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SOL (MSHA) V. W. A. BOWES
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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. DENV 79-337-PM A.C. No. 35-02386-05002
v.	Cougar Mine
W. A. BOWES, INC., RESPONDENT	

DECISION

Appearances: Donald F. Rector, Esq., Office of the Solicitor, Department of Labor, for Petitioner
Warde H. Erwin, Esq., Portland, Oregon, for Respondent

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act) 30 U.S.C. 820(a) by a petition filed February 12, 1979. A timely answer was filed by the Respondent denying the charges and requesting a hearing. On August 30, 1979, a hearing was held in Pendleton, Oregon, at which both parties were represented by counsel.

Issues

1. Whether the Cougar Mine of the Respondent is engaged in "commerce" within the meaning of that term under Section 3(b) of the Act.

2. Whether Respondent violated the mandatory standards as charged, and, if so, the amount of penalty which should be assessed.

Commerce

The matter of whether the Cougar Mine is engaged in interstate commerce was decided tentatively from the bench for the purpose of permitting the rendering of decisions on the merits of the citations. I found, subject to full and complete reconsideration upon the submission of briefs, that interstate commerce was established (Tr. 44). The parties duly filed briefs on the matter which I have carefully considered. The following is my reconsidered determination on the question of interstate commerce.

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Facts on "Commerce"

The following is a statement by Respondent's counsel which provides helpful general background about the Respondent and the Cougar Mine, as well as factual data on the issue of commerce. See pages 10-15 of the transcript. Counsel for MSHA stipulated that if witnesses were called they would testify to the facts contained in Respondent's opening statement. Counsel in effect accepted the statement as facts (Tr. 18-19). It is as follows:

> MR. ERWIN: Well, basicically we have just now touched on what I was going to say, because the evidence will probably be very simple.
>
> There is a question, a serious question, as to whether or not this operation is within interstate commerce. And I think by way of opening statement I can tell you what I expect the evidence will show because it is going to come from our clients anyway.
>
> One is that William Bowes, Incorporated, is not a production company. It has properties -- Now, it doesn't own any properties. Let me put it that way first. Every property that it is in the process of developing is separately incorporated and there are properties being developed under contract with New York owners. There is property in Wyoming, not being developed at all. There is a property owned by New York people. There is property in Colorado which is being developed I presume under a lease but no production as far as William Bowes is concerned. There is a property in South Mountain -- incidentally, that property in Colorado is copper. It is a different operation than what we are talking about here. These are precious metal mines.
>
> There is a property in South Mountain, Idaho, which is not producing, has not produced. There is a property in Nevada which has not produced and only assessment work is being done on it. There is a property in southern Oregon, but that's not true. The only other property in Oregon is this property as far as I know.
>
> Now, these properties are being developed with the idea that they will perhaps some day be put into production. To this date they have not produced any ore nor has any been shipped from the mine, no by-product has been shipped from the mine. They are totally in the development stage of their operation. * * *
>
> The purpose of the work they are doing now is eventual production so that they can remove the precious metal from the ore in some method. I think it is a little important

that you know why this is an exceptional situation insofar as the processing of the raw product is concerned. And it is because this particular vein that they are interested in in the Cougar Mine is a type of material which is susceptible to what they call a heap leaching method of extraction.

Normally when we think of hard rock ore, we think of going to a crushing plant or a reduction plant of some kind of thing that you normally think of. And if that were true we certainly would be having to ship ore into Tacoma and we would probably have to have other kinds of reduction plants, some sort of a mill someplace to do that.

Not all ore is susceptible to the heap leaching process. So on the Cougar Mine what they have done is to build what appears to be almost the size of a small football field and it is paved with asphaltic pavement, it has ridges in it, squaring it off into sections so they can put a heap of ore on this section and another heap of ore on another section and so forth. Because in this particular case the people in New York do not own this but they are leasing this property from another party. So this is not an owned property. The property is being developed for the same owners but under a lease with a different party.

What they do when they get these heaps of ore on these various pads, each one slopes down so that the fluid that they use will eventually go into the same trough. They put a hose, just like a garden hose which has holes in it and spray like you water your lawn a diluted solution of cyanide.

Now, cyanide as it permeates these heaps of ore carries with it and leaches out the precious metal of both gold and silver.

