CCASE:
SOL (MSHA) V. CLINCHFIELD COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket Nos.	Assessment Control Nos.
		NORT 78-325-P Moss No. 2 Mine	44-00281-02018F
v.			
CLINCHFIELD COAL COMPANY,	RESPONDENT	NORT 78-364-P	44-00280-02022V
		NORT 78-365-P	44-00280-02023V
		NORT 78-366-P Camp Branch No. 1 Mine	44-00280-02024V
		NORT 78-367-P Chaney Creek No. 2 Mine	44-00279-02012V
		NORT 78-368-P Hurricane Creek Mine	44-01773-02010V
		NORT 78-369-P Open Fork No. 2 Mine	44-00267-02019V
		NORT 78-376-P Lambert Fork Mine	44-00241-02013F

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, Department of Labor, for Petitioner Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to written notice dated August 16, 1978, as amended August 28, 1978, a hearing in the above-entitled consolidated proceeding(FOOTNOTE 1) was held on November 28 and 29, 1978, in Abingdon, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

All of the Petitions for Assessment of Civil Penalty in the docket numbers listed in the caption of this decision were filed on June 22, 1978, except the Petition in Docket No. NORT 78-325-P which was filed on May 12,, 1978. All of the Petitions seek assessment of a civil penalty for a single violation of the mandatory health and safety standards except for the Petition filed in Docket No. NORT 78-366-P which seeks assessment of civil penalties for two alleged violations.

Counsel for MSHA filed on February 26, 1979, a posthearing brief with respect to the issues raised in each docket except for Docket Nos. NORT 78-366-P and NORT 78-368-P. Counsel for MSHA did not file briefs in Docket Nos. NORT 78-366-P and NORT 78-368-P because, during the hearing, he had orally made motions for approval of settlement with respect to those two cases. Counsel for Respondent filed posthearing briefs on March 1, 1979, with respect to the issues raised in all dockets except for the issues raised in the two cases in which the parties had entered into settlement agreements. Counsel for Respondent did not file a brief in Docket No. NORT 78-369-P, but there is nothing in the official files to show whether the failure to file a brief in that docket was by inadvertence or for some other reason.

Issues

The issues raised by the Petitions for Assessment of Civil Penalty are whether violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Four of the six criteria may usually be given a general evaluation, but in this particular proceeding only two of the criteria may readily be considered on a general basis so as to make such generalized consideration applicable to all of the violations which were alleged in each docket. The two criteria which may be given a general evaluation are the size of Respondent's business and the question of whether the payment of penalties would cause Respondent to discontinue in business. The remaining four criteria, namely, Respondent's good faith effort to achieve rapid compliance, Respondent's negligence, if any, the gravity of the alleged violations, and Respondent's history of previous violations, will be considered on an individual basis in each docket when the parties' evidentiary presentations are hereinafter reviewed. The two criteria concerning the size of Respondent's business and whether the payment of penalties would cause Respondent to discontinue in business are considered below.

Size of Respondent's Business

Five of Respondent's mines were the subject of the Petitions filed by MSHA in this consolidated proceeding. Respondent's Moss No. 2 Mine is one of the largest coal mines in the State of Virginia. It employs approximately 350 miners to produce from 2,500 to 3,000 tons of coal per day (Tr. 15). Respondent's Camp Branch No. 1 Mine employs about 185 miners to produce approximatley 1,200 tons of coal per day (Tr. 254-255). Respondent's Chaney Creek No. 2 Mine employs approximately 150

miners to produce about 1,300 tons

of coal per day (Tr. 477). Respondent's Open Fork No. 2 Mine employs about 150 miners to produce approximately 1,400 tons of coal per day (Tr. 524). There are no data in the record to show the size of Respondent's Hurricane Creek Mine because the Petition filed with respect to that mine was the subject of a motion for approval of settlement. Since the data already in the record supported a finding that Respondent operates a large coal business, no evidence was given with the respect to the size of Respondent's Hurricane Creek Mine. It was stipulated that Respondent is a part of the Pittston Coal Group (Tr. 16). On the basis of the foregoing facts, I find that Respondent operates a large coal business and that any penalties which may hereinafter be assessed in this proceeding should be in an upper range of magnitude insofar as they are determined under the criterion of the size of Respondent's business.

Effect of Penalties on Operator's Ability to Continue in Business

Respondent's counsel did not present any evidence at the hearing with respect to Respondent's financial condition. In Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), the former Board of Mine Operations Appeals held that when a Respondent fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties would not cause Respondent to discontinue in business. In the absence of any specific evidence to the contrary, I find that payment of penalties will not cause Respondent to discontinue in business.

The Settlement Agreements

Docket No. NORT 78-366-P (Camp Branch No. 1 Mine)

Order No. 1 CAG (7-46) September 6, 1977, section 75.400 (Exhibit M-18)

Order No. 1 CAG cited a violation of section 75.400 because float coal dust and loose coal accumulations existed in depths ranging from 1/8 inch to 2 inches along various conveyor belts for a distance of about 4,800 feet. The Assessment Office waived the formula normally used in assessing penalties and made findings as to the six criteria to support a proposed penalty of $4,000.

Counsel for MSHA stated that Respondent had offered to pay a penalty of $2,000 in settlement of the violation of section 75.400 alleged in Order No. 1 CAG. MSHA's counsel said that he was willing to accept the offer of settlement because MSHA personnel who were acquainted with the facts at the time Order No. 1 CAG was written had explained to him that a very serious roof problem had developed in a portion of the mine. Management had consulted with MSHA personnel and everyone agreed that the section with the bad roof should be abandoned because of the deteriorating condition of the roof. While the mine's personnel were engaged in removing the conveyor belt so that the section

could be abandoned, the loose coal and float coal dust accumulated, but the urgency of the abandonment operations was believed to have priority over the cleaning up of the accumulations. MSHA's counsel noted

that the Assessment Office did not have the aforementioned extenuating facts in its possession when it proposed a penalty of $4,000 for the violation cited in Order No. 1 CAG (Tr. 463-466).

As has been found above, Respondent is a large operator. There was a good faith effort made to achieve rapid compliance with respect to Order No. 1 CAG. Respondent was nonnegligent in the circumstances. Exhibit M-12 shows that Respondent has paid penalties for 43 prior violations of section 75.400 at its Camp Branch No. 1 Mine. Exhibit M-12 also shows, however, that Respondent violated section 75.400 only three times during the first 8 months of 1977. That is an especially good trend in reducing the number of violations of section 75.400 and warrants acceptance of Respondent's proposed settlement with respect to the violation of section 75.400 alleged in Order No. 1 CAG.

Order No. 2 CAG (7-47) September 19, 1977 section 75.301-4 (Exhibit M-21)

Order No. 2 CAG alleged that section 75.301-4 had been violated because the velocity of the air reaching the working face of the No. 2 pillar split in the 2 Right Section off the 8 Left Mains was too low to be measured with an anemometer. The Assessment Office waived the usual formula employed for determining civil penalties and made findings as to the six criteria to support a proposed penalty of $4,000.

MSHA's counsel stated that Respondent had offered to settle the issues raised by Order No. 2 CAG by paying a civil penalty of $2,500. Although the Camp Branch No. 1 Mine releases some methane, there have been no explosive quantities of methane found in the mine. Consequently, the primary factor to be considered in assessing a penalty is that absence of a sufficient air velocity exposed the miners to the possibility of contracting pneumoconiosis. In such circumstances, MSHA's counsel expressed the opinion that the Assessment Office had not shown sufficient gravity to warrant imposition of a penalty of $4,000 and he moved that the settlement offer of $2,500 be approved (Tr. 466-467).

As previously shown above, Respondent is a large operator. There was a rapid good faith effort to achieve compliance as the alleged violation was corrected within a period of 45 minutes. There was ordinary negligence. Exhibit M-13 shows that Respondent has paid penalties for four previous violations of section 75.301-4 at its Camp Branch No. 1 Mine, but Exhibit M-12 also reflects that Respondent has not violated section 75.301-4 at its Camp Branch No. 1 Mine since November 30, 1976. In such circumstances, the facts support approval of Respondent's offer to pay a penalty of $2,500 for the violation of section 75.301-4 alleged in Order No. 2 CAG.

Docket No. NORT 78-368-P (Hurricane Creek Mine)

Notice No. 1 VH (7-28) August 1, 1977 section 75.200 (Exhibit M-27)

Notice No. 1 VH alleged that a violation of section 75.200

had occurred because Respondent had failed to comply with its roof-control plan in that

the face of the left crosscut off No. 3 entry had been advanced 29 feet but only two rows of roof bolts had been installed in the last 14 feet of supported roof. The Assessment Office waived the formula which is normally used in determining penalties and made findings with respect to the six criteria to support a proposed penalty of $1,500.

MSHA's counsel stated that Respondent had offered to settle this alleged violation of section 75.200 by paying a penalty of $1,250. MSHA's counsel said that the only extenuating circumstances were that the roof appeared to be sound and that the violation consisted of Respondent's failure to install two additional rows of roof bolts in an area from which coal had recently been extracted by the continuous-mining machine. The violation had not apparently exposed anyone to a serious threat and MSHA's counsel expressed the belief that a penalty of $1,250 was adequate in the circumstances (Tr. 468-472).

As has been found above, Respondent is a large operator. There was a good faith effort to achieve rapid compliance because the alleged violation was corrected within an hour after the notice was written. There was ordinary negligence. Exhibit M-26 shows that Respondent has paid penalties for 12 prior violations of section 75.200 at its Hurricane Creek Mine, but only one violation occurred in 1975, none in 1976, and only one occurred in 1977 prior to the violation alleged in Notice No. 1 VH. I do not condone any violations of section 75.200, but the evidence shows that Respondent is making an effort to eliminate violations of section 75.200 at its Hurricane Creek Mine. The aforesaid findings warrant approval of Respondent's offer of settlement with respect to the violation of section 75.200 cited in Notice No. 1 VH.

The Contested Cases

Docket No. NORT 78-325-P (Moss No. 2 Mine)

Notice No. 1 WJT (6-85) December 21, 1976 section 75.1403-10 (Exhibit M-7)

Findings. Section 75.1403-10, to the extent here pertinent, requires that a permissible trip light or other approved device, such as reflectors, be used on the rear of coal cars pulled by locomotives. Respondent violated section 75.1403-10 because no light or reflector had been placed on the last or 17th car of a line of loaded coal cars being pulled in Respondent's mine (Tr. 14). The violation was very serious because the train of cars became stalled on the main track leading to the dumping point and the unlighted end of the train of cars was hit by another locomotive pushing an empty car (Tr. 41; 152). The impact of the collision drove the empty car back upon the operator of the locomotive. The empty car came to rest upon the locomotive operator and caused his death by suffocation (Tr. 60-61; 80-81). Respondent was grossly negligent in failing to provide a proper reflector on the end of the train of loaded coal cars (Tr. 44-45; 47).

Discussion and Conclusions. Respondent's brief (pp. 8-9) contends that MSHA failed to prove that the death of the locomotive operator was the result

of Respondent's failure to provide a reflector or other light on the end of the 17th car of coal. Respondent argues that the locomotive which was pushing the empty car was 1 inch higher than the empty car and that the operator of the locomotive would have had to have been crouched down to avoid the cold air in the track haulageway and would have had to have been unobservant to have run into the rear of a loaded coal car which was 8 feet wide and 30 inches high. It is true that no one saw the operator of the locomotive just before the collision and it is possible that he was not alert in performing his job, but the coal car was not a bright color and it is a fact that the end of the car was not equipped with a light or reflector which might have caught the locomotive operator's attention in time for him to have stopped before colliding with the end of the coal car (Tr. 117; 130; 148).

Respondent's superintendent testified that before becoming a supervisor, he had been a locomotive operator for about 20 years, and that it is the practice for motormen to crouch low in the locomotives to avoid the cold air in the haulageway and thereby get only occasional glimpses of the track in front of them (Tr. 135; 140-141; 148). It is management's obligation to train its operators to look where they are going and to provide them with such shields or goggles as may be necessary to withstand the cold air and still enable them to operate the locomotives in a safe manner. The deceased operator may well have been following the example of the superintendent and may have assumed that nothing would be on the track in front of him. Nevertheless, I must reject the defense that Respondent cannot be held to be negligent because of the claim that the deceased operator of the locomotive would have seen the unlighted stationary coal car if he had been observant.

It is true, as Respondent notes in its brief (p. 6), that one of MSHA's witnesses expressed the belief that a trip light would not have helped the deceased operator of the locomotive (Tr. 69). On the other hand, two of MSHA's witnesses believed that a trip light would have assisted in preventing the fatal accident (Tr. 117; 130). In fact, one inspector believed that the fact that there was no trip light and the fact that the deceased locomotive operator was pushing (instead of pulling) an empty car were the direct causes of the fatal accident (Tr. 131-132). Respondent can hardly expect to avoid liability for the fatal accident by claiming that it had failed to train the deceased operator of the locomotive to look where he was going and had also failed to instruct him in safe operating procedures, that is, to pull cars on the main line instead of pushing them (Tr. 132).

MSHA's brief (p. 9) recommends that a penalty of $9,000 be assessed for this violation of section 75.1403-10. I believe that a penalty of $9,000 is warranted. None of the facts associated with the fatal accident are favorable to Respondent's management. The locomotive which was stalled was not functioning properly at the time the dispatcher suggested to its operator that he take a trip of 17 loaded cars to the loading point (Tr.

94). The locomotive had just come from the repair shop and should have been returned there for further repairs (Tr. 92). The operator of the locomotive which stalled did not report to the dispatcher that the train was stopped (Tr. 97). There was speculation that the locomotive operator's failure to call the

dispatcher was related to a discharged battery, but MSHA's electrical inspector testified that locomotive phones or radios depend on the trolley wire for power rather than batteries (Tr. 96; 122). In any event, the operator of the stalled locomotive was able to talk to the dispatcher after the fatal accident occurred (Tr. 101). Thus, the events leading up to the occurrence of the fatal accident all indicate that Respondent's management had failed to train its personnel in proper safety procedures. The lack of lights or reflectors on the end of the 17th car was not the only negligent act which caused the fatal accident, but the unmarked car was certainly a contributing cause of the accident and may have been the sole reason for the deceased operator's failure to see the 17th car in time to avoid the collision which resulted in his death.

Respondent's brief (p. 6) argues that failure to have a trip light or reflector on the end of the loaded car was not a serious violation, but no safety violation can be judged in a vacuum. The failure to have a reflector on a coal car in a well-lighted place is nonserious, but when that same car is stalled in total darkness on a main track in a coal mine, where 10 tram locomotives and six supply locomotives are operated, the failure to equip the car with a reflector is a very serious violation (Tr. 149).

In assessing a penalty of $9,000, I am bearing in mind that a large operator is involved (Tr. 15-16), that there was a good faith effort to achieve rapid compliance after the violation was cited (Tr. 52), and that Respondent has violated section 75.1403-10 on only two previous occasions (Exh. M-1, p. 5). The two criteria of gravity and negligence require that a high penalty be assessed. It should be noted that Respondent repeatedly failed to provide trip lights. On October 10, 1973, an inspector issued a notice to provide safeguards requiring Respondent to install trip lights on the ends of coal cars (Exh. M-2; Tr. 22). Yet, over 3 years later, Respondent was using coal cars in its mine without equipping them with proper reflectors (Tr. 130; 133). I consider the failure to comply with section 75.1403-10 in such circumstances to be the result of gross negligence and the penalty of $9,000 recommended by MSHA will hereinafter be imposed for this violation.

Docket No. NORT 78-364-P (Camp Branch No. 1 Mine)

Notice No. 1 CAG (7-38) June 21, 1977 section 75.317 (Exhibit M-13)

Findings. Notice No. 1 CAG dated June 21, 1977, alleged that Respondent had violated 30 CFR 75.317 because (Exh. M-13):

> Five foremen entered underground with flame safety lights that had not been tested in a gas box provided for that purpose to insure that such lamps were in a permissible condition and could not ignite the outside atmosphere of such lamps. This violation occurred despite the fact that this requirement of the regulations was discussed with mine management on June

15, 1977, with the hope that this requirement would not be violated.

Section 75.317 states as follows:

> Each operator shall provide for the proper maintenance and care of the permissible flame safety lamp or any other approved device for detecting methane and oxygen deficiency by a person trained in such maintenance, and, before each shift, care shall be taken to insure that such lamp or other device is in a permissible condition.

The inspector's notice alleged that Respondent's foremen had not tested their flame safety lamps in a gas box to insure that such lamps were in a permissible condition. There is nothing in the language of section 75.317 which requires that a flame safety lamp be tested in a gas box to insure permissibility. In fact, the unrebutted testimony of Respondent's witness Strong, who has a mining engineering degree (Tr. 338), shows that once the light in a flame safety lamp has been extinguished by being placed in a box containing methane, the lamp may be rendered nonpermissible by such testing and the lamp should then be removed from the gas box and be disassembled, examined, defective parts, if any, replaced, and reassembled in order to restore the lamp's permissibility (Tr. 342).(FOOTNOTE 2)

The inspector's notice citing a violation of section 75.317 is based solely on an allegation that Respondent's foremen had not checked the permissibility of their lamps by testing them in a gas box. Since the evidence shows that placing flame safety lamps in a gas box may destroy their permissibility instead of insuring permissibility, I find that use of a gas box for testing permissibility is an undesirable procedure. Therefore, the alleged violation of section 75.317 cited in Notice No. 1 CAG cannot be sustained.

Discussion and Conclusions. MSHA's brief (p. 3) argues that a violation of section 75.317 was proven because it is undisputed that all five foremen failed to check the permissibility of their lamps by placing them in the gas box. As I have already found above, failure to place a flame safety lamp in a gas box to test permissibility is not a violation of section 75.317. MSHA's brief attempts, alternatively, to prove that a violation of section 75.317 occurred by alleging that at least one of the five foremen admitted that he had not cleaned his flame safety lamp before going underground (Tr. 307).

There are several reasons for rejecting MSHA's claim that Notice No. 1 CAG should be sustained because one of the foremen admitted that he had not cleaned his flame safety lamp. First, there is nothing in the pleadings to show that Respondent was advised that the inspector was claiming that a violation had occurred because of the failure of one foreman to clean his lamp

before going underground. The former Board of Mine Operations Appeals held in Old Ben Coal Co., 4 IBMA 198, 208 (1975), that MSHA must give Respondent notice of the violation which is being charged so that it can prepare a proper defense. I cannot accept MSHA's attempt to sustain a violation of section 75.317 based on an entirely different reason from the one alleged by the inspector when he wrote the notice which is the basis for the Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P.

The second reason for rejecting MSHA's claim that a violation of section 75.317 occurred because one foreman had not cleaned his lamp before going underground is that the inspector himself knew little about the condition of the flame safety lamps. The inspector first stated that he did not examine the lamps to determine whether they had been cleaned (Tr. 260). Thereafter he claimed that he could on the basis of experience and general observation attest to the fact that all five flame safety lamps were dirty (Tr. 294). Yet, one of Respondent's foremen testified that he had cleaned his lamp and had lighted it while the inspector was in the mine office (Tr. 319), so there is evidence in the record to rebut the inspector's claim that his general observation was sufficient for him to conclude that all five lamps were dirty. Additionally, one of the witnesses subpoened by MSHA's counsel testified that he was with the inspector and had observed the lamps, but that he could not say that they were either dirty or clean (Tr. 308).

That same subpoened witness introduced the only specific facts in the record about a dirty lamp by testifying that one of the foremen stated that he had not cleaned his lamp before going underground (Tr. 307). The failure of one foreman to clean his lamp falls short of proving that the lamp was nonpermissible. The foregoing conclusion is supported by the testimony of one of Respondent's foremen who said that he sometimes cleans his lamp every other shift. He testified that the lamp held enough fuel to last for two shifts and that since no one used the lamp but him, he was sure it was permissible for use on two shifts. Thus, the failure to clean a lamp immediately prior to going underground does not necessarily mean that the lamp is nonpermissible. It is true that the flame in one of the five lamps could not be ignited, but the inspector said that the failure of the lamp to ignite had nothing to do with his claim that a violation of section 75.317 had occurred (Tr. 292).

Respondent's brief (pp. 7-9) argues that Notice No. 1 CAG should be vacated because the inspector issued the notice under the unwarrantable failure provisions of section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 and Respondent claims that the inspector failed to show that the violation was unwarrantable. The former Board's holdings that the validity of a notice issued under the 1969 Act is not an issue in a civil penalty proceeding has been upheld by the Commission in MSHA v. Wolf Creek Collieries Co., Docket No. PIKE 78-70-P, 79-3-11, and in Pontiki Coal Corp. v. MSHA, Docket No. PIKE 78-420-P, 79-10-13. Therefore, it would be improper for me to address

Respondent's argument that Notice No. 1 CAG was shown by the evidence in this case to have been erroneously issued under section 104(c)(1) of the 1969 Act.

As a part of my finding that section 75.317 is not violated when an operator fails to test the permissibility of a flame safety lamp by placing it in a gas box, it is desirable, however, that I discuss the ramifications which accompany an inspector's failure to understand the intended use of a gas box. The inspector placed a lot of emphasis on the fact that he had warned Respondent's management on June 15, 1977, that they were not using the gas box to test permissibility of flame safety lamps (Tr. 256). The inspector advised management on June 15 that he would make further checks to determine whether they were testing permissibility of the lamps by placing them in the gas box. On June 21, 1977, the inspector returned to the mine and wrote the notice here involved after observing five foremen go underground without having tested their lamps in a gas box (Tr. 251).

Respondent's mine superintendent testified that they did test the flame safety lamps by placing them in the gas box for a short period of time after the notice was issued, pending consideration of the matter by Respondent's safety department. The safety department subsequently advised the superindendent that testing the lamps in the gas box was not required for compliance with section 75.317 and all further testing by use of the gas box was discontinued (Tr. 347).

The inspector issued the notice here involved at 12:15 a.m. when Respondent's superintendent was at home because the superintendent works the day shift instead of the midnight-to-8 a.m. shift during which the notice was issued. Respondent's superintendent testified that if he had been at the mine, he would not have permitted the lamps to be tested on June 21 by placing them in the gas box because Respondent did not then have a tank of methane at the mine for injection of gas into the box. For that reason, the foremen on June 21, in order to satisfy the inspector's requirement that the lamps be tested by placing them in the gas box, used a tank of acetylene to test the lamps. The superintendent stated that acetylene is much more explosive than methane and that it was hazardous for the men to use acetylene for the purpose of testing permissibility by insertion of the lamps into the box (Tr. 347).

The evidence also shows that Respondent did not have the gas box at its Camp Branch No. 1 Mine for the purpose of testing permissibility of flame safety lamps. A gas box is used by the State of Virginia as part of the testing given to persons who wish to become certified mine foremen. The purpose of the gas box is to have the prospective foremen demonstrate how the flame in the lamp will react when it comes into contact with methane in the mine. A halo effect forms around the flame as a warning to a person carrying the lamp that methane is present (Tr. 310; 321). Respondent's superintendent testified that the gas box was kept at the mine in a room used by State and Federal personnel to test employees for competency in performing gas tests, rather than for the purpose of checking permissibility of flame safety lamps (Tr. 345). Therefore, the inspector misunderstood the reason that the gas box was kept at the mine and consequently incorrectly stated in his notice that Respondent failed to check permissibility of

the flame safety lamps by placing them in "a gas box provided for that purpose"

(Exh. M-13). Moreover, the gas box was not kept near the mine office where the flame safety lamps were maintained, but was kept in a building which was about a half mile from the mine office (Tr. 345). That location in itself was an indication that Respondent did not keep the gas box at the mine for the purpose of testing permissibility of flame safety lamps.

A final reason for declining to uphold the inspector's citation of a violation of section 75.317 lies in the fact that the inspector admitted that not all operators have gas boxes and that permissibility can be established at mines without gas boxes simply by disassembling the lamps, inspecting them, cleaning them, replacing defective parts, if any, and reassembling them. The inspector's concession that cleaning and inspecting are sufficient to establish permissibility if an operator has no gas box, but that placing them in a gas box is required when the operator has a gas box, would produce a disparity in the degree of permissibility and safety of flame safety lamps, depending on which operators have gas boxes at their mines (Tr. 292-293). Fortunately, the evidence in this proceeding shows that gas boxes should not be used at all to test permissibility, so permissibility of flame safety lamps at all mines is assured by careful cleaning and examining of the lamps before they are taken underground. Specifically, permissibility may be insured as required by section 75.317 by (1) opening the lamps with a special magnet, (2) checking and cleaning the leather gasket, gauze ring, asbestos rings, pyrex globe, gauzes, nuts, boot, and bonnet, and (3) replacing any of the aforementioned parts, prior to reassembly, which show any sign of defectiveness (Tr. 339-342).

The testimony of John W. Crawford, who was Respondent's director of health and safety at the time the hearing was held, and who had formerly been the district manager of MSHA's Norton Office and assistant administrator of the Mining Enforcement and Safety Administration, was also significant. He stated that it is not Pittston Company's policy to use a gas box to test for permissibility because that kind of test is not required by section 75.317, that it was not the practice of the inspectors, when he was district manager, for them to use a gas box to test permissibility of their flame safety lamps, and that the gas box was supposed to be used to tune one's eye to the appearance of the flame when it was subjected to a gaseous atmosphere (Tr. 325-329).

For the foregoing reasons, I find that the violation of section 75.317 alleged in Notice No. 1 CAG dated June 21, 1977, was not proven. Therefore, MSHA's Petition for Assessment of Civil Penalty in Docket No. NORT 78-364-P will hereinafter be dismissed because the sole civil penalty sought to be assessed in that docket was the violation of section 75.317 alleged in Notice No. 1 CAG issued June 21, 1977.

Docket No. NORT 78-365-P (Camp Branch No. 1 Mine)

Order No. 2 CAG (7-15) January 31, 1977 section 75.400 (Exhibit M-15)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible

materials, shall be cleaned up and not be permitted to accumulate in active workings. Respondent violated section 75.400 because float coal dust and loose coal had been permitted to accumulate in two areas of Respondent's mine. One location was inby the 8 Left Mains tailpiece for a distance of 500 feet. The second location was inby Survey Station No. 3006 in the No. 3 entry of the 3 Right off 8 Mains and in the Nos. 1 and 2 entries of 2 Right off 8 Mains. In both the 3 Right and 2 Right sections, the accumulations existed at crosscuts for a distance of 1,100 feet. The accumulations ranged in depth from 1/4 inch to 20 inches (Tr. 355-356). The accumulations constituted a serious violation because the float coal dust could have propagated an explosion if one had occurred.

A trolley wire constituted a potential ignition source in the first area of accumulations in the 8 Left Mains and at least one high-voltage disconnect switch was a possible ignition source in the second area of accumulations in 2 Right and 3 Right Sections. The ignition sources would have posed a threat of an explosion if methane in an explosive quantity had accumulated in the vicinity of the trolley wire or disconnect switch (Tr. 371). Float coal dust, if thrown into suspension, may explode in the presence of a spark.

At the time the order was written, the areas where the accumulations were observed were traveled mostly for inspections and served as a transfer point for coal produced from other parts of the mine, but the accumulations had originally occurred during active mining operations and had remained a potential explosive threat for a period of several months. The violation was the result of gross negligence because the coal accumulations were being deliberately left in the areas cited in Order No. 2 CAG because Respondent's continuous-mining equipment then being used was unable to extend far enough to extract coal from crosscuts and clean up the residual coal left at such break-through points (Tr. 364-365; 432). Moreover, one of the reasons that the accumulations were not cleaned up was that Respondent was unable to get its roof-bolting equipment into the areas where the accumulations existed for the purpose of installing roof bolts. For the foregoing reason, it would have been hazardous for Respondent to have cleaned up the accumulations because such clean-up would have required that miners work under unsupported roof (Tr. 369).

Discussion and Conclusions. Respondent's brief filed in Docket No. NORT 78-365-P recommends for my consideration a large number of findings of fact, but does not contain a discussion of the six criteria or make any recommendations as to whether a penalty should or should not be assessed. Petitioner's brief contends that a maximum penalty of $10,000 should be assessed because the coal accumulations had been in existence for a long period of time and were associated with Respondent's failure to comply with the provisions of its roof-control plan (Br., p. 5).

There is some merit in Petitioner's argument that a maximum penalty should be assessed for this violation of section 75.400.

Even the two witnesses presented by Respondent corroborated the inspector's statement that accumulations existed (Tr. 413; 430-432). Still, it is a fact that the

inspector was unable to show that the ignition sources were located within the actual area of the accumulations. Therefore, the inspector felt that the likelihood of an explosion depended on the presence in the vicinity of the trolley wire or disconnect switch of an explosive quantity of methane. Respondent's Camp Branch No. 1 Mine has historically liberated such a small amount of methane, that it has not been detected with a hand-held methanometer, but from .01 to .03 of 1 percent of methane has been detected through analyses of bottle samples (Tr. 376). Nevertheless, all mines are classified as gassy under the Act and a mine which liberates any methane could have a concentration large enough to cause an explosion which, in turn, could be propagated by the existence of float coal dust in quantities such as were described in the inspector's order (Tr. 378). As the Commission pointed out in its decision in MSHA v. Old Ben Coal Co., 79-12-4, one of the primary purposes of the Act is to prevent death and injury from fire and explosions. In that case, the Commission also held that the mere existence of combustible materials constitutes a violation of section 75.400. Consequently, the inspector no longer has to satisfy the prerequisites set forth by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), in order to prove that a violation of section 75.400 occurred.

Despite the foregoing considerations, the inspector appeared to have considerable difficulty in supporting his belief that the accumulations were very hazardous in this instance because he was faced with the remoteness of the ignition sources to the accumulations and with the fact that he had observed no defects in the physical condition of those potential ignition sources (Tr. 362; 381-382). A countervailing consideration is the fact that one of Respondent's witnesses agreed with the inspector that the disconnect switch was supposed to be in a neutral split of air, but through a mistake in the way the ventilation curtains had been installed, the disconnect switch was in return air (Tr. 383; 440). Therefore, the area was more susceptible to a possible methane accumulation than it would have been if the area had been properly ventilated. When all aspects of the accumulations are evaluated, the only conclusion which one can reach is that the accumulations constituted a serious threat to the miners' safety.

A consideration of Respondent's negligence shows that Respondent deliberately failed to clean up the accumulations because the mining equipment it was then using would extend only 200 feet and that was not a sufficient distance to permit the crosscuts to be completed without leaving accumulations of loose coal at such break-through points (Tr. 442-443; 451). A mitigating factor about the equipment is that Respondent recognized the equipment's hazardous limitations and has now ceased to use that type of equipment in its mine in order to avoid occurrence of the kinds of accumulations which were cited in the inspector's order (Tr. 460). As Petitioner notes in its brief, Respondent's failure to support the roof in the area of the accumulations was another aspect of the coal accumulations which augumented both the seriousness and negligence associated

with occurrence of the coal accumulations.

The extent of the accumulations is emphasized by the fact that three consecutive shifts of miners worked around the clock for 3 days in applying

enough rock dust in the areas cited in the inspector's order to render the accumulations sufficiently inert to eliminate their threat to the miners' safety (Tr. 455-456).

In view of the fact that the accumulations were extensive and were the result of a deliberate pattern of mining which necessarily resulted in such accumulations, a penalty of $8,000 is warranted and will hereinafter be imposed. The penalty of $8,000 also takes into consideration that Respondent is a large operator and that Respondent's Camp Branch No. 1 Mine has an unfavorable history of previous violations because Exhibit No. M-12 shows that 41 previous violations of section 75.400 have occurred at the Camp Branch No. 1 Mine. Since 10 of those 41 violations occurred in 1976, there is no mitigating downward trend in Respondent's proclivity for violating section 75.400. Therefore, assessment of a large penalty of $8,000 seems to be necessary in this instance to achieve the deterrent effect which imposition of civil penalties was intended to accomplish.

