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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

PONTIKI COAL CORPORATION, CONTESTANT	Contest of Order Docket No. KENT 79-115-R
v.	Order No. 706444
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	May 3, 1979 No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. KENT 80-53 Assessment Control No. 15-08413-03042V
v.	No. 1 Mine
PONTIKI COAL CORPORATION, RESPONDENT	

DECISION

Appearances: William H. Howe, Esq., and Timothy J. Persons, Esq., Loomis, Owen, Fellman & Howe, Washington, D.C., for Pontiki Coal Corporation
John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Secretary of Labor

Before: Administrative Law Judge Steffey

Pursuant to written order dated June 22, 1979, a hearing in the above-entitled(FOOTNOTE 1) consolidated proceeding was held on August 9, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Counsel for Pontiki Coal Corporation filed on December 11, 1979, a posthearing brief and counsel for the Mine Safety and Health Administration filed on January 7, 1980, a reply to Pontiki's brief.

Issues

Pontiki's brief argues that Order No. 706444 is invalid as well as underlying Citation No. 706762 on which Order No. 706444 is based. Pontiki also contends that the violation of 30 CFR 75.403 alleged in Order No. 706444 did not occur or, in the alternative, that if a violation of section 75.403 did occur, the violation was not the result of any unwarrantable failure on the part of Pontiki.

MSHA's brief argues that a violation of section 75.403 occurred as alleged in Order No. 706444, that the violation was the result of an unwarrantable failure on the part of Pontiki, and that underlying Citation No. 706762 was validly issued and properly cited a violation of 30 CFR 75.313. Additionally, MSHA's brief claims that I am obligated to determine in my decision whether the violation of section 75.313 alleged in underlying Citation No. 706762 occurred even though Pontiki did not raise that issue in its contest of Order No. 706444. Finally, MSHA contends that a judge is obligated to consider a conglomerate's total civil penalty record of previous violations when he is evaluating an operator's history of previous violations as one of the six criteria which must be considered in assessing penalties in civil penalty proceedings if violations of the mandatory health and safety standards are found to have occurred.

Findings of Fact

My decision on all issues in this consolidated proceeding will be based on the findings of fact set forth below:

1. Pontiki Coal Corporation is a subsidiary of Mapco, Inc. (Exh. 1). In addition to Pontiki Coal Corporation, Mapco controls four other coal companies, namely, Webster County Coal Corporation, Martiki Coal Corporation, Topiki Coal Corporation, and Mettiki Coal Corporation. Mapco's five subsidiaries operate a total of nine underground and surface coal mines. Pontiki operates two underground coal mines and one preparation plant (Exh. 2). Only Pontiki's No. 1 Mine is involved in this proceeding. That mine employs 169 miners on two production shifts and one maintenance shift to produce about 3,500 tons of raw coal per day from the Pond Creek coal seam (Tr. 12). After cleaning, the No. 1 Mine's production amounts to about 3,000 tons per day (Tr. 96). The mining height ranges from 36 to 109 inches (Tr. 12; 84). The No. 1 Mine is entered by one 400-foot shaft and one slope (Tr. 12). Coal is produced from four working sections, three of which use continuous mining machines and one of which utilizes conventional mining methods (Tr. 45). The No. 1 Mine liberates approximately 450,000 cubic feet of methane over a 24-hour period (Tr. 13).

2. An MSHA inspector entered the No. 1 Mine on May 3, 1979, at about 4:30 p.m. He was accompanied by an inspector trainee and Pontiki's safety

director, Mr. Danny P. Curry (Tr. 65; 81). All three men traveled to the No. 5 Section which uses conventional mining equipment (Tr. 136). For a month prior to May 3, the inspector had been engaged in making a complete inspection of the No. 1 Mine (Tr. 14; 41). He knew from previous experience that the personnel in the No. 5 Section were having some difficulty in controlling the roof and he wanted to check the roof conditions in the No. 5 Section before finishing his inspection (Tr. 42; 45; 194).

3. The inspector, the trainee, and Mr. Curry traveled up the No. 5 or track entry to the second crosscut outby the face (Tr. 83; 137). At that point they observed a miner installing roof bolts. Mr. Curry remained at the site of the roof bolter while the inspector and the trainee walked over to return entries Nos. 6 and 7. When they returned from those entries, they were rejoined by Mr. Curry at the No. 5 entry and all three men thereafter continued their examination of the entries by walking through the last open crosscut to the No. 1 entry. They walked down the No. 1 entry to the second open crosscut. As they entered the crosscut between the Nos. 1 and 2 entries, the inspector orally advised Mr. Curry that he was issuing a "(d)" order (Tr. 139; 146).

4. Mr. Curry himself had been a former MSHA inspector (Tr. 134) and he understood that the inspector was issuing an unwarrantable failure order (Tr. 154). Mr. Curry then left the inspector for about 10 minutes so that he could call the mine superintendent, Mr. Sloan, for the purpose of letting the superintendent know that No. 5 Section had been closed by an order (Tr. 140; 162).

5. The inspector had found that the mine personnel were doing a "good job" of supporting the roof (Tr. 91), but he found that there was insufficient rock dust on the floor of the mine (Tr. 31-38). The inspector's Order No. 706444 was written at 6:05 p.m. on May 3, 1979, and cites Pontiki for a violation of 30 CFR 75.403 because there had been an "[i]nadequate application of rock dust on mine floor in entries No. 1 through No. 7 and connecting crosscuts on No. 005-0 Section, starting at spad No. 1450 and extending inby approx[imately] 360 feet" (Exh. 5).

6. The inspector based his citation of inadequate rock dusting in seven entries and their connecting crosscuts on an examination of the crosscuts and entries which he could see by walking through the No. 5 entry to the two rows of crosscuts outby the face (Tr. 46-47; 82-83). The inspector walked through the first and second rows of crosscuts outby the face and looked down each of the seven entries. The inspector walked down the No. 1 entry for three crosscuts from the face, down the No. 2 entry for 2-1/2 crosscuts from the face, and down the No. 4 entry to the belt feeder which was located just inby the third crosscut from the face. With the exception of the No. 5 entry, the inspector did not travel any entry for a distance of more than three crosscuts from the face (Tr. 84). Although the inspector had no illumination other than his cap light, he stated that he

could see a distance of from 300 to 360 feet down each entry and could determine that the floor had been inadequately rock dusted (Tr. 82; 87; 196). There were permanent stoppings between the Nos. 2 and 3 entries and

between the Nos. 5 and 6 entries for the purpose of separating the intake and return airways (Tr. 47; 86; 159-160). The inspector could not have seen what the condition of the rock dust was in the crosscuts between Nos. 2 and 3 entries and between Nos. 5 and 6 entries because his observation from entry No. 5 would have been blocked by permanent stoppings as he walked up the No. 5 entry to the working faces (Tr. 149). Those portions of the crosscuts would not have constituted a major part of the No. 5 Section and would not have existed closer than three crosscuts from the working face (Tr. 86).

7. The inspector took two floor samples and the trainee took one floor sample to support the inspector's claim that rock dust on the mine floor in No. 5 Section was inadequate. One of the inspector's floor samples was taken at a point 20 feet inby spad No. 1491 in the No. 2 entry. The inspector's other floor sample was taken in the crosscut between the Nos. 1 and 2 entries at a point which was about 50 or 60 feet from the place where he obtained the first sample. The inspector trainee's floor sample was taken in the No. 3 entry about 10 feet outby spad No. 1490, or approximately 80 feet from the place where the inspector took his first sample (Exh. C; Tr. 190-195). Thus, all three samples used to substantiate the inspector's order were taken either in or close to the second crosscut from the face and all three samples were taken within a distance from each other of about 120 feet even though the inspector's order covered the entire No. 5 Section for a distance of seven crosscuts, or about 420 feet outby the face (Exhs. 5, 6 and C; Tr. 78-79; 86). The inspector considered the three samples, two of which revealed an incombustibility of 35 precent and one of which showed an incombustibility of 31 percent, to be representative of the condition of the floor throughout the No. 5 Section (Tr. 37-38).

8. The inspector conceded that there had been spillage in the crosscut where the samples were taken, but he insisted that he did not take samples where spillage existed (Tr. 71-72). In the inspector's opinion, the amount of spillage in the crosscuts and entries near the face was not excessive and would not have justified citing Pontiki for a violation of 30 CFR 75.400 for permitting combustible materials to accumulate (Tr. 90-91).

9. Respondent's safety director introduced as Exhibit C a drawing of the No. 5 Section which he made about 2 days after the inspector's order was issued. Exhibit C shows that both of the inspector's samples were taken in places where spillage existed. The sample obtained by the trainee was taken at a place where no spillage is shown on Exhibit C, and the incombustibility of that sample was 35 percent (Exhs. 6 and C; Tr. 144).

10. The chief mine foreman, second-shift mine foreman, and third-shift mine foreman all testified that they were having trouble in controlling the roof in the No. 5 Section (Tr. 105; 112; 121; 124; 170). Timbers were being set on each side of the entry and 72-inch roof bolts on 4-foot centers were being used to support the roof (Tr. 91-92). It was also frequently necessary to install cribs as further supplemental support (Tr. 112; 124;

Exh. B).

Pontiki's safety director and all three foremen stated that when additional roof supports and rock dusting needed to be done at the same time, they gave priority to installation of roof supports (Tr. 112; 124; 151; 180).

11. All three foremen testified that the cleaning and rock dusting program in the No. 5 Section consisted of cleaning and rock dusting during both production shifts as well as cleaning and rock dusting on the maintenance shift (Tr. 99-100; 119; 124; 168-169). On each production shift, the operator of the scoop had the duty of bringing in supplies such as roof bolts, timbers, and rock dust during the first part of his shift. After he had completed bringing in supplies, it was the scoop operator's duty to shove excess coal accumulations into the face and to apply rock dust to the floor after the loading machine had completed removal of coal from each working place (Tr. 99-100; 167-169). The chief mine foreman each day leaves a list of duties for the third-shift mine foreman to complete on his shift between midnight and 8:00 a.m. Those duties always include cleaning up excessive coal accumulations and applying rock dust (Tr. 100-101; 119; Exhs. A and B).

12. Three of Pontiki's witnesses agreed that on May 3, 1979, when Order No. 706444 was written, there was an inadequate amount of rock dust on the mine floor (Tr. 110; 164; 174-175). Pontiki's safety director, who had formerly been an MSHA inspector for about 3 years, stated that he agreed that a violation of section 75.403 existed at the time Order No. 706444 was written, but the safety director stated that he disagreed with the inspector's claim that the violation was the result of unwarrantable failure (Tr. 164-165).

13. Pontiki's mine foreman stated that rock dusting on the midnight or maintenance shift is done by a machine and the maintenance shift concentrates on the area which has been mined during the preceding two production shifts (Tr. 99-100). The mine foreman specifically stated: "Honestly, when he dusts the last line of breaks he doesn't concentrate on the floor. Really machine dusting you just can't dust the floor * * *" (Tr. 104). The mine foreman explained that rock dust is applied by hand during the production shift by the scoop operator. Sometimes they get behind with dusting the floor and at such times "* * * we'll work extra hours at dusting the floor" (Tr. 105).

14. Pontiki's third-shift foreman stated that the miners on his maintenance shift did not apply rock dust to the mine floor as well as they should. He stated specifically, "I leave instructions for them to spray the ribs and the top and the bottom. Of course, you know, a lot of times, they don't get maybe to the bottom as good as they should. It should be thicker than what it is, really" (Tr. 123).

15. The inspector issued an unwarrantable failure order because the section foreman knew that inadequate rock dusting had been done, but the foreman was taking no action to apply rock dust although the roof-bolting machine was being operated and the

miners were getting ready to produce

coal at the time Order No. 706444 was issued (Tr. 39; 45). The inspector believed that the violation of section 75.403 contributed significantly and substantially to the cause and effect of a safety hazard because the No. 1 Mine releases methane and an explosion could have occurred as a result of the inadequate rock dusting. The inspector believed that management was becoming complacent about the need to apply an adequate amount of rock dust. The inspector did not find that there was sufficient methane in the area at the time the order was written to warrant a finding of imminent danger (Tr. 39-40; 64; 73-80).

16. Order No. 706444 was based on Citation No. 706762 issued April 3, 1979, citing Pontiki for a violation of section 75.313 because "[t]he S and S battery powered scoop (no serial No.) which is used to load and haul coal from the faces on No. 001-0 Section is not equipped with a methane monitor" (Exh. 3). Pontiki had been using the scoop for about 2 weeks without ever having installed a methane monitor on the scoop. If the inspector had found that the scoop had been equipped with a methane monitor which had become inoperable, he would have issued an ordinary citation under section 104(a) of the Act, but he found that Pontiki's use of a scoop for 2 weeks without installing a methane monitor was a sufficient showing of negligence to justify his issuance of the citation under section 104(d)(1) of the Act. The inspector found that the alleged violation of section 75.313 contributed significantly and substantially to the cause or effect of a safety hazard because the No. 1 Mine releases methane and a methane monitor will deenergize equipment if it encounters a concentration of methane of up to 2 percent or more. A concentration of methane of up to 5 percent may cause an ignition. The inspector did not find that an imminent danger existed because the scoop was not being operated in an explosive concentration of methane (Tr. 14-29).

17. In the inspector's opinion, Pontiki's management failed to demonstrate a good faith effort to achieve rapid compliance after he issued Order No. 706444 citing Pontiki for a violation of section 75.403. The inspector based his opinion of lack of good faith abatement on the fact that his order was issued on May 3, 1979, and was not abated until May 7, 1979 (Tr. 40). After the inspector was shown a calendar, he stated that his order was issued on a Thursday at 6:05 p.m. and that an intervening weekend passed before he terminated the order on Monday, May 7, 1979 (Tr. 41). The inspector's opinion as to lack of good faith abatement failed to take into consideration the fact that Pontiki's management tried to get an inspector to return to the mine on Friday, May 4, 1979, to terminate the order, but no MSHA inspector was available for checking the conditions in the No. 5 Section because all of the inspectors were attending a personnel meeting at MSHA's Prestonsburg Office (Tr. 42-43; 115; 187). The inspector did not bring his notes with him when he testified at the hearing and therefore was unable to agree or disagree as to his availability to check the No. 5 Section on May 4, 1979, to determine whether his order should be terminated (Tr. 43). In the opinion of Pontiki's mine foreman, the conditions cited in the inspector's order had been abated by the next day after the

order was issued (Tr. 115).

18. When Pontiki's management was unable to obtain an inspector to check the conditions in the No. 5 Section on May 4, 1979, additional cleaning and rock dusting were done during the weekend, but much of that cleaning consisted of removal of loose coal which had sloughed off the ribs and was lying behind the roadway timbers (Tr. 132; 187). The inspector stated that his order was not intended to require the removal of material from behind the timbers (Tr. 67-71). The preponderance of the evidence shows that Pontiki's management demonstrated a good faith effort to achieve rapid compliance.

Docket No. KENT 79-115-R

The Validity of Underlying Citation No. 706762

The first contention made in Pontiki's brief (pp. 24-27) is that underlying Citation No. 706762, on which Order No. 706444 is based, is invalid because it does not contain the finding of unwarrantable failure which is required by section 104(d)(1) of the Act. For all practical purposes, Pontiki is raising the question of whether MSHA Form 7000-3, which is used by inspectors for issuing citations and orders under the 1977 Act, is sufficiently specific to comply with the requirements of section 104(d)(1) when the inspector wishes to issue an unwarrantable failure citation. As Pontiki correctly points out, section 104(d)(1) unambiguously requires that "* * * if he [an authorized representative of the Secretary] finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter."

Exhibit No. 3 in this proceeding is Citation No. 706762 issued by an inspector on April 3, 1979. Citation No. 706762 is written on MSHA Form 7000-3. The inspector placed an "X" in a box at the top of the form to show that he was issuing a citation. Under the word "Citation" there appears in parentheses "See Reverse." If one turns the form over, he reads on the right side of the back of the form the following statement:

CITATION/ORDER

> Pursuant to the Federal Mine Safety and Health Act of 1977, the undersigned Authorized Representative of the Secretary upon making an inspection or an investigation of the hereon designated mine on this date finds/believes that the following condition or practice exists, or has existed, in the mine area or on the equipment described hereon.
>
> Section 104(a) - Violation of the Act, mandatory health or safety standard, rule, order or regulation

Section 104(d)(1)	- Unwarrantable failure - could significantly and substantially contribute to health or safety hazard
Section 104(f)	- Citation - exceeding respirable dust standard

Beneath the word "Citation" on the front of the form, the phrase "Type of Action" appears. The inspector entered after "Type of Action" the numbers and letter "104-D." There is nothing on the front of the form to explain what the entry "104-D" means. If one turns the form over, he will find nothing on the back of the form which explains what "104-D" means, but he will find under the caption "Citation/Order," as quoted above, an explanation opposite "Section 104(d)(1)" to the effect that section 104(d)(1) is associated with "unwarrantable failure."

Beneath the words "Part and Section" on the front of the form, the inspector placed an "X" in a box after which there appears "S and S (See Reverse)." Again, if one turns to the back of the form, he will find opposite "Section 104(d)(1)" a statement indicating that a 104(d)(1) type of action involves a violation which "could significantly and substantially contribute to health or safety hazard."

Pontiki contends that the entries on Exhibit No. 3 or Form 7000-3, as described above, fall short of compliance with section 104(d)(1) of the Act which requires that an inspector shall include a finding of unwarrantable failure "* * * in any citation given to the operator under this chapter."

MSHA's brief (p. 11) notes that the Commission stated in Secretary of Labor v. Jim Walter Resources, Inc., 1 F.M.S.H.R. Comm. Decisions 1827, 1829, that "[t]he primary reasons compelling the statutory mandate of specificity is for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter." The issue in the Jim Walter case was whether the inspector's description of the "condition or practice" cited in his notice of violation was sufficiently specific to comply with section 104(e) of the Federal Coal Mine Health and Safety Act of 1969, but the principle is the same, namely, whether Exhibit No. 3 sets forth a specific finding as to unwarrantable failure which satisfies the provisions of section 104(d)(1) of the 1977 Act.

