FEDERAL **MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding	
	Docket Nos.	Assessment Control Nos.
v.	PIKE 78-308-P	15-03738-02002
	No. 3 Mine	
LITTLE BILL COAL COMPANY, INC., Respondent	PIKE 78-451-P	15-07311-02009V
	PIKE 78-458-P	15-07311-02010
	PIKE 79-25-P	15-07311-03001
	PIKE 79-50-P	15-07311-03002
	PIKE 79-77-P	15-07311-03003
	PIKE 79-99-P	15-07311-03004
	KENT 79-l	15-07311-03006
	KENT 79-125	15-07311-03005
	No. 2 Mine	
	KENT 79-151	15-11645-03001
	KENT 80-28	15-11645-03004
	KENT 80-31	15-11645-03005
	KENT 80-32	15-11645-03006
	No. 4 Mine	
	KENT 80-33	15-10394-03008
	KENT 80-68	15-10394-03010
	No. 6 Mine	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Herman W. Lester, Esq., Combs & Lester, Pikeville, Kentucky, for Respondent.

&fore: Administrative Law Judge Steffey

Pursuant to a notice of hearing dated June 7, 1979, as amended June 25, 1979, July 6, 1979, and September 5, 1979, a hearing in the above-entitled

consolidated proceeding 1/ was held on October 16, 17, and 18, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977. The hearing had not been completed at the end of the day on October 18, 1979.

The hearing was scheduled to be reconvened on March 18, 1980, but, at the request of MSHA's counsel, was thereafter continued to be reconvened on July 29, 1980. At the request of respondent's counsel, the hearing was again continued to August 5, 1980. Thereafter, counsel for MSHA advised me that the parties had settled all issues which had not been the subject of the hearing held in 1979. Consequently, this decision will dispose of all contested issues which were the subject of the hearing held in 1979 and will grant the motion for approval of settlement which was filed by MSHA's counsel on October 15, 1980, with respect to all issues other than those which were the subject of the 1979 hearing.

Several inspectors appeared as witnesses at the hearing held in 1979. In order that the inspectors' time could be used to maximum advantage, MSHA's counsel introduced evidence with respect to all notices of violation or citations which had been written by a given inspector irrespective of whether the notices of violation or citations written by a given inspector were the subject of more than one Petition for Assessment of Civil Penalty in more than one docket number. Therefore, the Petitions. for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-308-P, PIKE 79-77-P, and PIKE 79-99-P will be considered in this decision under both contested and settled issues. The Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-451-P, PIKE 78-458-P, and KENT 79-1 will be disposed of entirely in the portion of this decision which is devoted to the contested issues considered at the hearing held in 1979.

The dates of filing and the number of violations alleged in each Petition for Assessment of Civil Penalty are listed in the following tabulation:

Docket Nos.	Dates of Filing	Number of Alleged Violations
PIKE 78-308-P	April 24, 1978	12
PIKE 78-451-P	August 28, 1978	1
PIKE 78-458-P	August 29, 1978	17
PIKE 79-25-P	November 15, 1978	20
PIKE 79-50-P	December 6, 1978	2
PIKE 79-77-P	January 17, 1979	7
PIKE 79-99-P	February 2, 1979	4
KENT 79-l	June 15, 1979	1

1/ The original hearing in October of 1979 involved nine cases. Six additional cases were added after the initial hearing was held. The six cases which were consolidated subsequent to October 1979 were in Docket Nos. KENT 79-151, KENT 80-28, KENT 80-31, KENT 80-32, KENT 80-33, and KENT 80-68.

KENT 79-125	May 30, 1979	8
KENT 79-151	July 9, 1979	1
KENT 80-28	April 7, 1980	2
KENT 80-31	April 7, 1980	17
KENT 80-32	April 7, 1980	4
KENT 80-33	April 7, 1980	6
KENT 80-68	April 1, 1980	7
Total Alleged Violations in This Proceeding		109

CONTESTED ISSUES

Evidence at the hearing was completed with respect to 27 alleged violations and, because of the unavailability of a witness, counsel for MSHA asked that the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P be dismissed to the extent that it seeks assessment of a penalty for the violation of section 75.400 alleged in Notice of Violation No. 3 VEH (7-50) dated August 1, 1977 (Tr. 119).

The issues raised in civil penalty proceedings are whether any violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. It is usually possible to make a general consideration as to some of the criteria. In this proceeding, one set of findings may be made as to the criteria of the size of respondent's business, the question of whether the payment of penalties would cause respondent to discontinue in business, the matter of whether respondent demonstrated a good faith effort to achieve rapid compliance after notices of violation, citations, and orders were written, and respondent's history of previous violations.

The size of respondent's business and the question of whether payment of penalties would have an adverse effect on respondent's ability to continue in business will first be considered. Little Bill Coal Company, Inc., is owned by two men named John McGuire and Bill Leslie. The company's name, Little Bill Coal Company, was conceived by reference to Mr. Bill Leslie who happens to be small in stature.

The company has operated several mines at various times. The No. 2 Mine was operated until about October'1978 when it was closed because all of the coal reserves had been exhausted (Tr. 65). When the No. 2 Mine was producing at its peak, the mine employed about 14 persons on two shifts. The equipment used in the mine consisted of a continuous-mining machine, two shuttle cars, two roof-bolting machines, and conveyor belts (Tr. 37).

The No. 3 Mine was operated for only a short period of time. The owners say that a total of 115 MSHA inspectors examined the No. 3 Mine over a period of 41 days with the result that the mine had to be closed (Tr. 66). The owners alleged that they had an altercation with a first cousin of a supervisory inspector employed by MSHA and that their No. 3 Mine was excessively inspected for the sole purpose of causing the company to stop mining coal (Tr. 774-775).

The No. 4 Mine has been a disappointment because it encountered a coal seam which is only about 20 inches high. As a result, that mine was subleased to some other miners who have been producing about 50 or 60 tons per day. Respondent agreed to pay them $15 per ton for the coal they produced and respondent also agreed to pay the electric power bill, provide insurance, and furnish an end loader for the loading of their coal (Tr. 772).

In 1976, Little Bill Coal Company was a relatively successful operation which sold about 90,000 tons of coal for which it received a gross income of $2,169,887. Respondent's income tax return, however, shows that the company's costs were $2,209,017 which produced a loss of $39,130. Nevertheless, in 1976, the owners were able to pay themselves a total of $172,000 in salaries, or $86,000 each (Tr. 706-707; Exh. F). In 1977, the company had a gross income of $1,035,377 and its expenses were $1,040,149 with a resulting loss of $3,371. In 1977, the owners were able to pay themselves total salaries of $128,000 or $64,000 each (Tr. 719; Exh. G).

The company's business continued to decline after 1977 so that by the 11 months ending August 31, 1979, the company had lost a total of $266,706 or $6.23 for each ton of coal produced. During the single month of August 1979, the company lost $6,369 despite the fact that the owners paid themselves no salary at all that month. It is true that during the preceding 10 months, the owners had paid themselves total salaries of. $80,000, or $40,000 each, but during that same period of time, Mr. Leslie had had to advance the company $105,000 from his personal funds and Mr. McGuire loaned the company $108,000 from his personal funds. Mr. McGuire had to mortgage his personal residence for $80,000 in order to loan the company $108,000 (Tr. 753; Exh. I).

Based on the facts set forth above, I find that respondent operates a very small business at the present time and that payment of penalties will have an adverse effect on its ability to continue in business.

The evidence introduced at the hearing with respect to each alleged violation indicates that respondent abated the violations within the time given in the inspectors' notices of violation or citations. There is no testimony by any inspector indicating that respondent failed to make a good faith effort to achieve compliance. Therefore, I find that respondent did make a normal good faith effort to achieve compliance and, in the assessment of penalties, credit for that mitigating factor will be given.

During the hearing held in 1979, MSHA introduced 72 exhibits, but none of those exhibits provided any information with respect to the criterion of history of previous violations. The attorney who represented MSHA at the hearing held in 1979 resigned between the time that the 1979 hearing was held and the time that the 1980 hearing was scheduled to commence. The attorney who was assigned to represent MSHA at the 1980 hearing submitted, prior to the convening of the supplemental hearing, proposed Exhibit Nos. 72A through 196. Two of those proposed exhibits, Nos. 72A and 143, are computer printouts showing prior violations for which respondent has paid penalties.

I have examined proposed Exhibit Nos. 72A and 143 and those exhibits show that respondent has violated the same sections of the regulations involved in this proceeding on from none to nine previous occasions. Two types of violations which I consider to be especially serious are section 75.400 which pertains to the accumulation of combustible materials and section 75.200 which concerns violations of a respondent's roof-control plan. Respondent's largest number (nine) of previous violations is of section 75.400, but the trend in those violations has been downward from six in 1976 to one in 1977 by October 3, 1977. Respondent has violated section 75.200 on two previous occasions, but the trend in those violations is also downward from two in 1975 to none in 1977 by July 15, 1977.

It is my practice to consider an operator's history of previous violations on an individual basis when assessing each penalty, but in this proceeding, since the criterion of the effect that payment of penalties will have on respondent's ability to continue in business is the overriding consideration in the assessment of each penalty, I am finding, in the circumstances which exist in this proceeding, that no useful purpose would be achieved by giving individual consideration to the criterion of history of previous violations because that history is not substantial in the first instance and would, in final analysis, have little effect on the ultimate penalty to be assessed because I would, in the circumstances of this case, merely reduce the amount of a given penalty assessed under the other five criteria so as to allow for the assessment of a minor amount under the criterion of history of previous violations.

There is one other important reason for not giving individual consideration to the criterion of history of previous violations. That reason relates to the fact, as stated above, that no evidence as to the criterion of history of previous violations was presented by MSHA's counsel during the hearing held in 1979. If the supplemental hearing had gone forward in 1980 as scheduled, the proposed exhibits which I have referred to in discussing respondent's history of previous violations would have been offered in evidence at a hearing where respondent's counsel could, if he had been so inclined, have objected to the receipt in evidence of such evidence and could, if he had been so inclined, have introduced evidence with respect to the criterion of history of previous violations. Inasmuch as that criterion was not the subject of any evidence at the hearing held in 1979, it would be unfair to respondent for me to consider proposed exhibits, submitted after the 1979 hearing, for the purpose of assessing penalties with respect to contested issues which are being decided on the basis of evidence presented by the parties at a hearing during which neither party introduced any evidence whatsoever with respect to the criterion of history of previous violations.

In the portion of this decision which follows, I shall give individual consideration to the evidence presented by both MSHA and respondent for the purpose of determining whether each alleged violation occurred. If I hereinafter find that violations have occurred, I shall give individual consideration to the remaining two criteria of gravity and negligence and shall assess penalties on the basis of those two criteria and the findings made above as to the other four criteria.

Docket No. PIKE 78-451-P

Notice No. 1 JM (7-57) 8/18/77 § 75.200 (Exhibit 1A)

Findings. Section 75.200 requires each operator of a coal mine to file an approved roof-control plan with MSHA and to follow its provisions in all mining operations. Respondent violated section 75.200 by failing to install roof bolts on 4-foot centers as required by its roof-control plan (Exh. 1B). Respondent also failed to install roadway posts as required by the roof-control plan. The violation was serious because the roof bolts were from 1 to 4 feet farther apart than the roof-control plan permitted. Roof falls still account for large numbers of injuries and deaths in underground coal mines and respondent had failed to follow the proper spacing of the bolts for a distance of 20 feet outby the face in five different entries. Respondent was grossly negligent in failing to see that the roof bolts were properly installed (Tr. 14-30).

Conclusions. Respondent's owners both sought to discredit the inspector's testimony by testifying that they had to maintain pillars of coal on each side of the section to provide proper ventilation. Mr. McGuire stated that there were only five pillars and that maintenance of two pillars for ventilation would have left only three pillars from whidh coal could have been removed (Tr. 40-41). Mr. McGuire also claimed that two cuts would enable the continuous-mining machine to pass all the way through the blocks after removal of 20 feet of coal in each cut. Therefore, Mr. McGuire said that the inspector was wrong in claiming that three cuts of coal were taken from each pillar of coal (Tr. 40).

The testimony on respondent's claims as to the mining of three pillars versus the inspector's claim that respondent was taking coal from five pillars extended for over 100 pages in the transcript. Ultimately, the inspector introduced as Exhibit 1F a mine map which unequivocally shows that on the date that the notice of violation was issued, the area of the mine from which coal was being removed had six blocks or pillars of coal. Only one block or pillar of coal had been left for ventilation purposes so that five pillars were left for mining purposes (Tr. 80; 94).

Mr. Leslie's testimony sought to show that there were unmined blocks on both sides of the section being mined on August 18, 1977, when the notice was issued, but he had no explanation for the fact that'respondent's map shows that the pillars of coal had been extracted except for the No. 1 entry. He excused the inconsistency of his testimony with his own map by saying that MSHA should not have accepted the map which failed to show the pillars which had been left on both sides for ventilation purposes (Tr. 107). The fact is that the mine map was prepared by respondent's own engineer on the basis of facts provided by Messrs. Leslie and McGuire (Tr. 99). Therefore, I find that the inspector's testimony is more credible than that of Messrs. Leslie and McGuire with respect to how many pillars were being mined on August 18, 1977.

Additionally, it should be emphasized that the alleged violation was that roof bolts had been installed from 1 to 4 feet wider apart than the spacing permitted by respondent's roof-control plan. Neither Mr. McGuire nor Mr. Leslie had gone to the section to inspect it immediately after the notice was issued and they were therefore in no position to rebut the inspector's testimony that the roof bolts had been installed on an excessively wide spacing at the time he wrote Notice No. 1 JM (Tr. 59; 63; 105). Even if respondent had been removing coal from only three pillars, there is nothing in the record to show that respondent had complied with its roof-control plan insofar as the spacing of the roof bolts was concerned.

Inasmuch as the violation was serious and there was gross negligence, a penalty of $100 will be assessed for this violation of section 75.200. A much larger penalty would be assessed if respondent's evidence had not shown that it is in a very difficult financial condition.

I should note that Inspector Farley's supplemental testimony is being given no weight at all in deciding the issues raised by Notice No. 1 JM because Inspector Farley was not even positive that he was in the mine on August 18, 1977, when the notice was written (Tr. 109). He also did not know the location of the section on the mine map. He could not recall for certain whether he saw the other inspector measure the distance between roof bolts. He could not recall whether he was in the No. 5 pillar split on August 18 and he did not know whether there were or were not roadway pillars in the No. 5 pillar split (Tr. 110; 117; 118).

Docket No. PIKE 78-458-P

Notice No. 3 VEH (7-50) 8/1/77 § 75.400

Conclusions. MSHA's counsel stated that he would introduce no evidence in support of Notice No. 3 VEH alleging a violation of section 75.400 because the inspector who wrote the notice was unavailable to testify. MSHA's counsel stated that he would not object to my dismissal of the Petition for Assessment of Civil Penalty in Docket No. PIKE 78-458-P insofar as it seeks to have a penalty assessed for the violation of section 75.400 alleged in Notice No. 3 VEH (Tr. 119). Accordingly, the Petition in Docket No. PIKE 78-458-P is hereinafter dismissed to the extent it seeks assessment of a penalty for the violation of section 75.400 alleged in Notice No. 3 VEH dated August 1, 1977.

Notice No. 1 EDF (7-63) 10/12/77 § 75.400 (Exhibit 1)

Findings. Section 75.400 requires the operator to clean up coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials and not allow such materials to accumulate in active workings or on electric equipment therein. The operator violated section 75.400 because combustible materials, coal, oil, and grease had been allowed to accumulate in the deck and on and around the 250-volt DC motor in a depth of from 1/16 to 1 inch in depth on the Joy 21 off-drive shuttle car. The inspector did not know if the motor was warm, did not know if there were

any leaks in the hydraulic hoses, did not know what the operator's cleanup plan was, and did not know how long the accumulations had existed (Tr. 121-138). The operator had a regular cleanup program under which the equipment was washed down with a high pressure hose twice a week and the operator agreed that some accumulations could occur within a 2-day period between cleanups which were performed on the maintenance shift between midnight and 8 a.m. (Tr. 421-430).

Conclusions. At the time the testimony and exhibits in this proceeding were received in evidence, the elements of evidence required to prove a violation of section 75.400 were those which the former Board of Mine Operations Appeals had set forth in Old Ben Coal Co., 8 IBMA 98 (1977). In the interim between the receipt of evidence in this proceeding and the rendering of this decision, the Commission issued its decision in Old Ben Coal Co., 1 FMSHRC 1954 (1979), reversing the former Board's Old Ben decision and holding that combustible accumulations must be prevented from occurring and declaring that a violation of section 75.400 does not depend upon the question of whether the operator cleans up a given accumulation within a reasonable period of time. I am not in doubt about the fact that I must follow Commission precedents which become effective between the receipt of evidence and the time I render a decision based on that evidence because I was reversed for failing to do so in C.C.C.-Pompey Coal Co., 2 FMSHRC 1195 (1980).

Since the operator was unable to present a witness who had personally examined the shuttle car on the day the violation was cited, I find that the accumulation described by the inspector existed and was moderately serious. There was a low degree of negligence since the accumulation had occurred in a short time between the operator's biweekly cleanings. In view of the operator's small size and difficult financial condition, a penalty of $15 will be assessed for this violation of section 75.400.

Notice No. 2 EDF (7-64) 10/12/77 § 75.400 (Exhibit 4)

Findings. The only difference between the violation of section 75.400 alleged in Exhibit 4 and the violation of that section alleged in Exhibit 1 is that the combustible materials had accumulated on the standard-drive Joy 21 shuttle car instead of the off-drive shuttle car. Since the witnesses agreed that the same circumstances prevailed for the two violations of section 75.400, I find that the violation was moderately serious, that there was a low degree of negligence, and a penalty of $15 will also be assessed for this violation of section 75.400 (Tr. 140-145; 431-434).

Notice No. 3 EDF (7-65) 10/12/77 § 75.503 (Exhibit 7)

Findings. Section 75.503 requires each operator to maintain equipment used inby the last open crosscut in a permissible condition. Respondent violated section 75.503 because two bolts were missing from the foot-control switch of the standard-drive Joy 21 shuttle car. The violation was moderately serious because no methane had ever been detected in respondent's No. 2 Mine either with a hand-held methane detector or by analysis of a

bottle sample of air obtained in the mine atmosphere. Respondent was negligent for failing to replace the bolts, but there is no way to know whether the violation occurred between the weekly inspections of electrical equipment (Tr. 149-157).

Conclusions. Respondent's witness testified that the cover fits so tightly over the foot-control switch that he thinks it would be permissible even with all four bolts missing (Tr. 435), but he stated that he did not personally inspect the shuttle car after the notice of violation was written (Tr. 439). Since respondent could present no evidence showing that the cover was still in a permissible condition on the day the notice was written, I conclude that the preponderance of the evidence supports a finding that the violation occurred. Since the circumstances as to gravity and negligence for this violation are the same as they were for the previous violations of section 75,400, a penalty of $15 will also be assessed for this violation of section 75.503.

Notice No. 5 EDF (7-67) 10/12/77 § 75.400 (Exhibit 11)

Findings. The inspector alleged that coal dust and oil had accumulated on the roof-bolting machine to the same degree that he had observed such accumulations on the two shuttle cars described above. The operator violated section 75.400 by failing to keep the combustible materials off the roof-bolting machine. The violation was moderately serious and there was a low degree of negligence (Tr. 158-172).

Conclusions. The primary difference between the inspector's testimony with respect to the accumulations on the roof-bolting machine, as opposed to those on the two shuttle cars previously considered, is that the inspector stated that in his opinion, the accumulations had occurred over a period of at least 1 week (Tr. 168-172). Respondent's witness testified that the roof-bolting machine was cleaned twice a week, but since the inspector did not inquire into the operator's cleanup program, there is no evidence to cast any doubt on respondent's claims (Tr. 443-445). On the other hand, respondent's witness did not personally inspect the roof-bolting machine on the day the notice was written and could not say for certain that the roof-bolting machine was free of accumulations of combustible materials (Tr. 446). Inasmuch as the evidence fails to show that this violation of section 75.400 was serious or that respondent had failed to comply with its cleanup program, I shall assess a penalty of $15 for this violation of section 75.400.

Notice No. 6 EDF (7-68) 10/12/77 § 75.807 (Exhibit 14)

Findings. Section 75.807 requires, among other things, that all underground high-voltage cables be guarded where miners are required to work. Respondent violated section 75.807 because a 4,160-volt cable transmitting power to a transformer was looped beside the transformer and lying on the mine floor where a miner would have to step over it to plug or unplug circuit breakers used for energizing equipment. The violation was serious because such cables are subject to blowing up for no apparent reason. Respondent

was negligent for failing to place the cable in a protected place where miners, including the mine foreman and electrician, would not have to step over the cable to get to the transformer (Tr. 173-189).

Conclusions. Respondent's witness inspected the cable at the time Notice No. 6 EDF was written and agreed that the cable had been looped beside the transformer as shown on Exhibit 15A (Tr. 446). Although respondent's witness said that a person could get around the cable without stepping over it, he said that the transformer is 8 feet wide and 34 feet long and fills up most of a 20-foot entry when the cable is attached (Tr. 456). Respondent's witness also stated that he was not afraid to step over the cable or handle it with gloves (Tr. 451). The fact that respondent's witness is not afraid of the cable does not prevent it from being a source of danger. Respondent's witness also emphasized the fact that the type of cable cited in Notice No. 6 EDF has two ground wires, a monitoring wire, and an individual ground for each of the three phases as well as shielding tape (Tr. 452).

I do not think that any of the facts stated by respondent's witness justify respondent's failure to guard the high-voltage cable or place it in a less hazardous position than it was placed when the notice was written. Since this was a serious violation and was associated with a fairly high degree of negligence, I believe that a penalty of $25' should be assessed for it despite respondent's difficult financial position.

Notice No. 8 EDF (7-70) 10/12/77 § 75.507 (Exhibit 21)

Findings. Section 75.507 requires the operator to place all nonpermissible power connection points in intake air if they are located outby the last open crosscut. Respondent violated section 75.507 because its 4,160-volt, nonpermissible transformer was situated in return air. The violation was moderately serious because the hazard involved is that a combustible amount of methane might accumulate in the return air passing over the transformer and cause an explosion. Inasmuch as no methane has ever been detected in respondent's mine, the likelihood of an explosion was less than it would have been in a mine which is known to liberate methane. The violation was associated with a high degree of negligence (Tr. 205-210).

Conclusions. Respondent's defense was presented by Mr. Leslie who stated that he entered the mine on the evening shift after Notice No. 8 EDF had been issued on the day shift. Mr. Leslie testified that the transformer was situated in a crosscut and that a curtain had been installed between the transformer and the return entry (Tr. 461). The inspector testified on rebuttal that he would not have cited a violation if the curtain had existed at the time he examined the transformer (Tr. 464). Mr. Leslie thereafter testified that it was possible that the curtain was installed between the time that he entered the mine and the time the violation was cited by the inspector (Tr. 467). The difference in time between Mr. Leslie's and the inspector's examination is also an explanation for the fact that Mr. Leslie claims the transformer was not moved between the time the violation was cited and the time it was abated, whereas the inspector contended that the violation was abated by the movement of the transformer into intake air.

