

CCASE:
SOL (MSHA) V. HERB COAL
DDATE:
19801120
TTEXT:

from interfering with, hindering, or delaying the Secretary, or his authorized representatives in carrying out the provisions of the Federal Mine Safety and Health Act of 1977 * * *.

In addition, the order denied Respondent's motion for a stay pending appeal. Accordingly, on September 7, 1979, Respondent's request for a stay was denied.

On March 7, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on May 29, 1980, in Harrisburg, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating. Respondent made an oral motion to dismiss at the close of Petitioner's case-in-chief. The motion was denied.

After the presentation of the evidence, a schedule for the submission of post-trial briefs was agreed upon. Petitioner and Respondent filed briefs on July 17, 1980, and August 1, 1980, respectively. Neither party filed a reply brief.

II. Violation Charged

Citation No.	Date	Section
225011	9/21/78	103(a)

III. Witnesses and Exhibits

A. Witnesses

Petitioner called as its witness Federal mine inspector Albert F. Zegley.

Respondent called as its witness Dale Herb, its proprietor.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a copy of an order entered in Marshall v. Herb Coal Co., Civil Action No. 79-313 (E.D. Pa., filed July 18, 1979), granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment.

M-2 is a copy of the judgment order in Marshall v. Herb Coal Co., No. 79-2152 (3rd Cir., filed February 22, 1980).

M-3 is a copy of 104(a) Citation No. 225011, issued on September 21, 1978, citing Respondent for a violation of section 103(a) of the 1977 Mine Act.

M-4 is a copy of 104(b) Order No. 225012, issued to Respondent for its failure to abate M-3.

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M-5 is a copy of a controller information report prepared by the Directorate of Assessments containing information as to Respondent's size.

M-6 is a computer printout prepared by the Directorate of Assessments listing Respondent's history of previous violations for the time period beginning September 29, 1976, and ending September 28, 1978.

M-7 is a copy of a memorandum dated April 28, 1980.

M-8 is a copy of a memorandum dated August 6, 1979.

2. Respondent introduced the following exhibit in evidence:

R-1 is a copy of Dale Herb's 1978 Federal income tax return.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of section 103(a) of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Herb Coal Company operates the No. 7 Drift Mine under lease from the State of Pennsylvania, Schuylkill County (Tr. 7).

2. Herb Coal Company and its No. 7 Drift Mine are subject to the jurisdiction of the 1977 Mine Act (Tr. 7).

3. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding (Tr. 7).

B. Occurrence of Violation

Federal mine inspector Albert F. Zegley arrived at Respondent's No. 7 Drift Mine at approximately 8:45 a.m. on September 21, 1978, to conduct a regular health and safety inspection of the mine (Tr. 13-14). (FOOTNOTE 1) Inspector

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Zegley apprised Mr. Dale Herb, Respondent's proprietor, as to the purpose of his visit. Mr. Herb thereupon inquired as to whether Inspector Zegley had a search warrant, and apprised the inspector that, absent a search warrant, he would be denied entry to the mine. Entry was denied on this basis (Tr. 14-15, 57).

Accordingly, at approximately 9:00 a.m., Inspector Zegley issued Citation No. 225011 citing Respondent for a violation of section 103(a) of the 1977 Mine Act. The citation states that "[o]n [September 21, 1978] Dale Herb, owner and mine foreman, refused to allow Albert F. Zegley, an authorized representative of the Secretary, entry into the No. 7 Drift Mine for the purpose of conducting an inspection of the mine pursuant to section 103(a) of the Act. Mr. Herb stated that the Federal inspector could not enter his mine to conduct any inspection without a search warrant. Mr. Herb was advised that a search warrant was not necessary" (Exh. M-3).

Section 103(a) of the 1977 Mine Act provides, in part, that: "For the purpose of making any inspection or investigation under this Act, the Secretary, * * * with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary * * *, shall have a right of entry to, upon, or through any coal or other mine."

Federal courts addressing the issue have ruled that a search warrant is not required in order to gain entry to a mine for the purpose of conducting health and safety inspections pursuant to the 1977 Mine Act. See *Marshall v. Sink*, 614 F.2d 37 (4th Cir. 1980); *Marshall v. The Texoline Company*, 612 F.2d 935 (5th Cir. 1980); *Marshall v. Nolichuckey Sand Company*, 606 F.2d 693 (6th Cir. 1979), cert. denied, 100 S. Ct. 1835 (April 21, 1980); *Marshall v. Stoudt's Ferry Preparation Company*, 602 F.2d 589 (3rd Cir. 1979), cert. denied, 100 S. Ct. 665 (January 7, 1980); *Marshall v. Cedar Lake Sand & Gravel Company, Inc.*, 480 F. Supp. 171 (E.D. Wis. 1979); *Marshall v. Donofrio*, 465 F. Supp. 838 (E.D. Pa. 1978), aff'd, 605 F.2d 1194 (3rd Cir. 1979), cert. denied, 100 S. Ct. 1067 (February 19, 1980). (FOOTNOTE 2) In fact, Respondent and its "agents, servants, representatives and all persons in active concert therewith" have been permanently enjoined "from denying authorized representatives of the Secretary of Labor entry to, upon, or through" its mine; "from refusing to permit inspection of said mine; from interfering with, hindering, or delaying the Secretary, or his authorized representatives in carrying out the provisions of" the 1977 Mine Act. *Marshall v. Herb Coal Company*, Civil Action No. 79-313 (E.D. Pa., filed July 18, 1979), aff'd., No. 79-2152 (3rd Cir., filed February 22, 1980).

There is no dispute as to the fact that Inspector Zegley was denied entry to Respondent's No. 7 Drift Mine on September 21, 1978, for the purpose of conducting a health and safety inspection pursuant to the 1977 Mine Act. Accordingly, it is found that the denial of entry, as set forth in Citation No. 225011, occurred, and that such denial of entry was a violation of section 103(a) of the 1977 Mine Act.

C. Negligence of the Operator

In *Marshall v. Donofrio*, supra, the Secretary of Labor sought to enjoin the defendants from denying his authorized agents access to their coal mine for the purpose of conducting inspections pursuant to the 1977 Mine Act. The mine involved in the Donofrio case was an anthracite mine located in Schuylkill County, Pennsylvania. The Court addressed two issues in determining whether to grant the Secretary of Labor injunctive relief: First, whether the statute covers mines that are totally owned and operated by the same persons, i.e., those mines where the only persons working therein are the owners themselves; and second, whether warrantless inspections conducted pursuant to section 103(a) of the 1977 Mine Act run afoul of the United States Supreme Court's rationale in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), or the restraints imposed on the Federal Government by the Fourth Amendment to the United States Constitution. The United States District Court for the Eastern District of Pennsylvania answered the first question in the affirmative, and answered the second question in the negative in an opinion issued on November 16, 1978.

The District Court opinion reveals that on September 1, 1978, a hearing was conducted on the Secretary of Labor's motion for a preliminary injunction, with all parties represented, at which time the parties argued the legal issues. Following the hearing, the Court determined that it would be inappropriate to grant preliminary injunctive relief. However, the parties were able to stipulate to many of the facts at the hearing and, in view of this, the parties were asked either to stipulate that the hearing be deemed a final hearing on a permanent injunction, or to file cross-motions for summary judgment. The parties agreed to follow the latter course. No hearing was held on the motions for summary judgment because no new contentions were raised by the parties which were not raised when the motion for a preliminary injunction was argued.

The foregoing specifics of the Donofrio case are of significance to the instant case only insofar as they provide a background to study Mr. Herb's state of mind on September 21, 1978, when he denied Inspector Zegley entry to the mine. Mr. Herb, the proprietor of a small anthracite mine (FOOTNOTE 3) in Schuylkill County, Pennsylvania, attended the September 1, 1978, hearing in

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the Donofrio case. He testified that he recalled hearing the oral argument on whether search warrants were required to conduct inspections, and recalled that Mr. Donofrio's position was that warrants were required (Tr. 59). He also recalled that the U.S. District Judge had denied the Secretary of Labor's motion for a preliminary injunction (Tr. 58), and knew, as of September 21, 1978, that no decision had been issued in the Donofrio case (Tr. 58).

Additionally, Mr. Herb's testimony makes reference to an organization amongst miners in the Pottsville, Pennsylvania, area known as the Independent Miners and Associates, an organization whose membership consists of owner-operators of large and small mines, mostly anthracite (Tr. 58, 60). According to Mr. Herb, during the summer and early fall of 1978, discussions were held amongst the owner-operators as to the need for search warrants. He testified that "we" received a memorandum in the mail in the form of a letter stating that it might be advantageous to ask the mine inspector for a search warrant (Tr. 58). Mr. Herb's testimony does not identify the drafters of this memorandum, and he did not know precisely why its drafters reached the conclusion stated therein. But it appears from his testimony that he believed the Donofrio case was somehow involved (Tr. 58-59).

When Mr. Herb stated to the inspector that he would have to produce a search warrant prior to being granted entry to the mine, the inspector produced and read from a two page memorandum addressing the Barlow's decision, and attempted to persuade Mr. Herb that, under the Barlow's decision, a search warrant was not required for an inspection conducted by the Mine Safety and Health Administration (Tr. 14, 22-23). Mr. Herb again stated that without a search warrant, the inspector would not be permitted to enter the mine (Tr. 14).

The foregoing facts and circumstances indicate that Mr. Herb's decision was based upon a bona fide uncertainty as to whether Inspector Zegley was authorized under the law to conduct an inspection of the No. 7 Drift Mine without a search warrant. The fact that the inspector attempted to persuade Mr. Herb that the Barlow's decision did not require a warrant for a mine safety and health inspection is not persuasive proof that the denial of entry was accompanied by a culpable state of mind. It must be remembered that Mr. Herb had heard a Federal Judge deny the Secretary of Labor's motion for a preliminary injunction in the Donofrio case, and that Mr. Herb knew that no final decision had been entered in that case.

Accordingly, it is found that Petitioner has failed to establish operator negligence by a preponderance of the evidence. (FOOTNOTE 4)

D. Gravity of the Violation

The inspector was unable to provide precise testimony as relates to the gravity of the specific denial of entry at issue in this case because, not having gained access to the mine, he did not know what conditions existed there (Tr. 17).

I find that the denial of entry was a serious violation of the 1977 Mine Act. One of the principal purposes of inspections conducted pursuant to the provisions of the 1977 Mine Act is to detect violations of the mandatory health and safety standards and order their abatement so as to remove the associated hazards from the miners' work environment, and to determine whether an imminent danger exists. Absent entry to the mine, these salutary and Congressionally mandated objectives cannot be achieved.

Accordingly, it is found that the violation was serious.

E. Good Faith in Attempting Rapid Abatement

Inspector Zegley testified that Mr. Herb and another individual came out of the mine at approximately 9:40 a.m. on September 21, 1978, in order to obtain some timber. The inspector asked Mr. Herb whether he would permit entry into the mine, and Mr. Herb restated his position that entry would be denied in the absence of a search warrant (Tr. 15). Accordingly, at approximately 9:45 a.m., Inspector Zegley issued Order No. 255012 pursuant to section 104(b) of the 1977 Mine Act based upon Respondent's failure to abate the violation cited in Citation No. 225011. The order of withdrawal states that "Dale Herb, owner and mine foreman, continued to deny Albert Zegley, an authorized representative of the Secretary, the right of entry into the No. 7 Drift Mine for the purpose of conducting an inspection of the mine in accordance with the requirements of section 103(a) of the [1977 Mine Act], on [September 21, 1978], after the expiration of the reasonable time allowed for Mr. Herb to comply" (Exh. M-4). The inspector's testimony reveals that a brief conversation ensued following which Mr. Herb turned to his fellow worker and stated, "Well, I guess we are done for the day" (Tr. 15).

It appears that the above-mentioned proceeding in the United States District Court for the Eastern District of Pennsylvania was initiated

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against Respondent shortly after the September 21, 1978, denial of entry. The inspector testified that he returned to the No. 7 Drift Mine on a social visit after September 21, 1978, to inquire as to the health of the hoisting engineer's son who had been injured in a motorcycle accident. At that time, Mr. Herb apprised the inspector that he did not intend to work the mine until the litigation had been concluded (Tr. 50-52). However, the testimony of Mr. Herb points to only one 3-month period, from July through September of 1979, during which mining was not conducted. Additionally, Mr. Herb testified that mining was conducted during the winter of 1979-1980, and that mining was being conducted as of the date of the hearing (Tr. 79).

On July 18, 1979, the District Court entered the above-mentioned injunction, and denied the defendant's motion for a stay pending appeal (Exh. M-1). On July 24, 1979, two Federal mine inspectors visited the No. 7 Drift Mine. The results of that visit are set forth in a memorandum dated August 6, 1979, from Federal mine inspector Charles C. Klinger to John B. Shutack, District Manager for Coal Mine Safety and Health District 1. The memorandum states as follows:

On Tuesday, July 24, 1979, James R. Laird, coal mine inspection supervisor, and the writer, Charles C. Klinger, coal mine inspector, went to the subject mine to make a regular Safety and Health inspection following information provided by Attorney Barbara Kaufmann on July 23, 1979, concerning a Federal Court Order enjoining said mine operator from denying entry to the mine to authorized representatives of the Secretary. Dale Herb, owner and operator of the mine, was on the surface at the mine when we arrived there at about 9 a.m. We advised Mr. Herb of our reason for being there. Mr. Herb replied that he was aware of the court ruling and then he informed us that he was not working the mine because he did not have a hoisting engineer and that he was there only to pump water from the mine. He also stated that if we wanted to go into the mine to conduct any inspection we could do so because he did not intend to be in contempt; however, inasmuch as there was no hoisting engineer available and the mine was not working we could not make the inspection. Mr. Herb also stated that he did not plan to work the mine until all pending litigation with other small operators was resolved; however, he also said that if he changed his mind and decided to start working again he would telephone the Schuylkill Haven office before doing so. We departed the mine property about 10:30 a.m.

(Exh. M-8).

Inspector Zegley testified that the actions of Mr. Herb, as set forth in the August 6, 1979, memorandum, did not constitute a denial of entry to the mine (Tr. 39).

On February 22, 1980, the United States Court of Appeals for the Third Circuit affirmed the judgment entered against Respondent by the District Court (Exh. M-2). On April 28, 1980, Federal mine inspectors Michael C. Scheib and Charles C. Klinger attempted to inspect the No. 7 Drift Mine, but were denied entry by Mrs. Dorothy Herb, the wife of Dale Herb. The visit is described in a memorandum dated April 28, 1980, from the inspectors to John B. Shutack. The memorandum states as follows:

On Monday April 28, 1980, as a result of Court Order, Civil Action No. 79-313, we, the writers, arrived at the subject mine about 9:30 a.m. to conduct an inspection of the mine. Upon arrival, Dorothy Herb approached the vehicle and before we had an opportunity to get out she yelled, "Don't bother getting out; get the hell out of here." Mr. Scheib informed her that we had a court order to conduct an inspection. Attempting to hand her a copy, she said, "I don't want that damn paper; take it and get the hell out of here." Scheib then stated, "We are required to give you a copy of the court order." At this time Scheib placed a copy of the court order on the ground. She then replied (yelling), "This is our property; don't let that damn paper lay there; if you don't take the damn paper, I'll shove it under your door." (Meaning at Scheib's residence.) She also asked, "Do you have your tape recorder turned on?" Scheib answered, "We have no need for a recorder." She then replied, "Well, I have mine, and I also have a witness." However, we did not observe any other person in the immediate area. She again stated (yelling), "Now get the hell out of here and take your damn paper with you." At this time we departed from the mine property, leaving the court order lay on the ground.

Entry to this mine has been denied to MSHA personnel since September 21, 1978.

(Exh. M-7).(FOOTNOTE 5)

The evidence presented reveals that Respondent was actively litigating the warrantless search issue in the Federal courts subsequent to September 21, 1978. July 18, 1979, is deemed the significant date insofar as those proceedings affect the issue of good faith in the instant case because, on that date, the United States District Court for the Eastern District of Pennsylvania issued its injunction and denied the motion for a stay pending appeal. On February 22, 1980, the United States Court of Appeals for the Third Circuit affirmed the judgment. Accordingly, as of July 18, 1979, Respondent was faced with a Federal Court order requiring it to permit warrantless inspections of its mine.

I do not consider that the actions of the Respondent as relates to the violation at issue in this case constitute a lack of good faith in attempting abatement of the violation; since the Respondent did, as soon as the injunction was issued by the Court, offer to permit the inspectors to carry out an inspection. Until the injunction was issued, the Respondent apparently had a good faith belief that he had a right to object to a warrantless inspection. In this regard, it should be noted that the observation set forth in the last sentence of Exhibit M-7 is in error because the events of July 24, 1979, as set forth in Exhibit M-8, did not constitute a denial of entry to the mine.

The events which occurred in April of 1980, at the time that Mrs. Herb refused to permit an inspection should actually be treated as an event separate from the violation charged in this case. In the event MSHA would desire to take action as to that April 1980, incident, it could issue a separate citation.

It should be kept in mind that the Respondent's proprietor, Mr. Herb, did state during the hearing in this case that he would now admit the inspectors if they wanted to carry out an inspection and that he actually invited certain MSHA officials to visit his mine in March of 1980 (Tr. 76-79).

F. History of Previous Violations

Respondent has no history of previous violations for which assessments have been paid between September 29, 1976, and September 21, 1978 (Exh. M-6). Additionally, no evidence was presented establishing a history of previous violations for which assessments have been paid prior to September 29, 1976. Accordingly, it is found that Respondent has no history of previous violations cognizable in this proceeding. Peggs Run Coal Company, Inc., 5 IBMA 144, 148-150, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975).

G. Size of the Operator's Business

The evidence submitted by Petitioner reveals that Respondent operates one mine. Respondent produced 480 tons of coal in 1977, 1,688 tons of coal in 1978, and zero tons of coal in 1979 (Exh. M-5). Accordingly, it is found that Respondent is an extremely small operator.

H. Effect of a Civil Penalty on Respondent's Ability to Continue in Business

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

The Office of Assessments proposed a civil penalty in the amount of \$800 for the violation. Respondent contends that a civil penalty assessment will affect its ability to remain in business (Tr. 64-65; Respondent's Post-trial Brief, pp. 2, 4).

The best available evidence indicates that Respondent is a sole proprietorship owned by Dale Herb. Respondent placed in evidence a copy of Mr. Herb's 1978 Federal income tax return (Exh. R-1), and Mr. Herb's testimony reveals that he had no occupation other than mining during the 1978 tax year. The tax return reveals that Respondent's gross sales for 1978 amounted to \$48,756.68. Total deductions in the amount of \$45,202.66 were claimed, yielding a net profit in the amount of \$3,554.02. Accordingly, Mr. Herb's total income for 1978, as reflected on the tax return, was \$3,554.02.

However, it is significant to note that Mr. Herb was in the process of purchasing a home of undisclosed value as of the date of the hearing, but that he was not purchasing a home during 1978 (Tr. 63-64). It appears that he owned more than one automobile in 1978, and, to the best of his recollection, was paying on them in 1978 (Tr. 65). The record does not disclose the makes, models or years of these automobiles, or whether they were purchased new or used. He further testified that his household consists of six members, i.e., Mr. and Mrs. Herb and four others (Tr. 65). There is no indication, however, as to how many, if any, of the four are dependent upon Mr. Herb for financial support.

The fact that Mr. Herb was purchasing a home in 1980, but not in 1978, strongly implies that his financial condition improved after 1978. Accordingly, it must be concluded that the 1978 tax return does not accurately reflect Mr. Herb's current financial condition. Accordingly, I find that Respondent has failed to prove that the assessment of a civil penalty in the amount set forth in Paragraph VIII of this decision will affect Respondent's ability to remain in business.

VI. Conclusions of Law

1. Herb Coal Company and its No. 7 Drift Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

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

3. Federal mine inspector Albert F. Zegley was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The violation charged in Citation No. 225011 is found to have occurred as alleged.

5. The oral determination made during the hearing denying Respondent's motion to dismiss is AFFIRMED.

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

VII. Proposed Findings of Fact and Conclusions of Law

Both parties filed post trial briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

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

Citation No.	Date	Section	Penalty
225011	9/21/78	103(a)	\$100

ORDER

A. The oral determination made during the hearing denying Respondent's motion to dismiss is AFFIRMED.

B. Respondent is ORDERED to pay a civil penalty in the amount of \$100 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE_ONE

1 In September of 1978, only three individuals worked at the mine. A paid hoisting engineer and Mr. Herb appear to have been the only individuals working at the mine on a regular basis, with Mr. Herb working underground and the hoisting engineer working on the surface. On September 21, 1978, Mr. John Frantz, a part-time worker who received no monetary compensation, was working underground with Mr. Herb. Mr. Herb and Mr. Frantz performed reciprocal favors for each other on occasion, thus accounting for Mr. Frantz's part-time activities at the No. 7 Drift Mine (Tr. 67-68).

~FOOTNOTE_TWO

2 Two Federal courts considering the issue have reached the opposite conclusion. *Marshall v. Wait*, No. 78-2345 (9th Cir., filed September 29, 1980); *Marshall v. Dewey*, 493 F. Supp. 963 (E.D. Wis. 1980).

~FOOTNOTE_THREE

3 Neither Inspector Zegley nor Mr. Herb affirmatively testified that anthracite is mined at the No. 7 Drift Mine. However, both the tenor of the questions addressed to them and the tenor of their responses thereto indicate that anthracite is mined there.

~FOOTNOTE_FOUR

4 It appears that on September 21, 1978, Mr. Herb expressed his dissatisfaction with the civil penalty program (Tr. 16). Mr. Herb testified that he undoubtedly told the inspector that the fines were really hurting the small operators and that he didn't believe it was fair for small operators to have to pay fines for violations (Tr. 61-62). Petitioner points to these facts and argues that the denial of entry was "based on a calculated decision that it would be cheaper to operate in violation of the law because of the mandatory fines aspect of the [1977 Mine] Act's enforcement scheme" (Petitioner's Post-trial Brief, p. 5). The record does not support the assertion advanced by Petitioner. It may well be that the civil penalty program leaves a bitter taste in the mouths of many small operators who perceive it as unfair and burdensome. It cannot be said that such perceptions would be at odds with human nature. But the fact remains that Respondent has proved that Mr. Herb's state of mind on September 21, 1978, was influenced by the controversy then surrounding the warrantless inspection issue. Petitioner has not produced probative evidence to counter this proof. (See also, Tr. 63.)

~FOOTNOTE_FIVE

5 For approximately 1 to 1-1/2 years prior to the hearing, Mr. and Mrs. Herb were the only individuals working at the mine. Mr. Herb worked underground and Mrs. Herb worked on the surface as a hoist operator. (See Tr. 67.)