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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. LAKE 80-3 A.O. No. 33-1303-03007-V
v.		Broken Aro No. 1 Strip Mine
OHIO AMCO, INC.,	RESPONDENT	

DECISION

Appearances: Linda Leasure, Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the petitioner Paul E. Bryant, Coshocton, Ohio, for the respondent

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802(a), through the filing of a proposal for assessment of a civil penalty on October 29, 1980, for one alleged violation of the provisions of 30 C.F.R. 77.1004(b). Respondent filed a timely response and contest and a hearing was convened in New Philadelphia, Ohio, on July 8, 1980, and the parties appeared and particiated therein. Petitioner filed a posthearing brief, but the respondent did not.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty

to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The authenticity and admissibility of all documents identified and introduced by the parties.

2. Respondent is an operator engaged in augering surface coal at the Broken Aro No. 1 Strip Mine.

3. At all relevant times to this proceeding, respondent's coal production (1979) was 199,427 tons annually.

4. As of April 1, 1979, respondent employed 30 employees for all of its mining operations, and eight to nine employees were employed at the pit in question.

Discussion

The section 104(d)(1) citation, No. 0785532, April 30, 1979, citing 30 C.F.R. 77.1004(b), states as follows:

> The auger crew (3 men) were observed working in close proximity to an overhanging highwall in pit 004. The overhanging area to the left of the auger had been readied for augering and according to the foreman, Gerald McCuiston, the employees were instructed to proceed in that direction. The next hole to be augered would have placed the coal conveyor operator directly beneath the affected highwall. The overhanging area was about 66 feet in length and 40 feet wide. The height of the highwall was approximately 105 feet.

Petitioner's Testimony and Evidence

MSHA inspector Robert L. Grissett confirmed that he conducted an inspection at the mine in question on April 30, 1979, and upon arriving at the pit

he noticed a large overhang in the highwall and he observed the auger crew close to it. He measured the overhang by pacing and estimating its height. Referring to his notes where he recorded the measurements, he indicated that the width of the pit from the toe of the highwall to the toe of the spoil was 140 feet, that the estimated height of the highwall from the ground up to the bottom of the overhang was approximately 105 feet, and that the overhang distance from where it jutted out from the highwall to where it went back it was 66 feet long (Tr. 20-26).

Mr. Grissett stated that there were three men on the augering crew, namely, an auger operator, his helper, and a man that operates the coal conveyor. He described the mining sequence carried out by the auger crew. He observed three holes which were augered to the right of the overhang, and the mining sequence was moving to the left in the direction of the overhang and the crew would have moved one more hole, or a distance of 2 to 3 feet, to place them under the overhang. He observed the highwall to the right of the auger operation and observed loose, hazardous material some 5 feet to the right where the augering had started (Tr. 26-31).

Mr. Grissett stated that he spoke with the foreman who advised him that his intention was to continue augering in the direction of five holes which had been prepared, and this would have put them under the overhang (Tr. 32). He also spoke with the auger operator who also confirmed the direction of the augering and also confirmed the existence of the overhang and stated that it "didn't look very good" (Tr. 35). He also said that Mr. Bryant knew about most of the mine conditions (Tr. 35). At that point, Mr. Grissett decided to issue Citation No. 0785532, and advised the foreman that if the crew continued to mine in the direction of, and under the highwall, he would issue an order of withdrawal. The foreman thereupon moved the crew and auger out of the area (Tr. 36). He also issued another Citation No. 0785533 for the area to the right of the augering operation for loose and hazardous material near the top of the highwall (Tr. 37).

Mr. Grissett observed equipment tracks in the area of the loose and hazardous materials and this indicated that equipment was in the area. He confirmed that he issued the instant section 104(d)(1) unwarrantable failure citation because the foreman admitted knowledge of the overhang and yet permitted the crew to work there (Tr. 38).

Referring to the notations on his inspector's statement concerning blasting and auger vibration contributing to the gravity of the citation, he could not state whether these conditions were present during his inspection (Tr. 41-42). He did state that the crew was augering into the side of the highwall and that the day was clear (Tr. 43).

