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SOL (MSHA) V. PEABODY 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 Proceeding Docket No. BARB 78-613-P A.C. No. 15-05120-02014V
v.	
PEABODY COAL COMPANY, RESPONDENT	Ken No. 4 North Mine

DECISION

Appearances: Gregory E. Conrad, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Thomas F. Linn, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent

Before: Judge Cook

I. Procedural Background

On August 9, 1978, a petition for assessment of civil penalty was filed by the Mine Safety and Health Administration (MSHA) against Peabody Coal Company (Peabody) 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). The petition, as amended herein, alleged a violation of 30 CFR 75.1722(c). An answer was filed on September 7, 1978.

Subsequent thereto, various notices of hearing were issued. The hearing was held on January 11, 1979, in Evansville, Indiana. 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 difficulties experienced by counsel forced a revision thereof.

MSHA and Peabody submitted their posthearing briefs on April 12, 1979, and April 13, 1979, respectively. Neither party submitted a reply brief.

II. Violation Charged

Notice No. 7-0057 (1 TML), October 17, 1977, 30 CFR 75.1722(c).

III. Evidence Contained in Record

A) Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B) Witnesses

MSHA called as its witness MSHA inspector Thomas M. Lyle.

Peabody called as its witness William C. Ford, a unit foreman at the Ken No. 4 North Mine.

C) Exhibits

1) MSHA introduced the following exhibits into evidence (Footnote 1):

a) M-1 is a copy of Notice No. 7-0057 (1 TML), October 17, 1977, 30 CFR 75.1722(c).

b) M-2 is a computer printout compiled by the Office of Assessments listing violations at the Ken No. 4 North Mine for which Peabody had paid assessments between July 1, 1977, and October 17, 1977.

c) M-3 is a termination of M-1.

d) M-4 is a computer printout compiled by the Office of Assessments of the history of violations for which penalties have been paid beginning January 1, 1970, and ending June 30, 1977. (Footnote 2)

e) M-5 is a page from the Inspector's Manual.

f) M-6 is a diagram of the subject area of the Ken No. 4 North Mine.

2) Peabody introduced the following exhibits into evidence:

a) 0-1 is a piece of wire.

b) 0-2 is a piece of expanded metal mesh.

c) 0-3 contains copies of preshift and onshift examiners' reports for the No. 1 Unit at the Ken No. 4 North Mine.

d) 0-4 is a "J" bolt.

e) 0-5 is a photocopy of 0-7.

f) 0-6 is a photocopy of 0-8.

g) 0-7 is an uncorrected carbon copy of Notice No. 7-0057 (1 TML).

h) 0-8 is an uncorrected carbon copy of the termination of 0-7.

3) MSHA and Peabody jointly introduced the following exhibits into evidence:

a) Joint Exhibit No. 1 is a diagram of a tailpiece.

b) Joint Exhibit No. 2 is a diagram of a head drive.

4) The following exhibit is contained in the official file of the consolidated proceedings in Peabody Coal Company, Docket No. BARB 78-6, BARB 78-688-P and BARB 78-690-P:

M-1, as marked in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P, is a controller information report compiled by the Office of Assessments containing information as to the size of both Peabody Coal Company and the Ken No. 4 North Mine. (Footnote 3)

D) Order Receiving Exhibit in Evidence

During the consolidated proceedings in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P, MSHA moved for the receipt in evidence of Exhibit M-4. Peabody objected (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 17-28). It was agreed that a ruling would be withheld until after the parties had been afforded the opportunity to argue their respective positions in their posthearing briefs (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 17-28, 761).

During the hearing in the instant case, it was provided that reference could be made to the three above-noted proceedings for any reference that either party wished to make to Exhibit M-4 (Tr. 7-9). (Footnote 4)

Thereafter, MSHA moved for approval of a settlement in Docket No. BARB 78-690-P, and for leave to withdraw the petition in Docket No. BARB 78-688-P. Peabody moved to withdraw its application for review in Docket No. BARB 78-6. These motions were granted in a decision dated July 26, 1979. Consequently, a ruling was not made as relates to Exhibit M-4's receipt in evidence. Accordingly, this ruling will be made herein.

Effective July 1, 1977, Peabody Holding Company became the controller of Peabody Coal Company, replacing Kennecott Copper Corporation. Peabody objects to the Administrative Law Judge's consideration of a history of the violations of Peabody Coal Company while it was under the ownership of Kennecott Copper Corporation for purposes of assessing a civil penalty (Respondent's Posthearing Brief, p. 9). Peabody presented the testimony of Mr. Richard Romero, an operations administrative supervisor for Peabody Coal Company, to establish that significant and substantial management changes occurred subsequent to Kennecott Copper Corporation's divestiture of Peabody Coal Company (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 27, 738-761).

The testimony of Mr. Romero reveals that since the divestiture Peabody's management operations, with the exception of data processing, have been decentralized (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 739, 748-746). The purpose of this decentralization is to localize all decision-making, policy-making and financial authority, thus placing accountability within the corporation at the local level (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 746-750). However, responsibility for safety matters had not been completely decentralized as of the date of the hearing (Docket No. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 755), although the individual in charge of safety at the Ken No. 4 North Mine had been changed (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 759).

The above-noted testimony is insufficient to establish that substantive changes in company mine safety and health policy, as relates to the Ken No. 4 North Mine, have followed the divestiture. In effect, Peabody argues that the mere change of the controlling company is sufficient to bar consideration of the history of violations prior to July 1, 1977 (Docket Nos. BARB 78-6, BARB 78-688-P and

BARB 78-690-P at Tr. 26-27). I disagree. In spite of the divestiture, the fact remains that the entity known as Peabody Coal Company has been the operator of the Ken No. 4 North Mine at all times relevant to this proceeding, and the history of previous violations at that mine is material to the assessment of a civil penalty for the subject violation. Peabody's position, when carried to its logical extreme, would permit a controlling company with an onerous history of previous violations to escape the consequences of its conduct through a paper reorganization having no effect on substantive safety policies at its various mines. Accordingly, the enforcement scheme envisioned by the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970) (1969 Coal Act) and the 1977 Mine Act is best promoted by evaluating history of previous violations on an operator by-operator, mine-by-mine basis.

Accordingly, Peabody's objection is OVERRULED, and Exhibit No. M-4, contained in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P and incorporated herein, is hereby RECEIVED in evidence.

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

The parties filed the following stipulations on January 9, 1979, applicable to the above-captioned proceeding:

1) Administrative Law Judge Cook has jurisdiction over the subject matter in this proceeding.

2) Peabody Coal Company and the Ken No. 4 North Mine are subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Federal Mine Safety and Health Act of 1977.

3) The subject notice of violation was duly served on the operator.

4) The assessment of any penalty in this proceeding will not affect the ability of the Respondent to continue in business.

5) Peabody Coal Company is considered to be a large-sized operator for purposes of assessing any penalties in this proceeding.

6) Inspector Thomas M. Lyle was a duly authorized representative of the Secretary at all times relevant to this proceeding.

B). Motions

After the last witness had testified, MSHA moved to amend its petition to conform with the proof. Peabody objected to the amendment and moved for dismissal of the proceeding. These motions were made after the undersigned Administrative Law Judge observed apparent discrepencies regarding the violation charged. Specifically, the Judge noted that Inspector Lyle had testified that the notice charged a violation of 30 CFR 75.1722(c), and that some of the documents attached to the petition made reference to 30 CFR 75.1722(b) (Tr. 180-81).

The notice of violation attached to the petition alleged a violation of 30 CFR 75.1722(c).

The motions were taken under advisement (Tr. 183, 205-208).

Peabody bases its motion to dismiss on the grounds that it was not demonstrated that the operator had been duly served with a notice alleging a violation of 30 CFR 1722(c) (Tr. 207). In a civil penalty proceeding, a notice is adequate, even though it does not specify a particular section of the Act or mandatory standard violated, if the alleged violation is described with sufficient specificity to permit abatement. At the stage where the operator is charged with a violation of law in a civil penalty proceeding it is entitled to adequate and timely notice of the section of the Act or mandatory standard involved so as to permit preparation of a timely and adequate defense. Old Ben Coal Company, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975); Eastern Associated Coal Corporation, 1 IBMA 233, 79 I.D. 723, 1971-1973 OSHD par. 15,388 (1972).

The description of the condition or practice in the notice (Exh. M-1) can only be construed as alleging a violation of 30 CFR 75.1722(c). The testimony with respect to Peabody's abatement efforts establishes that the notice described the alleged violation with sufficient specificity to permit abatement (Tr. 123, 131-132). The petition was clearly sufficient to permit preparation of a timely and adequate defense since the evidence adduced by Peabody related solely to 30 CFR 75.1722(c) (Tr. 119-178). Furthermore, Peabody states in its posthearing brief that it will not assert that it was unaware of the section allegedly violated (Respondent's Posthearing Brief at page 6).

The Commission's Interim Procedural Rules, 29 CFR 2700.1 et seq., in effect on the date of the hearing, do not specifically address the

amendment of petitions to conform with the proof. Rule 15(b) of the Federal Rules of Civil Procedure, although not specifically applicable to this proceeding, reflects the collective experience of the courts in addressing such motions, and, as such, provides some guidance in the instant case.

Rule 15(b) states that issues not raised in the pleadings shall be treated in all respects as if they had been raised in the pleadings when such issues are tried by the express or implied consent of the parties. Under such circumstances, a party may move at any time, even after judgment, to amend the pleadings to conform with the proof. If an objection is raised to evidence at the trial on the ground that it is not within the scope of the pleadings, the court is empowered to permit amendment of the pleadings when such action will subserve the presentation of the merits and "the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." The court is empowered to grant a continuance to enable the objecting party to meet such evidence.

The fact that the evidence adduced by both parties relates solely to 30 CFR 1722(c) indicates that the issues raised in a civil penalty proceeding addressing that regulation were tried with the implied consent of both parties. Although Peabody did not object to the introduction of such evidence during the presentation of MSHA's case-in-chief within the meaning of Rule 15(b), it is significant to note that Peabody has not demonstrated that it would be prejudiced by the proposed amendment. In fact, it is highly doubtful that Peabody could do so in light of the above-noted statement that it will not assert that it was unaware of the section allegedly violated.

Accordingly, Peabody's motion to dismiss is DENIED, and MSHA's motion to amend the petition to conform with the proof is GRANTED. IT IS THEREFORE ORDERED that the petition be, and hereby is, AMENDED to allege a violation of 30 CFR 75.1722(c) wherever 30 CFR 75.1722(b) is cited.

C) Occurrence of Violation

On October 17, 1977, MSHA inspector Thomas M. Lyle visited Peabody's Ken No. 4 North Mine to conduct a hazard analysis and accident prevention inspection (Tr. 16-17). He was accompanied on his inspection underground by Mr. William C. Ford, the foreman on the No. 1 Unit (Tr. 18). At approximately 5:30 p.m., Inspector Lyle issued a notice pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, citing Peabody for a violation of the

mandatory safety standard embodied in 30 CFR 75.1722(c) (Footnote 5) (Exh M-1). The notice described the "condition or practice" as follows:

> Guards that had been installed on the main line belt tailpiece and the No. 1 Unit conveyor drive had not [sic] fastened or secured adequately to prevent persons from coming in contact with the moving belt and rollers. The guards were tied along side of the tailpiece and conveyor drive with small amounts of shooting wire or placed against bolt studs that were not fastened with screw type nuts. The operator or his agent knew or should of [sic] known this violation existed. Responsibility of Alton Fulton mine manager.

(Exh M-1).

At the time that the inspector observed the machinery, the belts were both in operation (Tr. 65).

There were guards along both sides of the tailpiece (Tr. 32, 45-46). There were two guards on one side, measuring approximately 5 or 6 feet and 4 feet in length, respectively (Tr. 32, 34). These guards were approximately 2 feet in width (Tr. 35). There were guards along both sides of the conveyor drive. Three guards were present on one side of the conveyor drive. One measured 6 feet by 4 feet. The remaining two were each approximately 6 feet in length, but their widths were not given (Tr. 43-46).