So what runs off of these piles from this other operation is a solution of cyanide. So that is saturated with gold and silver ore, we hope. And it is then pumped --

ALJ: Is this a new process?

MR. ERWIN: It's not completely new but it has not been used in this part of the country, and the only other one that I know that is in operation is in New Mexico -- no, it is in Carlin, Nevada, where the same type of thing is used. It is an open pit gold mine there.

After this saturated solution drains off these piles, it is then pumped into a tower where there is carbon columns

where the water or solution rate of flow is controlled so that it goes down through these carbon columns, the carbon extracts from the solution basic mineral that we are interested in recovering.

To date there has been no production from that except for test purposes and that's all. None of it has been shipped.

To be quite frank, at this moment we are having difficulty in trying to extract from the carbon columns the precious metal and determine whether or not they are getting a sufficient quantity out of this operation to make this procedure worthwhile.

The point of all of this explanation is to show the court and really for counsel's edification, too, that there is nothing at this moment being shipped interstate by way of product, nothing has been shipped outside the State of Oregon, nothing probably will be shipped outside the State of Oregon for a long time, if ever. I don't know. After they recover the gold out of these carbon columns, I don't know whether the gold would be sold in interstate commerce then or whether people would come to the mine to pick it up. I am not knowledgeable enough to know how that would be done.

But in any event at this moment this mine is totally in the development stages, as are the rest of the properties of William Bowes, many of which there is no activity on yet. They are merely in the assessment stages on many of them.

Counsel asked some questions about supplies. Most of our supplies are bought locally. In fact I will ask Mr. Henderson to testify, and I guess probably all of them are bought locally. I don't know where the cyanide come from but I suspect it could be purchased locally, although it might have to be shipped in. But my understanding is that that doesn't constitute interstate commerce. It is the transportation out or the sale of the product which constitutes interstate commerce.

So there is a little question as to whether at this stage we come under this act at all. And I thought it might be helpful if I would explain to the court why this is an unusual type of mining operation, why it is not subject to the usual situation.

There are few other facts in the record bearing directly on the commerce question. Kenneth D. Henderson, mine manager at the Cougar Mine testified that he was familiar with two other mine sites of the Respondent,

namely, the South Mountain property in Idaho and the operation in the Steamboat Springs area, Colorado (Tr. 20). Also he testified that Cougar property is owned by a family in Baker, Oregon, and leased to the Respondent, a New York corporation (Tr. 21).

Mr. Henderson explained that the mine was not producing ore on the lower level but that the operator was working the upper levels on a part time basis and the personnel used varies from 14 to as many as 25 (Tr. 21-22). The approximate length of the tunnel worked in August 1978 was about 470 feet (Tr. 27).

Explosives are used in the operator's conventional method of mining. The explosives are purchased on a 60-day interval basis. These are obtained in Boise, Idaho, and shipped from there to the Cougar Mine in Oregon. Fifty cases are purchased at a time which cost a total of $2,500 (Tr. 23-24).

Discussion of "Commerce" Issue

Respondent contends that its Cougar Mine operation is solely developmental, that no ore has been produced or shipped, and that the mine operation therefore neither is in "commmerce" or affects "commerce." It cites Morton v. Bloom 373 F. Supp. 797 (WDC Pa. 1973) as holding that a one man coal miner who sold the production of the mine in intrastate commerce is not subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969.

In approaching this discussion, it is first noted that the delegation of authority under the act is very broad. In affirming the District Court decision, the United States Court of Appeals for the 3rd Circuit in Kraynak Coal Company v. Marshall, Docket No. 78-2576 ___ F.2d ___ (3rd Cir. 1979) held on interstate commerce as follows:

> Appellants also argue that the Coal Mine Act does not reach them because their mine sells coal only intrastate to the Penntech Papers Company. They contend that these sales are insufficient to bring their operation within section 803, which declares that the act covers "[e]ach coal of other mine, the products of which enter commerce, or the operator or products of which affect commerce." In enacting the statute Congress intended to exercise its authority to regulate interstate commerce to "the maximum extent feasible through legislation." S. Rep. No. 1005, 89th Cong., 2d Sess. 1, reprinted in [1966] U.S. Code Cong. & Ad. News 2072, 2072. We agree with Judge Rosenberg's conclusion that "the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of 803 of the Act." 457 F. Supp. at 911. See also Shingara, 418 F. Supp. at 694-95.

