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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),		Civil Penalty Proceeding	
		Docket Nos.	Assessment Control Nos.
	PETITIONER	PIKE 79-19-P	15-09727-03002
		PIKE 79-111-P	15-09727-03005
v.		PIKE 79-112-P	15-09727-03006 V
		PIKE 79-117-P	15-09727-03003 V
C.C.C.-POMPEY COAL COMPANY, INC.,		PIKE 79-125-P	15-09727-03004 V
	RESPONDENT	KENT 79-116	15-09727-03007 V
		No. 3 Mine	

DECISION

Appearances: Robert A. Cohen, Esq., and Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner Garred O. Cline, Esq., Pikeville, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued June 7, 1979, as amended on June 26, 1979, and August 29, 1979, a hearing in the above-entitled proceeding was held on September 25, 26, and 27, 1979, in Pikeville, Kentucky, under Section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves six Petitions for Assessment of Civil Penalty filed by the Mine Safety and Health Administration. The tabulation below shows the dates on which the Petitions were filed and lists the number of violations alleged in each Petition:

Docket Numbers	Dates of Filing	Number of Alleged Violations
PIKE 79-19-P	November 14, 1978	20
PIKE 79-111-P	March 13, 1979	3
PIKE 79-112-P	March 13, 1979	1
PIKE 79-117-P	March 19, 1979	1
PIKE 79-125-P	March 22, 1979	11
KENT 79-116	May 30, 1979	1
Total Alleged Violations.....		37

Counsel for the parties entered into the following stipulations (Tr. 5-6):

(1) Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(2) The inspectors who wrote the notices of violation, orders of withdrawal, and citations involved in this proceeding were authorized representatives of the Secretary of the Interior or the Secretary of Labor at the time such documents were written.

(3) At the time the alleged violations were cited, respondent's No. 3 Mine employed between 20 and 40 miners and produced approximately 60,000 tons of coal per year.

(4) Exhibit 1 in this proceeding shows that respondent has paid penalties for 64 previous violations at the No. 3 Mine.

The Summary of Assessments given at the end of this decision shows that seven of the 37 violations alleged by MSHA in this consolidated proceeding were the subject of evidentiary presentations by the parties and that the remaining 30 alleged violations were the subject of a settlement agreement entered into by the parties. I rendered bench decisions with respect to the seven contested violations. The bench decisions will first be reproduced in this decision as they appear in the transcript. Subsequently, this decision will summarize the reasons advanced by counsel in support of their request that their settlement agreement be approved with respect to the remaining 30 alleged violations.

The Contested Violations

Docket No. PIKE 79-19-P

Notice No. 2 FIJ (7-8) 2/28/77 75.1710

Upon completion of introduction of evidence by the parties, I rendered the bench decision quoted below with respect to Notice No. 2 FIJ (Tr. 198-199):

> The former Board of Mine Operations Appeals held in several cases -- Buffalo Mining Company, 2 IBMA 226, at Page 259 (1973) -- that if the materials needed for abatement are not available, no Notice of Violation should be written; and the Board held the same thing in two other cases -- Associated Drilling, Incorporated, 3 IBMA 164, at Page 173 (1974); and Itmann Coal Company, 4 IBMA 61 (1975).
>
> The Board also held in P and P Coal Company, 6 IBMA 86 (1976) that an administrative law judge cannot raise this impossibility of performance defense himself, and I do not think I have raised it here.

But it does seem to me Mr. Cline's testimony, through both Mr. Chaneys, do[es] show that this Acme 100 was unfit and unqualified for installation of canopies in 1977 -- that is February 26, 1977, when the Notice was written.

And I realize and recognize the inspectors had a job to do and they were applying this Section 75.1710 to all mines in an effort to get these canopies put on them.

And as Mr. Cline pointed out, they did require a lot of companies to get into the designing of canopies, to make their own, and some of the more affluent companies such as the Pittston Company did actually redesign shuttlecars; and in one case I had, they spent three million dollars redesigning equipment so that canopies could be put on them; but I do not think C.C.C.-Pompey Coal Company is large enough to have done a job such as that.

So, I think the evidence here clearly shows it was an impossibility of performance on this Acme 100 roof drill; consequently, I am going to grant Mr. Cline's motion to dismiss the petition in Docket Number PIKE 79-19-P, insofar as it seeks assessment of penalty with respect to Notice Number 2 FIJ dated February 28, 1977.

Notice No. 5 BHT (7-23) 5/11/77 75.1710

Upon completion of introduction of evidence by the parties with respect to the above Notice, I rendered the following bench decision (Tr. 236-238):

This particular Notice is much more difficult to deal with because it is a fact it was terminated with the company acquiring a usable canopy, if you consider the conditions Mr. Chaney talked about as being usable.

But it is also a fact it took them over a year after the Notice was originally issued before they were able to get a canopy that would work. I recognize on the day the Notice was issued, as Mr. Chaney also recognized, the height was forty-eight inches; and that perhaps if he can keep it at forty-eight inches all the time and keep a level floor all the time, he might be able to accommodate this canopy fairly well.

But as he pointed out, it is not quite that easy; it fluctuates, both in height and floor condition, and is still giving them an awful lot of trouble.

And one of the factors I have to give considerable weight to is the fact Mr. Tackett said that on May 11, 1977,

he had not found other mines that were using a Galis 300 with canopies on them any more than Mr. Chaney was succeeding with that.

And as Mr. Chaney pointed out, he did try to get a canopy on this machine about six months before the Notice was issued, which shows an unusual amount of effort and certainly more so than if he had waited around until he was cited and then tried to get one.

So, I think this situation, even though there are many factors about it that weigh heavily, the fact a violation perhaps -- the Notice, rather, should have been issued in order to protect miners and apparently did ultimately succeed in getting them the protection, the fact remains there is a certain amount of danger associated with these canopies, and it is still a debatable situation; but that is neither here nor there.

The important and only thing I have to consider today is whether this is truly a situation where the materials needed for the canopy were available on the date the Notice was issued, and I think the preponderance of the evidence shows that the equipment was not available; and therefore, I am going to grant Mr. Cline's motion with respect to Notice Number 5 BHT dated May 11, 1977, and dismiss the petition in Docket Number PIKE 79-19-P with respect to that particular Notice.

Upon completion of the introduction of evidence by the parties, I rendered the following bench decision with respect to the alleged violations which are discussed in the bench decision (Tr. 602-616):

There are four general criteria as to which I can make a general finding and those findings will be applicable for all of the remaining alleged violations unless there is some specific evidence persuading me there was not a good faith effort to achieve rapid compliance.

The evidence submitted by stipulation indicates as to the size of Respondent's business that it produced sixty thousand tons per year and if you assume two hundred fifty working days a year that would amount to about two hundred forty tons per day.

Yesterday Mr. Cline referred to production of three hundred tons per day in some of his questions so I assume the daily production is somewhere between two hundred forty tons and three hundred tons. I would conclude from that that

Respondent operates a relatively small business, so the penalties that I assess will be in a relatively low magnitude under the criteri[on] of the size of Respondent's business.

Mr. Cline indicated on Tuesday he did not intend to introduce evidence regarding Respondent's ability to pay penalties; therefore, in the absence of any evidence, I find payment of penalties will not cause Respondent to discontinue in business.

I am finding there was a normal good faith effort to achieve rapid compliance with respect to all the alleged violations. I recognize that Inspector Steele did not think there had been a good faith effort to achieve rapid compliance with respect to some of his citations and orders, but he based that primarily on the fact that the alleged violations were not abated until May 25, and it so happens that a lot of notices or citations were issued on the same day, May 12, and all of them had the effect of closing down the mine.

The Respondent worked on all of them simultaneously and finished cleaning up the mine and getting ready for inspection by May 25 so I don't think you could make a finding of failure to abate any one of the alleged violations at a given point between May 12 and May 25 would have shown a lack of good faith effort to achieve rapid compliance.

So as to all the citations and orders that have been issued up 'til now I find a good faith effort to achieve rapid compliance unless we have evidence of a contrary nature at some subsequent point in which case I would give that criteri[on] additional consideration at that time.

As to the history of previous violations, I shall consider that criteri[on] individually when the penalty is assessed. Of course, I shall also give individual consideration to the remaining two criteria of negligence and gravity.

Turning then to the order in which the evidence was received [in] Docket No. [PIKE] 79-19-P, the first one of those was Citation No. 66814 issued on May 25, 1978, by Inspector Murphy alleging a violation of Section 75.400. The alleged violation consisted of float coal dust extending from the portal to Spad No. 605 which was a distance of about eight hundred feet.

The float coal dust existed in an entry which had been designated as an escapeway and while it was an intake escapeway on May 25, 1978, when the citation was written, the

escapeway had previously been a return entry because in the inspector's opinion, based upon a review of the mine map, the float coal dust had accumulated in the entry during the time the entry had been used as a return which would have made the accumulation form in a period prior to about May 8 to May 12, 1978, when the flow of air was reversed in the escapeway.

The inspector did not take any samples because the float coal dust was paper thin and defied the taking of samples. Moreover, the former Board of Mine Operations Appeals held in the Kaiser Steel case at 3 IBMA 489 (1974), that it is unnecessary to take samples to support a violation of Section 75.400.

The former [B]oard did establish some very strict criteria which must be shown or proven by an inspector in order to make a prima facie case with respect to an alleged violation of Section 75.400. The [B]oard's opinion on that matter was issued in Old Ben Coal Company, 8 IBMA 98, where at pages 114 to 115 the [B]oard said that a prima facie case requires the following steps in proof: First, an accumulation of combustible material existed in the active workings or on electrical equipment in the active workings of a coal mine; two, that the coal mine operator was aware, or by exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and three, that the operator failed to clean up such accumulation or failed to undertake to clean it up within a reasonable time after discovery or within a reasonable time after discovery should have been made.

There is a close question between Inspector Murphy and Mr. Harold Chaney with respect to whether the gray appearance of the escapeway was dark enough to be considered a float coal dust accumulation because both witnesses stated the appearance of the entry was gray.

Mr. Chaney claims the gray appearance was the result of dampness and after the entry was rock dusted to abate the citation it regained its gray appearance a short time after the rock dusting when the new coat of rock dust became as wet as the old coat of rock dust.

That evidence requires me to make a credibility determination between the two witnesses and I'm finding in favor of Inspector Murphy because both Mr. Harold Chaney and his brother praised the fair and objective manner in which Inspector Murphy made his inspection and I don't -- and I mean all inspections -- and I don't believe Inspector

Murphy would have written a citation as to float coal dust without making a very careful and thorough examination which convinced him an accumulation of float coal dust existed.

Therefore, I find that the accumulation of float coal dust existed and I find Mr. Chaney either knew about it or should have known about it if he had made as diligent an examination of the escapeway as Inspector Murphy did.

Inspector Murphy believed that Respondent had failed to clean up the accumulation within a reasonable time because he wrote the citation on May 25, 1978, and he believed the float coal dust had existed since about May 8, 1978, when the air flow was reversed from the return to intake air.

Mr. Harold Chaney said the air flow was reversed on May 12, 1978, and he stated there was no float coal dust in the escapeway on May 12, 1978. Nevertheless, I have found the float coal dust existed on May 25, 1978, so it would have had to have accumulated after May 12, 1978, under Mr. Chaney's view of the facts.

In the Old Ben case the [B]oard stated that the operator knew exactly when the accumulation there involved occurred and knew when the cleanup was begun and how many men were being used to do the cleanup. In this case, Mr. Harold Chaney did not know when the escapeway was last rock dusted; therefore, I find he lacked the necessary facts to overcome MSHA's prima facie case that violation of Section 75.400 occurred.

I find that the violation was only moderately serious because Inspector Murphy cited no ignition hazards and stated that an explosion at the face of some size would be required for propagation of an explosion down the escapeway. There was normal negligence involved because the gray color of the float coal dust might have been a reason for Mr. Chaney to omit having a new coat of rock dust applied; therefore, a penalty of one hundred dollars ($100) will be assessed for this violation of Section 75.400.

Exhibit 1 shows Respondent violated Section 75.400 twice in 1976, and eight times in 1977. That is a very adverse trend in the numbers of violations of Section 75.400; therefore, the penalty will be increased by one hundred dollars ($100) to two hundred dollars ($200) because of Respondent's unfavorable history of previous violations.

Also in Docket No. PIKE 79-19-P there is an alleged violation of Section 75.1704 alleged by Inspector Murphy in

Citation No. 66815 dated May 25, 1978. Section 75.1704 requires an escapeway [to] be maintained in a safe condition.

Inspector Murphy stated a two hundred foot portion of the same escapeway inby Spad No. 605 mentioned in the previous citation was unsafe because the roof needed scaling in several locations and additional timbers needed to be installed to maintain a travelway six feet wide.

Mr. Chaney stated the two hundred foot portion had just been added to the escapeway to correct another alleged violation but the two hundred foot portion had been marked as an escapeway and was required to be in a safe condition.

Inspector Murphy believed that this violation was only potentially serious and I find it was moderately serious and involved normal negligence; therefore, a penalty of one hundred dollars ($100) will be assessed for this violation of Section 75.1704.

Exhibit 1 shows Respondent has violated this section on one previous occasion. It is important that escapeways be maintained in a safe condition so the penalty will be increased by twenty-five dollars ($25) to one hundred twenty-five dollars ($125) because of Respondent's history of a previous violation.

The petition for assessment of civil penalty filed in Docket No. PIKE 79-117-P seeks assessment of civil penalty with respect to Citation No. 66866 dated May 12, 1978, involving an alleged violation of Section 75.301 because the velocity of air was too low to be measured with an anemometer.

There was a great deal of discussion in the record about the way that Inspector Steele conducted himself during the inspection made on May 12, 1978, but Respondent has presented no witness who denies that the air velocity was below nine thousand cubic feet per minute when Inspector Steele issued Citation No. 66866.

Mr. Harold Chaney found a velocity of more than nine thousand cubic feet per minute when he made his pre-shift examination prior to 6:00 a.m. but Mr. Chaney agrees some of the required curtains were down when he next examined the section and since he did not take an air reading at the subsequent time when Inspector Steele issued Citation No. 66866 on May 12, 1978, I believe the evidence shows the velocity was very low at the time Inspector Steele made his examination.

While all witnesses agree no coal was being mined on May 12, 1978, all witnesses did agree that the coal was being loaded on May 12 and the ventilation, methane, and dust control plan requires that a velocity of nine thousand cubic feet of air be maintained at the last open crosscut if coal is being mined, cut or loaded; therefore, I find a violation of Section 75.301 occurred.

The preponderance of the evidence shows the violation was only moderately serious because the low air velocity had not existed for more than one or two hours as it occurred between the preshift examination and the writing of the citation at 8:30 a.m.

The low air velocity was caused by heavy rain which caused the belt on the fan to slip and turn more slowly than was normal and by the fact that the scoop operator knocked down curtains when they began cleaning up the coal on the section at the beginning of their shift. The section foreman was considerably negligent in failing to maintain his air velocity or check with Mr. Chaney if he could not determine why he lacked the required air velocity.

Inspector Steele did not observe a tremendous amount of dust in suspension in the section at the time the citation was written and since the violation had existed for only one or two hours there was not a great likelihood of an explosion from methane accumulation since no methane was detected by Inspector Steele and none has ever been detected in the No. 3 Mine. Since there was a high degree of negligence a penalty of three hundred dollars ($300) is warranted. Exhibit 1 shows no previous violations of Section 75.301; therefore, the penalty will not be increased under the criteri[on] of history of previous violations.

There was only one alleged violation in that docket [PIKE 79-117-P]. The next docket that was considered is Docket No. PIKE 79-125-P. In that one, the first one that was considered was Order No. 66869 which was written by Inspector Steele on May 12, 1978, at 9:00 a.m. citing a violation of Section 75.400.

Here again the [B]oard's Old Ben opinion at 8 IBMA 98 must be considered. All witnesses, namely Inspector Steele, Inspector Ratliff, and both Mr. Harold Chaney and Mr. Ronald Chaney, agreed there was some coal dust, oil and grease on the S&S scoop cited in Inspector Steele's order.

There is disagreement among the witnesses as to whether the accumulations were great enough to warrant the issuance of an order but Inspector Ratliff believed it would take -- or would have taken about a week for the oil to accumulate to the extent he observed it when he was checking permissibility.

But he did not express an opinion as to the time that would have been required for the coal dust to accumulate. Nevertheless, the preponderance of the evidence supports my finding, and I find an accumulation of combustible materials existed on the scoop.

The next step in building a prima facie case is barely made out by the evidence but I find the operator knew or should have known that the accumulation existed. The third step in the prima facie case, however, is not supported by Inspector Steele because he stated during cross-examination that he could not put a time limit on the period the accumulation had existed and he stated he did not ask when the scoop had last been cleaned. The [B]oard in the Old Ben case reversed the finding that a violation of Section 75.400 had occurred primarily because of the Inspector's failure to make an investigation as to whether the operator had failed to clean up the accumulation within a reasonable time after the accumulation occurred.

It should be noted that Inspector Murphy in the previous violation that I found as to Section 75.400 knew an exact time when the float coal dust in the escapeway should have been removed and re-rock dusted but here Inspector Steele did not have the necessary facts to support all steps of the prima facie case required by the [B]oard's Old Ben opinion; therefore, I find that MSHA failed to prove that a violation of Section 75.400 occurred with respect to Order No. 66869 and that its petition for assessment of civil penalty in Docket No. PIKE 79-125-P should be dismissed to the extent that a penalty is sought with respect to the violation of Section 75.400(FOOTNOTE 1) alleged in Order No. 66869 dated May 12, 1978.

Also in Docket No. PIKE 79-125-P Order No. 66870 dated May 12, 1978, cited Respondent for a violation of Section 75.316 because Respondent had failed to install stoppings in five open crosscuts. Inspector Steele's allegation that five stoppings were missing was strongly challenged by Respondent's witness, Mr. Harold Chaney, who said that stoppings were required in only four crosscuts because the section had only advanced four crosscuts to the right of the main heading.

The confusion as to the disagreement between Mr. Chaney and Inspector Steele was resolved and Inspector Steele numbered the affected crosscuts on Exhibit 4 or the mine map. Mr. Chaney, thereafter, said Inspector Steele was including a crosscut inby the feeder which Mr. Chaney did not consider to be a part of the [working] section cited in Order No. 66870.

Inspector Steele agreed the stoppings which were installed at the time Mr. Chaney made his preshift examination would have been in compliance with the ventilation plan or Exhibit 3, since Mr. Chaney had obtained an air velocity of nine thousand cubic feet a minute or more at the last open crosscut. Eventually, both Mr. Chaney and Inspector Steele agreed that enough stoppings had been knocked down by the scoop operator when he was cleaning up to reduce the required number of stoppings below those required to be maintained to have a proper separation of the return from the intake entries; therefore, I find a violation of Section 75.316 occurred.

Here again, the preponderance of the evidence shows that the violation existed for only about three hours, so the miners were not exposed for long to excessive respirable dust or a possible explosion, which would have been remote in any event since no methane was detected on May 12, 1978, or has ever been [detected] in the No. 3 Mine. Again I find the section foreman was very negligent in failing to see th[at] proper ventilation was maintained and a penalty of three hundred dollars ($300) is warranted.

Exhibit 1 shows Respondent has previously violated Section 75.316 on two prior occasions; therefore, the penalty will be increased by fifty dollars ($50) to three hundred

fifty dollars ($350) under the criteri[on] of Respondent's history of previous violations.

Also in Docket No. PIKE 79-125-P Order No. 66872 dated May 12, 1978, cited Respondent for a violation of Section 75.200 because Respondent had failed to comply with its roof control plan or Exhibit 3 by driving seven entries for three crosscuts inby and two crosscuts outby Survey Station No. 1708 to a width of from twenty-one feet, ten inches to twenty-three feet, one inch, whereas the roof control plan permits a width of only twenty feet.

Mr. Harold Chaney challeged that order, that is No. 66872, as having correctly cited a violation of Section 75.200 because he stated a provision on page 8 of Respondent's roof control plan allows Respondent to drive an entry up to four feet in excess of the normal twenty foot width, provided an extra roof bolt is installed, so as to prevent a spacing of roof bolts greater than four feet from the rib.

Since Inspector Steele did not allege he had checked the roof bolts at the wide places cited in his order and found spaces -- and therefore did not know whether spaces existed at the roof bolts greater than four feet [from the ribs], Mr. Chaney correctly contended no violation of the roof control plan had been proven. I find Mr. Chaney's point is well taken. The provision on page 8 of the roof control plan would permit varying entry widths of up to four feet so long as an extra roof bolt is installed to prevent a roof bolt spacing from the rib of more than four feet.

Inspector Steele stated another inspector had examined the spacing of the roof bolts and that he did not personally make that a part of his order. I find that Inspector Steele's failure to consider the roof bolt spacing as a simultaneous part of the citation of a violation of the roof control plan is a fatal flaw in his Order No. 66872 and prevents me from finding that a violation of Section 75.200 is proven.

Therefore, MSHA's petition for assessment of civil penalty in Docket No. PIKE 79-125-P will be dismissed to the extent it seeks assessment of a civil penalty for a violation of Section 75.200 with respect to Order No. 66872 dated May 12, 1978.

Order No. 70617 8/14/78 75.603, 75.604, and 75.517

Upon completion of the introduction of evidence by the parties, I rendered the following bench decision with respect to Order No. 70617 (Tr. 627-632):

> The order that Mr. Cline has been talking about is No. 70617 issued August 14, 1978, alleging violations of Sections 75.603, 75.604 and 75.517. Considering those in the order they are set forth in Order No. 70617 I shall discuss the alleged violation of 75.603 first.
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> Inspector Murphy alleged there were four temporary splices in the trailing cable to a Galis 300 roof bolting machine, whereas only one temporary splice is permitted in a twenty-four period. Mr. Harold Chaney, Respondent's witness, stated he had added an exten[s]ion to the pre-existing trailing cable to the roof bolting machine and that the exten[s]ion was obtained by removing it from an unused Acme roof bolter on the surface.
>
> Mr. Chaney connected the exten[s]ion to the pre-existing cable by using a temporary splice. Mr. Chaney said there were some taped places on the trailing cable but as far as he knew the only temporary splice in the cable was the one he used for connection of the cable to the pre-existing cable.
>
> Inspector Murphy's rebuttal testimony shows that he specifically found the spliced conductor in the cable and since Inspector Murphy examined the trailing cable with greater care than Mr. Chaney I find that his testimony supports a finding that the four temporary splices existed and at the time I wrote that language, I did not have before me Mr. Cline's offer of proof on behalf of witness Cantrell.
>
> I cannot give Mr. Cantrell's proposed statement as much weight as I do Inspector Murphy's statement because Inspector Murphy was here and [was] cross-examined in great detail about all these matters. I am unwilling to find that an offer of proof is sufficient to rebut Inspector Murphy's testimony on this point, particularly in light of general testimony in this record to the effect that Mr. Murphy is a fair and objective inspector.
>
> So with respect to the temporary splices I find the violation was only moderately serious because the four temporary splices were apparently in satisfactory condition inasmuch as

no bare wires were cited by Inspector Murphy when he examined them; the shock and fire hazard associated with the temporary splices was therefore only potential.

The negligence associated with this violation, however, was of a high degree because Mr. Chaney, Mr. Harold Chaney, used a temporary splice without making certain that other temporary splices were nonexist[e]nt.

He says there were taped places but he was not sure whether there were splices in those tapes or not. While Mr. Chaney intended to remove the temporary splice within the twenty-four period so as to avoid a violation of Section 75.603, it is a fact that he used the temporary splice to save the cost of buying a permanent splicing kit and to avoid stopping production for from one to one half of one shift because he expected to pull out of [the area here involved] after roof bolts had been installed to abate another violation written at a previous time.

Mr. Ronald Chaney, Respondent's president, was aware the trailing cable had been lengthened but he believed any defects in the cable were nonserious because they existed near the nip station where miners would be unlikely to walk unless a fuse should need to be replaced. It is haste and taking unnecessary risks which produce fatalities in coal mines.

While neither of Respondent's witnesses believed the extension of the cable exposed the miners to serious injury, it is a fact that the extension could have resulted in the electrocution of a miner who might have come to the nip station to replace a fuse which might have blown because of the use of a different size cable or defects in the old piece of cable used to make the extension; therefore, I believe the moderate seriousness and high degree of negligence involved in this violation of Section 75.603 warrants a penalty of five hundred dollars ($500).

I would assess more if a relatively small operator were not involved. Exhibit 1 does not indicate that Respondent has previously violated Section 75.603, so the penalty will not be increased under the criterion of history of previous violations.

Passing on to the alleged violation of Section 75.604 which deals with permanent splices and a bare wire in one and worn places in others, there's no dispute about the fact the trailing cable had worn permanent splices in it. As both Inspector Murphy and Mr. Harold Chaney agreed, the

cable contained permanent splices and Mr. Chaney agreed that some of the permanent splices were worn and needed to be repaired.

While Mr. Chaney stated he did not see a bare wire exposed in any permanent splice, Mr. Chaney did not examine the splices as carefully as Inspector Murphy and therefore I find Inspector Murphy's testimony supports the finding [that] an exposed bare wire existed in one of the splices.

Since an exposed wire is capable of causing electrocution I find that the violation was very serious. Mr. Chaney was very negligent in failing to repair the permanent splices; therefore, a penalty of seven hundred fifty dollars ($750) will be assessed for the violation of Section 75.604.

Exhibit 1 shows no history of previous violations with respect to Section 75.604 and therefore there will be no increase in the penalty under that criteri[on].

As to Section 75.517, Inspector Murphy's testimony also supports a finding that two damaged places existed in the trailing cable. Since one of the damaged places had a bare wire exposed in it, the violation of Section 75.517 was equally serious and involved a similar degree of negligence.

For those reasons a penalty of seven hundred fifty dollars ($750) will be assessed for the violation of Section 75.517. Exhibit 1 indicates that Respondent has not previously violated Section 75.517 so the penalty will not be increased under that criteri[on].

That completes the decision on all the cases or alleged violations as to which we had evidence. I assume that you're ready to proceed to the matters that were settled?

Settlement Agreements

Docket No. PIKE 79-19-P

Citation No. 66877 dated May 12, 1978, alleged that respondent had violated Section 75.200 because loose roof bolts had been observed in an area starting at the portal and extending inby to the 001 Section. The citation was subsequently changed to Withdrawal Order No. 66813 when Inspector Murphy returned on May 25, 1978, and found that the alleged violation had not been abated. The Assessment Office proposed a penalty of $760 for this alleged violation and respondent has agreed to pay a penalty of $400. MSHA's counsel stated that he had agreed to accept the reduced amount because the operator's contention is that in some places the roof had been doubly supported by additional roof bolts. Also there was no allegation made that

the roof itself was bad, other than around the roof bolt area, and there is doubt as to the number of roof bolts involved in this particular violation. Those facts warrant a reduction in the penalty. Additionally, even though the operator had been issued a withdrawal order for failure to abate on May 25, 1978, MSHA's counsel thought that some consideration should be given to the fact that the operator's mine had been closed by numerous outstanding withdrawal orders and the operator was having some difficulty in abating all of the orders simultaneously (Tr. 633).

Citation No. 67701 dated May 12, 1978, alleged that respondent had violated Section 75.514 because suitable connectors were not being used in approximately 40 splices installed in 200 feet of feeder wire. Wire rope clamps were being used for connectors and a dispute arose over the types of clamps that can be installed in feeder wire. MSHA's counsel stated that in some instances some of the clamps that had been installed as connectors had been acceptable by MSHA in the past. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay a penalty of $500. MSHA's counsel stated that he had agreed to accept the reduced amount because even though it was a serious violation, the small size of the operator should be considered. Also the fact that the operator failed to abate in a timely fashion was again the result of the fact that he was under numerous withdrawal orders and may have been hindered from abating all alleged violations as rapidly as he would have preferred to have corrected them (Tr. 634-635).

Citation No. 67702 dated May 12, 1978, alleged that respondent had violated section 75.517 in that the 300-volt DC feeder wire was uninsulated in approximately 40 places along its entire length from the drift up to the face of the 001 Section. MSHA's counsel noted that some of this wire was located in places not frequently traveled by the miners and that factor reduced the miners' likelihood of exposure to danger associated with the uninsulated places. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay a penalty of $500. The penalty was increased substantially by the Assessment Office because a subsequent withdrawawl order was issued on May 25 for failure of the operator to abate the condition, but, again, the operator was trying to cope with numerous withdrawal orders and was hindered from abating the citation as quickly as the inspector seemed to think it should have been abated (Tr. 636).

Citation No. 67703 dated May 12, 1978, alleged that respondent had violated Section 75.516 in that the DC feeder wire was not properly supported on insulators and was in contact with the roof or mine floor along its entire length from the portal to the working section. MSHA's counsel stated that this was a serious violation since the principal danger was the possibility of a fire. The operator claims that there were areas where the wire was properly supported. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay $500. MSHA's counsel stated that the Assessment Office increased the proposed penalty substantially because a withdrawal order had been issued. MSHA's counsel said

that the operator was hampered from supporting the feeder wire by obligations resulting from other orders and that he believed a penalty of $500 was fair and reasonable in this instance (Tr. 637-638).

Citation No. 67704 dated May 12, 1978, alleged that respondent had violated Section 75.512 because the switch used to control the No. 2 belt drive from the tailpiece was not properly designed in that a bare wire and nail were being used to make contact on the 230-volt DC control circuit. The Assessment Office considered that the violation involved gross negligence, that it was very serious, and proposed a penalty of $690 which respondent has agreed to pay in full (Tr. 638-639).

Citation Nos. 67706 and 67708 were both dated May 12, 1978, and both alleged that respondent violated Section 75.523-2. Both citations alleged violations because the deenergization devices, or panic bars, installed on two scoops were inoperative. The scoops were used to load coal in the 001 Section. Respondent's and MSHA's counsel agreed that panic bars do break down on a fairly regular basis. MSHA's counsel stated that there was no way to determine how long the panic bars had been inoperative prior to the inspection. The operator claims that the panic bars had been checked before the inspection and found to be working. Therefore, the operator contends that he was unaware of their inoperative condition. The Assessment Office proposed a penalty of $195 for each of the alleged violations and respondent has agreed to pay $125 for each alleged violation (Tr. 640-641).

Citation No. 67707 dated May 12, 1978, alleged that respondent had violated Section 75.503 by not maintaining the scoop so that it was in a permissible condition. Counsel for MSHA stated that the lack of permissibility should have been found during an electrical inspection, but he noted that no methane had been detected and he believed that the lack of methane should be considered as a factor to reduce the gravity of the alleged violation. The Assessment Office proposed a penalty of $255 and respondent has agreed to pay $200 (Tr. 641-642).

Citation No. 67709 dated May 12, 1978, alleged that respondent had violated Section 75.503 because an S & S scoop was not maintained in a permissible condition. That condition, when considered with the fact that no methane was found, reduced the gravity of the alleged violation sufficiently, in the opinion of MSHA's counsel, to justify accepting respondent's offer to pay a penalty of $150 instead of the penalty of $170 proposed by the Assessment Office (Tr. 642).

Citation No. 67710 dated May 12, 1978, alleged that respondent had violated Section 75.313-1 because the methane monitors on two scoops were inoperative. The operator stated that the panic bars were not operating either because an electrical problem had developed on the scoops which the operator claims prevented his knowing of the inoperative monitors. Respondent alleges that it endeavors to keep the monitors in good condition even though no methane has been found on the working

section. The Assessment

Office proposed a penalty of $195 and respondent has agreed to pay $150 for the alleged violation (Tr. 643).

Citation No. 67711 dated May 12, 1978, alleged that respondent had violated Section 75.518 because no short circuit protection had been provided for the 30-horsepower belt drive motor. The violation produced a fire and shock hazard. The Assessment Office proposed a penalty of $655 and respondent has agreed to pay $500 for the alleged violation. Here, again, the Assessment Office increased the penalty substantially because a withdrawal order was subsequently issued. MSHA's counsel stated that the operator was confronted with abating a large number of alleged violations and could not work on all of them simultaneously. In such circumstances, MSHA's counsel stated that he believed the acceptance of a reduced penalty was justified (Tr. 643-644).

Citation Nos. 67712 and 67713 dated May 12, 1978, alleged that respondent had violated Sections 75.515 and 75.701, respectively. Both of the alleged violations deal with electrical connections for the belt-drive motor. MSHA's counsel said that the first citations deals with the fact that suitable cable fittings were not provided where the power cable entered the metal frame of the motor. In the second citation, the alleged violation was that respondent had failed to provide a frame ground. Both alleged violations produced possible shock and fire hazards. Again, the Assessment Office increased the penalties substantially because withdrawal orders were subsequently issued for failure of the operator to abate within the time originally given by the inspector. The Assessment Office proposed a penalty of $760 for the alleged violation of Section 75.515 and respondent has agreed to pay $500. MSHA's counsel was agreeable to accepting the reduced penalty because no worn places existed on the wires for which proper fittings had not been provided. For the alleged violation of Section 75.701, the Assessment Office proposed a penalty of $920 and MSHA's counsel believed that respondent's agreement to pay $500 was reasonable in view of the problems respondent was having in correcting a large number of alleged violations (Tr. 644-645).

Citation No. 67728 dated May 12, 1978, alleged that respondent had violated Section 75.1722 because a guard had not been provided for the chain-type control between the drive motor and the speed reducer for the No. 2 belt drive. MSHA's counsel stated that two protective guards are required in this area. The operator was engaged in repairing one guard and another had been broken during the shift. In the opinion of MSHA's counsel, those circumstances reduced the degree of negligence and warranted accepting a reduced penalty of $150 instead of the penalty of $240 proposed by the Assessment Office (Tr. 646-647).

Citation No. 67716 dated May 25, 1978, alleged that respondent had violated Section 75.200 by failing to maintain a required apron over the portal to prevent rocks from falling from the highwall on the men as they went in and out of the mine. MSHA's counsel stated that the supports had been dislodged and

were not serving the purpose for which they had been installed.

The Assessment Office proposed a penalty of $305 and respondent has agreed to pay a penalty of $200. The operator claimed that a scoop had knocked the supports down on the same morning during which the inspector made his examination. MSHA's counsel stated that the short period of time between the knocking down of the supports and the time the citation was written supported a finding of a low degree of negligence and justified accepting the reduced penalty (Tr. 647-648).

Citation No. 67715 dated May 25, 1978, alleged that respondent had violated Section 75.202 because overhanging brows were present in the working section and in the outby haulage roadways. The overhanging brows had not been scaled or supported. Counsel for MSHA said that when an overhanging brow is present, it either has to be taken down or supported and that MSHA feels this was a serious violation. In the opinion of MSHA's counsel, roof brows have been the cause of both deaths and serious injuries in coal mines and the operator should have been aware of the condition. The operator claims that a lot of the brows were in crosscut areas where they would not normally have exposed miners to danger. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay $600. MSHA's counsel believed that the reduced penalty was warranted since the Assessment Office had increased the penalty largely on the basis that a withdrawal order had subsequently been issued. As has previously been stated, a large number of citations had been issued within a relatively short period of time. Respondent's mine had ceased to produce coal while the alleged violations were being corrected, but respondent was unable to abate all of the violations simultaneously (Tr. 648-649).

Docket No. PIKE 79-125-P

The Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P seeks assessment of civil penalties for 11 alleged violations. Three of those violations were alleged in Order Nos. 66869, 66870, and 66872 which have already been considered in my bench decision, supra (Tr. 613-616).

Order No. 66873 dated May 12, 1978, alleged that respondent had violated Section 75.1704 by failing to prevent the accumulation of water to a depth of 30 inches in the intake escapeway. The Assessment Office proposed a penalty of $600 and respondent has agreed to pay $350. Counsel for MSHA stated that there was some evidence that the operator had attempted to provide another escapeway around this area. The violation occurred during a rainy period when water could accumulate rapidly. MSHA's counsel believed that the circumstances justified acceptance of a reduced penalty (Tr. 650).

Order No. 66874 dated May 12, 1978, alleged that respondent had violated Section 77.1104 in that the diesel generator was not maintained in a safe operating condition because oil and grease had accumulated on the generator and oil was standing in puddles under it. Counsel for MSHA stated that this particular piece of equipment was on the surface and that its location had the effect

of reducing the danger of fire. The operator showed good faith in abating the condition rapidly. The Assessment Office

proposed a penalty of $400 and respondent has agreed to pay $200. MSHA's counsel believed that good reasons had been given for accepting a reduced penalty in view of the fact that respondent claimed that some of the puddles consisted of water and that the oil was engine-lubricating oil rather than diesel fuel. The engine oil was less ignitable than fuel oil would have been (Tr. 650-652).

Order No. 66875 dated May 12, 1978, alleged that respondent had violated Section 77.404 in that the front-end loader was not being maintained in a safe operating condition because its windshield was cracked, it was not equipped with a fire extinguisher, and its back-up alarm was not operative. MSHA's counsel said that the mitigating circumstances were that the loader was not being used at the time of inspection and the fact that it was a surface violation made it less serious than if the equipment had been used in the underground mine. The Assessment Office proposed a penalty of $400 and respondent has agreed to pay $250 which MSHA's counsel believed to be appropriate for the reason stated above (Tr. 652-653).

Order No. 66876 dated May 12, 1978, alleged that respondent had violated Section 77.202 in not maintaining the belt drive located on the surface in a safe operating condition because oil and float coal dust had been permitted to accumulate on the drive. MSHA's counsel stated that the Assessment Office had proposed a penalty of $400, but he had concluded that no assessment should be made because this particular alleged violation was a duplication of another citation written by a different inspector. The operator has agreed to pay the full penalty proposed by the Assessment Office with respect to the overlapping citation and MSHA's counsel said that since the same belt drive was involved in both citations, he believed that fairness justified assessment of only one penalty. Therefore, MSHA's counsel requested that he be permitted to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P to the extent that it alleged a violation of Section 77.202 with respect to Order No. 66876. That request is hereinafter granted in the order accompanying this decision (Tr. 654-655).

Order No. 67705 dated May 12, 1978, alleged that respondent had violated Section 75.701 because the cutting machine and roof-bolting machine had not been properly grounded. MSHA's counsel said that an effort to ground the machines had been made, but the inspector was not convinced that the machines had been adequately grounded. The Assessment Office proposed a penalty of $400 and respondent has agreed to pay $300. MSHA's counsel stated that he believed a reduced penalty was justified in light of the operator's strong contention that the machines had been adequately grounded (Tr. 655-656).

Order No. 67726 dated May 12, 1978, alleged that respondent had violated Section 75.400 by allowing excessive amounts of loose coal, coal dust, and float coal dust to accumulate in the conveyor belt entry and connecting crosscuts. The accumulation

ranged from 1/8 inch to 10 inches in depth. The conveyor belt is 900 feet long. The Assessment Office believed that

the violation involved a high degree of negligence and gravity and proposed a penalty of $1,100 which respondent has agreed to pay in full (Tr. 656-657).

Order No. 67727 dated May 12, 1978, alleged that respondent had violated Section 75.1100-1 by having removed a joint in the waterline running parallel to Nos. 1 and 2 conveyor belts with the result that the conveyor belts did not have adequate fire protection. It was the contention of the operator that the waterlines had been temporarily disconnected so that a motor on the belt drive could be fixed. It was the operator's intention to restore the waterlines to an operable condition as soon as the repairs had been completed, but the inspector observed the condition before the necessary work had been done. The Assessment Office proposed a penalty of $900 and respondent has agreed to pay $500. It was the opinion of MSHA's counsel that a reduced penalty of $500 was adequate when the extenuating circumstances are taken into consideration because there is nothing to show that a fire was likely to occur at the time the waterline was out of service (Tr. 656-658).

Order No. 67729 dated May 12, 1978, alleged that respondent had violated Section 75.200 because approximately 50 roof bolts had not been installed in accordance with the roof-control plan inasmuch as the bolts were required to be installed on 4-foot centers, whereas they had been installed from 4-1/2 to 6 feet apart. The Assessment Office correctly found that a high degree of negligence and gravity were involved and proposed a penalty of $500 which respondent has agreed to pay in full (Tr. 658).

Docket No. KENT 79-116

Order No. 66871 dated May 12, 1978, alleged that respondent had violated Section 75.403 because no rock dust had been applied for a distance of three crosscuts beginning at a point two crosscuts inby Survey Station No. 1708. Two samples were taken by the inspector of the area cited in his order and the analyses of the samples showed the incombustibility content of one sample to be 35 percent while the incombustibility content of the other sample was 79 percent. No explanation exists for the fact that one sample showed no violation while the other did. MSHA's counsel stated that the equivocal nature of the evidence justified acceptance of a reduced penalty of $400 instead of the penalty of $800 proposed by the Assessment Office (Tr. 658-659).

Docket No. PIKE 79-112-P

Order No. 66868 dated May 12, 1978, alleged that respondent had violated Section 75.400 in that the operator had allowed combustible material consisting of loose coal and float coal dust to accumulate on the ribs and floor in depths ranging from 1 inch to 24 inches. The accumulations started two crosscuts outby Survey Station No. 1708 in the No. 5 entry and extended inby for three crosscuts. The area included Nos. 1 through 7 entries and

connecting crosscuts. The Assessment Office proposed a penalty of $600 and respondent has agreed to pay the proposed penalty in full.

I find that counsel for respondent and MSHA gave satisfactory reasons for the penalties agreed upon in their settlement conference and that the settlement agreements hereinbefore discussed should be accepted.

Summary of Assessments and Conclusions

(1) Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreements, the following civil penalties should be assessed:

Docket No. PIKE 79-19-P

Citation No. 66814	5/25/78	75.400..(Contested).....	$ 200.00
Citation No. 66815	5/25/78	75.1704..(Contested).....	125.00
Citation No. 66877	5/12/78	75.200...(Settled).....	400.00
Citation No. 67701	5/12/78	75.514...(Settled).....	500.00
Citation No. 67702	5/12/78	75.517...(Settled).....	500.00
Citation No. 67703	5/12/78	75.516...(Settled).....	500.00
Citation No. 67704	5/12/78	75.512...(Settled).....	690.00
Citation No. 67706	5/12/78	75.523-2..(Settled).....	125.00
Citation No. 67707	5/12/78	75.503....(Settled).....	200.00
Citation No. 67708	5/12/78	75.523-2..(Settled).....	125.00
Citation No. 67709	5/12/78	75.503....(Settled).....	150.00
Citation No. 67710	5/12/78	75.313-1..(Settled).....	150.00
Citation No. 67711	5/12/78	75.518....(Settled).....	500.00
Citation No. 67712	5/12/78	75.515....(Settled).....	500.00
Citation No. 67713	5/12/78	75.701....(Settled).....	500.00
Citation No. 67715	5/25/78	75.202....(Settled).....	600.00
Citation No. 67716	5/25/78	75.200....(Settled).....	200.00
Citation No. 67728	5/12/78	75.1722...(Settled).....	150.00
Total Settlement and Contested Penalties in Docket No. PIKE 79-19-P.....			$ 6,115.00

Docket No. PIKE 79-111-P

Order No. 70617	8/14/78	75.603.....(Contested).....	$ 500.00
Order No. 70617	8/14/78	75.604.....(Contested).....	750.00
Order No. 70617	8/14/78	75.517.....(Contested).....	750.00
Total Penalties in Docket No. PIKE 79-111-P.....			$ 2,000.00

Docket No. PIKE 79-112-P

Order No. 66868	5/12/78	75.400.....(Settled).....	$ 600.00
Total Settlement Penalty in Docket No. PIKE 79-112-P.....			$ 600.00

Docket No. KENT 79-116

Order No. 66871 5/12/78	75.403.....(Settled).....	$ 400.00
Total Settlement Penalty in Docket No. KENT 79-116		$ 400.00

Docket No. PIKE 79-117-P

Citation No. 66866 5/12/78	75.301....(Contested).....	$ 300.00
Total Penalty in Docket No. PIKE 79-117-P		300.00

Docket No. PIKE 79-125-P

Order No. 66870 5/12/78	75.316.....(Contested).....	$ 350.00
Order No. 66873 5/12/78	75.1704.....(Settled).....	350.00
Order No. 66874 5/12/78	77.1104.....(Settled).....	200.00
Order No. 66875 5/12/78	77.404.....(Settled).....	250.00
Order No. 67705 5/12/78	75.701.....(Settled).....	300.00
Order No. 67726 5/12/78	75.400.....(Settled).....	1,100.00
Order No. 67727 5/12/78	75.1100-1.....(Settled).....	500.00
Order No. 67729 5/12/78	75.200.....(Settled).....	500.00
Total Settlement and Contested Penalties in Docket No. PIKE 79-125-P		$ 3,550.00
Total Settlement and Contested Penalties in This Proceeding		$12,965.00

(2) Respondent was the operator of the No. 3 Mine at all pertinent times and, as such, is subject to the provisions of the Act and to the regulations promulgated thereunder.

(3) For the reason given in my bench decision, supra (Tr. 198-199, and Tr. 236-238), the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-19-P, should be dismissed to the extent that penalties are sought for violations of Section 75.1710 cited in Notice Nos. 2 FIJ (7-8) dated February 28, 1977, and 5 BHT (7-23) dated June 6, 1977.

(4) For the reason given in my bench decision, supra (Tr. 616), the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P, should be dismissed to the extent that a penalty is sought for a violation of Section 75.200 cited in Order No. 66872 dated May 12, 1978.

(5) For the reason given in my decision at page 20, supra, the request of MSHA's counsel to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P, should be granted to the extent that a penalty is sought for a violation of Section 77.202 cited in Order No. 66876 dated May 12, 1978.

WHEREFORE, it is ordered:

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(A) The parties' request for approval of settlement is granted and the settlement agreements submitted in this proceeding are approved.

(B) Pursuant to the parties' settlement agreement and the bench decision rendered in this proceeding, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $12,965.00 as set forth in paragraph (1) above.

(C) MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 79-19-P and PIKE 79-125-P are dismissed to the extent specified in paragraphs (3) and (4) above.

(D) MSHA's request to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P is granted and the Petition is deemed to have been withdrawn to the extent described in paragraph (5) above.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

~FOOTNOTE 1

On December 12, 1979, the Commission issued its decision in MSHA v. Old Ben Coal Co., Docket No. VINC 74-11, 79-12-4, in which it held that the mere existence of a combustible accumulation could be considered a violation of Section 75.400. Since my bench decision was rendered on September 27, 1979, and was final insofar as the parties were concerned, I do not believe that my decision should be amended to change my finding with respect to the violation of Section 75.400 alleged in Order No. 66869 because the Board's Old Ben opinion was the applicable law at the time my bench decision was rendered.