On cross-examination, Mr. Grissett confirmed that when he first entered the pit the auger machine was idle and the crew was waiting for a truck. He spoke with the crew, and during this

time no augering actually took place. The foreman then appeared on the scene, and Mr. Grissett discussed his plans

for the day and when the foreman told him that he and his crew intended to continue augering in the direction of the overhang area which had been cleaned, he decided he had to do something and issued the citation. Mr. Grissett conceded that no augering took place from the time he appeared and began talking to the crew and the time the citation issued (Tr. 45).

Regarding any vibration, Mr. Grissett conceded that none took place while he was there because no augering took place, and as for any blasting going on, he conceded that it was being done by another company "on the same ridge," but he did not know any of the details, including the distance from the citation location or the amount of blasting taking place (Tr. 47). Regarding the loose, hazardous materials citation, he conceded that there was no equipment in the area when he issued that citation and the reason he issued it was to keep equipment and men from going into that area (Tr. 48-49). Mr. Grissett testified as to locations of the auger and conveyor during the drilling operations and the distances that the equipment and men would be from the highwall (Tr. 50-52).

Mr. Grissett stated that before any augering can take place, the face must first be stripped of the coal and loaded out. In other words, coal was stipped and loaded from the face by someone else before the respondent moved in with its augering operation. Mr. Grissett did not know the angle of the highwall but estimated that the toe was out some 20 feet from the top (Tr. 55-56). When he observed the crew, the conveyor operator was some 10 to 15 feet from the base of the highwall (Tr. 58).

In response to bench questions, Mr. Grissett stated that he could not have issued an imminent-danger order because no one was under the overhang, and when the foreman asked him what he should do, Mr. Grissett told him to barricade the area. He did not expect the respondent to take the overhang down within the 15-minute abatement time (Tr. 68-69).

Paul E. Bryant, President, Ohio Amco, Inc., was called as an adverse witness by MSHA, and testified that as of April 30, 1979, his company employed approximately 30 employees, eight or nine of whom were engaged in auger operations, and that including the auger pit in question, his company operated a total of three auger pits. He indicated that foreman Gerald McCuiston supervised the auger crew at the mine in question and this was limited to one auger machine. He recalled being at the No. 4 pit on April 30, and indicated that unless he personally is present on the site to discuss any dangerous or hazardous highwall conditions, Mr. McCuiston has the responsibility for this area of his augering procedure and he indicated that Mr. McCuiston did his job well in this regard (Tr. 102-108).

Mr. Bryant could not specifically recall visiting the mine site on April 28 or 29, but stated that he did go there prior to April 30 to evaluate the highwall conditions to determine whether it was safe or unsafe for augering, that he normally follows this procedure as time would permit, and that Mr. McCuiston

periodically reports to him in this regard. Mr. McCuiston's duties included the safety of his men, coal production, equipment scheduling

and maintenance, procurement of supplies and parts, and the scheduling of the crew. Mr. McCuiston had daily contact with him, either personally or by telephone or radio.

Mr. Bryant stated that he observed the overhang in question prior to April 30, and indicated that the portion he saw was safe. However, should the conditions change, his instructions were not to auger it if cracks or rock movement are observed. Highwalls are usually inspected through observation from the top, but he could not recall inspecting the particular highwall in question from the top because the overhang was not located near the top, and in this situation he would observe the adjoining rock protrusions and strata to determine whether it is consolidated or tied into the hill itself. Regarding that specific overhang, he did not determine whether it was tied in to the hill, but the employees have the right to refuse to work in unsafe places, they were not working under the overhang, and he could not state whether the foreman intended for the crew to work under the overhang on the day the citation issued. He did not authorize the men to continue augering in the direction of the overhang at the specific location which was cited by the inspector. The question of whethre to auger is left to the judgment of the foreman (Tr. 108-117). If the highwalls or overhangs look safe, they will mine under them (Tr. 128).

Respondent's Testimony and Evidence

Mr. Bryant testified by the time he arrived at the highwall after the citation had been issued, the area had already been barricaded and all of the men and equipment had been withdrawn. After discussing the matter with Inspector Grissett that same day or the next day, and after receiving Mr. Grissett's evaluations, he was disturbed over the inspector characterizing his company as an "unsafe company." Mr. Bryant stated further that his employees are free to report dangerous conditions to MSHA, and that on those occasions when dangerous highwalls are encountered, employees are not required to work under them, and even where a highwall is questionable, he has always honored the feelings of employees not to work in those areas. He also stated that his company's safety record is a good one and that he has trained his employees and has a concern for them and their families and would not want to see any of them injured (Tr. 136-139).

