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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. VINC 79-109-P A.O. No. 33-01172-03011
v.	
SOUTHERN OHIO COAL COMPANY, RESPONDENT	Docket No. VINC 79-148-P A.O. No. 33-01172-03013 Meigs No. 1 Mine Docket No. VINC 79-110-P A.O. No. 33-01173-03009 Docket No. VINC 79-111-P A.O. No. 01173-03010 Meigs No. 2 Mine Docket No. VINC 79-112-P A.O. No. 33-02308-03010 Docket No. VINC 79-114-P A.O. No. 33-02308-03012 Docket No. VINC 79-115-P A.O. No. 33-02308-03013 Docket No. VINC 79-141-P A.O. No. 33-02308-03009 Raccoon No. 3 Mine

DECISIONS

Appearances: Linda Leasure, Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the petitioner
David M. Cohen, Esq., Lancaster, Ohio, for the respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with a total of 14 alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed timely answers, hearings were held on June 19, 1979, in Columbus, Ohio, and the parties appeared and participated therein. The parties filed posthearing arguments in support of their positions and they have been considered by me in the course of these decisions.

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, 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) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

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, 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.

Discussion

Docket No. VINC 79-109-P

Citation No. 279540, July 28, 1978, alleges a violation of 30 CFR 75.507, and states as follows: "The battery charger unit for the

scoop car operating the 002 section was located in the return air course in the crosscut from the No. 4 entry to the No. 5 entry in the 002 section."

Petitioner's Testimony

John W. Collins, Federal coal mine inspector, testified that on July 28, 1978, he conducted an inspection of the 002 section of the Meigs No. 1 Mine and that he observed an S & S scoop car battery-charging unit located in the return air course in the No. 5 entry. He observed that the permanent stoppings were installed to the third connecting crosscut outby the faces, and the second connecting crosscut outby the face had a curtain which, according to the roof-control plan, is a temporary stopping. However, it was separating the intake from the return. On the other side of the temporary stopping located in the return entry, he observed a battery charger unit which he cited as a nonpermissible piece of equipment since it was not located out of the return. The only connection that the battery charging unit should have with the return is that the air current that flows over the battery charger should be air that is coursed directly on the return (Tr. 52-56).

Inspector Collins confirmed his prior statement made on his inspector's statement that the occurrence of the event against which the cited standard is directed was "probable." The mine does liberate methane and it is currently on a 15-day spot inspection cycle. The return air comes off the section and returns over the nonpermissible battery charger which is a potential hazard in the event of a possible accumulation of methane. He determined that the condition "should have been known to the operator" because the preshift and onshift examinations of the section should have revealed the existing condition. With respect to good faith, the inspector indicated that there was normal compliance (Tr. 57-60).

On cross-examination, Inspector Collins testified that the battery charger was operating at the time the citation was written or he would not have issued the citation (Tr. 61-63). However, in response to questions from the bench, he testified that he had no present recollection as to whether or not the battery charger was in fact operating, and his notes did not reflect anything that would indicate that it was operating. However, his normal practice is not to issue a citation of this kind unless the battery-charging station is in fact operational. The charging units are moved quite often because of advancing sections, and it is often necessary to reroute them around crosscuts in order to get them to the proper location on the section so that the charger units can be ventilated directly to the return. The function of the battery charger is to recharge the batteries for the sand scoops. If a nonoperational battery-charging unit was located in the return, it is possible that someone would hook it up to some other piece of equipment at some time during

the mining cycle, and in such a situation, he would not cite the condition unless he actually saw it connected to the power center or in operation. Since the unit is moved from one section to another, he did not know how long this particular battery-charging unit was in the area cited, and the unit was not mentioned in the preshift and/or onshift books, (Tr. 63-67).

On redirect examination, Mr. Collins testified that he observed the area after abatement and that the location of the temporary stopping had been changed by moving a line brattice made of a flame-resistant plastic material on the other side so that it would make a difference in the intake and return (Tr. 67).

Respondent's Testimony

W. Keith Carpenter, respondent's safety representative at the No. 1 Mine, testified that he made the drawing (Exh. R-1), which shows the air course on the day the subject citation was issued, and it depicts the location of the battery charger, the ventilation curtains, and the stoppings, but does not indicate a curtain between the battery control unit and the No. 4 entry. He discussed with Jack Stallings, a union representative and safety committeeman who was present when the citation was written, whether there was a curtain between the No. 4 entry and the battery charger at the time the citation was written and his response was that he saw no curtain. The battery unit is located in intake air which does not come through the return until it reaches the immediate return. The air that passes over the battery charger does not reach or go back to the working faces, but rather, goes directly into the return air. The battery charger was not energized at the time the citation was written, and copies of the permissibility book signed by two mechanics the day that they were checking the scoop, reflects it was unplugged from the power center due to the fact that the mechanic was checking the permissibility of the power center at that time. Abatement was achieved by installing a curtain between the battery charger and the No. 5 entry (Tr. 68-73).

On cross-examination, Mr. Carpenter testified that he made the diagram (Exh. R-1) the day after he returned to the mine surface. He also noted a description of the process of the movement of the air, but does not recall whether or not he did that on the same day. He made the diagram because he felt that the condition was not a violation, and he discussed his observations regarding the alleged violation with Jack Stallings the day before the hearing and he does not remember having a similar conversation with him over a year ago (Tr. 75-76).

In response to questions from the bench, Mr. Carpenter testified that the basic difference between his diagram and that of the inspector, is that the inspector's diagram does not indicate the presence of

a curtain. The curtain which was installed as part of the abatement was not present at the time the citation issued. He did not see the curtain, but he was present when the condition was observed by the inspector. Assuming that the curtain was there at the time of the citation, this would have placed the battery charger in intake air although the inspector stated that it was in the return. Even though the curtain was on the left side of the charger, there was still intake air flowing over the return because all the air is pulled in at the stopping depicted by the double parallel line on the diagram which connects the two blocks. There was a movement of air coming over the charger, and even though the curtain was behind it, this was still considered intake air as it came over the charging unit (Tr. 77-80).

Inspector Collins was recalled for rebuttal testimony, and testified that if the battery charger were located where it is located in Exhibit R-1, and there was no curtain on either side of it, he still would have issued the notice of violation since the area is also a return area because the air from the section is returning through it (Tr. 81-82).

On cross-examination, Mr. Collins testified that on Exhibit R-1, although a curtain had been drawn between the No. 4 and No. 5 entries, there was no curtain on either side of the battery charger; thus the battery charger is located in return air and anything returning in that area is return air (Tr. 82-83). If the battery charger were located between the No. 4 and No. 5 entries without curtains on either side, it would be located in return air since it would be on a return area because the battery charger was located as indicated by both diagrams (Tr. 83-86).

Mr. Carpenter, upon being recalled, testified that intake air comes up the No. 1 entry to the face and around the check curtain and back out the entry, and that the purpose of the check curtain is to prevent complete and total loss of air. There is enough leakage in the intake air to prevent complete, total loss of air, and the air goes around the faces and back out, and it becomes return air when it gets to the immediate return in the No. 5 entry (Tr. 86-87).

Docket No. VINC 79-148-P

Citation No. 279550, August 2, 1978, alleges a violation of 30 CFR 75.1003(a), and states as follows: "The trolley wire was not guarded where supplies for the 006 section were located along the 006 section track. Men were required to pass under the trolley wire in order to place supplies from the supply cars to the storage area for the supplies for the 006 section."

Petitioner's Testimony

MSHA inspector Collins testified that during the course of conducting an inspection of the Meigs No. 1 Mine on August 2, 1978, he

observed along the 006 section track that the trolley wire was not guarded where supplies for the 006 section were located along the 006 section track. Men were required to pass under the trolley wire in order to place supplies from the supply car to the storage area with the supplies in the 006 section. Supplies were being unloaded into the crosscut from the supply car to the storage area, but he could not recall whether or not he actually saw the supplies being unloaded; however, his notes indicate that he had spoken with two utility men on the section who indicated that they had gone to the supply area to pick up some resin and that they had passed under the trolley wire to obtain it. He indicated that the condition should have been known to the operator because in order to gain access to the section, it is necessary to travel through the area. With respect to the gravity of the situation, he noted that injury could be a "probable" result since persons could come in contact with the trolley wire as they pass under it and injury could result from the shock that they could receive because the supply car itself is grounded to the track and one person would be in danger.

The respondent uses a yellow piece of trolley guard to guard trolley wires in the mine and it is possible for one to come into contact with this guarding and not receive a shock. The normal guarding procedure is to put the trolley guarding, which is a plastic-type of insulated material, over the top of the wire itself and install belt hangers to keep it in place. To his knowledge, no temporary type of guard had ever been used in the mine (Tr. 102-107).

On cross-examination, Mr. Collins confirmed that his notes reflect that the trolley wire was energized at the time he cited the alleged violation, but they do not reflect whether or not it was energized at the time the two men passed under it. The only time that the trolley is deenergized at the mine is during any installation of a trolley system, and a trolley wire is deenergized by the tripping of switches that are located at certain branch line locations and in outby areas (Tr. 107-109). The trolley wire is not normally guarded along its entire length, but it is guarded at the mantrip stations and areas where persons have to pass under it, such as refuse holes, supply areas, and also at doors on the track. A trolley wire is required to be guarded at any place a person has to pass under it. The supply area involved was regularly used, and the trolley wire is required to be guarded so long as men pass under it while taking supplies from the supply cars to the storage area (Tr. 110-113).

Inspector Collins testified that he could not recall the height of the trolley wire, the height of the entry, or the type of roof present, and he does not have such information in his notes. The height of the trolley wire throughout the mine varies with the height of the seam. The height of the working mine seam is 54 to 52 inches, but the track and trolley cause it to be even higher--sometimes 6 to 7 feet. His notes indicate that he actually saw the supplies being

unloaded, and he considers his notes to be accurate, but he had no independent recollection of the particular event (Tr. 110-122).