While the court was passing on the 1969 Act, the present Act, the Federal Coal Mine Health and Safety Act of 1977, was not changed with reference to commerce. It may be concluded, therefore, that the 1977 Act contains a delegation of authority over commerce as broad as that which Congress can give.

Respondent's principal argument in this case, as noted above, seems to be that because the Cougar Mine was developmental and no ore was produced, nothing therefore either moved in commerce or affected commerce. The commerce grant in Section 4, however, does not necessarily require that products be produced. It states in part "or the operations or products of which affect commerce" (emphasis added). "Commerce" in Section 3(b) is defined very broadly as encompassing "trade, traffic, commerce, transportation, or communication among the several states or between a place in a State and anyplace outside thereof * * *". In this case the facts, as will be related in more detail below, show at a minimum an "operation" which affects commerce, i.e., affects any trade, traffic, transportation, or communication among the several states or otherwise as set out in section 3(b).

The evidence or reasonable inferences therefrom demonstrates that the operation affects commerce in several direct ways. First, Respondent is not a one man operation or a small, localized business as was true in the Bloom case, supra. Far from it. Respondent is in a way a multi-state operation. William Bowes, Incorporated, is not a "production" company, but it does separately incorporate and under contract or lease develop certain properties. Some of the properties include one in Wyoming, one in the Steamboat Springs area in Colorado, a South Mountain property in Idaho, a property in Nevada and the Cougar Mine in Oregon, the subject of this proceeding. Apparently none are at this time in production, but rather are in a developmental stage.

The fact of these different properties in different states, even though not in production suggests an operation which affects trade, traffic, or communication between two or more states. It is a fair inference that communication by telephone, mail, or otherwise has occurred between states involving the New York Corporation and the Oregon Corporation or other properties.

Specifically concerning the Cougar Mine, although there has been no production, the leasing of the property in Oregon by a New York Corporation and the building of a significant facility including an area paved the size of a small football field and all reasonable inferences therefrom permits a conclusion that the operation has affected trade, traffic, or communication between states. Finally, as to the Cougar Mine, the evidence expressly shows the movement of goods from out of state: specifically, the shipments of explosives from Boise Idaho, to the plant site in Oregon. Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976). Therein, the court held that the "purchase of several items of equipment and an insurance policy produced by out-of-state sources also brings [the mine] within the

affecting commerce rubrique and exposes them to the Act." Cf. Kraynak Coal Company v. Marshall, supra, and Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974).

Finally, the holding of the Ninth Circuit in Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), appears to be dispositive of the argument that the Cougar Mine was only in the developmental stage. In that case, involving the Occupational Safety and Health Act, the court held that the activity of clearing land for the purpose of growing grapes is an activity which, if performed under unsafe conditions, will adversely affect commerce; that clearing land is an integral part of the manufacturing of wine, and therefore commerce is affected by the activity. In this proceeding, the activity of developing a mine is an integral part of gold mining and the subsequent production of gold and similarly will affect commerce.

Based on the above cited facts and circumstances, I affirm my decision from the bench that the Respondent at its Cougar Mine facility is engaged in "commerce" within the meaning of that term in the Act and subject to the Act and the regulations.

Decisions on the Citations

Citation No. 350060

The decision made orally from the bench on this citation is contained in the record at pages 70-75 and reads as follows:

> This decision deals with Citation No. 00350060. My finding on the fact of the alleged violation is as follows:
>
> The mandatory standard in this case, alleged to have been violated, is 30 CFR 57.13-21 and reads as follows, "Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines at high pressure hose lines of three quarter inch inside diameter or larger, and between high pressure hose lines of three quarter inch inside diameter or larger, where a connection failure would create a hazard."
>
> The inspector in citing the violation stated, "A safety chain or other suitable locking device was not used at the connection of the high pressure air line to the jack leg air drill in use at the face of the decline to prevent persons from being injured in the event the air line came loose from the drill."
>
> The evidence consists mainly of the testimony of the inspector and is not in dispute on most aspects of the charge. The inspector did testify that he found -- or that he

observed the jack leg drill in use and while he did not see an automatic shutoff valve, he believed that there may [not] have been one. He also observed that the machine was of the type that normally requires the three quarter inch inside diameter hose. He also observed that the jack leg drill did not have the safety chain or other suitable locking device. A locking pin was acceptable to the inspector and abatement consisted of inserting of the locking pin.

I find these to be the facts. And I should add that no evidence in defense was presented which would suggest that there was an automatic shutoff valve or that this machine otherwise was not covered by this mandatory standard.

In circumstances and for the reasons that I am going to shortly explain, I find this to be a violation of the standard as charged.

The principal defense as I understand it and which I believe deals with the aspect of negligence more than it does the fact of the violation is to the effect that this was the fault of the individual employee. However, I will deal with that right here and now because it was a defense raised.

Perhaps my view is colored to some extent. I have grown up and developed under the coal mine law or when the law was applied only to coal mines. The question of responsibility of the operator was fairly early settled and did not ever seem to be in serious doubt. I think the legislative history, the way the Act is written, all tell us that Congress intended for the operator and not the employee to be held responsible. It was only I think in perhaps one rare instance, and that is in the securing of the smoking materials, do they ever place responsibility on the employee. Now, I fully recognize and I think that everybody that works with this does, that there are occasions when no matter what the operator does, it is just simply impossible to carry out a particular regulation. That is, where you fail to get the employees' cooperation. Some of those areas I have mentioned previously. That is, personal protective devices. And the board has ruled on that.

However, in other areas dealing with the use of machines and devices, I don't think that rule applies. The argument was made and put very strongly and very ably, that * * * it was impossible for the operator here to comply with this particular regulation, and I would say

from what I have seen, that it was perhaps difficult, but I cannot agree with the impossible designation. I accept the fact that in this case the operator was diligent, used all reasonable means available to it to comply with the law, but in spite of all of that employees did get out of line and did not follow through and engaged in the acts that they weren't supposed to for the purposes of safety.

So what is the answer to that? It would just be glib of me [if] I sit here and say there is an answer; that you can somehow penalize men. Maybe that's impossible, labor relations being what they are. I don't know what the answer to it is.

I simply could not subscribe, however, to the proposition that there is no answer, and my general conclusion would be that further efforts or other efforts could be employed to prevent this sort of a violation.

My judgment, of course, is based upon the clear requirements of the law which place the responsibilities solely and exclusively upon the operator. And if I did not so hold, I would just be going contrary to the very settled law in this area. So that would then be the reason for my finding of the violation in this case as to this citation.

I will go through all of the criteria for this first alleged violation and that won't be necessary hereafter.

As to the history of prior violations, based on the stipulation, there were only two other prior citations.

I find there was no significant history of prior violations.

As to the appropriateness of the penalty to the size of the operator, pursuant to the stipulation I find that the penalties herein will be appropriate to the size of the operator. I should make the finding that there were 20 employees working at the mine and that they worked some 19,000 man-hours.

I would conclude that this would be a small mine under the circumstances and that the penalties, if any, that are assessed herein will be appropriate to its size. The effect on the operator's ability to continue in business. Pursuant to the stipulation, I find that the fines which will be assessed will not affect the operator's ability to continue in business.

> Good faith compliance. Again, based upon the stipulation, I find that the operator which abated all of the violations within the times established, demonstrated good faith efforts to achieve rapid compliance.
>
> Gravity. On this criterion, the only evidence that we have is that by way of the inspector who testified that if this hose breaks loose, it might whip around and injure employees, and in this instance one employee might have been subjected to the effects, could have resulted in bruises and eye injury. And also that employee could not have easily avoided the whipping hose. I appreciate the statement by counsel for the operator that this maybe isn't all that serious. However, that would not be evidence of record and I could not rely on it. Accordingly, I find it to be a moderately serious violation.
>
> The last and final criterion is negligence. I have already indicated some of my thoughts on the negligence. I think it is evident that the operator did have a program to check these kinds of activities to make sure that this hose was locked. In this instance it appears that it might have been the fault of an individual man, not inserting the key. In the circumstances I would find slight negligence.
>
> Accordingly, and in summation, I find that the operator violated the regulations as charged and that an appropriate penalty would be that which has been recommended by the Secretary, which is $18. I hereby assess the penalty of $18.

This decision is hereby affirmed.