The factors I have just given show that there was no inconsistency in the two witnesses' testimony if consideration is given to the difference in time of the two inspections. There was a greater degree of negligence in this instance than in most of the previous violations. Therefore, a penalty of $20 will be assessed for this violation of section 75.507. It should be borne in mind that the low penalties I am assessing are based to a very large extent on the criterion that payment of penalties would cause respondent to discontinue in business.

Notice No. 1 EDF (7-71) 10/13/77 § 75.1725 (Exhibit 24)

Findings. Section 75.1725 requires, among other things, that an operator maintain mobile and stationary equipment in a safe operating condition and that any unsafe equipment must immediately be removed from service. Respondent violated section 75.1725 because the covers on the transformer were bent sufficiently *to* expose internal wires and all bolts designed to hold the covers in place were missing. The violation was only moderately serious because the insulation on all wires was in good condition and the covers were recessed into the transformer's side to such an extent that a person would be unlikely to come into contact with the exposed insulated wires, There was a high degree of negligence in respondent's failure to keep the covers properly bolted (Tr. 213-221).

Conclusions. A great deal of testimony was presented by respondent through its witness, Mr. Leslie, but when the testimony is analyzed, it all boils down again to the fact that Mr. Leslie examined the transformer on the night shift, whereas the inspector examined it and wrote the notice of violation on the day shift. The inspector stated that all bolts were missing from the two bent covers or panels when he examined them, whereas Mr. Leslie testified that only two of the six bolts in the panels were missing when he examined the panels (Tr. 50.5). Mr. Leslie agreed that it would have been possible for an electrician to have installed four bolts on each panel so as to pull them back into place between the time that the inspector cited the violation and the time Mr. Leslie examined the transformer (Tr. 476; 504). It must be borne in mind that the panels were only slightly bent and installation of the bolts would have drawn them down so as to reveal no indication that they had been bent as they appeared at the time the notice of violation was written.

In view of Mr. Leslie's statement that the transformer cost $50,000, it is easy to understand why an employee would want to conceal from Mr. Leslie the fact that he had abused two of the panels sufficiently to bend them. When all the evidence is carefully examined, it appears that the violation here cited was very minor in nature and may have consisted solely of a failure of the electricians to replace the bolts when they were working on the transformer. That kind of carelessness should be discouraged because it can lead to other and more serious violations than the one here involved. In such circumstances, and in view of respondent's difficult financial condition, a penalty of $5 will be assessed for this violation of section 75.1725.

Notice No. 1 EDF (7-72) 10/14/77 § 77.1605(k) (Exhibit 27)

Findings. Section 77.1605(k) requires that berms or guards be provided on the outer bank of elevated roadways. Respondent violated section 77.1605(k) because it had failed to maintain berms in at least three places for an average distance of 30 feet along the roadway between the county road and its mine office. The berms had existed at one time, but they had been eroded by weather and traffic at some places. The violation was serious because the roadway was steep and there was a 200-foot drop from the roadway in some places and the road was traveled by the miners' vehicles and by coal trucks. Respondent was negligent for failing to maintain the berms (Tr. 223-243).

Conclusions. Respondent's witness, Mr. Leslie, confirmed that Exhibit 27A correctly showed the location of the loading bin on the elevated roadway leading from the county road to the mine office, but Mr. Leslie said that the roadway was constructed on a lo-degree grade in accordance with an engineering survey (Tr. 509). Mr. Leslie stated that the entire length of the roadway is about 3,400 feet and that the road consists of mine rocks, creek rocks, gravel, sand, and dirt (Tr. 512). Mr. Leslie said that a grader was used on the road once a month and that the inspectors constantly cited him for failing to have a berm. Each time Mr. Leslie received a citation, he had the grader pile up additional gravel and sand and dirt to increase the height of the berm with the result that the berm became 3 or 4 feet high and the roadway itself was narrowed down to about 10 feet in some places (Tr. 516-158). Here again, however, Mr. Leslie stated that he did not look at the berm on the day the violation of section 77.1605(k) was cited (Tr. 522). The inspector, on the other hand, testified on rebuttal that he got out of his vehicle at the three places he cited for failure of the operator to have a berm and that there was no berm at all at those three places (Tr. 524; 527). Although the inspector did not measure the berm where it existed, I must give his testimony more credibility than I can give to Mr. Leslie's because Mr. Leslie stated that he did not even examine the berm on the day the notice of violation was written. Moreover, Mr. Leslie agreed that floods would wash away the berms and require them to be reconstructed (Tr. 513).

As I have already found, the violation was serious and there was a fairly high degree of negligence. Therefore, a penalty of $20 will be assessed for this violation, bearing in mind respondent's difficult financial condition.

Notice No. 1 EDF (7-73) 10/17/77 § 75.604 (Exhibit 30)

Findings. Section 75.604, among other things, provides that permanent splices shall be effectively insulated and sealed so as to exclude moisture. Respondent violated section 75.604 because there was a hole about 1 inch in diameter in the jacket of a permanent splice on the trailing cable of the roof-bolting mzthine. The hole was entirely through the jacket but no bare wires were exposed. The mine floor was wet and the inspector believed that moisture could penetrate the jacket and produce a serious shock or electrocution. The violation was serious because the trailing cable was lying in a

travelway where all miners were exposed to possible shock. There was a low degree of negligence because it is possible that the small hole did not exist when respondent made its last weekly inspection of electrical equipment (Tr. 244-254).

Conclusions. Respondent's witness, Mr. McGuire, testified that he examined the permanent splice cited in Notice No. 1 EDF and he agreed that the boot on the splice had a hole in it, but he said there was no way to keep permanent splices from wearing and that a small hole is difficult to discover when it is considered that the trailing cable is dragged through dirt and mud on the mine floor. Mr. McGuire did not think that the violation was serious because the insulation on the wires inside the boot was in good condition (Tr. 579-583).

As indicated in my findings above, there was a low degree of negligence. There was a potential for electrical shock, however, especially since the mine floor was wet. In such circumstances, a penalty of $15 will be assessed.

Notice No. 2 EDF (7-74) 10/17/77 § 75.200 (Exhibit 33)

Findings. Notice No. 2 EDF alleged that respondent had violated its roof-control plan because an operative torque wrench was not provided on the roof-bolting machine as required by Safety Precaution No. 13 of its roof-control plan (Exh. 1B). In this instance, the preponderance of the evidence shows that a violation of section 75.200 was not proven.

Conclusions. The inspector testified that when he had the mine foreman check the torque of the bolts, no reading would show on the dial of the torque wrench. The inspector did not personally try to test the torque by using the operator's wrench (Tr. 257; 261). The operator's witness, Mr. McGuire, said that he would remember this particular incident if he lived to be 150 years old (Tr. 585). Mr. McGuire testified that on the day Notice No. 2 EDF was written, he had given a new torque wrench to the operator of the roof-bolting machine before the man entered the mine. About 3 hours later, Mr. McGuire received a call from the mine foreman asking for a torque wrench. Mr. McGuire told the foreman that he had just given the operator of the roof-bolting machine a new torque wrench that morning and that he would come into the mine and show them how to use it. Mr. McGuire said that the type of torque wrench in use had two dials on it. There is a knob for each dial. The knob on the larger of the two dials is required to be turned all the way to the left and the knob on the smaller dial is turned to zero. When that is done properly, a reading can be obtained. Therefore, it was Mr. McGuire's contention that the reason the inspector wrote the notice was that the mine foreman did not know how to use the new torque wrench which had just been sent into the mine. After Mr. McGuire had gone into the mine and had showed the mine foreman how to use the torque wrench, they had no trouble in checking the torque of the roof bolts (Tr. 587-588).

The inspector was recalled to give rebuttal testimony and he said that he thinks the incident described by Mr. McGuire occurred on the morning following

the writing of the notice of violation (Tr. 589). In this instance, I believe Mr. McGuire's testimony is more credible than that of the inspector because Mr. McGuire recalled details about asking where the instructions for the torque wrench had been placed as well as asking what had been done with the box in which the wrench had been placed (Tr. 587). The inspector did not use any of the torque wrenches and was uncertain as to the number of dials on them (Tr. 591). Therefore, I find that MSHA failed to prove that the violation of section 75.200 alleged in *Notice No.* 2 EDF occurred and the Petition in Docket No. PIKE 78-458-P will be dismissed to the extent that it alleges a violation of section 75.200 in Notice No. 2 EDF (7-74) dated October 17, 1977.

Notice No. 1 EDF (7-75) 10/18/77 § 75.316 (Exhibit 36)

Findings. Section 75.316 requires each operator to submit a ventilation system and methane and dust-control plan which the operator is obligated to follow. One of the provisions in respondent's ventilation plan is a requirement that the mine map show projections of anticipated mine development for at least 1 year. Respondent violated section 75.316 because respondent had driven into a part of its mine which was not projected for mining on respondent's ventilation system and methane and dust-control plan. The violation was moderately serious because respondent was driving an entry in the direction of another mine whose existence was not shown on respondent's map at that time. Respondent was negligent for failing to have a map which would show the area into which it planned to mine (Tr. 266-279).

Conclusions. Respondent's witness, Mr. Leslie, testified that he knew about the fact that another mine existed to the left of the No. 1 entry in respondent's mine. Mr. Leslie agreed that one or two cuts of coal were taken to the left of the No. 1 entry and that the mine map did not at that time show projections for mining in that area. Mr. Leslie stated that respondent was in the process of trying to lease the coal reserves located to the left of respondent's No. 2 Mine, but that the area turned out to be so wet and roof conditions became so poor that respondent never did try to mine any further to the left than the two cuts which had been taken at the time the notice of violation was written (Tr. 536-537).

Mr. McGuire testified that the ventilation plan permits respondent to make a cut to the left or right of the return or intake entry provided the cut is ventilated (Tr. 599). Assuming that respondent may lawfully make such a cut, that fact does not rebut the inspector's claim that the mine map did not show such a projected cut at the time the cut was made. Since Mr. Leslie and the inspector both said that the projection was not shown on the map, the preponderance of the evidence supports a conclusion that a violation occurred.

The violation was not serious because respondent's management was aware of the existence of the other mine and respondent's engineer was in the process of preparing an updated map to show the location of the mine which was adjacent to respondent's No. 2 Mine. In such circumstances, I conclude that the violation occurred because respondent should have obtained the updated map prior to making any cuts of coal toward the other mine. Since respondent was aware of

the existence of the adjacent mine and since the other mine was active, the hazard was not as great as it would have been if respondent had been unaware of the existence of the other mine and if no one knew what conditions existed in the adjacent mine. Bearing in mind that respondent is in a precarious financial condition, a penalty of $5 will be assessed for this violation of section 75.316.

Notice No. 2 EDF (7-76) 10/18/77 § 75.316 (Exhibit 39)

Findings. Respondent's ventilation system and methane and dust-control plan requires respondent to show on its mine map all known underground workings bordering the mine. The violation occurred because the map did not show the adjacent mine. The violation was nonserious because Mr. Leslie testified that respondent's management was aware of the existence of an adjacent mine and that they were drilling three test holes each time they made a cut of coal to ensure that they did not penetrate the adjacent mine (Tr. 539). Respondent was negligent for failing to have a map which showed the adjacent mine, especially since respondent's management knew about the adjacent mine but did not have its engineer show the adjacent mine on its map (Tr. 539).

Conclusions. Inasmuch as this violation of section 75.316 was technical in nature, the penalty should reflect little assessment from the standpoint of gravity, but there was a high degree of negligence in respondent's failure to show on its mine map the location of an adjacent mine which respondent knew existed. Therefore, a penalty of $15 will be assessed for this violation of section 75.316, bearing in mind respondent's difficult financial position.

Notice No. 2 EDF (7-78) 10/20/77 § 75.1101-l (Exhibit 42)

Findings. Section 75.1101-l requires that deluge-type water sprays be installed at main and secondary belt conveyor drives. Respondent violated section 75.1101-l because about seven sprays were missing from the 24 which existed at each belt drive. The violation was nonserious because the lack of sprays was offset by the high pressure which respondent maintained in its waterline (Tr. 544). Respondent was negligent for failing to replace the missing sprays as soon as they were dislodged, but a low degree of negligence must be found because the evidence does not establish that the sprays had been missing for a long period of time (Tr. 287-298).

Conclusions. Respondent's witness, Mr. Leslie, agreed that five or six sprays were missing from the belt drive on each of three belt conveyors (Tr. 541). Mr. Leslie said that the sprays break routinely and have to be replaced frequently. Mr. Leslie said that they have so much pressure on the waterline that the efficiency of the deluge water spray system would not be reduced in case a fire should occur. Also, he said that other firefighting equipment existed along the conveyor belt, including fire extinguishers, rock dust, and a waterline with outlets at 150-foot intervals (Tr. 543-545). Inasmuch as respondent had installed outlets which were only 150 feet apart, as opposed to the 300-foot spacing required by the regulations (Tr. 548), I

find that the violation was nonserious in nature, but respondent should have made sure that the system was equipped with the required number of sprays. Therefore, a penalty of $5 will be assessed for this violation of section 75.1101-l after giving considerable weight to the criterion that payment of large penalties would have an adverse effect on respondent's ability to continue in business.

Docket No. PIKE 79-77-P

Notice No. 1 EDF (7-81) 10/31/77 § 75.1100-2 (Exhibit 45)

Findings and Conclusions. Section 75.1100-2 requires, among other things, that an operator provide 500 feet of firehose with fittings suitable for connection with each belt conveyor waterline system. Respondent had provided at least 500 feet of l-inch yellow hose for use along each belt conveyor. Inspector Farley issued Notice No. 1 EDF on October 31, 1977, after concluding that respondent's l-inch hose was inadequate to meet the requirements of section 75.1100-2 (Tr. 330). Respondent brought to the hearing a piece of the yellow hose which was being used on October 31, 1977, and that hose was labeled "Republic Wiretex High Pressure Water Hose, 1000 WP, MESA No. 2G-9C-W226" (Tr. 356). Inspector Farley testified that,if he had seen that label on the yellow hose when he was making his inspection, he would have considered that the yellow hose was acceptable (Tr. 343).

Another inspector, Noah Ooten, wrote the subsequent action sheet which terminated Notice No. 1 EDF dated October 31, 1977 (Exh. 45C). Inspector Ooten testified that the mere fact that a piece of hose has a MESA approval number on it does not mean that it can be used for firefighting purposes. He said that the 1-l/2-inch hose which respondent was required to purchase to replace the yellow hose was acceptable for firefighting purposes because it would deliver a larger'quantity of water to a fire than the l-inch yellow hose which respondent was using prior to the issuance of Notice No. 1 EDF (Tr. 349-350). Inspector Ooten, however, did not know whether the l-inch hose which respondent was using would supply the volume of water referred to in the regulations or whether the l-inch hose would comply with the pressure provisions set forth in the regulations (Tr. 361-362). Inspector Ooten said that the 1-l/2-inch hose which respondent was forced to purchase would be easier to store and would be easier to handle during a fire than the l-inch yellow hose, but he was unable to explain for certain why respondent's yellow hose was not in compliance with the regulations (Tr. 357; 361-362).

It may be that respondent's l-inch yellow hose did not comply with the Pressure provisions and gallons of capacity set forth in the regulations. It may also be that respondent should have replaced the l-inch yellow hose with the 1-1/2-inch hose and it may well be that if a fire had occurred along respondent's belt line, respondent would have been in a better position to fight it with the 1-1/2-inch hose than it would have been in with the l-inch yellow hose, but I believe that when a respondent is required to discard equipment having a MESA-approved number on it, the inspectors should be able to explain to respondent why its equipment does not comply with the

regulations. Inspector Farley, who wrote Notice No. 1 EDF, agreed at the hearing that if he had seen the MESA-approved number on the hose, he would not have written the notice (Tr. 343). Inspector Ooten tried to defend the writing of the notice by saying that the l-inch hose would not deliver the required quantity of water at the required pressure for firefighting purposes, but he was unable to state what size hose is required to comply with the regulations and he therefore completely failed to justify the issuance of Notice No. 1 EDF.

Therefore, I find that MSHA failed to prove that respondent violated section 75.1100-2 and MSHA's Petition for Assessment of Civil Penalty in Docket No. PIKE 79-77-P should be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.1100-2 alleged in Notice No. 1 EDF (7-81) dated October 31, 1977.

Docket No. PIKE 78-458-P

Notice No. 3 EDF (7-79) 10/20/77 § 75.1102 (Exhibit 47A)

Findings. Section 75.1102 requires that underground belt conveyors be equipped with slippage and sequence switches. Respondent violated section 75.1102 because the slippage and sequence switches on the Nos. 3 and 4 belt conveyors would not stop the belts when the switches were tested. The violation was moderately serious because failure of the switches to stop the belts in case they start slipping may result in enough friction to cause a fire. The inspector believed that the violation would be more serious if dry coal were involved, but he could not recall whether there was any coal on the belts, so there is no evidence to support a finding of gravity greater than moderately serious. Respondent was negligent in failing to make sure that the switches were in operable condition because the belt conveyors are supposed to be examined at the beginning of each working shift (Tr. 364-374).

Conclusions. Respondent's witness, Mr. Leslie, testified that the switches were working when he tested them after the notice was written, but he was not present at the time the switches were tested by the inspector, so he was not in a position to challenge the inspector's credibility (Tr. 555). Mr. Leslie commented extensively about the fact that Inspector Farley had failed to insert the word "not" in his notice, but Inspector Farley had already explained during his cross-examination by respondent's counsel that he had inadvertently omitted the word "not" from the notice at the time it was written and that his supervisor had thereafter inserted the word "not" to show that Inspector Farley had intended to say that the switches would not stop the belts when the switches were tested. Inspector Farley stated that he orally made it clear to respondent's mine superintendent that a violation of section 75.1102 had been cited because the slippage and sequence switches did not work (Tr. 374; 556-557).

Inasmuch as the violation of section 75.1102 was only moderately serious in the circumstances, the penalty is required to be assessed primarily under

the criterion of negligence. There was a relatively high degree of negligence, so a penalty of $15 will be assessed for this violation after giving considerable weight to respondent's difficult financial condition.

Notice No. 4 EDF (7-80) 10/20/77 § 75.516-2 (Exhibit 48)

Findings. Section 75.516-2 requires that communication wires be supported on insulated hangers or insulated J-hooks. Respondent violated section 75.516-2 because the communication wires were entangled with the fire-sensor cable and belt-control cable. The violation was potentially serious because if the insulation on the 110-volt control cable had been defective and had happened to touch the communication wire at a place where the insulation was also defective, a person handling the phone might be shocked because of energy from the control wire being transferred to the communication wire. Respondent was negligent for failing to have all the wires separated and installed on their own insulated hangers (Tr. 375-387).

Conclusions. Mr. Leslie testified that respondent's communication wires carried only 12 volts from two batteries and that the sensor cable also carried only 12 volts from two batteries, but he agreed that a potential shock existed if the communication wire had come into contact with the control wire which carried 110 volts. There was only a remote possibility of shock in this instance because all wires were well insulated (Tr. 377; 568-569; 572). Here again, the penalty to be assessed should be done primarily under the criterion of negligence because there was little gravity involved, but there is always a potential for injury and it existed here because of the negligence of respondent to see that the wires were properly placed on insulators. Therefore, a penalty of $15 will be assessed, keeping in mind respondent's poor financial condition.

Notice No. 7 EDF (7-69) 10/12/77 § 75.200 (Exhibit 17)

Findings. Respondent's roof-control plan requires that roof bolts be installed on 4-foot centers (Exh. 1B, p. 9). Respondent violated section 75.200 because roof bolts in the No. 1 and No. 2 pillar splits had been installed from 4-1/2 to 6 feet apart for a distance of about 20 feet. In this instance, the violation did not expose the miners to any serious danger as the roof appeared to be in good condition, but there existed the potential of a rock falling between roof bolts which were up to 2 feet wider than the plan permitted. There was a high degree of negligence because the inspector said that respondent frequently installed roof bolts farther apart than the 4-foot spacing required by the roof-control plan (Tr. 190-203).

Conclusions. Respondent's witness, Mr. McGuire, testified that he was present in the mine on the day Notice No. 7 EDF was written because he had gone into the mine for the purpose of replacing the pump motor on the continuous-mining machine. Mr. McGuire says that he measured the distance between the bolts with a 42-inch stick which they kept on the roof-bolting machine and that he found about 10 or 12 bolts to be about 44 inches apart (Tr. 578)

Both the inspector and Mr. McGuire agreed that the continuous-mining machine was broken down and was being repaired. The inspector found it necessary to extend the time for compliance because it was not possible for the roof-bolting machine to pass by the inoperative continuous-mining machine for the purpose of installing additional bolts (Exh. 19). The inspector eventually terminated the notice of violation when he was told that they had withdrawn from the pillar split cited in his notice. The inspector stated that he did not go back to check the area cited in his notice because he agreed that no bolts needed to be installed in an area where no further mining would be done (Tr. 196-198). Mr. McGuire testified that they completed mining of coal in the area after the continuous-mining machine was repaired and that they did not install any additional roof bolts because they did not need to do so (Tr. 577).

Once again, I find that the inspector's testimony is more credible than Mr. McGuire's because Mr. Puckett, the mine foreman, was with the inspector when the inspector made his measurements and all discussions about the abatement of the violation were with Mr. Puckett rather than with Mr. McGuire. Additionally, Mr. McGuire stressed in his testimony the difficulty he was having replacing the pump motor. The inspector stated that Mr. McGuire continued to work on the continuous-mining machine all the time the inspector was examining the section (Tr. 195). As interested as Mr. McGuire was to restore the continuous-mining machine to operation, it is unlikely that he would have taken out time from that important matter to check the distance between roof bolts and if he had, his statements in this proceeding have shown that he would have hotly contested an inspector's claim that roof bolts had been installed excessively wide apart if, in fact, they had not been so installed.

As the inspector testified, rocks may fall from the area between roof bolts when they are installed on an excessively wide spacing, but in this instance, the violation appears to be moderately serious since the inspector did not observe any obviously bad roof. There was a high degree of negligence because respondent has previously been cited for installing roof bolts on a wider spacing than its roof-control plan permits (Tr. 197; Exh. 18). In such circumstances, a penalty of $50 is warranted, keeping in mind respondent's difficult financial condition.

Docket No. PIKE 78-308-P

Notice No. 3 EDF (7-40) 7/15/77 § 75.326 (Exhibit 51)

Findings. Section 75.326 requires that return air courses be separated from belt haulage entries. Respondent violated section 75.326 because there were holes ranging from 1/3 of an inch to 2 inches in length in three permanent stoppings located outby spad No. 5162 (Tr. 389). The violation was only moderately serious because it was not proven that the holes extended all the way through the stoppings and no methane has been detected in respondent's mine. The inspector did not take either a methane reading or a bottle sample of air to check for methane on the day the notice was written (Tr. 392; 396-399). There was a low degree of negligence because both sides of the cinder

blocks had been plastered, but some small cracks did exist on at least one side of the wall (Tr. 601).

Conclusions. Mr. McGuire, respondent's witness, testified that he examined the stoppings cited in Notice No. 3 EDF and that the stoppings had been plastered on both sides. Since the stoppings are made of cinder blocks which are hollow in the middle and 8 inches thick, Mr. McGuire contended that just because there were cracks from 1/3 of an inch to 2 inches on one side of the wall did not mean that the holes extended all the way through the blocks and that the only way one could be certain that the holes did pass all the way through the wall would be to have a person hold a light on one side of the wall while another person stood on the other side to determine if the light could be seen on the opposite side of the wall (Tr. 601).

I would have found that no violation was proven if Mr. McGuire had actually made a check with the use of a light on the opposite side of the stoppings while he checked for light passing through the stoppings, but neither he nor the inspector had made the necessary check to determine if the holes passed all the way through the stoppings (Tr. 606). The inspector stated that air pressure is greater on the return side of the stoppings than it is on the belt side and that there is always a possibility that methane may pass through stoppings with holes in them so as to produce an explosive quantity of methane in the belt entry where nonpermissible electrical equipment is located (Tr. 400).

Inasmuch as neither the inspector nor respondent's witness disputed the fact that small cracks existed in the stoppings, there was a possibility that air, laden with methane, might have passed from the return into the belt entry. As indicated above, however, the violation in this instance was only moderately serious. Respondent was negligent in failing to plaster the stoppings thoroughly because a check with a light by a person situated on each side of a stopping should not be necessary in order to be certain that return air will be prevented from flowing through the stopping into the belt entry. Therefore, a penalty of $15 will be assessed, bearing in mind respondent's difficult financial condition.

Notice No. 4 EDF (7-41) 7/15/77 § 75.200 (Exhibit 54)

Findings. Respondent's roof-control plan requires that reflectorized warning devices be suspended from at least two roof bolts in the last row of bolts except when bolts have been installed within 4 feet of the faces (Exh. 1B, p. 6). Respondent violated section 75.200 because reflectorized warning devices had not been suspended from the last row of bolts in the Nos. 1, 2, 3, 4, and 6 entries and bolts had not been installed within 4 feet of the faces (Tr. 402). The violation was serious because the reflectors indicate to niners working on the section that the roof inby the reflectors has not been bolted. There was a high degree of negligence involved in failure tc install the reflectors (Tr. 404-407).

Conclusions. Respondent's witness, Mr. McGuire, agreed that the miners may not have installed all the reflectors which should have been installed

and that he had made no actual check so as to be able to testify as to which entries did have reflectors and which did not (Tr. 607-608). Mr. McGuire tried to cast doubt on the likelihood that all five entries could need reflectors at any one time by contending that if it were true, there would not have been any place where the men could have worked (Tr. 609-610; 615-616). Regardless of the logic of Mr. McGuire's contentions, I must take the inspector's testimony as being more credible than Mr. McGuire's arguments when Mr. McGuire fails to support his opinions with actual observations which he has made and which he can unequivocally state support his belief that the inspector was wrong in citing five different entries.

Inasmuch as the violation was serious and there was a high degree of negligence, a penalty of $50 will be assessed for this violation of section 75.200, bearing in mind respondent's difficult financial condition.

Docket No. PIKE 79-99-P

Order No. 65862 3/15/78 § 75.400 (Exhibit 57)

Findings. Section 75.400 provides that coal dust, including float coal dust on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment. Respondent violated section 75.400 because float coal dust was present along the entries of three conveyor belts and was prevalent on the roof, ribs, floor, timbers, belt structures, and power wires. Loose coal and coal dust were present up to 9 inches in depth under the conveyor belt, beginning at the No. 2 belt drive and extending inby the No. 3 belt drive for a distance of 400 feet. The violation was very serious because the conveyor belt was dragging on top of the loose coal and four rollers were stuck along the Nos. 1 and 2 conveyor belts. The stuck rollers were a source of friction and heat which could have started a fire and the wires and motors in the belt entries constituted potential fire hazards. There was a high degree of negligence in respondent's permitting float coal dust and loose coal dust to accumulate to the extent that it had (Tr. 822; 828; 837; 840; 846; 860-861).

Conclusions. Respondent's witness, Mr. McGuire, testified that he went into the mine on the day Order No. 65862 was written and he agreed that there may have been some float coal dust around the belt head and that some loose coal had fallen from the belt conveyors, but Mr. McGuire said they had a cleanup program under which they clean up loose coal once a week and apply rock dust. They clean and rock dust more often than once each week, if necessary, to prevent accumulations (Tr. 864-868). Mr. McGuire stated that there was moisture along the belts and that wet belts would pick up coal dust and deposit the dust as float coal dust after it had dried. Mr. McGuire said that it had been only 2 days since the belt entries had been cleaned, but he agreed that the frequency of cleaning should be increased when weekly cleaning fails to prevent accumulations of combustible materials. Nevertheless, Mr. McGuire did not change his cleanup program after Order No. 65862 was written (Tr. 879).

Since the violation was very serious and there was a rather high degree of negligence, a penalty of $100 will be assessed for this violation of section 75.400, bearing in mind respondent's difficult financial condition.

Order No. 65862 3/15/78 § 75.1725 (Exhibit 57)

Findings. Order No. 65862, discussed above, also alleged a violation of section 75.1725 which provides that machinery and equipment shall be maintained in a safe operating condition and that equipment in an unsafe condition shall be removed from service immediately. Respondent violated section 75.1725 because the stuck rollers, float coal dust, and loose coal along the conveyor belts had created unsafe conditions, but the conveyor belts were being used for producing coal despite the fact that they were exposing the miners to a possible fire or explosion because of the stuck rollers and undue amount of combustible materials which existed along and under them (Tr. 823; 861).

Conclusions. The violation of section 75.1725 is interrelated with the violation of section 75.400. I frequently have cases in which violations of section 75.400 are cited and the inspectors state that they also found stuck rollers which produce an ignition hazard. The ignition hazard is taken into consideration under the criterion of gravity in assessing a penalty for the violation of section 75.400. All inspectors could technically cite a violation of section 75.1725 every time they find stuck rollers, but it has been my experience that they rarely cite section 75.1725 in conjunction with stuck rollers associated with loose coal and coal-dust accumulations. Since I have taken the gravity of the violation of section 75.1725, having to do with stuck rollers, into consideration in the assessment of the penalty for the violation of section 75.400 also cited in Order No. 65862, I believe that the additional violation of section 75.1725 should not be given an incrementally high penalty. In such circumstances, a penalty of $5 will be assessed for this violation of section 75.1725, bearing in mind respondent's difficult financial condition.

Order No. 65862 3/15/78 § 75.1101-l (Exhibit 57)

Findings. Order No. 65862, discussed above, also alleged a violation of section 75.1101-l which provides that deluge-type spray systems shall be installed at main and secondary belt-conveyor drives. Such sprays become operative when there is a rise in temperature great enough to cause a fire sensor to activate a control valve. Respondent violated section 75.1101-l because the deluge-type spray system at the No. 3 conveyor-belt drive was rendered inoperative by disconnection of the chain and sensors which cause the control valve to open. Additionally, some of the water sprays were broken (Tr. 825). The violation was serious because combustible materials were present in the vicinity of the No. 3 belt head and the deluge-type spray system would not have assisted in putting out any fire which might have occurred (Tr. 828; 861). There was a high degree of negligence because the preshift examiner should have observed that the chain to the valve was disconnected or broken with the result that the deluge-type water system would not work if needed (Tr. 826).

Conclusions. Respondent's witness, Mr. McGuire, stated that the fire-suppression system and chain controlling the valve were connected when he inspected the conveyor-belt drives cited in Order No. 65862 (Tr. 878). Inasmuch as Mr. McGuire was not present at the time the inspector observed the conditions along the conveyor belts, I conclude that the inspector's testimony is sufficiently credible to support my findings above that the violation occurred, that it was serious, and that respondent was negligent. The inoperative water-deluge system was taken into consideration above in assessing a penalty for the violation of section 75.400 cited in Order No. 65862. In view of the interrelated overlapping of the violations cited in Order No. 65862, a penalty of $25 will be assessed for this violation of section 75.1101-l.

Docket No. PIKE 79-77-P

Citation No. 65863 3/21/78 § 75.601 (Exhibit 60)

Findings. Section 75.601, to the extent here pertinent, provides that the disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and that such devices shall be designed so 'that it can be determined by one's eyesight that the power is disconnected. The preponderance of the evidence shows that no violation of section 75.601 occurred (Tr. 883-905). The sole action that respondent had to take to abate the alleged violation was to paint the female and male receptacles for each piece of equipment a matching color so that an illiterate person would theoretically be able to determine which circuit breaker should be connected to a given piece of equipment. Respondent's power center had been manufactured specifically for the types of equipment used in respondent's mine (Tr. 892). Therefore, each circuit breaker and trailing cable had already been labeled, before Citation No. 65863 was written, so that a person who can read would know which circuit breaker to connect for the continuous-mining machine, or roof-bolting machine, or shuttle car. Moreover, a chain was attached to each disconnect device so that the power for the shuttle car, for example, could not be plugged into the circuit for the continuous-mining machine or roof-bolting machine. Consequently, even an illiterate person would not be able to connect the wrong trailing cable to the wrong circuit in the power center. There is nothing in section 75.601 which specifically requires respondent to paint the disconnect devices with different colors of paint so that an illiterate person would be able to determine, for example, that a pink plug is to be connected only with a matching pink receptacle in the power center. Finally, since the circuit breakers for the off-drive shuttle car and the standard-drive shuttle car are the same size, an illiterate person would be unable to determine, if, for example, he were sent to the power center to disconnect the trailing cable for the off-drive shuttle car, whether he would be supposed to disconnect the circuit breaker painted blue or the circuit breaker painted yellow in order to be sure that he was disconnecting the off-drive shuttle car instead of the standard-drive shuttle car.

Conclusions. In this instance, I have chosen to accept the testimony of respondent's witness, Mr. Leslie, as being more credible than that of the

inspector. Mr. Leslie was with the inspector when Citation No. 65863 was written and Mr. Leslie's testimony shows that he is more familiar with the electrical equipment in the mine than the inspector was. Mr. Leslie testified that it was necessary for him to purchase five different colors of paint for application to the disconnect devices in order to abate the citation (Tr. 892). The inspector claimed that the disconnect devices were neither marked nor color-coded (Tr. 891), but Mr. Leslie claimed that the power center was ordered from the factory with labels for the various types of equipment already installed on the equipment (Tr. 893). Mr. Leslie introduced as Exhibit E a picture of the type of device which is used to connect equipment at the power center (Tr. 902). There is no reason to believe that Mr. Leslie was mistaken about the types of labels which he had requested the manufacturer to place on the disconnect devices (Tr. 894).

It should be noted that the language used in Citation No. 65863 is susceptible to the interpretation of the facts given by Mr. Leslie because the citation alleges that the "* * * connecting plugs were not plainly marked or colored" (Exh. 60). Since the connecting plugs had already been plainly marked before the citation was written, it was necessary for the inspector to use the words "plainly marked or colored" in his citation in order to show that the conditions he observed constituted a violation of section 75.601 because the language in that section requires plain marking but fails to mention color-coding. If respondent's disconnect devices had not already been plainly marked, the inspector could have required color-coding as one way of accomplishing the plain marking required by section 75.601, but the inspector cannot properly cite respondent for violating section 75.601 when plugs and receptacles have already been plainly marked, but the inspector additionally wants the disconnect devices painted with matching colors as a means of further plainly marking the disconnect devices for the benefit of illiterate persons who are unable to read the labels which respondent had already placed on the disconnect devices.

For the foregoing reasons, the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P will be dismissed insofar as it alleges a violation of section 75.601 in Citation No. 65863 dated March 21, 1978.

Citation No. 65864 3/21/78 § 75.503 (Exhibit 62)

Findings. Section 75.503 requires that electrical equipment used inby the last open crosscut be permissible. Respondent violated section 75.503 because an opening in excess of .005 of an inch was present between the cover plate at the top of the trailing cable junction box and at the bottom of the main panel box on the continuous-mining machine (Tr. 907). The violation was moderately serious because, although no methane was present at the time the violation was observed, it is always possible for methane to accumulate in a coal mine so as to cause an explosion (Tr. 911). There was a low degree of negligence because no bolts were missing and the machine vibrates constantly so that it may jar bolts loose. The inspector did not know how long the .005 of an inch opening had existed (Tr. 913).

Conclusions. The operator's witness, Mr. Leslie, testified that he could not dispute the existence of the .005 of an inch opening because he personally observed the inspector insert the .005 of an inch gauge into the opening (Tr. 917). Since the violation was moderately serious and there was a low degree of negligence, a penalty of $15 will be assessed for this violation of section 75.503, bearing in mind respondent's difficult financial condition.

Citation No. 65865 3/21/78 § 75.503 (Exhibit 64)

Findings. Respondent violated section 75.503 again because an opening in excess of .005 of an inch existed on the No. 2 Joy shuttle car between the cover plate and the panel box. Additionally, the headlights were inoperative on both ends of the shuttle car. The violation was moderately serious as to the opening in the panel box, but the lack of headlights on either end of the shuttle car was serious because the shuttle car is driven around corners and through crosscuts where the shuttle car becomes a hazard for miners who are working on the section. There was a high degree of negligence in respondent's permitting the shuttle car to be driven without having the lights replaced (Tr. 921-929).

Conclusions. Respondent's primary defense as to the violation of section 75.503 alleged in Citation No. 65865 was that headlights on shuttle cars glare in the eyes of the operator of the continuous-mining machine and consequently the operators of the shuttle cars do not use the headlights even when the lights are capable of being operated (Tr. 930-931). The inspector stated that the operator of the shuttle car normally turned off the light on the end next to the continuous-mining machine when coal was being loaded into the shuttle car and turned on the light on the outby end of the shuttle car so as to avoid blinding the operator of the continuous-mining machine. The inspector stated that he had driven shuttle cars while using only his cap light for illumination, as was being done in this instance, and that he felt he had less light than is needed to permit safe operation of the shuttle car (Tr. 928-929). Inasmuch as the violation was serious and there was a high degree of negligence, a penalty of $25 will be assessed for this violation of section 75.503, bearing in mind respondent's difficult financial condition.

Citation No. 65866 3/21/78 § 75.503 (Exhibit 66)

Findings. Respondent again violated section 75.503 by failing to have operative headlights on either end of the No. 1 Joy shuttle car (Tr. 932-933). Both the inspector and respondent's witness stated that their testimony with respect to the lack of headlights on the No. 1 shuttle car would be identical with the testimony they had already given with respect to the lack of headlights on the No. 2 shuttle car (Tr. 933).

Conclusions. Since this violation was identical with the previous violation as to the No. 2 shuttle car, the same findings would apply and a penalty of $25 should be assessed for this violation of section 75.503.

Citation No. 65867 3/22/78 § 77.1605(a) (Exhibit 68)

Findings. Section 77.1605(a) provides that cab windows shall be in good condition and shall be kept clean. Respondent violated section 77.1605(a) because a truck loading coal at respondent's loading chute had three or four cracks in the windshield on the driver's side. The violation was moderately serious because glares from the cracks in the windshield might have caused the driver to have an accident resulting from his inability to see clearly through the cracked windshield. Respondent was not negligent because the truck with the cracked windshield was used to haul one load of coal from respondent's mine. The truck had never been driven to respondent's mine on any occasion prior to the time the cracked windshield was observed by the inspector and was never used to haul coal from respondent's mine on any other occasion (Tr. 937-946; 947-949).

Conclusions. The truck involved in the violation alleged in Citation No. 65867 was driven to respondent's mine to obtain a single load of coal. The circumstances were that the independent contractor's regular truck needed to have a tire repaired. While the tire was being repaired, the person who normally hauled coal for respondent asked a substitute driver to use that driver's own truck to transport a load of coal from respondent's mine. The substitute truck had the cracked windshield described in Citation No. 65867, but respondent was unaware that the substitute truck and driver had been asked to haul a load of coal from respondent's mine and respondent's owners were not close enough to the truck on its single visit to respondent's mine to know that it had a cracked windshield (Tr. 948-949). Moreover, the inspector terminated the citation without ever knowing whether the crack in the windshield was ever replaced because the citation was terminated with an explanation that the truck left mine property and was no longer used to haul coal from respondent's mine (Exh. 70).

The Commission held in Republic Steel Corp., 1 FMSHRC 5 (1979), Raiser Steel Corp., 1 FMSHRC 343 (1979), Consolidation Coal Co., 1 FMSHRC 347 (1979), Old Ben Coal Co., 1 FMSHRC 1480 (1979), and Monterey Coal Co., 1 FMSHRC 1781 (1979), that an operator may be held liable for violations by independent contractors even if the independent contractors' employees are the only persons involved in a particular violation. Therefore, the inspector properly cited respondent for the violation of the substitute independent contractor in this instance because respondent would have been liable for a violation committed by the driver of the truck which was normally used to haul coal from respondent's mine and can be held liable for violations committed by a substitute driver who is hired by the independent contractor who normally hauls respondent's coal.

In view of the fact that only one load of coal was hauled by the truck involved in Citation No. 65867, I think that only a nominal penalty should be assessed in the circumstances which prevailed in this instance. Therefore, a penalty of only $1 will be assessed for this violation of section 77.1605(a).

Docket No. KENT 79-1

Citation No. 64600 11/16/78 § 75.1722(b) (Exhibit 71)

Findings. Section 75.1722(b) provides that guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Respondent violated section 75.1722(b) because an adequate guard had not been provided for the No. 2 conveyor belt drive and discharge roller inasmuch as a person could become caught between the belt and pulley. The inadequate guard was located at the point where the No. 2 belt dumps coal on the No. 1 belt. Spillage of coal occurs at that discharge point and it is necessary for a miner to clean up the spillage. Therefore, the violation was serious because an inadequate guard exposes the miner who is cleaning up the coal to becoming caught between the belt and the pulley. Respondent was negligent because a chain-link fence had been erected around the exposed machine parts, but the guard had been taken down so that it provided no protection at the time the violation was observed by the inspector. The examiner of the belt should have noticed the absence of the guard and should have had it reinstalled in proper position (Tr. 951-961).

Conclusions. Respondent's witness, Mr. McGuire, testified that he was one of the first persons ever to use a chain-link fence as a guard at conveyor belt drives, but Mr. McGuire was not present at the time Citation No. 64600 was written and conceded that someone could have shoveled coal from under the belt drive and could have left the fence down. He said it was the responsibility of the person who takes the fence down to rehang it (Tr. 974; 977). It is respondent's duty to see that its employees comply with the safety standards, so I cannot find that respondent has a valid defense in this instance. Since the violation was serious and respondent was negligent, a penalty of $25 will be assessed for this violation of section 75.1722(b), bearing in mind respondent's difficult financial condition.

SETTLED ISSUES

The matters to be considered in this portion of my decision are discussed in the 47-page motion for approval of settlement filed on October 15, 1980, by MSHA's counsel. Under the settlement agreement, respondent would pay penalties totaling $4,631 instead of the penalties totaling $8,031 proposed by the Assessment Office. The motion for approval of settlement disposes of the remaining 82 violations which were not the subject of the hearing held in 1979. The motion considers violations alleged in Petitions for Assessment of Civil Penalty which were filed in 12 different docket numbers. As previously indicated on page 2 of my decision, all of the violations alleged in the Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-451-P, PIKE 78-458-P, and KENT 79-l were the subject of testimony introduced at the hearing held in 1979 and the issues raised in those three Petitions have been entirely disposed of in the first portion of this decision which deals with contested issues.

Also, as previously indicated on page 2 of my decision, some of the issues raised by the Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-308-P, PIKE 79-77-P, and PIKE 79-99-P are partially disposed of in the portion of my decision devoted to the contested issues and the remainder of the issues raised by the Petitions filed in those three docket numbers are disposed of by the motion for approval of settlement. Finally, the issues raised by the Petitions filed in the remaining nine docket numbers involved in this consolidated proceeding are disposed of by the motion for approval of settlement.

As to the six criteria which are used in determining penalties, it should be noted that my decision on the contested issues has already made findings as to three of those criteria, namely, the size of respondent's business, the question of whether payment of penalties would cause respondent to discontinue in business, and respondent's history of previous violations. The findings as to the aforesaid three criteria are based on the evidence received during the hearing held in 1979 and they are applicable to the settled issues as well as to the contested issues which have already been considered above.

The finding made in my decision with respect to a fourth criterion, namely, that respondent had demonstrated a normal good faith effort to achieve rapid compliance is applicable to the settled issues except for the alleged violations which became the subject of withdrawal orders issued under section 104(b) of the Act. The motion for approval of settlement takes the position that respondent did not demonstrate a good faith effort to achieve rapid compliance with respect to all violations involving issuance of withdrawal orders under section 104(b) of the Act. Under the settlement agreement, respondent has agreed to pay the full penalty proposed by the Assessment Office in all instances involving issuance of withdrawal orders.

The motion for approval of settlement agrees that the evidence introduced at the hearing held in 1979 shows that payment of penalties will have an adverse effect on respondent's ability to continue in business. The motion states that respondent will have to secure a loan in order to pay the settlement penalties totaling $4,631 and asks that I give respondent a period of 90 days after issuance of my decision within which to pay the penalties because respondent needs more than the normal 30-day period for obtaining the loan before payment is due. I find that the request for a 90-day period within which to pay penalties is reasonable and the order accompanying this decision will so provide. That request is especially reasonable when it is considered that my decision with respect to the contested issues requires respondent to pay penalties totaling $636 in addition to the settlement penalties totaling $4,631.

I shall now give consideration to the matters discussed in the motion for approval of settlement.

Docket No. PIKE 78-308-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-p seeks assessment of penalties for 12 alleged violations. Two of

those violations have already been disposed of under the portion of this decision devoted to contested issues. Respondent has agreed to pay the full amount of the penalties proposed by the Assessment Office with respect to the remaining 10 alleged violations except for Notices of Violation Nos. 4 KM (7-45) and 2 RM (7-47) dated July 14 and July 15, 1977, respectively, as to which MSHA's counsel indicates that no penalty should be paid for the two violations of section 75.403 alleged in those notices because MSHA does not have the results of the laboratory analyses of dust samples which are required for proof of such violations (Hall Coal Co., Inc., 1 IBMA 175 (1972), and Valley Camp Coal Co., 1 IBMA 243 (1972)).

The motion for approval of settlement states that MSHA declined to settle the two violations alleged in Notice Nos. 1 KM (7-42) and 2 RM (7-43) both dated July 14, 1977, for less than the penalties of $106 each proposed by the Assessment Office because respondent failed to abate the alleged violations until after withdrawal orders were issued under section 104(b). The motion avers that the failure to abate the alleged violations before withdrawal orders were issued indicated a failure of respondent to demonstrate a good faith effort to achieve rapid compliance.

I find that the motion for approval of settlement (pp. 7-11) has provided ample reasons for approving the settlement agreement under which respondent would pay total penalties of $534 instead of total penalties of $621 as proposed by the Assessment Office for the remaining 10 alleged violations involved in Docket No. PIKE 78-308-P.

Docket No. PIKE 79-25-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-25-P seeks to have penalties assessed for 20 alleged violations. None of those alleged violations were the subject to any testimony at the hearing held in 1979. The Assessment Office proposed penalties totaling $3,509 in this docket. Under the settlement agreement, respondent would pay reduced penalties totaling $960. More of the reductions in penalties involved in the parties' settlement agreement relate to the violations alleged in Docket No. PIKE 79-25-P than are involved in any of the other docket numbers. The motion for approval of settlement (pp. 12-22) justifies many of the reductions on the basis that respondent's mine has never shown a history of releasing methane and on the fact that respondent has proven that it is in a very difficult financial condition. Additionally, it is a fact that the Assessment Office rated all of the violations alleged in Docket No. PIKE 79-25-P as being more serious and involving a greater degree of negligence than it did for similar violations involved in the other dockets. I find that the motion for approval of settlement has shown adequate reasons for reducing the penalties to the total of $960 which respondent has agreed to pay.

Docket No. PIKE 79-50-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-50-P seeks to have penalties assessed for two violations, neither of which

was considered at the hearing held in 1979. Under the settlement agreement, respondent would pay penalties totaling $85 instead of the penalties totaling $174 proposed by the Assessment Office. The motion for approval of settlement (pp. 14 and 22) justifies the reduction in the proposed penalties on the grounds, as to the permissibility violation, that no methane has ever been detected in respondent's mine and that no negligence on the part of respondent could be shown. As to the alleged violation of section 75.603, the reduction is based on the fact that respondent was aware of the existence of two temporary splices in the trailing cable and was in the process of obtaining a new trailing cable. I find that adequate reasons have been given for approving the reductions agreed upon as to the Petition filed in Docket No. PIKE 79-50-P.

Docket No. PIKE 79-77-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P seeks to have penalties assessed for seven alleged violations. All but one of the alleged violations were the subject of evidence presented during the 1979 hearing and have been disposed of in the section of this decision devoted to the contested issues. Under the settlement agreement, respondent has agreed to pay in full the penalty of $40 proposed by the Assessment Office for the remaining alleged violation of section 75.1704 involved in this docket number. The motion for approval of settlement (p. 22) justifies the proposed penalty of $40 by noting that the circumstances of the violation are such that negligence on the part of the operator cannot be establfshed. I find that the penalty of $40 is reasonable and that the settlement agreement with respect to this alleged violation of section 75.1704 should be approved.

Docket No. PIKE 79-99-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-99-P seeks to have penalties assessed for four alleged violations. Three of those alleged violations were the subject of testimony introduced at the 1979 hearing and have been disposed of in the section of this decision devoted to contested issues. Under the settlement agreement, respondent would pay a reduced penalty of $40 instead of the penalty of $80 proposed by the Assessment Office for the violation of section 75.400 which has not already been considered as a part of the contested issues. The motion for approval of settlement (pp. 23-24) justifies the reduction primarily on the ground that respondent is in a difficult financial condition. I find that a sufficient reason has been given for approving the parties' settlement as to Docket No. PIKE 79-99-P.

Docket No. KENT 79-125

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-125 seeks to have penalties assessed for eight alleged violations, none of which were the subject of the hearing held in 1979. Under the settlement agreement, respondent would pay reduced penalties of $443 instead of the

penalties totaling $618 proposed by the Assessment Office. The motion for approval of settlement (pp. 14; 23-26) discusses each of the eight alleged violations in detail. All of them were from moderately serious to serious and each was accompanied by at least ordinary negligence. Therefore, the primary reason for the parties' agreement to reduce the penalties in this docket number is that respondent is in a difficult financial condition. That has been the primary reason for the fact that I assessed low penalties in the portion of this decision which was devoted to the contested issues and those findings support the parties' settlement agreement which I find should be approved as to Docket No. KENT 79-125.

Docket No. KENT 79-151

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-151 seeks to have a civil penalty assessed for a single violation of section 75.400. Under the settlement agreement, respondent would pay the full penalty of $445 proposed by the Assessment Office. The motion for approval of settlement (p. 27) states that this alleged violation of section 75.400 was not considered at the hearing held in 1979. While it is true that Inspector McClanahan, who wrote the citation and order involved in Docket No. KENT 79-151, did not testify at the hearing held in 1979, some of the testimony at the 1979 hearing did show that one of respondent's owners and Inspector McClanahan had had an altercation which caused the co-owner to order the inspector off of mine property (Tr. 782-783).

Inasmuch as the hearing was never reconvened so that the inspector could give his version of the facts which led to the altercation, I am not making any findings about the merits of the dispute between the inspector and one of respondent's owners, but I think that the testimony as to the respondent's version of the controversy should be mentioned in view of the fact that the motion for approval of settlement (p. 28) primarily bases MSHA's refusal to reduce the proposed penalty in this instance on the fact that respondent declined to allow the inspector to come on mine property to determine whether the alleged violation of section 75.400 had been abated. The fact that respondent has agreed to pay a rather high penalty for what would otherwise have been considered to be a moderately serious violation is sufficient reason to approve the settlement agreement with respect to the violation of section 75.400 alleged in Docket No. KENT 79-151.

Docket No. KENT 80-28

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-28 seeks to have penalties assessed for two alleged violations. Under the settlement agreement, respondent would pay reduced penalties totaling $360 instead of the penalties of $650 proposed by the Assessment Office. Respondent has agreed to pay the full amount of $60 proposed by the Assessment Office with respect to an alleged violation of section 75.1725. The other alleged violation related to a charge that respondent had violated its ventilation, methane and dust-control plan by failing to install a proper seal at a point where the operator had cut into an abandoned mine. Respondent had constructed a seal made of cinder blocks, but the seal was required

to be made of concrete blocks and be provided with a water seal. It was necessary for a withdrawal order to be issued before the violation was abated. The motion for approval of settlement (p. 30) indicates that MSHA agreed to reduce the proposed penalty proposed by the Assessment Office from $590 to $300 primarily for the reason that respondent is in a difficult financial condition. I find that adequate reasons have been given for approving the settlement agreement with respect to the Petition filed in Docket No. KENT 80-28.

Docket No. KENT 80-31

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-31 seeks to have penalties assessed for 17 alleged violations. Under the settlement agreement, respondent would pay the total penalties of $772 proposed by the Assessment Office. The Proposed Assessment sheet in this docket indicates that the Assessment Office had current information about respondent's size at the time the penalties here involved were determined under the formula provided for in 30 C.F.R. § 100.3. The Assessment Office assigned penalty points based on a finding that respondent is a very small operator. The Assessment Office found that ordinary negligence was associated with all of the 17 alleged violations and that all of them were either moderately serious or serious. The motion for approval of settlement states that MSHA's counsel considers several of the violations to be serious enough to warrant assessment of penalties larger than those proposed by the Assessment Office, but MSHA's counsel states that he agreed to settle all of the alleged violations at the amounts proposed by the Assessment Office under the criterion that payment of large penalties would have a very adverse effect on respondent's ability to continue in business. I find that adequate reasons have been shown to approve the settlement agreed upon as to the 17 violations alleged in Docket No. KENT 80-31.

Docket No. KENT 80-32

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-32 seeks to have penalties assessed for four alleged violations. In this docket, the Assessment Office also rated respondent as operating a very small business and proposed low penalties totaling $200 based on findings that each violation was associated with ordinary negligence and was moderately serious or serious. Under the settlement agreement, respondent would pay penalties totaling $173. The only penalty which was reduced below the amount proposed by the Assessment Office is for a violation of section 75.316 alleged in Citation No. 703939 dated April 30, 1979. As to that violation, which was based on the inspector's charge that only 2 of 24 water sprays on the continuous-mining machine were operable, the motion for approval of settlement states that the reduction from a proposed penalty of $72 to a settlement penalty of $45 was based on respondent's difficult financial condition. I find that an adequate reason has been given for approving the settlement agreed upon in Docket No. KENT 80-32.

Docket No. KENT 80-33

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-33 seeks to have penalties assessed for six alleged violations. Under the settlement agreement, respondent would pay penalties totaling $340 instead of the penalties totaling $358 proposed by the Assessment Office. The only penalty reduced by the settlement agreement below the amount proposed by the Assessment Office relates to Citation No. 713703 dated May 14, 1979, alleging a violation of section 75.1725 because a shuttle car's brakes were inoperative. The Assessment Office proposed a penalty of $78 for the violation of section 75.1725. The motion for approval of settlement (p. 29) had agreed to settle a previous violation of section 75.1725, pertaining to a shuttle car's brakes, on the basis of a $60 penalty involving a very similar violation. The settlement agreement consistently agreed to reduce the $78 penalty proposed by the Assessment Office for this very similar violation to the same amount, that is, $60. MSHA's counsel agreed on a penalty of $60 in each instance because of respondent's poor financial condition. I find that the settlement agreement proposed in Docket No. KENT 80-33 should be approved for the reason stated above.

Docket No. KENT 80-68

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-68 seeks penalties for seven alleged violations. Under the settlement agreement, respondent would pay total penalties of $439 instead of the total penalties of $560 proposed by the Assessment Office. The Assessment Office considered that all of the alleged violations were associated with ordinary negligence and considered all of the violations to be moderately serious or serious. The Assessment Office proposed a penalty of $140 for a permissibility violation alleged in Citation No. 713717 dated May 31, 1979. Since respondent's mine has never been known to liberate methane, permissibility violations have not been considered to be very serious in this proceeding. In this instance, however, the Assessment Office proposed a large penalty of $140 because the respondent failed to abate the violation in a timely manner which resulted in the issuance of a withdrawal order. The Assessment Office, therefore, assigned 10 penalty points under 30 C.F.R. § 100.3 because it believed that respondent had failed to demonstrate a good faith effort to achieve compliance. The motion for approval of settlement (p. 44) shows that MSHA's counsel would not agree to a reduction of that relatively large penalty because of respondent's lack of good faith abatement.

The settlement agreement indicates that MSHA's counsel agreed *to* reduce three of the seven violations by a total of $121. A reduction of $10 in the $60 penalty proposed for the violation of section 75.601 alleged in Citation No. 713719 dated May 31, 1979, was agreed upon because of respondent's poor financial condition (Motion, p. 45). A reduction of $46 in the penalty of $106 proposed for the violation of section 77.504 alleged in Citation No. 714047 dated June 11, 1979, was made in the settlement agreement because of respondent's poor financial condition (Motion, p. 46). Finally, a reduction of $65 was made in the penalty of $90 proposed for the violation of

section 77.512 in Citation No. 714048 dated June 12, 1979, partly because of respondent's poor financial condition and partly because the condition described in Citation No. 714048 was also covered by the condition described in Citation No. 714047 for which respondent is paying a penalty of $60 (Motion, p. 47). I find that adequate reasons have been given for approving the settlement agreed upon by the parties for the violations alleged by the Petition filed in Docket No. KENT 80-68.

Summary of Assessments and Conclusions

(1) On the basis of all the evidence received at the hearing held in this proceeding in October 1979 and the parties' motion for approval of settlement filed on October 15, 1980, the following civil penalties should be assessed:

Docket No. PIKE 78-308-P

Notice No. 3 EDF (7-40) 7/15/77 § 75.326 . . (Contested) . .	$	15.00
Notice No. 4 EDF (7-41) 7/15/77 § 75.200 . . (Contested) . .		50.00
Notice No. 1 RM (7-42) 7/14/77 § 75.200 . . . (Settled)		106.00
Notice No. 2 KM (7-43) 7/14/77 § 75.200 . . . (Settled)		106.00
Notice No. 3 KM (7-44) 7/14/77 § 75.400 . . . (Settled)		61.00
Notice No. 4 KM (7-45) 7/14/77 § 75.403 . . . (Dismissed) . .		0.00
Notice No. 1 KM (7-46) 7/15/77 § 75.302-l . (Settled)		34.00
Notice No. 2 KM (7-47) 7/15/77 § 75.403 . . . (Dismissed) . .		0.00
Notice No. 3 RM (7-48) 7/15/77 § 75.400 ... (Settled)		102.00
Notice No. 1 RM (7-49) 7/19/77 § 75.326 . . . (Settled)		46.00
Notice No. 2 RM (7-50) 7/19/77 § 75.316 . . . (Settled)		36.00
Notice No. 2 KM (7-52) 7/20/77 § 75.301-l . (Settled)		43.00
Total Contested and Settled Penalties in Docket No. PIKE 78-308-P	$	599.00

Docket No. PIKE 78-451-P
(All Contested)

Notice No. 1 JM (7-57) 8/18/77 § 75.200	$	100.00
Total Contested (None Settled) Penalties in Docket No. PIKE 78-451-P	$	100.00

Docket No. PIKE 78-458-P
(All Contested)

Notice No. 3 VEH (7-50) 8/1/77 § 75.400 .. (Dismissed) ...	$	0.00
Notice No. 1 EDF (7-63) 10/12/77 § 75.400		15.00
Notice No. 2 EDF (7-64) 10/12/77 § 75.400		15.00
Notice No. 3 EDF (7-65) 10/12/77 § 75.503		15.00
Notice No. 5 EDF (7-67) 10/12/77 § 75.400		15.00
Notice No. 6 EDF (7-68) 10/12/77 § 75.807		25.00
Notice No. 7 EDF (7-69) 10/12/77 § 75.200		50.00
Notice No. 8 EDF (7-70) 10/12/77 § 75.507		20.00

Notice No. 1 EDF (7-71) 10/13/77 § 75.1725		5.00
Notice No. 1 EDF (7-72) 10/14/77 § 77.1605(k)		20.00
Notice No. 1 EDF (7-73) 10/17/77 § 75.604		15.00
Notice No. 2 EDF (7-74) 10/17/77 § 75.200 . . (Dismissed) .		0.00
Notice No. 1 EDF (7-75) 10/18/77 § 75.316		5.00
Notice No. 2 EDF (7-76) 10/18/77 § 75.316		15.00
Notice No. 2 EDF (7-78) 10/20/77 § 75.1101-l		5.00
Notice No. 3 EDF (7-79) 10/20/77 § 75.1102		15.00
Notice No. 4 EDF (7-80) 10/20/77 § 75.516-2		15.00
Total Contested (None Settled) Penalties in Docket No. PIKE 78-458-P	$	250.00

Docket No. PIKE 79-25-P
(All Settled)

Citation No. 63654 6/19/78 § 75.1722	$	45.00
Citation No. 63655 6/19/78 § 75.200		50.00
Citation No. 63656 6/19/78 § 75.200		35.00
Citation No. 63657 6/19/78 § 75.1722		45.00
Citation No. 63658 6/19/78 § 75.503		50.00
Citation No. 63659 6/19/78 § 75.313		35.00
Citation No. 63660 6/19/78 § 75.301-4		46.00
Citation No. 63801 6/19/78 § 75.523-2		60.00
Citation No. 63802 6/19/78 § 75.503		50.00
Citation No. 63803 6/19/78 § 75.503		50.00
Citation No. 63804 6/19/78 § 75.1704-2(d)		50.00
Citation No. 63805 6/19/78 § 75.1710		50.00
Citation No. 63806 6/19/78 § 75.1710		50.00
Citation No. 63807 6/19/78 § 75.1722		49.00
Citation No. 63809 6/19/78 § 75.1100-2		50.00
Citation No. 63810 6/19/78 § 75.316		50.00
Citation No. 63811 6/20/78 § 75.1101-6		60.00
Citation No. 63812 6/20/78 § 75.316		50.00
Citation No. 63813 6/20/78 § 75.316		50.00
Citation No. 63814 6/20/78 § 75.503		35.00
Total Settled (None Contested) in Docket No. PIKE 79-25-P	$	960.00

Docket No. PIKE 79-50-P
(All Settled)

Citation No. 63815 6/20/78 § 75.503	$	35.00
Citation No. 63816 6/20/78 § 75.603		50.00
Total Settled (None Contested) in Docket No. PIKE 79-50-P	$	85.00

Docket No. PIKE 79-77-P

Notice No. 1 EDF (7-81) 10/31/77 § 75.1100-2 (Dismissed)	$	0.00
Citation No. 65863 3/21/78 § 75.601 ..... (Dismissed) ...		0.00

Citation No. 65864 3/21/78 § 75.503 . . . . . (Contested) . . .		15.00
Citation No. 65865 3/21/78 § 75.503 . . . . . (Contested) . . .		25.00
Citation No. 65866 3/21/78 § 75.503 . . . . . (Contested) . . .		25.00
Citation No. 65867 3/22/78 § 77.1605 . . . . (Contested) . . .		1.00
Citation No. 63817 6/21/78 § 75.1704 . . . . (Settled)		40.00
Total Contested and Settled Penalties in Docket No. PIKE 79-77-P	$	106.00

Docket No. PIKE 79-99-P

Order No. 65862 3/15/78 § 75.400 . . . . . (Contested) . . .	$	100.00
Order No. 65862 3/15/78 § 75.1725 . . . . . (Contested) . . .		5.00
Order No. 65862 3/15/78 § 75.1101-l . . . . . (Contested) . . .		25.00
Citation No. 63808 6/19/78 § 75.400 . . . . . (Settled)		40.00
Total Contested and Settled Penalties in Docket No. PIKE 79-99-P	$	170.00

Docket No. KENT 79-1
(All Contested)

Citation No. 64600 11/16/78 § 75.1722(b)	$	25.00
Total Contested (None Settled) Penalties in Docket No. KENT 79-l	$	25.00

Docket No. KENT 79-125
(All Settled)

Citation No. 64310 9/18/78 § 75.1710	$	52.00
Citation No. 64311 9/18/78 § 75.503		50.00
Citation No. 64312 9/18/78 § 75.400		40.00
Citation No. 64313 9/18/78 § 75.515		56.00
Citation No. 64314 9/18/78 § 75.515		56.00
Citation No. 64315 9/18/78 § 75.601		75.00
Citation No. 64330 9/18/78 § 75.400		66.00
Citation No. 64331 9/19/78 § 75.512		48.00
Total Settled (None Contested) Penalties in Docket No. KENT 79-125	$	443.00

Docket No. KENT 79-151
(All Settled)

Citation No. 64969 12/13/78 § 75.400	$	445.00
Total Settled (None Contested) Penalties in Docket No. KENT 79-151	$	445.00

Docket No. KENT 80-28
(All Settled)

Citation No. 703899 4/26/79 § 75.1725	$	60.00
Citation No. 703940 5/4/79 § 75.316		300.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-28	$	360.00

Docket No. KENT 80-31
(All Settled)

Citation No. 703896 4/26/79 § 77.701	$	52.00
Citation No. 703898 4/26/79 § 77.701		60.00
Citation No. 703900 4/26/79 § 77.506		40.00
Citation No. 703930 4/26/79 § 75.1725		52.00
Citation No. 703931 4/26/79 § 75.400		40.00
Citation No. 703932 4/26/79 § 75.316		40.00
Citation No. 703933 4/26/79 § 75.200		56.00
Citation No. 703935 4/26/79 § 75.1103		52.00
Citation No. 703961 4/26/79 § 75.523		34.00
Citation No. 703936 4/30/79 § 75.200		36.00
Citation No. 703937 4/30/79 § 75.200		56.00
Citation No. 703962 4/30/79 § 75.604		38.00
Citation No. 703963 4/30/79 § 75.604		56.00
Citation No. 703964 4/30/79 § 75.503		38.00
Citation No. 703965 4/30/79 § 75.503		30.00
Citation No. 703967 4/30/79 § 75.523		36.00
Citation No. 703968 4/30/79 § 75.1722		56.00
Total Settlement (None Contested) Penalties in Docket No. KENT 80-31	$	772.00

Docket No. KENT 80-32
(All Settled)

Citation No. 703897 4/26/79 § 77.1605(a)	$	40.00
Citation No. 703934 4/26/79 § 75.1100-2		52.00
Citation No. 703938 4/30/79 § 75.400		36.00
Citation No. 703939 4/30/79 § 75.316		45.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-32	$	173.00

Docket No. KENT 80-33
(All Settled)

Citation No. 713455 5/2/79 § 75.604	$	60.00
Citation No. 713456 5/2/79 § 75.200		66.00
Citation No. 713703 5/14/79 § 75.1725		60.00
Citation No. 713707 5/14/79 § 75.603		60.00
Citation No. 713708 5/14/79 § 75.503		34.00
Citation No. 713710 5/14/79 § 75.200		60.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-33	$	340.00

Docket No. KENT 80-68
(All Settled)

Citation No. 713717 5/31/79 § 75.503	$	140.00
Citation No. 713718 5/31/79 § 75.1177		52.00

Citation No. 713719 5/31/79 § 75.601		50.00
Citation No. 713720 5/31/79 § 77.505		52.00
Citation No. 714581 5/31/79 § 77.700		60.00
Citation No. 714047 6/11/79 § 77.504		60.00
Citation No. 714048 6/11/79 § 77.512		25.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-68	$	439.00
Total Contested and Settled Penalties in This Proceeding	$	5,267.00

(2) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P should be dismissed insofar as it seeks to have penalties assessed for the violations of section 75.403 alleged in Notice Nos. 4 RM (7-45) and 2 RM (7-47) dated July 14 and July 15, 1977, respectively, because the motion for approval of settlement (p. 9) states that the analyses of the dust samples required to prove those alleged violations are unavailable.

(3) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P should be dismissed to the extent that it seeks assessment of a penalty for the violation of section 75.400 alleged in Notice No. 3 VEH (7-50) dated August 1, 1977, because MSHA's counsel stated at the hearing that the inspector who wrote Notice No. 3 VEH was unavailable to testify in support of the alleged violation (Tr. 119).

(4) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P should also be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.200 alleged in Notice No. 2 EDF (7-74) dated October 17, 1977, because of MSHA's failure to prove that the violation occurred.

(5) The Petition for Assessment of Civil Penalty filed in Docket No PIKE 79-77-P should be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.1100-2 alleged in Notice No. 1 EDF (7-81) dated October 31, 1977, because of MSHA's failure to prove that the violation occurred.

(6) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P should also be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.601 alleged in Citation No. 65863 dated March 21, 1978, because of MSHA's failure to prove that the violation occurred.

(7) Respondent, as the operator of the Nos. 2, 3, 4, and 6 Mines involved in this proceeding, is subject to the Act and to the regulations Promulgated thereunder.

WHEREFORE, it is ordered:

(A) Pursuant to the parties' settlement agreement and to my decision concerning the contested issues, Little Bill Coal Company is ordered, within

90 days from the date of this decision, to pay civil penalties totaling $5,267.00, as summarized above in paragraph (1).

(B) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P is dismissed to the extent and for the reason given in paragraph (2) above.

(C) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P is dismissed to the extent and for the reasons given in paragraphs (3) and (4) above.

(D) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P is dismissed to the extent and for the reasons given in paragraphs (5) and (6) above.

(E) The motion for approval of settlement filed on October 15, 1980, is granted and the settlement agreement described therein is approved.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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