Mr. Bryant took issue with the inspector's statements concerning the positioning of the augering crew and their alleged exposure to the highwall, and he indicated that the conveyor operator would normally be at least 30 to 35 feet or more from the toe of the highwall (Tr. 140-141), and the auger operator would be even further back than that because the auger itself would take up 15 to 18 feet horizontally out from the highwall (Tr. 142-143). Further, since the inspector testified that the top of the highwall was 20 feet back from the toe, the overhang would have had to protrude out into the pit for a distance of 40 feet and this was clearly not the case (Tr. 144).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of the provisions of mandatory safety standard 30 C.F.R. 77.1004(b), which provides that "overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted." The gist of the alleged violation in this case lies in the fact that Inspector Grissett believed that the augering crew intended to continue the mining process in the direction of the overhang and that this would shortly place them directly under the overhang in question. Since the overhang area was not posted or barricaded, the inspector concluded that had the mining cycle continued the crew would have proceeded under the overhang, thus placing them in a hazardous position.

Inspector Grissett indicated that his interpretation of section 77.1004(b) is that an operator has an option to either take down an overhang or to barricade and post the area and mine around it. In this case, due to the great size of the overhang, he believed it was unreasonable to expect the operator to take down the overhang because it would have cost him approximately "half a million dollars" to blast it out or to drill and take it out with a stripping machine (Tr. 67). However, he issued the citation because it was obvious to him that the crew intended to continue mining under the overhang and the area had not been posted. He also believed that it is incumbent on a mine operator to make his men aware of the existence of hazardous overhangs and he should not permit his men to work under them unless they are taken down or otherwise isolated by posting and barricading (Tr. 68-69).

Inspector Grissett also testified that had Foreman McCuiston indicated to him that he would immediately withdraw his men and barricade the area instead of indicating to him that he intended to continue mining in the direction of the overhang, he would not have issued the citation. However, since Mr. McCuiston readily admitted the existence of the overhang, that it "looked pretty bad," and stated his intention to continue mining, Mr. Grissett stated he had no choice but to issue the citation (Tr. 80-81).

Respondent does not seriously dispute the existence of the overhang in question, nor does it rebut the fact that the overhang was not taken down or that the area beneath it was posted or otherwise secured so as to preclude the augering crew from mining in that area. Accordingly, I find that the preponderance of the testimony and evidence adduced in this case by the petitioner supports a finding of a violation of section 77.1004(b), and Citation No. 0785532, issued on April 30, 1979, is therefore AFFIRMED.

Gravity

It is clear from the inspector's testimony that at the time the citation issued men were not mining coal and the augering

machine was not in operation. Further, petitioner conceded that no employees were actually working under the overhang in question, and that while augering may have taken place shortly

before the inspector's arrival on the scene, no such augering was taking place under the overhang (Tr. 141, 155). Nonetheless, petitioner argues that the inspector considered the violation to be serious because the crew was about to move under the overhang and he considered the situation as bordering on an imminent danger. In these circumstances, petitioner argues that an additional degree of seriousness attaches in this case (Tr. 157). Inspector Grissett considered the particular overhang to be dangerous because he observed cracks with spaces in them, but he indicated that it would be impossible to determine whether there had been any recent movement of the overhang (Tr. 92).

Inspector Grissett clarified the matter concerning the position of the overhang by stating that it protruded some 18 to 20 feet from the highwall, and that in any normal augering process men would be exposed to an overhang danger while positioning the equipment and that should an overhang come down it does not "dribble down," but collapses. The distance it would collapse would depend on its thickness, and as an example, Mr. Grissett stated that a 2-foot overhang would not expose men to any hazard if they were working in an area 24 feet out from the base of the highwall (Tr. 146-147).