Respondent's Testimony

Mr. Carpenter testified that he was with Inspector Collins at the time the citation was issued but did not notice any miner loading or unloading supplies at the place indicated on Exhibit R-1. They rode into the area on a jeep and then pulled in directly behind the mantrip that was parked there. The supplies were already there when they arrived but there was no motor crew or any person unloading supplies at the time. He conceded that in retrieving the supplies from where they were stored, it was necessary for the men to pass under the trolley wire. Except for unloading supplies, there was no reason for men to pass underneath the trolley wire on a regular basis. The trolley wire is sometimes deenergized since all the motor crews and the men that are involved with transporting supplies from one part of the mine to the other are instructed that the trolley wire is to be deenergized when they are working under or around it. When unloading, the men are instructed to deenergize the wire if it is not guarded, and there are cut-off switches at the mouth of the track spur as it comes off the main mine (Tr. 114-127).

On cross-examination, Mr. Carpenter testified that he did not know for certain whether the trolley wire switch was pulled when the supplies were being unloaded. He indicated that it is reasonable to assume that if the two supply cars were in the location corresponding to Exhibit R-1 and somebody brought some equipment into the mine and wanted to off-load it, they could not put the cars under the guard, but had to move them elsewhere. Mr. Carpenter stated that it is reasonable to conclude that if the inspector came in and saw the supplies, he would naturally assume that at some point in time somebody put those supplies in by passing under the unguarded cable (Tr. 132). The citation was abated by guarding the area (Tr. 134-138). He did not recall the height of the trolley wire (Tr. 139).

Docket No. VINC 79-110-P

Citation No. 278046, May 11, 1978, alleges a violation of 30 CFR 75.503, and states as follows:

> The No. 7009 shuttle car involved in the non-fatal accident in 008 section was not maintained in permissible condition in that at 7:30 p.m. on 5/10/78, the cable was pulled out of the reel and burned the insulation off the reel and the cable was re-entered, the shuttle car put back in operation and the damaged reel was not repaired.

Petitioner's Testimony

MSHA inspector Dalton E. McNece, Jr. testified that while conducting an accident investigation at the mine on May 11, 1978, he issued a citation involving the No. 7009 shuttle car which was involved in an accident in the 008 section. His investigation began on the evening of May 10, shortly after he had received word from a company official that an accident had occurred. In investigating the shuttle car which was involved in the accident, he and fellow inspector Don Osborne found one place in the trailing cable where the accident victim had received a shock from the trailing cable while standing in mud, and in addition, a bare place was found in the trailing cable. A citation was issued for a violation of 30 CFR 75.517 because the trailing cable was not properly and adequately insulated. Mr. McNece then proceeded to inspect the shuttle car and found that the cable had been pulled out of the trailing cable reel. When it had been pulled out of the trailing cable reel, the 250-volt, DC power cable caused a short circuit and burned the insulation off the trailing cable reel. There was a sharp edge on the reel despite the fact that the shuttle car was equipped with insulation on the trailing cable reel, and the car had been put back into operation in that condition. Had this condition continued, another man could have been shocked or possibly electrocuted by the shuttle car becoming deenergized.

Mr. McNece stated the operator was negligent because one man had already been injured by the trailing cable, and the repair work was supervised by a certified company official. Although the cable reel had been checked, anyone shining a light into the reel compartment would see the bare metal on the cable reel. Mr. McNece believed the condition cited was very serious due to the fact that it could cause another person to receive an electrical shock or possibly be electrocuted. Approximately 11 persons could be affected as a result of the condition since 10 people work in the section in addition to the foreman. The condition was abated by insulating the trailing cable reel and by spraying approved insulating paint onto the shuttle car reel and trailing cable reel. After the paint dried, it provided adequate insulation for the trailing cable reel and restored it to its original approved condition (Tr. 150-152).

On cross-examination, Mr. McNece testified that the earlier injury which prompted the investigation occurred when a miner came in contact with an energized power cable that had a bare place in it. When he arrived at the mine, the miner who was hurt was still at the hospital, but he would not classify the injury as serious because there was no lost time. However, the electrical shock that was sustained by the miner was serious enought to warrant hospital treatment and it disturbed the miner's nervous system. The existence of an uninsulated area on the trailing cable reel could lead to the electrocution of an individual. Although there is short-circuit

protection to keep the current from going to ground, any malfunction to this short-circuit protection would send 250 volts of direct current onto the shuttle car. If an individual were to come into contact with the car he could possibly be electrocuted since the area was very wet, and mud and water is a very good conductor of electricity. In order for an individual to be hurt, three conditions have to be present; namely, insulation being off the cable, insulation being off the reel, and a malfunction in the short-circuit system. A violation of section 75.503 occurred because the insulation was not on the trailing cable reel as it came approved, and section 75.503 requires that it be maintained in permissible condition (Tr. 153-157).

Mr. McNece testified that the shuttle car had been taken out of service at 7:30 p.m., the day the citation issued, and men were taking up cable slack from the power center that was anchored behind the trailing cable. While in the process of reeling the cable, the individual who was pulling up the extra slack came into contact with the exposed bare wire and was shocked when it came by the anchor point. The shuttle car was then placed back into operation, but after learning that the injured man was to go to the hospital, the area was fenced off for the investigation. He could not explain the interval between the time when the man was injured and when it was determined that the injury was serious. It was evident that no examination was made of the trailing cable reel after the shock incident to determine whether it was damaged. The only thing that was done was to pull up the cable slack, reenter it in the reel, and placing the excess on the reel. He had to personally pull the cable off the reel in order to wipe the mud off with a rag so that he could examine the cable and reel compartment (Tr. 163-168).

Mr. McNece testified that he determined the trailing cable was not examined because if it had, the bare place in the trailing cable, which was approximately 2 inches in length, would have been seen. The bare place was obvious and he took a rag and wiped the mud off the trailing cable to see the 2-inch spot. The cable in question was approximately 500 feet long, and he conceded it was possible that someone could examine a 500-foot cable and not locate a 2-inch bare spot covered with mud. He could not state that mine management did not conduct a visual observation of the cable by just walking along and looking at it, but in his opinion, the cable needed very close attention since it lay in mud and water and an individual had been shocked by it (Tr. 169-171).

In addition to the citation for the insulation being burned off the reel, another citation was issued for a violation of section 75.517, in regard to the insulation being burned off the cable. He examined the cable and found only one bare spot, and in order for an injury to occur to an individual, a bare spot on the reel would have to come into contact with any bare spot on the cable, but in this particular case, only one bare spot was detected (Tr. 171-173). The

insulation was worn off the reel and this rendered the shuttle car nonpermissible since it is required to be insulated. The reason the shuttle car was not taken out of service was because mine personnel had to pick up the excess cable on the shuttle car in order to move it out. When the man was injured and the accident was determined to be of a serious nature, the trailing cable reel should not have been picked up again. However, he does not contend this was done intentionally. By use of the term "put back in operation," he does not mean that the shuttle car was actually used to run coal, but rather, he means that it was moved back out of the way (Tr. 173-180).

On redirect examination, Mr. McNece testified that he determined that the violation was "significant and substantial" because it met the four criteria for the unwarrantable category, namely, (1) it was a violation of a mandatory health and safety standard, (2) it did not constitute an immindent danger, (3) it was significant and substantial in that it could cause death or serious physical harm to the miner, and (4) it was known or should have been known by the operator (Tr. 180-182).

Docket No. VINC 79-111-P

The proposal for assessment of civil penalties filed in this proceeding alleges two violations. Citation No. 280459, July 25, 1979, alleging a violation of 30 CFR 75.605, was settled by the parties. The initial assessment was for $305, and the parties were afforded an opportunity to present arguments on the record in support of a proposed settlement for $150. In support of the settlement, petitioner argued that if called to testify, the inspector would state that the trailing cable in question was not clamped securely to the machine, that the strain clamp had loosened and slipped, but the inspector was of the view that there was no negligence on the part of the respondent in allowing the condition to exist. However, in the initial assessment, the Assessment Office considered that the respondent was negligent. In view of the absence of negligence, petitioner argued that the reduction in the assessment is warranted. In the circumstances, the proposed settlement was approved (Tr. 19-24).

The remaining citation in this docket, namely, No. 278095, July 20, 1978, 30 CFR 75.200, was tried, and testimony and evidence was adduced by the parties in support of their respective positions, and a discussion of this citation follows.

Citation No. 278095, July 20, 1978, alleges a violation of 30 CFR 75.200, and states as follows: "The approved roof control plan was not being complied with in 005 section in that a cut of coal 18 feet wide and 10 feet deep was loaded out and temporary roof supports were not installed in the crosscut between Nos. 2 and 3 entries."

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Petitioner's Testimony

MSHA inspector McNece testified that on July 20, 1978, in making a routine inspection of the Meigs No. 2 Mine, he observed that the crosscut between the No. 2 and No. 3 entries was driven 17 feet wide and 10 feet deep, and that temporary supports were not installed as required by the approved roof-control plan. The mine's approved roof-control plan requires that such supports, on 5-foot centers, be installed within 15 minutes after the loading has been completed in the area. When he arrived on the section at 11 a.m., the loading crew was loading the crosscut from the No. 3 entry towards the No. 4 entry and the loading cycle was two-thirds of the way completed. It took more than 15 minutes to mine out two-thirds of a cut of coal, and he was told by the loading crew that they had cleaned up the crosscut between No. 2 and No. 3 entries and had moved into the crosscut between No. 3 and No. 4. At the time, he made notes and drew a small sketch or diagram of the area, labeling the entries, and it indicated that the crosscut to the right in No. 3 entry was loaded out (Tr. 190-192).

Mr. McNece testified that the respondent should be familiar with the approved roof-control plan, and a certified company official on the working section should have instructed someone to install the temporary supports. A foreman was on the section at the time. As for the gravity of the situation, Mr. McNece testified that the lack of temporary supports would leave an area 18 feet wide and 10 feet deep unsupported and it would be possible for someone to walk under unsupported roof believing it was roof bolted. The condition of the roof was solid, and it had no breaks or cracks in it (Tr. 193-194).

On cross-examination, Inspector McNece testified that he issued the citation just after he arrived at the location cited and he did not remain there for 15 minutes in order to determine whether 15 minutes had actually passed. Instead, he determined the passage of time from the fact that the individuals who were loading the crosscut between No. 3 and No. 4 had loaded two-thirds of the cut, and they could not have accomplished such loading in just a 15-minute period. The term "loading cycle" means using a loading machine for loading the coal out, bringing it to the shuttle car, transporting it from the face to the section loading point, and then discharging it onto the belt conveyor. This process of loading could occur in every face area where coal is shot or cut down (Tr. 194-198).

