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

27 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. DENV 79-181-P
	:	A.O. No. 41-01900-03002
v.	:	
	:	Docket No. DENV 79-182-P
TEXAS UTILITIES GENERATING COMPANY,	:	A.O. No. 41-01900-03003
Respondent	:	Docket No. DENV 79-183-P
	:	A.O. No. 41-01900-03004
	:	
	:	Monticello Strip
	:	
	:	Docket No. DENV 79-194-P
	:	A.O. No. 41-02632-03004V
	:	
	:	Docket No. DENV 79-251-P
	:	A.O. No. 41-02632-03002
	:	
	:	Martin Lake Strip

DECISION

Appearances: Eloise Vellucci, Esq., Jordana Wilson, Esq., U.S. Department of Labor, Dallas, Texas, for Petitioner;
Richard L. Admas, Esq., Worsham, Forsythe, and Samples, Dallas, Texas, for Respondent.

Before: Judge Stewart

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a). 1/ At the hearing in these matters held in Dallas, Texas, the parties entered into the following stipulations:

1/ Section 110(a) of the Act provides:

PENALTIES

"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

The annual tonnage of coal produced by Texas Utilities Generating Company as of March 22, 1978, was 16,653,961.

The Monticello Fuel Facility produced 22,000 tons of coal per day, and employed 383 surface employees as of July 25, 1978.

The Martin Lake Strip Mine produced approximately 7 to 8 million tons of coal per year. As of May 26, 1978, 312 employees worked at the mine with a daily production tonnage of 16,000.

In the period from July 26, 1976, through July 18, 1978, there were a total of 45 paid violations at Respondent's Monticello Strip Mine. In the period from February 16, 1976, through February 15, 1978, a total of 17 paid violations occurred at Respondent's Martin Lake Strip Mine.

In the absence of evidence to the contrary on the record, it is found that the ability of the operator to continue in business will not be adversely affected by any civil penalty assessed herein.

Docket No. DENV 79-181-P

A total of seven violations were alleged in Docket No. 79-181-P. The parties agreed to settle five of these alleged violations.

On December 10, 1979, Petitioner submitted a motion for approval of settlement for three of the violations alleged herein. These alleged violations resulted in the issuance of citations pursuant to section 104(a) of the Act. The citations and respective proposed dispositions are as follows:

Number	Date	30 C.F.R. Standards	Assessment	Disposition Settlement
392163	7/19/78	77.502	$114.00	$ 85.50
392172	7/24/78	77.16058	98.00	73.50
392167	7/20/78	77.26058	40.00	Withdrawn

fn. 1 (continued)

Section 110(i) of the Act provides:

"The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

In support of this settlement, counsel for Petitioner asserted the following:

> Respondent has paid the $159.00 penalty sought by petitioner and therefore desires to withdraw Its Notice of Contest as to all citations except those that are indicated above as being withdrawn or stayed.
>
> The proposed assessments for Citation numbers 392163 and 392172 shown above as reduced were reduced for the following reasons:
>
> 1. No employees were directly exposed to the hazardous conditions.
>
> 2. There was little or no negligence involved, since the violations could not have been reasonably predicted.
>
> Petitioner has thoroughly *reviewed* the facts and circumstances pertaining to the violations In citations shown above as "withdrawn". Upon such review and after careful consideration, petitioner has determined that there is insufficient evidence to support said citation and the proposed penalty associated therewith.

Based on the information furnished and an independent evaluation of the circumstances, it is found that the settlement proposed with respect to Citation Nos. 392163, 392167, and 392172 is in accord with the provisions of the Act. The agreed-upon settlement is, therefore, approved. Since the agreed amount has been paid or the citations withdrawn, the proceeding in regard to those citations is dismissed.

At the hearing held on December 20, 1979, counsel for Petitioner moved that a proposed settlement of two additional violations be approved. The parties agreed to settle the proceedings regarding Citation Nos. 392162 and 392165 for the amount proposed by MSHA's Office of Assessments. The citations and proposed penalties are as follows:

Citation No.	Date	30 C.P.R. Standard	Civil Penalty
392162	7/19/78	77.1103(a)	$ 140
392165	7/20/78	77.1103(a)	98

In support of this settlement, counsel for Petitioner asserted the following: "The parties *state* that the settlement will effectuate the purposes of the Act, that penalties were properly assessed and took into consideration the six criteria, and, therefore, * * * that the penalty was proper and should be approved." Counsel for Petitioner also submitted copies of the Inspector's statement for Citation Nos. 392162 and 392165.

Based on the information furnished and an independent evaluation of the circumstances, it is found that the settlement proposed with respect to

Citation Nos. 392162 and 392165 is in accord with the provisions of the Act. The agreed-upon settlement'is, therefore, approved.

Evidence with respect to Citation Nos. 392174 and 392175 was adduced at the hearing held on December 20, 1979.

(a) Citation No. 392174

Citation No. 392174 was issued by inspector James Cameron on July 24, 1978, pursuant to section 104(a) of the Act. The inspector cited 30 C.F.R. § 77.400(c) and described the condition or practice as follows: "The conveyor drive pulley of the main 54 inch silo belt was not guarded to prevent a person from reaching behind the guard and becoming caught between the belt and pulley."

Section 77.400(c) requires that "[g]uards at conveyor drive * * * pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between belt and pulley." The conveyor-drive pulley in question was approximately 30 inches in diameter. It was guarded except for a square hole at the center of the pulley. This hole was estimated by the inspector to be 8 inches wide and was situated at 4 to 5 feet, or shoulder height, above the adjacent walkway. The pinch point was located 26 to 28 inches beyond the opening. According to the inspector's testimony, a person could reach through the opening and touch the pinch point between belt and pulley, but he would have to intentionally attempt to reach the pinch point in order to do so. Glen Hood, Respondent's field technician at the Monticello facility at the time of the inspection, testified that an individual could contact the pinch point but would have to work at it to do so.

Since it has been established by the record that an individual would have to intentionally attempt to contact the belt and pulley in order to be injured, the condition would not be expected to lead to an accident. The inspector testified that it was very unlikely that an individual would have occasion to try to contact the belt and pulley while the machinery was in operation. In the event that the machine was to be repaired, a clearance procedure was in effect to ensure that it was not accidentally turned on. Since an individual could not contact the belt and pulley inadvertently, the guarding was adequate to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and pulley. The guard installed was in effective compliance with the requirements of section 77.400(c). Citation No. 392174 is vacated and the proceeding in regard to this citation is dismissed.

(b) Citation No. 392175

Citation No. 392175 was also issued by Inspector Cameron on July 24, 1980, pursuant to section 104(a) of the Act. The inspector cited a violation of 30 C.F.R. § 77.505 and described the condition or practice as follows: "The insulated wires supplying power to the speaker located at the 54 inch main silo belt drive platform were not bushed with insulated bushings where they passed through the metal frame of the splice boxes."

Section 77.505 reads as follows: "Cables shall enter metal frames of motors, splice boxes, and electric 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 speaker in question was located on the take-up tower and was part of a paging system. Insulated wires supplying power to the speaker passed through the metal frame of a splice box. The hole in the metal frame permitting passage of the wire was not bushed with insulated bushings.

Although the condition was, therefore, in violation of section 77.505, as alleged, it is unlikely that the violation would lead to an accident or injury. At the time the citation was issued, the wires were in very good condition. Measurements taken by Respondent's employees indicated that they carried only 5 volts and had a current flow of one-half amp. Even if the wires wore down and energized the metal frame which they contacted, the electric current or potential to which an individual might be subjected would be insignificant.

Neligence of the operator has not been established by the record. It has not been shown that it knew or should have known that a violation existed or that he failed to exercise care to prevent or abate such conditions.

The condition was abated within the time set by the inspector. The operator demonstrated good faith in the abatement of this condition after the citation was issued.

Docket No. DENV 79-182-P

On December 10, 1979, Petitioner filed a motion for approval of settlenent in Docket No. DEW 79-182-P. The parties agreed to settle this case for $202.50. The two alleged violations had been originally assessed a total of $270. The citations and proposed assessments are as follows:

Number	Date	30 C.F.R. Standards	Assessment	Disposition Settlement
392184	7/26/78	77.208(e)	$130.00	$ 97.50
392185	7/26/78	77.1605(d)	$140.00	105.00

In support of the proposed settlement, counsel for petitioner asserted the following:

> After a review of all available evidence, the parties agreed that the settlement, attached hereto and incorporated herein, would be just and proper.
>
> Respondent has paid the $202.50 penalty sought by petitioner and therefore desires to withdraw its Notice of Contest as to all citations except those that are indicated above as being withdrawn or stayed.

The proposed assessments for Citation numbers shown above as reduced were reduced for the following reasons:

1. No employees were directly exposed to the hazardous conditions.

2. Defendant demonstrated extraordinary good faith in achieving rapid compliance.

3. The violations were the result of ordinary negligence.

Based on the information furnished and an independent evaluation and review of the circumstances, it is found that this settlement is in accord with the provisions of the Act. The agreed-upon settlement is, therefore, approved. Since the agreed amount has been paid, the proceeding in regard to Citation Nos. 392184 and 392185 is dismissed.

Docket No. DENV 79-183-P

A total of three violations were alleged in Docket No. DENV 79-183-P. The parties agreed prior to hearing to settle two of these alleged violations and, on December 10, 1979, Petitioner filed a motion for approval of settlement. The two citations and corresponding assessment amounts are as follows:

Number	Date	30 C.F.R. Standards	Assessment	Disposition Settlement
392155	7/18/78	77.1605A	$106.00	$ 87.00
392157	7/18/78	77.512	160.00	120.00

In support of this settlement, counsel for Petitioner asserted the following:

Respondent has paid the $207.00 penalty sought by plaintiff and therefore desires to withdraw its Notice of Contest as to all citations except those that are indicated above as being withdrawn or stayed.

The proposed assessments for Citation numbers shown above as reduced were reduced for the follwing reasons:

1. No employees were directly exposed to the hazardous conditions.

2. Defendant demonstrated extraordinary good faith in achieving rapid compliance.

3. The violations were the result of ordinary negligence.

Based on the information furnished and an independent evaluation and review of the circumstances, it is found that the settlement proposed is in

accord with the provisions of the Act. The agreed-upon- settlement is, therefore, approved. Since the agreed amount has been paid, the proceeding in regard to Citation Nos. 392155 and 392157 is dismissed.

Evidence with respect to the remaining citation, Citation No. 392156, was adduced at the hearing held on December 20, 1979. Citation No. 392156 was issued by Inspector Cameron on July 18, 1978, pursuant to section 104(a) of the Act. The inspector cited 30 C.F.R. § 77.1607(n) and described the condition or practice as follows: "The Chevrolet boom truck #2519 parked on about a 10 percent grade at pit #001 was left unattended and did not have the wheels turned into a bank or berm or blocked."

Section 77.1607(n) reads as follows: "Mobile equipment shall not be left unattended unless the brakes are set. The wheels shall be turned into a bank or berm, or shall be blocked, when such equipment in parked on a grade."

In the course of this inspection of the Monticello Strip Mine, the inspector flagged down a boom truck in order to examine the vehicle. The truck was between 1 and 1-1/2 tons in size. The operator of the truck brought the vehicle to a stop and left it facing in a downhill direction. The grade of the slope was estimated by the inspector to be 10 percent, or 6 to 7 degrees in steepness. The road was estimated to be between 200 and 250 feet wide. A 5- to 6-foot drop into a pit was located 100 to 200 feet downhill from the truck.

Mr. Hollingsworth testified that both he and the operator of the vehicle got out of the truck twice; once when the vehicle was pointing downhill and a second time after.it had been parked across the downslope. He testified that the inspector ordered them to get out of the truck and that he would not have done so unless the inspector had so ordered. He testified that both men stood outside the vehicle while the inspector examined the cab. This testimony was rebutted by Inspector Cameron. He testified that he asked the two men to step down from the truck only after the vehicle had been parked across the slope. He stated that he had a specific recollection of doing so and it is not his practice to ask drivers to get out of their trucks for an inspection. The testimony of Inspector Cameron is accepted.

The inspector examined the vehicle, including its cab. While he did so, the operator of the vehicle, Gary Star, and the single passenger, David Hollingsworth, remained seated in the vehicle. After completing the examination of the cab, the inspector proceeded 15 to 20 feet from the truck and engaged in conversation with Glen Hood, Respondent's field technician. While these two were talking, the occupants got out of the truck, and the operator of the vehicle walked over to the inspector, and spoke with him. The operator had set the brakes but left the truck unattended. A 10- to 12-foot bank was located 15 feet to one side of the truck. The operator of the vehicle didnot turn the wheels of the vehicle into the bank. The inspector asked Mr. Star and Mr. Hollingsworth to get out of the cab only after the truck had been parked across the grade. The record establishes that the violation of section 77.1607(n) occurred as alleged.

The record does not support a finding of negligence on the part of Respondent. The inspector believed that the event was spontaneous and that Respondent could not have anticipated its occurrence. It was not established that the training given Respondent's truck operators was deficient.

As noted above, the driver set the brake before leaving the vehicle. The possibility that an injury would occur was remote.

The operator demonstrated good faith In abating the condition after the citation was issued. The truck driver was immediately given safety instructions and the truck was parked across the downgrade.

Docket No. DENV 79-194-P

A single violation was alleged in Docket No. DENV 79-194-P. Inspector Larry G. Maloney issued the subject Order Of Withdrawal No. 391715 *on* March 22, 1978, pursuant to section 104(d)(l) of the Act. He cited 30 C.F.R. § 77.504 and described the relevant condition or practice as follows:

> The connection for the radial drill press in the dragline erection site warehouse was spliced into the energized 480 volt trailing cable to a portable heater. The splice was made only with friction tape and plastic screw nuts. A portfon of the outer jacket had been cut away exposing the insulated lead wires.

Section 77.504 reads as follows: "Electrical connections or splices in electric conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be insulated at least to the same degree of protection as the remainder of the wire."

The condition existed as alleged. A temporary splice had been made in a 480-volt cable so that it provided power for both a drill press and a portable heater. The cable was situated on the floor of a warehouse at the dragline erection site. It was comprised of three separately insulated conductors encased in an outer jacket. The outer jacket and the insulation surrounding each of the separate conductors were made of a rubber-like material. Six to 8 inches of this outer jacket had been removed from each cable to allow for splicing. The wires were not soldered. The stripped conductor wires were stripped, twisted together, and then screwed into threaded wire nuts. The splice was then secured with friction tape.

The inspector testified that the friction tape, which was plastic, was wrapped in a haphazard fashion. It was used, in his opinion, for protection from moisture and other environmental reasons as well as for strength. He stated that it was not wrapped to the thickness of the cable's original outer jacket and that the insulated inner wires *were* visible at least for a "fraction of an inch".

The-inspector believed that the splice was deficient because of the use of wire nuts in splices of this type of cable. He was also concerned with the lack of an adequate substitute for the cable's outer jacket. It was his opinion that the splice was not efficient enough to permit the cable to be safely handled.

Leroy Churchill, one of Respondent's electrical engineers, testified that wire nuts are typically used and are acceptable for splicing. He stated that the wire nuts provided insulation as well as mechanical strength; and that, on the other hand, the outer jacket of the cable provided mechanical strength and bound the three conductors together, but it was not intended to provide insulation. Mr. Churchill admitted, however, that the outer jacket had Insulating properties. Mr. Churchill stated that electrical tape had been loosely wrapped around the wire nuts and that the tape extended back to the outer jacket of the cable. He was unsure whether a gap or gaps existed in the wrapping. In this instance, the electrical tape was intended to provide mechanical strength rather than insulation. He also testified that it was "normal routine" to handle the cable while It was energized.

Michael Morrison, an electrician supervisor for Respondent at the time of the inspection, performed a number of tests on the splice after the order was issued. He first surrounded the splice with metal scraps and tested it with a "megger" and stated that there was no current leakage. A "megger" or megohmmeter is an instrument ordinarily used to measure resistance In ohms or megohms. It is routinely used to check for grounds without damaging the wiring or electrical equipment being tested. If the megger test was for the purpose of determining the resistance between the wires in the cable or between the metal scraps and the wires in the cable, no reading would be expected through the splice unless there was a ground due to damaged or wet tape or other insulation. If the intended use of the megger was to perform a high potential (Hi-Pot) test, the results are inconclusive. The test was attempted with an instrument which is designed for routinely checking resistance without damaging equipment. It was not shown that the capacity of the equipment was adequate to perform an effective Hi-Pot test.

Mr. Morrison also applied a current of 23 amperes (amps) to the cable rated at 20 amps for 3 weeks and had no build up of heat. The safety factor to which the cables had actually been designed was not known but may have been several times the rating of the cable. It is possible that a cable with much less electrical efficiency than the unspliced cable would be able to carry 23 amps under the conditions under which the test was made.

Mr. Morrison tested the mechanical efficiency of the splice by attempting to pull it apart and stated that the splice withstood "a man's maximum force." The tensile strength of the cable was not established by the record and this test was inconclusive as to whether the splice was mechanically efficient. As with the tests for electrical efficiency, the parameters for the test were not established and they were therefore not determinative of the issues under consideration. The results of Respondent's tests of splice strength do not

warrant a finding that the splice was mechanically or electrically efficient. Respondent did not reveal the particulars of the test or elaborate on the amount of stress applied to the splice. The test did not measure the capacity of the splice to withstand a force greater than a "man's maximum force." Moreover, it neasured only the immediate capacity of the splice to withstand stress. It did not provide information relating to the integrity of the splice over time.

Specifically, the tests did not show that the splice was mechanically and electrically efficient to enable it withstand the conditions under which such a cable might be handled. It has not been demonstrated that the splice MS electrically and mechanically efficient under various conditions which could be encountered with the cable in service, i.e., wetness, bending, pulling stress, abrasion, kinking, coiling, crushing, and other conditions to which cables could be subjected. Even worse, the cable might be subjected to a combination of some of these factors at the same time.

The inspector's testimony that there was a gap in the tape through which the inner insulation of the wires was visible was not effectively rebutted and is therefore accepted. The area of the splice was especially vulnerable to damage in use, especially if water should be present. It was not contended that wire nut connections were waterproof, therefore, reliance must be placed on other means of protection from damage and water and it was not demonstrated that the splice had sufficient protection. The gap in the electrical tape impaired the mechanical efficiency of the splice and there was also a potential impairment of electrical efficiency under conditions that might be experienced when the cable was in use. The specific issue as to whether splices may be properly made by the use of wire nuts is not reached. This decision merely holds that the particular splice in the cable in this case did not comply with the regulation.

The cable was situated on the floor of a warehouse and was routinely handled by Respondent's employees. It was likely that the splice would be subjected to stress. The mechanical strength of the splice was provided by electrical tape and wire nuts. The tape had been wrapped around the splice in a loose, and haphazard fashion. Its capacity to withstand stress over time was rendered even more suspect by the failure to completely cover the Insulated inner conductors whiah were visible at least for a fraction of an inch. Given that the cable was regularly handled, it is found that the splice was not mechanically efficient.

The standard's requirement that splices in insulated wires shall be insulated at least to the same degree of protection as the remainder of the wire was not met in this instance. Insulation was provided originally by the dielectric material surrounding and separating each of the three conductors and by the cable's outer jacket. In order to make the splice, 6 to 8 inches of outer jacket had been removed from each cable. Insulation was provided only by the wire nuts and the dielectric material around each of the three conductors. The friction tape did not provide the degree of Insulation afforded by the outer jacket because the tape was not wrapped to the thick-

ness of the outer jacket and a gap existed in the wrapping. The amount of insulation and, therefore, the degree of protection, was less at the splice than in the rest of the cable.

The operator was negligent in its failure to comply with the mandatory standard. The supervisor of the area, Mr. Buchanan, had actual knowledge of the existence of the splice. Because he was a member of mine management, his knowledge is imputed to Respondent. It was visually obvious that the splice was not mechanically efficient, and that removal of the outer jacket had reduced the degree of protection.

The condition presented a safety hazard. It was probable that the condition would result in accident and injury, and, if an accident were to occur, the anticipated injury would be that associated with severe electrical shock.

The operator demonstrated good faith in abatement of this condition after the citation was issued. The cable was immediately deenergized and removed from service.

Docket No. DENV 79-251-P

A total of nine citations were included within Docket No. DENV 79-251-P. On December 3, 1979, the parties moved that approval be given to a proposed settlement of eight of these alleged violations. The citations, corresponding assessments, and settlement dispositions are as follows:

Number	Date	30 C.F.R. Standards	Assessment	Disposition Settlement
391717	3/23/78	77.400(a)	$ 72.00	$ 36.00
391732	3/29/78	77.400(a)	72.00	36.00
392520	4/25/78	77.516	180.00	Withdrawn
392521	4/25/78	77.205(b)	225.00	112.50
392523	4/25/78	77.901(a)	275.00	181.25
392525	4/26/78	77.904	255.00	127.50
392532	4/27/78	77.205(b)	255.00	127.50
392534	4/27/78	77.516	225.00	112.50

In support of the proposed settlement, counsel for Petitioner asserted the following:

> After a review of all available evidence, the parties agreed that the settlement, attached hereto and incorporated herein, would be just and proper.
>
> Respondent has paid the $733.25 penalty sought by petitioner and therefore desires to withdraw its Notice of Contest as to all citations except those that are indicated above as being withdrawn or stayed.

The proposed assessments for Citation numbers shown above as reduced were reduced for the following reasons:

1. There was little or no negligence involved, since the violations could not have been reasonably predicted.

2. Although the compliance officer's notes recite facts which demonstrate the defendant's good faith and subsequent conferences with the defendant further demonstrate good faith, insufficient points were allowed for good faith.

Petitioner has thoroughly reviewed the facts and circumstances pertaining to the violations in citations shown above as "withdrawn". Upon such review and after careful consideration, petitioner has determined that there is insufficient evidence to support said citation and the proposed penalty associated therewith.

Based on the information furnished and an independent evaluation and review of the circumstances, it is found that the settlement proposed is in accord with the provisions of the Act. The agreed-upon settlement is, therefore, approved, and the proceeding with respect to these citations is dismissed.

Evidence was adduced at hearing with respect to Citation No. 391740. Citation No. 391740 was issued by inspector Larry Maloney on May 16, 1978, pursuant to section 104(a) of the Act. The inspector cited a violation of section 103(f) of the Act and described the relevant condition or practice as follows: "The mine maintenance engineer (Lonnie Smith) refused the elected representative of the miners the opportunity to participate in the pre-inspection conference and denied him the right to accompany me during the physical inspection of the mine."

Section 103(f) of the Act provides the following:

(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine.. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period

> of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representative&. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Inspector Maloney arrived at the Martin Lake Strip Mine on May 16, 1978, to conduct a spot inspection. Clarence Horn, another MSHA inspector, was already at the mine conducting an electrical inspection. Truman Davis, the only available representative of miners who had complied, at least in part, with the filing requirements in 30 C.F.R. Part 40, 2/ formerly Part 81, accompanied Clarence Horn. Inspector Maloney asked Mr. Davis if he wished to accompany him during the spot inspection. Mr. Davis declined, stating that he felt his participation in Inspector Horn's electrical inspection was of greater importance.

Inspector Maloney next asked Tom Hopkins, one of Respondent's maintenance men, if he desired to accompany him on the inspection. Mr. Hopkins replied affirmatively. Mr. Hopkins had not complied with the requirements for filing set forth for representatives of miners in 30 C.F.R. Part 40, but he was a union steward, an elected official of the union. Lonnie Smith, Respondent's mine maintenance engineer, refused to allow Mr. Hopkins to participate in a preinspection conference or to accompany Mr. Maloney during the inspection. The inspector testified that Mr. Smith gave as the reason for this refusal that Mr. Hopkins' job was too sensitive--the lubrication truck would be out of service. At no time was compensation an issue. The citation was abated when Respondent permitted Mr. Hopkins to accompany the inspector.

The refusal to permit Mr. Hopkins to accompany the inspector was in violation of the standard as alleged. The term "representative of miners" is defined in 30 C.F.R. 40.1(b)(2) to encompass a "representative authorized by his miners," the wording contained within section 103(f). A "representative of miners" is "[a]ny person * * * [who] represents two or more miners at a

---

2/ 30 C.F.R. § 40.2 provides:

"(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by § 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

"(b) Miners or their representative organization may appoint or designate different persons to represent them under various sections of the act relating to representatives of miners.

"(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection."

coal or other mine for the purposes of the Act". Mr. Hopkins was an authorized representative of miners within the meaning of section 103(f) of the Act. His failure to aeet the filing requirements of 30 C.F.R. Part 40, or former Part 81, should not be permitted to serve as a premise for denial of section 103(f) representative status.

The operator was negligent in its refusal to permit Mr. Hopkins to accompany the inspector. Inspector Maloney had notified representatives of nine management on prior occasions of the walkaround rights of miners and of MSHA's policy regarding these rights when two or more inspectors conducted simultaneous inspections. The inspector had explained the policy to Mr. Smith after the latters' initial refusal to permit Mr. Hopkins to accompany the Inspector. Mr. Smith persisted in his refusal. It is found, therefore, that through Hr. Smith, Respondent had knowledge of the condition and knowledge of both of the requirements of section 103(f) and MSHA's policy in this regard, but refused to accord Mr. Hopkins the opportunity to accompany the inspector.

The inspector testified that the reason given by Mr. Smith for refusing to let Mr. Hopkins accompany the inspector was that the position occupied by Mr. Hopkins--that of lubrication truck driver--was a vital one. The inspector did not believe that Mr. Hopkins' job was vital and his opinion is accepted since the record does not support the finding that Mr. Hopkins' duties on the lubrication truck were vital to the operation of the mine at that particular time.

The gravity of this violation was slight. The inspector testified that he did not rely on accompanying miner representatives to point out violations. Rather, he relied on miner representatives to provide incidental information, e.g., the nature of the work performed in a particular area or the number of employees which would have occasion to pass through an area. It is unlikely, therefore, that the violation would have led to accident or injury.

The condition was abated within one-half hour of the'issuance of the citation. Mr. Hopkins was permitted to accompany the inspector. Respondent demonstrated good faith in abatement after the citation was issued.

ASSESSMENTS

In consideration of the findings of fact and conclusions of law contained in this decision, the following amounts are assessed as appropriate under the criteria of section 110 of the Act.

Docket No.	Citation or Order No.	Civil Penalty
	Contested Citations	
DENV 79-181-P	372175	$ 10
DENV 79-183-P	392156	72
DEW 79-194-P	391715	100
DENV 79-251-P	391740	100
		$282

Settled Citations

DENV 79-181-P	392162	$ 140
DENV 79-181-P	392165	98
		$ 238

ORDER

Respondent is ordered to pay the sum of $520 within 30 days of the date of this decision if it has not already done so.

Forrest E. Stewart
Administrative Law Judge

Distribution:

Eloise Vellucci, Esq., U.S. Department of Labor, Office of the Solicitor, 555 Griffin Square Building, Suite 501, Griffin & Young Streets, Dallas, TX 75202 (Certified Mail)

Richard L. Adams, Esq., Worsham, Forsythe & Samples, 2500-2001 Bryan Tower, Dallas, TX 75201 (Certified Mail)

Thomas A. Mascolino, Counsel for Trial Litigation, U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)