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SOL (MSHA) V. BUFFALO MINING 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 Proceeding Docket No. HOPE 78-333-P A/O No. 46-02140-02005 S
v.	
BUFFALO MINING COMPANY, RESPONDENT	No. 5 Preparation Plant

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
James W. St. Clair, Esq., Marshall and St. Clair, Huntington, West Virginia, for Respondent

Before: Judge Cook

I. Procedural Background

On April 19, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty against Buffalo Mining Company in the above-captioned proceeding. This petition, filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1978) (1977 Mine Act), alleged violations of 30 CFR 77.1401, 77.1402-1, 77.1403(a), and 77.404(a). These alleged violations are embodied in an imminent danger order of withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 814(a) (1970) (1969 Coal Act), against Buffalo Mining Company subsequent to a fatal injury suffered by an employee of Lester Construction Company, an independent subcontractor, during the installation of a coal stacker on mine property owned by Buffalo Mining Company.

An answer was filed by Buffalo Mining Company on May 17, 1978.

Notices of hearing were issued on May 19, 1978, and July 21, 1978. On August 3, 1978, Buffalo requested a continuance, which request was granted by an order dated August 14, 1978. The hearing was held on October 24, 1978, and October 25, 1978, in Charleston, West Virginia. Representatives of both parties were present and participated.

A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing, but a delay in the receipt of transcripts forced a revision of the schedule. Buffalo submitted its posthearing brief on February 22, 1979. MSHA submitted its posthearing brief on March 16, 1979. Buffalo submitted its reply brief on April 10, 1979. Although MSHA did not file a reply brief, it submitted a letter on April 10, 1979, wherein it addressed certain statements contained in Buffalo's reply brief.

II. Violations Charged

Order No. 6-0012 (1 BA), November 26, 1976,	30 CFR 77.1401
	30 CFR 77.1402-1
	30 CFR 77.1403(a)
	30 CFR 77.404(a)

III. Evidence Contained in the Record

(A) Stipulations

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

(B) Witnesses

MSHA called as its witnesses James E. Davis, Jesse P. Cole, Birkie Allen, and Kennis A. Mullins, MSHA inspectors; and Tony D. Travis, a mechanical engineer for the MSHA Technical Support Group in Beckley, West Virginia.

Buffalo called as its witnesses Edgar M. Wode, the assistant sales manager at the Walker Machinery Company in Belle, West Virginia; Mayo Lester, who identified himself as the owner of Lester Construction Company; Travis Ellison, Jr., the safety director for Lester Construction Company; and W. R. Counts, a supervisor employed by Lester Construction Company.

(C) Exhibits

(1) MSHA introduced the following exhibits into evidence:

(a) M-1 is a computer printout compiled by the Office of Assessments listing Buffalo's history of paid assessments for violations occurring at the No. 5 Preparation Plant.

(b) M-2 is a copy of Order No. 6-0012 (1 BA), November 26, 1976, 30 CFR 77.1401, 77.1402-1, 77.1403(a), and 77.404(a).

(c) M-2-A is a typewritten copy of the "condition or practice" paragraph of M-2.

(d) M-3 is the "fatal machinery accident" report dated June 1, 1977.

(e) M-4 is a modification of M-2.

(f) M-5 is a termination of M-2.

(g) M-6 is a copy of a legal identity report relating to the No. 5 Preparation Plant. (Received into evidence by an order dated December 14, 1978.)

(h) M-7 is a photograph.

(i) M-8 is a two-page extract from M 11.1-1960 U.S.A. "Standard Specifications for and Use of Wire Ropes for Mines."

(j) M-9 is a wire rope analysis and tensile test report compiled by the Denver Technical Support Center.

(k) M-10 is a photograph.

(l) M-11 is a schematic of the accident scene, prepared by Buffalo at the request of the Mining Enforcement and Safety Administration (MESA) accident investigators.

(m) M-12 is a photograph.

(2) Buffalo introduced the following exhibits into evidence:

(a) 0-1 is a purchase order.

(b) 0-2 is a copy of Lester Construction Company's safety rules in effect on November 26, 1976.

(c) 0-3 is a Lester Construction Company memorandum bearing the signatures of Lester Construction Company employees.

(d) 0-4 is a copy of M 11.1-1960 U.S.A. "Standard Specifications for and Use of Wire Ropes for Mines."

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should

be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

(A) Stipulations

During the course of the hearing, the parties entered into the following stipulations:

(1) The Buffalo Mining Company was the operator of the No. 5 Preparation Plant (Tr. 13).

(2) The No. 5 Preparation Plant is located near Saunders, in Logan County, West Virginia (Tr. 13-14).

(3) The crew employed by Lester Construction Company, under a subcontract with the Long-Airdox Company, and under the supervision of foreman W. R. Counts, began work at 7 a.m. on Friday, November 26, 1976 (Tr. 19).

(4) Exhibit M-8 is M 11.1-1960 U.S.A. "Standard Specifications for the Use of Wire Ropes for Mines" (Tr. 232).

(B) Motion to Dismiss

The Respondent, Buffalo Mining Company (Buffalo), moved for dismissal of the proceeding on the grounds that the owner of mine property cannot be held responsible for violations of mandatory safety standards created by independent subcontractors performing work on such mine property where the evidence fails to establish that the mine owner either caused the violations or possessed a right to direct the independent subcontractor's employees in the performance of their tasks (Tr. 431, 445-446, 557). Statements in support of this motion are contained in the Respondent's posthearing submissions (Respondent's Posthearing Brief, pp. 15-22; Respondent's Reply Brief).

