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

HELVETIA COAL COMPANY,
APPLICANT
v.
Application for Review
Docket No. PENN 79-165-R
Lucerne No. 6 Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

AND

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER
v.
Civil Penalty Proceeding
Docket No. PENN 80-68
A.C. Control No. 36-00917-03036
Lucerne No. 6 Mine

HELVETIA COAL COMPANY,
RESPONDENT

DECISION

Appearances: Jay W. Freedman, Esq., Freedman, Levy, Kroll,
& Simonds, Washington, D.C., for Helvetia Coal
Company Robert Cohen, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for Secretary of Labor

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a consolidated proceeding involving an application
for review and a civil penalty proceeding. The application for
review was filed by Helvetia Coal Company (hereinafter
"Helvetia") under section 107(e) of the Federal Mine

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Safety and Health Act of 1977, 30 U.S.C. 817(e), to modify an order of withdrawal due to imminent danger issued by a federal mine inspector employed by the Mine Safety and Health Administration (hereinafter "MSHA") pursuant to section 107(a) of the Act. The civil penalty proceeding was filed by MSHA under section 110(a) of the Act, 30 U.S.C. 820(a), to assess a penalty against Helvetia for violation of a mandatory safety standard. The parties filed prehearing statements and the case was heard in Pittsburgh, Pennsylvania, on March 11 and 12, 1980. The following witnesses testified on behalf of MSHA: Roy C. Craver, inspector; George E. Tersine, inspector; and Robert Nelson, inspection supervisor. The following witnesses testified on behalf of Helvetia: Robert Anderson, manager of mines; Ronald Evanick, section foreman; Jerome Strong, mine foreman; and Edward Onuscheck, assistant to the president and safety director.

This matter involves the discovery of methane concentrations in excess of five percent at the Lucerne No. 6 Mine in September 1979. Thereafter, MSHA issued the following: (1) an order of withdrawal of the entire mine due to imminent danger; and (2) a citation for failure to immediately notify MSHA of the occurrence of an accident. Helvetia contends as follows: (1) although an imminent danger existed, the order of withdrawal should be modified to close only one section of the mine rather than the entire mine; and (2) Helvetia was not required to report an accident because there was no unplanned inundation of a mine by a gas. Helvetia requested a modification of the withdrawal order and a vacation of the citation. MSHA requested that the withdrawal order be affirmed as issued and that a civil penalty be assessed for the violation of the Act.

ISSUES

The first general issue is whether the order of withdrawal due to imminent danger was properly issued. The specific issue is whether the order of withdrawal should be modified to cover only the one section rather than the entire mine.

The second general issue is whether Helvetia violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. 817(a), provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. 802(j), states:
"imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

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30 C.F.R. 50.10 provides in pertinent part as follows:
"If an accident occurs, an operator shall immediately contact the MSHA district or subdistrict office having jurisdiction over its mine * * *."

30 C.F.R. 50.2 defines an "accident," inter alia, to be "an unplanned inundation of a mine by a liquid or gas * * *."

Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

1. Lucerne No. 6 Mine is subject to the jurisdiction of the Mine Safety and Health Act of 1977.
2. Lucerne No. 6 Mine is a gassy mine liberating in excess of one million cubic feet of methane within a 24-hour period.
3. Lucerne No. 6 Mine is a large mine employing approximately 460 miners working on 13 working sections rotating on a three-shift basis.
4. Lucerne No. 6 Mine is a part of Helvetia Coal Company, which is a subsidiary of R & P Coal Company.
5. The inspectors who represent the Secretary in this case were at all pertinent times to this proceeding duly authorized representatives of the Secretary of Labor.
6. The operator has a previous history of 448 paid violations issued against Lucerne No. 6 Mine within the previous 24-month period to September 7, 1979. There is no previous history of violation of section 50.10.

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7. The operator does not contest the validity of the issuance of the imminent danger order but is primarily concerned with the extent of the order.

8. Any penalty assessed in this proceeding would not affect the operator's ability to remain in business.

9. With regard to the alleged violation of 30 C.F.R. 50.10, the violation was abated by the operator in good faith.

SUMMARY OF THE EVIDENCE

Undisputed Evidence

The Lucerne No. 6 Mine was classified as a gassy mine with a prior history of excessive methane concentrations and methane ignitions. The section involved in this incident, 1 Butt 4 Right, had been mined by retreat mining. At approximately 12:30 p.m. on September 5, 1979, the day-shift foreman of this section was making his weekly inspection of the return airway. He called the mine superintendent, William Tanner, and reported that he had found methane in the return airway in concentrations of five percent or greater. No other section used this return airway. When the 4:01 shift came on duty that day, this information was reported to section foreman Ronald Evanick. Thereafter, Mr. Evanick took his crew of six or seven men up to the working face where he found only .1 to .2 percent methane. The crew went to work and Mr. Evanick went to the air return to check for methane. He reported that the methane in the air return "pegged my spotter." The reading was taken 12 inches from the roof and indicated that there was more than 9.9 percent methane in that area. Thereupon, Mr. Evanick returned to his section and consulted with other members of mine management. At approximately 6:30 to 7 p.m. on September 5, 1979, management decided to cut off all power to the affected section and

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to stop all mining. Thereafter, the members of the crew remained in the area to correct problems with the ventilation system. The working face in this section was approximately 500 feet from the place where the high concentration of methane was found.

On the morning of September 6, 1979, a regular MSHA inspector of this mine, George E. Tersine, was on the mine property to conduct an inspection. No one from management reported to him that high concentrations of methane had been found on the previous day. He went about his regular inspection in another section of the mine. At about the same time, Robert Anderson, manager of mines, was informed that methane in excess of five percent had been found in the return airway on the prior day. Manager Anderson, Superintendent Tanner, and Mine Foreman Jerome Strong went into the section to investigate. They found methane in excess of five percent. They decided to rearrange the stoppings and tighten the canvas and checks in order to bleed off the excessive methane. They reaffirmed the prior decision to de-energize the section and discontinue mining operations.

While Inspector Tersine was conducting his regular inspection of the Lucerne No. 6 Mine, a miner approached him at the dinner hole and advised him that Helvetia had voluntarily closed one section of the mine because of methane problems. At approximately 1:30 p.m., Inspector Tersine encountered Manager Anderson and Superintendent Tanner. When the inspector inquired about the methane problem, he was advised by Superintendent Tanner that approximately 1.8 percent methane had been found in the return airway of the affected section and that this section was closed and the power was cut off. Inspector Tersine asked why this had not been reported to MSHA and

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Helvetia stated that it had no duty to report this incident. Mr. Anderson conceded that the operator did not have a copy of Part 50 of the applicable regulations in its mine office. After this exchange, Inspector Tersine returned to the MSHA office. He did not go into the affected section at any time on September 6, 1979.

Upon returning to the MSHA office, Inspector Tersine mentioned the methane problem at this mine to Robert Nelson, his supervisor. Supervisor Nelson then ordered Inspector McClure to investigate this matter during the 4:01 p.m. shift on September 6. According to Helvetia's witnesses, Inspector McClure went into the affected section and took methane readings. It was alleged that he obtained methane readings in excess of five percent, but left the mine without issuing any orders or citations. In any event, Inspector McClure did not testify in this case.

At approximately 11:30 p.m. on September 6, 1979, Supervising Inspector Nelson entered the mine to conduct his own inspection. No one from Helvetia advised him that methane in excess of five percent had been found. In fact, the company advised him that it had obtained low readings in this area. Supervisor Nelson took several readings in various places but did not detect methane in excess of 1.3 percent. Based upon the information that was available to him at the time, Supervisor Nelson concluded that he did not have enough evidence at that time to issue a withdrawal order. While he was conducting his inspection, Supervisor Nelson noted that the power to the section was cut off and no mining was being performed. Miners were hand-carrying blocks for stoppings.

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On the morning of September 7, 1979, Supervisor Nelson assigned Inspector Roy C. Craver and regular Inspector George E. Tersine to the mine in question to conduct a further inspection. At approximately 8:15 a.m., Inspectors Craver and Tersine went underground. Inspector Craver admitted that he may have said that he would issue a closure order for the entire mine if he found methane in excess of 1.5 percent. After arriving in the affected section, four check points were established for methane sampling. At each check point, the inspectors took methane readings on their methanometers and obtained bottle samples which were later analyzed in the MSHA laboratory. At check point No. 1, the methanometers indicated 1.2 to 1.3 percent methane. A bottle sample was subsequently analyzed as showing 1.13 percent methane. The inspectors then advanced inby and established check point No. 2. The methanometers indicated 1.1 to 1.3 percent methane. A bottle sample was subsequently analyzed as showing 1.2 percent methane. The inspectors again advanced inby and established check point No. 3. The methanometers indicated methane at 2.8 percent and a bottle sample was subsequently analyzed at 2.83 percent. At this point, Inspector Craver advised management that they were over 1.5 percent methane and were subject to a closure order. He did not write any closure order at this time but rather advanced inby to establish check point No. 4 to determine the extent and concentration of the methane. At check point No. 4, the methanometer indicated 4.0 percent methane and a bottle sample was subsequently analyzed at 6.25 percent methane. Although no additional check points were established, Inspector Craver testified that he took additional methane readings which established methane concentrations in the range of 5 to 10 percent. Inspector Craver believed that the methane was coming from a caved-in section of the gob area.

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Based upon finding the foregoing methane concentrations, Inspector Craver determined that a section 107(a) order should be issued closing the entire mine due to imminent danger. He thereupon left the section and returned to the surface. He called Supervisor Nelson and informed him of the methane readings and his decision to issue the order of withdrawal. At 1:15 p.m. on September 7, 1979, the order of withdrawal was issued closing the entire mine. Thereupon, 161 miners were removed. On September 9, 1979, Inspector Tersine terminated the withdrawal order during the day shift. The termination was based upon the fact that methane had been reduced below one percent in the entire affected area.

On September 12, 1979, Inspector Tersine issued a citation under section 104(a) for violation of 30 C.F.R. 50.10 for Helvetia's failure to notify MSHA of an accident. This citation was based upon the fact that Helvetia never reported an accident to MSHA and did not mention the methane problem until after interrogation by Inspector Tersine.

It is undisputed that methane concentrations between five and 15 percent are explosive. It is agreed that no one from MSHA had any disagreement with the methods used by Helvetia to abate this condition.

Other Evidence

Roy C. Craver has been an MSHA inspector for nine years. He testified that based upon his experience and findings on September 7, 1979, the methane problem in the affected section presented an imminent danger to miners working in the mine and required the closure of the entire mine. His reasons were as follows: (1) there was no way to determine the extent

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of the area which would be affected in the event of an explosion and the threat of an explosion affected the entire mine; (2) it was impossible to determine the amount of methane present in the mine; (3) continued mining in other sections would have liberated more methane; (4) if the sand rock roof collapsed, it could cause a spark which could ignite the methane; (5) all three elements necessary for an explosion were present: oxygen, fuel, and a possible ignition source; and (6) the mine had a history of an ignition during the preceding month and five ignitions in the previous 8 years. Inspector Craver testified that he was primarily concerned about an ignition and the safety of miners. He stated that he would not necessarily close an entire mine if 1.5 percent methane were found in an advancing section. However, in this case he found methane in excess of five percent in a retreat section. While he did not know precisely where the other working sections were located in the mine, he testified that if the No. 1 fan had a problem, eight working sections would be affected. At the time he issued the order, no one from Helvetia complained to him that the order was too broad or that it should be limited to the one section.

George E. Tersine has been an MSHA inspector for 4 years. He was a regular inspector of this mine. He testified that Superintendent Tanner advised him that there was a feeder resulting from a fall in the affected area. Since there was no report of a methane accumulation in the prior weekly report, he assumed that this was a sudden inundation of methane. Although Helvetia never advised him of the existence of the methane problem, he did not believe that it was trying to hide the problem from him.

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Robert Nelson has been an inspection supervisor since 1971. He has been a mine inspector since 1962. He reported that on March 11, 1977, Helvetia experienced a cave-in at this mine resulting in an inundation of methane. At that time, Helvetia immediately reported this accident to MESA (MSHA's predecessor). In September 1979, all of the top management of the mine were new to this mine within the previous year. Supervisor Nelson did not think that mine management had experience in liberating large quantities of methane. He stated that if the methane exploded, it would endanger a large area of the mine. He further testified that the order of withdrawal for the entire mine was proper under the circumstances. He stated that while the methane was being diluted and removed from the mine it could cause an explosion at a fan or bathhouse. At the time the order of withdrawal was written, Helvetia had no plan to remove the methane and had not decided where to build stoppings. It was necessary to issue an order of withdrawal for the entire mine because of the necessity to move large quantities of methane. Control of a large area of the mine was necessary in order to liberate this amount of methane.

Supervisor Nelson did not recall any conversation with Helvetia management wherein they expressed the opinion that only one section of the mine should be closed. He also testified that he would not necessarily close an entire mine if methane in excess of 1.5 percent was found. With regard to Inspector McClure's alleged detection of methane in excess of five percent, Supervisor Nelson testified that he was informed that Inspector McClure obtained such a reading at a cave by the roof rather than at a place where methane readings should be taken by law. Supervisor Nelson stated his

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opinion that an inundation of gas was a sudden inrush or a slow build up that covered an area.

Robert Anderson has been the manager of mines for Helvetia for one year. He testified that he did not know if anyone from Helvetia informed Inspector Tersine of the levels of methane found by the operator. Prior to the issuance of the order of withdrawal, Helvetia was rearranging stoppings and tightening canvas and checks. Four stoppings had been built during the day shift on September 6. The return air flow was changed. Manager Anderson assumed that the accumulation of methane was due to falls that knocked out canvas and disturbed the ventilation system. He never ascertained the cause of the accumulation of methane.

Manager Anderson testified that he was unable to determine the exact area of methane concentration because of the existence of falls. Nevertheless, he expressed his opinion that the entire mine should not have been closed, because even if there was an explosion, it would only affect one section, and the possibility of ignition was remote. He conceded that he had no experience or expertise in the area of mine explosions.

Manager Anderson admitted that on September 6, 1979, he did not have Part 50 of the MSHA regulations concerning a duty to report accidents. He thought he was only required to report inundations of water rather than inundations of gas as well as water. On the morning of September 7, 1979, he was informed by Superintendent Tanner that Inspector Craver had said that he would close the entire mine if he found over 1.5 percent methane because the inspector "had orders." Manager Anderson knew that the

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inspector would find more than 1.5 percent methane because the sampling by Helvetia reported higher concentrations. Helvetia took more readings of methane than are reported on its Exhibit O-1.

Jerome Strong, mine foreman, testified that he was the general assistant mine foreman in March 1977 and he was involved in the removal of methane from the mine at that time. In the early afternoon of September 5, 1979, Section Foreman, Richard Barkley, called him and reported finding methane of "five percent or better." Mine Foreman Strong conceded that no one told Inspector Tersine, who was on the premises on September 5 and 6, 1979, what had been found regarding methane.

Edward Onuscheck is the assistant to the president and safety director of R & P Coal Company, Helvetia's parent company. He was on vacation at the time of this incident. He returned to work on September 8, 1979. He testified that he conducted an investigation which resulted in verbal reports being submitted to him. His investigation indicated that at a point a couple of hundred feet inby check point No. 4, retreat mining had disturbed ventilation and a combination of feeders, cave-ins, and ventilation problems resulted in the excessive accumulation of methane. He further concluded that there had been a gradual build up of methane but no inundation. He distinguished the March 1977 methane incident at this mine as being a massive chain reaction of falls which required that the entire mine be de-energized. He also distinguished the March 1977 incident because at that time, the extent of the affected area could not be identified, whereas in the present case, the area was defined. However, he agreed that as late as September 8, 1979, a finding of 4.1 percent methane was made at the

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right regulator after the methane had been diluted. He also conceded that if there were an explosion in the mine, he would feel safer if all men were outside the mine. He defined "inundation" as a flooding or outburst. Hence, he did not believe that the incident in question was an inundation of methane. He also noted that section 50.10 of the regulations became effective in January 1978, wherein the definition of "accident" was expanded to include inundations of gas as well as inundations of liquid.

Documentary Evidence

Helvetia submitted reports of methane readings taken at various points in the mine from September 5 through 9, 1979. However, none of the reports for September 5, 1979, showed the percentage of methane found. On September 6, 1979, 9.7 percent methane was found at check point No. 3 at 2:35 p.m. The various readings for September 6 show three readings of five percent methane or more. On September 7, 9.9 percent methane was found at check point No. 3 at 9:35 a.m. Even as late as September 8, 4.1 percent methane was found at the right regulator which was approximately 1 mile from the points where methane in excess of five percent was previously found (Exh. O-1).

The Mine Examiner's Report of Daily Inspections submitted by Helvetia showed several alterations under the subject of explosive gases. For example, on September 5, the word "none" appears under the column of "Explosive Gases" but is crossed out and the following appears: "excessive amount of CH₄ found in right return" (Exh. O-3).

Helvetia submitted a copy of the definition of the term "inundation" from the Dictionary of Mining, Mineral, and Related Terms, Bureau of Mines, which is as follows: "An inrush of water on a large scale which floods

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the entire mine or a large section of the workings" (Exh. O-4). Helvetia also submitted a definition of the term "inundate" from Webster's New Collegiate Dictionary which is as follows: "1: to cover with a flood: overflow. 2: overwhelm" (Exh. O-5).

MSHA submitted a computer printout of the prior violations at the mine in question for the previous 2 years. In that period of time, 448 violations were assessed for a total amount of \$60,626. There were no prior violations of 30 C.F.R. 50.10 (Exh. G-4).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that in the early afternoon of September 5, 1979, Richard Berkely, a section foreman, found methane in excess of five percent in the return airway of the 1 Butt 4 Right Section of the Lucerne No. 6 Mine. Several hours later, the power was cut off and normal mining operations were voluntarily discontinued in this section by Helvetia. No one informed MSHA of this condition until a miner mentioned the methane problem to MSHA Inspector George Tersine approximately 24 hours after the discovery of the excessive methane. When Inspector Tersine inquired of Helvetia management about the methane problem, he was advised that 1.8 percent methane had been found in the return airway and that the power had been cut off and normal mining operations discontinued. Inspector Tersine did not go into the affected area to conduct an inspection. He returned to the MSHA office and subsequently informed his supervisor, Robert Nelson. Three MSHA inspectors went into the affected section on the evening of September 6 and early morning of September 7. No orders were issued. At 8:15 a.m. on September 7, 1979, Inspector Roy Craver went

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underground to conduct an inspection. He found concentrations of methane in excess of five percent at several places in the affected section. He advised Helvetia management that he would issue an imminent danger withdrawal order based upon his findings. He returned to the surface and discussed his findings and proposed course of action with Supervisor Robert Nelson. At 1:15 p.m. on September 7, 1979, Inspector Craver issued an imminent danger withdrawal order for the entire mine. At the time of the issuance of the imminent withdrawal order, 161 miners were removed. The order was terminated on September 9. On September 12, 1979, Inspector Tersine issued a citation to Helvetia for violation of 30 C.F.R. 50.10, failure to report an accident to MSHA.

MSHA contends that the withdrawal order due to imminent danger pursuant to section 107 of the Act was properly issued and that the entire mine should have been closed because of the imminent danger. MSHA further contends that a civil penalty in the amount of \$60 should be assessed against Helvetia for failure to report an accident. Helvetia concedes that an imminent danger existed in the affected section of its mine but contends that the withdrawal order should be modified to permit the rest of the mine to remain open because no imminent danger existed in other sections. Helvetia further contends that there was no inundation of its mine by gas and, hence, it had no duty to report an accident to MSHA.

Withdrawal Order due to Imminent Danger

Since Helvetia concedes that there was an imminent danger which warranted the issuance of a withdrawal order in the affected section, its evidence concerning the remoteness of a possible ignition of the methane

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is of no moment. The sole issue is whether the order of withdrawal should be modified to limit it to the affected section rather than to the entire mine. In this regard, Helvetia is the party proposing a modification of the order and, hence, has the burden of proof to establish such a modification. See 5 U.S.C.A.

1006(c) and *Environmental Defense Fund v. Environmental Protection Agency*, 548 F.2d 998 (D.C. Cir. 1977).

Helvetia's evidence fails to show that the imminent danger was confined to one section of the mine. Although Robert Anderson and Edward Onuscheck, Helvetia management employees, expressed their opinions that the order was too broad, they failed to support such opinions with facts or expertise in the area of mine explosions. Edward Onuscheck conceded that in the event of an explosion in the mine, he would feel safer if all miners were outside the mine. Moreover, since the area containing methane could not be specifically identified, it was impossible to estimate the extent of a potential explosion. Hence, the opinions of Robert Anderson and Edward Onuscheck concerning the area of the mine which would be affected by an explosion are entitled to little weight.

However, MSHA presented credible evidence that the entire mine would be affected by an explosion and that the safety of the miners required the protection of a withdrawal order encompassing the entire mine. Inspector Craver and Supervisor Nelson presented credible testimony concerning the reasons for closing the entire mine.

The preponderance of the evidence establishes that the withdrawal order of the entire mine was properly issued and should not be modified. The application for review is DISMISSED.

Civil Penalty Proceeding

A mine operator is required to "immediately contact the MSHA District or Subdistrict Office having jurisdiction of its mine" if an accident occurs. 30 C.F.R. 50.10. An "accident" is defined, inter alia, as "an unplanned inundation of a mine by a liquid or gas." 30 C.F.R. 50.2. MSHA contends that a civil penalty should be assessed because Helvetia failed to notify it of the accident in question. Helvetia contends that it did not violate the Act because there was no "inundation" of the mine and, hence, no duty to report this occurrence to MSHA.

Resolution of the civil penalty case depends upon whether there was an "inundation" by methane. The parties cite no prior cases construing this term.

As noted, supra, the term "inundation" is defined in the Dictionary of Mining, Mineral, and Related Terms as "an inrush of water on a large scale which floods the entire mine or a large section of the workings." Webster's New Collegiate Dictionary defines "inundate" as "1. to cover with a flood: Overflow. 2. Overwhelm." Webster's New International Dictionary, 2d Ed., Unabridged (1955) defines inundation as follows:

1. Process or act of inundating, or state of being inundated; an overflow; a flood; a rising and spreading of water over low grounds.
2. An overspreading of any kind; an overflowing or superfluous abundance; as, an inundation of tourists.

Clearly, the purpose of the regulation in question is to afford MSHA the opportunity to make its own assessment of the "inundation" in order to accomplish the goal of protecting the safety of miners. Although Helvetia

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never voluntarily informed MSHA of the methane problem in this case, MSHA's actions in the 24 hours after it had notice of the condition present a sorry example of mine safety enforcement. Upon questioning Helvetia management on the afternoon of September 6, 1979, Inspector Tersine was informed that 1.8 percent methane was found in the return airway of the affected section. Helvetia's own evidence shows that over five percent methane had been found prior to that time. None of Helvetia's witnesses contradicted the statement of the inspector that Helvetia reported only 1.8 percent methane. It is noted that Robert Anderson of Helvetia was present at the time Inspector Tersine was informed of the methane reading in question. 30 C.F.R. 75.308 provides that where the air contains 1.5 percent or more of methane, all miners, except those necessary for abatement, shall be withdrawn and all electric power shall be cut off. Even though Helvetia advised the inspector that miners had been withdrawn and electric power cut off, the inspector did not go into the affected area to determine the actual amount of methane or the extent of the area affected by the hazard. Rather, the inspector returned to his office. While three MSHA inspectors visited the affected section later that same day, no orders were written despite Helvetia's own records which showed methane concentrations of up to 9.7 percent. It was not until September 7, 1979, at 1:15 p.m., 24 hours after MSHA's first notice and 48 hours after Helvetia's discovery of methane in the explosive range, that Inspector Craver issued the order of withdrawal for the entire mine. During the 48 hours after the methane was detected by Helvetia, all of the elements necessary for a mine explosion were present. Fortunately, no such incident occurred.

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While MSHA can be criticized in this case for its lack of diligent enforcement of the law enacted to ensure the safety of miners, I find that the principal culprit in this occurrence was Helvetia. On a prior occasion in 1977, it had encountered a large quantity of methane and promptly reported it to MSHA's predecessor. In the instant case, it not only failed to report the incident to MSHA, but when asked about this condition by Inspector Tersine, Helvetia gave incorrect and misleading information to MSHA which minimized the danger. At no time did Helvetia advise MSHA that it found methane in the explosive range. Helvetia's Mine Examiner's Reports beginning on September 5, 1979, have been altered. The original entries showed no findings of explosive gas, whereas the alterations show "excessive amount of CH₄ found in right return."

In any event, the weekly inspection of the right return airway on August 31, 1979, showed no evidence of methane. The inspection on September 5, 1979, revealed methane concentrations in that area between five and ten percent. Neither the extent of the affected area nor the source of the methane was ever specifically identified. However, it is clear that the affected area was over 200 feet from the end of the mine and all reported readings in that area on September 5, 1979, were in excess of five percent methane. The facts of this case establish the following: (1) there was no methane present in the return airway on August 31, 1979; (2) on September 5, 1979, all of Helvetia's methane readings in the affected area were between five and ten percent; and (3) the methane in question covered a large, undefined area of the mine. Therefore, whether the term "inundation" is defined as an inrush of gas which floods an area, a covering of an area with a flood

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of gas, or an overspreading of gas, I find that this mine was inundated by methane on September 5, 1979, and that Helvetia was required to report it as an accident to MSHA pursuant to 30 C.F.R. 50.10.

Section 103(j) of the Act, 30 U.S.C. 812(j) requires an operator to notify MSHA of any accident occurring in a mine. Section 3(k) of the Act, 30 U.S.C. 802(k), defines "accident" to include a "mine inundation." Since I find that Helvetia violated section 103(j) of the Act and 30 C.F.R. 50.10, a civil penalty must be assessed.

In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act, supra, shall be considered. As pertinent here, the operator's prior history of 447 violations in this mine in the previous 2 years is noted. None of those violations was for 30 C.F.R. 50.10. Helvetia is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

Helvetia was negligent in failing to report the inundation in question. Helvetia's management did not even have a copy of the regulation in question at its mine office. There is evidence in the record, in the form of alterations in the Mine Examiner's Report of Daily Inspection and misleading statements to Inspector Tersine that only 1.8 percent methane had been found, which would support an inference of gross negligence on the part of Helvetia. However, there is also evidence that Helvetia voluntarily cut off electric power and discontinued normal mining operations in this section and believed that it had no duty to report this occurrence to MSHA because the accumulation of methane did not amount to an "unplanned inundation of a mine by a

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* * * gas." Although I have found that these contentions by Helvetia do not preclude a finding of violation of the Act and regulation, they are relevant to the issue of Helvetia's negligence. For these reasons, I find that Helvetia's conduct amounted to a high degree of negligence but less than gross negligence.

The gravity of this violation is extremely serious. MSHA's ability to perform its duty to protect the safety of miners was significantly impaired by Helvetia's failure to notify it of the inundation of the mine by methane. More than 400 miners continued to work in the mine after the discovery of excessive concentrations of methane. Since I have upheld the validity of a withdrawal order for the entire mine, supra, I find that the failure to report the inundation of the mine by methane constituted an extremely serious condition. I reject Inspector Tersine's testimony that this was not a serious violation. The inspector's conclusion that the failure to report an inundation of methane was not serious can only be explained by his refusal to take any action after being informed that 1.8 percent methane had been found and Helvetia had voluntarily cut off electric power and discontinued normal mining in the affected section. There can be no justification for concluding that the failure to report a mine inundation by methane is not serious.

The citation in question shows that it was terminated 15 minutes after it was issued upon a review by management of the procedures to notify MSHA of an accident. The issue of good-faith compliance is of little significance in this case.

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At the hearing, the attorney for MSHA requested that a civil penalty of \$60 be assessed. Such a statement in light of the evidence of record makes a mockery of the criteria mandated by Congress in section 110(i) of the Act. It is the purpose of those criteria to insure that while the amount of the penalty will not unduly hamper the ability of the operator to stay in business, it will deter future violations of the Act.

I conclude that the evidence established that Helvetia violated section 103(j) of The Act and 30 C.F.R. 50.10 by failing to report to MSHA an inundation of its mine by methane. Helvetia's conduct amounted to a high degree of negligence. After MSHA finally heard about the problem, Helvetia told the inspector that it had only 1.8 percent methane when its own tests showed methane concentrations between five and ten percent. I further find that the violation was extremely serious because the lives of more than 400 miners were endangered. For these reasons, I reject MSHA's request to impose a civil penalty of \$60. Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$2,500 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

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It is FURTHER ORDERED that Respondent pay the sum of \$2,500 within 30 days of the date of this decision as a civil penalty for the violation of section 103(j) of the Act and 30 C.F.R. 50.10.

James A. Laurensen
Judge