Respondent's Testimony

Lowell Carte, safety supervisor, Raccoon No. 3 Mine, testified that he is familiar with the approved roof-control plan (Exh. R-1), and that the plan requires that the installation of temporary roof supports after a loading cycle must be started within a 15-minute

time period, and once such support work is begun, it must be completed. Conceivably, in the event of damaged supports, it could take more than 15 minutes to install such supports (Tr. 199-204).

Mr. Carte testified that if Mr. McNece arrived on the section at 11 a.m., it would probably take an additional 5 or 10 minutes to arrive at the actual mining area. He further testified that based upon his mining experience, he would not agree with the inspector's statement that two-thirds of a cut of coal could not be loaded out in 15 minutes, because he has run a loader in a coal mine and he knows that a decent loaderman can load a place out in 20 minutes, and in 15 minutes if he is a good loaderman (Tr. 204-205).

On cross-examination, Mr. Carte stated that he was not present when the inspector made his inspection, and he only recently conferred with the safety supervisor concerning the citation. There are people in the Raccoon No. 3 Mine who are capable of loading a section in 15 to 20 minutes, and although he has never timed such individuals, he has observed them loading coal in the past, and would estimate they could load an 18-foot cut-out 110 feet deep in less than 10 minutes, and that it is even possible to do it in less than 15 minutes, depending on how far the coal has to be transported and how close the feeder is to the face area (Tr. 205-207).

Mr. Carte testified that the usual procedure followed in the Raccoon Mine with regard to roof control is that a loading crew, the loaderman, or helper, install the temporary supports before leaving the area. The only reason for not following such a procedure would be that they did not have the temporary supports or the supports they were using were damaged. In such a case, they would probably relay the information to the utility man on the section who would probably go to the supply area and bring in additional temporary supports (Tr. 208-209).

On rebuttal, Inspector McNece testified that based on his experience, if everything were working properly and assuming the men were working productively, he would estimate that it would take 30 to 45 minutes to load a section similar to the section in question (Tr. 209-213).

Docket No. VINC 79-141-P

In this docket, the proposal for assessment of civil penalties filed by the petitioner seeks civil penalties for three alleged violations. However, the parties proposed a settlement for two of the violations and were afforded an opportunity to present arguments on the record in support of the proposed settlement for Citation No. 279953, July 25, 1978, 30 CFR 75.400, and Citation No. 279990, August 3, 1979, 30 CFR 75.1100-2(f). With respect to Citation No. 279953, the petitioner argued that the conditions cited were abated in a rapid fashion

and that the respondent exhibited good faith in the abatement of the conditions. With respect to Citation No. 279990, the petitioner pointed out that there was an arguable question of interpretation with respect to the application of the cited standard, particularly with respect to the question of what constituted an "oil storage station" within the meaning of the cited standard. Coupled with the fact that fire extinguishers were in fact provided on the section, and that the respondent exhibited rapid abatement of the violation, a decrease in the initial proposed settlement amounts were warranted (Tr. 42-45). After consideration of the the arguments presented in support of the proposed settlements, I find and conclude that they should be approved. Accordingly, civil penalties in the amount of $160 for Citation No. 279953 (originally assessed at $345), and $160 for Citation No. 279990 (originally assessed at $225) are approved as dispositive of these two citations.

The remaining citation in this docket, No. 279989, August 2, 1978, 30 CFR 75.1710-1(a)(4), was tried, and testimony and evidence was adduced by the parties in support of their respective positions, and a discussion of this citation and the supporting arguments follows.

Citation No. 279989, August 2, 1978, citing a violation of 30 CFR 75.1710-1(a)(4), states as follows: "The front canopy had been removed from the Co. No. 4539 roof bolting machine operating in 006 section. The average mining height was more than 42 inches."

Petitioner's Testimony

MSHA inspector Jesse J. Petit testified that during the course of conducting an inspection at the 006 section of the Raccoon No. 3 Mine, he observed that the front canopy of the No. 4539 roof-bolting machine had been previously removed. The machine was in operation at the time he observed this condition and he issued a citation. The average mining height on this particular section was 48 to 50 inches, and the condition was abated by installing the front canopy. In filling out the gravity sheet accompanying the citation, Mr. Petit indicated that the machine had previously passed through some extremely low coal in the section, and this evidently resulted in the removal of the canopy. He determined that the operator should have known about the alleged violation because the front canopy on the roof-bolting machine is not to be removed, and he believed that the condition could have resulted in a probable roof fall (Tr. 216-219).

On cross-examination, Inspector Petit testified that he took measurements at various locations on the section to determine that the average coal height was 48 to 50 inches. His notes do not indicate that he took such measurements, but he knows that he would not have issued the citation unless he had taken measurements. Even if the

mining height is less than 42 inches, he would still have issued a citation because the front canopy is supposed to remain on the machine. The mining height in this particular section of the Raccoon No. 3 Mine fluctuates (Tr. 219-221).

In response to questions from the bench, Mr. Petit testified that the front canopy must remain on under all conditions. All three of Southern Ohio Coal Company's mines have been granted relief for up to 56 inches mining height before the canopies can be removed from roof-bolting equipment, with the exception of the front canopy. Even when the equipment is operating in low coal, the front canopy cannot be taken off. He does not know the height of the canopy or the canopy adjustment heights. No one gave him an explanation as to why the front canopy was off at the time he cited the condition, and he served the citation on Ray Lieving, the master mechanic. The canopy in question was a hydraulic canopy, and at the time he issued the citation, the roof bolter was energized. However, he did not know if it was in the process of installing bolts, and he did not remember whether he saw anyone using it, standing under it, or kneeling under it. The roof conditions in the section were good, and under the circumstances, he would consider this a nonserious violation although it could conceivably result in a fatality (Tr. 219-225).

Respondent's Testimony

Mr. Carte, testified that he is familiar with, and has previously measured the height in the 006 section, and that at the time the citation was issued in the No. 1 and No. 2 entries, the coal seam measured anywhere from 29 to 31 inches. He measured several areas on the section, and there were areas on the section in Nos. 3, 4, and 5 entries inby the feeder that ranged anywhere from 46 to 56 inches in thickness. In the No. 2 entry where the coal vein had lowered, it was from 29 to 31 inches in thickness. Once low coal was encountered, they were operating in it for four or five breaks and they had to mine at least another five breaks before they exited the small seam of coal. The particular roof-bolting machine that was cited was working in the low coal area, and fireclay had to be taken to make height for the miner to get in to mine the low seam of coal. In order for the roof bolter to bolt the top, the canopy had to be removed because it extends approximately 8 inches higher than the roof-bolting machine itself. There was no way possible to bolt with the canopy on, the canopy could not be raised, and there was no human way of raising it or even going into the area (Tr. 226-239).

Docket No. VINC 79-112-P

In this docket, the proposal for assessment of civil penalties filed by the petitioner seeks civil penalty assessments for four alleged violations of certain mandatory safety standards. During the course of the hearings, the parties were afforded an opportunity to

present arguments in support of a proposed settlement for three of the violations, namely Citation Nos. 279961, August 9,1978; 279964, August 10, 1978; and 279973, August 15, 1978; all of which were issued for alleged violations of the provisions of 30 CFR 75.606. The initial assessments made for these citations were $225, $295, and $195, respectively. In support of a proposed settlement in the amounts of $122, $140, and $90 for each of these citations, petitioner argued that the reductions were warranted in view of the fact that after evaluation of the negligence criteria, the petitioner was of the view that there was little or no negligence on the part of the respondent in that there was no way that the respondent could have been aware of the fact that the equipment involved in each of these citations was in fact positioned in such a fashion as to be resting on the cables in question. The citations were issued after the inspector found that certain pieces of equipment had been parked in such a fashion as to come to rest on the trailing cables. Although petitioner conceded that the operator is responsible for insuring against the type of violations cited, it believes that the respondent could not have been aware of the fact that the equipment operators had in fact positioned the equipment in question in such a fashion as to be in violation of section 75.606, which requires that the trailing cables be adequately protected to prevent damage by mobile equipment (Tr. 31-35).

In view of the fact that the evidence and abatements reflect that the conditions cited were immediately abated and that the cables in question were not damaged, I conclude and find that the proposed settlements should be approved. With respect to the remaining citation in this docket, the parties presented testimony and evidence in support of their respective positions, and a discussion of this citation follows.

Citation No. 279997, August 8, 1978, 30 CFR 75.402, states as follows: "Rock dust had not been applied to the roof, ribs and floor of the last open crosscut between Nos. 4 and 5 entries, 009 section. A spot rock dust sample was collected to substantiate the citation. The distance through the crosscut was 60 feet."

Petitioner's Testimony

MSHA inspector Petit testified that during the course of conducting an inspection at the Raccoon No. 3 Mine on August 8, 1978, he observed that rock dust had not been applied to the last open crosscut between the Nos. 4 and 5 entries. He took a dust sample at the location, which involved a band sample of the roof, rib and floor, and the results indicated 47 percent incombustible. The dimension of the crosscut was 60 feet, and during the time that he was in the area, he did not observe any rock dusting in any other crosscuts or entries. The mine does have a program for rock dusting that calls for all crosscuts to be rock dusted within 40 feet of the faces except

in those areas that are too wet. He does not remember looking at the preshift book; however, he usually makes it a practice to so do before entering the mine. The respondent shut the whole section down and immediately assigned men to rock dusting. The rock dusting was completed at 11 o'clock, and he believes that the men must have had some additional work to do in the area, such as shoveling the ribs, or scooping up the crosscut, since it should not have taken an hour to rock dust 60 feet. The only explanation for taking that long to rock dust 60 feet is the lack of available rock dust on the section, or the cleaning of the section first. He observed rock dusting being done prior to terminating the order, and he remained there while it was being done (Tr. 249-253).

On cross-examination, Mr. Petit testified that if there was a coal accumulation he would have had to issue the citation under a different standard, and he did not know what time the company discovered the condition. On his gravity statement, he indicated that the condition "should have been detected" by a preshift examination at the end of the prior shift. The citation was written at 10 o'clock in the morning, and the oncoming shift does not arrive on the working section until 8:45 a.m. or 9 a.m., and the earliest arrival time would be 8:30 a.m. The citation was abated at 11 a.m, and prior to issuing the abatement, he is certain that he did not leave the section and go to other areas. However, he indicated that it is possible that he was in another area of that particular section and that the area that needed rock dusting had been taken care of in 5 or 10 minutes (Tr. 253-256). There was the possibility of fire resulting from a cable being shorted or an energized cable being shorted (Tr. 256-257).

Docket No. VINC 79-114-P

Citation No. 277726, August 29, 1978, alleges a violation of 30 CFR 75.1405, and states as follows: "The Company Nos. 8730 and 8107 stone haulage cars, located on the surface track in the supply yard could not be coupled without a person going between the ends of the cars. Order issued because: sufficient effort was not made to abate the citation."

Petitioner's Testimony

MSHA inspector Petit testified that in conducting an inspection on August 29, 1978, at respondent's Raccoon No. 3 Mine, he observed that certain uncoupling devices on a train of six rock cars, namely, car Nos. 8107 and 8730, had broken uncoupling devices. The cars were loaded with rock, and they were eventually going to the rock dump. The cars could not be uncoupled without someone going between the ends of the cars, and he determined this due to the fact that it was necessary to position oneself in between the cars in order to uncouple them. Each uncoupling device consisted of a rod or lever that extends on both sides of the car, from the middle of the car outward where a

person can raise it up from the outside and uncouple it without going near the rail. He issued the citation at 1:15 p.m., and set a termination deadline for 4 p.m., that same day. He checked the coupling devices on other haulage cars and found that they were all right (Tr. 276).

On August 30, 1978, he returned to the mine to check the cars again and he found that no effort had been made to abate the citation by the 1:15 p.m. deadline. The No. 8107 haulage car had been used after the citation was issued, but car No. 8730 was tagged out and off the track, but no effort had been made to have it repaired. The subsequent order was abated in 31 minutes.

Mr. Petit believed that the operator was negligent in that a more thorough check of the haulage equipment should have detected the damaged uncoupling devices. He believed that the condition could result in a fatal injury in the event the car should happen to roll while someone was trying to uncouple it. That person could be run over, or at the least be knocked down or receive a broken leg. When he returned on August 30, 1978, he issued an order rather than granting additional time for abatement because while the company had tagged out two of the cars, car No. 8107 rock car was not tagged out and was still on the rails (Tr. 277-279).

On cross-examination, Inspector Petit testified that the last time that the cars had been removed was when they were brought out of the mine. At the time he issued the order of withdrawal, the cars were not in use, but car No. 8107 was still on the rails and could have been used at any time. It had been used after the citation issued, but this was not improper as long as it had been repaired by the abatement deadline. There was no danger connected with car No. 8730 since it was tagged out and off the track, and he does not recall asking anyone if car No. 8101 had been repaired (Tr. 279-281).

According to Mr. Petit, a welder would have been required to repair the uncoupling devices, but he did not know whether there was a welder on each shift, how busy the repair shop was that particular day, or how many jobs the welder had to do, and he did not attempt to find out. He cited a violation of section 75.1405, which is the section that pertains to underground mining, and he chose to cite it under that section rather than Part 77 because the cars are underground more than they are on the surface. It is possible that they are used 1 or 2 days a month, and would be on the surface the other portion of the month. He does not know of any requirement in Part 77 that requires automatic coupling devices for cars while they are located on the surface (Tr. 281-283).

In response to questions from the bench, Mr. Petit testified that the surface area was a regular track haulage area for transporting

supplies underground and transporting loaded rock cars from underground to the surface. The track does go underground, it is a spur of the mine, and the rock that was in the two cars came from underground. He did not consult with anyone in regard to fixing the abatement time since he believed that 7 hours was a sufficient time in which to repair the equipment, and he does not remember whether anyone complained about the abatement time (Tr. 286-288).

Respondent's Testimony

Chris Mapper, surface foreman, Raccoon No. 3 Mine, testified that after the citation was issued, he was instructed to remove the two cars and unload them, remove them from the track, and then transport them to the shop for repairs. When they finally got the cars to the shop it was probably 3 to 3:30 p.m., and due to the weight of the cars, a forklift had to be used to get them off the track. Each car weighs approximately 5 to 6 tons, and the cars were not used prior to the time they were taken off the track. He is aware that Mr. Petit issued Order of Withdrawal No. 277727, stating that sufficient effort was not made to abate the citation. Moreover, the welder that was working on the cars works a straight day shift, leaving work around 3:45 p.m., and he thus he did not have time to work on the cars that day. After the citation was issued, five other cars were tagged out for repairs (Tr. 293).

According to Mr. Mapper, the rock cars are used only onch a month when they shoot overcasts, but on occasion they are used 3 or 4 days a month. The cars spend most of the time on the surface, and last winter they were not used at all. It is possible to uncouple the cars on the surface without an automatic coupling device, but it is dangerous (Tr. 293-294). Only one welder is on duty on the mine surface and he is supposed to check the cars to see if they have automatic coupling devices before they go underground. However, once the cars are underground, they can get bent up and they are treated roughly when underground (Tr. 299-300).

Mr. Carte testified that at the time the initial citation issued there was no confusion. However, on the duplicate copy of the citation received by mine management, the car numbers were confused and one of the wrong cars was tags out. Company policy dictates that all cars be equipped with automatic couplers and are not to be taken underground in a damaged condition. On the day following the citation in question, five additional cars were tagged out for being in need of repairs and this was done at the initiative of the company (Tr. 305-306).

Docket No. VINC 79-115-P

Citation No. 277736, September 12, 1978, alleges a violation of 30 CFR 75.200, and states as follows: "Temporary supports were not

installed in the unsupported face area of No. 1 entry, 006 section as required by the operator's approved roof control plan."

Petitioner's Testimony

MSHA inspector Petit testified that on September 12, 1978, he inspected the Raccoon No. 3 Mine and observed that temporary supports were not installed in the unsupported area of the No. 1 entry, as required by the roof-control plan. An area 7 feet wide by 11 feet long was not roof bolted. The area was drilled, the cutter was ready to cut the place, and the area had been reported by the 8 a.m. to 4 p.m. shift as being bolted. The applicable section of the approved roof-control plan required that temporary supports be installed or that installation be begun no later than 15 minutes after the loading cycle is completed. He determined that this provision had not been complied with because the coal driller already had drilled the area, and it takes 10 to 12 minutes to drill such an area. When he observed the operation, the cutter was getting ready to cut the area, so he determined the cutter was either moving in or was ready to move in. The coal drill operator, or the cutting machine operator, told him that he was told by the section foreman that the area was ready to cut.

With respect to whether the operator had been negligent, Mr. Petit testified that a more thorough examination of the working section should have detected the violation and the fact that the area was not ready to be cut, drilled, and shot down. Such an observation should have been made by the preshift examiner. He determined the gravity of the condition and found that a roof fall was probable, but the roof was solid and in good condition. He abated the citation after temporary roof supports were installed on not more than 5-foot centers, and the roof-control plan was reviewed with the crew (Tr. 327-328).

On cross-examination, Mr. Petit confirmed that the place was drilled and that the cutter was about ready to cut the area. The cutter was to undercut the new face and the scrap coal that is left. Mr. Petit's notes did not reflect whether scrap coal was left, and had there been scrap coal left, this would have indicated that the area already had been drilled. The mining cycle was begun when the area was drilled because it is not normal to drill ahead of the cutting machine. In this particular case, the driller came before the cutter (Tr. 330-331).

Mr. Petit further testified he is aware of the fact that the roof-control plan permits 15 minutes from the second loading cycle to begin on a new face of coal, but it does not permit another loading cycle to start. Although the area had been previously drilled, the roof bolter came in and supposedly bolted it and then the coal driller came in. In response to the question of how he knew that 15 minutes

had elapsed without beginning the installation of temporary supports. Mr. Petit indicated that he did not even think about the 15 minutes. He knew that the next mining cycle had started since the place had been drilled and it was reported roof bolted (Tr. 330-331).

Respondent's Testimony

Mr. Carte testified that when the preshift examiner who is the section boss already on the section, made his rounds in the last 3 hours of the shift, and called out his report to the boss that is coming onto the section, he automatically told him that the area was bolted because there was enough time to allow the roof bolter to bolt it. He noticed that the place had not been completely bolted because there was some scrap coal left on the bottom. In the meantime, he instructed the cuttermen to go back in the area and scrap the coal so that the roof bolter could continue bolting (Tr. 336-339). The mining cycle had not been completed in this area, and under the roof-control plan, until the cycle is completed, the plan does not require the setting of temporary supports. Once it is started, however, it must be completed (Tr. 340).

On cross-examination, Mr. Carte testified that although he was not present on the 006 section on September 12, 1978, he obtained information through his safety assistant who travels with an inspector and the oncoming and offgoing section boss. On September 12, the scrap coal was taken care of on the next cycle of the shift in which the citation was issued. As the cutting machine moved in, he would have scraped the coal, sent his roof bolter back in to install another row of bolts, and a new cycle would have begun. The cycle could not be completed until after the citation issued. Thus, at the time the inspector was there, there should have been scrap coal present. However, at the point after the section was drilled and the cutter was being moved in, the other cycle was not being started due to the fact that scrap coal had been left and the loader would have to come back in and clean it out and then the roof bolter goes back in and finishes bolting (Tr. 341-343).

Stipulations

The parties stipulated that the inspectors who issued the citations in issue were duly authorized representatives of the U.S. Department of Labor, that they were issued to the respondent on the dates indicated, and that the conditions cited were terminated within the time-frames set forth in the citations (Tr. 51, 101).

Findings and Conclusions

Docket No. VINC 79-109-P

Citation No. 279540--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.507, which provides as follows: "Except where permissible power connnection units are used, all power-connection points outby the last open crosscut shall be in intake air."

The citation here charges that the battery-charging unit in question was located in return air rather than intake air as required by the cited standard. After review of the testimony and evidence presented by the parties in support of their respective positions, the key question presented with regard to the location of that unit lies in the positioning of a brattice curtain or temporary stopping. According to the inspector, the course of the ventilation current at the cited location is determined by the installation and location of the curtain, and the positioning of the curtain determines whether or not the unit is located in intake or return air (Tr. 68). Here, the inspector contends that the air being coursed over the unit was return air, and while the same air was used to abate the citation, the crux of the violation lies in the fact that complete air separation was not being maintained because the unit was being ventilated by return air, and the purpose of the curtain is to serve as a temporary stopping separating intake air from return air (Tr. 88-95).

Petitioner argues that the intent of the cited standard is to insure that such battery chargers are adequately ventilated and are positioned in such a manner so as to preclude a buildup of methane, thereby posing an explosion threat in the event of arcing from the unit (Tr. 99). In its posthearing proposed findings and conclusions, petitioner argues that even assuming the absence of a temporary stopping, the lack of a stopping would have permitted the intermingling of intake and return air. Further, petitioner points out that the nonpermissible battery charger unit was located immediately on the return side of the temporary stopping between the check curtain or line brattice and the No. 5 entry, and by being positioned between the unit and the No. 4 entry, the curtain prevented or reduced intake airflow over the charger and exposed it to methane content in the return air.

Respondent's argument is that the battery charger was located in intake air and that there was no curtain between the battery charger and the No. 4 entry. Further, respondent maintains that the charger was not operating, and since the inspector conceded that chargers of this type are moved often, one can assume that it was not in operation at the particular location cited (Tr. 96-98). Respondent presented the testimony of safety representative Carpenter who apparently

was not present when the inspector made his observations. His sketch of the scene, Exhibit R-1, was prepared a day after the citation issued and was based on purported conversations with a safety committeeman who was apparently present but not called as a witness. The inspector's sketch of the scene, as reflected in his notes made at the time the citation issued, Exhibit P-1, is consistent with the inspector's testimony concerning the positioning of the curtain and the location of the charger unit. Mr. Carpenter's notes on his sketch reflect in pertinent part that "The battery charger was not moved to abate the citation. The only thing that was done was to place a curtain behind the battery charager." This tends to support the inspector's observations, rather than to contradict it.

I find and conclude that the petitioner has established a violation as charged in the citation by a preponderance of the evidence. Respondent's contention that petitioner must first establish that the battery charger unit in question was energized in order to support a violation of section 75.507 is rejected, notwithstanding the inspector's practice of not issuing citations if it is not energized. I find no such requirement in the standard and respondent has not persuaded me otherwise. The question of whether the unit was energized at the time of the inspection goes to the question of gravity and may not serve as an absolute defense to the violation. The citation is AFFIRMED.

Gravity

The inspector's testimony reflecting that the mine liberates methane and was on a 15-day spot inspection cycle has not been rebutted by the respondent. However, there is no evidence here that the inspector made any methane check at the location of the battery unit. Further, although the inspector made a sketch of the location of the unit, for some unexplained reason, he failed to note whether or not the battery charger in question was energized or operating at the time the citation issued, and there is no evidence that the unit was in other than good condition. Also, there is nothing in the record concerning the quantity or quality of air being coursed through the section or entry where the unit was located, no indications as to how long the unit had been in the location, and there is nothing in the record to suggest any other violations concerning nonpermissible equipment operating, etc. In my view, these are critical questions concerning the actual conditions which prevailed at the time of the citation, and lacking any further evidence in this regard, I cannot conclude that the condition cited was serious.

Negligence

I find that the respondent failed to exercise reasonable care to prevent the condition cited and that an onshift inspection of the area

cited would have detected the condition. Although the inspector and Mr. Carpenter alluded to pertain preshift and onshift books, they were not produced, and there is nothing in the record to support a finding that respondent was not oblivious to, or unaware of, the condition cited. I find that the violation resulted from respondent's ordinary negligence.

Good Faith Compliance

I find that respondent exercised normal good faith compliance in abating the condition cited.

Findings and Conclusions

Docket No. VINC 79-148-P

Citation No. 279550--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.1003(a), which states:

> Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:
>
> (a) At all points where men are required to work or pass regularly under the wires;
>
> (b) On both sides of all doors and stoppings; and
>
> (c) At man-trip stations. [Emphasis added.]

In its posthearing proposed findings and conclusions, petitioner argues that miners were required to pass under the unguarded wire in question in order to unload supplies from the supply car and place them in a storage or supply area which is indicated on Exhibit R-1. In support of this contention, petitioner cites the inspector's notes, recorded at the time of the inspection, which indicates that the inspector based his conclusions in this regard on conversations with two utility men working on the section who indicated that in picking up some resin from the supply area in question, they passed under the unguarded trolley wire. Petitioner contends this area was an "active supply hold" (Brief, p. 7). Petitioner presented no further arguments during the hearing (Tr. 143), but did concede that it was not contending that men normally passed back and forth under the unguarded wire as a normal routine (Tr. 142).

Respondent asserts that the petitioner failed to establish a prima facie case in that it presented no evidence that men regularly

passed under the cited unguarded trolley wire. Further, respondent asserts that the inspector could not state whether he actually observed men passing beneath the unguarded trolley wire, and that respondent's testimony reflects that company policy dictates that the wire be deenergized before men walk under it (Tr. 140-141). In addition, in its posthearing proposed findings and conclusion, respondent asserts that petitioner has not established that the trolley wire was energized at the time the citation issued, and that supplies could be removed from the supply area without men passing under the trolley wire.

As I read the requirements of section 75.1003(a), it mandates that trolley wires be guarded at all points where men are required to work or pass regularly under such wires. I agree with the respondent's position that petitioner has not established that men were required to regularly pass under the wires at the place where the supplies in question were located on the day the citation issued. However, the standard also requires that trolley wires be guarded where men are required to work. In this case, the inspector testified that the supply area in question was one which was regularly used for that purpose and respondent has not rebutted this fact. In this regard, I believe the definitions of the terms "working section" and "active working" found in the definitions section on Part 75, 30 CFR 75.2, is broad enough to sustain a finding that the area cited by the inspector was in fact a place where miners were required to work, and respondent's evidence does not convince me otherwise. With regard to the argument that petitioner has not established that the trolley wire was in fact energized at the time the citation issued, I believe that this fact goes to the gravity of the situation presented, and may not serve as an absolute defense to the asserted violation. The standard, on its face, requires that trolley wires be guarded under the conditions and terms specifically set forth therein, and there is no requirement that petitioner establish as a condition precedent that it be energized before a violation may be established. Thus, on the facts presented here, I cannot conclude that the fact that the petitioner did not establish that men regularly passed under the wire or that the wire was in fact energized is controlling as to the question of whether a violation occurred. In my view, the critical question is whether or not men passed under an unguarded trolley wire while performing work at the location cited by the inspector.

In this case, I believe it is clear that the inspector did not personally observe men passing under an unguarded trolley wire, and the inspector candidly admitted that this was the case. His conclusion that men passed under the wire was based on the fact that the supplies were positioned in such a fashion that it was physically impossible for them to be off-loaded from the adjacent car and track without men actually passing under the unguarded wire. His conclusion was supported by statements purportedly made to him by two men who told him that they passed under the unguarded wire to obtain some

of the supplies stored there, and his conversations in this regard were documented by notes made at the time of the inspection.

Respondent does not dispute the fact that the trolley wire in question was not in fact guarded, or that the supplies were not stored at the place indicated by the inspector. Further, Mr. Carpenter candidly conceded that in retrieving the supplies from the storage area in question, it was necessary for men to pass under the unguarded wire, and he also conceded that it was natural for the inspector to assume that due to the location of the supplies someone had to pass under the unguarded wire in order to place them in that location.

The burden of proof in this instance lies with the petitioner. Although the best evidence of the fact that men passed under the unguarded wire would be the testimony of the two men who purportedly spoke to the inspector, neither the petitioner nor the respondent saw fit to call these men as witnesses. However, on the facts presented here, I believe the inspector's testimony is credible, and the inference that men passed under the unguarded wire in off-loading the supplies is supported by credible and probative testimony from the inspector, including the notes made at the time of the event in question. I find and conclude that the petitioner has established a prima facie case which remains unrebutted by any evidence or testimony presented by the respondent. As a matter of fact, I believe that Mr. Carpenter's testimony corroborates the inspector's testimony that the supplies were in fact stored in such a fashion that required men to pass under the unguarded wire in storing or retrieving them. On the facts and circumstances here presented, I conclude and find that the petitioner has established a violation by the preponderance of the evidence. Respondent's defense as to the fact of violation is rejected, and the citation is AFFIRMED.

Gravity

It is clear that the inspector's notes reflect that the trolley wire was energized at the time the citation was issued, but do not reflect that it was so energized at the time men may have passed under it. Although the inspector indicated that two men told him they passed under the wire, they apparently did not state that it was energized at the time, and that fact is still in dispute. Respondent's witness did not know whether the trolley wire switch was on or off at the time the supplies were off-loaded, and he alluded to the fact that employees are instructed to deenergize the wire when they are working under or around such wires. Neither party disputed the fact that passing under an energized trolley wire constitutes a hazard of shock or electrocution. Under the circumstances, I conclude that the violation was serious.

Negligence

The supplies in question were located at a place where men

had to walk under the unguarded wire to either store or retrieve them.

In these circumstances, I conclude that the respondent had a duty to exercise reasonable care to insure that the wire at that location was guarded. Its failure to do so constitutes ordinary negligence and that is my finding.

Good Faith Compliance

The citation was abated by guarding the area in question, and there is no evidence that abatement was not achieved within the time fixed by the inspector. I find that respondent exercised normal compliance in abating the condition cited.

Findings and Conclusions

Docket No. VINC 79-110-P

Citation No. 278046--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.503, which provides as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

The thrust of the violation in this case is the assertion that the presence of a worn or "burned out" spot on the cable reel on the shuttle car, which resulted in the destruction of the insulation at that point, rendered the car nonpermissible and in violation of the permissibility requirements of section 75.503. In support of the citation, petitioner has presented the testimony of Inspector McNece, who, upon investigation of an accident concerning a shock received by a miner in conjunction with the use of the shuttle car in question, determined that the cable reel had been damaged. The inspector determined that the car in question had been used inby the last open crosscut and that the damaged reel rendered the car nonpermissible. Respondent presented no evidence to rebut the inspector's findings concerning the condition of the shuttle car. Its defense to the citation focused on the manner in which MSHA's Office of Assessments assessed the violation (Tr. 187-189), and this argument is addressed by me below in my findings concerning the question of gravity. As for the fact of violation, I find that petitioner has established a violation by a preponderance of the evidence and the citation is AFFIRMED.

Negligence

The inspector conceded that the one bare spot in question on the cable reel was approximately an area of some 2 inches and the cable was some 500 feet in length. He also indicated that he discovered the bare spot only after he wiped some mud off the cable with a rag,

and further conceded that it was possible that someone could examine the cable and not locate or observe the mud-covered, 2-inch bare spot. While he could not state that any visual examination was made, he did indicate that "close attention" was required to discover the bare spot (Tr. 170, 173-174).

With regard to the movement of the shuttle car after the injury, and the inspector's assertion that the car was "put back in service," one could be led to believe that the respondent in this instance totally disregarded any safety considerations after the bare spot was discovered, and deliberately placed an unsafe piece of equipment back into operation running coal. However, this is not the case. Although the inspector's testimony was somewhat misleading and confusing on this point, it is now clear from the record that the car in question was operated and moved back out of the way some 50 feet in order to facilitate its movement out of the area so that it could be examined to ascertain the cause of the shock incident (Tr. 176-180). Under these circumstances, I conclude that under the then prevailing conditions, the respondent acted reasonably and I cannot conclude that there was any reckless or deliberate disregard for safety.

Based on the total circumstances which prevailed and in light of the foregoing discussion, I cannot conclude that the evidence supports a finding that the respondent was negligent in failing to discover the somewhat miniscule bare spot on the cable reel.

Gravity

It seems clear from the record that the shock incident in question resulted in an injury to a miner. Fortunately, the incident did not result in a fatality, but it did cause some trauma to the individual involved and he was taken to a hospital. The inspector indicated that no "lost time" was recorded, but that conclusion remains unexplained, and there was no testimony concerning the actual injuries, sustained by the shock victim. However, the bare spot on the reel was hazardous and could have resulted in further serious injuries had it gone undetected. In the circumstances, I conclude that the condition cited was serious.

During the course of the hearing, respondent's counsel alluded to the fact that during the initial assessment of this citation, a clerical error apparently occurred in that a "gravity sheet" pertaining to another citation somehow found its way into the official file for the instant citation (Tr. 158). I have taken this into account and have assessed the matter de novo based on the testimony and evidence presented by the parties at the hearing.

Good Faith Compliance

I find that the respondent abated the condition in a timely fashion after the citation issued.

Findings and Conclusions

Docket No. VINC 79-111-P

Citation No. 278095--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.200, which provides:

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

The approved roof-control plan of April 25, 1978, for the Meigs No. 2 Mine (Exh. R-1), contains, in pertain part, the following requirements listed under "Safety Precautions for Temporary Support," page 8, paragraphs 2 and 8:

* * * * * * *

> 2. * * * the installation of temporary supports shall be started no later than 15 minutes after the loading cycle is completed, and after the installation of such supports is started, installation shall be continued until at least the minimum number are installed as required by the approved plan.

* * * * * * *

> 8. In areas where temporary supports are required, only those persons engaged in installing the temporary

> supports will be allowed to proceed beyond the permanetly supported roof.
>
> Before any person proceeds inby permanently supported roof to install temporary supports, a thorough visual examination of the unsupported roof and ribs shall be made. If the visual examination does not disclose any hazardous condition, persons proceeding inby permanent supports shall do so with caution and shall test the roof by the sound and vibration method as they advance into the area.

The applicable roof-control provision (p. 8, paragraph 2, Exh. R-1) requires that the installation of temporary supports be started no later than 15 minutes after the loading cycle is completed. Once started, the installation of such temporary supports shall be continued until at least the minimum number are installed as required by the plan. From the inspector's point of view, the gist of the violation is that after observing an area of unsupported roof, he looked into the next entry, observed that approximately two-thirds of the entry had been loaded out, and he surmized that the loading process there took more than 15 minutes. He therefore assumed that the mining cycle had advanced from the previous cut without the installation of the required temporary roof support (Tr. 214). No temporary supports were installed, and a loading crew had cleaned up a place, moved into another area where two-thirds of the cut had been loaded out, and no temporary supports had been set in the previous cut that had just been left. The inspector supported his findings by notes and a sketch of the area made at the time of the citation, and he spoke with the loading crew at the scene.

In its posthearing proposed findings and conclusions concerning this citation, respondent advances the defense that two-thirds of a cut can be loaded out within 15 minutes, and that by failing to remain at the location in question or initially observing the conditions at the location and returning at least 15 minutes later, the inspector had no basis for concluding that the applicable roof-control provision was violated. This assertion by the respondent is rejected, and I find that the petitioner has established a violation by a preponderance of the evidence. On the facts presented here, the fact that a place can generally be loaded out in 15 minutes or less is not persuasive since the conditions which prevailed at the time of the citation control, and I conclude that respondent has not rebutted the fact that more than 15 minutes had elapsed from the completion of the loading cycle. As correctly pointed out by the petitioner, Mr. Carte was not present at the time of the citation, and I find the inspector's testimony in support of the citation and the prevailing conditions at the time it was issued to be credible. I find that the preponderance of the evidence adduced supports a finding of a violation as charged. Failure to comply with a provision of the roof-control plan here

constitutes a violation of section 75.200. Peabody Coal Company, 8 IBMA 121 (1977); Affinity Mining Company, 6 IBMA 100 (1976); Dixie Fuel Company, Grays Knob Coal Company, 7 IBMA 71 (1976). The citation is AFFIRMED.

Good Faith Compliance

The inspector confirmed that abatement was achieved immediately, and that the respondent "got right on it and put the temporary supports up" (Tr. 215). I find respondent acted in good faith in abating the citation.

Gravity

The inspector stated that the lack of temporary roof support left an unsupported area of some 18 feet wide and 10 feet deep, and that someone could have "unconsciously" walked through that area believing that the roof was bolted and in so doing they would in fact be under unsupported roof (Tr. 193). I find that the lack of roof support presented a hazard of a possible roof fall and that the condition cited was serious.

Negligence

I find and conclude that the respondent failed to exercise reasonable care to insure that the roof area in question was adequately supported in accordance with its own approved plan. Its failure to do so, either through a thorough preshift or onshift examination, constitutes ordinary negligence.

Findings and Conclusions

Docket No. VINC 79-141-P

Citation No. 279989--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.1710-1(a)(4), which provides:

> (a) Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib

and face rolls. The requirements of this paragraph (a) shall be met as follows:

* * * * * * *

(4) On and after July 1, 1975, in coal mines having mining heights of 36 inches or more, but less than 48 inches;

In defense of the citation, respondent argues that there is no requirement that cabs or canopies be installed on self-propelled electric face equipment where the mining heights are less than 30 inches (actual height from bottom to top less than 42 inches). In support of this assertion, respondent cited Exhibit R-2, an MSHA memorandum dated January 24, 1979, which explains and supplements MSHA's enforcement policy concerning the use of cabs and canopies as previously detailed in a prior memorandum issued on July 11, 1977 (Exh. R-2). The 1979 memorandum contains detailed instructions concerning the testing of equipment underground, and the monitoring of such tests by MSHA to determine whether an operator has in fact acted in good faith in complying with the requirements of installing canopies on underground equipment, and whether such efforts would warrant the granting of extensions on citations issued for noncompliance. Paragraph 3 of the memorandum states in pertinent part as follows:

To reduce the repeated issuance and termination of citations on self-propelled electric face equipment operated without canopies in mines which experience frequent changes in the mining height (measured from the mine floor to the mine roof) below 42 inches, the following policy is established.

Where the mining height fluctuates below and above 42 inches, a citation for a violation of Section 75.1710-1, 30 CFR 75, shall not be issued when such fluctuations below 42 inches would routinely create the necessity to remove cabs or canopies. An evaluation of the mining height shall be made periodically, not less than two times a year, to determine if such fluctuations still exist. These evaluations should normally be made as a part of a mandated complete mine inspection.

This policy is not applicable where the mining height does not frequently fall below 42 inches.

Although Inspector Petit testified that he took measurements to substantiate his conclusions that the average mining height was 48 to 50 inches, he could not state where those measurements were taken. He indicated that his notes did not reflect that he took any measurements at all, or where they may have been taken. When asked whether he remembered taking any notes, he responded "Yes. I wouldn't have

issued a citation unless I had have, even though I didn't have to because the front canopy is not supposed to be removed" (Tr. 220). He also stated that the front canopy was not to be removed even if the mine height is less than 42 inches (Tr. 220). And, he conceded that the operator had previously come through "very low coal" and that the mining height in the 006 section fluctuated (Tr. 221, 245). He also testified that any measurements he may have taken were restricted to an area inby the section dumping point and this was because he believed that was the only place where the bolter would be operating (Tr. 245). However, he conceded that it was possible that it had been used in other low areas, which necessitated that the canopy be taken off, and that someone forgot to put it back on (Tr. 245). When asked whether he measured the specific location where he found the roof bolter energized, he answered "Yes." However, when asked to describe the area, he answered "I don't recall" (Tr. 245). And, although he indicated that he never measured anyting on the section below 48 inches and that "it fluctuated 46, 47, 48, 49," he also indicated that he never measured a place below 42 inches on the section, but he could not recall how many time he measured, did not know the distance from the section dumping point to the face area, speculated that it may have possibly been 500 feet, and could not remember how much of that distance he measured (Tr. 247).

Cutting across this entire episode with respect to the citation concerning the lack of a front canopy on the roof-bolting machine in question is a prior proceeding involving these very same parties. The prior proceeding concerned a petition for modification filed by the respondent pursuant to section 301(c) of the 1969 Act. The petition sought a modification of the canopy requirements of 30 CFR 75.1710-1(a) for the Meigs No. 1 and No. 2 Mines and the Raccoon No. 3 Mine. My decision in that proceeding was issued on October 29, 1976, Southern Ohio Coal Company v. MESA, et al., Docket No. M 76-349. On appeal, my decision was affirmed, with certain modifications, by the former Interior Board of Mine Operations Appeals, 7 IBMA 331 (1977). I have reviewed my prior decision and the IBMA decision, and aside from the fact that the inspector touched on it during the course of the hearing when he alluded to the fact that the respondent had obtained some relief from the requirements of the standard in mining heights of 56 inches, the parties have offered no further arguments in this regard. Further, I see nothing in those prior proceedings that would permit the respondent to operate the roof bolter in question without a canopy assuming that the petitioner has established through credible evidence that the mining heights were more than the required 42 inches.

The burden of proof in this instance lies with the petitioner. Petitioner must establish that the average mining heights where the roof bolter was operating was more than 42 inches. If the petitioner can establish that fact, then I believe it has established a violation. However, based on the evidence presented, namely, the testimony of the inspector who issued the citation, I cannot conclude that the

petitioner has established a case. I find the testimony of the inspector to be confusing and contradictory with respect to the key question concerning the operational mining height in the section where the roof bolter was operating. He failed to take detailed notes or otherwise establish as a matter of fact that the mining heights were such as required the use of a canopy. Based on a close scrutiny of his testimony, I conclude that he made only a cursory evaluation of the situation and failed to establish a true average of the mining heights on the section. I find and conclude that petitioner has failed to establish a violation by a preponderance of the evidence and the citation is VACATED.

Findings and Conclusions

Docket No. VINC 79-112-P

Citation No. 279997--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.402, which states:

> 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.

Respondent's "policy and procedure" cleanup program dated June 1, 1974, is set out in Exhibit R-1, and the applicable provisions of that plan are paragraphs 8 and 10 which provide:

> After a thorough clean-up the section will be blanket dusted when the section is advanced or before the end of your regular shift.
>
> All areas from feeder inby will be cleaned up and dusted before end of regular shift.

Respondent's defense is that its plan fixes no time-frame for the completion of rockdusting, it permits rock dusting as the section advances or by the end of the shift, and that time did not permit rock dusting at the time the conditions were observed by the inspector (Tr. 259-260). Mr. Carte's testimony in defense of the citation reflects that he was not present at the time the inspector observed the conditions, he had not observed the conditions during the prior

shift, and he indicated that the section bosses in charge of the section, including the foremen, were unaware of their own cleanup plan (Tr. 262). Respondent's additional defenses, as articulated in its posthearing proposed findings and conclusions, focus on the provisions of 30 CFR 400-2, which deals with cleanup programs dealing with cleanup and removal accumulations of coal and coal dust, and I fail to understand the relevance of that provision to the facts presented here. Respondent is not charged with failure to clean up coal accumulations; it is charged with a failure to rock dust as required by section 75.402. With regard to respondent's assertion that the petitioner failed to establish that the last open crosscut between the Nos. 4 and 5 entries were within 40 feet from a working face, the inspector specifically stated that he observed no rock dust applied to the last open crosscut between those entries, that the crosscut extended some 60 feet, and that he observed no rock dust in any of the other entries or crosscuts (Tr. 249). In the circumstances, I find that the testimony of the inspector concerning his observation of the area cited supports a finding that rock dust had not been applied to the ribs, roof and floor in the area described by the inspector in his citation, and the respondent's evidence and testimony has not rebutted this fact. The citation is AFFIRMED.

Good Faith Compliance

The inspector testified that abatement was achieved immediately and that the respondent "shut the whole section down and immediately got on it." Although abatement took an hour, it was suggested that other work had to be done first, and while the inspector believed that the necessary rock dusting could have done in less than an hour and speculated that the reason it was not was the fact no rock dust was available, he really did not know that this was in fact the case (Tr. 252-263). He remained on the section and observed the rock dusting operation taking place to achieve compliance, and since he believed that the respondent "got right on it," I conclude and find that abatement was achieved through rapid compliance, and that the respondent acted in good faith in this regard.

Gravity

Although the inspector believed that there was a fire hazard presented by the lack of rock dust (Tr. 251), he could not support that conclusion and there is nothing of record to indicate why he believed this was the case. Further, he specifically stated that the mine in question is "blessed" because of the absence of methane, and while he alluded to the fact that a fire could occur in the event of a cable short, there is no indication of the presence of damaged cables or nonpermissible equipment operating in the area (Tr. 256-257). In short, I cannot conclude that the record supports a finding of any threat of fire, and I cannot conclude that the circumstances presented were serious.

Negligence

The inspector stated that his "inspector's statement" reflects that the conditions cited "should have been detected through a proper preshift and onshift examination" of the section, and that the conditions cited "had to exist at the end of the prior shift," but he could not remember whether he checked the preshift books, and his notes apparently did not reflect that he did (Tr. 251). Although Mr. Carte indicated that the section bosses and foreman were not aware of their own cleanup plan, that is no excuse. I find it rather incredible that such supervisory personnel, who are responsible for the safety of their crews, are unaware of the company's own cleanup plan. I can understand someone misinterpreting a particular plan, but cannot understand someone in a responsible supervisory position being completely oblivious of a cleanup plan. I find that the respondent failed to exercise reasonable care to insure that its plan was followed and that such failure constitutes ordinary negligence.

Findings and Conclusions

Docket No. VINC 79-114-P

Citation No. 277726--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.1405, which provides:

> All haulage equipment acquired by an operator of a coal mine on or after March 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on March 30, 1970, shall also be so equipped within 4 years after March 30, 1970.

30 CFR 75.1405-1 provides: "The requirement of 75.1405 with respect to automatic couplers applies only to track haulage cars which are regularly coupled and uncoupled."

In its arguments presented at the hearing, and detailed in its proposed findings and conclusions, respondent asserts that the citation should be dismissed because section 75.1405 does not apply to the surface work area of an underground mine. In support of this argument, respondent contends that the supply yard for the Raccoon No. 3 Mine where the cars were located constituted a surface work area of an underground mine and was therefore subject to the requirements of Part 77, Title 30, Code of Federal Regulations, which contain mandatory safety standards "for bituminous, anthracite, and lignite surface coal mines, including open pit and auger mines, and to the

surface work areas of underground coal mines, * * *." 30 CFR 77.1. Since there is no comparable standard requiring automatic coupling devices for stone haulage cars while located on surface work areas, respondent contends that petitioner has failed to establish a prima facie case and that the citation should be dismissed.

A second defense argued by the respondent is that assuming that section 75.1405 does apply to the cars in question, petitioner has not established they are regularly coupled and uncoupled are stated in section 75.1405-1. Respondent contends that the subject haulage cars are used sporadically, rather than regularly, and therefore, section 75.1405 does not apply. In support of this argument, respondent relies on the testimony of surface foreman Mapper and Mr. Carte.

Respondent does not dispute the fact that the cars in question are taken underground by means of the regular mine track haulage system which goes in and out of the underground areas of the mine, nor does it dispute the fact that the cars in question were used underground in loading out materials resulting from the "shooting-out" of overcasts (Tr. 286-299, 293). As for the frequency of use of the cars in question, Mr. Mapper confirmed that they are used in connection with the shooting of overcasts, and that this is done once a month over a period of 3 or 4 days (Tr. 293).

On the day the citation issued, the inspector observed a train of six such cars, including the two with defective coupling devices, and they were all loaded with rock obviously taken from the mine and awaiting transportation to the rock dumping area. Under the circumstances, I conclude and find that the cars in question are regularly used within the meaning of the cited standard. I believe it is reasonable to conclude that the shooting of overcasts underground is an important and ongoing underground mining activity essential to the production of coal, and respondent has not established that this is not the case. That is, respondent does not contend that the shooting of overcasts is a onetime or infrequent event. I find that it is an ongoing and regular incident to the mining of coal which takes place once a month over a period of 3 or 4 days, and the mining cars in question are an essential and integral part of those operations. The fact that the cars in question remain idle during the winter months is irrelevant. Curtailment of mining activities during the winter months is not unusual, particularly in the case of track haulage areas where inclement weather, snow, ice, etc., present practical and potentially hazardous problems. Respondent's defense that the cars were not regularly used is rejected.

With regard to the application of section 75.1405 to the cited rock haulage cars, respondent's assertions that they do not apply in this case are rejected. It seems clear to me that the mine in question is in fact an underground mine within the meaning of the Act and the mandatory standards set forth in Part 75 of the regulations. It

is also clear that the track haulage system is an integral part of that underground mine, that the rock haulage cars were in fact used underground, and respondent concedes that the storage area where the cars were located at the time the citation issued was in fact part of the underground mine. The definition of the term "coal mine" found in the Act includes the surface storage area in question and it is clearly within the definitional terms an area of land * * * under or above the surface * * * used in * * * the work of extracting * * * coal. I conclude and find that section 75.1405 is applicable to the rock haulage cars in question, and that petitioner has established a violation. The citation is AFFIRMED.

Gravity

I find that the conditions cited presented a real danger of serious injury or death to miners who may have had to position themselves between the cars to couple and uncouple them. Since the cars in question were loaded and awaiting transportation at the time the citation issued, one can reasonably infer that someone had to go between the cars to couple them. Respondent's own witness, Mapper, conceded that while the cars could be coupled and uncoupled without an automatic coupling device, it is a dangerous practice and that one has to be careful. His own words are "It is best to have automatic couplers on it" (Tr. 293). In addition, respondent's witness Carte stated that company policy dictated that automatic couplers be installed on the rock cars, and one of considerations for this policy was that "We didn't want to get nobody hurt" (Tr. 305). I find that the conditions cited were serious.

Negligence

I find that the record supports a finding that the conditions cited resulted from respondent's failure to take reasonable precautions to insure that the coupling and uncoupling devices were maintained in good working order, and that its failure to do so here constitutes ordinary negligence. Respondent's own witness, Mr. Carte, confirmed that the rock cars and coupling devices are subjected to damage "just about everytime they are taken underground" due to normal wear and tear in the loading process. This being the case, I believe it is reasonable to expect that more time and attention be given to the priority inspection, maintenance, and repair of the cars, notwithstanding the shortage of welders or other maintenance personnel.

During the hearing, there was some confusion surrounding the fact that the actual cars cited by the inspector were not the ones taken out of service by the respondent and tagged for repair. In addition, there appeared to be a suggestion by the inspector that the respondent intended to put the cars back into operation after they were cited, thus presenting the possibility that the respondent may have been guilty of recklessness and total disregard for the safety of miners

bordering on gross negligence. After close scrutiny of the testimony and the explanations given by the witnesses presented by the respondent, I find the testimony on this question to be credible and plausible, and thus cannot conclude that there was gross negligence in this case.

Good Faith Compliance

The initial citation in this case was issued on August 29, 1978, at 1:15 p.m., and the inspector fixed the abatement time as 8 p.m., that same day. Upon returning to the mine the next day, August 30, 1978, the inspector observed that neither car had been repaired. Although one of the cars (No. 8730) had been tagged out, he believed that the other car (No. 8107), which was not tagged out, had also been used after he had cited it. This prompted him to issue Order No. 277727, at 9:40 a.m., taking both cars out of service, and he noted on the face of the order that "sufficient effort was not made to abate the condition." The initial Citation No. 277726, was then terminated less than an hour later on August 30 after repairs were made to the cars and the coupling and uncoupling devices were restored to effective operating condition.

Respondent asserts that it acted with due diligence by removing from operations the two cars respondent believed were the subject of the initial citation, and that on its own initiative, removed other cars in need of repair, and acted diligently in making repairs to those cars. Further, respondent argues that as soon as it discovered the actual cars to which the inspector was referring, and since they were awaiting repairs, it acted in a diligent manner to correct and abate the conditions cited.

Petitioner's posthearing proposed findings and conclusions contain no further proposals with respect to the question of good faith compliance. The inspector obviously believed that the initial citation was not abated in good faith since he made a finding that the respondent was making an insufficient effort to comply and that prompted him to issue the order taking the equipment out of service. Once that order issued, there was prompt and immediate compliance. Based on a close scrutiny of the testimony of the witnesses during the hearing, it seems clear to me that the parties had a communication problem as to which cars were required to be taken out of service and repaired, and I take note of the fact that this seems to be a recurring problem in cases of this kind. That is, an inspector will cite a condition and leave it up to the respondent to take corrective action. On the facts presented here, the inspector cited two cars and the respondent apparently took the wrong car or cars out of service, and apparently left the defective car or cars on the rail. Respondent's defense seems to be that there was a shortage of welders, and that the initial time for abatement was far to short. This is no excuse.

It seems to me that if an operator believes the time fixed for abatement is not reasonable, he should at least attempt to convey this to the inspector. By the same token, I believe that an inspector has a duty to listen and not simply walk away for the situation. In short, the time for resolving these differences is at the time the citation issues, and not a year later when the case is litigated.

Respondent's assertion in its posthearing proposed findings concerning the extension of the abatement time is irrelevant in this proceeding. This is a civil penalty proceeding and not a review proceeding, and the time for abatement is not in issue insofar as the fact of violation is concerned. However, I have considered the question as part of my findings concerning the questions of good faith compliance and negligence.

In light of the foregoing, and based on all of the circumstances, I cannot conclude that respondent was dilatory or exhibited such a total lack of good faith or disregard for the law requiring to supporting a substantial increase in the civil penalty assessed for the citation in question. Although it is true that respondent had not completed the repairs on one of the cited cars because of certain logistical problems connected with removing it from the tracks and transporting it to the repair shop, the other car was apparently misidentified, and the wrong one was tagged out. In any event, I believe that viewed in perspective, the respondent attempted to comply, and while its goal fell short of the inspector's expectations that repairs could have been made within the time originally fixed, I am not totally convinced that this was not the case.

Findings and Conclusions

Docket No. VINC 79-115-P

Citation No. 277736--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.200, for failing to install certain temporary roof supports as required by its approved roof-control plan. The parties stipulated that the applicable roof-control plan with respect to this citation is the same one previously discussed with regard to Citation No. 278095 (Docket No. VINC 79-111-P) (Tr. 335).

Respondent's defense is based on the testimony of Mr. Carte, who was not present when the citation issued. He contended that the mining cycle had not as yet been completed when the inspector arrived on the scene because there was scrap coal that had to be loaded out. He conceded that had it not been for the presence of that scrap coal, the cycle would be considered completed. He believed the applicable roof-control provisions were being followed, and under his interpretation of those procedures, temporary supports need not be installed as

long as scrap coal remains to be removed, because any attempts to set such temporary supports at the face area while removing scrap coal introduces another hazard into the process. Although the inspector's notes did not reflect the presence of any scrap coal, he testified that had scrap coal been present, this would indicate that the area had already been drilled. In this case, his unrebutted testimony is that a face area 7 feet wide by 11 feet long was drilled and a cutter was about to begin cutting with no supports installed. Further, although the area had previously been reported as roof bolted, the fact is that it was not completely bolted, and Mr. Carte admitted this was the case (Tr. 337).

After careful consideration of the testimony presented, I conclude that the respondent has not established that scrap coal was present and that the mining cycle requiring the installation of temporary supports had not been completed. To the contrary, I conclude and find that the testimony presented by the inspector in support of the citation supports the conditions cited and supports a finding that respondent failed to install the temporary supports required by its own roof-control plan, and the failure to do so constitutes a violation of section 75.200. The citation is AFFIRMED.

Gravity

The inspector testified that the roof condition was "solid and good," and although his conclusion that aroof fall was "probable" is somewhat illogical in light of the roof conditions, the fact is that the area and extent of specific unsupported roof at the face where coal is being cut presents a potential danger and hazard of a roof fall in that immediate area. Under the circumstances, I find that the violation is serious.

Good Faith Compliance

Abatement was achieved by the installation of temporary roof supports as required by the roof-control plan and the plan was reviewed with the crew (Tr. 328). The citation was terminated and the conditions abated within the time fixed by the inspector and I conclude that the respondent exercised normal compliance in correcting the cited conditions.

Negligence

It is clear that the respondent failed to follow its own roof-control plan in this instance, and while there is testimony reflecting that the area was reported bolted, when in fact it was not, I cannot conclude there is sufficient evidence to support a finding of gross negligence or a reckless disregard for safety. I have taken into account the fact that the respondent may have believed that it was following its plan, but I conclude that a closer examination and

attention to that plan, coupled with the conditions which prevailed at the time the citation issued, should have alerted respondent to the fact that the required roof supports were not installed. I find that respondent failed to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence.

The following findings and conclusions are applicable to all of the dockets:

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

Information developed during the hearing reflects that respondent's Meigs No. 1 Mine has a daily coal production of 3,000 tons, and that the mine operates 2 productions shifts and one maintenance shift, employing 204 surface employees, and 447 underground employees (Tr. 16-17). The Raccoon No. 3 Mine also produces 3,000 tons of coal daily on three similar shifts, but employs 58 surface employees and 373 underground. Both mines have eight to nine active working sections (Tr. 35). No information was forthcoming with respect to the scope of respondent's operations at the Meigs No. 2 Mine. However, I believe the evidence adduced supports the conclusion that the respondent is a large coal mine operator and that is my finding. Further, absent any information to the contrary, I conclude that any civil penalties assessed by me with respect to any proven citations will not adversely impair the respondent's ability to remain in business.

History of Prior Violations

Respondent's prior history of violations is reflected in three computer printouts submitted by the petitioner at the hearing (Exh. P-1) for the Meigs No. 1 and No. 2 Mines, and the Raccoon No. 3 Mine (Tr. 6, 26, 35). The printout for the No. 1 Mine reflects 558 paid violations amounting to $92,948.20 for the period July 18, 1976 through July 18, 1978. For the No. 2 Mine, the printout reflects that respondent paid $110,069 for 589 violations covering the period August 15, 1976, through August 15, 1978. The printout for the Raccoon No. 3 Mine reflects 454 paid violations totaling $70,281.40, for the period August 15, 1976, through August 15, 1978. For the time period in question, the prior history of paid violations reflects that respondent has paid civil penalty assessments for 1,601 violations, approximately 180 of which were for violations of the roof-support provisions of section 75.200, and some 140 for violations of the permissibility requirements of section 75.503. Based on this prior 2-year history of violations, I conclude and find that it constitutes a significant history of prior paid violations which I have taken into account in assessing civil penalties in these cases.

ORDERS

Pursuant to 29 CFR 2700.30, settlement is approved for the following citations, and respondent IS ORDERED to pay civil penalties in the amounts shown below in satisfaction of the settled citations:

Docket No. VINC 79-111-P

Citation No.	Date	30 CFR Section	Assessment
280459	07/25/79	75.605	$150

Docket No. VINC 79-141-P

Citation No.	Date	30 CFR Section	Assessment
279953	07/25/79	75.400	$160
279990	08/03/79	75.1100-2(f)	$160

Docket No. VINC 79-112-P

Citation No.	Date	30 CFR Section	Assessment
279961	08/09/78	75.606	$122
279964	08/10/78	75.606	$140
279973	08/15/78	75.606	$ 90

In view of the foregoing findings and conclusions, the following citation is VACATED, and the proposal for assessment of civil penalty for this citation is DISMISSED:

Docket No. VINC 79-141-P--Citation No. 279989, August 2, 1978, 30 CFR 75.1710-1(a)(4).

In view of the foregoing findings and conclusions, affirming the following citations, including consideration of the six statutory criteria pursuant to section 110(i) of the Act, civil penalties are assessed as follows:

Docket No. VINC 79-109-P

Citation No.	Date	30 CFR Section	Assessment
279540	07/28/78	75.507	$400

Docket No. VINC 79-148-P

Citation No.	Date	30 CFR Section	Assessment
279550	08/02/78	75.1003(a)	$700

Docket No. VINC 79-110-P

Citation No.	Date	30 CFR Section	Assessment
278046	05/11/78	75.503	$700

Docket No. VINC 79-111-P

Citation No.	Date	30 CFR Section	Assessment
278095	07/20/78	75.200	$600

Docket No. VINC 79-112-P

Citation No.	Date	30 CFR Section	Assessment
279997	08/08/78	75.402	$350

Docket No. VINC 79-114-P

Citation No.	Date	30 CFR Section	Assessment
277726	08/29/78	75.1405	$975

Docket No. VINC 79-115-P

Citation No.	Date	30 CFR Section	Assessment
277736	09/12/78	75.200	$900

Respondent IS ORDERED to pay civil penalties, as shown above, totaling $5,447 within thirty (30) days of the date of these decisions and orders.

George A. Koutras
Administrative Law Judge