Buffalo was the operator of the No. 5 Preparation Plant at all times relevant to this proceeding (Exh. M-6). The preparation plant produced approximately 5,800 tons of coal daily (Tr. 404-406, Exh. M-3). Buffalo is a West Virginia corporation (Exh. M-6). Both before and after the accident, Buffalo was a subsidiary of the Pittston Company (Exh. M-6). The legal identity report filed on April 6, 1973, lists the Pittston Company's address as 4514 Pan Am

Building, New York, N.Y. 10017 (Exh. M-6), while the change notice filed on November 2, 1977, lists Pittston's address as One Pickwick Plaza, Greenwich, Connecticut 06830 (Exh. M-6). After the coal is processed by the No. 5 Preparation Plant, it is loaded aboard Chesapeake and Ohio Railway coal cars for transportation to various points (Tr. 107).

Buffalo entered into an agreement with Long-Airdox Company for the purchase and installation of a raw coal storage and conveyor system on mine property owned by Buffalo (Exh. M-3 at p. 3, Tr. 342, 420). Long-Airdox Company subcontracted the project to build the raw coal silo or stacker to Lester Construction Company (Exhs. M-3 at p. 3, 0-1, Tr. 420, 447).

A crane owned by Lester Construction Company and operated by one of Lester's employees was involved in an accident on November 26, 1976, during the course of the construction of the raw coal stacker (Tr. 123, 450). Buffalo's employees never worked on the project (Tr. 451, 523), and Buffalo had no supervisory control over the job site (Tr. 473, 523). Buffalo was cited with several alleged violations of the Code of Federal Regulations relating to mining safety in connection with the operation of the crane at the time of the accident (Exh. M-2).

The Federal Mine Safety and Health Review Commission (Commission) recently addressed the respective liabilities of both coal mine owners and independent contractors performing work on mine property in Cowin and Company, Inc., Docket No. BARB 74-259, IBMA 75-57, 1979 OSHD par. 23,456 (FMSHRC, filed April 11, 1979), and Republic Steel Corporation, Docket No. IBMA 76-28, 77-39, 1979 OSHD par. 23,455 (FMSHRC, filed April 11, 1979).

In Cowin, the Commission concluded that an independent contractor performing work on coal mine property is an "operator" (Footnote 1) of a "coal mine" (Footnote 2) under the 1969 Act for the reasons set forth in Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 861-862 (D.C. Cir. 1978), and Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d 240, 244-246 (4th Cir. 1977).

In Association of Bituminous Contractors v. Andrus, supra, the Court observed that under section 109(a) of the 1969 Coal Act, 30 U.S.C. 819(a)(1) (1970), "the operator of a coal mine in which a violation occurs" is liable for civil penalties. The "operator" may be the "owner" of the mine, a "lessee" or an "other person." In this context, the term "other person" must be read ejusdem generis to refer to other similar persons "of like kind and character to the designated "owner[s or] lessee[s] designated'." Thus, "other persons" must be similar in nature to owners or lessees, and would include independent contractors who operate, control or supervise a "coal mine," as the term "coal mine" is defined in the statute.

An "other person" does not have to supervise the entire coal mine in order to be an "operator." All that is required is that they have control or supervision over one or more of the areas or facilities designated in the statutory definition of a coal mine. Coal mine construction operations are under the "supervision" of the construction company, thus bringing the independent contractor within the scope of the phrase "other person" and thereby defining the contractor as an "operator."

The District Court had reached a contrary conclusion, holding that independent contractors could not be "operators" within the meaning of the statute because, in the District Court's view, only one party could actually be operating, controlling, or supervising the mine. The Court of Appeals, in disagreeing with this position, stated that there must be some cases where the person who operates, controls or supervises the mine is not the owner, and that in such cases, the definition of "operator" must encompass both the owner and such other person.

In Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, supra, the Court held that construction companies must observe the health and safety standards set forth in the 1969 Coal Act and the regulations implementing them. In reaching this conclusion, the Court turned to the statutory definition of a "coal mine," and stated that: "When a contractor sinks a mine shaft, excavates a tunnel, or builds a coal preparation plant, it is constructing a facility "to be used in' the work of extracting or processing coal." 547 F.2d at 245.

Additionally, the Court observed that an independent contractor's employees are frequently subjected to the same hazards as miners, causing the Court to conclude that Congress did not implicitly exclude such employees from the 1969 Coal Act's protection.

The Court then found that independent contractors fall within the definition of an "operator," and can therefore be held liable for failing to comply with the health and safety standards.

In Republic Steel Corporation, supra, the Commission held that a mine owner can be held responsible for violations of the 1969 Coal Act created by its independent contractors even though none of the owner's employees were exposed to the violative conditions and the owner could not have prevented the violations.

Previous decisions by the Interior Board of Mine Operations Appeals (Board) had taken a different approach. The Board had recognized that both the coal mine owners and the independent contractors fell within the 1969 Coal Act's definition of an "operator," but held that only the operator responsible for the violation and the health and safety of the endangered employees could be held liable. Affinity Mining Company, 2 IBMA 57, 80 I.D. 229, 1971-1973 OSHD par. 15,546 (1973); Laurel Shaft Construction Company, Inc., 1 IBMA 217, 79 I.D. 701, 1971-1973 OSHD par. 15,387 (1972). Subsequent Board cases modified this approach by holding the mine owner liable for an independent contractor's violations of the health and safety standards where the owner's employees were endangered by the violation and the owner could have prevented the violation with a minimum degree of diligence. Armco Steel Company, 6 IBMA 64, 83 I.D. 77, 1975-1976 OSHD par. 20,512 (1976); West Freedom Mining Corporation, 5 IBMA 329, 82 I.D. 618, 1975-1976 OSHD par. 20,230 (1975); Peggs Run Coal Company, 5 IBMA 175, 82 I.D. 516, 1975-1976 OSHD par. 20,033 (1975).