The inspector testified that the guards, made of expanded metal mesh (Tr. 31, 43), were substantial and adequate (Tr. 30, 32, 35, 46). According to the inspector, bolt studs had been welded to the machinery for the purpose of hanging and securing the guards (Tr.47). In the inspector's opinion, compliance with 30 CFR 75.1722(c) required the use of nuts and bolts or "J" hooks as securing devices (Tr. 47). Since neither of these methods had been employed, the inspector concluded that Peabody was not in compliance with the regulation.

It is unnecessary to determine whether the use of nuts and bolts or "J" hooks are the sole permissible means of complying with 30 CFR 75.1722(c). The scope of inquiry in the present case is considerably more limited. The question presented is whether the method employed

by Peabody was adequate to secure the expanded metal mesh guards to the subject tailpiece and conveyor drive. The controlling inquiries in this regard are what type of wire was used and how was the wire used to secure the guards?

The inspector testified that he picked up a piece of the wire and examined it while the men were securing the guards (Tr. 37). He was adamant in his opinion that shooting wire, and not the type of wire represented by Exhibit 0-1, had been used to secure them. Exhibit 0-1 is a sample of the general utility wire used for such purposes as securing guards and tying up water hoses (Tr. 79, 126). It is thicker than shooting wire (Tr. 37-38). Although Mr. Ford never testified affirmatively that general utility wire had been used to secure the guards in question, (Footnote 6) his testimony is of that general tenor. He stated that shooting wire would never be used to secure the guards because "we are only issued two rolls a week." Using it to secure the guards would require such a sizable portion of this wire that "you wouldn't have enough to use to shoot at the face" (Tr. 148). By way of illustration, it would require 60 to 70 feet of general utility wire to secure a tailpiece (Tr. 148).

Several factors are present indicating that the inspector properly identified the type of wire used. First, his experience in shooting coal (Tr. 12-16, 37-38) indicates a familiarity with the type of materials used in such operations. This knowledge, coupled with the fact that he examined a piece of the wire while the men were securing the guards (Tr. 37), points to a correct identification.

Secondly, the inspector testified that Mr. Ford had stated that he had observed the guards being wired on October 15, 1977, and that he had brought it to the attention of Mr. Alton Fulton, the mine manager. Mr. Fulton told Mr. Ford not to worry, and that he, Mr. Fulton, "would take the credit for setting it up or he'd take the blame if anything was wrong" (Tr. 63-64). This statement must be juxtaposed with the testimony of Mr. Ford, who indicated that the use of general utility wire for securing guards was a common practice at the mine dating back to 1972 or 1973 (Tr. 142-143, 161). He also testified that this method was adequate to hold the guards securely in place (Tr. 139). In light of these considerations, it would appear that the only logical reason for mentioning the subject to Mr. Fulton was to inform him of a deviation from the customary practice, e.g., to inform him that shooting wire was being used to secure the guards.

Accordingly, the inspector's identification, bolstered by the inferences drawn from Mr. Ford's conversation with Mr. Fulton, results in a finding that the thinner shooting wire and not the thicker general utility wire, was used to secure the guards.

As relates to the placement of the wires, Mr. Ford indicated that the guards on the tailpiece were wired at 12 separate locations (Tr. 135-136). The guards were wired to the frame or the belt rope at 10 separate places, and at the two remaining locations the guards were wired to each other (Tr. 135-136; brown "X's" on Joint Exhibit No. 1). A belt rope is a one-half or five-eighths-inch steel cable on a tailpiece, and is located approximately 16 to 18 inches above the mine floor (Tr. 172-173). The top of the guard is approximately 12 inches above the rope (Tr. 173). A turntable keeps the belt rope pulled tight so that it has very little flexibility (Tr. 173-175). The guards on the conveyor drive were wired at six locations (Tr. 137-138; red lines on Joint Exh. No. 2). At four of these locations, the guards were wired to the frame. At the remaining two locations, they were wired to each other (Tr. 137-138). Only a small amount of wire was used, three wraps at the most (Tr. 114-115).

According to the inspector, a guard is "securely in place" within the meaning of 30 CFR 75.1722(c) when the method of attachment will prevent an individual from becoming entangled in the machinery. This would occur if the method of attachment is insufficient to prevent the guards from coming off when a person strikes them with his body (Tr. 39, 101, 115). The inspector testified as an expert that shooting wire would be inadequate to perform this function (Tr. 39).

The testimony reveals that the inspector correctly identified the type of accidents that 30 CFR 75.1722(c) was designed to prevent. A guard that is not secured so as to prevent such injuries cannot be deemed "securely in place." It is unnecessary to decide whether general utility wire (Exh 0-1) meets these standards because the credible evidence in the record reveals that such wire was not used to secure the guards in question. The inquiry is limited to the conditions that existed on October 17, 1977. I am inclined to accept the inspector's expert opinion that the guards were not securely in place based upon his characterization of the physical properties of shooting wire and the number of wraps used, in conjunction with Mr. Ford's

description of the placement of the wires. Of particular significance, is the following: The tailpiece guards were secured at seven of the 12 separate locations by wiring the guards to the belt rope, a steel cable which, altough under tension, still retained a measure of flexibility. As relates to the conveyor drive, four of the six wire attachments were located at the top along the length of the guard, with none on either side along the width of the guard. It is highly conceivable that an individual falling against the guards would cause the cable to vibrate or the guard to bend (Tr. 69), breaking one or more of the wire attachments and threatening the integrity of the system.

Accordingly, in light of the foregoing, it is found that a violation of 30 CFR 75.1722(c) has been established by a preponderance of the evidence.

D) Gravity of the Violation

The inspector classified the violation as very serious (Tr. 71). The area was wet and slippery due to the dust-suppressing water sprays at the conveyor drive. Some of this water would reach the tailpiece area (Tr. 68). An individual could slip and dislodge the guards, and thereby become exposed to the moving parts of the machines (Tr. 29, 42, 68-71). The anticipated injuries were described as severe, ranging from the loss of an arm to death (Tr. 70-115). The miners directly exposed to the hazard included belt cleaners, belt examiners and maintenance men working in the area (Tr. 115-116).

Mr. Ford disagreed, stating that the conveyor drive and the tailpiece were sufficiently guarded to prevent entry (Tr. 140).

In view of the fact that the guards were present and attached, although not as securely as the regulations require, it is found that the violation was moderately serious.

E) Negligence

The inspector opined that the condition had existed since at least October 15, 1977, based on his conversation with Mr. Ford (Tr. 65), wherein Mr. Ford stated that he had noticed the guards being wired on October 15, 1977 (Tr. 63). The inspector classified the violation as readily visible, and that it would be noticeable to a preshift or onshift examiner (Tr. 64). The area was subject to onshift belt examinations during production shifts (Tr. 64-65). The belts were running on the day in question (Tr. 65).

Determining whether a method of attachment is adequate to secure guards in place is essentially an exercise in sound judgment. The regulation does not designate any identifiable methods as either acceptable or unacceptable. The record clearly reveals that Peabody demonstrated a good faith effort to secure its guards in place, even though the methods employed have been found inadequate in the instant

proceeding. The fact that other inspectors could have determined that the use of wire was an appropriate method of securing the guards (Tr. 139), although not controlling in the instant case because the inferences drawn from the conversation between Mr. Ford and Mr. Fulton indicate that the use of shooting wire was a deviation from past practices, is not wholly without significance. While it is true that Inspector Lyle told Peabody on previous occasions that nuts and bolts or hooks must be used (Tr. 60-63), the fact that other inspectors could have permitted the use of wire indicates that Peabody's judgment could have been affected by a reasonable belief that MSHA would consider wire adequate under some circumstances.

Accordingly, it is found that Peabody demonstrated a slight degree of ordinary negligence.

F) Good Faith in Attempting Rapid Abatement

The violation was abated by fastening the guards to the bolt studs with nuts (Tr. 67, 131). No additional studs were installed (Tr. 134). It required 15 to 20 minutes to abate the condition (Tr. 139-140). The notice was terminated 1 hour after its issuance (Exhs. M-1, M-3).

Accordingly, it is found that Peabody demonstrated good faith in attempting rapid abatement.

G) History of Previous Violations

30 CFR Standard	Year-1 10/18/75 - 10/17/76	Year-2 10/18/76 - 10/17/77	Totals
All sections	69	85	154
75.1722	0	0	0

(Note: All figures are approximations).

As relates to the Ken No. 4 North Mine, Peabody had paid assessments for approximately 154 violations of regulations in the 24 months preceding October 17, 1977. Approximately 69 of these paid assessments were for violations cited between October 18, 1975, and October 17, 1976. Approximately 85 of these paid assessments were for violations cited between October 18, 1976, and October 17, 1977.

There were no paid assessments for violations of 30 CFR 75.1722(c) during the 24 months preceding October 17, 1977.

H) Appropriateness to Penalty to Operator's Size

Peabody produced approximately 47,650,569 tons of coal in 1978 (Exh. M-1 filed in Docket Nos. BARB 78-6, BARB 78-688-P, BARB 78-690-P). The Ken No. 4 North Mine produced approximately 168,792 tons of coal

in 1978 (Exh. M-1 filed in Docket Nos. BARB 78-6, BARB 78-688-P, BARB 78-690-P). Furthermore, the parties stipulated that Peabody Coal Company is considered to be a large-sized operator for purposes of penalty assessment.

I) Effect on Operator's Ability to Continue in Business

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

VI. Conclusions of Law

1. Peabody Coal Company and its Ken No. 4 North Mine have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act at all times relevant to 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 Thomas M. Lyle was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the notice which is the subject matter of this proceeding.

4. The violation charged in Notice No. 7-0057 (1 TML), October 17, 1977, 30 CFR 75.1722(c), is found to have occurred as alleged.

5. As set forth in Part V(B), supra, Respondent's motion to dismiss is DENIED, and MSHA's motion to amend the petition to conform with the proof is GRANTED.

6. All of the conclusions of law set forth in previous parts of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

MSHA and Peabody submitted posthearing briefs. No reply briefs were submitted. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are

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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 a penalty is warranted as follows:

Notice No.	Date	30 CFR Standard	Penalty
7-0057 (1 TML)	10/17/77	75.1722(c)	$275

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of $275 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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Footnote starts here

~Footnote_one

1 Exhibit M-8 is a copy of an alert flier. It was offered, but not received, into evidence at the hearing, and is to be found in a separate envelope filed with the record.

~Footnote_two

2 Exhibit M-4 is filed, and has the same exhibit number, in the official file of the consolidated proceedings in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P; which cases also involve the Petitioner and Respondent herein. By agreement of the parties reference can be made to those three cases as relates to the content of such exhibit (Tr. 7-8).

~Footnote_three

3 The official exhibit is contained in the official file of the consolidated proceedings in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P. It was agreed by the parties that official notice could be taken of Exhibit M-1, as marked in those consolidated proceedings (Tr. 197-180). For convenient reference, a copy of such exhibit has been placed in a separate envelope and filed with the official file in the instant case.

~Footnote_four

4 A copy of those portions of the transcript in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P material to the

instant case has been placed in an envelope filed with the official file in the instant case.

~Footnote_five

5 30 CFR 75.1722 provides:

"Mechanical equipment guards. (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

"(b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

"(c) Except when testing the machinery, guards shall be securely in place while machinery is being operated."

~Footnote_six

6 Apparently, Inspector Lyle and Mr. Ford employed the term "shooting wire" to refer to two separate things. The inspector defined it as the blue and red, plastic-coated leg wire from a blasting cap (Tr. 37-38), and indicated that they are often found lying on the mine floor after blasts have been set off. Miners often use these discarded wires for various purposes (Tr. 38). This definition coincides with Mr. Ford's definition of a "cap wire" (Tr. 130-131). Mr. Ford used the term "shooting wire" to refer to a yellow-plastic coated wire that comes on rolls (Tr. 130-131, 148), which apparently indicates that he was referring to a much longer wire.