

CCASE:

PENN ALLEGH COAL V. SOL (MSHA)

DDATE:

19801021

TTEXT:

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

PENN ALLEGH COAL COMPANY, INC.,
CONTESTANT

Notice of Contest

Docket No. PENN 81-6-R

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

Order No. 843525

October 7, 1980

RESPONDENT

Underlying Citation No. 843526

October 6, 1980

Allegheny No. 2 Mine

DECISION

Appearances: Henry Ingram, Esq., and Ronald S. Cusano, Esq.,
Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty,
Pittsburgh, Pennsylvania, for the Contestant
Stephen P. Kramer, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent The United Mine Workers of America,
which had been served with the pleadings and the
notice of hearing, did not enter an appearance

Before: Judge Stewart

On October 8, 1980, Penn Allegh Coal Company, Inc.
(hereinafter, Penn Allegh), filed a contest of Citation No.
843526 and Order No. 843525 pursuant to section 105(d)(FOOTNOTE 1)
of the Federal Mine Safety and Health Act of 1977 (hereinafter, the
Act), 30 U.S.C. 801 et seq. At the same time, Contestant filed

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a motion for expedition of the proceeding pursuant to 29 C.F.R. 2700.52. This motion was granted. An expedited hearing in this matter was held on October 15 and 16, 1980, in Pittsburgh, Pennsylvania. To expedite the decision, the parties waived submission of proposed findings of fact and conclusions of law.

STIPULATIONS

The mine in question here is the Allegheny No. 2 Mine, an underground coal mine, operating in the Upper Freeport seam of coal.

There are five operating sections in the mine, underground.

There are approximately 150 underground employees, and 50 persons employed on the surface.

The annual production, coal production from the mine is approximately 600,000 tons.

DOCUMENTARY EVIDENCE (MSHA)

At approximately 10 a.m., Monday, October 6, 1980, Federal mine inspector John J. Savine issued Citation No. 843526 pursuant to section 104(a)(FOOTNOTE 2) of the Act. The inspector cited a violation of 30 C.F.R. 75.316 and described the condition or practice as follows:

In the 1 right working section (I.D. #005) the operator's approved ventilation plan was not being followed in that, the water pressure, on the continuous miner, under flow conditions was only 80 P.S.I. when measured just outby the shut-off valve provided for the operator. The approved plan requires 150 P.S.I. when measured under flow conditions (page 6a), the miner is a Lee Norse 106, Serial No. 7786 approved 2G-2752A.

The inspector set 12:30 p.m., October 6, 1980, as the termination due date. At 12:30 p.m., he extended the termination due date to 12 midnight, October 6, 1980. The justification he gave for doing so reads as follows: "Citation No. 843526 is hereby extended to allow the operator more time to check into the ventilation plan with MSHA" (Govt. Exh. 16).

30 C.F.R. 75.316 is a statutory provision corresponding with section 303(o) of the Act. It reads as follows:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

At 8:45 a.m., on the following day, October 7, 1980, the inspector issued Order No. 843525 pursuant to section 104(b) of the Act. On the order, he noted as his reason for issuing the order: "No effort is being made to correct or increase the water pressure on the continuous miner to the 150 P.S.I. flow pressure as required in the ventilation plan." Edward Michaels, general manager, and Al Reisz, chief engineer, both stated that they were not going to take corrective action to abate the condition (Govt. Exh. 17).

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Page 6(a) of Penn Allegh's ventilation system, methane and dust-control plan (hereinafter, dust plan) Review No 15, bears the date January 12, 1977, and it was established at the hearing that a similar page had been part of the dust plan several years prior to that date.

A safety and health ventilation and respirable dust technical inspection (hereinafter, technical inspection) conducted by MSHA between June 26 and June 30, 1978, found that the ventilation system, methane and dust-control plan (Review No. 11) (hereinafter, dust plan) of Contestant's Allegheny No. 2 Mine was being followed. Water pressure was 150 psi at the continuous mining machine and 150 psi at the sprays. Thirty seven of 39 sprays were operating (Govt. Exh. 1, Govt. Exh. 4).

A technical inspection completed on September 11, 1979, to determine compliance and adequacy of the dust plan (Review No. 14) approved on August 21, 1979, determined that the average respirable dust concentration on the 036 miner operator on the 1 right 005 section was 2.75 milligrams. A citation was issued. In his inspection report addressed to the MSHA district manager, the inspector stated: "It is my opinion that the plan is inadequate and the operator must submit a new revised ventilation and respirable dust control plan to the District Manager." The report stated that the water pressure at the continuous miner was as follows:

Washdown hose(FOOTNOTE 3)

Location	Flow	Static	Pressure at Spray
1 Right 005	150	240	140 psi
4 Right 011	160	250	100 psi
East Main 010	150	200	150 psi
3 North 013	150	220	50 psi
1 North 014	180	210	60 psi

In a citation issued on September 17, 1979, the inspector stated:

The average concentration of respirable dust collected in the working environment of the continuous miner operator and the roof bolter operator in 4 and 5 days respectively in the 005 section (1 Right) during a MSHA inspection was 2.75 and 2.4 milligrams per cubic meter of air respectively. Management shall collect and submit samples from the working environment of the two above occupations each production shift during the period of reasonable time. Management shall also revise their methane and dust control plan to

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provide protection measures for the continuous miner operator and the roof-bolt operator.

(Govt. Exh. 18).

The subsequent action terminating this citation on October 24, 1979, stated:

Based on the results of 10 samples submitted by the Company, the cumulative concentration of respirable dust in Section 005-0 in the working environment of the continuous miner operator (036) was 8.6 milligrams and the roof bolter (046) was 7.6 milligrams, which is within the applicable limit of 2.0 milligrams per cubic meter of air. A plan has been submitted to the District Manager.

(Govt. Exh. 18).

Government Exhibits 19 and 20 were citations for average respirable dust concentrations of 2.25 and 2.24 milligrams per cubic meter of air in sections other than the 1 right (005) section of the No. 2 Mine in April and September of 1979.

On January 29, 1980, a citation alleging a violation of 30 C.F.R. 75.316 was issued, noting that "[t]he ventilation system and methane and dust control plan was not being followed in the 1 right (005) section in that the water pressure when measured at the continuous mining machine, serial no. 7341 measured only 120 pounds per square inch water gauge." The plan states that a 150-pounds per square inch water gauge would be maintained. In a subsequent action on January 30, 1980, extending the time for abatement, the inspector stated: "The condition existed due to a malfunctioning in a pressure relief valve. The operator is in the process of obtaining a new valve." In a subsequent action on February 6, 1980, further extending the time for abatement, the inspector stated: "The operator has received a pressure relief valve to replace a valve which restricted flow to the 1 right (005) section." In terminating the citation on February 7, 1980, the inspector stated in his subsequent action report: "The water pressure was increased to 185 pounds per square inch gauge at the continuous mining machine in the 1 right (005) section" (Govt. Exh. 3).

Contestant's dust plan (Review No. 15) approved on March 4, 1980, specified 150 psi and 40 gallons per minute on the continuous miners at the Allegheny No. 2 Mine. There was a marginal notation, "coal producing," beside four of the continuous miners and "cutting bottom for track" beside two of the continuous miners. Thirty nine operating sprays were specified for the coal-producing miners and 23 operating sprays for the other two continuous miners. This information was contained on Page 6(a), the page dated January 12, 1977 (Govt. Exh. 4).

On April 16, 1980, in a citation alleging a violation of 30

C.F.R. 75.316, the inspector stated: "The ventilation system and methane and

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dust control plan was not being followed in east main (010) section in that the water pressure when measured at the continuous mining machine measured only 75 pounds per square inch water gauge." In his action to terminate the citation on the same date, the inspector stated: "The water pressure was increased to 240 pounds per square inch water gauge" (Govt. Exh. 5).

On April 17, 1980, in a citation alleging a violation of 30 C.F.R. 75.316, the inspector stated: "The approved Ventilation System and Methane and Dust Control Plan dated March 4, 1980, is not being followed in that water pressure was measured with an Ashcroft gauge and flow pressure was 100 psi and static pressure 160 psi and at spray 45 psi." Further notations by the inspector in the citation indicated that this was in the (005) 1 right section (Govt. Exh. 6).

In a subsequent action on April 21, 1980, terminating the citation which had been issued on April 17, 1980, the inspector stated: "The approved ventilation system, methane and dust control plan is being followed in that water pressure at the HH265 miner as measured was 165 psi flow pressure in (005) 1 right section" (Govt. Exh. 6a).

In a letter to MSHA dated April 18, 1980, Penn Allegh stated:

[W]e would like to modify our approved plan for clarification to mean and read as follows: The total water pressure when measured under flow condition at a point outby the shut-off valve provided to the operator of the continuous mining machine shall be maintained at seventy (70) psi or higher.

In this letter, Penn Allegh also stated:

[S]ince the 150 psi pressure approved in our present plans were meant by us to represent shut off pressure at static conditions measured at any point of the system and your present enforcement policies, as we understand it now, call for evaluation under flow conditions, it is obvious that the two (2) subject citations were issued in error due to lack of understanding in respect to the meaning of the numbers
* * *.

(Govt. Exh. 7).

A technical inspection completed on April 29, 1980, to determine compliance and adequacy of the dust plan (Review No. 15) approved on March 4, 1980, determined that the water pressure at the continuous miner on the 005 section was 45 psi. On the other four sections, the pressures were 60 psi, 155 psi, 65 psi, and 50 psi. In a memorandum to the district manager, the inspector included in his recommendations for plan improvement a statement that "[t]he plan should state water flow pressure as needed at miner in plan" (Govt. Exh. 8).

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In a letter to Penn Allegh dated May 1, 1980, the MSHA district manager stated in part:

Permission is granted to reduce the water pressure to 70 psi measured under flow conditions at the shutoff valve of the continuous miner only while an MSHA representative is collecting respirable dust samples to determine the adequacy of your revised plan. The survey will be conducted by MSHA inspection personnel from the Monroeville Subdistrict office. They have been instructed to conduct the survey with the quantity of air at the face, number of water sprays, and water pressure exceeding the parameters tested in your plan by not more than 10 percent. If neither compliance nor noncompliance can be determined after the first day of sampling, you will be given the opportunity to suspend the survey and revise your proposed plan.

(Govt. Exh. 9).

In a letter dated May 6, 1980, declining MSHA's proposed study, Penn Allegh reasserted its contention that the water pressure of 150 psi in its approved plans represent the shut-off pressure at the static condition measured at any part of the system and stated that the inspectors are measuring pressure under flow conditions (Govt. Exh. 10).

In a letter dated May 14, 1980, acknowledging receipt of the May 6 letter which had declined MSHA's offer to conduct the environmental dust-survey plan, Penn Allegh was informed that "[y]our current plans requiring 150 psi, measured under flow conditions at the shutoff valve of the continuous miner shall remain in effect" (Govt. Exh. 11).

On July 21, 1980, Penn Allegh forwarded an amended dust plan (Review No. 16) to MSHA for approval. A paragraph on Page 6(a) of this dust plan stated:

At least 75 per cent of the spray heads on the continuous miners shall always be maintained operative. The pumps supplying the water to the continuous miners shall be operated at least 150 psi pressure and the total pressure under flow condition shall be maintained at least 70 psi when measured just outby the shut off valve provided for the operator.

(Govt. Exh. 12).

Penn Allegh's forwarding letter, making no direct reference to the proposed change in water pressure, stated: "For your review and approval, attached are the 'Ventilation System and Methane and Dust Control Plan' and the updated mine map, in triplicate, showing: the extent of mining on June 30, 1980; the present ventilation system; and the areas of contemplated mining" (Govt. Exh. 13).

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A letter dated September 4, 1980, approved Penn Allegh's revised dust plan without reference to the change in water pressure. The last paragraph stated: "Revised ventilation system and methane and dust control plan shall be submitted to the District Manager for review by January 20, 1981" (Govt. Exh. 13).

By a letter dated August 11, 1980, Penn Allegh had forwarded a dust plan for the Allegheny No. 3 Portal Mine for approval by MSHA. This is for the No. 3 Mine, not the No. 2 Mine, the subject of this proceeding. In approving the plan, MSHA stated, in pertinent part, in a letter dated September 22, 1980:

Your revised ventilation system and methane and dust control plans as required by Section 75.316, 30 CFR 75, for the Allegheny #3 mine, I.D. No. 36 05691, (Review No. 8) are approved with the following stipulations and revisions as shown on the attached prints:

Page 6(a), Item 1. c. Water pressure is to be maintained at 150 psi when measured just outby the shutoff valve provided for the operator. * * * If we do not hear from you within 10 days from the date of this letter, it will be assumed you are in agreement.

(Govt. Exh. 14).

After MSHA discovered its mistake in inadvertently approving Review No. 15, it sent a letter dated October 2, 1980, to Penn Allegh, stating:

This is intended to clarify our position regarding the environmental dust control plan for the Allegheny #2 mine, I.D. No. 36 02581.

Reference is made to our letter of May 1, 1980, granting permission to reduce the water pressure to 70 psi as measured under flow conditions at the shutoff valves of the continuous miners only while an MSHA representative is collecting respirable dust samples to determine the adequacy of your revised plan.

Your reply dated May 6, 1980, indicated that you had decided to decline the proposed study. Consequently, you were notified by letter dated May 14, 1980, that a water pressure of 150 psi as measured under flow conditions at the shutoff valves of the continuous miners would remain in effect.

You are hereby notified that a water pressure of 150 psi as measured under flow conditions at the shutoff valves of the continuous miners shall remain in effect as part of your

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ventilation system and methane and dust control plans (Review No. 16).

If you wish to have your plan changed, please notify this office and appropriate action will be taken.

This correspondence, as well as the other letters between MSHA and Penn Allegh, was between Mr. Reisz and Mr. Huntley. The letter was addressed to Mr. Alfred Reisz, Chief Engineer, Penn Allegh Coal Co., Inc., R.D. #2, Box 238-A, Tarentum, Pennsylvania 15084. It was signed by Donald W. Huntley, District Manager--Coal Mine Safety and Health District 2 (Govt. Exh. 15).

DOCUMENTARY EVIDENCE (PENN ALLEGH)

In response to MSHA's repudiation of its inadvertent approval of Penn Allegh's dust plan (Review No. 16) containing amendments concerning the water pressure, Penn Allegh, in a letter dated October 7, 1980, stated:

We were dismayed to receive your letter dated October 2, 1980, purporting to clarify your position regarding our ventilation plan for the Allegheny No. 2 Mine. As we understand your letter (and MSHA's subsequent enforcement activities), you purport to rescind approval of paragraph 1 of Page 6(a) of Penn Allegh's approved Ventilation Plan. We are advised and believe you have no authority to do so. Penn Allegh contends your authority is limited to approving the plan or if you disapprove the plan, to state in detail the reasons for such disapproval including technical or regulatory reasons, and after giving us an opportunity to discuss your reasons, to allow us to adopt a plan acceptable to us.

Throughout our discussions of this matter, neither you nor others in MSHA have cited any provisions of the Mine Safety Act or Regulations which requires an operator to maintain a water pressure of 150 psi, as measured under flow conditions at the shutoff valves of the continuous miners. An internal memorandum has been alluded to by certain MSHA representatives but our requests for a copy have been refused.

Our position on the technical issues involved is outlined in my letter of May 6, 1980, to you. Our legal position is being asserted in Review Commission proceedings at Docket Nos. PENN 80-208-R and 80-209-R and in proceedings which are being filed tomorrow.

Despite the foregoing, we are willing to continue to discuss this matter with MSHA if you will set forth in writing and in detail the technical and/or legal basis for MSHA's position. These discussions, of course, would be without prejudice to positions advanced or rights asserted by either party in pending proceedings

before the Review Commission.

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In reference to the last paragraph of your letter, we do not wish to have our plan changed and our plan, which you approved on September 4, 1980, remains in effect.

(Exh. 0-1).

Penn Allegh had previously been issued citations for failure to comply with its dust plan for which it filed an application for review on April 21, 1980, stating in pertinent part:

PENN ALLEGH COAL CO., INC., the Petitioner above named, hereby respectfully requests a formal hearing in respect to Citations No. 837274, dated 4/16/80, and No. 0624481, dated 4/17/80, both citing violation of the ventilation system and Methane and Dust Control Plans, more particularly the part referring to the water pressure. One copy of each citation is attached. The Petitioner maintains that the Ventilation System and Methane and Dust Control Plans, more particularly the part referring to the water pressure, was complied to in both instances.

The Petitioner hereby respectfully requests that MSHA be restrained from arbitrarily, frivolously, and without notice to the Petitioner assign different meanings to the numbers found in the Petitioner's plans than meanings which were purported by the Petitioner.

The Petitioner hereby respectfully requests reimbursement from MSHA for all damages and expenses incurred by the Petitioner because of MSHA's indefensible, relentless and reckless efforts to cite the Petitioner for violations of the plans which, in fact, did not take place.

The April 16, 1980, citation noted:

Condition or practice: The ventilation system and methane and dust control plan was not being followed in east mains (010) section in that the water pressure when measured at the continuous mining machine measured only 75 pounds per square inch water gage. John Patterson was the section foreman.

Action to terminate: The water pressure was increased to 240 pounds per square inch water gage.

The April 17, 1980, citation noted:

Condition or practice: The approved ventilation system and methane and dust control plan dated March 4, 1980, is not being followed in that water pressure was measured with

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an Ashcroft gage and flow pressure was only 100 psi and static pressure 160 psi and the spray 45 psi on miner HH 265 serial number 7241 and 29 working sprays were operative out of 34 sprays located on the miner in 005, 1 right section.

(Exh. 0-2).

Operator's Exhibit 0-3 consisted of excerpts from a published report entitled "Measurement and Control of Respirable Dust in Mines." The part of this exhibit to which Penn Allegh alluded at the hearing concerned underground tests on a continuous miner performed to compare the dust suppression efficiency of two different models of spray nozzles. The relevance of these tests to the instant case was not established at the hearing.

Exhibit 0-4 was a schematic diagram showing, in general, the point in the water supply line at which the pressure was measured, the shut-off valve, the pressure regulator, the booster pump, and the nozzles.

The water pressure regulator valve on the miner was factory-set at 150 psi pressure (Exh. 0-5).

A letter dated July 23, 1980, acknowledged receipt of Penn Allegh's dust plan (Review 16) (Exh. 0-6).

A notice of compliance for the Allegheny No. 2 Mine dated August 18, 1980, noted a cumulative concentration of 10 samples to be 4.7 with a 12-milligram limit under the Interim Compliance Panel Permit quantity (Exh. 0-7).

A reminder notice of insufficient sample (intake air) dated September 11, 1980, noted a cumulative average concentration of 3.0 with a 12-milligram limit.

SUMMARY OF TESTIMONY

At the hearing, Petitioner called four witnesses--Robert Lee Davis, John Karp, John J. Savine, and Joseph J. Garcia. Respondent called two witnesses--Alfred Reisz and Peter Montali. The testimony of these witnesses is summarized in pertinent part as follows:

Robert Lee Davis

Mr. Davis is a coal mine technical specialist in charge of health for the bituminous region of Western Pennsylvania. He reviews health programs and plans submitted by operators and recommends approval.

Mr. Davis testified that it was MSHA policy to take water pressure readings for dust-suppression systems on continuous miners under flow conditions. He stated that it would be meaningless to take such measurements under static

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conditions. He also stated that the manual used by MSHA inspectors recommended that pressure readings be taken at the water spray, but that District 2 policy permitted the measurement to be taken anywhere under flow conditions. This District 2 policy was not written but passed on to inspectors verbally.

Mr. Davis testified that he was aware that Penn Allegh's plan called for a water pressure of 150 psi at least as early as March 1978.

Mr. Davis testified that most of the larger mines in District 2, approximately 20 percent of the total number of mines in the district, have requirements of water pressure in the 150-psi range. The remaining mines have, for the most part, pressures in the 50-100-psi range.

Mr. Davis also testified that MSHA requires that a study be made of a change in a plan, unless that change is an improvement. Upon request by an operator to revise a plan downward, such revision is permitted while a survey is taken. The survey takes 2 days, during which time respirable dust is collected and methane monitored.

Mr. Davis testified that he first became aware of the Penn Allegh position that the requirements in its plan for 150 psi water pressure was static rather than flow pressure when Mr. Reisz complained to him of the issuance of two citations (Govt. Exhs. 5 and 6) in April 1980. At that time, Davis orally offered to conduct a study to determine the adequacy of 70-psi flow pressure. He also drafted a letter containing the same offer for Mr. Huntley's signature. These offers were declined by Mr. Reisz.

Mr. Davis stated that he did not participate in the review of Review No. 16.

John Karp

Mr. Karp testified that he is a mining engineer for MSHA assigned to the health section. Among his responsibilities are the conducting of dust, noise and airborne contaminant surveys, and the review of plans and recommendation of their approval.

Mr. Karp testified that he examined the dust-control measures specified in Review No. 16 and recommended approval of the plan to Mr. Huntley through Alex O'Rourke, MSHA's supervisory mining engineer. In examining Review No. 16, he noted provisions as to the number of water sprays, water pressures, air quantities, and other control measures. He admitted that he was aware of the provision contained on Page 6(a), to the effect that a water pressure of 70 psi under flow conditions would be required by the plan. He stated that he approved the provision for a flow pressure of 70 psi because he observed MSHA's letter of May 1, 1980 (Govt. Exh. 9) in the file. In that letter, MSHA had offered to conduct a survey of the effectiveness of the 70-psi flow pressure. He assumed that the survey had been made. Standard procedure during a review of the plan includes

examination of prior reviews to spot changes. Mr. Karp testified that Penn Allegh made no mention in the cover letter to Review No. 16 of the change in its plan.

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Mr. Karp testified that he was first made aware of his mistake on October 2, 1980, by a phone call from the MSHA subdistrict office. (In later testimony, it was established that this phone call had been made by Joseph Garcia, a supervisory technical specialist at MSHA's Monroeville Office.)

On October 2, 1980, Mr. Karp had a telephone conversation with Mr. Reisz. During this conversation, he told Mr. Reisz that the reduction to 70 psi flow pressure could not be approved by MSHA without a survey of its effectiveness. Mr. Karp agreed with Mr. Reisz's observation that the measurement of flow pressure would be more meaningful if it was taken at the sprays. Mr. Karp also prepared the letter dated October 2, 1980, in which MSHA asserted that the approval of the flow pressure of 70 psi was revoked.

Regarding MSHA policy, Mr. Karp testified that (1) it had "always" been MSHA's policy to measure flow pressure and (2) that it was standard MSHA procedure to conduct a survey of the effectiveness of the reduction before approving a reduction in the water pressure called for under a plan.

John Savine

Mr. Savine is an MSHA inspector working out of the Monroeville Office. On October 2, 1980, in preparing for an inspection of the Allegheny No. 2 Mine, he observed the apparent change in Penn Allegh's plan requiring a water pressure of only 70 psi. He called the change to the attention of his supervisor, Joseph Garcia, who, in turn, called John Karp.

On October 6, 1980, Inspector Savine proceeded to the Allegheny No. 2 Mine, 005 section. He measured a water pressure of 80 psi under flow conditions on the continuous miner and issued Citation No. 843526. He took the measurement on the outby side of the valve located on the water line in the operator's compartment. The inspector set 2-1/2 hours as the time for abatement. He extended the period for abatement in the belief that some misunderstanding might have existed with regard to the water pressure provision of the plan.

Upon his arrival at the mine on the following morning, Inspector Savine was told by Ed Michaels, one of Penn Allegh's managers, that they would do nothing more about the water pressure. The inspector proceeded to section 005, found a water pressure of 110 psi under flow conditions and issued Order No. 843525.

Inspector Savine testified that his instructions had always been to measure water pressure under flow rather than static conditions, that he knew of no plan which called for measurement of static pressure.

The inspector noted that a coupling at the end of a hose failed during Contestant's abatement efforts, but that it had failed because it was not fastened tightly enough.

On rebuttal, the inspector testified that he had told Mr. Reisz that he was not personally aware of any other mine at which the water pressure

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was required to be 150 psi under flow conditions. He also explained his statement to Mr. Reisz to the effect that notification of the mistaken approval should have been given 2 weeks earlier. He assumed that an MSHA ventilation inspector had reviewed the major points of the plan during the period from September 8, 1980, through October 2, 1980.

Joseph J. Garcia

Joseph Garcia, Inspector Savine's supervisor, confirmed that the inspector approached him on October 2, 1980, and pointed out that Penn Allegh's plan had been changed. Mr. Garcia, in turn, contacted Mr. Karp.

Mr. Garcia stated that, as far as he knew and for as long as he could recollect, water pressure had been measured under flow conditions.

Alfred Reisz

Alfred Reisz is Penn Allegh's chief engineer. As such, he is responsible, among other things, for the formulation and submission to MSHA of Penn Allegh's ventilation and methane and dust-control plans.

Mr. Reisz testified that it was his understanding that the plan for the Allegheny No. 2 Mine called for the measurement of water pressure under static conditions. He testified that he became aware of MSHA's interpretation that the measurement be taken under flow conditions on April 16, 1980, when Penn Allegh received a citation for not having 150 psi under flow conditions. A second citation was issued to Penn Allegh on April 17, 1980, for the same reason.

Mr. Reisz met with Mr. Davis and Mr. Karp on April 18, 1980, to discuss the disputed provision of the plan. He testified that he stated within earshot of Mr. Karp that he would not permit a survey of the effectiveness of the lower water pressure because he disputed the soundness of MSHA's methods of testing; he would cooperate if MSHA had a "technically sound, statistically valid method of doing a study."

Mr. Reisz testified that he objected to MSHA's survey methods because the cause of the results unfavorable to Penn Allegh could not be identified. He stated he based his objection on his opinion that the dust-measuring devices were inaccurate and that the survey limited study to only three variables--water pressure, number of operating sprays and air quantity. He admitted that Penn Allegh had never submitted to an MSHA survey because of its objection to MSHA's survey techniques.

Mr. Reisz was responsible for the submission to MSHA of Review No. 16, including the change in the provision regarding required water pressure.

On October 2, 1980, Mr. Reisz received a phone call from Mr.

Karp regarding the provision of Review No. 16 relating to water pressure. Mr. Reisz testified that Mr. Karp told him that the requirement would be changed back

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to 150 psi flow pressure measured just outby the shut-off valve provided for the operator of the continuous miner. Mr. Reisz thereupon suggested that the measurement of pressure be taken at the water sprays and that an appropriate flow pressure at that point would be 40 psi.

Mr. Reisz testified that he was present on the 005 section on October 6, 1980, and that he spoke with Inspector Savine regarding the requirements of the plan. He stated that at that time he had yet to receive the letter dated October 2, 1980 (Govt. Exh. 15), containing notification that MSHA would enforce a pressure of 150 psi under flow conditions. Inspector Savine agreed to extend the time set for abatement because he said that he wanted to talk with his office for "clarification." Mr. Reisz later testified that, although the October 2, 1980, letter from MSHA had been stamped into his office on October 3, 1980, he had not seen it until October 6, 1980. Reisz continued operation of the continuous miner at 250-255-psi static pressure and 108-112-psi flow pressure. On October 7, 1980, the static pressure measured 160-170 psi and the flow pressure measured 108-112 psi. He attributed the differences in pressure on the two consecutive days to variations in the use of water by the second continuous miner and other sprays drawing from the same source of water.

Mr. Reisz testified that he had been told by Inspector Savine on October 7, 1980, that he (Savine) knew of no other operator required to maintain a 150-psi flow pressure and that at other mines where a 150-psi pressure is required, it was static rather than flow pressure.

Mr. Reisz testified that underground sumps provided the water at the Allegheny No. 2 Mine. The water for the continuous miner on the 005 section and for one other miner was drawn from one of these sumps.

Mr. Reisz explained the water spray system on the continuous miner, as represented in Operator's Exhibit No. 4. He testified that the water system was used in the machine's cooling system as well as for the dust-suppression system. The water passes first through the shut-off or ball valve. If the operator of the continuous miner were to shut off the supply of water to the machine, he would do so at the ball valve which is located in his compartment.

The water proceeds past the shut-off valve to a pressure regulator. The function of the pressure regulator is to protect the equipment from excessive pressure. The regulator, although adjustable, is factory-set to a pressure of 150 psi. The water is then routed so as to cool the pump motor and the cutter motors. Finally, the water passes through a booster pump which provides the correct pressure for operation of the sprays.

Mr. Reisz testified that the water pressure varies throughout this spray system under flow conditions and that to his knowledge, there is no direct relationship between the water

pressure under flow conditions at the shut-off valve and the pressure at the sprays.

Mr. Reisz stated that he placed the marginal notations on Page 6(a) of Review No. 15. By the notations "coal producing" and "cutting bottom for

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track," he had intended to locate the places where the continuous miners were to be used.

Peter Montali

Mr. Montali, a member of Penn Allegh's engineering department, was present when Inspector Savine issued Order No. 843525. When asked if he recalled Mr. Reisz's testimony to the effect that Inspector Savine stated at the time he issued the order that he, Mr. Savine, knew of no other mine in the district that was required to have a flow pressure of 150 psi, but that he knew that there were a couple that had a static pressure of 150 psi, Mr. Montali stated "I remember Mr. Savine stating that he did not know of any mine that required 150 psi flow pressure. That is the only thing that I remember that Mr. Savine said."

Method of Water Pressure Measurement

Penn Allegh asserts that the water pressure on its continuous miner was to be measured under static conditions (with the shut-off valve closed) and MSHA asserts that the pressure was to be measured under flow conditions (with the shut-off valve open).

MSHA has established that a water pressure reading of 150 psi to a closed valve would have little meaning since the static pressure could be maintained (as long as the valve remained closed) even with the volume of the available water supply inadequate to operate the spray nozzles. The record establishes that this might be due to inadequate size of the supply line, restrictions on the supply line, inadequate pump capacity, or too many spray nozzles in operation on other continuous miners or on the belt line operating from the supply line. With a severely restricted supply measuring 150 psi under static conditions, the pressure could be reduced sharply when the cut-off valve is opened and only a trickle might reach the spray nozzles.

It was the policy in MSHA District 2 to measure continuous miner water pressure under flow conditions (with the cut-off valve open) and the inspectors measured all of the continuous miners in the mines in that district under flow conditions. Penn Allegh's chief engineer, Mr. Alfred Reisz, was under the impression that on October 7, 1980, MSHA inspector John Savine had told him that there were several other mines in MSHA District 2 where static pressure, not flow pressure, had to be maintained and he so testified at the hearing. Mr. Savine, upon being recalled, testified that there were no mines in District 2 approved for measurement under static conditions and that he had never made and did not tell Mr. Reisz that measurements were made under static conditions. Mr. Peter Montali, employed in Penn Allegh's engineering department, was in the presence of Mr. Reisz and Inspector Savine on October 7, 1980, when they were discussing the methods of measuring water pressure in other mines. Upon being called on surrebuttal, he testified that on October 7, 1980, when the order of withdrawal was issued, he heard Mr. Savine say that he knew of no other mine with a

requirement of 150 psi flow pressure but he did not remember any statement about static pressure. Each of the witnesses

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for Petitioner testified that measurements of water pressure were taken under flow, rather than static, conditions.

Included in Review No. 15 approved by MSHA on March 4, 1980, there was a Page No. 6(a) which had the date January 12, 1977. Mr. Reisz testified that Page 6(a) went as far back as 1974. He had provided the information on a form which he had filled out at MSHA's request in 1974. The information provided in this form thereupon became part of Contestant's ventilation plan. He testified that the 150 figure he placed under the column headed "PSI" was meant to be 150 psi measured under static conditions although there was nothing in the plan to specifically show that a measurement of static pressure was intended.

Mr. Reisz made a marginal notation "coal producing" alongside four of the continuous miners (which he designated HH 265 Lee-Norse). MSHA contended at the hearing that this notation conclusively establishes that a pressure of 150 psi was required under flow conditions since it meant that 150 psi was to be maintained while producing coal, i.e., cutting coal with the continuous miner. This specific contention was rebutted by Mr. Reisz who testified that by the notation "coal producing" he meant to indicate that one group of miners was to be used at the face and another group of miners was to be used in other areas of the mine. Mr. Reisz had written the marginal notation "cutting bottom for tracks" alongside this second group of miners listed on Page 6(a). Nevertheless it has been established that in MSHA District 2 it was the policy that all plans were approved for flow pressure and that the inspectors in District 2 measured flow pressure when making their inspections.

For the four coal-producing miners listed in Page 6(a), Mr. Reisz entered the figures 150 psi, 40 gpm (gallons per minute), and 39 operating sprays. This could reasonably be construed to mean that the plan called for 150 pounds per square inch of water pressure at a flow rate of 40 gallons per minute with 39 sprays in operation.

The continuous miner on the 1 right section has a pressure regulator which was preset at the factory for 150 psi under flow conditions. That the 150-psi pressure quoted by the manufacturer in Operator's Exhibit 5 was a pressure under flow conditions follows because the pressure regulator is in by the water shut-off valve (Exh. 0-4). No water would reach the pressure regulator under static conditions with the shut-off valve closed even though the pressure reading taken out by the shut-off valve might be 150 psi. When the valve is opened, the water is flowing and the pressure regulator should be expected to reduce any supply of water pressure in excess of 150 psi to a pressure of 150 psi under flow conditions. The pressure regulator can be reset but mechanical operations and additional pressure gauges would be necessary to change the set pressure and determine the gauge pressure at that setting. This indicates that the factory setting of the reducing valve would produce a flow pressure of 150 psi measured at that point if water at sufficient pressure and volume was provided by the supply pump.

The record establishes that the pump supplying water to the continuous miners has in general been capable of producing pressure in excess of 150 psi

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and that in the past Penn Allegh has been able to comply with the requirement of 150 psi under flow conditions. In June 1978, MSHA inspector Jesse A. Bates found that "water pressure was 150 psi at the continuous mining machine and 150 psi at the sprays" (Govt. Exh. 1). In a technical inspection completed on September 11, 1979, MSHA inspector Erick Kenesky found water pressure at the continuous miner on the 1 right 005 section to be 150 psi flow and 240 static with a pressure of 140 psi at the spray. Pressures under flow conditions on the four continuous miners in the other sections were measured at the washdown hose to be 160 psi, 150 psi, 150 psi, and 180 psi.

Although the Allegheny No. 2 Mine had been cited for excessive concentrations of respirable dust in the past, there is no indication in the record of specific problems in maintaining water pressure until January 29, 1980, when a measurement of 120 pounds per square inch gauge was made on the 1 right (005) section and a citation was issued. On February 7, 1980, the water pressure was increased to 185 pounds per square inch gauge (Govt. Exh. 3). A citation was issued on April 17, 1980, when on that 1 right section the flow pressure was 100 psi, the static pressure was 160 psi and the pressure at the spray was 45 psi. The citation was terminated on the same day when the flow pressure was raised to 165 psi (Govt. Exh. 6(a)). A technical inspection completed on April 29, 1980, determined the water pressure in one section to be 155 psi but less than 150 psi in the other four sections (Govt. Exh. 8). This record therefore establishes that in the past it has not been impossible in general for Penn Allegh to comply with its plan calling for 150-psi flow pressure and that the 150-psi figure in the plan has always been considered by MSHA to mean that pressure measured under flow condition.

Before the time of Penn Allegh's refusal to take any further action to raise the flow pressure on October 7, 1980, in an apparent attempt to abate the violation, the pressure had been raised to some extent but not enough to comply with the requirements of the dust plan. Penn Allegh offered no explanation why it was unable to comply.

On October 6, when a measurement was made after the citation was issued, the pressure was 250 to 255-psi static pressure and 110 to 115-psi flow pressure. On October 7, the pressure had dropped to 160 to 170 psi and a flow pressure of 108 to 112 psi. The changes in pressures were attributed by Mr. Reisz to the operation of other machinery drawing upon the same water system.

Under the circumstances of this case, the 150-psi figure in the dust control plan is construed to mean 150 psi under flow conditions.

Amount of Flow Pressure Required

Mr. Reisz is the Penn Allegh official responsible for creating and submitting plans for approval by MSHA. The 150-psi figure was placed by him on Page 6(a) of Review No. 15 (approved

by MSHA on March 4, 1980). This is the page bearing the date January 12, 1977, which had been approved for several years as submitted on a form developed by MSHA. The dust plan is a continuing

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plan which remains in effect until changed. The Act prescribes a review of the plan every 6 months. Normally only the mine maps, which show continual change as mining progresses, are submitted for review unless required by MSHA, or there are amendments to other parts of the plan. This is to eliminate the need for copying and submitting bulky paper work which is unchanged. In the March 4, 1980, letter approving Review No. 15, MSHA stated: "Revised ventilation system and methane and dust control plans shall be submitted to the District Manager for review by July 20, 1980. For your next submittal, (Review No. 16), please submit the general information and face plans with the maps."

The form on which Page 6(a) had previously been submitted provided for the recording of the pertinent information in tabular form in a manner in which changes would be readily apparent. This procedure was not followed by Penn Allegh in submitting Review No. 16 in which there was a separate paragraph stating that a total pressure under flow condition shall be maintained at least 70 psi when measured just outby the shut-off valve provided for the operator. The letter from Penn Allegh forwarding Review No. 16 for approval on July 21, 1980, contained no explanation of the changes and indeed no reference at all to the change in water pressure on the continuous miner.

It should be noted that prior to the submission of Review No. 16 for approval, a number of significant events had transpired that year regarding water pressure on the continuous miner in the 005 section. On January 29, 1980, a citation was issued when the pressure was found to be 120 psi. On February 7, this citation was terminated after a pressure-relief valve had been replaced and the pressure increased to 185 psi. On March 4, Review No. 14 was approved. On April 16, a citation was issued for 75 psi and terminated when the pressure was increased to 240 psi. On April 17, a citation issued when the pressure was 100 psi, static pressure was 160 psi, and pressure at the spray was 45 psi. That citation was terminated on April 21 when 165 psi flow pressure was established. On April 18, Penn Allegh requested a modification to 70 psi flow. On April 21, Penn Allegh filed an application for review of the citation which had been issued on April 16 and 17. On April 29, a technical inspection was completed. On May 1, MSHA granted permission to reduce the water pressure to 70 psi flow for 1 day only while conducting a survey to determine the adequacy of a revised plan. On May 6, Penn Allegh declined the survey. On May 14, MSHA notified Penn Allegh that the 150-psi requirement under flow condition should remain in effect. Under these circumstances, either Penn Allegh knew that, without a survey, Review No. 16 calling for only 70 psi under flow condition would not knowingly be approved by MSHA, or Penn Allegh was proceeding under a misconception amounting to a material mistake of fact.

The dust plan was reviewed by Mr. John Karp, a mining engineer assigned to the health section of MSHA District 2. His unrefuted testimony was that it is standard practice to conduct a survey at the mine before approving a reduction in the requirements in a dust plan. In the file, he saw MSHA's letter

offering to conduct a survey and mistakenly assumed that a survey had in fact been conducted. Under this erroneous assumption, he recommended that

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the district manager approve the plan and the letter dated September 4, 1980, was accordingly prepared for the signature of Donald W. Huntley, the district manager. Mr. Karp testified that he would not expect that Mr. Huntley would go through each plan in the review process. Mr. Karp became aware of his mistake in recommending approval before a survey had been conducted when Mr. Joseph J. Garcia, supervisory coal mine technical superintendent at the Monroeville Subdistrict Office phoned on October 2, 1980, and asked why the plan had been approved without a survey. After the mistake was discussed, immediate steps were taken to rectify the error and advise Penn Allegh that 150-psi flow pressure was still required.

On August 11, 1980, Penn Allegh had forwarded for approval a dust plan for the Allegheny No. 3 Portal. This was after the date Review No. 16 for Mine No. 2 had been submitted, but before the date of the inadvertent approval of Review No. 16. On September 22 (a time after the date of inadvertent approval of Review No. 16, but before the date the mistake was discovered by MSHA) the dust plan for the Allegheny No. 3 Portal was approved subject to the following stipulation: "1. Page 6(a), Item 1. c. Water pressure is to be maintained at 150 psi when measured just outby the shutoff valve provided for the operator."

In the circumstances under which Review No. 16 was approved, it is clear that the inadvertent approval was due to a mistaken assumption of fact on the part of MSHA. It is undeniable that the mistake in approving the plan was made in good faith.

In a recent decision involving a civil penalty proceeding arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976 and Supp. I 1977), the Federal Mine Safety and Health Review Commission affirmed the decision of the administrative law judge who held that regulations adopted by the Department of Interior to implement the civil penalty program did not bind the Government to an assessment settlement agreement where such agreement was entered into because of a mistaken assumption of fact on the part of the department's assessment personnel. *Secretary of Labor v. Island Creek Coal Company* (Docket No. BARB 76-297-P, IBMA 77-27 (July 9, 1980)). That case was initiated as a result of a fatal accident that occurred at an underground coal mine. A mechanic employed at the mine was fatally injured when the boom of a loading machine fell on him.

The inspector failed to indicate on the face of the notice that it was being issued as a result of a fatality investigation. The regulations (citing 30 C.F.R. Part 100 (1975)) adopted by the Secretary to implement the civil penalty program required MESA's Office of Assessments to prepare and serve on the mine operator an initial order of assessment. Due to the omission on the face of the notice referred to above, the subject violation was assessed as a non-fatal infraction. By applying the point system provided in 30 C.F.R. 100.3(b) (1975), a penalty of \$102 was assessed. The penalty was further reduced to \$78 as a result of a settlement conference between a MESA assessment official and

Island Creek. During the conference, a formal assessment agreement was executed, in compliance with section 100.6, by the representatives of the parties.

Two weeks later, the Office of Assessments discovered that the notice of violation involved a fatality and determined that the assessment agreement was based on a mistaken assumption of fact on its part. On August 14, 1975, before Island Creek had tendered payment, MESA (MSHA's predecessor under the 1969 Act) wrote Island Creek a letter indicating the mistake and repudiated the agreement. Island Creek replied to MESA's letter stating that MESA was bound by the assessment agreement and could not unilaterally void the agreed penalty of \$78. Island Creek then tendered payment of the \$78, which amount was returned by MESA. MESA reassessed the violation on the theory that it contributed to the fatality and assessed a new penalty of \$5,000. Island Creek refused to pay the second assessment and requested a hearing.

Before the judge, Island Creek moved that the proceeding be dismissed with prejudice on the basis that it had previously made payment of an amount agreed upon by MESA in full satisfaction of civil penalty liability for the subject notice of violation. The judge denied the motion and the case proceeded to hearing. In a written decision issued on March 24, 1977, the judge held that a violation as charged occurred, but found that there was no negligence on the part of the mine operator. After a lengthy discussion of the criteria provided in section 109(a)(1) for the assessment of a penalty, the judge determined that a penalty of \$5,000 was appropriate.

An appeal on the contentions of Island Creek was that the judge erred in denying its motion to dismiss the proceeding. Island Creek argued that the record was devoid of any evidence which would support a finding that MESA entered into the agreement because of a good faith mistake. It further urged that MESA did not have a right to unilaterally void the assessment agreement and that the judge's decision nullifies the purpose of a key provision of the assessment regulations in section 100.6(d). Under that provision, failure of the mine operator to tender payment of the agreed amount within 10 days resulted in the agreed amount being entered as the final order of the Secretary. It was Island Creek's position that once the assessment agreement for \$78 was signed, MESA was precluded from further administrative action. The Commission in rejecting those arguments stated:

The record did not include testimony from the assessment official who signed the agreement regarding his state of mind during the negotiations. It did, however, provide substantial evidence that during the conference, this official was operating under a mistake of fact. Documents of record indicate that, in agreeing to a reduced assessment of \$78, he was unaware that the violation was considered by MESA to be the cause of the accident, in this case a fatality.

One of the six statutory criteria to be considered in assessing a civil penalty is "the gravity of the violation" (section 109(a)(1)). Island Creek's

criterion was obviously not considered by the MESA
assessment official in the context of the actual facts
of this case.

In the instant case, we have the unrefuted testimony of Mr. Karp regarding his state of mind in recommending approval of the plan to establish that this official was operating under a mistake of fact because he assumed that a survey had been made.

The Commission held that if Island Creek was also unaware of all facts material in assessing the civil penalty, the agreement of the parties was predicated upon a mutual mistake of fact, a firmly established basis for relief and avoidance of an agreement. (Citing 54 Am. Jr. 2d Mistake, Accident, or Surprise, 4 et seq. (1971); Peabody Coal Company, 7 IBMA 318, 32 (1977)).

Here Penn Allegh was unaware of all facts material in approving the plan just as Island Creek was unaware of all facts material in assessing the civil penalty. Although Penn Allegh should have anticipated under the circumstances that Review No. 16 would be disapproved, there is no evidence whatever to indicate that it was aware of the fact that the plan was approved because Mr. Karp had mistakenly assumed that a survey have been conducted.

Even if it had been established that Penn Allegh was aware of all material facts underlying the plan's approval and was also aware of MSHA's lack of knowledge, the plan reducing the water pressure on the continuous miner to 70 psi still would have been repudiated under the principles of Island Creek in which the Commission further stated:

[I]f the operator's representative was aware of all such material facts underlying this citation, and also aware of MESA's lack of such knowledge, he had an equitable obligation to so inform the MESA assessment official, or take the risk that the agreement herein could be timely avoided. In either case, the resulting document could be and under these facts was properly repudiated.

The principles enunciated by the Commission in Island Creek may be and clearly should be applied to this case in holding that Review No. 16 was void or voidable and had been repudiated. In Island Creek, the judge noted that the mistake and the repudiation of the agreement were called to the mine operator's attention before payment of the penalty. He concluded that the operator was not prejudiced and ordered the case to proceed to a full evidentiary hearing. The judge found, and the Commission agreed, that the regulations under Part 100 were designed to provide a mechanism by which an operator could settle penalties for alleged violations without the need for a hearing or a decision on the merits, but that these regulations were not intended to bind MESA to an assessment agreement which was entered into on the basis of a good faith mistake that became known to all parties prior to payment.

Likewise, the operator was not prejudiced in this case where the mistake by MSHA and the fact that 150-psi flow pressure must

be maintained were called to the attention of Penn Allegh before
an inspection was made. There is no

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evidence whatever that Penn Allegh changed its mining practices in any way or that it suffered harm in reliance on the erroneously approved plan.

MSHA inspector John J. Savine was assigned to make a respirable dust technical inspection at the Allegheny No. 2 Mine on October 3, 1980. He was familiar with the 150-psi requirement in the dust plan so he obtained a copy of the latest dust plan at the subdistrict office. He noticed the change to 70 psi. He asked Mr. Joseph J. Garcia, supervisory coal mine technical specialist at the Monroeville Subdistrict Office, about the change and after discussing the change, Mr. Garcia made a phone call to Mr. Karp in Pittsburgh. After Mr. Garcia read him the change, Mr. Karp said the pressure was not meant to be reduced to 70 psi and that the 150-psi requirement was supposed to stay in effect. Mr. Karp said that he would telephone Mr. Reisz and he would follow through with a letter. Mr. Savine also called and told Penn Allegh that the 70-psi flow pressure was not in effect and that it was to be 150 psi. The letter dated October 2, 1980, telling Penn Allegh that a flow pressure of 150 psi was required, prepared that day by Mr. Karp for Mr. Huntley's signature, was received by Penn Allegh on October 3, 1980.

After discussions between Mr. Savine and Mr. Garcia, it was decided that it would not be fair for the inspector to show up the very next day to enforce 150 psi, so the inspection on which Citation No. 843526 was issued was not started until the morning of October 6, 1980. Any additional time that might be required to adopt and submit a new plan was not raised as an issue. Mr. Reisz indeed testified that as long as he was chief engineer at Penn Allegh there would never be a dust survey of the type required by MSHA before the required pressure would be reduced.

Under these circumstances, the reduced requirement for only 70 psi had been repudiated, the requirement for 150 psi under flow condition was in effect and Penn Allegh should have maintained that pressure on its continuous miner.

Dust Survey

The focal point of this controversy between the parties to the proceeding seems to be the survey required by MSHA before it would reduce the minimum standards in a dust plan. In his testimony, Mr. Reisz stated that no survey was necessary because the 150-psi figure meant static pressure and that a change to 70 psi under flow condition was actually a more rigid requirement. This contention is not supported by the record which clearly shows that 150 psi under flow condition had previously been the requirement in the dust plan; therefore, a reduction to 70 psi would be a reduced standard. In his proposed plan (Review No. 16), Mr. Reisz proposed 70 psi flow measured outby the shut-off valve. In his testimony, he stated that 40 psi at the sprays would be acceptable. He was unable, however, to explain how he could demonstrate to MSHA that these were acceptable levels.

In his letter of May 5 declining the proposed survey, he

stated that the study proposed by MSHA was not sound technically or scientifically because

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the variables affecting the outcome were not professionally structured; MSHA had no sound method to evaluate the effects of the individual variables on the result; and, the result would not be statistically valid.

As one of the bases of his criticism, the letter stated that recent weight comparisons of simultaneous dust samples indicate that an individual dust sample by MSHA may be as much as three times greater than the average of all the others. There is little basis for this fear. Although as Mr. Reisz testified the sampler might be defective, turned upside down, or otherwise mishandled, some of the exhibits admitted at the hearing are reports of dust analyses tending to show quite uniform results even when taken on different days at the Allegheny No. 2 Mine. While it is possible that there is a nominal margin of error, the high readings usually indicate concentrations that are actually high and susceptible to correction. Penn Allegh in this case has offered analyses of samples of the type which Mr. Reisz criticizes as proof that the operator is now maintaining dust concentrations well below the prescribed level.

In proposing a survey, MSHA told Penn Allegh that if neither compliance nor noncompliance can be determined after the first day of sampling, it would be given the opportunity to suspend the survey and revise its proposed plan. Mr. Reisz in his testimony stated that 1 day would not be sufficient time and that sampling for several days would be necessary. It is true that in the normal sampling cycle the cumulative average for 10 different days is used to determine compliance, however, sampling under strictly supervised conditions for a lesser period would seem to have validity under test conditions. Penn Allegh is now able to maintain its respirable dust at less than half of the maximum allowable concentration as contended at the hearing. The use of more than one proposed sample under close supervision might eliminate some of the potential problems feared by Mr. Reisz. Close supervision should eliminate his suspicion that someone might "monkey around" with the sample.

In his letter declining a survey, Mr. Reisz stated that "[o]ur approved plans are not designed or meant to operate with all the variables simultaneously at their minimums, which is substantiated by the results of frequent inspections." If this is true, it is possible that the minimums in Penn Allegh's plans are set too low. The reluctance of operators to set the minimum standards in their plans at acceptable levels is understandable, however, the Act requires that they must adopt plans and it must be demonstrated that the minimums in the plan submitted for approval are acceptable.

Although the issue therein was the acceptable amount of ventilating air instead of the acceptable water pressure, a recent decision of Federal Mine Safety and Health Review Commission Judge James A. Laurenson is illustrative of the problems encountered in the instant case. *Sewell Coal Company v. Secretary of Labor*, Docket Nos. WEVA 80-264-R and WEVA 80-265-R (August 11, 1980).

Sewell abandoned its plan of May 1979, and switched to an all-exhaust system for dust control in the section. At the same time, it submitted to

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MSHA a proposed ventilation and dust-control plan (hereinafter proposed plan) which detailed the changes from the May 1979, plan.

MSHA gave verbal, tentative approval to the proposed plan. The inspector who was already at the mine, was instructed to conduct tests in the section to determine if the proposed plan adequately controlled dust and if it should be approved. To conduct the test, the inspector put dust samplers on miners with five different occupations. The samples were then sent to an MSHA laboratory to determine the dust concentration to which the men were exposed. The men were instructed to wear the samples for 2 to 5 days and the measured dust concentrations were averaged. A maximum concentration of 2.0 milligrams per cubic meter was permitted for a plan to be approved.

The inspector instructed Sewell that it could set its ventilation controls at any level it wished but he further indicated that the actual conditions during the test would be the minimum conditions which would be approved. Sewell chose not to change its ventilation. During the tests, the inspector measured the actual conditions present in the mine. The actual controls far exceeded the conditions in the proposed plan. The proposed plan required 18 operating water sprays at 90 pounds pressure on the continuous-mining machines; but during the test, there were 30 operating water sprays at 100 pounds pressure on the continuous-mining machines. The proposed plan required that an air velocity of 15 feet per minute be maintained in the main entry; during the test, there was an average air velocity of 60 feet per minute in the main entry. The proposed plan required an air volume of 3,000 cubic feet per minute at the end of the line curtain; but during the test, there was an average air volume of 4,000 cubic feet per minute behind the line curtain. Even with the controls set at these higher levels during the test, the results of the tests showed Sewell barely within the acceptable 2.0 milligrams per cubic meter level.

At the end of the inspection, the inspector told Sewell that the proposed plan would not be approved. He told Sewell to submit a new plan by February 8, 1980. On February 14, 1980, when the inspector returned to the mine, a new plan had not been submitted. The inspector thereupon issued a citation for a violation of 30 C.F.R. 75.316.

At that time, he set February 18, 1980, as the time by which the violation should be abated. On February 19, 1980, the inspector returned to the mine. Sewell had not submitted a new plan to abate the violation. The inspector thereupon issued a section 104(b) order of withdrawal. Immediately upon being served with the order of withdrawal, Sewell submitted a new proposed plan to the inspector. That plan mirrored the conditions present in the mine during the tests. The inspector thereupon terminated the order of withdrawal. The plan submitted on February 19, 1980, has been approved.

Sewell presented testimony that the proposed plan should

have been approved by MSHA, including testimony that in late January 1980, Sewell conducted its own respirable dust tests. During those tests, Sewell tried to stay as close as possible to 3,000 cubic feet per minute main entry air

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volume. According to Sewell's analysis, dust samples taken at that time were in compliance.

In this case, Mr. Reisz testified that water pressure on the continuous miner had little effect on dust concentrations and that measured ventilation was more effective. In Sewell, where the amount of air was the issue, the operator's witness testified that studies done with methane demonstrated that the volume of air could be lowered from 10,000 cubic feet per minute to 5,000 cubic feet per minute without an appreciable change in the methane concentration. He believed that that study would be applicable to respirable dust. He further stated that it is very difficult to maintain volume and velocity around air curtains. He stated that a plan requiring an air velocity of 60 feet per minute and an air volume of 4,000 feet per minute could be significantly reduced and still maintain a safe level of dust. On cross-examination, he stated that the minimum air velocity that would move dust would have to be empirically determined. He stated that the type of dust and the concentration of rock in the dust would be important in determining what velocity would be necessary.

In Sewell, the judge held that:

Normally when a proposed plan is submitted, MSHA will give the operator tentative written approval. Subsequent to such tentative approval, tests are performed to evaluate the efficacy of the proposed plan. Thereafter, that plan is either approved in writing or disapproved. Here tentative approval and the subsequent disapproval were given verbally.

Although regular procedures were not followed, Sewell was aware that the proposed plan was disapproved and it also had sufficient time to rework the proposed plan to meet MSHA's requirements. When the inspector issued the citation, Sewell had not adopted a dust-control plan which showed the equipment and quantity and velocity of air in the mine which had been approved by MSHA. Sewell, therefore, was in violation of the requirements of 30 C.F.R. 75.316.

In his decision in Sewell, the judge stated:

Another witness for Sewell gave a theoretical argument why air volume could be lowered without affecting dust concentration, but he could not state exactly to what extent the volume should be lowered. He conceded that the only way to arrive at the proper volume would be to test it empirically. Sewell failed to establish that its proposed plan would have been approved.

Here MSHA tested the conditions in the mine empirically. Sewell was given the opportunity to adjust its controls to correspond to the proposed plan for the test; it chose not to

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do so. The test results show that the conditions present during the test were barely adequate to control dust. Therefore, the average conditions during the test were considered to be the minimum acceptable conditions. MSHA did not err in requiring these conditions or in refusing to approve Sewell's proposed plan. (FOOTNOTE 4)

The procedures to be followed while collecting respirable dust samples to determine the adequacy of Penn Allegh's revised plan was stated simply and succinctly by MSHA as follows:

The survey will be conducted by MSHA inspection personnel from the Monroeville Subdistrict office. They have been instructed to conduct the survey with the quantity of air at the face, number of water sprays, and water pressure exceeding the parameters listed in your plan by not more than 10 percent.

Therefore in the case-at-hand, MSHA did not require Penn Allegh to set its minimum standards at precisely the levels used in the survey as Sewell was required to do. Here the requirement was less stringent in allowing the proposed survey to be conducted with the quantity of air at the face, number of waters sprays, and water pressure exceeding the parameters listed in the plan by not more than 10 percent. Mr. Reisz has testified that there are other factors affecting the concentration of respirable dust and some of these factors were discussed in Sewell. The instructions to the inspectors concerning the survey did not place limitations on those factors while performing the tests so Penn Allegh was not constrained thereby.

Mr. Reisz in his testimony has also charged that the proposed test is really an experiment disguised as a survey for which the operator should be compensated. In his letter declining the proposed survey, Mr. Reisz said that to "insure some sort of acceptable results of a study of the variables at their simultaneous minimums, we would be compelled by common sense to hold our production also at the minimum acceptable by MSHA, which we understand to be 60% of the average production." He explained his reluctance by saying that no "company should be expected or required to participate in a study where the effect of the variables on the result cannot be professionally evaluated and where the result is statistically invalid, when the cost of the study to the company is 40% decrease in its production." In his testimony, Mr. Reisz stated that there was also difficulty in determining what his average production was.

In its letter proposing a survey, MSHA did not require that production be held to 60 percent of the average production and the record does not

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reflect that there was any such requirement. To the contrary, the record reflects that the general rule is that production must be at least 60 percent of average production in order for respirable dust samples to be valid. Of course, the test parameters may be relaxed and factors affecting respirable dust may be maintained at a reasonable level acceptable to MSHA during the survey but common sense would suggest that the parameters for respirable dust control should be set at levels where the result would be adequate suppression of respirable dust during normal production in the mine.

Mr. Reisz's belief, as expressed in his testimony, that MSHA was requiring that during the survey all factors be at minimum levels prescribed by the plan or by the regulations is unfounded. Although, as he stated, the proposed survey might not have been a scientifically structured test or experiment with a broad statistical basis, it apparently gave the operator the benefit of any reasonable doubt that there might have been as to its validity. It is doubtful that a comprehensive series of scientifically structured tests of sufficient duration and scope to provide a broad established basis would be practicable each time a plan is amended by an operator.

Surveys of the type proposed by MSHA in the case-at-hand are routinely conducted in the course of its enforcement activities and evidently have not proved a serious obstacle to the approval of plans in which the standards are properly set. The criticism expressed by Contestant in declining the survey is unfounded; especially its statement that the "kind of study proposed by MSHA would not promote a better understanding of the subject but would have a tendency to obfuscate the issues, propagate superstitions and, therefore, it would not serve the health and safety of the miners."

Penn Allegh has introduced evidence to establish that its most recent dust sampling showed the average concentration of dust to be 0.47 milligrams of dust per cubic meter of air; a concentration well below the prescribed maximum of 1.2 milligrams of dust per cubic meter of air in its Allegheny No. 2 Mine. If these conditions remain true today, the operator should have little difficulty in adopting meaningful parameters in its dust plan and establishing under controlled conditions that it is able to maintain a concentration of 1.2 milligrams of dust per cubic meter.

After declining the survey, Penn Allegh stated that it would welcome a study by MSHA to promote the health and safety of the miners, provided that the study is professionally structured to yield statistically valid results reflecting the effects of changes in the variables, under a research grant to compensate for its loss of production. While this offer is commendable, the proposed study is not the kind of survey for which MSHA is calling as a prerequisite to reducing water pressure requirements on the continuous miner. This is not to say that a study such as that proposed by Contestant would not be useful. In Sewell, supra, where the amount of ventilation air was the issue, there

was expert testimony that the air could be appreciably reduced with little effect on respirable dust. In this case, where water pressure to the continuous miner is the issue, Mr. Reisz has testified that such water pressure has little effect on respirable dust concentrations and

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that ventilation air is more important. While a comprehensive technical study of the type proposed by Contestant might resolve the question as to which of the two factors is more important in the control of respirable dust, the resolution of that question is not necessary to resolve empirically the underlying problem in this case. All MSHA is asking is that the operator set minimums in its plan that would reduce the dust concentration to that required by the Act.

Citation No. 843526

Violation of 30 C.F.R. 75.316

Contestant has introduced evidence to establish that the No. 2 Mine has a good safety and health compliance record in the past and this has been acknowledged to some extent by MSHA inspectors at the mine. Nevertheless, the record establishes that there are now serious problems in maintaining the prescribed water pressure to a continuous-mining machine and there have been some problems with excessive respirable dust concentrations in the past. Even if the operator had a perfect record in keeping the concentration of respirable dust below the prescribed levels, the Act in dealing with dust requires more than compliance with a general performance standard. After prescribing means of determining the maximum respirable dust levels that would be required, the Act in section 303 sets forth specific requirements for some of the variable factors affecting the concentration of respirable dust. It prescribes in detail the quantity of ventilating air that must reach the working face and the specific requirement for line brattice to direct the air to the working face. Regulations promulgated by the Secretary elaborate upon these requirements, and section 303(a), cited supra, provides for further elaboration and the adoption of additional standards, suitable to the conditions and the mining system of the individual coal mine, to be set forth in a ventilation system and methane and dust-control plan. Review No. 15, adopted and approved under this section, established requirements for water on the continuous miner at 150 psi, 40 gallons per minute and 39 operating sprays. MSHA granted permission to reduce the water pressure for 1 day only for a proposed survey. When the survey was declined, MSHA informed Penn Allegh that the current plans requiring 150 psi measured under flow condition shall remain in effect.

Consonant with the findings in this decision, there was no ambiguity at that point in time. A pressure of 150 psi was clearly required under flow condition. The words in Review No. 16 stating that "the pumps supplying the water to the continuous miners shall be operated at least 150 psi pressure" introduced a new concept with apparently little meaning. This phrase failed to specify either the point at which pressure was to be measured or the condition under which it would be measured, i.e., flow or static. Previously, a requirement for 150-psi pressure under flow condition measured at a point outby the cut-off valve had been consistently applied in determining compliance with the plan. Nevertheless, the other phrase in Review No. 16 stating that the "pressure under flow conditions shall be maintained at

least 70 psi when measured just outby the shut-off valve provided for the operator" was clear and unequivocal. This is the relevant phrase in that sentence by

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which the operator sought to reduce the pressure under flow conditions from 150 psi to 70 psi.

As soon as MSHA discovered its mistake in approving Review No. 16, it voided the 70-psi provision by notifying Penn Allegh that a water pressure of 150 psi measured under flow condition shall remain in effect as part of Review No. 16. There was no ambiguity whatever as to the pressure that was required. It was clearly 150 psi under flow condition. The legal question as to whether, under the circumstances, MSHA could reimpose the requirement for 150 psi under flow condition after discovering the mistake is an entirely different issue which is answered in the affirmative.

MSHA waited until 4 days after voiding the erroneously approved 70 psi-provision and reimposing the 150-psi provision before conducting the inspection on which the citation was issued. At the inspection, inspector John Savine measured a pressure under flow condition of only 80 psi which was clearly a failure of Penn Allegh to comply with its dust plan in violation of 30 C.F.R. 75.316 as MSHA has alleged.(FOOTNOTE 5)

In contending that 80 psi on its continuous miner was not a violation, Penn Allegh relies on a decision by Federal Mine Safety and Health Review Commission Judge John Cook in Secretary of Labor v. Penn Allegh Coal Company, Inc., Docket No. PITT 78-390-P (February 27, 1979). On the issue of ambiguity, that case (hereinafter PITT 78-390-P) is readily distinguishable from the present Penn Allegh case where there is no ambiguity whatever as to the pressure that was required, i.e., 150 psi under flow condition. The citation in PITT 78-390-P alleged a violation of the roof-control plan because temporary roof supports designated D, E, F, and G were not installed in the Allegheny No. 3 Mine. Drawing No. 2, included as part of that plan, stated that temporary supports D, E, F, and G shall be installed prior to installing roof bolts. On Page 94, that plan approved a provision that when resin-grouted rods cannot be installed immediately, the pertinent exposed roof area shall be supported by installing temporary supports on not more than 5-foot centers. In holding that there was no violation, in this instance where resin-grouted rods were installed, the decision in PITT 78-390-P stated:

Needless to say, the roof control plan is totally ambiguous as to the issue raised by the notice of violation. It appears that this plan has grown by stages and that attempts have been made to tie it together as it progressed through each stage. It seems almost incredible that a plan

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worked out by action of both MSHA and the operator could have resulted in such ambiguity. However, one point is clear, the documents resulted in absolute ambiguity on the points which are the crux of this case. It is the duty of MSHA to immediately make an effort to clarify the plan so that no question exists in the future as to what is required for the safety of the miners.

Under the circumstances that exist here, there is no way that a finding can be made that the plan requires the action which the inspector set forth in the notice as constituting a violation of law. [Emphasis in original.]

By the time the citation was issued in the instant Penn Allegh case, there remained no ambiguity whatever in what pressure was required. In the letter revoking the reduced requirement for only 70 psi, Penn Allegh was clearly notified that a water pressure of 150 psi, as measured under flow condition, shall remain in effect as part of Review No. 16. Previously, it had been forcefully and clearly brought to Penn Allegh's attention that Review No. 15 required 150 psi under flow condition. Two citations had been issued and Penn Allegh was repeatedly told both orally and in writing that 150 psi under flow conditions were required and that its requirement would not be reduced until the survey proposed by MSHA was conducted.

By its course of action after the two previous citations (which are not in issue in this proceeding) were issued, MSHA has fulfilled its duty as outlined by Judge Cook in PITT 78-390-P when he stated that it was the duty of MSHA to immediately make an effort to clarify the plan so that no question exists in the future as to what is required for the safety of the miners.

Citation No. 843526 was properly issued.

Order of Withdrawal

Section 104(b) of the Act requires that an inspector shall issue an order under that subsection when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. As noted above, mine management did not abate the violation within the time set by the inspector. The test as to whether a 104(b) order was properly issued was enunciated by the Board of Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). (FOOTNOTE 6) It was stated therein that "the

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inspector's determination to issue a section 104(b) order must be based on "facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed.'" The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

The citation was issued by inspector John Savine at 10 a.m. on October 6, 1980, after measuring only 80 psi water pressure on the continuous miner. The inspector gave the operator until 12:30 p.m. (2-1/2 hours) to abate the violation, which he thought was a reasonable time to set the pump pressure in the line. The inspector was told by the acting section foreman that there was a pump in the water line and that they were going to go back and make some changes on the pump.

Before the 2-1/2 hours had expired, Mr. Reisz arrived on the section and he told the inspector, who had remained on the scene, that he had been in contact with John Karp and that there was some misunderstanding or some discrepancy about the plan. The inspector decided at that time that he would extend the citation to midnight that night to "give them a chance to iron out these problems with the plan, and also to continue working on the water pressure problem, if that's what they were going to do."

After issuing the extension, the inspector left the mine and went back to the office. He returned to the mine the morning of October 7. When he arrived at the mine that morning, the manager of mines for Penn Allegh Coal Company told him that they "weren't going to do anything further with the water pressure, whatever pressure he had found yesterday, would be the pressure that he would find today, and that they weren't going to do anything more about it."

In a discussion with the manager of mines about issuing a withdrawal order, the inspector told him that "if the water pressure didn't come up to the specs in the plan, the 100 psi flow pressure, then he would have to issue what is called a B order, for short." The response was "You can go

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ahead and issue it right here, if you want to, you don't have to go underground."

The inspector had to check for himself so he went underground and found that after the changes and adjustments that had been made, the pressure was still only 110 psi under flow condition.

The order of withdrawal was issued at 8:45 a.m. on October 7, 1980. Mr. Reisz, the chief engineer, was on the section at the time and there had been some discussion between him and the inspector. When the inspector issued the order, the chief engineer told him that "they weren't going to shut the section down, just go ahead and issue the paper that he had to issue, but they weren't shutting the section down, and they weren't going to do anything more to correct the situation."

Additional time to abate the violation was not requested by the operator. The lengths of abatement time fixed in the citation and in the modification extending the time for abatement were reasonable. Moreover, the operator informed the inspector that no further abatement efforts would be made.

The order of withdrawal was properly issued.

ORDER

Citation No. 843526 and Order of Withdrawal No. 843525 are AFFIRMED.

The contests of Citation No. 843526 and Order of Withdrawal No. 843525 are DISMISSED.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE_ONE

1 Section 105(d) reads as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and

thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

~FOOTNOTE_TWO

2 Sections 104(a) and 104(b) of the Act read as follows:

"(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

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

~FOOTNOTE_THREE

3 Exhibit O-4, a schematic diagram of the water spray system shows a valve bearing the caption "flush valve" located outby the cut-off valve and outby the point marked "X" on that exhibit as the place where measurements were taken. The valve referred to by the witness as a cut-off valve bears the caption "ball valve" on Exhibit O-4.

~FOOTNOTE_FOUR

4 The judge in Sewell also stated that:

"The fact that Sewell formerly had an approved plan which had not been disapproved in writing is not a defense to this violation. That plan was abandoned by Sewell."

~FOOTNOTE_FIVE

5 Section 75.316 provides, for the most part, only for the

adoption by the mine operator of an approved ventilation system and methane and dust-control plan. It has been held, however, to require compliance with this plan as well. Violations of section 75.316 have been found for failure to comply with ventilation plans. Zeigler Coal Company, 4 IBMA 30 (January 28, 1975), aff'd., 536 F.2d 398 (D.C. Cir. 1976).

~FOOTNOTE_SIX

6 The Board was addressing section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970), which reads as follows:

"Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative finds that the violation has not been totally abated, and he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

This section of the 1969 Act and section 104(b) of the 1977 Act are substantially similar with respect to the requirements each imposes on an inspector confronted with an operator's failure to abate a violation within the time specified.