This approach, described by the Commission as the "endangerment/preventability test," was reevaluated by the Commission in Republic Steel Corporation, supra, in light of the United States Court of Appeals for the District of Columbia and Fourth Circuit's decisions in Association of Bituminous Contractors v. Andrus, supra, and Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, supra.

The Commission held that, as a matter of law under the 1969 Coal Act, "an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors." The Commission was unable to find any provision in the 1969 Coal Act requiring that any consideration be given to the owner's ability to prevent the violations as a qualification for holding the owner liable for such violations.

The fact that the only employees endangered by the violation are the independent contractor's employees does not prevent the owner from being held responsible for such violations arising on mine property. According to the Commission:

> The Act seeks to protect the safety and health of all individuals in a coal mine. 30 U.S.C. 801(a) and 802(g). In order to achieve this goal, the Act places a duty on each operator to comply with its provisions. 30 U.S.C. 803. The purpose of the Act is not served by interpreting these provisions to allow an operator to

> limit the benefit of the protection it affords to its own employees. * * * The duty of an operator, whether owner or contractor, extends to all miners. * * *
>
> It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.

It should be pointed out that since an independent contractor performing work on coal mine property is an "operator" of a "coal mine," as those terms are defined in the 1969 Coal Act, the employees of such contractors are "miners" within the meaning of section 3(g) of the 1969 Coal Act, 30 U.S.C. 802(g) (1970). The term "miner" is therein defined as "any individual working in a coal mine."

Cowin and Company, Inc., supra, and Republic Steel Corporation, supra, when read together, establish a rule of law whereby either the coal mine owner or the independent contractor performing work on coal mine property, may be held liable for any health or safety violation of the 1969 Coal Act committed by the independent contractor.

Accordingly, on the facts and the law as set forth herein, the Respondent's motion to dismiss is DENIED.

(C) Occurrence of Violations

At approximately 10:20 a.m. on Friday, November 26, 1976, Mr. James D. Grant, an employee of the Lester Construction Company, sustained a fatal injury when a wire rope on a Lorain 1971 MC 30-H Moto Crane separated causing Mr. Grant to fall approximately 70 to 75 feet to the ground. The crane was owned by the Lester Construction Company and was being used to hoist two men to the top of a raw coal stacker being installed at the No. 5 Preparation Plant owned by the Buffalo Mining Company when the accident occurred. The second man, Mr. Wayne Taylor, who was also an employee of the Lester Construction Company, escaped injury. Subsequent thereto, MSHA inspectors were summoned to the scene of the accident and conducted a fatal accident investigation (Tr. 101, 121, 123, 160, 410, 524, 544, Exh. M-3). The crane involved in the accident had been obtained from the factory of the Lorain Crane Company thru the Walker Machinery Company of Belle, West Virginia (Tr. 64, 338).

MSHA inspector James E. Davis testified that Mr. Taylor was interviewed in connection with the fatal accident investigation and

that he gave a description of what had occurred (Tr. 108, 120). The statements made by Mr. Taylor, in conjunction with the testimony of the witnesses at the hearing, establish the circumstances surrounding the accident as set forth below.

The employees of the Lester Construction Company on the job site were under the supervision of Mr. W. R. Counts, a foreman employed by the Lester Construction Company (Tr. 130, 522-525). When the employees started work on the day in question, they began by installing a belt on a new conveyor trestle that had been attached to the stacker tube (Tr. 525-527). Mr. Counts testified that after the belt had been installed, he instructed Messrs. Taylor and Grant to get their bolts and belts from the tool trailer and go to the top of the stacker tube (Tr. 528, Exh. M-3). Mr. Taylor and Mr. Grant were hoisted to the top of the stacker in a basket, or cage, attached to the crane. The cage was approximately 4 feet in length and 3 feet in width. It was constructed of angle iron with a floor made from metal grating. It had no roof or cover (Tr. 127-128).

According to Inspector Davis, Mr. Taylor stated that when he and Mr. Grant observed the cage being hoisted up in close proximity to the "shed" wheel, they started shouting to the crane operator to stop. When he looked at the "overhaul" ball (Footnote 3) a second time, the rope was still being hoisted. Therefore, he jumped onto the platform at the top of the stacker. Simultaneously, the "overhaul" ball was pulled into the jib boom head sheave causing the rope to break. Mr. Taylor further stated that Mr. Grant jumped and thereby managed to grab hold of the end of the jib for a few moments before falling to the ground (Tr. 134-135, Exh. M-3).

Information provided to Inspector Davis by Mr. Mario Varrassi, the safety director for the Buffalo Mining Company (Tr. 393), indicated that Mr. Grant was transported to the Man Appalachin Regional Hospital where he was pronounced dead on arrival between 11 and 11:20 a.m. (Tr. 410, 423-424, Exh. M-3).

According to Inspector Davis, Mr. Dent, the crane operator, testified during the interview (Tr. 136) that the cage blocked his view and prevented him from seeing the head sheave of the crane. Mr. Dent also stated that an observer was not provided to watch the hoisting operation so as to signal him to stop the hoist when the cage had reached the top of the "shed" wheel (Tr. 138).

The testimony reveals that when the accident occurred Mr. Counts was standing on a hill adjacent to the job site watching employees of the Buffalo Mining Company take the old belt apart (Tr. 128-130, 529-530, Exh. M-11). Mr. Counts testified that he saw Mr. Grant fall, but indicated that he did not see what had occurred prior to the fall (Tr. 530).

MSHA inspector Birkie Allen visited the job site after the accident (Tr. 212), examined the crane, and thereupon issued the subject imminent danger order of withdrawal. He cited the Respondent for violations of four sections of the Code of Federal Regulations (Exh. M-2, Tr. 213). The order states, in pertinent part, as follows:

> 77.1401. The Lorain 1971, MC30-H Moto Crane used for manhoisting was not equipped with an overspeed, overwind and automatic stop controls.
>
> 77.1402-1. The American National Standards Institute "Specifications for the Use of Wire Ropes for Mines M 11.1-1960 was not used as a guide in the selection and use of the wire rope used to hoist men on the Lorain MC 30-H Moto Crane.
>
> 77.1403(a). The daily examination of the Lorain MC 30-H Moto Crane used as a manhoist was not made or recorded.
>
> 77.404(a). The hoisting facilities used to transport men (Lorain MC 30-H Moto Crane) was not being maintained in a safe operating condition in that the wire rope was severely damaged beginning near the wedge socket and extending about 50 feet along the rope (Numerous broken wires).
>
> It was a normal work procedure to ride the crane.
>
> The construction work was being done by Lester Construction Company.
>
> This was issued during a fatal investigation.

(Exhs. M-2, M-2-A).

30 CFR 77.1400 and 30 CFR 77.1401 provide as follows:

Subpart O - Man Hoisting

77.1400 Man hoists and elevators.

The standards set forth in this Subpart O, apply only to hoists and elevators, together with their appurtenances, that are used for hoisting men.

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77.1401 Automatic controls and brakes.

Hoists and elevators shall be equipped with over-speed overwind, and automatic stop controls and with brakes capable of stopping the elevator when full loaded.

The crane was being used as a manhoist when the accident occurred (Exh. M-3, Tr. 120-121, 131). In fact, the cage, or basket, in which the men were riding was constructed for the express purpose of being attached to the crane for use in manhoisting (Tr. 523). It was constructed for such purpose on instructions from Mr. Counts, Lester's foreman on the job site (Tr. 523). The evidence in the record shows that the crane had been used as a manhoist throughout the installation of the coal stacker, and that this procedure was authorized by the Lester Construction Company (Tr. 266, 462, 468, 472, 502-503, 508, 523-524).

A conflict is present in the testimony as to whether a suggestion had been made to Messrs. Taylor and Grant on November 26, 1976, expressly authorizing them to use the crane as a manhoist. According to Inspector Davis, Mr. Taylor stated that Mr. Counts suggested using the crane as an avenue of transport to the top of the stacker on the day of the accident (Tr. 131, Exh. M-3). Mr. Counts denied this at the hearing (Tr. 529). I am unable to accord great probative value to the hearsay statement of Mr. Taylor in view of the fact that Mr. Counts' testimony is in direct conflict with the statement of the hearsay declarant. However, the resolution of this conflict in the testimony in favor of the Respondent as to whether Mr. Counts specifically told Messrs. Grant and Taylor to use the cage on the day in question does not resolve the real issue as to whether the men were authorized to use the cage since the evidence in the record unmistakably points to the conclusion that the use of the crane as a manhoist was authorized by the Lester Construction Company throughout the installation of the stacker.

The Respondent's witnesses attempted to establish that this authorization was no longer in effect on November 26, 1976, because the belt line and adjacent walkway had been installed, thus providing an alternative route to the top of the stacker (Tr. 461-462, 469, 508, 524, 529). However, the various accounts given by the Respondent's witnesses contain certain inconsistencies indicating that this authorization was still in effect on November 26, 1976.

Some testimony was elicited with respect to two adjacent wooden boards used to connect the walkway to the adjacent hillside (Tr. 459-460). According to Mr. Lester, the boards had been installed on either the morning of November 26, 1976, the day of the accident, or the previous day (Tr. 460). However, he indicated that they were most likely installed on the morning of November 26, 1976 (Tr. 460). The boards were approximately 10 feet long (Tr. 460). Mr. Counts

testified that he had last observed someone riding in the cage approximately 5 days prior to the accident (Tr. 534), while Mr. Lester testified that the cage had been removed from the crane 3 days earlier, i.e., upon completion of the belt line and walkway (Tr. 461-462). But the inescapable conclusion remains that the use of the crane as a manhoist was clearly authorized at least until the morning of November 26, 1976, because, prior to the installation of the two wooden boards, it remained the sole means of access to the top of the stacker. Further, there is no indication that any of Lester's employees had been specifically informed prior to the accident that company authorization to use the crane for manhoisting had been rescinded, if it in fact had.

In fact, Mr. Counts specifically stated that he did not direct Taylor and Grant "in any manner" as to how to get to the top of the stacker (Tr. 529), a statement with overriding implications. The inferences drawn from the evidence in the record reveal, as noted above, that authorization to use the crane as a manhoist could not as a practical matter be rescined, until the morning of November 26, 1976. Prior to the installation of the boards, there was no other means of reaching the top of the stacker except via the crane because there would have been no means of crossing the abyss separating the hillside from the walkway. There is no indication that any employee of Lester was on the job site on November 26, 1976, who possessed more authority than Mr. Counts (Tr. 523). As such, he would have been the individual most likely to inform the employees of a change in company policy with regard to using the crane as a manhoist. The fact that he did not direct Messrs. Grant and Taylor in any manner as to how to get to the top of the stacker indicates that any change in company policy, if there was any, had not been effectively communicated to those men.

Mr. Ellison, Lester's safety director, testified that individuals who violate company safety rules are subjected to company-imposed discipline (Tr. 515). First offenders are suspended for 3 days, while recidivists are fired (Tr. 515). If company authorization to use the crane as a manhoist had been rescinded, then Mr. Dent, the crane operator (Tr. 340, 450), and Mr. Taylor the employee riding in the cage who escaped injury (Exh. M-3), should have at least been suspended for 3 days. Yet, they were not suspended (Tr. 518, 519). In fact, no consideration was given to suspending them after the accident (Tr. 521).

The existence of these disciplinary rules is highly probative for an additional reason. Statements made by Mr. Counts reveal that from his vantage point on the adjacent hill he could have seen the activities occurring on the job site if his attention had been directed there. It can be inferred that the employees could also see him. I find it highly improbable that the three employees directly involved in the accident would knowingly violate company safety rules in the

presence of the foreman and thereby intentionally subject themselves to company disciplinary proceedings.

Accordingly, it is found that Lester Construction Company not only condoned the use of the crane as a manhoist, but also authorized such use. Such authorization was either still in effect on the date of the accident, or, if it had been rescinded, the change in company policy had not been effectively communicated to Messrs. Dent, Grant and Taylor.

The evidence also establishes that the crane was not equipped with overspeed, overwind, or automatic stop controls (Tr. 214-215, 379). Furthermore, the Respondent conceded at the hearing that the crane was not so equipped (Tr. 8). Accordingly, it is found that a violation of 30 CFR 77.1401 has been established by a preponderance of the evidence.

As relates to the second alleged violation, 30 CFR 77.1402-1 provides as follows:

> 77.1402-1 Ropes and cables; specifications.
>
> The American National Standards Institute "Specifications for the Use of Wire Ropes for Mines," M 11.1-1960, or the latest revision thereof, shall be used as a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting.

According to inspector Birkie Allen, a specialist in hoisting, elevators, and major construction (Tr. 208), the wire rope on the crane was a five-eighths-type, 18 by 7 classification-type rope (Tr. 233-234). The M 11.1-1960 U.S.A. "Standard Specifications for the Use of Wire Ropes for Mines" (Exhs. M-8, 0-4) specifies both the recommended and minimum tread diameters for sheaves and drums (Exhs. M-8, 0-4, Table 36, Columns 1 and 2; Tr. 233-234). The minimum standards require the tread diameters of the sheaves and drums to be 34 times the rope diameter for an 18 by 7 classification (Exhs. M-8, 0-4, Table 36, Column 2; Tr. 233-234). Therefore, according to Inspector Allen, the sheaves and drums should have had a tread diameter of approximately 22-1/4 inches in order to comply with the minimum requirements (Tr. 234). However, a recomputation based on the formula set forth in Exhibits M-8 and 0-4, Table 36, Column 2, for an 18 by 7 classification reveals that the precise figure is 21-1/4 inches.

The crane's sheave had a 12-inch inside tread diameter, and its drum was approximately 14 inches in diameter (Tr. 234). Inspector Allen determined the sheave diameter by measuring it (Tr. 234). Since rope remained on the drum, the drum diameter was determined by checking the crane manufacturer's specifications (Tr. 234-235). He used a

caliper to determine that the hoist rope was five-eighths of an inch in diameter (Tr. 298). The inspector testified that the minimum standards had not been met because the sheave and the drum were smaller than 34 times the rope diameter (Tr. 234).

The Respondent stressed both at the hearing and in its posthearing brief that it does not matter whether the rope failed to meet the standards as long as the rope was safe (Tr. 229-230; Respondent's Posthearing Brief, p. 9). However, this is not material to the question of whether a violation occurred.

Accordingly, it is found that a violation of 30 CFR 77.1402-1 has been established by a preponderance of the evidence.

As relates to the third alleged violation, 30 CFR 77.1403(a) provides as follows:

> 77.1403 Inspection and maintenance.
>
> (a) Hoists and elevators shall be examined daily and such examination shall include, but not be limited to, the following:
>
> (1) A visual examination of the rope for wear, broken wires, and corrosion, especially at excessive strain points;
>
> (2) An examination of the rope fastenings for defects;
>
> (3) An examination of the elevator for loose, missing, or defective parts;
>
> (4) An examination of sheaves for broken flanges, defective bearings, rope alignment, and proper lubrication; and
>
> (5) An examination of the automatic controls and brakes required under 77.1401.

As regards the daily examinations of the crane, Mr. Lester testified that the crane operator had been instructed, via letters and posted bulletins, to examine the crane each day prior to starting the day's work (Tr. 463). Inspector Allen, who arrived on the job site shortly after the accident, asked Mr. Dent, the crane operator, whether he had made a daily examination of the crane (Tr. 263). According to Inspector Allen, Mr. Dent stated that although he normally would have made such examinations, he had not made any "since he had been on this job" (Tr. 263). Inspector Allen asked Mr. Counts whether the Lester Construction Company kept any inspection records pertaining

to the crane used for manhoisting (Tr. 263). He testified that Mr. Counts was unable to produce one (Tr. 263). According to Inspector Allen, Mr. Counts stated that the company had no such record, that he depended on the crane operator and that the crane operator had not made the inspection (Tr. 263).

Accordingly, it is found that a violation of 30 CFR 77.1403(a) has been established by a preponderance of the evidence in that the required examinations had not been made.

As relates to the fourth alleged violation, 30 CFR 77.404(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." Inspector Allen's examination of the wire rope revealed that it was damaged in several locations (Tr. 264, 309). One lay of the rope contained as many as six broken wires, and there were some randomly distributed broken wires throughout the rope for a distance of 50 feet (Tr. 264, Exhs. M-2, M-2-A). Inspector Allen stated that normally six broken wires are sufficient to cause the wire rope's removal from service (Tr. 264).

He determined that the rope was damaged by means of visual observation and through measuring some of the distortion in the rope with a caliper (Tr. 267). Although he was unable to remember the exact dimensions, the rope was somewhat flattened in areas where the wires were broken (Tr. 267).

The order of withdrawal alleges that the basis for the charge that the hoisting facility was not being maintained in a safe operating condition, is the condition relating to the broken wires. To constitute a violation upon this basis there would have to be proof that the broken wires existed prior to the accident. There does not appear to be clear cut proof to this effect in the record, although it may be argued that the description and opinions of the experts for the Petitioner infer that the broken wires may have existed prior to the accident.

There was no testimony by anyone who observed broken wires before the accident. In addition there is no actual statement of any of the Petitioner's experts which clearly states an opinion that the broken wires did exist prior to the accident.

To the contrary there is an opinion set forth in the record by the owner of Lester Construction Company that a strain on the cable enough to cause it to break would cause the breaking of strands at different intervals (Tr. 473). The owner of the construction company, Mr. Lester, may not have been shown to be as experienced an expert as the Petitioner's expert on hoisting equipment; however, Mr. Lester had operated a crane and had been in this type of construction

business for about 10 years prior to the date of his testimony (Tr. 481).

The experts for the Petitioner were of the opinion that the rope failure which occurred during the accident was due to excessive tension on the rope (Exh. M-3, p. 5, Exh. M-9, p. 5). And the evidence shows that this excessive tension occurred when the "two-blocking" took place. Therefore the possibility exists that the broken wires could have been caused by the same tension.

The Administrative Procedure Act provides that a sanction may not be imposed unless it is supported by and in accordance with the reliable, probative, and substantial evidence, 5 U.S.C. 556(d). In this case it cannot be said that the record contain substantial, probative evidence that the broken wires actually existed before the accident took place.

Therefore it is found that Petitioner has not proved a violation of 30 CFR 77.404(a) upon a basis that the hoist was unsafe because "numerous broken wires" allegedly existed in the rope prior to the accident. It is, however, true that a violation existed under 30 CFR 77.404(a) in that the hoisting facilities were not maintained in safe operating condition since such facilities were used for hoisting men and were not equipped with overspeed, overwind, or automatic stop controls and since the type of wire rope used did not properly match the size of the sheave and drum on the crane.

However, the order does not allege a violation of 30 CFR 77.404(a) in such terms, but confines the allegations under that regulation to the subject of "broken wires." In addition, two separate violations are already alleged in the order as relates to those bases upon which the hoist was unsafe. Those are under 30 CFR 77.1401 and 30 CFR 77.1402-1. Apparently the inspector decided not to mention such bases under 30 CFR 77.404(a) since he had already covered such unsafe practices under specific regulations in the first part of his order (Exh. M-2, Exh. M-2-A).

Accordingly, findings as to violations under 30 CFR 77.1401 and 77.1402-1 are made herein but no finding will be made as to a violation of 30 CFR 77.404(a).

(D) Gravity of the Violation

Two of Lester's employees were directly exposed to the hazard. Mr. James Grant sustained a fatal injury when the wire rope separated, falling approximately 70 to 75 feet to his death (Tr. 101, 134-135, 524, 544, Exh. M-3), Mr. Wayne Taylor narrowly escaped death or serious injury by jumping to the platform at the top of the stacker (Tr. 134-135, Exh. M-3). The cable separation occurred when the crane "two-blocked," i.e., when the overhaul ball was pulled into the sheave (Tr. 360-361, 369).

The rope broke at a location 23 feet from the socket where the counterweight was attached (Tr. 296, Exh. M-3 at p. 6). The significance of this lies in the fact that 23 feet is the exact dimension of the jib on the end of the crane, indicating that the rope broke where the main boom sheaves were located (Tr. 324).

Inspector Allen explained the function of overspeed (Tr. 215, 349-350, 355), overwind (Tr. 216-218, 369), and automatic stop controls (Tr. 225), during the course of his testimony. According to Inspector Allen, the overwind control in itself would have completely prevented two-blocking. Activation of the overwind control would have caused the automatic stop to bring the hoist to a safe stop. There was no problem with overspeed in connection with the accident (Tr. 355, 369).

As relates to the physical characteristics of the wire rope, according to Inspector Allen, the 18 by 7 classification rope used on the crane at the time of the accident was a nonrotating-type rope (Tr. 233). This type of rope is of very rigid construction with a high resistance to bending (Tr. 233). A rope bending over a small diameter sheave eventually develops fatigue (Tr. 237). If the rope is bent over a small sheave, and one end of the rope is free to rotate, an immediate loss of breaking strength results (Tr. 237). The rope in question was free to rotate because no guides were present where the rope was attached to the cage (Tr. 363).

Passing a rope over small sheaves and drums over a period of time causes case hardening of the crown wires (Tr. 240). This causes the rope to attain a strength greater than the catalogue breaking strength (Tr. 240). However, it is a false strength because the hardening of the outer crown wires causes them to become brittle (Tr. 240-241). As the report (Exh. M-9) notes, the rope broke at a greater strength than the catalogue breaking strength (Tr. 240).

As regards the effect of the drum on the rope, Inspector Allen stated:

> On the drum you have a secondary reason. If we had a recommended drum diameter of twenty-two and a quarter inches, if you visualize this as the drum (indicating), this rope is rigid. It resists bending due to the type of construction. As seen in the table, it requires a greater sheave size. If you intend to wind this on a drum, it will not wind.
>
> I think we're all maybe familiar with the rod and reel. The fleet angle normally determines how it's spooled onto the drum. However, with a rope that's as rigid as this, it will not spool properly. It will tend to overlap itself. Any time that you allow slack to

come in, it acts as a spring and will tend to open up and crush and destroy itself.

(Tr. 241-242).

The inside strand wires had nicks (Exhs. M-3 at p. 5, M-9). According to Inspector Allen, this condition is normally caused by bending the rope over small diameter sheaves and drums (Tr. 311).

Accordingly, it is found that the violations of 30 CFR 77.1401, and 1402-1, were extremely serious.

A daily examination of the crane, according to the procedure outlined by Inspector Allen (Tr. 269-270), would have revealed both the noncompliance with the M 11 standards and the absence of overspeed, overwind, and automatic stop controls. Accordingly, it is found that the violation of 30 CFR 77.1403(a) was moderately serious.

(E) Negligence of the Operator

The evidence contained in the record indicates that Lester Construction Company demonstrated gross negligence with respect to each of the three violations of the mandatory safety standards. The question presented is whether the negligence of an independent contractor can be imputed to a mine owner who neither exercises control, nor possesses a contractual right of control, over the actions of the independent contractor or his employees.

One approach would be to determine whether the mine owner demonstrated actual negligence or whether the mine owner either exercised control, or possessed a contractual right of control, over the independent contractor's employees. Under the control theory, the negligence of the independent contractor would be imputed to the mine owner. This would require a specific finding that such control existed. See, e.g., Old Ben Coal Company, VINC 79-119-P (April 27, 1979).

The evidence in the record reveals that the employees of Lester Construction Company were under the exclusive supervision of Mr. Count's, Lester's foreman. There is no probative evidence in the record indicating that Buffalo Mining Company supervised Lester's employees or directed or controlled them in the performance of their tasks. Nor is there any evidence of a contract provision granting to Buffalo such a right of control.

The record is also devoid of any probative evidence as to direct negligence on Buffalo's part. There is no indication that Buffalo knew, or, through the exercise of due diligence, should have known of the conditions giving rise to the violations of the cited mandatory safety standards. Nor is there any probative evidence indicating

that Buffalo materially abetted the violations or that Buffalo was negligent in selecting Long-Airdox as an independent contractor.

Accordingly, the application of this approach to the facts presented in the case at bar would preclude a finding that Buffalo demonstrated any negligence.

Another approach is found in the concept of the independent contractor as the "statutory agent" of the mine owner. In Bituminous Coal Operators' Association, Inc. v. Secretary of the Interior, 547 F.2d 240, 247 (4th Cir. 1977), the Court recognized that a construction company may be considered the statutory agent of the mine owner. Section 3(e) of the 1969 Coal Act, 30 U.S.C. 802(e) (1970), defines an "agent" as "any person charged wit responsibility for the operation of all or a part of a coal mine or the supervision of the miners in a coal mine." As noted previously in this decision, the employees of independent contractors performing work in a "coal mine," section 3(h) of the 1969 Coal Act, 30 U.S.C. 802(h) (1970), fall within the statute's definition of a "miner," section 3(g) of the 1969 Coal Act, 30 U.S.C. 802(g) (1970). The Court observed that the supervision of the "miners" in their employ brings the construction company "squarely within that part of the definition of a statutory agent which embraces "any person charged with responsibility for * * * the supervision of miners in a coal mine."' 547 F.2d at 247. Accordingly, the court held that "operators may be held liable for construction company violations, because the construction companies are statutory agents of the owners and lessees of coal mines." 547 F.2d at 247.

The question presented is whether the concept of statutory agent, mentioned by the Court of Appeals in the context of holding the mine owner liable for the independent contractor's violations of the 1969 Coal Act, can be employed to impute the independent contractor's negligence to the mine owner when determining the appropriate civil penalty to assess.

The Commission's decision in Republic Steel Corporation, Docket No. IBMA 76-28, 77-39, 1979 OSHD par. 23,455 (FMSHRC, filed April 11, 1979), does not directly address this issue, but does set forth certain principles providing guidance. The Commission observed that the Fourth Circuit had agreed with the District Court's conclusion in Bituminous Coal Operators' Association v. Hathaway, 400 F. Supp. 371 (W.D. Va. 1975), as to the application of the statutory agent concept. However, the Commission stressed the text of the statute when it held that, as a matter of law under the 1969 Coal Act, "an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors."

However, this is less than a repudiation of the statutory agent concept. The Commission did observe that the "Act seeks to protect

the safety and health of all individuals working in a coal mine," and that the "purpose of the Act is not served by interpreting these provisions to allow an operator to limit the benefit of the protection it affords to its own employees."

The question presented must be resolved so as to promote the purposes of the 1969 Coal Act. Statements contained in the legislative history indicate that the civil penalty provisions of the 1969 Coal Act are remedial in nature, i.e., the penalty assessed should be designed to deter future violations of the mandatory health and safety standards. See HOUSE COMMITTEE ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT, 91st Cong., 2nd Sess. at 462-463 (1970). See also, Robert G. Lawson Coal Company, 1 IBMA 115, 118, 79 I.D. 657, 1971-1973 OSHD par. 15,374 (1972).

Thus, the amount of the penalty imposed should be sufficient to encourage the mine owner to insure protection for the employees of the independent contractors. This purpose is promoted by imputing the negligence of the independent contractor to the mine owner because it is only through such action that an appropriate and truly remedial civil penalty can be devised.

It should also be pointed out that in this case the attorney for the Respondent stated that he represented Lester Construction Company, the independent contractor. He made the following statement at the hearing:

> In the contract there are certain provisions pertaining to the fact that we are an independent contractor and we hold Buffalo Mining harmless. As a practical matter, only through the hold harmless agreement do we represent Buffalo Mining, but we do in effect represent them because of the fact that we ultimately will be responsible for any outcome of this proceeding.

(Tr. 4, Exh. 0-1).

Accordingly, it is found that the gross negligence demonstrated by Lester Construction Company can be imputed to the Respondent.

(F) Good Faith in Attempting Rapid Abatement

The order of withdrawal was issued by Inspector Allen at 3:35 p.m. on November 26, 1976 (Exh. M-2). It was terminated by inspector William S. Pauley at 4 p.m. on December 1, 1976 (Exh. M-5). Exhibit M-5 describes the action taken to abate the violation as follows:

> The practice of hoisting and lowering men with the Lorain MC 30 H crane has been discontinued. Instructions which prohibit persons from being hoisted or

lowered with the crane have been posted in the cab of the crane. Also the defective hoist rope has been removed from the crane.

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

(G) History of Previous Violations

The history of violations for which penalties have been paid at the Respondent's No. 5 Preparation Plant during the 2-year period preceding the issuance of the subject order is summarized as follows (Exh. M-1):

30 CFR Standard	Year 1 11/27/74 - 11/26/75	Year 2 11/27/75 - 11/26/76	Totals
All Sections	24	9	33
77.1401	0	0	0
77.1402-1	0	0	0
77.1403(a)	0	0	0

(Note: All figures are approximations.)

No evidence was presented as to any possible history of violations as relates to Lester Construction Company.

(H) Size of the Operator's Business

The No. 5 Preparation Plant processes 5,800 tons of coal daily (Exh. M-3, p. 2). The plant is owned by the Buffalo Mining Company (Tr. 13). Buffalo Mining Company is a subsidiary of The Pittston Company (Exh. M-6). However, the record contains no evidence regarding the total annual coal production of either Buffalo Mining Company or The Pittston Company. No significant evidence as to the size of the Lester Construction Company was presented.

(I) Effect of the Assessment of a Civil Penalty on the Operator's Ability to Continue in Business

The Respondent introduced no probative evidence indicating that an assessment in this case would adversely affect the Respondent's or Lester Construction Company's ability to continue in business. The Interior Board of Mine Operations Appeals has held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find, therefore, that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

(J) Jurisdictional Issues

During the course of the hearing, the attorney for the Respondent stated that there was a question as to jurisdiction in that he took the position that the Occupational Safety and Health Administration (OSHA) rather than MSHA should have jurisdiction because he questioned whether the factual circumstances came under the 1969 Coal Act. He stated that no coal mining people were involved.

The Respondent's attorney is in error on this issue since it has already been pointed out in the prior portions of this decision that the area involved herein comes within the definition of a coal mine and that the employees of a contractor working at such mine come under the definition of miners.

All of the Respondent's attorney's arguments as relates to the jurisdictional issues revolve around the same issues argued in the motion to dismiss which was disposed of in Part V(C) of this decision wherein it was held that the Respondent could be held liable for safety violations committed by the independent contractor, Lester Construction Company.

In his reply brief, Respondent's attorney stated that Buffalo may be in interstate commerce but Lester Construction Company is not. However, the question of whether Lester is or is not in interstate commerce is immaterial since Buffalo is properly charged with the violations.

Based upon all of the findings of fact and conclusions of law previously set forth in this decision it is found that Buffalo Mining Company and its No. 5 Preparation Plant have been, during the pertinent periods involved herein, subject to the 1969 Coal Act and the 1977 Mine Act.

VI. Conclusions of Law

1. Buffalo Mining Company and its No. 5 Preparation Plant have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act during the respective periods involved in this proceeding.

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

3. MSHA inspector Birkie Allen was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the order of withdrawal which is the subject matter of this proceeding.

4. The violations charged as to 30 CFR 77.1401, 77.1402-1, and 77.1403(a) are found to have occurred as alleged.

5. MSHA has failed to prove, by a preponderance of the evidence, a violation as to 30 CFR 77.404(a) as alleged in the subject order.

6. The Respondent's motion to dismiss is denied as contrary to the law and the facts.

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

VII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs. Buffalo submitted a reply brief. Subsequent thereto, MSHA submitted a letter noting its disagreement with certain statements contained in Buffalo's reply brief. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalties Assessed

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

Order No.	Date	30 CFR Standard	Penalty
1 BA	11/26/76	77.1401	$6,000
		77.1402-1	1,500
		77.1403(a)	500
			$8,000

ORDER

A. Respondent is ORDERED to pay a civil penalty in the amount of $8,000 within 30 days of the date of this decision.

B. The petition is dismissed as relates to an alleged violation of 30 CFR 77.404(a).

John F. Cook
Administrative Law Judge

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Footnote starts here

~Footnote_one

1 Section 3(d) of the 1969 Act provides: ""Operator' means any owner, lessee, or other person who operates, controls, or

supervises a coal mine."

~Footnote_two

2 Section 3(h) of the 1969 Act provides: ""Coal mine' means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or methods, and the work of preparing the coal so extracted, and includes custom coal preparation facilities."

~Footnote_three

3 An overhaul ball is a counterweight connected to the end of a crane rope and serves to maintain tension on the rope (Tr. 133-134). The term "overhaul ball" was used synonymously with the term "headache ball" (Tr. 134). At one point in his testimony, Inspector Davis referred to the "overhaul" or "headache" ball as a "counterweight." (Compare Tr. 134 with Tr. 135.)