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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket Nos. Assessment Control Nos. PIKE 79-41-P 15-07371-03001 PIKE 79-107-P 15-07371-03003
v.	
JOHNSON BROTHERS COAL COMPANY, INC., RESPONDENT	No. 1 Mine

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner Gregory Johnson, Virgie, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to written notices of hearing dated June 19, 1979, and August 14, 1979, a hearing in the above-entitled consolidated hearing was held on August 8, 1979, and October 2, 1979, respectively, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

This proceeding involves two Petitions for Assessment of Civil Penalty filed by MSHA. The Petition in Docket No. PIKE 79-41-P was filed on November 20, 1978, and seeks to have civil penalties assessed for 20 alleged violations of the mandatory health and safety standards by respondent Johnson Brothers Coal Company. The Petition in Docket No. PIKE 79-107-P was filed on March 6, 1979, and seeks to have civil penalties assessed for three alleged violations of the respirable-dust standards. MSHA and respondent agreed to settle all issues in Docket No. PIKE 79-107-P as hereinafter described. Evidence was presented by MSHA and respondent with respect to the remaining 20 violations involved in Docket No. PIKE 79-41-P.

Issues

The issues raised by MSHA's Petition in Docket No. PIKE 79-41-P are whether Respondent violated any mandatory health and safety standards and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Three of those criteria may be given a general evaluation in this proceeding, while the remaining three will hereinafter be considered individually when the parties' evidence

concerning those three criteria is considered in detail. The three criteria which may be given a general evaluation, namely, the size of respondent's business, the question of whether the payment of penalties would cause respondent to discontinue in business, and the question of whether respondent demonstrated a good faith effort to correct the violations after being advised that they existed, will be considered first.

Size of Respondent's Business

Respondent is a corporation owned by four brothers: Gregory, Gwendell, Garney, and George Johnson. The corporation operates an underground coal mine which produces coal under a contract entered into with Bethlehem Steel Corporation. The coal is sold to Bethlehem at a fixed price and Johnson Brothers' sales do not fluctuate with changes in the market price of coal. When the brothers began mining coal, they used a hand-held drill operated from a roof-bolting machine and transported the coal out of the mine in battery-powered scoops. Their equipment was at first borrowed, but they now make payments on their own equipment which was purchased by money loaned to them by the Pikeville Bank.

When they first started mining in 1976, they employed only 12 miners and produced about 250 tons of coal per day. They now use a cutting machine and battery-powered scoops to haul coal to a conveyor belt. By 1979 they were employing about 23 miners and were producing about 400 or 500 tons per day from the Elkhorn No. 2 coal seam which measures about 40 inches in thickness at the place they are now mining. They produce coal on two production shifts and employ a maintenance crew on the third shift (Tr. 5-10; 190).

On the basis of the facts given above, I find that respondent operates a small mine and that any civil penalties assessed in this proceeding should be in a low range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

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

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

Good Faith Effort To Achieve Rapid Compliance

The inspectors testified with respect to each of the 20 violations alleged in this proceeding that respondent had

demonstrated a normal good faith effort to achieve rapid compliance (Tr. 25; 38; 108; 124; 137; 171;

198; 221; 235; 285; 304; 315; 325; 337; 349; 376; 388). Therefore, I find that respondent demonstrated a good faith effort to achieve rapid compliance with respect to all alleged violations and respondent will be given full credit for that mitigating factor when each penalty is hereinafter assessed.

Consideration of Remaining Criteria

The remaining three criteria, namely, the gravity of each alleged violation, respondent's negligence, if any, and respondent's history of previous violations, if any, will be considered below in connection with a detailed evaluation of the evidence presented by both MSHA and respondent.

The Contested Case
Docket No. PIKE 79-41-P

Notice No. 1 RDM (6-4) 1/7/76 75.1710 (Exhibit 2)
Notice No. 2 RDM (6-5) 1/7/76 75.1710 (Exhibit 12)
Notice No. 1 RDM (6-10) 4/16/76 75.1710 (Exhibit 22)

Findings. Depending upon the height of the mine in which the equipment is being operated, section 75.1710 requires that electric face equipment, including shuttle cars, be equipped with cabs or canopies to protect the miners operating such equipment from roof falls and rib rolls. The inspector stated that MSHA added 12 inches to the height referred to in the regulations in order to allow the canopies to pass under roof-supporting facilities such as crossbars, headers, and roof bolts. On January 7, 1976, and April 16, 1976, when the notices of violation listed above were written, canopies were required to be installed on equipment used in mines which were 36 inches or more than 36 inches in height (Tr. 36; 54; 62). Since the actual mining height in respondent's No. 1 Mine was 45 inches, respondent violated section 75.1710 by failing to install canopies on two Kersey scoops and an Acme roof-bolting machine which were being used in the face area of its mine (Tr. 16-17; 27-28; 32-33). The violations were moderately serious because a usable canopy would have provided some protection, but roof conditions were good and the miners were not exposed to a strong likelihood of injury by the absence of canopies (Tr. 17).

The violations were associated with a low degree of negligence because respondent made some effort to obtain canopies and it is extremely doubtful if the technology existed in January or April of 1976 to provide usable canopies for the Kersey scoops and Acme roof-bolting machine which respondent was operating in actual mining heights averaging 45 inches (Tr. 95-97). Actual mining heights in respondent's mine had dropped to 42 inches or less by the time the Secretary had issued an amendment suspending the requirement that canopies be used in mines whose actual height was 42 inches or less (42 Fed. Reg. 34876). Therefore, the notices of violation here involved were terminated because canopies ceased to be required in respondent's 42-inch mine (Tr. 72).

Conclusions. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226, 259 (1973), Associated Drilling, Inc., 3 IBMA 164, 173 (1974), and Itmann Coal Co., 4 IBMA 61 (1975), that if the

materials needed for abatement of a given violation are not available, no notice of violation should be written. Additionally, the Board held in P & P Coal Company, 6 IBMA 86 (1976), that the defense of impossibility to obtain equipment is an affirmative defense which can be considered only if respondent raises that issue itself. In this proceeding, respondent's witness testified that he had tried unsuccessfully to acquire a canopy for his Acme roof-bolting machine, but canopies were not being made for that machine in 1976 (Tr. 95). Although Kersey began to make canopies for its scoop in 1976, respondent's miners were unable to use that canopy in the coal height in respondent's mine and its miners resented even being asked to try using it (Tr. 97-98).

I am very much inclined to believe that respondent should be found not to have violated section 75.1710 under the Board's holdings in the cases cited above. It is a fact, however, that the Board also held in the P & P case, supra, that MSHA is not required to prove availability of equipment as a part of its case. I have found violations of section 75.1710 primarily because respondent's witness stated on cross-examination that he had not tried to obtain canopies until after the notices of violation were written (Tr. 91). Respondent's witness also stated that he had filed petitions for modification after the notices were written (Tr. 90).

The evidence shows that if respondent had insisted on its miners using the ill-fitting canopies which were available for Kersey scoops in 1976, the miners would have been exposed to at least as much chance of injury from trying to see out from under the canopies as they would have been exposed to injury by a possible roof fall by failure to use canopies (Tr. 97-98).

Because of the extenuating circumstances discussed above and shown in the hundred pages of transcript relating to the difficulties of obtaining and using canopies in 1976, a penalty of $1 will be assessed for each violation of section 75.1710. There is no history of previous violations to be considered.

Citation No. 69245 4/17/78 75.316 (Exhibit 29)

Findings. Section 75.316 requires each operator of a coal mine to adopt and follow a ventilation system and methane and dust control plan approved by the Secretary. Respondent violated section 75.316 by failing to install and maintain permanent stoppings to and including the third connecting crosscut outby the face as required by respondent's ventilation plan. On the intake side of the beltway, the last permanent stopping was five crosscuts from the face and on the return side of the beltway, the last permanent stopping was six crosscuts from the face (Tr. 103-105). The violation was only moderately serious because the inspector found a volume of 10,200 cubic feet of air per minute in the last open crosscut which was 1,200 cubic feet in excess of the required 9,000 cubic feet. Therefore, the miners were being supplied with an adequate amount of oxygen and sufficient air velocity to carry away any noxious fumes which might have

accumulated (Tr. 107). Besides assuring adequate ventilation, the permanent stoppings

prevent smoke from a possible fire on the beltline being carried to the working face (Tr. 115). Since respondent's No. 1 Mine has never been known to release any measurable amount of methane (Tr. 10; 105), there was little chance that air would come into the beltline from the return and cause an explosion (Tr. 113-114). Respondent was negligent in failing to erect the permanent stoppings as required by its ventilation plan.

Conclusions. Since the inspector believed that the violation was relatively nonserious in the circumstances prevailing at the time the citation was written, the penalty should be assessed primarily under the criterion of negligence. Respondent's witness failed to describe any extenuating circumstances in this instance. Considering that a small mine is involved, a penalty of $50 will be assessed for this violation of section 75.316. The penalty will be increased by $10 to $60 under the criterion of history of previous violations because respondent has violated section 75.316 on two prior occasions (Exh. 1).

Citation No. 69246 4/17/78 (Exhibit 31)

Findings. Respondent violated section 75.316 a second time on April 17, 1978, by failing to install and maintain line curtains to within 10 feet of the point of deepest penetration in all entries from which coal was being produced as required by respondent's ventilation plan. Respondent was producing coal from eight entries and the line brattices were installed to within 10 feet of the face in only one of the eight entries (Tr. 121-122). The inspector believed the violation to be nonserious because he found that there was adequate ventilation in the working faces without maintenance of the curtains to within 10 feet of the faces (Tr. 122). Respondent was negligent in failing to follow the provisions of its ventilation plan (Tr. 128).

Conclusions. The inspector's belief that adequate ventilation was being provided again requires that the penalty be assessed primarily under the criterion of negligence. The inspector stated that the instant citation was written during the first inspection to be made after respondent's ventilation plan had been changed to require that line curtains be maintained to within 10 feet of deepest penetration in all eight entries regardless of whether coal was actually being cut, mined, or loaded in those entries. The inspector said that the above-described requirement was an unusually strict provision and that MSHA subsequently retracted that provision (Tr. 125-128). Respondent should have been aware of the provisions in its own ventilation plan, but the fact that MSHA later changed the provision to a less demanding requirement shows that an honest misunderstanding could have caused respondent to maintain only the number of curtains which would have been required under the plan as it existed prior to the short-lived amendment (Tr. 128). Therefore, a penalty of only $25 will be assessed for this violation of section 75.316. The penalty will be increased by $10 to $35 because respondent has previously violated section 75.316 on two occasions (Exh. 1).

Citation No. 69247 4/17/78 75.316 (Exhibit 32)

Findings. Respondent violated section 75.316 again on April 17, 1978, because a curtain had been torn down where the battery-charging station was located. The gravity of respondent's failure to maintain the curtain, as required by the diagram shown on the mine map which is a part of respondent's ventilation plan, is that any toxic fumes from the battery-charging station could be carried to the working face if other curtains near the working face were also down. The violation was nonserious because no curtains at the face were down at the time the citation was written. Respondent was negligent for failing to maintain the curtain at the battery-charging station (Tr. 134-137; Exh. 61).

Conclusions. A great deal of testimony (28 pages) was given with respect to the gravity of this violation of section 75.316, but since the inspector had stated at the very outset of his direct testimony (Tr. 135), that he did not consider the violation to be serious, the extensive testimony established nothing constructive. In view of the nonserious nature of the violation, the penalty should primarily be assessed under the criterion of negligence. It appears that a scoop operator may have torn down the curtain without rehanging it and without reporting it to the section foreman (Tr. 141). It is respondent's obligation to maintain the ventilation curtains at all times, but the inspector did not know how long the curtain had been down, so there may have been a low degree of negligence in respondent's failure to have replaced the curtain before its absence was detected by the inspector. In view of the nonserious nature of the violation and the low degree of negligence, a penalty of $15 will be assessed for this violation of section 75.316. The penalty will be increased by $10 to $25 because respondent has previously violated section 75.316 on two occasions (Exh. 1).

Citation No. 69248 4/17/78 75.400 (Exhibit 33)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment. Respondent violated section 75.400 because loose coal ranging from 1 inch to 12 inches in depth had accumulated at a point beginning 40 feet outby spad No. 1233 for a distance of 240 feet in the No. 3 entry. Two dust samples taken in the area of the accumulations had an incombustible content of from 36 to 37.4 percent instead of the required 65 percent incombustible. The accumulations were up to 4 feet wide and had been caused by spillage from the scoops used to haul coal to the conveyor belt (Tr. 162-168; Exh. 34). The violation was serious because there were trailing cables in the vicinity of the accumulations and they were a potential source of an explosion or fire (Tr. 170). Respondent was negligent in failing to keep the loose coal cleaned up (Tr. 170).

Conclusions. Respondent's witness claimed that their cleanup program requires them to stop about a half hour before the end of each shift for the purpose of cleaning up any loose coal which might have accumulated during the shift (Tr. 178). Respondent's witness, however, could not recall what the

appearance of the mine was on April 17, 1978, when the citation was written and respondent's witness conceded that it was possible that the cleaning program may not have been followed on that day (Tr. 181-182). Since the violation was serious and respondent was negligent, a penalty of $125 would have been assessed for this violation, but since respondent has previously violated section 75.400 on 5 prior occasions, the penalty will be increased by $25 to $150 under the criterion of respondent's history of previous violations (Exh. 1).

Citation No. 69249 4/17/78 75.400 (Exhibit 35)

Findings. Respondent violated section 75.400 again on April 17, 1978, by allowing loose coal to accumulate on each side of the belt line to a depth of from 1 to 12 inches and to a width of about 2 feet on the left side and to a width of about 6 feet on the right side of the belt. The violation was only moderately serious at the time it was observed by the inspector but the accumulations could have become serious if they had not been cleaned up at the time they were observed by the inspector. Respondent was negligent in failing to prevent the spillage at the belt tailpiece from accumulating (Tr. 194-198).

Conclusions. Respondent's witness objected to the inspector's having cited respondent for two violations of section 75.400 in view of the fact that the coal accumulations described in the preceding citation ended only about one crosscut from those described in the instant citation (Tr. 200-202). The former Board of Mine Operations Appeals held in Old Ben Coal Co., 4 IBMA 198 (1975), and Clinchfield Coal Co., 6 IBMA 319 (1976), that an operator may be assessed penalties for several violations of the same section of the regulations so long as the respondent has been made aware of the separate citations and so long as MSHA's Petition for Assessment of Civil Penalty gives the operator notice that separate penalties would be sought for the different violations. The Petition for Assessment of Civil Penalty in Docket No. PIKE 79-41-P specifically requested that penalties be assessed for the separate violations of section 75.400 alleged in Citation Nos. 69248 and 69249. Therefore, I conclude that the existence of two separate violations were proven by MSHA and that respondent received notice prior to the hearing that a separate penalty would be sought for each violation of section 75.400. The second violation was considered to be less serious than the first violation, so a penalty of $75 would have been assessed for the second violation, but since respondent has violated section 75.400 on five prior occasions, the penalty will be increased by $25 to $100 because of respondent's history of previous violations.

Citation No. 69250 4/17/78 75.503 (Exhibit 36)

Findings. Section 75.503 requires that all electric equipment taken into or used inby the last open crosscut be maintained in a permissible condition. Respondent violated section 75.503 because there was an opening of .005 of an inch between the cover and the contactor box on the Acme roof-bolting

machine being used inby the last open crosscut. Although no methane has ever been detected in respondent's mine, the inspector believed

the violation to be potentially serious because it is always possible for methane to be encountered in mines believed to be nongassy. Respondent was negligent for failing to make certain that the roof-bolting machine was permissible (Tr. 219-221).

Conclusions. The inspector believed that there was only a remote possibility that the violation could have produced an explosion. The violation was abated in a few minutes by the tightening of the bolts on the cover of the contactor box. Considering that a small operator is involved, a penalty of $35 would have been assessed for this violation of section 75.503, but Exhibit 1 shows that respondent has violated section 75.503 on three prior occasions. Therefore the penalty will be increased by $15 to $50 because of respondent's history of previous violations.

Citation No. 69251 4/18/78 75.316 (Exhibit 37)

Findings. Respondent violated section 75.316 by using a temporary stopping inby spad No. 2063 to separate the intake entry from the neutral entry at a point where a permanent stopping should have been constructed (Tr. 228-232; 253-254). The violation was potentially serious because production activities turned to the right off the main entries at the point where the temporary stopping was located (Tr. 232). Failure to use a permanent stopping could have prevented an adequate amount of air from going to the working faces (Tr. 233). Neither the inspector nor respondent's witness had checked the air velocity on the day Citation No. 69251 was written and no finding can be made as to whether any lack of air resulted from respondent's use of a temporary stopping (Tr. 267-268). There was considerable confusion in the testimony of both the inspector and respondent's witness as to whether respondent was negligent in using a temporary stopping while respondent was in the process of installing two airlock doors at the place where the temporary stopping existed (Tr. 250; 266). Two airlock doors were installed to abate the violation (Tr. 272-276).

Conclusions. The testimony regarding this violation extends for 49 pages (Tr. 227 to 276) and seems never to be conclusive as to exactly what respondent's witness was trying to explain. About the only conclusion which I can make for certain is that a violation occurred, but the generalized and conflicting statements of both the inspector and respondent's witness do not show that the violation was actually serious or that respondent was negligent in having a temporary stopping at the time changes were being made in the mine map and ventilation procedures when Citation No. 69251 was written. Therefore, I would assess a penalty of $10 for this violation, but since Exhibit 1 shows that respondent has violated section 75.316 on two prior occasions, the penalty will be increased by $10 to $20 because of respondent's history of previous violations.

Citation No. 69252 4/18/78 75.503 (Exhibit 38)

Findings. Respondent violated section 75.503 because there

was an opening of .005 of an inch between the panel board and its cover and because there was a loose clamp on the conduit which covers the battery lead wires. The inspector did not consider the violation to be serious

because an explosion was unlikely in view of the fact that no methane has ever been detected in respondent's No. 1 Mine, but the inspector believed that it was important that equipment be kept permissible because it is never possible to be sure that methane will not be released. Respondent was negligent in failing to maintain the scoop in a permissible condition. The inspector believed that the required weekly inspection of electrical equipment ought to be made more frequently than once a week if permissibility violations are occurring between weekly inspections (Tr.278-285).

Conclusions. Respondent's witness resented being cited for his failure to make certain that the clamp was tightly fixed on the conduit because he said that the scoop was delivered from the factory with the clamp loose and that the only way the clamp can be made to stay on the soft conduit is to wrap the conduit with electrical tape to make the conduit large enough in circumference for the clamp to adhere to the conduit (Tr. 289-298). The regulations require all electrical equipment used inby the last open crosscut to be maintained in a permissible condition. Exceptions to the regulations cannot be made just because the factory produces an inferior product. Respondent's complaints regarding the delivery of defective equipment from the factory should be directed to the manufacturer of the equipment. Miners' lives may not be put in jeopardy just because a manufacturer is careless in the way its new equipment is designed or assembled. Inasmuch as the inspector considered the violation to be nonserious, the penalty should be assessed primarily under the criterion of negligence. Since respondent knowingly took the equipment underground without tightening the clamp (Tr. 291-292), there was a high degree of negligence. Therefore a penalty of $80 would have been assessed for this violation, but Exhibit 1 shows that respondent has violated section 75.503 on three prior occasions. Therefore the penalty will be increased by $15 to $95 because of respondent's history of previous violations.

Citation No. 69253 4/18/78 75.1713 (Exhibit 39)

Findings. Section 75.1713 provides that each operator shall have an adequate supply of first-aid equipment underground. Section 75.1713-7 lists 12 items which must be included in the first-aid equipment. Respondent's first-aid equipment lacked three of the 12 items, namely, eight 4-inch bandage compresses, eight 2-inch bandage compresses, and one cloth blanket. The violation was serious because the compresses would have been needed if a miner had been badly cut in an accident. Respondent was negligent in failing to maintain the first-aid equipment (Tr. 301-306).

Conclusions. Respondent's witness conceded that the three items were missing and stated in defense of his oversight that miners sometimes took first-aid supplies without advising the section foreman that the supplies had been taken (Tr. 310). Inasmuch as the violation was serious and was associated with ordinary negligence, a penalty of $50 would have been assessed for this violation of section 75.1713. The inspector stated that

respondent had a complete supply of first-aid equipment when he previously inspected the mine (Tr. 303). Nevertheless, Exhibit 1 reflects that respondent has violated section 75.1713-7 on a prior occasion. Therefore the penalty of $50 will be increased by $5 to $55 because of respondent's history of previous violations.

Citation No. 69254 4/18/78 75.1718 (Exhibit 40)

Findings. Section 75.1718 requires each operator to provide an adequate amount of drinking water in active workings of his mine and requires that the water be stored and protected in sanitary containers. Respondent violated section 75.1718 by failing to provide any drinking water in the working section. The inspector considered the violation to be moderately serious because he thought water might be needed if someone were to get choked or need water to wash dirt out of one's eyes. Respondent was negligent for failing to provide drinking water (Tr. 314).

Conclusions. Respondent's witness stated that he had eye wash in the first-aid kit and claimed water was not needed for preventing a person from choking. Respondent said water was kept on the section in a cooler until concrete mix was found in it one day. Respondent's witness said he concluded from that experience that the men did not want to be supplied with water as they brought their own water into the mine with them. After the instant citation was written, respondent resumed providing drinking water. Respondent's witness also claimed that water would not be needed in case the men should be trapped by an explosion because the miners would run out of oxygen before they ran out of water (Tr. 315-318). Respondent's excuses for not providing water have little merit. Since the violation was moderately serious and respondent deliberately declined to provide drinking water in the working section, a penalty of $50 will be assessed for this violation. There is no history of previous violations to be considered.

Citation No. 69255 4/18/78 77.410 (Exhibit 41)

Citation No. 69256 4/18/78 77.410 (Exhibit 42)

Citation No. 69257 4/18/78 77.410 (Exhibit 43)

Findings. Section 77.410 requires trucks, front-end loaders and other mobile equipment to be provided with alarms which will sound a warning when such equipment is put in reverse. Citation No. 69255 was written for failure of a Ford truck to have any back-up alarm at all. Citation No. 69256 was written for failure of a GMC truck to have an operable back-up alarm. Citation No. 69257 was written for failure of a front-end loader to have an operable back-up alarm. All three violations occurred (Tr. 320-324). The two trucks belonged to independent contractors hired by respondent to haul its coal to its purchaser's tipple, but the front-end loader was owned by respondent. The Commission has held that an operator may be cited for violations of independent contractors (Secretary of Labor (MSHA) v. Republic-Steel Corp., 79-4-4, 1 FMSHRC 5, and MSHA v. Old Ben Coal Co., 79-10-7, 1 FMSHRC 1480). Therefore, it is appropriate to assess a penalty against respondent for all three violations. All three violations were only moderately serious because there is room for only one truck at a time at respondent's loading area and each truck driver operates the end loader to dump coal in his own truck so that there is no reason for a person to walk behind

the trucks or end loader when they are backing up (Tr. 328). Respondent was negligent in failing to assure that the trucks and end loader were equipped with operable back-up alarms.

Conclusions. There is no evidence to show how long the end loader and GMC truck had been used with inoperable back-up devices, so there is less reason to find a high degree of negligence for the GMC truck and end loader than for the Ford truck which had no back-up alarm at all. Respondent's witness complained that the back-up alarms made so much noise that they were a psychological hazard for the truck drivers and that he had had at least 20 requests by drivers seeking permission to disconnect the back-up alarms (Tr. 327-328). Only 4 or 5 minutes are required to load a truck with a front-end loader. The time required to back out of the loading area is also short. In such circumstances, the time that any operator is exposed to the noise of the back-up alarm is short. Therefore, I find little merit in respondent's defense. The same is true with respect to his claim that the diesel engines in the equipment make so much noise that anyone who would fail to hear the engines would also fail to hear the back-up devices (Tr. 328). It is the difference in sound of the back-up alarm, as contrasted with the roar of diesel engines, which gives a person warning that equipment is backing up. Consequently, there is no merit to respondent's claim that a person who can not hear a diesel engine would ignore the sound given off by a back-up alarm.

Although the violations were only moderately serious, there was a high degree of negligence in each case because respondent's attitude about seeing that the alarms are operative amounts to indifference about providing the safety such alarms are intended to afford persons who may be exposed to the hazard of vehicles which are backing up. A penalty of $100 would have been assessed for the Ford truck which had no back-up alarm at all and a penalty of $75 each would have been assessed for the GMC truck and front-end loader which had inoperable back-up devices. Exhibit 1, however, shows that respondent has violated section 77.410 on one prior occasion. Therefore each penalty will be increased by $5 to $105 and to $80, respectively, because of respondent's history of a previous violation.

Citation No. 69258 4/18/78 77.1109 (Exhibit 44)

Findings. Section 77.1109(c)(1) provides that trucks, front-end loaders and other mobile equipment shall be provided with at least one portable fire extinguisher. Respondent violated section 77.1109 because its front-end loader was not equipped with a fire extinguisher. The violation was moderately serious because the end loader was used outside the mine where a fire would not endanger miners by destroying their oxygen supply or creating noxious fumes which could asphyxiate them. There was ordinary negligence in respondent's failure to provide a fire extinguisher (Tr. 336-340; 344).

Conclusions. The inspector believed that the primary hazard created by lack of a fire extinguisher would be that a miner might try to put out any fire with his hand or some inadequate object and burn himself or might be injured by a fuel-tank explosion (Tr. 336). There may be some validity to the inspector's claim, but he did not cite any cases in which that

had happened. Clearly respondent's witness was correct in pointing out that a person's life is not nearly as much endangered by a fire which occurs

on a piece of equipment above ground as one is by a fire which occurs underground where one's oxygen supply may be destroyed or one may be exposed to noxious fumes (Tr. 344). In any event, the violation was moderately serious. Respondent's witness stated that they made a strong effort to see that fire extinguishers were maintained on all equipment, but that equipment is left unattended over weekends and fire extinguishers are sometimes stolen (Tr. 344). The inspector said that there was a fire extinguisher on the end loader when he previously inspected it (Tr. 337). In such circumstances, the evidence shows that the violation was associated with a low degree of negligence. A penalty of $15 would have been assessed for this violation, but Exhibit 1 shows that respondent has violated section 77.1109 on a prior occasion, so the penalty will be increased by $5 to $20 because of respondent's history of a previous violation.

Citation No. 69259 4/18/78 77.1301(c)(8) (Exhibit 45)

Findings. Section 77.1301(c)(8) requires that explosives magazines be kept locked securely when the magazines are unattended. Respondent violated section 77.1301(c)(8) because both the magazine for storing detonators and the magazine for storing explosives were unlocked. The padlocks were in place on the doors and the doors to the magazines were closed, but the padlocks had not been locked and it would have been possible for an unauthorized person to take explosives and be injured by failing to handle them properly. A high degree of negligence was associated with the violation because the inspector had warned the operator on a previous occasion that the magazines should be kept locked (Tr. 346-352).

Conclusions. Respondent's witness claimed that the magazines were within 100 feet of the mine office and that someone was always at the mine office to see any unauthorized person who might venture close to the magazines (Tr. 355-366). Respondent's witness conceded, however, that no person was specifically given the responsibility of standing watch over the magazines when they are left unlocked (Tr. 360-361). The proximity of the magazines makes the likelihood of theft somewhat unlikely, but clearly it is serious to fail to keep the magazines locked when they are not being used by persons putting explosives in or taking them out. Respondent had been reminded by the inspector on a prior occasion to keep the magazines locked. In such circumstances, a penalty of $100 will be assessed for this violation of section 77.1301(c)(8). There is no history of previous violations to be considered.

Citation No. 69260 4/18/78 75.1306 (Exhibit 46)

Findings. Section 75.1306 provides, among other things, that no exposed metal may exist on the inside of the boxes or magazines used underground to store explosives and detonators on the working section. Respondent violated section 75.1306 because bare nails existed on the inside of the boxes used for storage of explosives and detonators. The boxes contained explosives and detonators and the inspector considered the violation to be

serious because a spark from the exposed metal could have caused an explosion. Respondent was negligent for not having made certain that all nails on the inside of the box were covered by nonmetallic materials (Tr. 369-381).

Conclusions. Respondent's witness stated that the magazines are dragged toward the face as production progresses. During a movement preceding the inspection the hinges on the box had been damaged. When the box was repaired, the employee making the repairs failed to inspect the interior of the box for exposed nails (Tr. 380). Respondent's witness stressed the fact that no metal was ever placed inside the magazines and that there was nothing in the magazines to produce a spark (Tr. 381). The fact remains that a metal object may strike an exposed nail when explosives are being put in or taken out of the magazines and an explosion could result. Respondent's defense did not show that the violation was less than serious or that there was a low degree of negligence associated with the violation. Therefore, a penalty of $100 will be assessed for this violation of section 75.1306. There is no history of previous violations to be considered.

Citation No. 69621 4/19/78 75.1701 (Exhibit 47)

Findings. Section 75.1701 provides, among other things, that 20-foot boreholes shall be drilled in advance of the working face and boreholes are also required to be drilled in the rib of such working face when the working section is within 200 feet of an adjacent mine. Respondent violated section 75.1701 because 20-foot boreholes were not being drilled in advance of the working face at a time when respondent's mine was within 100 to 150 feet of an adjacent mine. The violation was serious because it is possible to cut into an abandoned mine and be drowned by water or noxious gases which have accumulated in the abandoned mine. Respondent was grossly negligent for failing to drill the test holes because it was aware of the existence of the abandoned mine inasmuch as respondent had already cut into the adjacent mine on a prior occasion (Tr. 383-386; 398).

Conclusions. Respondent's witness was somewhat critical of the inspector because the inspector could not pinpoint the exact place in the mine where the miners were working on the day Citation No. 69621 was written (Tr. 392). That contention has no merit because the inspector clearly designated the area as being near spad No. 630 and any mining in that area would have required 20-foot test holes to be drilled (Tr. 393). Respondent's other defense was that the miners had been drilling test holes and he believed they may have been drilling them on the day the violation was cited, but respondent's witness could not be certain of that claim (Tr. 402). The fact that the 20-foot drill stem was broken on the day of the inspection and had to be repaired before the test holes could be drilled is a strong indication that test holes were not being drilled at the time Citation No. 69621 was written (Tr. 398).

The preponderance of the evidence shows that the violation occurred, that it was serious, and that the violation was accompanied by a high degree of negligence. Therefore, a penalty of $225 will be assessed for this violation of section 75.1701. There is no history of previous violations to be considered.

The Settlement Agreement

Docket No. PIKE 79-107-P

MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-107-P seeks assessment of civil penalties for three alleged violations of the respirable-dust standards. The parties agreed to settle the issues raised in Docket No. PIKE 79-107-P pursuant to an agreement under which respondent will pay a penalty of $9.00 for two violations and a penalty of $52.00 for the third violation. The Assessment Office had proposed penalties of $48.00 for one violation and $52.00 for each of the other two violations.

MSHA's counsel agreed to accept a reduced penalty of $9.00 with respect to two of the violations because they were cited prior to the amendments contained in the 1977 Act which had the effect of eliminating the cloud cast upon alleged violations of the respirable-dust standards by the Board of Mine Operations Appeals' opinions in Eastern Associated Coal Corp., 7 IBMA 14 (1976), aff'd on reconsideration, Eastern Associated Coal Corp., 7 IBMA 133 (1976). Large numbers of cases which arose during the period when the Board's Eastern Associated opinions were in effect were subsequently settled on a basis which amounted to an average payment by the coal operators of $9.00 per alleged respirable-dust violation. See, e.g., Judge Joseph B. Kennedy's Order Approving Consent Settlement and To Pay Civil Penalties issued May 10, 1978, in Secretary of Labor (MSHA) v. Consolidation Coal Company, et al., Docket Nos. VINC 76-76-P, et al. I believe that fairness to other operators justifies allowance of the settlement figure of $9.00 for all civil penalty cases involving alleged respirable-dust violations occurring prior to the amendment of the definition of "respirable dust" in the 1977 Act.

Respondent's agreement to pay the full penalty of $52.00 proposed by the Assessment Office for the third respirable-dust violation is appropriate because the Assessment Office considered that violation of section 70.100(b) to be moderately serious and to involve ordinary negligence. The Assessment Office's proposed penalty of $52.00 is in line with the penalties which have been assessed in the contested portion of this proceeding in situations in which the violations were found to be moderately serious and to involve ordinary negligence in view of the fact that a small operator is involved.

Based on the discussion above, I find that the parties' settlement agreement in Docket No. PIKE 79-107-P should be approved as hereinafter provided.

Summary of Assessments and Conclusions of Law

(1) Pursuant to the settlement agreement, respondent should be ordered to pay civil penalties totaling $70 which are allocated to the respective alleged violations as follows:

Docket No. PIKE 79-107-P

Notice No. 1 BPS (7-1) 1/7/77	71.108.....	$ 9.00
Notice No. 1 BC (7-13) 5/3/77	70.250.....	9.00
Citation No. 9926003 4/18/78	70.100(b).....	52.00
Total Settlement Penalties in This Proceeding....		$ 70.00

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

Docket No. PIKE 79-41-P

Notice No. 1 RDM (6-4) 1/7/76	75.1710.....	$ 1.00
Notice No. 2 RDM (6-5) 1/7/76	75.1710.....	1.00
Notice No. 1 RDM (6-10) 4/16/76	75.1710.....	1.00
Citation No. 69245 4/17/78	75.316.....	60.00
Citation No. 69246 4/17/78	75.316.....	35.00
Citation No. 69247 4/17/78	75.316.....	25.00
Citation No. 69248 4/17/78	75.400.....	$ 150.00
Citation No. 69249 4/17/78	75.400.....	100.00
Citation No. 69250 4/17/78	75.503.....	50.00
Citation No. 69251 4/18/78	75.316.....	20.00
Citation No. 69252 4/18/78	75.503.....	95.00
Citation No. 69253 4/18/78	75.1713.....	55.00
Citation No. 69254 4/18/78	75.1718.....	50.00
Citation No. 69255 4/18/78	77.410.....	105.00
Citation No. 69256 4/18/78	77.410.....	80.00
Citation No. 69257 4/18/78	77.410.....	80.00
Citation No. 69258 4/18/78	77.1109(c)(1).....	20.00
Citation No. 69259 4/18/78	77.1301(c)(8).....	100.00
Citation No. 69260 4/18/78	75.1306.....	100.00
Citation No. 69261 4/19/78	75.1701.....	225.00
Total Civil Penalties in Docket No. PIKE 79-41-P..		$1,353.00
Total Settlement and Contested Penalties.....		$1,423.00

(3) Respondent was the operator of the No. 1 Mine at all pertinent times and as such is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) The settlement agreement reached by the parties during the hearing is approved.

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(B) Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $1,423.00 of which $70.00 are assessed pursuant to the parties' settlement agreement summarized in paragraph (1) above and the remaining $1,353.00 are assessed pursuant to my decision on the contested aspects of the proceeding as summarized in paragraph (2) above.

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