Citation No. 350061

The decision made orally from the bench on this citation is contained in the record at pages 88-89 and reads as follows:

> ALJ: I will proceed now to make my decision from the bench on this citation, which is 00350061, with the same reservations that I mentioned for the prior citation [that is, subject to reconsideration of the "commerce" issue].
>
> In this case the inspector has alleged in his citation that there was a violation of 30 CFR 57.6-5, which reads "Area surrounding magazines and facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass, or trees (other than live trees ten or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet."

> The inspector indicated in his citation the condition or practice to be that the area around the powder magazine had an accumulation of rubbish, dry brush and other combustible materials.
>
> The only evidence we have in this citation is that received through the inspector. That is, his testimony and certain of the exhibits.
>
> The inspector has testified that there was an accumulation of materials which included a fallen tree, grass, possibly some brush and bark. This material was close up and even on top of the magazine.
>
> There is also evidence that at this particular time it was not dry but that it had rained a short time before.
>
> In light of this evidence and there being nothing to the contrary, I find that there has been a violation of the mandatory standard as alleged. My findings on the two criteria of gravity and negligence are as follows: On gravity, I find that while it may not have been extremely serious on this particular day because of the dampness, it was a situation in which dry periods do occur and therefore it could have been dangerous. I find therefore that this violation was moderately serious. On negligence, for the circumstances it appears to me that this was a situation which the operator knew or should have known about. And I find that this was ordinary negligence.
>
> Accordingly, in summation, I find that the operator violated the regulation as charged and that an appropriate penalty is that proposed by the Secretary in this case, the sum of $10.

The above decision is hereby affirmed.

Citation No. 350062

The decision on this citation was rendered orally from the bench. It will be found at pages 103-106 of the transcript and reads:

> ALJ: The following is my decision with reference to citation No. 00350062.
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> This decision is made with the same reservations as those made previously.
>
> The inspector alleged in this case a violation of 30 CFR 57.6-20(f) which requires that "Magazines shall be * * * (f) Made of non-sparking material on the inside, including floors."

And the inspector alleged as the condition or practice that the storage explosive magazine seen had exposed sparking material on the inside of the magazine.

The evidence received consists of the testimony and the exhibits of both the inspector and of the operator, Mr. Henderson. There is not much, if any, dispute about the facts. The magazine had a door of an outside metal construction to which was nailed wooden planks. The nails came through the backs on the inside and were bent over.

The inspector has testified that this was a sparking material and could be the source of a spark or an explosion of the dynamite stored in the magazine. The inspector's statement which was filed indicates that the possibility of the event occurring would be rare. So far as the fact of violation is concerned, which has nothing to do with the frequency or the likelihood of the event, I do find that the standard was violated as alleged.

I think, as I understand it at least, the defense is mainly along the lines that there was such a small amount of sparking material as to make it virtually impossible that a spark would ever occur.

Now, unfortunately, the standard does not specify the amount of sparking material. That is, whether it could be a small amount or a large amount.

The inspector has given his view as to the possibilities in which even what is obviously a relatively small amount of sparking material could still be sufficient under some circumstances to cause a spark. The main point that I would have to decide, then, was whether or not that was sufficent sparking material to come within the standard and, based on the inspector's testimony, I find that it is.
My findings on the two statutory criteria of gravity and negligence are as follows: * * * I do not find that that would be serious. I would refer back to the inspector's view that the possibility of the event occurring would be rare. I believe in light of that circumstance that I would find it to be non-serious. Now, that leaves negligence. In light of all the testimony including that of Mr. Henderson who held the view that this would not cause a spark and that he never realized that this would be required under the regulations, I find that there was a small degree of negligence. The penalty proposed

> by the Secretary which is $10, I believe, already takes into account the factors of non-seriousness and a small degree of negligence, so I would find the same amount %y(3)4B I would assess the same amount, that is, a penalty of $10.
>
> In summation, if it is not clear, I find that the operator has violated this regulation as alleged and that appropriate penalty, taking into account all of the statutory criteria, would be the sum of $10.