Although Mr. Bryant disputed the inspector's testimony concerning his estimates regarding equipment measurements, the location of the crew in relation to the highwall, etc., he did not dispute the fact that on occasion the autering crew is in fact at the base of the highwall while changing out augering bits, and that in these circumstances they would be in the area of any hazard. However, he steadfastly denied that his company would ever deliberately place men or equipment under an overhang, but conceded that "sometimes people do it" (Tr. 151-152).

While I consider the potential hazard resulting from an augering crew mining in the direction of an overhang to be a serious situation if it is not discontinued before they reach the danger zone, the particular gravity of the citation in this case must be considered in light of the violation which occurred. Here, the violation has been affirmed because the overhang area had not been taken down or posted to keep miners out. Therefore, I believe that any consideration of the question of gravity, insofar as a civil penalty assessment is concerned, should be considered in connection with the hazard to which the miners were exposed at the time the citation issued. In this case, the record reflects that no miners were working under any overhang or dangerous area, and the miners and equipment were immediately withdrawn from the area and it was barricaded. Therefore, the situation at the time the inspector arrived on the scene was not as grave as he made it out to be. Neverthless, I cannot overlook the fact that had he not appeared and acted when he did, the crew would have routinely continued to mine under the area of the overhang. Inspector Grissett relied on the statements of the foreman who purportedly advised him that the crew intended to continue mining in the direction of the overhang. While it is true that mining could have continued without incident or injury, one can never be sure in these circumstances, and the clear

intent of the safety standard in question is to insure that miners are not exposed to hazardous conditions in the course of their duties.

Therefore, I conclude that the failure to post the area to preclude miners from continuing mining into the overhang area constituted a serious violation.

Good Faith Compliance

The record establishes that the respondent immediately withdrew the men and equipment from the area which concerned the inspector, ceased all further mining operations, and barricaded the area (Tr. 77). In the circumstances, I find that respondent exhibited rapid good faith compliance in abating the conditions cited and this fact has been considerede by me in the penalty assessed for the violation.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business

The parties stipulated that respondent's annual coal production for the year 1979 was 199,427, respondent's overall employment compliment for all of its mining operations as of April 1, 1979, was 30 employees, and eight to nine of them were employed at the strip mine operations where the citation was issued. In addition, Mr. Bryant indicated that as of April 1, 1979, one of his operations closed down due to a lack of sales, thus reducing his size considerably (Tr. 13). Based on all of this information, I conclude that for purposes of a civil penalty assessment, respondent is a small mine operator. Further, respondent does not assert that a reasonable penalty imposed for the violation in question will adversely affect its ability to continue in business, and I conclude that it will not.

History of Prior Violations

Respondent's history of prior violations is reflected in petitioner's Exhibit P-4, a computer printout containing a listing of assessed and paid violations for the period April 31, 1977, through April 30, 1979. In addition, respondent produced Exhibit R-4, an MSHA computer printout listing all assessed and paid violations for the period January 1, 1970, through September 21, 1979. Respondent also submitted two letters from his insurance carrier (Exhs. R-3 and R-6), concerning his company's favorable workmen's compensation rating as compared to other comparable operators in the industry, and he believes these favorable ratings attest to his good safety record.

Respondent's prior history of violations for the approximate 9-year period reflected in Exhibit R-4, shows that respondent has paid $9,319 for a total of 108 violations issued during 1970 through 1979. Three of these prior violations were for violations of section 77.1004(b), one each in the 1975, 1976, and 1978, for which respondent paid civil penalties in the amounts of $210, $94, and $560. This information is verified by petitioner's Exhibit P-4, which reflects two paid assessments for violations of section 77.1004(b), prior to April 31, 1977, and one paid assessment for the year 1978.

After careful consideration of the history of prior violations as documented by the computer printouts, I cannot conclude that respondent's prior

history is a bad one. To the contrary, the record establishes that for a period of some 9 years, respondent has averaged some 12 violations a year, and for an operation of its size and scope, I believe respondent has a good history of prior violations. Further, with regard to repeat violations of section 77.1004(b), the record simply does not support a finding that respondent has deliberately failed to insure compliance with this standard. The record in this case establishes that the overhangs which exist at respondent's strip mining operation are created during the coal-stripping operations at the highwalls and those stripping operations are carried out by another mine operator. Respondent has a contract with that operator, and his operations are limited to taking out the coal which remains at the highwalls by means of augering. In these circumstances, and taking into account the fact that respondent has been cited for only three prior violations of section 77.1004(b), I cannot conclude that respondent has consciously disregarded the requirements of this standard as suggested by the inspector's testimony.

It seems clear to me that respondent's contest in this case was prompted in part by the inspector's characterization of the mine as one which "seems to have a history of placing men under bad highwalls." This statement was made at part of the inspector's statement executed by Mr. Grissett at or near the time he issued the citation (Exh. P-1). Taken out of context, this charge has serious implications for an operator, particularly with respect to the penalty assessed for any such violations, since it implies that the respondent deliberately exposes his crews to dangerous overhangs. In this case, I cannot conclude that the inspector's characterization of the mine operator is supported by any credible evidence, and I have given it no weight in the assessment of the civil penalty made by me for the violation.

Negligence

In its posthearing brief, petitioner asserts that the respondent demonstrated gross negligence "by permitting the development of employee exposure to the hazard despite his knowledge of his employees' activities and the existence of the unbarricaded overhang" (p. 8, Posthearing Brief). Coupled with the suggestion and inference that Mr. Bryant was personally aware of the dangerous nature of the overhang, but nonetheless instructed his employees to continue mining in that direction, petitioner seeks a substantial civil penalty in this case based on this asserted conduct on Mr. Bryant's part. However, based on a close review of all of the circumstances which prevailed at the time the citation issued, I cannot conclude that Mr. Bryant is the chief culprit in this matter, and my reasons for this conclusion follow.

Inspector Grissett candidly admitted that his opinion that the mine seems to have a history of placing men under bad highwalls was based on his "conversations in the past, on the history of that mine and the violations." He also stated that "I just got to the point where it appeared to me that that was the

feeling at the mine" (Tr. 154-155). In his inspector's statement of April 30, 1979 (Exh. P-1), Inspector Grissett commented that the foreman in charge of the auger crew was aware of the hazardous nature of the overhang and that members of the crew, including a safety committeeman,

were also aware of the overhang but failed to express their views to mine management. However, none of the augering crew, including the mine safety committeeman, were called as witnesses to back up their purported statements concerning the highwall conditions. Further, Mr. Grissett could recall no work-stoppages at the mine due to overhangs, nor could he recall that any dangerous highwall conditions had ever previously been brought to MSHA's attention (Tr. 97).

With regard to the culpabililty of Mr. Bryant, contrary to the veiled suggestion by the inspector that he somehow deliberately directed his personnel to continue mining in the face of a dangerous overhang, petitioner candidly admitted during the hearing that Mr. Bryant did not specifically direct the auger mining operation beneath the overhang (Tr. 122). Further, Inspector Grissett candidly conceded that due to Mr. Bryant's responsibilities as company vice president, that he could not be expected to be at the mine all the time, and that the primary responsibility for the day-to-day mining operations are delegated to the foreman (Tr. 72-76). It seems to me that a more effective method of achieving enforcement in a situation where MSHA believes that a mine foreman or operator deliberately and consciously places his men in peril through an infraction of any mandatory safety standard is to consider bringing an action pursuant to the "knowing" and "willfull" provisons of sections 110(c) and (d) of the Act. General, speculative suggestions in this regard, unsupported by any tangible evidence, simply are insufficient in my view.

At page 7 of its posthearing brief, petitioner asserts that Mr. Bryant knew about the overhang, knew that his crew was working in the pit, but gave his foreman no instructions either to take it down or barricade the overhang. However, a review of the transcript pages cited by the petitioner in support of these conclusions clearly indicate the following:

> 1. Mr. Bryant viewed the overhang 3 or 4 days prior to the issuance of the citation on April 30, 1979, and possibly the day before, but considering the location of the crew, he did not consider the overhang to be a hazard. Mr. Bryant considers an overhang to be dangerous if there are indications of movement or falling rocks, and highwalls are checked from the top to determine whether they are safe or unsafe (Tr. 112-113).
>
> 2. Mr. Bryant denied that he authorized or condoned employees working under dangerous highwalls, and indicated that judgments concerning the safety of highwalls are left to the foreman supervising the crew, and that if he or the men believe the conditions are unsafe, they are free not to continue augering (Tr. 115-117).

In addition Mr. Bryant also testified that as a general proposition, in the development of the different mine-augering

areas, if he is not personally

present to confer with his foreman concerning possible hazards, it is the foreman's responsibility to make these judgments, and he believed that Mr. McCuiston does a good job in this regard (Tr. 107-108). As for the specific condition of the overhang in question, Mr. Bryant testified that when he viewed the overhang a day or so before April 30, it appeared safe to him and he advised Mr. McCuiston that if any conditions changed in the interim that would indicate it was not safe, he was not to auger it (Tr. 112). Having viewed Mr. Bryant on the stand during the hearing, he impressed me as a straightforward, candid, and honest mine operator, and taken in context, I find his testimony to be credible, and cannot conclude that he deliberately ordered his foreman or the mining crew to continue mining in the face of a clearly hazardous overhang, and the fact that the foreman may, have made an off-hand comment to the inspector that Mr. Bryant "knows about all of the conditions out here" is hardly enough to support a finding of a knowing and reckless disregard for safety on his part, and petitioner's counsel candidly admitted the lack of any probative value to that purported statement (Tr. 127).

As indicated earlier, overhangs at the strip mining operation conducted by the respondent appear to be commonplace, and they result from coal being stripped from the highwalls. Those overhangs which are difficult to take down are left in place and mining is supposed to proceed around them. As long as the areas are posted or barricaded to prevent miners from mining under them, leaving the overhangs because they are too expensive or difficult to take down is not a violation of section 77.1004(b). Petitioner argues that Foreman McCuiston knew about the overhang in question, yet readily indicated his intention to continue the mining cycle in such a manner as to bring his crew directly beneath that overhang. However, at the time the citation issued, the crew was not positioned under the overhang, and the inspector's issuance of the citation resulted in the cessation of mining and the withdrawal of men. Thus, on the facts here presented, petitioner seeks to escalate the foreman's intent to continue mining toward an overhang into a violation of section 77.1004(b). However, it seems clear to me that the violation lies not in the fact that the crew was mining toward the overhang, but rather, deals with the existence of an overhang which had not been taken down or isolated as required by section 77.1004(b). In short, the approaching proximity of the crew to the overhang goes primarily to the question of gravity and the presence of the crew at the time the inspector arrived on the scene adds little to the question of whether the existence of the overhang per se constitutes a violation of section 77.1004(b). Nonetheless, I cannot disregard the inspector's testimony concerning the foreman's intent to continue mining toward the overhangs without taking any precautions to post or barricade the area. The inspector's testimony is not rebutted, and Foreman McCuiston did not appear at the hearing to testify. In the circumstances, since the foreman had the responsibility for the safety of his crew, his disregard for the overhang and his stated intention of continuing mining in that direction, thereby prompting the issuance of the citation and the threat of a closure order by the inspector, supports a finding of a reckless

disregard on his part for the safety of his crew, and it constitutes a reckless mining practice which would have resulted in placing the crew in

a potentially hazardous position under the overhang had the inspector not acted to have them withdrawn. In these circumstances, I find that the violation resulted from gross negligence.

Penalty Assessment

This case was "specially assessed" by MSHA's Assessment Office, and I am convinced that the assessment officer was influenced by the inspector's narrative statement concerning the asserted regular practice of the respondent routinely exposing his mine personnel to unsafe highwalls and overhangs, as well as the inspector's statements concerning respondent's prior history of violations in this regard. However, it is clear that I am not bound by the assessment officer's evaluation and assessment based on the facts known to him at the time the initial assessment is made. My findings and conclusions are based on a de novo consideration of the record made during the hearing, including the testimony and evidence adduced by the parties, not only as to the fact of violation, but also in regard to the six statutory criteria found in section 110(i) of the Act.

In view of the foregoing findings and conclusions, and in particular my findings concerning respondent's prior history of violations, its small size, and the fact that abatement was achieved immediately, petitioner's suggestion that I affirm the initial assessment of $2,500 is rejected. However, taking into account my findings concerning respondent's negligence and gravity, I believe that a civil penalty of $950 is reasonable in the circumstances.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $950 within thirty (30) days of the date of this decision. Upon receipt of payment by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge