FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6225

, 15 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : : Docket No. VA 80-30 : A.O. No. 44-03525-03014 :
v.		: Mine: No. 2
BIG TEN CORPORATION,	Respondent	:

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Gerald L. Gray, Esq., Clintwood, Virginia, for Respondent.

Before: Judge Edwin S. Bernstein

STATEMENT OF THE CASE

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of a civil penalty. A hearing was held on June 24 and 25, 1980, in Bristol, Tennessee. The issues are whether Respondent violated certain mandatory safety standards promulgated under the Act as alleged in eight citations 1/ and, if so, the appropriate civil penalty to be assessed.

1/ This case originally involved 14 citations. By Order dated April 28, 1980, I approved settlement with respect to three citations. At hearing, I issued a bench decision approving settlement with respect to one other citation and vacation of two additional citations. That bench decision is affirmed in a separate Order issued concurrently with this Decision.

At the hearing, the parties stipulated and I find:

1. Big Ten Corporation Mine No. 2 is owned and operated by Respondent, Big Ten Corporation.

2. Big Ten Corporation Mine No. 2 is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 and I have jurisdiction over this proceeding.

3. The subject citations, modifications, and terminations were properly served by duly authorized representatives of the Secretary of Labor upon an agent of Respondent at the dates, times, and places stated therein. They may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements contained therein.

4. The assessment of an appropriate civil penalty in this proceeding will not affect Respondent's ability to continue in business. 2/

2/ Although the parties stipulated to this fact at hearing, on August 4, 1980, Respondent's counsel filed a letter with this office which stated:

> You will recall that on the first day of the hearing in. the above-styled matter, as recorded on page 9 of the transcript, one of the stipulations entered into by the parties was that the assessment of an appropriate civil penalty in this proceeding will not affect respondent's ability to continue in business (85). I regret to inform the court and counsel for the Department of Labor that the financial position of the respondent has changed substantially from the date the stipulation was entered into.
>
> As I had earlier advised Ms. Rooney, the respondent filed a chapter eleven petition in bankruptcy in August of 1979. However, the corporation was doing sufficiently well in the chapter eleven proceeding at the time of the hearing that I felt that it was proper to stipulate that an appropriate penalty would not affect the respondent's ability to continue in operation. (Continued on page 3.)

5. The appropriateness of the penalty, if any, to the size of Respondent's business should be determined on the basis of Respondent's total 1978 tonnage of 70,291, and tonnage at Mine No. 2 during 1978 of 45,291.

6. The alleged violations were abated in a timely fashion and Respondent demonstrated good faith in attaining abatement.

7. Respondent is a relatively small operator, and in the 24-month period immediately preceding the proposal of penalties had 63 violations. The parties characterized this as a small number of previous violations.

8. The parties stipulated to the authenticity, including chain of custody, of their exhibits, but not to their relevance or the truth of the matters asserted therein.

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fn. 2 (continued)

> Subsequent to the date of that hearing however, the financial situation of the respondent has worsened considerably. In fact, there is now some question as to whether respondent will be able to successfully complete its chapter eleven reorganization plan to pay its present creditors.
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> I might add that I am not counsel to Big Ten Corporation in their bankruptcy proceeding, and was informed of the financial position of Big Ten Corporation approximately one week ago. I regret the necessity of advising the court as to this development, but I felt that it was necessary since circumstances had changed substantially since the date of the hearing.

* * * * * * *

Respondent has the burden of proving that the assessment of an appropriate penalty may affect its ability to continue in business. See Buffalo Mining Company, 2 IBMA 226, 247-46 (1973). Respondent has not met this burden. The letter from counsel constitutes a mere allegation which is unsupported by any probative evidence. Furthermore, Petitioner has not been given the opportunity to challenge, rebut, or cross-examine with respect to any of the assertions made'in the letter. Therefore, the letter does not alter the stipulation entered into by the parties at hearing.

9. Respondent has fully complied with Commission Rule 27, 29 C.F.R. § 2700.27 by posting the petition on the mine bulletin board for 30 days.

FINDINGS AND DECISION FOR CITATION NO. 0682317

The citation, issued by Inspector Allan Howell on July 24, 1979, read:

> The guards on the No. 2 underground belt drive were inadequate in that the power roller was not guarded and the guard provided for the takeup rollers and jack was about 4 feet back from the drive and both ends were open allowing persons to enter and leave the area at will around the belt takeup rollers and jack.

Petitioner alleged that Respondent violated the mandatory standard at 30 C.F.R. § 75.1722, which requires guards for such belt drives and rollers.

The parties agreed that the belt drive system consisted of a series of rollers, each of which was approximately 36 inches in diameter and approximately 36 inches long. At the top of the line were head rollers. Further down the belt drive were power rollers, and a takeup roller and jack.

Inspector Howell testified that both ends of both the power rollers and the takeup rollers were unguarded and a person could have reached in and touched them. He also stated that there was a fence several feet from the belt drive, consisting of about four timbers 48 inches long and eight inches in diameter which extended from the floor to the roof. Attached to these timbers was a wire mesh which stretched from floor to ceiling and ran parallel to the belt drive. Mr. Howe11 stated that the fence was not adequate to guard the belt line assembly because there was an opening at each end of

the fence about four feet wide which would enible persons access to the machinery. He testified that he was not aware of any other guarding of the belt drive assembly.

Mr. Howell testified that he considered this condition to be hazardous. The area had a wet, muddy, uneven bottom, and a man could slip and fall into the rollers. He stated that one miner would be affected, a man who examines or services the machinery. He further indicated this was an area which was not frequently traveled, and that if someone were injured, he might not be found for quite some time and could die. He felt Respondent was negligent since the condition should have been known to the operator.

On cross-examination, the inspector added that grease hoses were attached to the machines so that a man could reach them without going near the equipment. Mr. Howell was also questioned about his abatement statement, which read: "The guard on the No. 2 underground belt drive was repaired." He indicated that he was negligent in preparing this statement, and that it was inaccurate because the operator constructed a new fence instead of repairing the guards.

Frank Clisso, who at the time the citation was issued was employed by Respondent, also testified. Mr. Clisso stated that he was formerly a beltman for Respondent, and that his job was to inspect and grease this belt. He also set up the belt drive and the guard on this system. His testimony differed from that of Inspector Howell in his description of the fence. He stated that at the end of the fence, the timbers'were set in closer to the belt drive assembly so that they formed an arc. The end timbers were about

a foot away from the belt drive assembly. The fence wire was then bent around further so that no one could reach into the belt drive assembly without removing this barrier. He stated that the fence ran two to 2-1/2 feet away from, and parallel to, the belt drive system. He denied that the area was wet or muddy.

Mr. Clisso also testified that the belt drive assembly was further protected by pieces of belting which were used as guards. This belting consisted of pieces of fiber-reinforced rubberized material approximately one-half inch thick and 36 inches wide. Strips of this material were hung from a steel cable above the belt drive. One strip approximately 36 inches wide and 3-1/2 to four feet long was hung above the head rollers. Another 36-inch strip six to seven feet long covered the power rollers, and a third strip protected the takeup rollers. Mr. Clisso stated that before this inspection, a Department of Labor inspector named Roy Dixon had asked Respondent to add these materials as additional protection for the belt drive. This material was very stiff and could not be bent by an individual using one hand. Mr. Clisso stated that as a result of the guards, all moving parts were protected and the belt drive could be greased by someone standing outside the fence using the grease hoses. The only time that the guards would be removed would be when the system was being repaired, and in such a case the power would be turned off.

Freddie Surratt, Respondent's mine superintendent, testified that the area was double-guarded since the system had strips of belting at each side, and also was guarded by the fence constructed on the outside. He stated that

the fence was at least two feet from the drive system and that the ends' of the fence were about a foot away. He did not see how a person could get in between the fence and the rollers even if he squeezed his body. He added that the whole length of the belt drive was protected by pieces of belting and fencing, and stated that to abate the citation he was required to tear everything down and put up a chain link fence. He believed that he left the belt protectors in place.

Mr. Surratt's testimony about the strips of belting differed from that of Mr. Clisso in that he said that the strips ran up and down instead of horizontally along the belt line, and that they overlapped each other, Troy Elkins, an owner of Big Ten, testified for the purpose of indicating that Mr. Surratt was mistaken in describing the belting that protected the system as overlapping rather than running horizontally. He stated that the description given by Mr. Surratt was accurate for the No. 4 belt drive system and that Mr. Surratt had confused the two systems.

I find that Respondent did not violate the standard at 30 C.F.R. § 75.1722 as alleged in this citation. The testimony of Mr. Howell on the one hand, and Mr. Clisso and Mr. Surratt on the other, was contradictory with regard to the method of guarding. I find the testimony of Respondent's witnesses to be more convincing with regard to the condition that was described. I found Mr. Clisso to be a truthful witness whose memory appeared to be very good. He described a good deal of detail and I found him to be extremely believable. Additionally, his testimony was supported by that of Mr. Surratt with regard to the existence of the fence and the fact that the belt strips

were used for guarding. Mr. Howell, on the other hand, did not recall the strips being used and differed in his description of the manner in which the fence was constructed. Although .I found Mr. Howell to be a truthful witness, I noted that his recollection concerning the citation was not good. I think that his recollection with regard to the disputed areas of testimony was inaccurate, and I accept the testimony of Respondent's witnesses. I also note that Mr. Clisso is no longer employed by Respondent and has no connection with the company. Therefore, he would probably have no reason to testify falsely, and his testimony was quite emphatic. Therefore, I conclude that the power rollers and the takeup rollers in question were adequately guarded by strips of belting and by a fence which prevented anyone from gaining access to the machinery without removing it.

Citation No. 0682317 is DISMISSED.

FINDINGS AND DECISION FOR CITATION NO. 0682318

The citation read:

> Accumulations of wet loose coal and wet coal dust was allowed to accumulate around the No. 2 underground drive in depths up to 2 feet deep starting outby the belt drive 100 feet and extending inby the drive for 300 feet and in the connecting crosscut to the stopping line.

Inspector Howell, who also issued this citation, testified that this was an active working area. There was an electrical belt drive as well as electrical moving cables and power control lines in the area. He did not characterize this condition as spillage. He defined spillage as coal or other combustibles that would accumulate during a normal mining cycle. He stated

that the citation was written at 9:35 a.m. and that he believed the shift began at 8 a.m. He felt that the amount of coal dust which he found could not have accumulated during the shift. He stated that he measured depth-s up to two feet with his ruler, and that when he removed his ruler he found no traces of muck or mud on it. This indicated to him that the entire depth was coal dust .or coal. He indicated that there was no coal spilling from the belt at the time he examined the area. He stated that the accumulations. were approximately one foot high in an area about 150 feet long and two feet wide, and that there was a path through the coal. He indicated that in his view it would take quite a long time for so much coal and coal dust to accumulate. He further testified that the rock dust was black instead of being white or gray.

Mr. Howell stated that Respondent was negligent in that it should have been aware of this condition. The operator was required to have a belt examiner examine the area at least once per shift. As to gravity, he stated that the condition presented a fire hazard. It would increase the intensity of a fire, and probably cause a fatality. In his opinion, all personnel in the inby side, approximately 10 people, would be affected. To abate, he required the operator to remove the accumulations by shoveling and rock dusting the area.

Mr. Clisso testified that he was the beltman when the citation was issued. He stated that eight to 10 inches of coal had spilled from the belt drive for a distance of about 20 feet. He stated that he had washed this coal out from under the belt, and that this occurred before the shift began. He testified that to abate the condition, he and another man spent about an

hour shoveling the coal onto the belt. He stated that the area affected was larger than that described by the inspector. In his opinion, the area was approximately 10 feet by 20 feet and the coal was about one foot deep. He said the accumulation consisted of wet coal and coal dust. He added that as part of his job, he attempted to clean up the area everyday. In most cases, he would have cleaned up the spill, but this time he did not.

James Estep, who was Respondent's mine foreman at the time, testified that on the day in question the area was one of the cleanest in the mine. He indicated that there was a small coal accumulation at the tailpiece, but he saw very little coal spillage and it took'about 30 minutes to clean up what coal spillage there was.

I find that Respondent violated the mandatory standard at 30 C.F.R. § 75.400 as alleged. That standard reads:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Company, Docket No. VINC 74-11, 1 FMSHRC Decs. No. 9 at 1954 (1979), the Commission, in reversing an earlier interpretation of 30 C.F.R. § 75.400 made by the Interior Department's Board of Mine Operations Appeals, noted that the standard is derived from Section 304(a) of the Federal Coal Mine Health and Safety Act of 1969. The Commission stated:

> The language of section 304(a) * * * furnishes no support for the Board's view that accumulations of combustible materials may be tolerated for a "reasonable time." Rather, the language of the standard makes accumulations impermissible.

I'find that there was a substantial accumulation of coal at the time the inspector issued the citation. The size of these accumulations indicates that they existed before the shift began. The inspector's testimony was not contradicted by Respondent's witnesses; in fact, Mr. Clisso indicated that there were large accumulations present, although he said they were not as large as the inspector testified, and that they had existed prior to the start of this shift.

Respondent was negligent in that it should have known of this condition. I do not believe the gravity was as great as Petitioner contended, since the accumulations were wet and therefore not as combustible as they might otherwise have been. I assess a penalty of $100 for this violation.

FINDINGS AND DECISION FOR CITATION NO. 0682320

Inspector Howell testified that when he inspected Respondent's No. 3 underground belt drive on July 24, 1979, he found that the water deluge system for the drive was inoperative. A pipe which led into the deluge system was severed and the two parts of the pipe were separated by a three-inch gap. The inspector found that there was no water emitting from the deluge sprays. The operator was required to spray the top and bottom surfaces of the top belt, and the top surface of the bottom belt.

Although the citation initially referred to another section, at the hearing Petitioner indicated that Respondent was being charged with violating

30 C.F.R. § 75.1101-3, dealing with water requirements for deluge-type sprays, There being no contention of surprise, I permitted the amendment of the petition to refer to that section.

The inspector testified that Respondent was negligent in this matter since it should have observed the condition during routine daily inspections. He stated that the condition presented a fire hazard, and that if a fire broke out on the belt, people could suffocate from the fumes. He felt that an accident was probable, and that as many as 10 people could be affected. To abate the condition, the broken pipe was repaired.

Mr. Clisso testified that while he was not present when Inspector Howell checked the water deluge system on July 24, 1979, he was familiar with the system. He believed that the pipe was made of plastic and reinforced with mesh.

James Estep testified that he was the first shift foreman on July 24, 1979. Immediately after starting to load coal, he checks the water deluge systems. He checked the system during the shift before the alleged violation was discovered, and found a crack in the union. He said that where the pipe was screwed into a joint, there was a hairline crack about one-inch long, but that the pipe was not severed. Water was shooting out of the crack for a distance of three to four inches. Mr. Estep said.he reported the crack on July 23, 1979, but that despite the leakage the system was operating well enough to spray the belt line system as required.

Mr. Surratt testified that he was with Mr. Howell when the inspector tested the system on the No. 3 belt drive. He stated that Mr. Estep had told

him there was a crack in a piece of metal pipe the day before. He said-that the crack was about an eighth of an inch wide and at most two to three inches long, and that the belt was sufficiently sprayed despite this crack. He emphatically denied that the pipe was separated.

Petitioner recalled Inspector Howell, who testified that he did not believe Mr. Surratt was with him at the time he inspected. However, on cross-examination, Inspector Howell appeared to be uncertain about certain facts including how he proceeded while making his inspection.

I find that Petitioner has not sustained its burden of proof in connection with this citation. The evidence is conflicting, and I found Respondent's witnesses to be as convincing as Petitioner's witnesses. In view of this conflict of evidence, the citation is DISMISSED.

FINDINGS AND DECISION FOR CITATION NO. 0682322

Petitioner alleged that Respondent violated the mandatory safety standard at 30 C.F.R. § 77.205(e). That standard reads:

> **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 citation stated that a walkway around the Na. 1 belt drive on the surface, which is about 35 feet above the pit, was not provided with necessary toeboards.

Inspector Howell stated that the walkway in question was made of wood and was about 30 feet long. It ran along the left side of the belt. It was

provided with an upper handrail consisting of a metal pipe 36 to 40 inches high, and a mid-handrail consisting of a metal pipe approximately 20 inches high. Toeboards were not provided. The inspector felt that toeboards were necessary because if snow or ice accumulated on the walkway a person could slip. If the person fell, he could slide underneath the bottom rail and fall to the pit 35 feet below.

The inspector stated that this condition should have been detected by Respondent. However, he also stated that the walkway in question was not traveled very frequently, and would only be used'by maintenance men who were repairing or cleaning the belt. To abate the condition, the inspector required that a toeboard be installed along the entire length of the walkway.

Free1 Vanover, a roof bolter operator and the chairman of the safety committee at Respondent's mine, testified for Respondent. Mr. Vanover had been employeed by Respondent for two years before the July 24, 1979 inspection. He accompanied Inspectors Howell and Clements during their inspection on that day. Mr. Vanover stated that he is familiar with the area as he has serviced and greased the machinery from the walkway. He uses the walkway about once a week, but he is sure it is used daily. He said the walkway is made of wood, is 30 to 36 inches wide, and has two guardrails about six Inches from the edges of the walkway. One guardrail is about waist high, and the other one about knee high. He said the rails are made of steel pipe, and he considered the walkway to be a safe area even though toeboards were not provided. He felt it would be extremely unlikely for anyone to slip underneath the bottom railing and fall.

Mr. Troy Elkins, one of the owners of Big Ten Corporation, testified that the walkway had been there since the mine began operation in the middle of 1974. The rails are on both sides of the walkway floor, and the floor extends approximately six inches past the rails. He said the mine had been completely inspected about 20 times during the five years before this inspection, not including additional spot inspections. The walkway is readily visible to inspectors, but no inspector had ever cited this condition as a violation. Mr. Elkins stated that there were no prior injuries or accidents on the walkway, and indicated that it was unlikely that a man would fall under the rails. As with Mr. Vanover's testimony, Mr. Elkins stressed that the walkway extends six inches beyond the rails. He stated that the walkway is used once a day when the belt drive is greased.

I find that there was no violation of 30 C.F.R. § 77.205(e) in connection with this citation. The standard states that "[w]here necessary, toeboards shall be provided." The language "where necessary" obviously means that toeboards are not to be provided in every instance., In this case, I find that toeboards were not necessary since the walkway extended six inches beyond the two metal rails, and thus was sufficiently safe without toeboards. My views on this issue are reinforced by the fact that no accident occurred during the five years preceding this inspection. As Respondent indicated, the walkway was used once a day for five years, or approximately 1,500 times. No other inspector ever cited Respondent for this violation. I think this was because the condition did not constitute a violation of the standard. The citation is DISMISSED.

FINDINGS AND DECISION FOR CITATION NOS. 0682715 AND 0682716

Michael Clements, who inspected on behalf of Petitioner on July 24, 1979, testified that when he visited the No. 6 entry on the 3 left off 1 right working section, he noted that there was insufficient air being provided to the area. He used an anemometer to determine the volume of air and velocity of air, and received readings of zero for both. The standard at 30 C.F.R. § 75.301-l requires that a minimum quantity of 3,000 cubic feet of air a minute reach each working face. Additionally, Respondent was cited for violating 30 C.F.R. § 75.316 by failing to comply with its ventilation plan. Respondent's ventilation plan called for the minimum mean air velocity required by 30 C.F.R. § 75.301-4 of 60 feet of air a minute.

Mr. Clement; stated that when he made his measurements, a Joy continuous miner was loading coal onto a shuttle car. The inspector stated that he felt an air movement as he walked up to the face, but upon measurement noted that there was no such movement. The inspector testified that the continuous miner operator should have been able to detect the lack of ventilation because dust was not being carried away from the machine. However, on cross-examination, he stated that there would not be as much dust generated during the loading part of the cycle as during the mining part, and that it would be more difficult to detect the air problem from observing the dust during loading. He maintained that the condition could have resulted in a methane explosion.

Mr. Estep testified that the condition existed because a shuttle car had torn down a brattice curtain and caused air to be diverted. He said he was

a few steps away when he noted a sudden stoppage of air, and upon examination he found that the check curtain had been knocked down. The air movement was restored when the curtain was repaired.

Mr. Vanover testified that he was walking with Mr. Clements when he noticed the sudden stoppage in air movement. He said there was no movement on the inspector's anemometer. Mr. Estep came from the No. 5 face, began checking, and found the continuous miner was loading loose coal. Within 30 seconds to a minute after the condition was discovered, the continuous miner stopped loading. Mr. Vanover assumed that-Mr. Estep had told the miner operator to stop the machine. Mr. Vanover stated that the miner operator would be the last person to know that the air had stopped since he was not cutting coal and there was less dust when loading than when cutting coal. He stated that air movement was restored within five minutes;

Mr. Clements was recalled as a rebuttal witness. He stated that tearing down one check curtain should not affect the volume and velocity of air if the rest of the ventilation plan was being complied with. Mr. Clements said that this is an exhaust air ventilation system, and that Mr. Estep told him after he made this repair that the operator had to repair his curtains. This indicated to the inspector that more than one curtain had been involved.

Mr. Elkins also testified on rebuttal. He stated that if the curtain was knocked down as Respondent alleged, there would be practically no air moving through the area.

I find that Respondent violated the standards at 30 C.F.R. §§ 75.301-l and 75.316 as alleged. It is undisputed that at the time the inspector made

his inspection, there was no air volume and no air velocity as measured by the anemometer. Respondent argued that the condition was created immediately before the reading was made when a shuttle car operator knocked down a brattice curtain. Upon review of the sketches which were submitted as exhibits and consideration of the testimony of the parties, I find it extremely unlikely that there would be no air flowing to the point where the inspector made his measurements as a result of a single curtain being knocked down. Clearly, the knocking down of that curtain would divert a certain quantity of air. However, upon review of the ventilation plan, I believe that some air would be detected on an anemometer both in terms of volume and in terms of velocity, even without diversion. I think it is likely that more than one problem contributed to the loss of velocity and volume. Although the reduction of air to zero volume and zero velocity was probably caused by knocking down the curtain, I believe that another problem must have combined with that to cause the reduction to zero. As indicated by the judge in MSHA v. Western States Coal Corporation, Docket Nos. DENV 78-521-P et al., 1 MSHC 2059, 2061 (1979), "[f]ailure by an operator to comply with any provision of its ventilation plan constitutes a violation of 30 C.F.R. § 75.316."

I find that the Respondent'6 negligence was not very great. However, this condition was dangerous since it could have caused an explosion due to methane buildup, as well as respiratory problems for miners. There was. rapid, good faith abatement of this condition. Therefore, I assess a penalty of $130 for each violation.

FINDINGS AND DECISION FOR CITATION NOS. 0682717 AND 0682719

Citation No. 0682717 reads:

> The 3 left off 1 right working section had inadequate rock dust at the following locations. In the number 3 entry left and right crosscuts at survey station 5073.

Citation No. 0682719 reads:

> Accumulations of loose coal and coal dust ranging in depths up to 14 inches was present on the 3 left off 1 right working section. This condition was present 40 feet outby the faces and extending for a distance of approximately 200 feet to the dumping point in all 6 entries.

Mr. Clements testified that during the inspection, when he was accompanied by Mr. Howell, he noted that the coal in the area was not gray or white as it would be if it had sufficient rock dust on it. He took samples and sent them to a laboratory. The laboratory results confirmed Mr. Clements' suspicions. The incombustible contents of the samples were 37 and 41 percent respectively, well below the 65 percent requirement in 30 C.F.R. § 75.403. The inspector stated that this was a loading area in an active working section, but that no work was going on even though the shift had been in progress for approximately five hours. He did not think it was possible that the lack of rock dust and accumulations of combustible material could have developed since the beginning of the shift. He noted that the average accumulation was one to 14 inches in depth, and that the accumulations covered all six 200-foot entries for a total distance of 1,200 feet. He felt these accumulations could not have been caused by spillage since they were found in all six entries and all entries were not used as travel roads. There were some entries in which no mining was taking place.

Mr. Clements stated that Respondent was negligent in that the accumulations should have been noted by the section foreman who was in the area and reported to the operator. He stated that this situation could have led to a mine explosion and that the 10 people who were in the area could have been affected. The situation was abated by having the coal cleaned up and the area rock dusted.

Mr. Clements also testified that while he and Inspector Howell were taking the samples, a rock duster arrived. They asked him not to rock dust the area until they had completed taking their samples.

Inspector Howell also testified. He said the area was black, which indicated that there was little or no rock dust there. He agreed with Mr, Clements that the area should have been white or gray if it was properly rock dusted. He did not see a rock duster when they entered the area. Mr. Clements was taking the first of two samples when a rock duster came into the area and began distributing rock dust. Mr. Howell stated that he asked the rock duster to move away or stop for a moment, jokingly adding that he was allergic to rock dust.

Mr. Howell testified that the accumulations appeared to have been there since at least the preceding shift, as there were tracks in the dust. He agreed with Mr. Clements that this was an active working area.

Jackie Dales testified that he was assigned to do rock dusting on July 24, 1979, and that he was in the process of rock dusting the area in

question when he came upon the inspectors. The inspectors asked him to stop rock dusting to enable them to take a sample. He stated that he did see some accumulations.

Hr. Estep testified that on July 24, he discovered that he needed rock dust and assigned Mr. Dales to do the job. He denied that the depths of accumulations were up to 14 inches as alleged by the inspectors. He stated that a mantrip car had ridden in the area that day, and that if the accumulation were 14 inches deep a mantrip car would not have been able to pass through the area. Mr. Estep did notice some accumulations at the dump area near the tailpiece of the shuttle car. He said that normally the scoop operator is supposed to clean up, but this was not done around the time when the citations were issued.

I find that Respondent violated the standard at 30 C.F.R. § 75.403 in connection with Citation No. 0682717 as alleged. Admittedly, Respondent was in the process of distributing rock dust in accordance with a regular program at the time the inspectors were in the area taking rock dust samples. I believe that if the inspectors had permitted Mr. Dales to complete his job, they would have found that the area was adequately rock dusted. Obviously, there will be some periods of time when rock dust needs to be replenished. However, this does not mean that an operator should be allowed to have inadequate amounts of rock dust in its facility for any period of time. The standard requires "that the incombustible content of the combined coal dust, rock dust, and other dust * * * be not less than 65 per centum * * *." I believe this standard reflects a recognition by the draftsmen that an incombustible content of less than 65 percent represents a safety hazard which is

to be avoided. Thus, it is incumbent upon operators to organize their rock dusting programs so that the incombustible content never falls below this percentage. As a practical matter, this means that the incombustible content may have to be greater than 65 percent Immediately after rock dusting is done. Over a period of time, conditions in the mine will cause this content to decrease. I interpret the standard as requiring additional rock dusting before the incombustible content gets below the 65 percent cutoff.

With respect to Citation No. 0682719, I find that 30 C.F.R. § 75.400 was violated. The testimony of the two inspectors, which was uncontradicted by any of Respondent's witnesses, indicates that there were substantial accumulations extending outside working areas, where they might be attributable to spillage. It is reasonable to conclude that these accumulations existed before the beginning of the shift. Therefore, Respondent violated the standard.

With respect to both citations, I find that Respondent was negligent-and that the gravity of the situation was moderate. Respondent did abate both conditions rapidly. I assess penalties of $125 for each violation.

ORDER

Respondent is ORDERED to pay $610 in penalties within 30 days of the date of this Order as follows:

Citation No.	Penalty
0682318	$100
0682715	$130
0682716	$130
0682717	$125
0682719	$125

Citation Nos. 0682317, 0682320, and 0682322 are DISMISSED.

Edwin S. Bernstein
Administrative Law Judge

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