Citation No.350063

A decision was rendered from the bench on this citation and will be found at pages 136-138 of the transcript as follows:

> ALJ: I will make my decision in the citation No. 00350063. It will be made subject to the same reservations heretofore mentioned.
>
> The inspector has charged a violation of 57.12-2 which reads "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." The inspector found as the condition or practice that the diesel electric power generator did not have a disconnect switch located at the generator set and that the diesel electric generator was located within 150 feet of the mine portal.
>
> In this instance there is not a great deal, if any, dispute as to the basic situation. The diesel is located 150 feet or so from the mine portal. There is a line running therefore from the diesel to the portal and as I understand it, at least, there is no question that that line is not protected. There is no dispute that if a line %y(3)4B or I should say circuit or piece of equipment needs to be protected, that the type of switch required was appropriate.
>
> This is more or less the classic situation in which the inspector in his view and in his judgment, based upon his experience and knowledge, [determined] that such line should have been protected by a disconnect switch. On the other hand, Mr. Henderson testified at least as I understood it that the switch on this particular circuit was not necessary.
>
> My finding is that this did violate the regulation as charged and I would give my reason as I view it. The mandatory standard does require that every circuit be provided

with a switch. Now, this may not have been a highly vital or important circuit. I really don't know that. But it was, as I understand it, an unprotected circuit. This may be for all I know an area in which we are talking about something that becomes quite technical in electrical terms. That is certainly possible. But at least strictly speaking, as I understand it, the standard does require such a switch and I therefore find the violation as alleged.

The gravity of that violation. As the inspector testified, in the case of a short there was a possibility of electrical shock. I find the violation to be moderately serious. On negligence, this is a condition which the operator knew or should have known about and I find it to be slightly negligent. Under all of the circumstances mentioned and because of the disagreement about the strict need for the switch, I find that only a nominal penalty should be assessed. The Secretary has recommened $36, which under the circumstances may be too large. In my view the penalty should be $18.

And in summation I find that the operator violated the regulation charged and that an appropriate penalty, taking into account all of the statutory criteria, is $18.

This decision is hereby affirmed.

Citation No. 350064

A decision was rendered orally from the bench as to this citation and is found at pages 162-164 of the transcript as follows:

ALJ: The inspector in this instance charged a violation of 30 CFR 57.9-110, which reads as follows: "Shelter holes shall be provided to ensure the safety of men along haulageways where continuous clearance of at least 30 inches from the farthest projection of moving equipment on at least one side of the haulageway cannot be maintained."

In his citation the inspector charged the condition or practice to be as follows, "Shelter holes were not provided along the main haulageway to ensure the safety of men along the haulageway. At least 30 inches of clearance must be provided from the farthest projection of moving equipment on at least one side of the haulageway."

On this alleged violation we have the testimony of the inspector, Mr. Moore, and also of Mr. Henderson. Mr. Moore has indicated that he did not actually make any of the measurements but that it was his view that at times the clearance would be less than 30 inches

because of his experience and because of his estimate of the size of the entry.

Mr. Henderson has testified on the other hand that the entry would be at least 108 inches and more, possibly another foot, to make it 120 inches, and that based upon the manufacturer's design, the scoop is 61 inches wide, which would leave in actuality a total of approximately 5 feet at the maximum.

In looking at the standard, I observe that it does state that shelters are required where clearance of at least 30 inches on one side of the haulageway cannot be maintained.

Now, it would be apparent if the measurements mentioned by Mr. Henderson are true, that certainly 30 inches could be maintained. It is a question of whether they were. I believe that the inspector's belief was that with the conditions of the mine, the nature of the rubber tired vehicle and so forth, that they were not being maintained. The testimony does indicate his view that this would be a safety measure regardless of the regulation. I don't believe that I would be able nor would I want to rule on whether it should be a safety measure regardless of the regulation. My function would be to look at the regulation and see if it comes within it.

My holding is that there is insufficient evidence here to prove the violation. That is based mainly on the fact that the inspector did not have accurate measurements. So it does provide a certain amount of uncertainty. It is perhaps likely that when you consider rubber tired vehicles going down that entry, that maybe 30 inches was not maintained at all times on one side, but the main point that I would rely on is that we just simply don't know from the testimony that we have.

So, accordingly, I would find in this citation that there is no violation and that citation will be vacated. And hereby it is vacated.

This decision is hereby affirmed and the petition as to this citation is dismissed.

The assessments for the above citations are summarized as follows:

Citation Nos.	Assessments or other disposition
350060	$18.
350061	10.
350062	10.
350063	18.
350064	vacated
Total Assessment	$56.

ORDER

It is ordered that Respondent pay the penalty of $56 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge