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

MCCOY ELKHORN COAL CORPORATION,	CONTESTANT	Contest of Order Docket No. KENT 80-243-R Order No. 722582 April 4, 1980
v.		
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	RESPONDENT	No. 4 Mine Contest of Citation Docket No. KENT 80-244-R Citation No. 722581 April 3, 1980 No. 4 Mine

DECISION

Appearances: Fred G. Karem, Esq., Shuffett, Kenton, Curry & Karem, Lexington, Kentucky, for Contestant
William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to an order issued June 2, 1980, a hearing in the above-entitled consolidated proceeding was held on July 22, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d). All civil penalty issues were consolidated for purposes of avoiding an additional hearing in the event a violation of a mandatory safety standard should be found to have occurred, but the civil penalty issues will be severed from this decision and will be decided in a subsequent decision after I have received a Petition for Assessment of Civil Penalty filed by the Secretary of Labor with respect to the violation of 30 C.F.R. 75.400 alleged in Citation No. 722581 which is under review in Docket No. KENT 80-244-R.

At the conclusion of the hearing, counsel for the parties indicated that they would like to file briefs before a decision was rendered. It was agreed

that simultaneous briefs would be filed by September 29, 1980 (Tr. 366). Counsel for the Secretary of Labor filed a memorandum of law on October 1, 1980, and counsel for McCoy Elkhorn Coal Corporation filed a posthearing brief on October 2, 1980.

Issues

The memorandum of law (p. 2) submitted by counsel for the Secretary lists four issues which have been raised in this proceeding:

(1) Whether or not the violation set forth in the 104(a) citation issued April 3, 1980, had been completely abated at the time the 104(b) order was issued.

(2) Whether or not the Mine Safety and Health Administration's inspector abused his discretion when he determined not to extend the abatement time of the 104(a) citation.

(3) Whether or not failure to state correctly the initial action citation number voids the resulting 104(b) order.

(4) Whether or not the 104(b) order is void because the inspector failed to make a written finding that the abatement period should not be enlarged in regard to the 104(a) citation.

McCoy Elkhorn's posthearing brief contains arguments pertaining to the four issues set forth above. Since I am in substantial agreement with all of the arguments made in the Secretary's memorandum of law, my decision will primarily consider the arguments set forth in McCoy Elkhorn's brief.

Before considering the parties' arguments, I shall make some findings of fact on which my decision will be based.

Findings of Fact

1. Contestant McCoy Elkhorn Coal Corporation in April 1980 owned three coal mines, namely, Nos. 1, 3 and 4. On a daily basis, the No. 1 Mine produces about 1,900 tons, the No. 3 Mine produces approximately 400 tons, and the No. 4 Mine produces about 600 tons. McCoy Elkhorn has 237 employees, including both office and production personnel. McCoy Elkhorn is an affiliate of General Energy Corporation of Lexington, Kentucky. McCoy Elkhorn's three mines are all located in Pike County, Kentucky (Tr. 32; 178-180).

2. Mr. Kellis Fields, a duly authorized representative of the Secretary of Labor, traveled to McCoy Elkhorn's No. 4 Mine on April 3, 1980, for the purpose of initiating a regular inspection pursuant to section 103(a) of the Federal Mine Safety and Health Act of 1977 (Tr. 139). On that day, the inspector issued two citations alleging violations of 30 C.F.R. 75.400

which provides "[c]oal 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" (Tr. 14-15).

3. One of the citations alleged a violation of section 75.400 with respect to a loading machine and the other citation was No. 722581 issued at 11:30 a.m. alleging that "combustible material in the form of oil and grease with coal dust was allowed to accumulate under the lid, on and around electrical motors, in one place around the motor 1/2 inch deep on the 16-RB cutter on the 002 section." The time set for abatement was 8 a.m. the next day, that is, April 4, 1980 (Tr. 15-16; Exh. 1).

4. When the inspector returned to the mine on the morning of April 4, he first examined the loading machine and found that all combustible materials had been cleaned from the loading machine. He therefore terminated the citation which had been issued with respect to the loading machine (Tr. 19).

5. Mr. Michael K. Norman, McCoy Elkhorn's safety director, accompanied the inspector during his examination of the No. 4 Mine on both April 3 and 4, 1980 (Tr. 13; 183). At the time of the hearing held on July 22, 1980, Mr. Norman had been promoted to the position of mine foreman (Tr. 178).

6. After completing his examination of the loading machine, the inspector watched the miners load coal and took an air reading. Then the inspector went to the place where the cutting machine was sitting and began checking it (Tr. 51). He and the safety director were joined by Mr. Lester Varney, McCoy Elkhorn's section foreman on the day shift. The inspector could see down into the cutting machine because one of the guards on the back side had been removed. The inspector remarked that the cutting machine had not been cleaned of all combustible material. The safety director and the section foreman examined the cutting machine and both expressed the opinion that they thought the cutting machine was "okay" (Tr. 19-20).

7. The inspector then asked that the other lid on the front of the cutter be removed. After the front lid had been removed, the inspector again examined the remainder of the machine. The inspector used his ruler and found that oil and grease still existed under the lids to a depth of from 1/4 to 1/2 inch. The inspector again remarked that the cutter had not been properly cleaned of all combustible materials (Tr. 21; 42; 127; 359). Neither the safety director nor the section foreman offered to have any more cleaning done on the cutter (Tr. 105; 214; 359-361).

8. After the inspector had carefully examined the entire machine and had shown the safety director the amount of oil and grease which he had measured around electrical components, the inspector waited an additional 5 to 15 seconds for the safety director or section foreman to offer to do additional cleaning or explain why additional time was needed for properly cleaning the

machine, the inspector stated that the machine was down or closed

(Tr. 21; 359-361). The safety director asked if that meant the inspector had issued a withdrawal order and the inspector replied that it did (Tr. 128-129). The inspector's Order No. 722582 issued April 4, 1980, stated "[a]ll combustible material still has not been cleaned from the 16 RB Joy Cutter, and oil and grease still can be measured from 1/4 to 1/2 inch in depth and no one is cleaning on this piece of equipment" (Tr. 118; Exh. 1).

9. The inspector defended his issuance of the withdrawal order on various grounds. He stated that it is his practice to grant extensions of time for compliance with violations he has cited when an operator explains why a given violation has not been abated and asks for an extension of time (Tr. 106; 135). The inspector stated that in this instance he did not grant an extension of time because no one asked for additional time within which to clean the remaining combustible material off the cutting machine and both the safety director and the section foreman had unequivocally expressed the opinion that the cutting machine had been adequately cleaned (Tr. 20; 51; 188; 212; 314). The inspector stated that he had reason to doubt that the additional cleaning he believed to be necessary would have been done if he had voluntarily extended the time for a couple of hours (Tr. 109). He believed that issuance of a withdrawal order was necessary to obtain total abatement, that is, the cleaning of all combustible materials from the cutting machine (Tr. 127; 361).

10. The inspector stated that about 60 percent of the combustible materials on the cutting machine had been removed between the time he issued the original citation on April 3 and the time he examined the cutting machine on April 4 (Tr. 88). The inspector believed that the use of water and solvents and the other cleaning which had been done on the cutting machine had reduced the machine's propensity for causing a fire on April 4 (Tr. 98), but the inspector believed that the water and solvents would evaporate at a subsequent time and leave the same kind of ignitable residue which he had initially observed (Tr. 93; 100). Therefore, he concluded that failure to remove all the combustible materials which existed on April 4 would cause the cutting machine to revert to a hazardous condition since oil was still present where heat from the motor and a possible spark from electrical components could produce a fire or an explosion (Tr. 27; 40; 58; 95).

11. The inspector believed that the violation was the result of a high degree of negligence (Exh. 1, p. 2). The operator's cleaning program under which the equipment was to be cleaned once every 2 weeks was either not being performed or, if being performed, was not requiring sufficient frequency of cleaning to keep the equipment free of combustible materials (Tr. 356-357; Exh. 12). The inspector stated that the amount of combustible materials he saw on the equipment would not have accumulated if the operator had been cleaning the equipment with sufficient regularity (Tr. 75; 161).

12. The inspector considered the violation to be serious depending on the circumstances that might exist at the time a

fire or explosion might occur as a result of the accumulation of combustible materials on the cutting

machine. If all 10 of the miners who worked in the section where the cutting machine was used were present in the mine, they could be overcome by smoke inhalation depending on the adequacy of ventilation at the time of the fire and the extent of the miners' training as to what to do in case of fire, that is, how well they reacted in using the proper escapeways and whether the escapeways were being properly maintained (Tr. 27; 28; 40; 144). Considerations countervailing the above-mentioned hazards were that the mine had been adequately rock dusted on April 3 and 4, 1980, and the fact that no methane had been detected on either day (Tr. 65-66). Additionally, the cutting machine is equipped with a fire suppression system and a breaker system which should disconnect power in an emergency (Tr. 98).

13. As to the operator's history of previous violations, Exhibit 3 shows that McCoy Elkhorn was previously cited on October 2, 3, and 4, 1979, for having accumulations of combustible materials on five different pieces of mining equipment (Tr. 156; 356-357).

14. McCoy Elkhorn's safety director examined the cutting machine along with the inspector on the morning of April 4, 1980 (Tr. 183-184). The safety director was of the opinion that the cutting machine had been cleaned thoroughly, although he conceded that in the compartments under the lids there were still some accumulations of soggy-like stuff with oil in it (Tr. 186). The safety director had never seen a cutting machine, as clean as that one was, receive a citation before (Tr. 188). Although the safety director did not ask the inspector for an extension of time within which to do more cleaning (Tr. 214), he said they would have done additional cleaning if the inspector had voluntarily extended the time (Tr. 190). The safety director's description of the number of hours that were spent by the maintenance shift in cleaning the cutting machine was based on his discussion with the section foreman who works on the maintenance shift and with Mr. Dover Varney, the scoop operator, who was chiefly given the responsibility for cleaning the cutting machine (Tr. 225).

15. Mr. Ronnie Fletcher was the section foreman on the maintenance shift which began at 11 p.m. and ended at 7 a.m. (Tr. 253). He was called at home by the day-shift section foreman, Mr. Lester Varney, who told him that citations had been written with respect to excessive accumulations on the loading machine and cutting machine and that the superintendent wanted the machines thoroughly cleaned on Mr. Fletcher's shift (Tr. 236). The superintendent, Mr. Stanley Charles, called Mr. Fletcher at the mine about 10:50 p.m. and emphasized that the equipment should be made "extra clean" (Tr. 237; 344). Mr. Fletcher described in great detail how he and the three miners on his crew used cap wedges and roof bolts to scrape and loosen the dirt and grease around the motor and other fittings (Tr. 238). Two 3-inch holes in the bottom of the motor compartment were filled with mud when they began cleaning and those holes had to be opened with roof bolts so that the dirt could be raked out of the compartment (Tr. 239). After the four men had scraped dirt off the machine

for 2 hours, one of them sprayed a solvent on the machine from a 55-gallon drum, using about 40 to 50 gallons on the cutter (Tr. 241; 262). Mr. Fletcher said that the solvent was sprayed on the

machine while it was still hot so that it would dissolve the grease around the motor (Tr. 241-246). The solvent works especially well when equipment is hot (Tr. 246).

16. The miners ate lunch from about 3 to 3:45 a.m. Then they rinsed the solvent off the cutting machine with a water hose and backed the cutter out of the place where they had cleaned it and turned it left-handed in the No. 6 entry (Tr. 256; 272-274). Two men had started scraping the dirt off the loading machine at 2 a.m. They finished scraping on the loading machine and had started scraping on the coal drill shortly before eating lunch at 3 a.m. (Tr. 259; 272-273). Then the loader was brought in, sprayed with solvent, and washed with water. Finally, after moving the loading machine out of the washing place, the coal drill was brought in, sprayed with solvent, washed with a water hose, and returned to the place where the men had found it in the No. 5 entry (Tr. 275). All three pieces of equipment were cleaned at the same place in the mine and not one of the three pieces of equipment was sitting in the place where it had been cleaned when it was examined by the inspector on the morning of April 4 (Tr. 274-275).

17. Mr. Fletcher referred to cleaning grease off the cutting machine, specifically mentioned that grease was cleaned from around the motor, and stated that grease ran out of the compartment under the lids (Tr. 238; 241; 242). Mr. Charles, the mine superintendent, claimed that the inspector should not have referred in his citation and order to the existence of grease on the cutting machine because the only grease used in the rear compartment was in a sealed unit (Tr. 363-364). Mr. Fletcher found it necessary to contradict himself about his references to grease in his direct testimony when his counsel specifically asked him if he saw any grease under the lid in the rear compartment (Tr. 245).

18. Mr. Fletcher stated that it was impossible to clean accumulations of oil from beneath the motor in the rear compartment and that if the inspector had put a ruler down beside the motor after the cutter had been cleaned, that he would expect the inspector would definitely have been able to measure from 1/4 to 1/2 inch of oil in that location (Tr. 283-284). Mr. Fletcher also stated that the miners had cleaned the cutting machine to his "satisfaction" (Tr. 271).

19. Despite Mr. Charles' position that grease can not exist on the cutting machine, a memorandum from McCoy Elkhorn's division manager states that all "grease" and other combustible materials are to be cleaned off the equipment every 2 weeks (Tr. 289; Exh. 12). Notwithstanding the posting of the memorandum about the necessity of cleaning equipment every 2 weeks (Tr. 290), Mr. Fletcher stated that it was not one of his regular duties to clean equipment on the maintenance shift and that cleaning of equipment was done primarily when equipment breaks down because, at such times, the men have nothing else to do other than to clean equipment (Tr. 285).

20. Mr. Dover Varney is a scoop operator on the maintenance shift and he had the primary duty of cleaning the cutting machine on April 4. His

description of the cleaning process does not differ from Mr. Fletcher's, but Mr. Varney did describe a practice which may well have contributed to the accumulations which the inspector saw when he issued his citation. Although Mr. Varney denied that grease existed in the compartment under the rear lid, he said that if they find an oil accumulation down in a compartment, they throw rock dust on the oil which has the effect of absorbing the oil. Then they can scrape off the combined mixture of rock dust and oil, spray the area with a solvent, and wash it with a water hose (Tr. 308).

21. Mr. Lester Varney, the day-shift section foreman, was present when the inspector issued the citation on April 3 and he stated that oil and dirt were "pretty thick" on the machine at the time the citation was issued (Tr. 310). Mr. Varney was instructed by the superintendent to check the cutter as soon as he went underground on the day shift. Mr. Varney checked the cutter and thought it looked clean and reported to the superintendent on the mine telephone that the cutter was clean (Tr. 312). Mr. Varney claimed that he was surprised when the inspector examined the cutter and stated that it was not clean enough (Tr. 314). Mr. Varney said that he would have been willing to clean some more on the cutter if the inspector had asked him to do so and had voluntarily extended the time for that purpose (Tr. 316). Despite the fact that Mr. Varney thought the cutter was clean, after the order was issued, he had five miners use cap wedges and roof bolts for about 1-1/2 hours for the purpose of cleaning the remaining materials from the cutting machine (Tr. 320). Mr. Varney stated that there was some mud, water, solvent, and a little oil on the cutter at the time the inspector issued his order (Tr. 313; 324). Although Mr. Varney was within 2 feet of the inspector when the inspector was checking the depth of the oil and grease inside the rear compartment on the cutting machine, Mr. Varney could not say how much oil showed on the inspector's ruler when he measured the materials on the bottom of the compartment (Tr. 335). Mr. Varney stated that the barrels from which the cleaning solvent had been taken were sitting nearby and were pointed out to the inspector by McCoy Elkhorn's safety director (Tr. 335). The maintenance shift foreman, Mr. Fletcher, however, testified that the barrel from which the solvent had been taken was left lying on the scoop so that they could conveniently fill buckets from the barrel (Tr. 262).

22. Mr. William Stanley Charles, the superintendent of the No. 4 Mine, did not personally see the cutting machine before the inspector's citation was written and did not examine the cutting machine before or after the inspector's order was written (Tr. 350). The superintendent stated that his foremen are very competent miners and that he believed that they correctly reported to him that the cutter was in excellent condition on the morning of April 4 when the inspector issued the withdrawal order after finding that all combustible materials had not been cleaned from the cutting machine (Tr. 351). Mr. Charles could not state that he has a specific program which assures that the equipment will be cleaned at least once every 2 weeks. All Mr. Charles

could state was that cleaning was done when equipment had broken down and that cleaning was a priority consideration on Saturday (Tr. 355-357).

Consideration of Arguments Contained in McCoy Elkhorn's Brief

1. Whether There Was an Accumulation within the Meaning of Section 75.400 at the Time Order No. 722582 Was Issued on April 4, 1980

McCoy Elkhorn's brief does not challenge whether a violation of section 75.400 existed when the inspector issued Citation No. 722581 on April 3, 1980. McCoy Elkhorn cannot question whether a violation of section 75.400 existed when the citation was issued because its own witnesses agreed that the accumulations on the cutting machine on April 3, 1980, were "pretty thick" (Tr. 310) and that four miners worked on the cutting machine for about 12 man hours before they had cleaned it to the section foreman's "satisfaction" (Tr. 271; Finding Nos. 3, 15-16, 20-21, supra).

McCoy Elkhorn's brief (pp. 4-7) does contend, however, that there was no violation of section 75.400 on April 4, 1980, when the inspector issued Withdrawal Order No. 722582 after he had found that the violation had not been "totally abated" within the meaning of section 104(b) of the Act. McCoy Elkhorn argues that "accumulate" means "to heap or pile up" and that the mere existence of combustible materials cannot be considered a violation of section 75.400. In support of the foregoing contention, McCoy Elkhorn cites the Commission's decision in Old Ben Coal Co., 1 FMSHRC 1954 (1979), at 1958, where the Commission stated:

> We accept that some spillage of combustible materials may be inevitable in mining operations. Whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount. * * *

McCoy Elkhorn claims that its witnesses' testimony shows that the cutting machine had been thoroughly cleaned on the maintenance shift which begins at 11 p.m. and ends at 7 a.m. It is argued that the inspector's position as to what constitutes an "accumulation" within the meaning of section 75.400 is clearly wrong because he believed that mere existence of any amount of a combustible material is an "accumulation" prohibited by section 75.400.

The above argument of McCoy Elhorn is not well taken in the context of the factual situation which confronted the inspector on the morning of April 4. The inspector had on April 3, 1980, issued two citations alleging violations of section 75.400 because of accumulations of coal dust, oil, and grease on the loading machine and the cutting machine. When the inspector returned on April 4, he found that the accumulations had been properly removed from the loading machine and he terminated the citation with respect to that machine. The inspector, however, found that the cutting machine had not been properly cleaned because he could still see and measure up to 1/2 inch of oil and grease around the motor in the rear compartment of the cutting machine. Although the inspector agreed with McCoy Elkhorn's

counsel on cross-examination that the oil and grease were then mixed with water and solvent as a result of the miners' partial abatement of the violation, he still believed that the accumulations he had cited on April 3 had been only

60 percent removed. He stated that the water and solvents used on the oil and grease would evaporate and the oily substances around the motor and electrical components would cause the cutting machine to become a possible fire or explosion hazard shortly after it began to be used again (Finding Nos. 4, 7-8, 10, supra).

It is true that McCoy Elkhorn's witnesses claimed that there were only small amounts of materials around the motor and electrical components, but not one of the foremen failed to concede that some oil still existed after they had completed cleaning the cutting machine (Finding Nos. 18 and 21; Tr. 185-186; 202; 215; 227). McCoy Elkhorn overlooks the fact that when its foremen conceded that any combustible materails remained after the cleaning of the cutting machine, the likelihood that the combustible materials were as extensive as those described by the inspector is great. The reason for the foregoing conclusion lies in the fact that the mine superintendent had specifically told his foremen to make certain that the cutting machine was thoroughly cleaned. They assured him that it had been (Finding Nos. 15, 21, and 22, supra). Therefore, when the inspector issued a withdrawal order, they had no choice but to take the position that the inspector had incorrectly claimed that the cutting machine still had not been properly cleaned.

I find that the inspector's testimony is more credible than that of McCoy Elkhorn's witnesses in the above-described circumstances. Additionally, there was no reason whatsoever for the inspector to examine the loading machine and find that it had been properly cleaned and then to examine the cutting machine and find that it had not been properly cleaned (Finding Nos. 4 and 7, supra). The fact that the inspector considered one violation of section 75.400 to have been "totally abated" and found that the other violation had not been "totally abated" shows that the inspector was making independent and impartial evaluation with respect to each piece of equipment.

I have examined the judges' decisions cited on pages 5 and 6 of McCoy Elkhorn's brief in support of its arguments, but those decisions were based on facts which are different from those which existed in this proceeding. I find that accumulations of oil and grease to a depth of 1/2 inch are sufficient to constitute an accumulation of "combustible materials" * * * "on electrical equipment" within the meaning of section 75.400 (Finding Nos. 2 and 8, supra). Therefore, McCoy Elkhorn's argument that there was no violation of section 75.400 when Order No. 722582 was issued is rejected.

2. Whether any Materials Remaining on the Cutting Machine Were "Combustible Materials" within the Meaning of Section 75.400

McCoy Elkhorn's brief (pp. 7-9) next contends that whatever nominal material may have still existed on the cutting machine on the morning of April 4 was basically inert matter and was so mixed with incombustibles as not to be ignitable. McCoy Elkhorn cites the extensive testimony of its witnesses in support of the

foregoing argument. It is true that McCoy Elkhorn's witnesses explained in great detail all the hours of cleaning with

cap wedges, roof bolts, solvent, and water hoses which had been done to the cutting machine on the maintenance shift. It is true that all of the miners who worked on the cutting machine and the foremen who examined the cutting machine on April 4 emphasized that the cutting machine had been drenched in solvents and water. The inspector himself agreed that at the time he issued his order, the cutting machine was probably no hazard to the miners because of the amount of water which had been used on the machine. The inspector explained, however, that the water would evaporate after the miners began operating it and that the oily substance which was originally cited would again render the machine a fire or an explosive hazard (Finding Nos. 10; 15-16).

No witness rebutted the inspector's claim that the water would evaporate, leaving the oily substances which created the fire hazard. Additionally, if the cutting machine was as free of combustible materials as is contended by McCoy Elkhorn, there would have been no reason for five miners to clean on the cutting machine for 1-1/2 hours after the order was issued if the 40 percent of combustibles originally cited in the inspector's citation had not still existed on the cutting machine at the time the order was issued (Finding No. 21, supra). The preponderance of the evidence shows that combustible materials still existed on April 4 when the order was issued. Therefore, the argument that no combustible materials within the meaning of section 75.400 existed on the morning of April 4 must also be rejected.

3. Whether, Assuming Arguendo, that Additional Work toward Abatement Was Required, the Inspector Acted Arbitrarily and Unreasonably in Failing To Extend the Time for Abatement and in Issuing the Order

The first part of McCoy Elkhorn's argument as to the inspector's alleged unreasonableness in issuing the withdrawal order, instead of extending the time for compliance, is that the miners would have been exposed to no danger if the inspector had extended the time instead of issuing a withdrawal order (Brief, pp. 10-12). There is no doubt but that the inspector knew when he wrote the original citation giving McCoy Elkhorn until 8 a.m. the following day for abating the violation, that McCoy Elkhorn had the option of continuing to use the cutting machine during the remainder of the day shift and during the evening shift which followed before doing any cleaning on the cutter. As a matter of fact, that is what happened, because the superintendent of the mine assigned all work toward abatement of the violation to the section foreman on the maintenance shift which extended from 11 p.m. to 7 a.m. (Finding No. 15, supra).

I have already found above that the inspector did not think that the miners would have been exposed to an immediate hazard if he had extended the time for abatement (Finding No. 10, supra). McCoy Elkhorn argues that the primary matter which the inspector must consider when deciding whether to extend the time for compliance, or issue an order pursuant to section 104(b), is whether an extension of time will expose the miners to any undue hazard. McCoy Elkhorn cites United States Steel Corp., 7 IBMA 109

(1976), in support of the above argument. In that case, the former Board of Mine Operations Appeals

affirmed a judge's decision finding that an inspector had abused his discretion in issung a withdrawal order instead of extending the time within which U.S. Steel could submit some additional respirable dust samples. The Board's decision emphasizes that U.S. Steel offered to achieve early abatement in securing the dust sample by calling a miner in to work on the shift beginning at 4 p.m., instead of his normal midnight shift, but the inspector declined to grant the extension despite U.S. Steel's affirmative and voluntary efforts to achieve early compliance.

In this proceeding, McCoy Elkhorn's safety director and section foreman told the inspector that they thought the cutting machine was "okay" and did not need further cleaning. They never did offer to have additional cleaning done, did not explain why the cutting machine had not been properly cleaned, and did not ask for an extension of time within which to perform additional cleaning (Finding Nos. 4-8, supra). Moreover, the inspector stated that he believed that the safety director and section foreman had taken a firm position indicating that they would not do any additional cleaning on the machine unless he issued a withdrawal order (Finding No. 9, supra).

Inasmuch as the cutting machine had been used on the evening shift, as was demonstrated by the fact that the section foreman on the maintenance shift stated that he had the machine sprayed with solvent while it was still hot, the inspector reasonably assumed that the cutting machine would again be used for production if he extended the time (Finding Nos. 10 and 15, supra). Although some of McCoy Elkhorn's witnesses claimed that no production had occurred on the morning of April 4 prior to the time that the inspector examined the cutting machine, the inspector had watched the men operate the loading machine just a few minutes before he examined the cutting machine which, up to that time, had not been used on the day shift (Finding No. 6, supra).

The Secretary's memorandum of law cites a decision by Judge Stewart in United States Steel Corp., 2 FMSHRC 1515 (1980), in which Judge Stewart held that the primary considerations in determining whether an inspector acts reasonably in determining whether to extend the time for abatement are whether the original time allowed for abatement was adequate and whether the operator communicated to the inspector any extenuating circumstances which prevented abatement within the allotted time. In that case, Judge Stewart affirmed an inspector's order because the inspector said that the operator had ample opportunity within which to correct the condition described in his citation but failed to do so. In this proceeding, all agree that the period of 21 hours originally given by the inspector for cleaning all combustible materials from the cutting machine was an adequate amount of time.

McCoy Elkhorn's chief claim of aggrievement is that the inspector acted arbitrarily and unreasonably in issuing a withdrawal order instead of extending the time for abatement. All of McCoy Elkhorn's claims of arbitrariness are based on

obligations which it places upon the inspector's shoulders.

McCoy Elkhorn first states that it was obvious that its miners had made an extensive, good faith effort to achieve compliance (Brief, pp. 12-13). There is no doubt about that claim because the inspector agreed that McCoy Elkhorn's efforts had resulted in the cleaning of about 60 percent of the combustible materials from the machine (Finding No. 10, supra).

McCoy Elkhorn next contends that the inspector acted arbitrarily by issuing the order without making appropriate inquiries as to what action its foremen and miners had already taken to clean the machine (Brief, p. 14). The inspector had been a mine foreman himself before he became an inspector and knew how much work was involved in cleaning a cutting machine (Tr. 161). He knew that the miners had ample time within which to clean the machine. Therefore, he did not need to make an investigation to determine how many hours or what sorts of materials and equipment had been used to do 60 percent of the work needed to remove all combustible materials from the machine.

The third portion of McCoy Elkhorn's argument with respect to the inspector's arbitrariness in issuing the order pertains to a very long discussion about how long and how hard the foremen and miners had worked to clean all combustible materials from the cutting machine, along with emphasis on the fact that the inspector knew that McCoy Elkhorn had always shown a spirit of cooperation and willingness to abate all conditions promptly. It is contended that the inspector, knowing all the company had done in this instance and possessing an awareness of the company's spirit of cooperation in the past, acted very arbitrarily and unreasonably in declining to extend the time for abatement (Brief, pp. 15-25). As I have observed above, since the inspector knew what kind of effort is required to clean combustible materials from a cutting machine, McCoy Elkhorn's safety director and section foreman should have made it clear to the inspector that they were willing to have additional cleaning work performed. Instead, they took a firm position that the machine had already been cleaned.

I believe that the inspector satisfactorily and succinctly explained why his refusal to extend the time was not arbitrary or unreasonable when he answered the following question as indicated below (Tr. 361).

> Q. Yes. In other words, why didn't you just say to them, "I'm going to give you--if I give you another hour, will you get this cleaned to my satisfaction?"
>
> A. Okay. Like I said before, I think in my opinion, that I had already given them a sufficient amount of time to do the job in, which they had not done it. They at no time offered to tell me why they hadn't cleaned it, nor did they offer to get anybody to start cleaning on it. They never even offered to give me a reason to extend it.

McCoy Elkhorn's brief (pp. 18-19) cites as precedents two

cases in which administrative law judge vacated orders issued under section 104(b) of the Act. Those cases dealt with factual situations which are completely different

from the facts in this proceeding. In Consolidation Coal Co., 1 FMSHRC 1638 (1979), Chief Judge Broderick vacated an order issued under section 104(b) in a factual situation which showed that the company was still working to abate the alleged violation at the time the inspector arrived to determine whether the violation had been abated. Additionally, the inspector was vague about what additional work was required to abate the violation. In this proceeding, McCoy Elkhorn was not still trying to clean the cutting machine when the inspector examined it and McCoy Elkhorn showed no willingness to do any additional work.

In Consolidation Coal Co., 2 FMSHRC 2021 (1980), the other case cited by McCoy Elkhorn, Judge Cook vacated an order issued under section 104(b) under factual conditions showing that the inspector's order required the company to abate a condition other than the one described in the original citation and the company requested additional time and gave reasons why an extension of time was needed. In this proceeding, the inspector very specifically stated in his order that from 1/4 to 1/2 inch of oil and grease still existed around the electrical components and McCoy Elkhorn did not ask for an extension of time or give any reason for needing additional time.

4. Whether Order No. 722582 Complied with Procedural Requirements of Section 104(b)

McCoy Elkhorn (Brief, pp. 25-27) argues that the inspector's Order No. 722582 is invalid because he did not make the findings required by section 104(b) which provides:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons * * * to be withdrawn * * *.

McCoy Elkhorn claims that the above-quoted language from section 104(b) requires that the inspector make some affirmative inquiry as to whether the violation has been abated and that his actions must show by some concrete manifestation that the findings have been made. McCoy Elkhorn says that the inspector's order clearly shows that he did not make the two findings required by section 104(b).

Findings of Fact Nos. 6 through 9, supra, show that the inspector did make a thorough investigation of the conditions which existed on April 4 and that his actions were sufficient to put McCoy Elkhorn's safety director and section foreman on notice that the inspector had found that the violation

still existed. There is nothing in section 104(b) which shows that the inspector has to make a formal preliminary finding that the time for abatement should not be extended. Section 104(b), unlike section 104(d)(1), contains no directive that the inspector's findings shall be included in his citation or order. As pointed out by the Secretary's memorandum of law (p. 9), there is nothing in the legislative history to show that Congress wanted the inspector to reduce to writing, or otherwise communicate to the operator, a formal finding that the abatement period should not be extended. In support of the foregoing conclusion, the Secretary quotes a passage from Senate Report No. 95-181, 95th Congress, 1st Session, at page 30, or page 618 of the Legislative History of the Federal Mine Safety and Health Act of 1977 prepared by the Senate Committee on Human Resources:

> The Committee intends that withdrawal orders shall be issued when there has been a failure to abate violations within the time specified in the citation. A withdrawal order is properly issued under this section if an inspector finds during the same or subsequent inspection of the mine that an operator has failed to abate a violation. For example, if a citation is issued with an abatement period of one hour, and the violation is not abated in that time, the authorized representative shall issue a withdrawal order under this section when he follows-up on the citation, whether such follow-up is on the same or a subsequent inspection.

The second argument in McCoy Elkhorn's brief (pp. 27-28) regarding its claim that the inspector's Order No. 722582 is invalid for failure to comply with all procedural requirements is that the inspector's order, when originally issued, alleged on the "Initial Action" line of the order that the order was preceded by Citation No. 722582, whereas, in fact, Order No. 722582 was preceded by Citation No. 722581 (Exh. 1). McCoy Elkhorn argues that the inspector had already terminated the order on April 4, 1980, the same day it was issued, and that the inspector could not thereafter properly modify the order on May 20, 1980, to reflect that the "Initial Action" reference should have been to Citation No. 722581 instead of to Citation No. 722582. McCoy Elkhorn argues that the inspector did not correct the reference to the incorrect citation until after McCoy Elkhorn had already filed its Notice of Contest in this proceeding. McCoy Elkhorn also contends that section 104(h) of the Act permits an inspector to modify or terminate an order, but does not permit him to modify an order after he has terminated it (Brief, p. 28).

In Old Ben Coal Co., 2 FMSHRC 1187 (1980), the Commission affirmed an administrative law judge's decision which had affirmed four orders of withdrawal which indicated that they had been issued under section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 when, in fact, they should have shown that they were issued under section 104(c)(2) of the 1969 Act. The judge had held that the incorrect reference to section

104(c)(1) was no more than a clerical error which did not prejudice Old Ben in any way. The Commission stated that it agreed with the judge that Old Ben was not prejudiced because Old Ben did not show how its defense to a 104(c)(2) order would differ from its defense to a 104(c)(1) order.

In this proceeding, the inspector's mistake in writing No. 722582 was even more the result of a clerical error than in the Old Ben case cited above. Exhibit 1 shows that the inspector's Order No. 722582 was served on the same person who had received Citation No. 722581 on the previous day. That individual testified at the hearing on cross-examination that the inspector's use of No. 722582, instead of No. 722581, had not in any way confused him. McCoy Elkhorn has not shown that its defense was prejudiced in any way by the inspector's having written the wrong citation number on Order No. 722582.

It appears to me that an inspector ought to be able to correct a mistake regardless of whether he discovers it before or after a Notice of Contest has been filed or whether he discovers it after he has already terminated the order. It is certain that section 104(h) of the Act empowers the Commission and its judges to modify orders. Therefore, to remove all doubt as to whether Order No. 722582 has been modified to correct the reference to the erroneous citation number, the order accompanying this decision will modify the order to change the reference to Citation No. 722581 instead of to Citation No. 722582. In any event, I find that the inspector's order was not rendered invalid by the fact that he mistakenly wrote Citation No. 722582 on the "Initial Action" line instead of Citation No. 722581.

5. Whether the Order Described a Different Condition from the Condition Set forth in the Citation

The last argument in McCoy Elkhorn's brief (p. 28), to the effect that Order No. 722582 is invalid, begins with a claim that the language in section 104(b) shows that any order issued for failure to abate must be based on the continued existence of the same condition which constituted the violation described in the underlying 104(a) citation. McCoy Elkhorn claims that Citation No. 722581 referred to oil around "electrical motors" although the inspector admitted during cross-examination that there was only one motor under the cutting machine's lids (Tr. 70). McCoy Elkhorn contends that Order No. 722582 alleged a condition far beyond the scope of the condition described in Citation No. 722581.

As shown in Finding No. 3, supra, Citation No. 722581 alleged that "combustible material in the form of oil and grease with coal dust was allowed to accumulate under the lid, on and around electrical motors, in one place around the motor 1/2 inch deep on the 16-RB cutter on the 002 section." Order No. 722582, as shown in Finding No. 8, supra, alleged "[a]ll combustible material still has not been cleaned from the 16 RB cutter, and oil and grease still can be measured from 1/4 and 1/2 inch in depth and no one is cleaning on this piece of equipment."

As to McCoy Elkhorn's claim that the inspector mistakenly referred to "electrical motors" when, in fact, there is only one electrical motor, the testimony shows unequivocally that the rear compartment contains both a hydraulic motor and an electric motor (Tr. 364). To the extent that the inspector's citation referred

to "electrical motors," he may have been in

error, but only because the adjective "electrical" modified the word "motors." Since McCoy Elkhorn's superintendent is the one who clarified the record by pointing out that the rear compartment contained both a hydraulic motor and an electrical motor, I find that the inspector's reference to the word "motor" in the plural was not so misleading or confusing as to make the inspector's order invalid.

As to McCoy Elkhorn's claim that Order No. 722582 unduly widened the scope of the condition alleged in the original citation, I find that the contention is not well taken. The inspector's citation had clearly stated that the combustible materials consisted of oil, grease, and coal dust. The order also clearly stated that "[a]ll combustible material still has not been cleaned from the 16 RB cutter, and oil and grease still can be measured from 1/4 to 1/2 inch in depth." I find that the order very precisely stated that the same condition described in the citation still existed. Inasmuch as the inspector had gone over the cutting machine and had shown McCoy Elkhorn's safety director the exact measurements of the oil and grease which still remained on the cutting machine, there can be no doubt but that the safety director knew exactly what conditions still existed when the inspector issued his order.

I do not agree that Order No. 722582 referred to "cutters" in the plural (Exh. 1), but assuming, arguendo, that such is true, McCoy Elkhorn's safety director stated that there is only one cutting machine at the No. 4 Mine (Tr. 197). Therefore, no one would have been confused by a reference to "cutters" even if the inspector had used that word in the plural.

Civil Penalty Issues

The last part of McCoy Elkhorn's brief (pp. 29-31) addressed the civil penalty issues which I shall consider when I have received the Secretary's Petition for Assessment of Civil Peanlty seeking assessment of a penalty for the violation of section 75.400 alleged in Citation No. 722581. As I indicated in the first part of this decision, I shall sever the civil penalty issues from this proceeding and decide them after I have received the Secretary's Petition. I shall consider McCoy Elkhorn's arguments with respect to the civil penalty issues in the separate decision which remains to be written.

Ultimate Findings and Conclusions

(1) Citation No. 722581 dated April 3, 1980, was properly issued under section 104(a) of the Act and correctly stated that a violation of section 75.400 had occurred. Therefore, the Notice of Contest filed on May 2, 1980, in Docket No. KENT 80-244-R should be denied and Citation No. 722581 should be affirmed.

(2) Order No. 722582 dated April 4, 1980, was properly issued under section 104(b) of the Act. Therefore, the Notice of Contest filed May 2, 1980, in Docket No. KENT 80-243-R should be

denied and Order No. 722582 should be affirmed.

(3) The reference on the "Initial Action" line of Order No. 722582 should be corrected to reflect the fact that the initial action preceding the issuance of the order was the issuance by the inspector on April 3, 1980, of Citation No. 722581 instead of Citation No. 722582 as shown on the order as it was originally issued.

(4) McCoy Elkhorn Coal Corporation, as the operator of the No. 4 and other mines, is subject to the jurisdiction of the Act and to the regulations promulgated thereunder.

(5) Inasmuch as the Secretary of Labor has not yet filed a Petition for Assessment of Civil Penalty with respect to the civil penalty issues which were consolidated for hearing in this proceeding, the civil penalty issues should be severed from this proceeding and decided in a separate decision based on the facts in this record upon receipt by the undersigned administrative law judge of the Petition for Assessment of Civil Penalty pertaining to the violation of section 75.400 alleged in Citation No. 722581 dated April 3, 1980.

WHEREFORE, it is ordered:

(A) Citation No. 722581 dated April 3, 1980, is affirmed and the Notice of Contest filed in Docket No. KENT 80-244-R is denied.

(B) Order No. 722582 is modified on the "Initial Action" line to reflect that the initial action was Citation No. 722581 instead of Citation No. 722582.

(C) Order No. 722582 dated April 4, 1980, is affirmed, as modified by paragraph (B) above, and the Notice of Contest filed in Docket No. KENT 80-243-R is denied.

(D) The civil penalty issues consolidated for hearing in this proceeding are severed from this proceeding and the decision on those issues is deferred until such time as I receive the Secretary of Labor's Petition for Assessment of Civil Penalty with respect to the violation of section 75.400 alleged in Citation No. 722581 dated April 3, 1980.

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