Docket No. NORT 78-367-P (Chaney Creek No. 2 Mine)

Notice No. 1 KCK (7-95) November 17, 1977 section 75.501-2(2) (Exhibit M-24)

Findings. Section 75.501-2(2) provides in pertinent part that all hand-held drills taken into or used inby the last open crosscut shall be permissible. Respondent violated section 75.501-2(2) because its electricians were using a 3/8-horsepower, hand-held nonpermissible drill inby the last open crosscut to drill holes in headless bolts to facilitate their removal by means of a screw extractor or "easy out". The violation was moderately serious because methane emissions of up to .06 of 1 percent have been detected in Respondent's Chaney Creek No. 2 Mine, but methane checks were being made at the time the violation was cited and power for the hand-held drill was being obtained from the continuous-mining machine which would have deenergized the power for the electric drill if as much as 2 percent of methane had accumulated in the atmosphere where the drilling was being done. Respondent was grossly negligent for using the hand-held drill because the electricians knew that it was a nonpermissible drill and were obligated to evaluate the conditions under which they were deliberately using a drill which emitted sparks when it was running (Tr. 478; 486; 491; 508; 515).

Discussion and Conclusions. Respondent's brief raises two primary defenses with respect to MSHA's claim that a violation of section 75.501-2(2) occurred. Respondent's first defense (Br., pp. 5-6) is based on the preliminary observation that using a nonpermissible drill is less dangerous than using a cutting torch or welding equipment under ground. Respondent's argument continues by pointing out that section 75.1106 would have permitted Respondent to use a welding machine for removal of the headless bolts, whereas section 75.501-2(2) entirely prohibits the removal of the bolts by a less dangerous means, namely, use of a nonpermissible hand-held drill. The mere fact that the regulations permit cutting and welding to be done under certain

controlled conditions does not remove the danger associated with use of nonpermissible equipment. As the inspector noted, it is always possible

for methane to accumulate in an explosive quantity despite the fact that only .06 of 1 percent of methane was detected by the inspector at the time he wrote Notice No. 1 KCK (Tr. 480; 486; 491).

Respondent had an option of using a welding machine to remove the bolts, but if Respondent had done so, it would have been obligated to follow the precise provisions of section 75.1106 which require that a check for methane be maintained on a continuous basis. Such welding or cutting is entirely prohibited if as much as 1 percent of methane is encountered and Respondent must have present at the welding or cutting site a suitable supply of rock dust or fire extinguishers. Respondent's witnesses conceded that they were not continuously testing for methane with a hand-held methane detector and, while Respondent did have fire-suppression equipment on the continuous-mining machine and a water hose, Respondent did not have rock dust or fire extinguishers as required by section 75.1106 (Tr. 504; 509). Therefore, Respondent was not taking precautions equivalent to those required by section 75.1106 when welding or cutting is being done. Since Respondent had not taken the same precautions which are required by section 75.1106 when welding or cutting is being done, Respondent cannot expect its use of the nonpermissible drill in violation of section 75.501-2(2) to be condoned.

Respondent's second defense (Br., pp. 7-9) is that the inspector's notice was improperly issued under the unwarrantable failure provisions of section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. The Commission has already held in MSHA v. Wolk Creek Collieries Co., 79-3-11, and in Pontiki Coal Corp. v. MSHA, 79-10-13, that the validity of notices and orders issued under the 1969 Act are not at issue in civil-penalty proceedings. Nevertheless, since Respondent's contentions are based essentially on arguments pertaining to the criteria of negligence and gravity, which must be considered in civil-penalty proceedings, I shall discuss its arguments with respect to those two criteria.

Respondent argues in its brief (pp. 8-9) that the violation was not serious because Respondent's electricians were making methane tests every 15 minutes and that the Chaney Creek No. 2 Mine does not have a history of emitting enough methane to make the likelihood of an explosion more than a mere possibility. As MSHA notes in its brief (p. 9), it is necessary to consider the potential danger associated with a given violation because the purpose of the regulations is to require that miners be protected from possible explosions as well as those which are indisputably likely to occur. An inspector does not have to find the existence of an imminent danger in order to conclude that the use of a nonpermissible drill inby the last open crosscut is a potentially dangerous violation (Tr. 483; 486).

Respondent's brief (p. 8) also argues that there was a very low degree of negligence, if any, associated with the violation. The testimony shows that Respondent's electricians were grossly

negligent in using the nonpermissible drill inby the last open crosscut. While it is true that the chief electrician said that he was unaware that the continuous-mining machine was inby the last open crosscut and that he would not have used the nonpermissible drill if he had known that the continuous-mining machine was inby the

last open crosscut (Tr. 514-515), the fact remains that the chief electrician knew that the drill was nonpermissible. He either knew or was obligated to know whether the machine was inby the last open crosscut. The chief electrician had been working in coal mines for over 30 years and can hardly be found to have been nonnegligent in failing to realize that he was using a nonpermissible drill inby the last open crosscut.

The chief electrician's use of the nonpermissible drill was also associated with his having removed the cover on the control compartment of the continuous-mining machine for the purpose of obtaining electrical current to power the nonpermissible drill (Tr. 514; 517). He stated that he was making checks for methane every 15 minutes for the reason that he had removed the panel cover rather than for the reason that he was using a nonpermissible drill (Tr. 514). Respondent's safety director was hard pressed to support the chief electrician's removal of the panel cover. The most the safety director could say in justification of the opening of the control compartment was that such acts are permitted if the purpose of opening the compartment is to determine the reason for a malfunction of the continuous-mining machine. There was no need to open the control compartment for the purpose of trouble shooting because the electricians working on the mining machine knew what was wrong with the machine, namely, that sheared bolts in the tracks prevented the machine from being trammed from one location to another (Tr. 499-500).

MSHA's brief (p. 3) argues that the inspector's testimony to the effect that a trailing cable was being used to power the hand-held drill is more credible than that of the electrician's testimony to the effect that the drill was being powered from an outlet located in the control compartment beneath the panel cover which had been removed. I have found the chief electrician's testimony to be more credible than the inspector's for several reasons. First, in stating that he had removed the cover to the control compartment (Tr. 514), the chief electrician was admitting that he had done an unsafe act. It is unlikely that he would have fabricated a statement that made him look even more negligent than he would otherwise have appeared. Second, the electricians were very anxious to restore the continuous-mining machine to an operating condition. Use of power from the mining machine would have been an easy way to obtain power for the drill without the electricians' having to find a trailing cable and connect it to the main power source in the mine. Third, at the time the inspector left the scene of the violation, the drill was still hooked to a power source, but the drill had been removed from the vicinity of the mining machine by the time the inspector returned (Tr. 488). The inspector, therefore, was not present when the drill was disconnected from its power source. The chief electrician was certainly in a position to know what the drill's source of power really was. Therefore, I find that the source of the drill's power was the control compartment on the continuous-mining machine. Of course, the removal of the cover from the control compartment increased the number of potential arcing electrical components which could have caused a fire or

explosion if a dangerous accumulation of methane had occurred.

MSHA's recommendation that a penalty of $10,000 be assessed for this violation of section 75.501-2(2) fails to recognize many of the extenuating

circumstances surrounding the violation. First, the continuous-mining machine weighed 40 tons and the inspector incorrectly stated that a shuttle car could have been used to pull the machine a distance of 25 to 30 feet so as to permit the work to be done outby the last open crosscut (Tr. 492; 505-506). Second, the operator did not have the kind of hoist which would have been required to move the machine to a point outby the last open crosscut. Third, a period of about 3 days, or nine shifts, would have been required to bring in another continuous-mining machine having sufficient power to pull the inoperable machine to a point outby the last open crosscut. Third, the inspector removed himself physically from the site of the repair operations with the result that the electricians had time during the inspector's absence within which to continue using the nonpermissible drill for the purpose of completing the removal of the headless bolts (Tr. 509-510; 516). Fourth, if the inspector considered the use of the nonpermissible drill to be a very serious violation, he should have required that the drill be immediately removed from the site of the continuous-mining machine instead of merely advising the electricians that he would not issue a notice of violation at that time and would return later for that purpose (Tr. 509-510). Fifth, the electricians were making a methane test every 15 minutes and the drill would have been deenergized by the continuous-mining machine's methane monitor if the concentration of methane in the atmosphere had reached as much as 2 percent. MSHA's brief (p. 6) argues that the methane tests required by section 75.1106 must continously be made by means of a hand-held methane detector and that a methane monitor cannot be substituted for a hand-held device. That may be true if we were determining whether a violation of section 75.1106 had occurred, but we are not here confronted with an actual violation of section 75.1106, and MSHA introduced no evidence to controvert the chief electrician's statement that the methane monitor on the continuous-mining machine was working. Therefore, the monitior would have deenergized the drill if methane in a concentration of 2 percent had occurred. For the foregoing reasons, I find that the violation was not of such a serious nature as to warrant assessment of a maximum penalty of $10,000.

MSHA's brief (p. 8) does correctly argue that Respondent's deliberate use of the nonpermissible drill was equivalent to gross negligence. Consequently, in assessing a penalty, most of the weight in determining the penalty must be assigned under the criterion of negligence and the criterion of the size of Respondent's business. Respondent has not previously been cited for a violation of section 75.501-2(2) (Tr. 477). Therefore, it is unnecessary to consider the criterion of Respondent's history of previous violations. There was a good faith effort to achieve rapid compliance (Tr. 488). Since Respondent operates a very large coal business and inasmuch as its electricians were grossly negligent in using a nonpermissible drill inby the last open crosscut, a penalty of $2,000 will hereinafter be assessed for this violation of section 75.501-2(2).

Notice No. 2 KFO (7-115) October 18, 1977 section 75.400 (Exhibit M-31)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible

materials, shall be cleaned up and not be permitted to accumulate in active workings. Respondent violated section 75.400 because loose coal had been permitted to accumulate in active workings for a depth of 2 to 4 inches in the No. 3 entry for a distance of 175 feet inby the loading point and for a depth of from 2 to 24 inches in an adjacent crosscut for an additional distance of 60 feet, or for a total distance of 235 feet (Tr. 526-527). The deepest coal accumulation in the crosscut had fallen from the feeder prior to the time that the belt line had been moved (Tr. 528; 568). The loose coal accumulations in the No. 3 entry resulted from overfilling of the shuttle cars so that the coal was dragged off the top of the shuttle cars as they passed through the entry on their way to the dumping point (Tr. 562; 570). The violation was moderately serious because the only ignition sources in the vicinity of the accumulations were the trailing cables and electrical components of the shuttle cars. The danger of a fire or explosion was reduced because no methane was detected and the inspector observed no defects in the shuttle cars' trailing cables (Tr. 547-548). While the inspector found a permissibility violation in one of the shuttle cars, he did not know if that particular shuttle car had passed through the loose coal accumulations (Tr. 548). Respondent was grossly negligent in permitting the accumulations to exist because Respondent's employees had to stand in the deepest of the accumulations at the time they moved the conveyor belt and the accumulations should have been cleaned up at that time (Tr. 532).

Discussion and Conclusions. Respondent failed to file a posthearing brief with respect to the issues raised by MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-369-P. MSHA's brief is primarily devoted to demonstrating that MSHA's presentation in Docket No. NORT 78-369-P was sufficient to satisfy the evidentiary steps for proving the existence of a violation of section 75.400 as those steps were established by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977). While it appears that MSHA did prove that a violation occurred even if the requirements of the Board's Old Ben case were still in effect, the Commission held in MSHA v. Old Ben Coal Co., 79-12-4, that MSHA does not have to satisfy the criteria established by the Board in its Old Ben opinion. The Commission held in its Old Ben decision that the mere existence of combustible materials is sufficient to show that a violation of section 75.400 has occurred.

Respondent's section foreman agreed that the inspector had correctly described some loose coal accumulations which existed in the No. 3 entry and adjacent crosscut (Tr. 564). Respondent's section foreman agreed that the accumulations had been caused by loose coal accumulating at the belt feeder before it was moved and by loose coal having been dragged off shuttle cars on which coal had been piled too high to pass under the low roof which existed inby the loading point (Tr. 569-570). The section foreman stated that he had observed the loose coal accumulations before the inspector arrived on the section and that he would have had them cleaned up by the continuous-mining machine when it completed cutting through the pillar from which it was extracting

coal at the time the inspector arrived to examine conditions in the section (Tr. 564). The section foreman said that he would have had the loose coal cleaned up within a period of from 30 minutes to an

hour (Tr. 566). The section foreman said that he did not stop the continuous-mining machine and clean up the loose coal immediately after he observed the loose coal accumulations because they were engaged in retreat mining and he believed that interrupting the cutting process in a given pillar of coal during retreat mining subjected the miners to greater danger than allowing the loose coal accumulations to exist for a period of from 1 to 2 hours (Tr. 566-567).

Since Respondent's section foreman testified after the inspector had finished his testimony, there is nothing in the record to controvert the validity of the reason given by the section foreman for not having cleaned up the loose coal prior to the time that it was observed by the section foreman. On the other hand, it would appear that the section foreman could have examined his section for the existence of loose coal accumulations prior to commencement of mining operations. If he had done so, it appears that he could have used the mining machine to clean up the loose coal prior to initiation of cutting operations in a pillar of coal. The section foreman who testified at the hearing was the one who was present at the time the inspector's notice of violation was written. That section foreman had been on leave for the 2 days preceding the writing of the notice and it was during his absence from the mine that the belt conveyor had been moved. He was, therefore, not present at the time the loose coal accumulations were left after the belt was moved. He was, nevertheless, grossly negligent in failing to clean up the loose coal accumulations prior to the commencement of mining operations. The section foreman should have been notified by entries in the preshift book that the loose coal accumulations existed. If the preshift book did not record the existence of the accumulations, then Respondent's section foreman and preshift examiner on the previous shifts were grossly negligent for either not having cleaned up the accumulations or for not having made an entry about the accumulations in the preshift book.

MSHA's brief (p. 10) recommends that a penalty of $2,000 be assessed for this violation of section 75.400. That appears to be a reasonable penalty when all of the criteria are considered. Although there were potential ignition hazards in the form of trailing cables to the shuttle cars, the actual danger of an explosion or fire was somewhat remote (Tr. 554). The inspector did not detect any trace of methane in the mine at the time he wrote the notice of violation (Tr. 547). The most methane the inspector had ever detected in the mine on any prior inspections was .2 of 1 percent and a bottle sample taken by the inspector revealed only .05 of 1 percent of methane (Tr. 547; 549). Consequently, the inspector himself said that an explosion was not likely to result from existence of the accumulations (Tr. 554).

As I have indicated above, the primary criterion which requires the assessment of a rather large penalty in this instance is that Respondent's supervisory personnel had known of the existence of the loose coal accumulations for a considerable

time and had failed to clean them up. Considering that a large operator is involved, that there was a good faith effort to achieve rapid compliance (Tr. 545), that the violation was moderately

serious, and that Respondent was grossly negligent, a penalty of $1,500 should be assessed. Exhibit M-30 shows that Respondent has paid penalties for 52 prior violations of section 75.400 in its Open Fork No. 2 Mine. Two of the violations occurred in 1971, 12 in 1972, 5 in 1973, 9 in 1974, 3 in 1975, 9 in 1976, and 12 in 1977. I find that the foreging statistics indicate that Respondent's Open Fork No. 2 Mine has a very unfavorable trend in its history of previous violations. The history is especially adverse in that Respondent had violated section 75.400 on 12 occasions during the 9-1/2 months of 1977 preceding the writing of the instant violation on October 17, 1977. In such circumstances, the penalty of $1,500 should be increased by $500 to $2,000 under the criterion of history of previous violations.

Summary of Assessments and Conclusions of Law

(1) The motions for approval of settlement made with respect to MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. NORT 78-366-P and NORT 78-368-P should be granted and the settlements should be approved for the reasons given in the firt part of this decision.

(2) Pursuant to the settlement agreements, Respondent should be ordered to pay civil penalties totaling $5,750.00 which are allocated to the respective alleged violations as follows:

Docket No. NORT 78-366-P

Order No. 1 CAG (7-46) 9/6/77	75.400.....	$ 2,000.00
Order No. 2 CAG (7-47) 9/19/77	75.301-4.....	2,500.00
Total Settlement Penalties in Docket No. NORT 78-366-P.....		$ 4,500.00

Docket No. NORT 78-368-P

Notice No. 1 VH (7-28) 8/1/77	75.200.....	$ 1,250.00
Total Settlement Penalties in Docket No. NORT 78-368-P.....		$ 1,250.00
Total Settlement Penalties in This Proceeding.		$ 5,750.00

(3) On the basis of all the evidence of record and the foregoing findings of fact, Respondent should be assessed the following civil penalties:

Docket No. NORT 78-325-P

Notice No. 1 WJT (6-85) 12/21/76	75.1403-10.....	$ 9,000.00
Total Civil Penalties in Docket No. NORT 78-325-P.....		$ 9,000.00

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Docket No. NORT 78-365-P

Order No. 2 CAG (7-15) 1/31/77 75.400..... $ 8,000.00

Total Civil Penalties in
Docket No. NORT 78-365-P..... $ 8,000.00

Docket No. NORT 78-367-P

Notice No. 1 KCK (7-95) 11/17/77 75.501-2(2)..... $ 2,000.00

Total Civil Penalties in
Docket No. NORT 78-367-P..... $ 2,000.00

Docket No. NORT 78-369-P

Notice No. 2 KFO (7-115) 10/18/77 75.400..... $ 2,000.00

Total Civil Penalties in
Docket No. NORT 78-369-P..... $ 2,000.00

Total Civil Penalties in Contested Cases in
This Proceeding..... $21,000.00

(4) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P should be dismissed for failure to prove that the violation of section 75.317 alleged in Notice No. 1 CAG (7-38) dated June 21, 1977, occurred.

(5) Respondent, as the operator of the coal mines listed in the caption of this decision, is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) The motions for approval of settlement described in paragraph (1) above are granted and the settlement agreements are approved.

(B) Respondent, within 30 days from the date of this decision, shall pay civil penatlies totaling $26,750.00 of which $5,750.00 are assessed pursuant to the parties' settlement agreements described in paragraph (2) above and $21,000.00 are assessed pursuant to my decision on the contested issues as summarized in paragraph (3) above.

(C) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P is dismissed for the reason given in paragraph (4) above.

Richard C. Steffey
Administrative Law Judge

~FOOTNOTE 1

At the time the notice of hearing was issued, MSHA's Petition for Assessment of Civil Penalty in Docket No. NORT 78-376-P was a part of this consolidated proceeding, but on November 8, 1978, counsel for MSHA filed a motion for approval of settlement in Docket No. NORT 78-376-P. I issued on November 14, 1978, a decision approving the settlement agreement reached by the parties with respect to MSHA's Petition in Docket No. NORT 78-376-P and severed all matters concerning the issues in Docket No. 78-376-P from this consolidated proceeding.

~FOOTNOTE 2

According to 30 CFR 21.6(a)(2)(ii), MSHA's laboratory personnel reexamine the interior of a lamp to redetermine its permissibility after a lighted lamp has been extinguished by having been placed in a gaseous atmosphere.