FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
520) LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

24 JUN 1980

SECKETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		: Civil Penalty Proceeding : Docket No. BARB 79-311-PM
	Petitioner	: A/O No. 09-00155-05001
v.		: Speer-Thor Mine
THOR MINING COMPANY,	Respondent	:

DECISION

Appearances: Larry A. Auerbach, Esq., Office of the Solicitor, U.S. Department of Labor; for Petitioner; Jeffrey J. Yost, Esq., Thor Mining Company, Berkeley Springs, West Virginia, for Respondent.

Before:, Judge Cook

I. Procedural Background

On April 26, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act) and alleged seven violations of various provisions of the Code of Federal Regulations. Thor Mining Company (Respondent) filed its answer on May 23, 1979. On August 16, 1979, the case was assigned to Assistant Chief Administrative Law Judge Paul Merlin. The case was subsequently transferred to the undersigned Administrative Law Judge on December 4, 1979.

Notices of hearing were issued on December 13, 1979, and February 11, 1980, scheduling the case for hearing on the merits on February 28, 1980, in Valdosta, Georgia. The hearing was held as scheduled with representatives of both parties present and participating.

During the hearing, Petitioner moved to dismiss the proceeding as relates to Citation No. 97920, October 25, 1978, 30 C.F.R. § 55.12-8 on the grounds that the available evidence would not sustain the violation as alleged. The motion was granted (Tr.11). Additionally, the parties moved for approval of settlement as relates to Citation No. 97925, October 25, 1978, 30 C.F.R. § 55.12-32 (Tr.105-108). Approval of the proposed settlement is set forth in Part VI of this decision.

A schedule for the submission of posthearing briefs was agreed upon following the presentation of the evidence. Both parties filed posthearing briefs on April 14, 1980, and both parties filed reply briefs on April 30, 1980.

II. Violations Charged

Citation No.	Date	30 C.F.R. Standard
97919	October 25, 1978	55.14-1
97920	October 25, 1978	55.12-8 1/
97921	October 25, 1978	55 .Ll-2
97922	October 25, 1978	5 5 . 1 4 - 1
97923	October 25, 1978	55.12-8
97924	October 25, 1978	55.11-12
97925	October 25, 1978	55.12-32 2/

III. Witnesses and Exhibits

A) Witnesses

Petitioner called as its witnesses Kenneth Pruitt and Charles Pittman, MSHA inspectors.

Respondent called as its witness Richard Allgyer, its plant manager.

B) Exhibits

1) Petitioner introduced the following exhibits into evidence:

M-l is a drawing pertaining to Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1.

M-2 is a photograph.

M-3 is a drawing pertaining to Citation No. 97922, October 25, 1978, 30 C.F.R. § 55.14-1.

2) Respondent introduced the following exhibits into evidence:

O-l is a photograph pertaining to Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1.

O-2 is a drawing prepared by Mr. Allgyer pertaining to Citation No. 97924, October 25, 1978, 30 C.F.R. § 55.11-12.

1/ As noted previously, a motion to dismiss was granted as relates to this citation.

2/ As noted previously, a settlement was proposed as relates to this citation.

3) The following exhibits are drawings produced by various witnesses during the hearing:

X-l was drawn by Inspector Pruitt and pertains to Citation No. 97921, October 25, 1978, 30 C.F.R. § 55.11-2.

X-2 was drawn by Inspector Pruitt and pertains to Citation No. 97922, October 25, 1978, 30 C.F.R. § 55.14-l.

X-3 was drawn by Inspector Pruitt and pertains to Citation No. 97924, October 25, 1978, 30 C.F.R. § 55.11-12.

X-4 was drawn by Mr. Allgyer and pertains to Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-l.

IV Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the subject regulations occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1) The mine had 18 employees who were working three 8-hour shifts per day (Tr. 5).

2) In terms of the penalty considerations promulgated at 30 C.F.R. § 100, the mine rated a 3 on a scale of 0 to 10 and it had between 30,000 and 60,000 hours of work per year, and the company rated a 0 on a scale of 0 to 10 and it had under 60,000 hours of work per year (Tr. 5).

3) The mine has no history of previous violations for the 24-month period prior to the inspection (Tr. 5).

4) Respondent is subject to the 'provisions of the 1977 Mine Act (Tr. 10-11).

B) Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1

Occurrence of Violation

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory

safety standard 30 C.F.R. § 55.14-l in that "[t]he head pulley on the cool clay conveyor belt was not guarded." The cited mandatory safety standard provides as follows: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The head pulley was located approximately 4 to 5 feet above the ground (Tr. 22, 125). One side of the head pulley was completely guarded since it abutted an adjacent building (Tr. 27, Exh. O-1). The evidence presented at the hearing reveals that the other side of the head pulley was adequately guarded except in one area located to the right of the expanded metal V-belt guard providing access to the pinch point formed where the conveyor belt initially achieved contact with the upper portion of the head pulley (Tr. 23, 28-32, 35). An individual making contact with the pinch point could sustain physical injury (Tr. 28-29, 40).

Respondent argues that Petitioner has failed to prove a violation because the evidence presented establishes that the pulley was guarded (Respondent's Posthearing Brief, p. 2). I disagree. The evidence presented shows that an employee could have achieved contact with the pinch point because the existing expanded metal V-belt guard extended only approximately 6 inches to the right of the pinch point (Tr. 114). Guarding should have been installed to a point approximately 2 feet past the pinch point (Tr. 42). Therefore, the existing guard was insufficient to provide adequate protection within the meaning of the regulation.

Additionally, Respondent attacks the citation as insufficient to provide adequate notice of the violation charged (Respondent's Posthearing Brief, p. 2). I disagree.

Section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. § 554(b)(3) 1978), requires that "[p]ersons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted.", Adequate notice is necessary to enable a mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." Old Ben Coal Company, 4 IBMA 198, 208, 82 I.D. 264, 1974-1975 OSHD par. 19, 723 (1975). However, an inquiry into whether notice is adequate need not be confined to the four corners of the citation so long as the operator is sufficiently apprised to permit abatement of the condition and preparation of an adequate defense. Jim Walter Resources, Inc., 1 FMSHRC 1827, 1979 OSHD par. 24,046 (1979).

A review of all evidence submitted reveals that Respondent was accorded notice sufficient to abate the condition and prepare an adequate defense (see, e.g., Tr. 125). In this regard, it is significant to note that Respondent did not request a continuance when evidence was introduced at the hearing delimiting the extent of the inadequate guarding. Instead,, Respondent defended on the merits by presenting evidence addressed to the pinch

point issue and raised the question of inadequate notice only in its post-hearing brief. Accord, Jim Walters Resources, Inc., 1 FMSHRC at 1829. In view of these considerations, it cannot be concluded that Respondent was prejudiced by the description of the condition as set forth in the citation.

In view of the evidence submitted, it is found that a violation of 30 C.F.R. § 55.14-1 has been established by a preponderance of the evidence. 3/

3/ Section 104(a) of the 1977 Mine Act authorizes the issuance of citations when the mine operator violates a mandatory safety standard. Respondent argues that the duly authorized representative of the Secretary of Labor was not empowered to issue a citation for the condition existing on October 25, 1978, because the condition falls within the definition set forth in 30 C.F.R. § 55.14-3, a standard which was not mandatory at the time of the inspection (Respondent's Reply Brief, pp. 5-6).

A proper evaluation of Respondent's position requires an assessment of both 30 C.F.R. §55.14-3 and the Secretary of Labor's interpretation of the interrelationship between that regulation and 30 C.F.R. § 55.14-1.

On October 25, 1975, 30 C.F.R. § 55.14-3 was a nonmandatory safety standard providing as follows: "Guards at conveyor-drive, -head, and -tail pulleys should extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." The regulation was subsequently revised and made mandatory, effective November 15, 1979, pursuant to a final rule published in the August 17, 1979, issue of the Federal Register, 44 Fed. Reg. 48518 (1979), and currently provides as follows: "Mandatory. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley."

On March 17, 1980, the Mine Safety and Health Administration published a program directive designed to provide guidance to Federal mine inspectors in enforcing 30 C.F.R. § 55.14-3 stating as follows:

"New mandatory standard 55/56/57.14-3 requires that the guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley. This standard is to be cited when there is a guard at such locations, but it does not extend a distance sufficient to prevent persons from accidentally reaching behind the guard and becoming caught.

"The new standard is to be distinguished from standard 55156157.14-l which requires guarding of certain moving parts (such as drive, head, tail and takeup pulleys) which may be contacted by, and cause injury to, persons. Standard 55/56/57.14-l is to be cited in those instances when there is no guard at the conveyor-drive, conveyor-head, or, conveyor-tail pulleys." [Emphasis added.]
1 BNA Mine Safety and Health Reporter 485 (1980).

The Secretary of Labor's interpretation of both 30 C.F.R. § 55.14-3 and its relationship to 30 C.F.R. § 55.14-1, as set forth in the March 25, 1980, program directive, does not preclude a finding that Respondent violated 30 C.F.R. § 55.14-1 on October 25, 1978 because 30 C.F.R. § 55.14-l was the

Gravity of the Violation

The pinch point was located approximately 54 inches above the ground (Tr. 125). It was partially guarded by a cover positioned approximately 2 to 3 inches above the conveyor belt (Tr. 22-23, Exh O-l), by the electric motor and V-belt drive (Tr. 32) and by the expanded metal V-belt guard which extended approximately 6 inches to the right of the pinch point (Tr. 31-32, 115). In order to achieve contact with the pinch point, an individual would have to reach at an angle into the 12-inch opening between the belt frame and the underside of the belt (Tr.154-156). The testimony of Mr. Allgyer indicates that an individual would have to extend his reach approximately 17 inches in order to contact the pinch point (Tr. 126-127), while the testimony of Inspector Pruitt indicates that an individual would be required to extend his reach only 12 to 14 inches (Tr.156-157).

Inspector Pruitt testified that an individual could, under the proper conditions, make contact with the pinch point (Tr. 24, 40). The circumstances ranged from a "slip and fall" occurrence in which the individual would instinctively reach out and grab for something to stabilize himself and thereby accidentally become entangled in the pinch point (Tr. 24, 157), to simply walking in close proximity to the belt and extending a hand for some reason (Tr.40). Mr. Allgyer disagreed, testifying that in his judgment an individual would have to make a "concerted effort" to put his hand in there (Tr. 125).

The evidence reveals that individuals would pass within 3 feet of the area (Tr. 34-35) but that no one was assigned to the head pulley on a permanent basis (Tr. 32-33). Additionally, the condition was outdoors and it should be noted that Fuller's earth material becomes very slick when wet (Tr. 24). 4/ Inferences drawn from the testimony indicate that such material was processed at the Speer Thor Mine.

In view of the foregoing, it is found that an occurrence of the event against which the standard is directed was improbable. However, if an accident occurred, one individual could reasonably be expected to sustain serious injury (Tr. 28-29, 36, 40).

The violation was moderately serious.

Negligence of the Operator

Inspector Pruitt testified that the condition looked as though it had existed for some time (Tr.46). The plant manager informed him that more

fn. 3 (continued)
sole mandatory safety standard addressing the condition existing on that date. The fact that the Secretary of Labor subsequently revised and made mandatory 30 C.F.R. §55.14-3 and thereafter issued a program directive to guide Federal mine inspectors in enforcing these mandatory safety standards which will require future citations to be issued under 30 C.F.R. § 55.14-3 is not controlling in the instant case.

4/ Fuller's earth material is a clay product used for making oil absorbents and kitty litter (Tr. 52).

extensive guards had never been present (Tr.46-47). Management personnel would have passed within 10 feet of the area daily since it was near the entrance to the plant (Tr.46). Accordingly, it must be concluded that Respondent knew or should have known of the condition.

However, mitigating factors are present. The description of the condition provided by the witnesses reveals that reasonable minds could differ as to need to extend the guard an additional 2 feet to the right. In view of this, it is found that Respondent demonstrated a low degree of ordinary negligence.

Good Faith in Attempting Rapid Abatement

The citation alleges 4 p.m. October 30, 1978, as the termination due date. The violation was abated on Saturday, October 28, 1978 (Tr.110). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

C) Citation No. 97921, October 25, 1978, 30 C.F.R. § 55.11-2

Occurrence of Violation

The allegations contained in this citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.11-2 in that "[t]here was no handrails around outer edge of the top of the storage tank. Occasionally, a person has to go out on top of the tank." The cited mandatory safety standard provides as follows: "Crossovers, elevated walkways, elevated ramps, and stairways, shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

The top of the storage tank was described as a galvanized metal roof approximately 20 feet square (Tr. 51, 55). Tine edge of the roof was approximately 30 feet above the ground (Tr. 50, Exh. M-2). Access to the top of the storage tank was provided by a vertical ladder attached to an adjacent bucket elevator. A short, handrail equipped walkway, which terminated at the edge of the top of the tank, served as the connection between the ladder and the top of tank. However, the handrails did not extend beyond the edge of the short walkway and handrails were not present around the outside edge of the tank (Tr. 48-49, 57, Exh. X-l). An inspection cover, or plate, was located approximately in the center of the roof (Tr. 55, Exh. X-l). The plant manager informed Inspector Pruitt that occasionally an individual was required to go atop the storage tank and proceed to the cover plate in order to determine the amount, of material in the bin (Tr. 49, see also Tr. 129). Accordingly, an individual would have been required to traverse the distance between the end of the short walkway and the cover plate without the protection afforded by handrails.

Respondent argues that the regulation does not apply to the storage tank since it is not a crossover; elevated walkway, elevated ramp or stairway (Respondent's Posthearing Brief, p. 4). I disagree. The function performed at the top of the tank governs the determination as to whether the regulation applies, and the function performed there brings it within the definition of an elevated walkway.

Accordingly, it is found that a violation of 30 C.F.R. § 55.11-2 has been established by a preponderance of the evidence.

Gravity of the Violation

Inspector Pruitt testified that the roof had a slight elevation in the center (Tr. 51), and the testimony of Mr. Allgyer indicates that the center of the roof was probably not more than 5 inches higher than the outside edge (Tr. 129-130). According to the inspector, a dusting of Fuller's earth material gets on the roof and the material is very slippery when wet (Tr. 51-52). An individual falling from the roof would sustain injuries ranging from lost work days to death (Tr. 54). In this regard, it is significant to note that a concrete slab was present on one side of the storage tank (Tr. 54), and that at one point an individual would be within 2 feet of the edge of the tank (Tr. 60). One person would have been exposed to injury (Tr. 54).

Accordingly, it is found that the violation was serious.

Negligence of the Operator

Respondent knew that individuals were required to perform periodic checks at the cover plate and also knew or should have known that handrails had not been provided. It can be inferred that the condition had existed for a substantial period of time. Additionally, the height of the storage bin and the dimensions and physical characteristics of the roof give clear indication to a reasonable mind that handrails were necessary to protect the individuals atop the tank. Accordingly, it is found that Respondent demonstrated gross negligence.

Good Faith in Attempting Rapid Abatement

The citation alleges 4 p.m., October 31, 1978, as the termination due date. The violation was abated on Saturday, October 28, 1978 (Tr. 130). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

D) Citation No. 97922, October 25, 1978, 30 C.F.R. § 55.14-1

Occurrence of Violation

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.14-1 in that "[t]he tail pulley on the long conveyor belt on the bottom floor of the screen house was not guarded."

The evidence presented at the hearing reveals that guards were present on both sides of the tail pulley (Tr. 63). The citation was issued because the guards were inadequate to prevent contact with the pinch point formed where the lower portion of the conveyor belt initially achieved contact with the lower portion of the tail pulley (Tr. 63). The bottom of the belt was

49 inches above the floor (Tr.130). The guards extended below the pinch point but just barely came to the bottom of the belt (Tr. 67). A 10- or 12-inch space was present between the inside of each guard and the belt (Tr. 67-68). In order to achieve contact with the pinch point, an individual would be required to enter this space from the underside of the belt and bring his hand or other object above the belt and into the pinch point (Tr.67-68).

Cleanup operations were perfomed in this area and, according to Mr. Allgyer, a person would have to pass under the belt at the cited location at a certain stage of the cleanup operation (Tr. 131). A person making contact with the pinch point could sustain physical injuries (Tr. 63-64, 70).

Respondent raises the same adequacy of notice argument set forth in connection with Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1, supra (Respondent's Posthearing Brief, p. 6). The argument is rejected for the reasons *set* forth previously in this decision. The testimony of Mr. Allgyer, the plant manager, is of particular significance to this determination. He testified that a piece of expanded metal was placed on the underside of the belt frame in the approximate area designated by Inspector Pruitt (Tr. 13). Thus, it must be concluded that the citation sufficiently apprised the Respondent of the condition constituting the alleged violation.

In view of the foregoing, it is found that a violation of 30 C.F.R. § 55.14-L has been established by a preponderance of the evidence.

Gravity of the Violation

An occurrence of the event against which the standard is directed would have been probable in the event an individual shoveled under the belt (Tr.65). As noted previously, cleanup operations were performed in this area and an individual would be required to pass under the belt at the cited location during cleanup operations (Tr.131). An individual was working in the area of the conveyor belt on the day of the inspection (Tr. 63). An individual could get pulled into the pinch point by a shirtsleeve, broom handle or other object achieving contact with it (Tr. 63-64, 70-71) and injuries could range from death to the loss of an arm (Tr. 65, 71). One person would have exposed to the hazard (Tr.65).

Accordingly, it is found that the violation was serious.

Negligence of the Operator

The condition was not readily visible in that it could not be seen while examining the belt from a side view (Tr.64). However, one of Respondent's supervisory personnel could have discovered the condition by looking up from the underside of the belt (Tr.64-65).

Accordingly, it is found that Respondent demonstrated a slight degree of ordinary negligence.

Good Faith in Attempting Rapid Abatement

The citation alleges 12 noon, October 30, 1978, as the termination due date. Abatement was accomplished on Saturday, October 28, 1978 (Tr.131). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

E) Citation No. 97923, October 25, 1978, 30 C.F.R. § 55.12-8

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.12-8 in that "[t]he motor junction box was missing on the electric motor for the screw conveyor." The cited mandatory safety standard provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The motor in question was enclosed by a metal casing (Tr.78). A junction box is approximately 6 inches square and fastens onto the side of the motor (Tr.78). Inside the junction box, the wires from the electrical cable running from the power source *are* connected to the motor's lead wires (Tr. 82-83). The junction box serves to protect the wiring at this connection point (Tr.81-82). In the instant case, the junction box was missing and the wires were fastened together and taped with electrical tape (Tr.78). The lead wires entered the side of the motor through a 2-1/2-inch opening (Tr. 78, 80-82). No form of bushing was present at the point of entry (Tr. 78,85). Inferences drawn from Inspector Pruitt'e testimony indicate his belief that proper bushings would reasonably be expected to be installed in connection with the installation of a junction box (Tr.83-84).

The Respondent argues that the citation fails to allege a violation of the cited regulation because the allegations contained in the citation make no reference to the absence of bushings, but are confined to the absence of a junction box when the regulation fails to make mandatory the installation of such junction boxes (Respondent's Posthearing Brief, p. 7; Respondent's Reply Brief, pp. 7-8). I agree. The citation clearly fails to describe a violation by failing to make reference to the absence of the required bushings.

The record developed at the hearing reveals the absence of such bushings and contains expert testimony indicating that they would have been present had the junction box been installed. However, the fact remains that the citation contains no allegation to this effect. As noted previously in this decision, an operator is entitled to notice sufficient to determine with reasonable certainty the nature of the violation charged so as to permit abatement of the condition and preparation of an adequate defense,

The citaton was clearly inadequate to apprise the operator that installation of insulated bushings was necessary to abate the condition, as demonstrated by the testimony of Mr. Allgyer. The condition was abated by installation of a junction box as required by the inspector, not through the installation of bushings (Tr.133-134).

The allegations were clearly inadequate to permit preparation of an adequate defense as relates to the absence of bushings since there is no indication that the Respondent was ever apprised that such absence formed the basis for the charge. Additionally, it cannot be found that the issue has been tried with the implied consent of the parties. The Respondent's case clearly centered around disproving any notion that 30 C.F.R. § 55.12-8 requires the use of junction boxes.

Accordingly, the petition for assessment of civil penalty will be dismissed as relates to Citation No. 97923, October 25, 1978, 30 C.F.R. § 55.12-8.

F) Citation No. 97924, October 25, 1978, 30 C.F.R. § 55.11-2

Occurrence of Violation

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.11-12 in that "[t]here was an opening at the fines pump sump that a person could fall into. The sump was about 5 feet deep." The cited mandatory safety standard provides as follows: "Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

The uncovered pump sump opening was approximately 2-1/2 feet by 2-1/2 feet and 5 feet deep (Tr.86). The opening was surrounded by a curb approximately 2 to 3 inches in height (Tr. 87, 91). Inspector Pruitt testified that no railings, barriers or covers were present and that it would be possible for someone to pass through the opening (Tr.87). The testimony of Mr. Allgyer reveals that the sump pump motor and a 2 to 3 inch diameter pipe partially covered the opening, but that an individual could still fit through it (Tr.138-139).

The pertinent language of 30 C.F.R. § 55.11-12 requires openings near travelways through which men or materials may fall to be protected by railings, barriers or covers. The testimony as relates to the steps taken to abate the condition reveals that it was practical to install such protective devices (Tr.140). 30 C.F.R. § 55.2 defines a "travelway" as "a passage, walk or way regularly used and designated for persons to go from one place to another." Accordingly, the condition cited by Inspector Pruitt constitutes a violation only if the uncovered pump sump opening was near a passage, walk or way regularly used and designated for persons to go from one place to another.

The testimony of Inspector Pruitt reveals the absence of signs designating walk areas (Tr.88). The testimony of Mr. Allgyer reveals that a dry cyclone, a wet cyclone and a fan and motor were located in the vicinity of the pump sump (Exh. O-2). He testified that an individual visiting these three pieces of equipment "normally" would not go near the sump (Tr. 137-138). Inspector Pruitt expressed a contrary opinion, testifying that the equipment in the area has to be serviced and that from a practical standpoint the shortest distance between given points would take an individual near the opening (Tr.87-88). However, notwithstanding this disagreement, it is significant to note that the pump motor experienced frequent breakdowns (Tr. 144) and that an individual would periodically check the pump on a regular basis to determine whether it was running (Tr. 138). Respondent experienced enormous problems with the system and people were required to travel to the pump to affect repairs (Tr. 146). An employee servicing the pump would come to within 2 feet of the sump.

Petitioner argues that Respondent, by its acts and omissions, designated the entire area as a travelway. In support of its argument, Petitioner asserts that Respondent was aware that its employees regularly traveled in the area, that it never claimed to have prohibited or even discouraged employees from traveling near the opening, and that it did not delineate the area as unsafe for employee travel or in any way restrict employees to areas it believed safe for travel (Petitioner's Posthearing Brief, p. 13). I agree. By failing to designate safe areas for travel, Respondent tacitly designated the entire area as a "way ... for persons to go from one place to another." The need to conduct regular inspection and repair activities at the sump pump establishes that it was regularly used, Accordingly, it is found that the area was a travelway within the meaning of 30 C.F.R. § 55.2. The need to perform regular inspections and work as relates to the pump motor establishes that the pump sump opening was near a travelway.

Accordingly, it is found that a violation of 30 C.F.R. § 55.11-2 has been established by a preponderance of the evidence.

Gravity of the Violation

An occurrence was improbable. In the event of an occurrence, a broken arm or leg resulting in lost work days would be the likely in jury. One person would have been affected (Tr.88-89).

Accordingly, it is found that the violation was of moderate gravity.

Negligence of the Operator

The condition was plainly visible and it can be inferred that it had existed for a substantial period of time. Therefore, Respondent should have known of- the condition.

Accordingly, it is found that Respondent demonstrated a high degree of ordinary negligence.

Good Faith in Attempting Rapid Abatement

The condition was abated by fabricating a guard to fit over the lip on the sump (Tr.140). Abatement probably occurred on Saturday, October 28, 1978, (Tr.140), i.e., prior to the October 31, 1978, termination due date alleged in the citation.

Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

G) History of Previous Violations

The parties stipulated that Respondent has no history of previous violations (Tr.5).

H) Size of the Operator's Business

The parties stipulated that the size of Thor Mining Company is rated at less than 60,000 annual manhours of work, and that the size of the Speer-Thor Mine is rated between 30,000 and 60,000 annual manhours of work (Tr.5).

Counsel for Respondent stated to the Judge that Thor Mining Company is a subsidiary of Pennsylvania Glass Sand Corporation which operates 12 mines in addition to Thor (Tr.6). Pennsylvania Glass Sand Corporation is owned by International Telephone and Telegraph Corporation which owns other mining operations (Tr.8-9).

Consideration will be confined to the size of Thor Mining Company and its Speer-Thor Mine in assessing civil penalties in the instant case because no evidence was presented establishing the size of Pennsylvania Glass Sand Corporation's and International Telephone and Telegraph Corporation's other mining operations.

I) Effect on Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of any penalty in this proceeding will affect Respondent's ability to continue in business. The Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI Approval of Settlement

During the hearing, the parties moved for approval of a settlement as relates to Citation No. 97925, October 25, 1978, 30 C.F.R. §55.12-32. The $34 settlement figure represents LOO percent of the assessment proposed by

the Mine Safety and Health Administration's Office of Assessments. As noted previously in the decision, the parties entered into stipulations as relates to the number of employees at the mine, to the size of the mine and controlling company in terms of the number of manhours worked per year, and to the absence of a history of previous violations. Counsel for the parties set forth on the record the following reasons in support of the proposed settlement:

> MR. YOST: Yes, Your Honor. At this time, we would like to move that you approve a settlement of citation 097925. This citation was issued because the junction box cover was missing on the fines sump pump motor and we have agreed with the Solicitor to pay the full amount of the assessed penalty and to admit that the violation did exist.
>
> The agreement takes into account the fact that there were no previous violations at Thor Mining prior to this inspection; that there were no exposed wires in the junction box, all the wires were insulated or properly taped so that there was no exposed -- exposed wires.
>
> Because there were no exposed wires, the gravity or probability of injury would be improbable and the -- there was a covering on order for several electrical equipment -- pieces of electrical equipment were on order at the time of the inspection and a cover was included in that order; and, it was corrected at least two days before the termination due date.
>
> JUDGE COOK Are you agreeing to those facts, Mr. Auerbach?
>
> MR. AUERBACH: Yes, Your Honor, except for the abatement date which we don't have direct knowledge of. We don't question it or disagree with it, but only couldn't stipulate it as a fact and we don't have direct knowledge of it. Everything else we would stipulate that we would agree, with it.
>
> JUDGE COOK: All right. Now, however, as it relates to negligence, I realize that you did say, of course, that this was on order, but has either of you reached some understanding as to what is the kind of negligence that is involved in this?
>
> MR. YOST: I'm sorry, Your Honor, I omitted that. Based on the assessment that was proposed by the Mine Safety and Health Administration, they found this to involve ordinary negligence and we have stipulated that it did involve ordinary negligence.
>
> JUDGE COOK: Is that agreeable, Mr. Auerbach?

MR. AUERBACH: Yes, Your Honor.

JUDGE COOK: All right, Is there anything further you want to present on it?

MR. YOST: No, Your Honor.

MR. AUERBACH: Nothing, Your Honor.

(Tr. 106-107)

The reasons given by counsel for the parties in support, of the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110(i) of the 1977 Mine Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that approval of the settlement will adequately protect the public interest.

The parties' stipulation that Respondent demonstrated ordinary negligence in connection with the violation is deemed of particular significance to approval of the settlement.

VII. Conclusions of Law

1) Thor Mining Company and its Speer-Thor Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2) Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3) MSHA inspector Kenneth Pruitt was duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.

4) Citation No. 97923, issued on October 25, 1978, fails to allege a violation of 30 C.F.R. § 55.12-8.

5) The violations charged in Citation Nos. 97919, October 25, 1978, 30 C.F.R. § 55.14-1; 97921, October 25, 1973, 30 C.F.R. § 55.11-2; 97922, October 25, 1978, 30'C.F.R. § 55.14-1; and 97924, October 25, 1978, 30 C.F.R. § 55.11-12 are found to have occurred.

6) All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.,

VIII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs and reply briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed

in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

IX. Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of a penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
97919	10/25/78	55.14-1	40.00
97921	10/25/78	55.11-2	130.00
97922	10/25/78	55.14-1	50.00
97924	10/25/78	55.11-12	75.00
97925	10/25/78	55.12-32	34(settlement)

ORDER

IT IS ORDERED that the oral determination made at the hearing granting Petitioner's motion to dismiss as relates to Citation No. 97920, October 25, 1978, 30 C.F.R. § 55.12-8 be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the settlement outlined in Part VI, supra, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to Citation No. 97923, October 25, 1978, 30 C.F.R. § 55.12-8.

IT IS FURTHER ORDERED that Respondent pay civil penalties in the amount of $329.00 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

Larry Auerbach, Esq., Office of the Solicitor, U.S. Department of Labor, 1371 Peachtree Street, N.E., Room 339, Atlanta, GA 30309 (Certified Mail)

Jeffrey J. Yost, Esq., Thor Mining Company, P. 0. Box 187, Berkeley Springs, WV 25411 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Standard Distribution