I find that Exhibit No. 3 complies with the "finding" requirements of section 104(d)(1). The front of Exhibit No. 3 informed Pontiki that Citation No. 706762 was being issued under section 104(d). Although the inspector did not add subsection (1) after his entry of section "104-D," his omission was not prejudicial to Pontiki because there is no entry on the back of Citation No. 706762 with which the inspector's reference to "104-D" could have been confused. Therefore, the back of Citation No. 706762 specifically stated that the inspector had found the existence of a condition

or practice which was described on the front of Citation No. 706762. The front of the citation also advised Pontiki that the citation was being issued under section 104-D and the back of the form clearly shows that any reference to "D" must pertain to section 104(d)(1) which is only associated with unwarrantable failure. The inspector's checking of "S and S" on the front of the citation was associated with a request that the operator examine the "reverse" or back side of the form. There, again, opposite "Section 104(d)(1)," the form explained that "S and S" meant a significant and substantial violation which could contribute to a health or safety standard.

I do not think that Pontiki's brief raises a question about whether the evidence in this proceeding would support a finding that the violation alleged in Citation No. 706762 was the result of unwarrantable failure on the part of Pontiki, but if such an issue is inherent in Pontiki's arguments, I believe that Finding No. 16, supra, supports the inspector's finding of unwarrantable failure in Citation No. 706762, assuming that unwarrantable failure has the meaning assigned to that term in Zeigler Coal Co., 7 IBMA 280, 295-96 (1977).

MSHA's Request that I Find a Violation of Section 75.313

At the hearing, I sustained an objection by Pontiki's counsel when MSHA's counsel asked the inspector whether Pontiki had demonstrated a good faith effort to achieve compliance after Citation No. 706762 was issued. I sustained the objection because my order had consolidated for hearing in this proceeding only the civil penalty issues pertaining to Order No. 706444. Since Pontiki's counsel had claimed that the underlying Citation No. 706762 was invalid only for failure to make the findings required by section 104(d)(1) of the Act, it did not occur to me that I should consolidate the the civil penalty issues with respect to underlying Citation No. 706762 with the civil penalty issues pertaining to Order No. 706444.

In the preceding portion of this decision I have rejected Pontiki's argument that Citation No. 706762 failed to make the findings required by section 104(d)(1). Since Pontiki was not given notice that the civil penalty issues with respect to Citation No. 706762 would be considered at the hearing, I think that I must reaffirm my sustaining of Pontiki's objection to my considering in this proceeding the civil penalty issues with respect to Citation No. 706762.

It is true that MSHA's brief (p. 7) argues that I may find a violation of section 75.313 on the basis of the evidence introduced by MSHA in this proceeding regardless of whether Pontiki was given notice that the civil penalty issues with respect to Citation No. 706762 would be considered at the hearing. MSHA's theory is that I may determine whether the violation of section 75.313 alleged in Citation No. 706762 occurred as a part of my consideration of Pontiki's arguments that Citation No. 706762 is invalid for failure to make the findings required by section 104(d)(1) because MSHA claims that

one of the findings required by section 104(d)(1) is that the inspector find that a violation has occurred. While that may be true, it

is a fact that Pontiki did not raise the specific issue of whether a violation of section 75.313 occurred. Pontiki's objection to the underlying citation has always been directed to the question of whether the citation properly made the finding as to unwarrantable failure which is required by section 104(d)(1).

In any event, it is a fact that my order did not consolidate for hearing in this proceeding the civil penalty issues associated with Citation No. 706762. The sole reason that MSHA requests me to find that a violation of section 75.313 occurred is to make my finding "res judicata" for the prospective civil penalty proceeding (MSHA's brief, p. 7). I do not believe I can ignore the clear provisions of my order providing for hearing and consider issues which my order failed to state would be considered.

As I stated at the hearing, it was an oversight on my part not to have consolidated for hearing the civil penalty issues pertaining to Citation No. 706762. It has been my consistent practice to consolidate for hearing all civil penalty issues with the issues relating to the primary order or citation involved in proceedings initiated by applications for review or notices of contest, but this is the first proceeding I have had in which MSHA wished to have me consider the civil penalty issues associated with an underlying citation. It would be unfortunate if my lack of foresight in consolidating the civil penalty issues pertaining to Citation No. 706762 for hearing in this proceeding should result in the necessity of my having to hold a further hearing on the civil penalty issues raised by MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 with respect to underlying Citation No. 706762. As explained below, I do not think that an additional hearing should be required to resolve the civil penalty issues remaining to be determined with respect to Citation No. 706762.

Although the order accompanying this decision disposes only of the civil penalty issues raised by Order No. 706444, it is my opinion that this record contains the essential facts required for determining all civil penalty issues with respect to Citation No. 706762, provided counsel for the parties are agreeable to a resolution of the civil penalty issues on the basis of the record in this proceeding. The fact that evidence has been received with respect to Citation No. 706762 should not, of course, preclude the parties from settling the civil penalty issues raised with respect to Citation No. 706762, if they should be inclined to do so.

I shall take no action in scheduling a hearing or deciding the civil penalty issues with respect to Citation No. 706762 until time for filing a request for discretionary review of my decision has expired. Within a reasonable time after review has either been granted or denied, counsel for the parties should advise me as to their wishes concerning the manner for disposition of the civil penalty issues. If I do not eventually receive an expression of opinion from counsel for the parties as to the method they would prefer for disposing of the civil

penalty issues raised by Citation No. 706762, I shall schedule those issues for hearing.

The Validity of Order No. 706444

The first argument in Pontiki's brief (p. 28) with respect to the invalidity of Order No. 706444 is that the order must fall because it was based on Citation No. 706762 which has been shown by Pontiki to be invalid. Since I have already held in a preceding portion of this decision that Citation No. 706762 was validly issued, I must necessarily reject Pontiki's first argument.

The second argument raised by Pontiki's brief (pp. 28-29) "* * * is substantially identical to that made with respect to the underlying citation," namely, that Order No. 706444 is invalid because it failed to make the special findings which are required by the remainder of section 104(d)(1) which provides:

> * * * If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order [of withdrawal] * * *.

Since Pontiki's argument with respect to the invalidity of Order No. 706444 is substantially identical to that made with respect to underlying Citation No. 706762, my determination as to the validity of Order No. 706444 will also be nearly identical to that made with respect to Citation No. 706762. Order No. 706444 was received in evidence as Exhibit No. 5. Form 7000-3 used by the inspector in this instance for issuance of Order No. 706444 is, of course, identical to the form used for issuance of Citation No. 706762 except that the inspector correctly cited the type of action as "104(d)(1)" and checked the block at the top of the form indicating that he was issuing an order of withdrawal. When Exhibit No. 5 is examined on its reverse side in response to the suggestion on the front of the form to "See reverse," the following statement will be found on the left side of the back of the form:

ORDER

> You are hereby ordered to cause immediately all persons, except those permitted under Section 103(j), 103(k) and/or 104(c) of the Federal Mine Safety and Health Act of 1977, to be withdrawn from, and to be prohibited from, entering the area of the mine described hereon until an Authorized Representative of the Secretary determines that the danger(s) and its causes no longer exist, the violation(s) of the mandatory health or safety standards have been abated or the emergency has been eliminated.

Section 104(b)	-	Failure to abate a violation 104(a) or (d)(1) in the time period given
Section 104(d)(1)	-	Unwarrantable failure - subsequent to 104(d)(1) citation during the same inspection or within 90 days after issuance of 104(d)(1) citation
Section 104(d)(2)	-	Unwarrantable failure violation - subsequent to issuance to 104(d)(1) order - subsequent inspection - no intervening inspection of the mine in its entirety which has disclosed no further unwarrantable violation
* * *	* * *	* * *

An examination of Exhibit No. 5 shows that the inspector checked that an order of withdrawal was being issued under section 104(d)(1) of the Act and the reverse side of Exhibit No. 5 explained to Pontiki that the order involved a finding that the violation was the result of unwarrantable failure found during the same inspection or within 90 days after the issuance of Citation No. 706762. Exhibit No. 5 clearly made all the preliminary findings which are required to comply with the provisions of section 104(d)(1) of the Act insofar as they pertain to the issuance of an order. Although the former Board of Mine Operations Appeals has held that the violation cited in an order issued under section 104(c)(1) of the 1969 Act does not have to be a violation which would significantly and substantially contribute to the cause or effect of a health or safety standard (Zeigler Coal Co., 6 IBMA 182 (1976); Old Ben Coal Co., 6 IBMA 229 (1976); Old Ben Coal Co., 6 IBMA 234 (1976); Old Ben Coal Co., 7 IBMA 224 (1976); and Alabama By-Products Corp., 7 IBMA 85 (1976)), the inspector checked the "S and S" block on Order No. 706444 because he believed the violation of section 75.403 cited in the order was a significant and substantial violation which could significantly and substantially contribute to the cause and effect of a health or safety standard (Finding No. 15, supra).

Based on the examination of Order No. 706444 set forth above, I find that the order contained the special findings required by section 104(d)(1) of the Act and was therefore a valid order.

The third argument made in Pontiki's brief (pp. 29-31) is that the violation of section 75.403 cited in Order No. 706444 was not proven. As indicated in Finding No. 5, supra, Order No. 706444 cited Pontiki for having inadequate rock dust in all seven entries and connecting crosscuts in the No. 5 Section of the mine. Pontiki points to the fact that the inspector's order of termination stated that loose coal and coal dust were removed from the No. 5 Section and that entries Nos. 1 through 7 and

connecting crosscuts were adequately rock dusted. Pontiki then refers to its own witnesses' testimony to the effect that there were loose coal accumulations in the No. 5

Section and concludes from such evidence that since there was a violation of section 75.400 in the No. 5 Section, the inspector incorrectly cited Pontiki for a violation of section 75.403.

One of the difficulties I have with Pontiki's argument that the existence of a violation of section 75.400 precludes an inspector from citing Pontiki for a violation of section 75.403, is the fact that three of Pontiki's own witnesses, including one who had previously been an MSHA inspector for 3 years, stated unequivocally that there was inadequate rock dust on the floor in the No. 5 Section (Finding No. 12, supra). Obviously, the inspector could have cited Pontiki for a violation of section 75.400 in the same order in which he cited Pontiki for a violation of section 75.403. Thus, it is quite immaterial that the floor in the No. 5 Section contained loose coal accumulations so long as the evidence also showed that Pontiki had failed to apply an adequate amount of rock dust to the floors as required by section 75.403.

Section 75.403 provides as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum [in intake entries] * * *. [Emphasis supplied.]

All the entries in which the inspector obtained a total of three samples were in intake air and two samples, when analyzed, showed an incombustible content of 35 percent and one sample had an incombustible content of 31 percent. The inspector's order cited a lack of rock dust in only those areas where rock dusting is required, that is, the areas were more than 40 feet from the working face, they were not too wet or too high in incombustible content to propagate an explosion, they were not inaccessible or unsafe to enter, and they had not been exempted from rock dusting by the Secretary (Tr. 93-94). Inasmuch as section 75.403 requires that an adequate amount of rock dust be "maintained" in the entries and crosscuts cited in Order No. 706444, Pontiki was not exempt from having the entries and crosscuts rock dusted just because its witnesses testified that an excessive amount of loose coal and coal dust had been permitted to accumulate. Pontiki was required by section 75.400 to keep the loose coal cleaned up and was also required by section 75.403 to apply sufficient rock dust to maintain the incombustible content at 65 percent in intake entries. The inspector believed the loose coal accumulations of about 1 inch were sufficiently thin that the area could be rendered 65 percent incombustible by application of rock dust alone without any cleaning (Finding Nos. 8 and 18, supra). If he had also believed that the loose coal needed to be cleaned up before rock dust could be applied, he could have cited Pontiki for a violation of section 75.400 and also for a violation of section 75.403. The fact that the inspector elected to cite Pontiki for only one violation instead of two does not make his

order invalid for failing to cite both violations.

Perhaps the most unsatisfactory aspect of the evidence presented by MSHA to prove that a violation of section 75.403 existed is the question of whether the inspector's three samples were really representative of the conditions which existed throughout the seven entries and connecting crosscuts cited in the inspector's order (Pontiki's Brief, p. 31). The evidence unequivocally shows that all three samples were taken within the second crosscut from the face, or within a few feet of that crosscut in the Nos. 2 and 3 entries. Thus, the samples proved that the floor in the second crosscut from the face had an incombustibility of from 31 to 35 percent (Finding No. 7, supra). The inspector believed that those three samples were representative of conditions throughout all seven entries and connecting crosscuts, but his credibility would have been considerably enhanced if he had taken his samples farther apart than he did.

The inspector's testimony was, however, corroborated by the testimony of Pontiki's safety director who had been an MSHA inspector for about 3 years before he began working for Pontiki. The safety director was traveling with the inspector when the inspector stated that he was going to issue a "(d)" order citing Pontiki for a violation of section 75.403. Pontiki's safety director candidly stated that he agreed that Pontiki had violated section 75.403 (Finding No. 12, supra). Pontiki's safety director was of the opinion that the inspector should have taken additional samples and that the violation was not the result of unwarrantable failure, but he readily agreed that a violation of section 75.403 had occurred. Additionally, two of Pontiki's foremen stated that an inadequate amount of rock dust had been applied to the mine floor and they specifically stated that the machine duster used on the maintenance shift did not apply as much rock dust to the floor of the mine as was desirable (Finding Nos. 13 and 14, supra). Therefore, I find that the preponderance of the evidence shows that a violation of section 75.403 occurred as cited in Order No. 706444 (Finding Nos. 3 through 9 and 12 through 14, supra).

The fourth argument made in Pontiki's brief (pp. 32-39) is that, assuming, arguendo, that a violation of section 75.403 occurred, the violation was not the result of an unwarrantable failure by Pontiki's management. Many of the factual arguments advanced by Pontiki in support of its argument that MSHA failed to prove that the violation was the result of unwarrantable failure have been answered in my discussion above of the issue as to whether a violation of section 75.403 was proven. I agree that Pontiki's brief correctly cites the language from the former Board's Zeigler opinion for the correct definition of the words "unwarrantable failure," namely (7 IBMA at 295-96):

> * * * an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because

of a lack of due diligence, or because of indifference or lack of reasonable care. [Emphasis supplied.]

Pontiki's brief also correctly quotes one of the inspector's answers in response to questioning done to elicit from the inspector his understanding of the words "unwarrantable failure" (Br., p. 32 and Tr. 27):

> Unwarrantable failure on the part of an operator is a violation of a law where a condition exists at the mines which could add substantially and significantly to the health and safety of the miners. The operator knows the condition exists and yet is doing nothing to correct it. Or it can be a condition that exists where the operator knows or through diligent effort should have known the condition existed yet he was doing nothing to correct it. This is what I consider unwarrantable; it's a condition the operator knows exists.

Inasmuch as the inspector practically quoted one of the definitions of unwarrantable failure given in the Board's Zeigler opinion, supra, it is difficult to determine any defects in the inspector's rationale for finding that the violation cited in his order was the result of an unwarrantable failure to comply. Pontiki, therefore, resorts to language in the Zeigler opinion in which the Board indicated that the inspector's judgment that unwarrantable failure existed must be based on a thorough investigation and must be reasonable in light of the peculiar relevant facts and circumstances which existed at the time the inspector writes an unwarrantable failure order. Pontiki argues that the inspector's finding of unwarrantable failure was not based on a thorough investigation or reasonable conclusions because he did not walk the complete length of all the entries and connecting crosscuts cited in his order and because he did not inquire about the efforts which Pontiki's management was making to maintain an adequate coating of rock dust in the No. 5 Section (Br., pp. 34-36).

Although the inspector did not walk the entire length of each of the entries cited in his order (Finding No. 6, supra), he did inspect the face area, including walking through the last open crosscut and the second open crosscut from the face. He did walk back to the feeder and he did look down each of the entries. While he may not have been able to see a total distance of 360 feet with great precision while having only his cap light for illumination, it is quite probable that he could distinguish between the blackness of the floor and the whiteness of the roof and ribs for a distance of 360 feet. His order was primarily based on what he saw in the last two crosscuts and the fact that the floor appeared black everywhere he looked. Therefore, his testimony that he could see for a distance of 360 feet for the purpose of determining the condition of the floor is a credible statement.

It should be recalled that the inspector entered the mine about 4:15 p.m. or shortly after the second shift went to work at 4:00 p.m. (Tr. 136). The inspector issued his unwarrantable failure order at 6:05 p.m. after an examination of the No. 5

Section which had lasted about 1-1/2 hours. Pontiki's safety director testified that 190 shuttle cars of coal had been

produced in the No. 5 Section during the day shift which had ended just a few minutes before the inspector began his examination of the No. 5 Section (Tr. 142). I have never had a case in which anyone estimated the amount of coal hauled by shuttle cars to be less than 5 tons, and most of the time, the tonnage is estimated at 8 tons. Since all witnesses agreed that the shuttle cars in the No. 5 Section had been loaded so high that coal spilled off of them on the way to the feeder, it is likely that the 190 shuttle cars produced on the No. 5 Section during a single shift were hauling 8 tons each. In any event, the cars would have hauled from 950 tons (190 x 5) to 1,520 tons (190 x 8). The four producing sections in the No. 5 Mine produce a total of about 3,500 tons of raw coal per day. Therefore, the production of about 1,000 tons of coal during a single shift on a single section was a remarkable achievement. Moreover, even if the 190 cars only hauled 1 ton of coal each, just the process of loading and unloading 190 cars within an 8-hour period was a phenomenal accomplishment.

Pontiki's brief emphasizes that management had a very fine program for cleaning and rock dusting in the No. 1 Mine (Finding No. 11, supra). A11 three of Pontiki's foremen testified, however, that they were having a great many roof-control problems in the No. 5 Section and that much of their time was being spent in installing supplemental roof support in addition to the normal roof-bolting configuration. They further stated that when both a need for supporting the roof and a need for rock dusting occurred simultaneously, they gave priority to supporting the roof (Finding No. 10, supra). Three of Pontiki's witnesses also testified that they were not applying as much rock dust to the floor as was desirable (Finding No. 13, supra). Pontiki's Pontiki's chief foreman, in describing their difficulties in keeping the floor cleaned and rock dusted in the No. 5 Section, stated (Tr. 105):

> Well, what I seen was just the ribs rolling off. And, well, the seam of coal was I guess all across the face from seven to nine feet and when a piece would tumble off it would almost close the roadway, if you know what I mean. Sometimes it would fall twenty foot long and clear across the road, but we had all kinds of trouble with that. We done everything I could and I guess just failed, that's all.

It is easy to understand why Pontiki's management thought that the inspector's finding of unwarrantable failure was unfair. The record shows that management had procedures which should have assured that the roof in the No. 5 Section was controlled and that the section was properly cleaned and rock dusted (Findings Nos. 10 and 11, supra). Nevertheless, in my opinion, there was at least one defect in management's plan, namely, an unreasonable and excessive reliance was placed on the ability of the operators of the scoop to bring in supplies, clean up excess coal, and apply rock dust to the floor during the production shifts. It was the duty of the scoop operator to bring in roof bolts, rock dust, and other supplies at the beginning of each shift. After

he had finished bringing in supplies, it was his duty to clean up loose coal accumulations and apply rock

dust to the floor by hand. The maintenance shift, which worked from midnight to 8 a.m., was responsible for machine dusting the roof, ribs, and floor. While they were supposed to apply rock dust to the floor, they did not apply as much as was desirable (Finding Nos. 12 and 13, supra).

Since management was having difficulty in supporting the roof and since extra time was needed to maintain the roof, the evidence clearly supports a finding that management was not giving as much attention to cleaning and rock dusting as was required in the circumstances. In every instance, it was the scoop operator's duty to clean and rock dust after he had completed bringing in supplies. In other words, Pontiki's management was placing primary emphasis on producing coal rather than in maintaining a completely safe operation. At the beginning of the shift on which the inspector's order was issued, one of Pontiki's shift foremen had made an inspection of the section before the inspector arrived and he had concluded that the section needed cleaning and rock dusting (Tr. 175). Despite the fact that management knew an inadequate amount of rock dust was being applied to the floor and that excessive coal needed to be cleaned up, management was continuing to produce 190 shuttle cars of coal per shift, instead of stopping production long enough to clean up the section and apply an adequate amount of rock dust. It makes very little difference if miners are protected from having the roof fall on them if, while standing under a perfectly safe roof, they are killed or injured by a coal dust explosion.

A preponderance of the evidence supports the inspector's finding that management knew an inadequate amount of rock dust had been applied and yet management was not making sure that the section was cleaned and rock dusted as required by section 75.403. Therefore, I find that the inspector properly found that the violation of section 75.403 cited in Order No. 706444 was the result of unwarrantable failure. Since Order No. 706444 has successfully withstood all of Pontiki's arguments, the order accompanying this decision will hereinafter affirm Order No. 706444.

Docket No. KENT 80-53

MSHA's Proposal for Assessment of Civil Penalty was filed on January 15, 1980, seeking assessment of civil penalties for the violations of sections 75.313 and 75.403 alleged in Citation No. 706762 and Order No. 706444, respectively. As I have already explained on page 10 of this decision, supra, my order setting this case for hearing did not consolidate the civil penalty issues raised with respect to underlying Citation No. 706762. Therefore, my decision in this proceeding will deal only with the civil penalty issues concerning Order No. 706444.

I have hereinbefore found that the violation of section 75.403 alleged in Order No. 706444 occurred. I shall hereinafter consider the six criteria set forth in section 110(i) of the Act so that an appropriate civil penalty may be assessed for the

violation of section 75.403 cited in Order No. 706444.

Size of Respondent's Business

On the basis of Finding No. 1, supra, I find that Pontiki is a large operator and that the civil penalty to be assessed in this proceeding should be in an upper range of magnitude insofar as it is determined under the criterion of the size of respondent's business.

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

Pontiki's counsel did not present any evidence at the hearing with respect to Pontiki'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 Pontiki to discontinue in business.

Good Faith Effort To Achieve Rapid Compliance

On the basis of Finding Nos. 17 and 18, supra, I find that Pontiki demonstrated a good faith effort to achieve compliance and Pontiki will be given full credit for that mitigating factor in the assessment of a civil penalty.

History of Previous Violations

At the hearing, MSHA's counsel introduced as Exhibit No. 2 a 53-page computer printout which lists previous violations at all the mines controlled by Mapco, Inc. (Finding No. 1, supra). I stated at the hearing that it has been my practice to consider only the history of previous violations of the individual mine in which a given violation is found to have occurred (Tr. 7). MSHA's brief (pp. 3 and 24-25) argues that I am obligated to consider Mapco, Inc.'s, total history of previous violations rather than the previous violations which have occurred only at Pontiki's No. 1 Mine where the violation of section 75.403 here involved occurred. MSHA's argument is primarily based on a claim that section 110(i) of the Act provides for consideration to be given to "* * * the operator's history of previous violations," rather than for consideration to be given to the history of previous violations which have occurred at a single mine. MSHA contends that a greater deterrent against continued violations will be achieved if top management is held responsible for all of its subsidiaries' history than will be achieved if only a single mine is considered at a given time.

I do not have a closed mind on the subject. There may be cases in which it would be beneficial to consider the controlling company's history of previous violations rather than to consider only the previous violations which have occurred at the mine under consideration for a specific violation. In each

proceeding, a judge must use the evidence which the parties

have presented. If the evidence concerning the controlling company's previous violations is limited, there is no way for the judge to show how he has considered a given respondent's history of previous violations.

In this proceeding, for example, Exhibit No. 2 indicates that Mapco, Inc., which controls Pontiki and four other coal companies, has a history of previous violations totaling 2,089 violations. The fact that Mapco's subsidiaries have violated various regulations on 2,089 occasions, by itself, means nothing. That figure does not reveal whether Mapco's violations are greater or less than the violations committed by other controlling companies of comparable size. Exhibit No. 2 does not indicate how many tons of coal are produced in the nine mines which are controlled by Mapco. Exhibit No. 2 does not reveal how many sections of each mine are engaged in production. Exhibit No. 2 does not show how many production shifts exist at each mine nor how many employees work at each mine.

The absence of statistical information prevents me from giving any meaningful consideration to Mapco's previous violations as a whole. For example, Exhibit No. 2 shows that Pontiki's No. 1 Mine has had 15 previous violations of section 75.403 over a period of 3 years, whereas the Retiki Mine of Webster Coal Company has had 14 previous violations of section 75.403 over a period of 5 years, and the Dotiki Mine of Webster Coal Company has had 11 previous violations of section 75.403 over a period of 6 years. The foregoing comparison would make it appear that Pontiki's previous violations are more adverse than those of its affiliated company, but I cannot make such a finding because I do not know how many sections produce coal in either the Retiki Mine or the Dotiki Mine. If those mines employ fewer miners and produce less coal than Pontiki's No. 1 Mine, their record of 14 and 11 previous violations of section 75.403 would be more significant and unfavorable than Pontiki's 15 previous violations of section 75.403.

In short, until MSHA is able to introduce data of a more meaningful nature than those provided in Exhibit No. 2, there is no way for me to show how I have actually considered the criterion of history of previous violations with respect to a given controlling company's total history of previous violations. Moreover, I believe that top management will be as much deterred from allowing future violations to occur by a penalty assessed specifically for a given mine's adverse history of previous violations as it would be deterred by a penalty assessed for its overall adverse history of previous violations. Management would recognize from having to pay a civil penalty so determined that action taken by it to reduce or eliminate future repetitious violations at all mines would be likely to reduce any civil penalties that might result from any subsequent violations.

As to the history of previous violations at Pontiki's No. 1 Mine, Exhibit No. 2 shows that there were two violations of section 75.403 in 1977, 12 in 1978, and one in 1979 by January 4, 1979. I find that 12 violations of section 75.403 during a

single year shows a very unfavorable history of previous violations. Therefore, the penalty hereinafter assessed will be

increased by $500 under the criterion of history of previous violations. That large a number of violations of section 75.403 tends to support the inspector's belief that Pontiki's management was becoming complacent about the need to maintain an adequate amount of rock dust to within 40 feet of the working faces (Tr. 39).

Negligence

The preponderance of the evidence shows that there was a high degree of negligence in respondent's violation of section 75.403. Management was producing coal at the rate of 190 shuttle cars per shift despite the fact that a greater amount of time and effort than normal was being exerted in controlling the roof. The effort to maintain a high productivity from the No. 5 Section, despite the roof-control problem, caused Pontiki's management to slight the need to exert as great an effort at cleaning and rock dusting as was being utilized to control the roof. Management's failure to keep the section clean and maintain an adequate amount of rock dust was the result of a considerable amount of indifference to adherence with section 75.403. The criterion of negligence requires that a penalty of $2,000 be assessed (Finding Nos. 5, 7, 10, and 12 through 15, supra).

Gravity

Inasmuch as Pontiki's No. 1 Mine liberates about 454,000 cubic feet of methane in a 24-hour period (Finding No. 1, supra), the failure to maintain an adequate amount of rock dust exposed the miners to a serious threat of an explosion. At the time the inspector cited the violation of section 75.403, he found that no dangerous amount of methane was present. Nevertheless, there was a potential for an explosion because the roof-bolting machine was being operated and respondent's shift foreman had just inspected the No. 5 Section and had recognized that the section was badly in need of cleaning and had directed that cleaning be done as soon as possible. The section foreman, however, had made no attempt to clean up or rock dust and no cleaning had been commenced up to the time that the inspector issued Order No. 706444. In such circumstances, the miners had been exposed to a potential ignition for a considerable period of time and the lack of rock dust was necessarily a serious violation. Therefore, I find that a penalty of $1,000 is required under the criterion of gravity (Finding No. 15, supra).

A total penalty of $3,500 will hereinafter be assessed based on my findings above that $500 be attributed to Pontiki's history of previous violations, that $2,000 be attributed to Pontiki's negligence and that $1,000 be attributed to the gravity of the violation. The penalty would have been larger than $3,500 if Pontiki had failed to demonstrate a good faith effort to achieve rapid compliance. The penalty would have been less than $3,500 if Pontiki were not a large operator and if the evidence in this proceeding had shown that Pontiki's ability to continue in business would be adversely affected by having to pay civil

penalties.

Ultimate Findings and Conclusions

(1) Pontiki's application for review or notice of contest of Order No. 706444 dated May 3, 1979, should be denied and Order No. 706444 should be affirmed as having correctly cited a violation of section 75.403 and having properly found that the violation was the result of unwarrantable failure under section 104(d)(1) of the Act.

(2) Underlying Citation No. 706762 issued April 3, 1979, and Order No. 706444 properly made the findings required by section 104(d)(1) of the Act and were validly issued.

(3) MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 should be granted to the extent that it seeks assessment of a civil penalty for the violation of section 75.403 alleged in Order No. 706444 and a civil penalty of $3,500.00 should be assessed for that violation.

(4) The portion of MSHA's Proposal for Assessment of Civil Penalty which seeks assessment of a civil penalty for a violation of section 75.403 with respect to Order No. 706444 should be severed from the remainder of that Proposal and should be disposed of as provided for in paragraph 3 above. The remaining portion of MSHA's Proposal for Assessment of Civil Penalty in Docket No. KENT 80-53 which seeks assessment of a civil penalty for the violation of section 75.313 alleged in Citation No. 706762 should be scheduled for a hearing or should be decided on the basis of the record already made in this proceeding, depending upon the requests which are hereafter received from the parties to the proceeding in Docket No. KENT 80-53.

(5) Pontiki Coal Corporation is subject to the provisions of the Act and to the regulations promulgated thereunder (Tr. 96).

WHEREFORE, it is ordered:

(A) Pontiki Coal Corporation's application for review or notice of contest filed in Docket No. KENT 79-115-R is denied and Order No. 706444 issued May 3, 1979, is affirmed.

(B) MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 is severed from the remainder of the Proposal and is granted to the extent specified in paragraph (3) above. Pontiki Coal Corporation is ordered, within 30 days from the date of this decision, to pay a civil penalty of $3,500.00 for the violation of section 75.403 cited in Order No. 706444.

~391

(C) MSHA's Proposal for Assessment of Civil Penalty, insofar as it seeks assessment of a civil penalty for the violation of section 75.313 alleged in Citation No. 706762 will be disposed of as provided for in paragraph (4) above.

Richard C. Steffey
Administrative Law Judge

~FOOTNOTE 1

The order providing for hearing consolidated any civil penalty issues which might arise with respect to Order No. 706444 with the issues raised by Pontiki Coal Corporation's request for review of Order No. 706444. MSHA's Proposal for Assessment of Civil Penalty was filed on January 15, 1980, in Docket No. KENT 80-53 seeking assessment of a civil penalty for the violation of 30 CFR 75.403 alleged in Order No. 706444. Therefore, it is now possible to decide in this proceeding the civil penalty issues on which evidence was presented by the parties at the hearing held on August 9, 1979. My order did not consolidate the civil penalty issues raised in Docket No. KENT 80-53 with respect to underlying Citation No. 706762. Therefore, the order accompanying this decision defers all civil penalty issues pertaining to Citation No. 706762 for future disposition.