize the fact that section 75.402, on its face, does not prohibit the use of wet rock dust, when read together with the statutory definition of the term "rock dust," I cannot conclude that the petitioner's interpretation and application of section 75.402 on the facts and circumstances presented here was unreasonable or incorrect, and respondent's posthearing arguments do not persuade me to the contrary.

The next question presented is whether the petitioner has established by a preponderance of the evidence that the area cited by the inspector had not been rock dusted to within 40 feet of the working faces as required by section 75.402. Simply stated, respondent takes the position that it met the requirements of section 75.402 by applying wet rock dust to the area cited. Petitioner's position seems to be that the use of wet rock dust not meeting the statutory definition is akin to not using rock dust at all. I conclude and find that the petitioner has the better part of the argument and that the testimony and documentation of the condition as articulated by the inspector supports the order which he issued.

With respect to the inspector's sampling procedures, and particularly respondent's attack on his credibility, I reject respondent's assertion that the inspector somehow misinterpreted the fact that he took samples. A careful review of respondent's testimony reflects that Face Foreman Stewart and Mine Manager Large did not see the inspector take samples, and while respondent's posthearing arguments suggest that the inspector was never out of the sight of Mr. Stewart and Mr. Large, that is not the case. The inspector had ample opportunities to take his samples, and I find his testimony and notes made at the time of the inspection to be credible. Further, respondent was free to take its own samples, but apparently did not do so.

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In denying that the 150 feet described by the inspector was white in color, Face Foreman Stewart stated that this was not so because the three entries had been driven a week before the inspector and had been rock dusted "a long time ago." Thus, Mr. Stewart's testimony lends credence and support to the inspector's testimony. If the entries had been previously driven and rock dusted even earlier, the subsequent mining activity which took place after those events obviously affected the condition of the section on the day of the inspection. Further support for this conclusion may be found in Mr. Stewart's candid admission that dry rock dust was not used because production would have to stop. Placing coal production ahead of adequate rock dusting simply should not be permitted.

I conclude and find that petitioner has established a violation of section 75.402 as charged in the order and it is AFFIRMED.

Negligence

Although respondent may have believed that wet rock dusting met the requirements of section 75.402, I am not convinced that mine management was completely oblivious to what was required to meet the rock-dusting requirements of that section. Mr. Large's testimony reflects his concession that certain areas were not rock dusted, that the area could have been dusted better, and he apparently was aware of the differences between the rock-dusting requirements of section 75.402, and the provisions of section 75.401 which permit the use of wetting agents at the face. Further, the extent of the area involved, some 150 feet, convinces me that the respondent failed to take reasonable care to insure that the area cited was properly rock dusted. I find that the condition cited resulted from the respondent's ordinary negligence.

Gravity

Failure to rock dust in an area where coal is being mined presents a hazard of fire or explosion. Considering the extent of the area which was not rock dusted, and the results of the inspector's sampling for incombustible content, I conclude and find that the violation was serious.

Good Faith Compliance

Exhibit G-3 reflects that the order was terminated at 9:30 a.m., the day after it issued, after the area was adequately rock dusted. Further, respondent's testimony reflects that rock dusting was accomplished at the beginning of the next production shift after the order issued at 7 p.m. on December 20. In these circumstances, I find that the respondent demonstrated good faith compliance in correcting and abating the conditions cited.

Fact of Violation

Respondent does not dispute the fact that there was an area of unsupported roof as described by the inspector in the order citing a violation of section 75.200. As a matter of fact, during the course of the hearing, respondent's counsel did not dispute the existence of some unsupported roof area, and conceded that the fact that the inspector may have been mistaken as to the numbering of the entries was not unusual since someone may have honestly and mistakenly given him the wrong entry numbers (Tr. 199).

The thrust of the respondent's defense to the violation is the assertion that the unsupported roof condition was first discovered by the mine manager, that the size of the unsupported area was approximately 15 square feet, that only three bolts were missing, and that the area had been posted with a "No bolts" sign. Since the area was posted and no one was working there, respondent argues that no violation occurred since the area would have been supported in the regular work cycle.

Petitioner argues that respondent admitted the roof was unsupported and the fact that a danger sign was put up is no defense.

I find that the evidence adduced with respect to the violation supports the action taken by the inspector and establishes a violation of section 75.200 as stated in the order. The applicable roof-control plan (Exh. G-9 at p. 6, item 13), provides in pertinent part that "[B]efore side cuts are started, the roof in the area from which it is turned shall be supported with permanent supports according to the approved plan; * * * ." It is clear here that one side of the intersection at the connecting crosscut in question had not been bolted as charged in the order. And, the fact that mine management may have discovered the condition before the inspector did and began abatement is not material to the fact that the condition cited did in fact exist and that it constituted a violation of the roof-control plan, and consequently, a violation of section 75.200. The order is AFFIRMED.

Gravity

Although the inspector saw no coal being cut in the entry or a cutting machine in the entries, coal was being run on the section and the roof had been bolted in the area beyond the cited unsupported roof area. The inspector believed the condition existed for at least one shift and men were working in the section. Although there was a dispute as to the extent of the unsupported roof area and the number of roof bolts which were missing, the fact is that the area cited was unsupported and posed a roof-fall hazard. I conclude and find that the violation was serious.

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Negligence

Although Assistant Mine Superintendent Bowen testified he found the missing bolts just before the inspector arrived at the intersection, I believe that a proper preshift inspection by the section foreman or his crew should have discovered the condition sooner, particularly on the facts presented here where the inspector indicated that the area beyond had been bolted and that the condition existed for at least one shift. Further, since the respondent maintains that the area was posted with a "No bolts" sign, which was not observed by the inspector, leads me to conclude that someone might have been aware of the missing bolts before Mr. Bowen arrived at the scene. In the circumstances presented, I conclude and find that the respondent failed to exercise reasonable care to prevent the condition cited and that this constitutes ordinary negligence.

Good Faith Compliance

The abatement notice reflects that the condition cited was immediately corrected and that the order was abated in approximately an hour after it was issued (Exh. G-11). I find that the respondent exercised good faith in abating the condition which was cited in the order in question.

Order No. 1 TML, February 28, 1977, 30 CFR 75.301

Fact of Violation

Respondent does not dispute the inspector's low air reading of 7,900 cfms in the last open crosscut at the location described in his order. In defense of the condition cited, respondent asserts that a technical violation occurred only after the loader operator inadvertently knocked down a check curtain, and that the loader operator and a helper were in the process of obtaining a hammer to replace the curtain when the inspector entered the last open crosscut and took his air reading. Since the only thing done to abate the violation was the rehangng of the check curtain which had been knocked down and the checking of another curtain that was loose, respondent asserts that it would have had the required amount of air were it not for the knocked down curtain.

With regard to the inspector's air readings and measurements, respondent, both during the hearing and in its posthearing brief, suggested that the inspector's air reading computations and calculations as set forth in Exhibits G-20 and G-33 were fabricated.

Petitioner argues that the inspector's testimony, notes, air readings, and calculations concerning the lack of a sufficient quantity of air at the location cited all support the order. Further, petitioner points to the fact that respondent's own witness admitted that the air

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was insufficient, that securing adequate ventilation was a continuing problem on the section, and that the section was shut down the day after the order issued by the mine manager due to the inability to maintain sufficient air at the working faces (Tr. 265, 266, 321-328).

As for the respondent's attack on the inspector's credibility surrounding the preparation of Exhibits G-20 and G-33, petitioner states that the exhibits were not produced for the respondent in advance of the hearing and in response to discovery requests because of a "clerical error" in the reproduction of the inspector's notes (Brief, pp. 4-5).

I find that the petitioner has established a violation of section 75.301 by a preponderance of the evidence. It is clear to me that 9,000 cubic feet of air per minute was not being maintained in the last open crosscut in the area described by the inspector and that the condition constituted a violation of the cited mandatory standard. Further, it is clear to me that respondent presented no credible evidence to dispute the inspector's findings which were supported by notes and air measurements taken by him at the time of his inspection.

Respondent's suggestion that the violation was "technical" is rejected. None of the air readings taken by the inspector reached the required levels and based on all of the evidence adduced with respect to this violation, it seems clear to me that the respondent was experiencing serious problems in maintaining the proper quantity of air in the section and I am not convinced that the ventilation problems could have been readily cured by simply finding a hammer and hanging up a check curtain, as suggested by the respondent.

With respect to respondent's suggestion that the inspector may have fabricated the air measurement computations which are reflected in his notes (Exhs. G-20, G-33), I find this to be a most serious accusation which should not be taken lightly. However, respondent has produced no credible evidence to support its assertion and it is rejected. I accept the explanation given by the petitioner in its brief with respect to the notes in question and find the explanation plausible. In the future, I would think that the respondent would have a more solid basis for such an accusation and should avoid speculative, groundless, and unfounded assertions of this kind. The order is AFFIRMED.

Gravity

The inspector detected no methane and the air readings which he obtained for the area cited indicated air quantity ranging from 5,700 to 7,125 cfms when measured with an anemometer, and 7,410 to 7,885 cfms when measured with a smoke tube. Further, the air in the intake measured 11,780 cfms and the inspector cited no permissibility

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violations. Further, respondent's evidence establishes that the curtain which was down was apparently rehung in about 5 minutes and that the required quantity of air was achieved.

Although I recognize the fact that the respondent was experiencing problems with mine ventilation which apparently required additional raises and which prompted the section to be subsequently abandoned and shut down, the gravity of the particular condition cited in the order must be determined on all of the prevailing conditions which existed as to that order. The facts presented here show that there was sufficient air in the intake, no methane, and no permissibility violations. Although the inspector believed that the low air readings may have affected the air at the face, he apparently took no air readings there and there is no evidence to support his conclusion that the air at the face was affected at the time the order issued.

The potential adverse effects of the violation must be determined within the context of the conditions or practices existing in the mine at the time the violation is detected, Lawson Coal Company, 1 IBMA 115, 120 (1972). In view of the totality of the conditions which prevailed, including the fact that the required quantity of air was apparently restored within a short time, I cannot conclude the violation was serious, and I conclude and find that it was not.

Negligence

The fact that the section had experienced problems with ventilation was known both to the respondent and the inspector. As a matter of fact, the inspector indicated that an MSHA ventilation team had previously visited the mine for the purpose of checking the ventilation and the respondent was apparently attempting to solve the problem. Viewed in this context, I cannot conclude that the ventilation problems being encountered in the mine can serve to establish negligence on the respondent's part with respect to the condition cited which served as the basis for the order. The order must stand on its own footing, and any negligence must be established by petitioner on the basis of the then prevailing conditions.

Respondent maintains that the low air readings resulted from a check curtain being down. However, the inspector testified that he took air readings after the curtain had been replaced and he did not believe the check curtain was the cause of the low air readings. Since the section was subsequently shut down because of the ventilation problems and consistently low air readings, I cannot conclude that his evaluation of the situation was wrong.

In view of the foregoing, I conclude that the respondent knew or should have known about the conditions cited and failed to exercise reasonable care to prevent the conditions. I find that the violation resulted from respondent's ordinary negligence.

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Good Faith Compliance

The evidence establishes that the order was terminated some 40 minutes after it was issued after the quantity of air was increased to 9,600 cfms. Further, respondent's testimony reflects that the curtain which was torn down was rehung in short order. In the circumstances, I conclude that the respondent exercised rapid abatement in achieving good faith compliance after the order issued.

Order No. 1 TML, March 1, 1977, 30 CFR 75.301-1

Fact of Violation

Respondent asserts that it is clear from the testimony of its face foreman, Pat Sturgill, that there was a technical violation of the cited safety standard in that respondent was only using a normal and acceptable mining practice to clean the ribs and that the inspector himself acknowledged that this practice is done to facilitate the cleaning of the ribs (Tr. 359-360, 365, 377-378, 388-389).

Petitioner argues that coal was being loaded in a working face although the air movement was so insufficient as to be incapable of measurement. The loading machine was actually loading coal along the ribs to the working face where the coal had not yet been loaded out (Tr. 353, 374).

I find that the petitioner has established a violation of section 75.301-1 by a preponderance of the evidence. Respondent has offered no defense other than the assertion that taking down the curtain is a normal mining practice when cleaning ribs. I reject that defense. I conclude from the inspector's testimony that coal was being loaded out of the section at the time of the order and respondent has not established that it is permitted to take down ventilation curtains while loading out coal. Further, while respondent presented testimony from its shift foreman that the curtain was taken down to facilitate the cleaning of the ribs, I find the inspector's testimony that coal was being loaded out to be the more credible. Even if the ribs were being cleaned, respondent has cited no standard or mine cleanup plan provision which would permit ventilation curtains to be taken down to facilitate the cleanup of ribs. Respondent's assertion that the inspector acknowledged this practice is taken out of context and does not excuse the violation. The inspector confirmed the section foreman's testimony in this regard, but he indicated that no inspector in his district would permit the practice and he obviously does not since he issued the citation. The order is AFFIRMED.

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Negligence

I find that the respondent deliberately took down the ventilation curtain in question in order to facilitate the loading out of coal and in so doing caused the quantity of air at the working face to be reduced to a point where it could not be measured. In the circumstances, I conclude that the respondent exercised a reckless disregard of the requirements of section 75.301-1, and in so doing, caused the condition cited through gross negligence.

Gravity

The quantity of air at the working face was so low as to make it impossible for the inspector to take an air reading with his anemometer. Coal was being loaded, the area was dusty, and if methane were liberated, the lack of air would present an explosion hazard exposing the 12 men on the section to danger. I find that the violation was very serious.

Good Faith Compliance

The abatement notice concerning Order No. 1 TML, for a violation of section 75.301-1, reflects that the order was terminated at 11:55 a.m. on March 1, 1977, 25 minutes after it was issued by increasing the quantity of air to 3,000 cfms at the location in the No. 5 entry where coal was being cut (Exh. G-26). I conclude that respondent exercised good faith in correcting the violation.

Order No. 2 TML, March 1, 1977, 30 CFR 75.301-1

Fact of Violation

Respondent argues that the testimony of the face foreman and assistant mine foreman clearly shows that there was more than enough air at the working face in question at the time the violation was written, that the inspector erred in his assessment of the correct position of the wing curtain, and that respondent's personnel were required to perform a very unsafe and highly dangerous act to abate the condition. Respondent asserts that it is highly unlikely that an experienced mine foreman, knowing that an inspector was on the section, would take an air reading at the incorrect wing curtain position and then advise the cutter to begin cutting. Respondent also points out that although the inspector alluded to a 104(b) notice which he said he issued at the same working face moments before he issued the order, when MSHA attempted to introduce the notice at the hearing, it was discovered that it did not deal with the alleged situation described by the inspector and the exhibit was withdrawn. Respondent asserts that this is an indication of the inspector's confusion as to what actually occurred.

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Petitioner argues that the inspector described in detail the results of three anemometer readings and two smoke tube readings which he took to support his order, and that they averaged 1,748 cfms as stated on the face of the order. Although both the inspector and Foreman Sturgill testified that the cutter was cutting the crosscut to the left as alleged, petitioner asserts that Exhibit R-11 and other testimony by respondent's witness attempted to indicate that the working was actually the face of the entry and not the face of the crosscut to the left. Petitioner submits that Exhibit R-11 was obviously not prepared by eyewitnesses underground at the time the violation was cited and is clearly a self-serving product of prehearing preparation.

Petitioner points to the fact that the violation was issued some 26 months prior to the date the hearing was held and that because of the passage of time, the critical and specific details surrounding the violation are difficult to recall from memory. Since the inspector was able to consistently refresh his memory from notes made at the time of the violation, and since he was the only one to take air measurements and tests, petitioner suggests that his testimony should be given more weight.

After careful review and consideration of all of the testimony adduced in this proceeding, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. I find that the inspector's testimony, as supported by his notes which were taken at or near the issuance of the order, supports his findings of a violation and support the order which he issued. I further find and conclude that the testimony presented by the respondent in defense of the citation does not rebut the findings made by the inspector, both as to the existence of the conditions cited or the fact of violation.

With regard to the location of the working face, the inspector's testimony is consistent with the description noted on the face of his order, as well as the notes taken by him on the day the violation issued. He defined the term "working face" as "wherever coal is being cut, mined, or loaded" and specifically testified that coal was being cut in the crosscut to the left. The inspector's testimony that coal was being cut and that the cutting machine was "sumped up and cutting" (Tr. 412) has not been rebutted by the respondent. As a matter of fact, Mr. Sturgill admitted that the cutting machine was in the entry cutting coal and that the crosscut had been advanced or began one cut when he and the inspector reached the entry (Tr. 424). Thus, I cannot conclude from the testimony presented that the inspector was wrong in his assessment of the situation, nor can I conclude that he erroneously located the working face.

Respondent's assertions that the inspector admitted confusion as to what actually occurred is taken out of context. A close review of the inspector's testimony makes it clear that while he alluded to some confusion based on the fact that mine management was not happy with the issuance of the order and accused him of "nitpicking," when asked whether that confusion may have spilled over to his notes, he specifically and directly stated "No." I put in my notes what I observed and what I had seen and what I came out with" (Tr. 417). Further, based on the somewhat limited cross-examination of the inspector, I cannot conclude that he was confused or unsure of the conditions which he observed on the day in question which led him to issue the violation.

Regarding the respondent's assertion that the inspector required its personnel to perform an unsafe and dangerous act to abate the conditions, although the face foreman testified on direct examination that the inspector "told me that I would have to hang a wing curtain across this machine" (Tr. 428), on cross-examination, he stated that the inspector did not instruct him to hold the line curtain and that the inspector did not care "how I cut the place" (Tr. 438). And, in testifying that the inspector "made me hang this curtain across this cutter bar" (Tr. 439), he confirmed that inspectors do not order or instruct him how to abate a violation but simply indicate that the air is insufficient and leave it to him to bring it up to requirements. In this case, he admitted that the inspector did not order him to hang the curtain, but that he told him to hang it to a roof bolt (Tr. 440). Under the circumstances, I cannot conclude that the respondent's assertion that the inspector required its personnel to perform a dangerous act has been established. Even if it were, I fail to understand how the method of abatement detracts from the condition which the inspector believed was a violation of the cited standard. The citation is AFFIRMED.

Negligence

The evidence adduced that the respondent was in the process of cutting coal at the face of the entry cited by the inspector. In such circumstances, it is reasonable to expect that the section foreman would insure that the proper amount of air was maintained at the face where such cutting was taking place. I find and conclude that the condition cited by the inspector should have been discovered and corrected and that respondent's failure to do so prior to the time that the violation was cited, constituted ordinary negligence.

Gravity

The inspector testified that he believed the gravity presented with respect to the violation "was the same as the others," meaning the previous violations which he testified about in this proceeding. Although he alluded to certain hazards if a pocket of methane were

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encountered, he also stated that he took methane tests and found none (Tr. 413). As for the existence of other prevailing conditions which may have amounted to violations, while he confirmed the issuance of other notices, he specifically stated that those conditions had been abated prior to the issuance of the subject order (Tr. 413) Notwithstanding the fact that the respondent was experiencing difficulties with is mine ventilation at the time the order issued, I cannot conclude from the evidence presented by the petitioner that it has established that this violation was serious. Taking into account all of the conditions established by the credible evidence adduced, I conclude that it was nonserious.

Good Faith Abatement

The abatement notice concerning Order No. 2 TML, for the violation of section 75.301-1, reflects that the order was terminated at 12:55 p.m., 15 minutes after the order was issued on March 1, 1977, by increasing the quantity of air to 3,400 cfms (Exh. G-30). Absent any evidence to the contrary, I conclude that the respondent exercised good faith in abating the conditions cited.

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

The parties stipulated that respondent is a large mine operator. Respondent presented no evidence or arguments that any civil penalties assessed by me in this proceeding will adversely affect its ability to remain in business, and I conclude that they will not.

History of Prior Violations

As evidence of respondent's history of prior violations, respondent produced a computer printout (Exh. G-1) for the period January 1, 1970, to December 19, 1976, for the Ken No. 4 Underground Mine, indicating that respondent has paid a total of \$132,270 in civil penalty assessments for 1,127 violations. Seventy nine violations were for infractions of section 75.200, 89 were violations of 75.301, 21 were violations of 75.301-1, and 11 were violations of 75.402. Twelve of these violations were orders of withdrawal, and the remaining 188 were notices of violation. The individual civil penalties paid for all of the violations on the printout range from a low of \$9 to a high of \$6,300.

For the 6-year period covering respondent's prior history of violations, the violations issued at the mine in question averaged 185 a year. For an operation of its size, I cannot conclude that respondent's overall track record during this period of time is indicative of any total disregard for the safety and health of its workforce. I conclude that respondent has a moderate history of prior violations, but I do take note of the fact that approximately

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20 percent of the prior violations were for violations of the very same safety standards which are the subject of this proceeding, and this is reflected in the civil penalties assessed by me in this proceeding.

Penalty Assessments

In view of the aforesaid findings and conclusions, and after due consideration of the six statutory criteria for assessment of civil penalties, and in particular, respondent's size, prior history of paid violations, and the negligence and gravity issues previously discussed, I conclude and find that the following civil penalty assessments are appropriate for each of the violations which have been affirmed:

Order No.	Date	30 CFR Section	Assessment
1 TML	12/20/76	75.402	\$ 1,500
1 TML	02/16/77	75.200	2,000
1 TML	02/28/77	75.301	1,000
1 TML	02/01/77	75.301-1	4,000
2 TML	03/01/77	75.301-1	1,600
Total			\$10,100

ORDER

Respondent is ORDERED to pay civil penalties in the total amount of \$10,100 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge