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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEVA 80-84 A/O No. 46-01286-03035
v.	
WINDSOR POWER HOUSE COAL COMPANY, RESPONDENT	Beech Bottom Mine

DECISION

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 (FN.1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter referred to as the Act).

Inspector Charles Coffield issued Citation No. 811574 to Windsor Power House Coal Company (hereinafter Windsor) on May 11, 1979. The inspector cited a violation of 30 C.F.R. 75.316 (FN.2) and described the pertinent condition or practice as follows:

> The ventilation, methane and dust control plan was not being followed in 6 West (028) section in No. 5 entry when coal was cut with a 15RV cutting machine and there was only approximately 1280 cubic feet of air per minute and 15 fm of mean air velocity reaching the working face. No. 1 entry, 3420 CFM, 29 FM; No. 4 entry, 2625 CFM, 22 FM; No. 6 entry, 2520 CFM, 30 FM. * * * 3600 CFM, 35 FM required.

Approximately 2 hours later, the inspector issued an order of withdrawal pursuant to section 104(b) of the Act on the grounds that "little or no effort" was made to abate the condition.

Windsor has previously contested the issuance of both the citation and order in a review proceeding pursuant to section 105(d) of the Act (hereinafter, the contest proceeding). A decision was rendered in that proceeding by Judge Melick on March 10, 1980. It was found therein that Citation No. 811574 was properly issued and that Windsor was in violation of 30 C.F.R. 75.316 as alleged.

Windsor petitioned the Commission for discretionary review of the decision rendered in the contest of Citation No. 811574, but the petition was not granted. Windsor did not pursue its right to obtain judicial review pursuant to section 106 of the Act. The decision rendered in that contest proceeding, therefore, became a final decision of the Commission.

A petition for assessment of a civil penalty was filed by the Secretary of Labor (hereinafter the Secretary) on December 17, 1979. After assignment of the case on February 12, 1980, it was set for hearing in Charleston, West Virginia, on May 12, 1980, along with another subsequently settled case, Docket No. WEVA 80-68. On March 19, 1980, pending settlement negotiations, the cases were continued to April 18, 1980. On April 17, 1980, the cases were continued to June 18, 1980. Windsor stated that the parties were in the process of developing stipulations of fact and that no evidentiary hearing would be necessary.

On June 13, 1980, Petitioner submitted a motion for partial summary disposition and on August 25, 1980, the parties submitted stipulations of fact. As grounds for the motion for partial summary disposition, counsel for Petitioner asserted the following:

> 1. Under the authority of Reliable Coal Corp., 1 IBMA 51 at 61, the "fact of violation" should not be litigable in more than one administrative proceeding.

2. In the case at bar, a Notice of Contest was filed and on December 12, 1979, an evidentiary hearing was held before JudgeMelick on the underlying fact of violation.

3. On March 10, 1980, a decision was issued by Judge Melick affirming the fact of violation.

4. On April 7, 1980, the Contestant filed a Petition for Discretionary Review with respect to Judge Melick's decision issued on March 10, 1980.

5. The Petition was subsequently denied by the Commission.

6. The Secretary does not oppose Windsor Power House Coal Company's right to an evidentiary hearing in the civil penalty proceeding, however, the proceeding should be limited to the six statutory criterion found in 105(B) of the Federal Mine Safety and Health Act of 1977, and not include another hearing on the fact of violation which has already been established.

Windsor filed its statement in opposition to Petitioner's motion for partial summary disposition on July 1, 1980. Windsor disagreed with the decision rendered in the earlier contest proceeding and desired to relitigate the fact of violation.

The parties submitted stipulations of fact on August 25, 1980. These stipulations are as follows:

1. At approximately 2:00 p.m. on May 11, 1979, Inspector Charles B. Coffield arrived at Respondent's Beech Bottom Mine.

2. Shortly after 2:00 p.m. on May 11, 1979, Inspector Coffield and Roger Caynor, representing Respondent, entered the mine and proceeded to the Six West section.

3. The feeder for the Six West section, which was located approximately 240 feet outby the face of the No. 4 entry, had broken at about 2:45 p.m. on the subject date and was not repaired during the 8:00 a.m. to 4:00 p.m. shift on May 11, 1979.

4. After the above-mentioned feeder had broken, the Six West section crew went to the dinner hole, except for the bolters and the men repairing the feeder.

5. While walking towards the face of the No. 5 entry in the Six West section at about 3:05 p.m., Inspector Coffield and Mr. Caynor noticed an energized cutting machine in the No. 5 entry.

6. While in the No. 5 entry Inspector Coffield asked the section foreman what the air reading was when the cutting machine was cutting coal in the No. 5 entry and the foreman responded that the cutting machine had quit cutting just about 1/2 hour ago (at approximately 2:45 p.m.). At that time there was 4100 cubic feet a minute (hereinafter "cfm") of air reaching the No. 5 face and about 4000 cfm of air reaching the face of the other entries.

7. At no time during Inspector Coffield's inspection on May 11, 1979, did Inspector Coffield or Mr. Caynor observe the cutting machine cutting coal in the Six West section of the Beech Bottom Mine.

8. At no time during Inspector Coffield's inspection on May 11, 1979, did any of the parties observe the loading of coal in the Six West section of the Beech Bottom Mine.

9. After observing the No. 5 entry Inspector Coffield and Mr. Caynor (hereinafter the "parties") proceeded to the No. 1 entry at approximately 3:20 p.m. and observed spot roof bolting in the last open crosscut between the No. 1 and 2 entries. Spot roof bolting was concluded in the applicable area at approximately 3:25 p.m.

10. After the above spot roof bolting was completed, no other equipment was used by the Six West section crew during the May 11, 1979, 8:00 a.m. to 4:00 p.m. shift.

11. Except for two miners who were repairing the feeder, the 8:00 a.m. to 4:00 p.m. Six West section crew left the section between 3:30 and 3:40 p.m. on May 11, 1979.

12. The afternoon shift at the Beech Bottom Mine begins at 4:00 p.m. and ends at 12:00 a.m.

13. At about 3:45 p.m. on the subject date Inspector Coffield took an air reading in the No. 5 entry and determined that the quantity of air at the face of the No. 5 entry at the time was less than 3600 cfm and the mean air velocity reaching the face was less than 35 feet per minute (hereinafter "fm").

14. The parties then proceeded to the No. 1 entry where Inspector Coffield determined that there was an air quantity of 3420 cfm and an air velocity of 24 fm.

15. After the Inspector took air readings in the faces of the No. 2 and 3 entries and determined that the quantity and velocity of air was greater than 3600 cfm and 35 fm, the

parties then proceeded to the No. 4 entry at approximately 4:00 p.m.

16. After Mr. Caynor was relieved by Mr. Roxby in the No. 4 entry, Inspector Coffield determined that the air quantity and velocity in the face of the No. 4 entry was 2625 cfm and 25 fm respectively and the air quantity and velocity in the face of the No. 6 entry was 2520 cfm and 30 fm respectively.

17. At the time Inspector Coffield took his air readings in the Six West section on May 11, 1979, because the miners working the day shift had left and the miners working the afternoon shift had not yet begun working, the equipment in the Six West section was not energized and no miners were working in the face area of any of the entries of the Six West section.

18. Thereafter Inspector Coffield served upon Mr. Roxby Citation No. 811574 (a copy of which is attached hereto as Exhibit A) alleging a violation of 30 C.F.R. 75.316, in that the ventilation plan was not being followed in the Six West (028) section in the No. 5 entry where coal was cut with a 15RV cutting machine, since there was only approximately 1280 cfm of air and 15 fm mean air velocity in the working face; No. 1 entry 3420 cfm, 24 fm; No. 4 entry 2625 cfm, 22 fm; No. 6 entry 2520 cfm, 30 fm. Inspector Coffield further alleged that the ventilation plan required 3600 cfm and 35 fm mean air velocity.

19. On May 11, 1979, at 5:40 p.m., Inspector Coffield served upon Respondent Order of Withdrawal No. 811576 (a copy of which is attached as Exhibit B) alleging that little or no effort was being made to abate this violation in that air had not been increased in No. 5 and 6 entries of 6 West (028) section although 1 and 4 entries were increased to more than 3600 cfm and 35 fm.

20. Respondent's ventilation plan in effect at the time of the issuance of Citation No. 811574 provided in Item 24 on page 5 and Item 2 on page 6 that Respondent shall "maintain a minimum of 3000 cfm at each working face, where coal is being cut, mined, loaded or the roof bolted * * *." A copy of the subject ventilation plan is attached hereto as Exhibit C.

21. Respondent's subject ventilation plan stated in Item 1 on page 12 in column form:

Quantity air at face - 3600 cfm
Mean air quantity - 35 fpm

The above constitutes the ventilation plan's only reference to mean air velocity.

22. 30 C.F.R. 75.301-1 specifies that "[a] minimum quantity of 3000 cubic feet a minute of air shall reach each working face from which coal is being cut, mined, or loaded or any other working face so designated by the District Manager, in the approved ventilation plan."

23. 30 C.F.R. 75.301-4(a) specifies that "except * * * in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and to carry away methane and to reduce the level of respirable dust to the lowest attainable level by the Coal Mine Safety District Manager, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined, or loaded from the working face with mechanical mining equipment * * *."

24. Beech Bottom Mine constitutes a coal mine, the products of which enter commerce or the operations or products of which affect commerce. Respondent, Windsor Power House Coal Company, operates and at all times pertinent to the citation and order at issue operated Beech Bottom Mine. Respondent and every miner employed in the above-stated mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

25. Jurisdiction of the above-captioned matter vests in the Federal Mine Safety and Health Review Commission.

26. As of June 27, 1980, Beech Bottom Mine employed 231 UMWA and 57 exempt and nonexempt employees. The mine, which is Respondent's only mine, produced a total of 575,935 tons of coal during 1979. Windsor Power House Coal Company is a wholly-owned subsidiary of Ohio Power Company.

Motion for Partial Summary Judgment

The question presented by Petitioner's motion for partial summary judgment is whether the operator can litigate the fact of violation before one judge in a proceeding contesting the citation and order and later litigate the same fact of violation before another judge in a civil penalty proceeding.

Petitioner's position is, in essence, that the fact of violation should not be litigable in more than one administrative proceeding. By reference, Petitioner sought application of the doctrines of res judicata or collateral estoppel to prevent Respondent from litigating the fact of violation twice.

Windsor advanced a number of arguments in opposition. Windsor urged, in substance, that the fact of violation alleged in the citation must be reviewed two times because 29 C.F.R. 2700.73 in the Procedural Rules of the Commission states that an unreviewed decision of a judge is not a precedent binding on the Commission. While it is not a precedent binding on the Commission or its administrative law judges in future cases, discretionary review was denied by the Commission and the decision is, therefore, a final order of the Commission. Section 113(d)(1) of the Act provides that the decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period of time the Commission has directed that such decision shall be reviewed by the Commission. It does not follow that, because the decision is not a precedent binding on the Commission in future cases, the fact of violation in this case must be reviewed two times. By this assertion, Windsor apparently seeks a second trial on the issue of the fact of violation by application of the rules of legal precedent and stare decisis which are distinct from those regarding res judicata and collateral estoppel. Windsor's assertion that the doctrines of res judicata or collateral estoppel should not be applied in the instant action in which the judge's decision was unreviewed is unfounded.

Respondent advanced a second argument in support of its contention that the doctrines of res judicata or collateral estoppel should not be applied in this proceeding by asserting that these doctrines preclude only matters which can be demonstrated to have been litigated and determined. (FN.3)

In the review proceeding, the judge determined that Windsor was in violation of 30 C.F.R. 75.316. This precise question of the fact of violation is the one raised in the instant proceeding. The basis of the decision in the review proceeding was that Respondent failed to provide the amount of ventilation required by the ventilation plan. The time at which the air measurements were taken and the violation was found to have occurred was during the mining cycle even though coal was not actually being cut, mined or loaded, or the roof bolted. In view of the stipulations by the parties in the instant proceeding, the basis of any finding as to whether Windsor was in violation of the same regulation, 30 C.F.R. 75.316, would also be whether Respondent was required to maintain the required amount of ventilation even though coal

was not actually being cut, mined, or loaded or the roof bolted at the time the air measurements were taken.

Windsor argued, however, that the precise determination whether coal was being "cut, mined, loaded or the roof bolted" had not been made in the earlier proceeding. It asserted the following:

> WPHCCo contested the validity of the subject citation and the order based thereon on the basis that no coal was being "cut, mined, loaded or the roof bolted" at any of the subject face areas at the time of the issuance of the subject citation and order and that the locations cited by the Inspector did not constitute "working faces." * * * Subsequently on March 10, 1980, Judge Melick issued his decision, in which he determined that the readings were taken at "working faces". However, while Judge Melick determined that "there was no active cutting or loading of coal in any of the face areas", he made no determination as to whether coal was being "cut, mined, loaded or the roof bolted" at the subject locations at the time of the issuance of the subject citation. [Footnote omitted.]

In a footnote, Windsor referred to page 2 of the decision. On page 2 of the decision, the judge stated at the beginning of the last paragraph that:

> The air readings cited herein were taken in the Nos. 1, 4, 5, and 6 entries of the 6 West section of the mine by Inspector Coffield beginning around 3:45 p.m., on May 11, 1979. At that time there was no active cutting or loading of coal in any of the face areas although mining equipment was being moved about.

It is possible that these sentences, taken out of context, provide the basis for Windsor's allegation that a litigable issue still exists. However, not only had the judge in that decision clearly held that Windsor was in violation of 30 C.F.R. 75.316, but it is also clear that he had not ignored or overlooked the issue of roof bolting in his rationale. The judge also stated on page 2 of his decision that:

> It is apparent, however, that Windsor has reached an erroneous conclusion because of its misplaced reliance upon only a small segment of the definition of "working face" lifted out of context. "Working face" is defined in 30 C.F.R. 75.2(g)(1) as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." The issue to be resolved then is not whether the inspector's air readings were taken while coal was being extracted, but rather whether the readings were taken at places "in which work of extracting coal from its natural deposit in the earth [was] performed during the mining cycle."

After finding that the readings were taken beginning around 3:45 p.m., the judge stated:

> The operator concedes that the full sequence of conventional mining operations continued in the cited entries until 2:45 p.m. It appears that at that time the feeder had broken down and, as a result of that and an anticipated shift change at 3:45 p.m., the various operations were being phased out. Even after 2:45 p.m., however, the evidence shows that further work was performed with the admitted purpose of setting up the entries for production to resume as soon as the feeder was repaired. The uncontradicted evidence shows that various equipment used in the mining cycle was energized at least until 3:45 p.m., that a roof-bolting machine continued to spot roof bolts (the process of replacing bolts) at the inby corner of the No. 1 entry until at least 3:15 or 3:20 p.m., that the cutting machine which had completed cutting the No. 5 entry at around 2:45 p.m., was on its way to cut the No. 4 entry and that the loading machine was waiting to operate in the No. 6 entry.

The decision, therefore, disposes of the issue of roof bolting. It does not hold or even intimate that the decision was reached because roof-bolting operations, which continued until at least 3:15 or 3:20 p.m., were still in progress at 3:45 p.m., when the air readings were taken by the inspector.(FN.4)

Although the judge did not find that coal was actually being cut, mined or loaded or the roof bolted at the time the air readings were taken, he stated:

> Within this framework, I have no difficulty concluding that when Inspector Coffield took his air readings each of the cited entries was a place in which work of extracting coal from its natural deposit in the earth was performed during the mining cycle. Thus, the readings were taken at "working faces." 30 C.F.R. 75.2(g)(1). Under the circumstances, the underlying citation in this case was properly issued and the subsequent order of withdrawal was therefore valid. [Emphasis added.]

A reading of sections 303(b) and 303(c)(1) of the Act (30 C.F.R. 75.301 and 75.302(a)) (FN.5) by themselves might lead one to conclude that line brattice

or other approved devices are required to be continuously used to provide 3,000 cubic feet of air a minute to each working face. 30 C.F.R. 75.301-1, however, provides as follows (FN.6): "A minimum quantity of 3,000 cubic feet a minute of air shall reach each working face from which coal is being cut, mined or loaded and any other working face so designated by the District Manager, in the approved ventilation plan." [Emphasis added.] The specific issue in the earlier proceeding was not whether Windsor was in violation of section 75.305-1 for failure to provide 3,000 cubic feet of air per minute at each working face from which coal is being cut, mined or loaded. It was whether Windsor failed to provide 3,000 cubic feet per minute of air at working faces designated by the District Manager in the approved ventilation plan. If the ventilation plan specified that 3,000 cubic feet of air per minute must reach all working faces, the operator would be obligated to provide 3,000 cubic feet of air per minute to those faces as defined in section 75.2(g)(1), i.e., any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle. As Judge Melick held, that was the net effect of the provision specifying the places where 3,000 cubic feet of air per minute were required in Windsor's approved ventilation plan.

Respondent's ventilation plan in effect at the time of the issuance of Citation No. 811574 provided that Respondent shall "maintain a minimum of 3000 cfm at each working face, where coal is being cut, mined, loaded or the roof bolted * * *." [Emphasis added.] Where roof bolting was used to support the roof in the Beech Bottom Mine, the times and occasions when Respondent

was required to maintain 3,000 cfm at each working face closely correspond to the sequence of events which comprised the mining cycle found to be in effect at Respondent's mine. In his decision, Judge Melick found as follows:

> The term "cycle" is defined in the Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968), as the complete sequence of face operations required to get coal. In conventional mining, as followed in the Beach Bottom Mine, the sequence consists of supporting the roof, cutting the face, drilling the face, shooting the face, and loading and hauling the coal. In order for the face to be a "working face," it is not therefore necessary that work of extracting coal be performed at all times. Cf. Peggs Run Coal Company, Inc., PITT 73-6-P, March 29, 1974, aff'd., 3 IBMA 421, December 6, 1974. The definition clearly contemplates that the mining cycle is a continuing process in spite of temporary delays caused by shifting equipment or mechanical break down.

Except for the use of the words "loading and hauling" used by the judge in the contest proceeding in describing the mining cycle instead of the word "loaded" used in Respondent's approved ventilation plan, the mining procedures described are identical. Since coal may be hauled away from a face area during all of the phases of the cycle, the actual hauling at the face area might be considered for purposes of definition or construction of the ventilation plan to be an inconsequential part of the "sequence of face operations to get coal." Thus, the words in Windsor's ventilation plan might be construed to be identical for all practical purposes with the definition of the mining cycle. It follows that it could be held that Windsor's ventilation plan required 3,000 cfm at the working face--defined as any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle--throughout the entire mining cycle.

Windsor asserted that "the administrative law judge in his March 10, 1980, decision did not determine whether the cutting, mining, and loading inactivity at the subject face areas at the time of the issuance of the subject citation should deem the citation and order based thereon invalid, even though this issue was raised and discussed both orally and in writing prior to the issuance of the judge's decision." This assertion is unfounded. The judge expressly stated that "at that time there was no active cutting or loading of coal in any of the face areas although mining equipment was being moved about." It is clear that he did not find a violation because coal was actually being cut, mined, loaded or the roof bolted. The basis of the decision was that the air readings were taken at places in which the work of extracting coal from its natural deposit in the earth was performed during the mining cycle although not while coal was actually being cut, mined, loaded or the roof bolted. The requirement of the ventilation plan was not suspended by a temporary interruption of cutting, mining, loading or roof bolting.

In view of the above, Respondent's assertion that Judge Melick did not make certain determinations critical to the finding of the fact of violation is rejected.

Unlike the 1977 Act, the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, the 1969 Act) made no provision for the review of abated violations and no provision for the review of unabated notices of violation other than that made incidental to the review of the reasonableness of the time allowed for abatement. In Reliable Coal Corp., 1 IBMA 51 (June 10, 1971), which held that there was no provision in the 1969 Act for review of such violations prior to the institution of a civil penalty proceeding, the Interior Board of Mine Operations Appeals stated:

> [W]e find no merit in Reliable's contention that the interrelationship of the statutory provisions of sections 104, 105(a)(1) and 109(a)(3), supports its view that an operator has a statutory right of review of the "fact of violation" in a section 105(a) proceeding. As we interpret these provisions of the Act, and as we held in Freeman, the Act does not preclude a determination of this issue in a section 105(a) proceeding where it is raised as an element of the reasonableness of time allowed for abatement. Indeed, in such case, a decision under section 105(a) on the issue of reasonableness of time must inherently incorporate a determination that the violation did or did not occur -- and such determination, if final, would be res judicata within the Department. Thus, the "fact of violation" would not be litigable in more than one administrative proceeding.

Reliable serves to show that the application of the doctrine of res judicata was appropriate under the 1969 Act. There is even more reason for the application of res judicata or collateral estoppel in the instant case. Under the 1977 Act, provision is expressly made for the review of the "fact of violation" of a citation in a review case, even when the violation is abated, Energy Fuels Corp., 1 MSHC 2013 (May 1, 1979).

In Energy Fuels Corporation, the Commission, in holding that the operator is permitted to contest the citation immediately upon its issuance, stated:

> If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. The two contests could then be easily consolidated for hearing upon motion of a party or the Commission's

> or the administrative law judge's own motion. If the operator has an urgent need for a hearing, the Secretary could make it more likely that the two contests would be tried together by quickly proposing a penalty. If a penalty is contested, and the hearing on the citation is already underway, consolidation would still be possible. Moreover, even if consolidation were not possible, it has not yet been suggested that principles of repose, such as res judicata, or collateral estoppel, could not be employed to prevent multiple hearings on the same issues. We are unwilling to eschew so early in the history of the 1977 Act these possible avenues of accommodation.

The proceeding in which Citation No. 811574 and Order No. 811576 were contested had already been completed, therefore, consolidation with this civil penalty proceeding was not feasible. Although section 105(a) of the Act requires the Secretary to propose a penalty within reasonable time after the termination of an inspection or investigation, compliance with the assessment procedures prescribed in Part 100 of Title 30 Code of Federal Regulations requires a considerable amount of time. Under the regulations all citations which have been abated and all closure orders, regardless of termination or abatement, are referred by MSHA to the Office of Assessments for a determination of the fact of the violation and the amount, if any, of the penalty to be proposed. These regulations prescribe an initial review of the citation or order, formula computations, conferences or the submission of additional information for consideration, issuances of notice of proposed penalty and notices of contest. In addition to the time required to perform some of these steps, periods of time such as 10 days, 33 days and 30 days are allowed between some of the steps. In addition to those delays, 29 C.F.R. Part 100 provides that the Secretary has 45 days from the receipt of the notice of contest to file a proposal for a penalty with the Commission. Even after this, the Respondent has 30 days to file an answer, the parties have 60 days from the filing of the proposal of a penalty to complete discovery and 10 days to oppose each motion, and notice to all parties must be given at least 20 days before the date set for hearing.

In actual practice, it has developed that considerable time is required between the issuance of the citation and the assignment of the civil penalty proceeding for trial. The instant case was not assigned to a judge until February 12, 1980, 2 months after the contest proceeding hearing had been held in December 1979. It was not apparent that res judicata or collateral estoppel was an issue until several months later, after the case had been continued, when the Secretary filed its motion for pretrial summary disposition.

Since consolidation was not feasible by the time the existence of the review case was disclosed in the record of the instant case, the remaining alternatives are (1) to make two separate determinations of the same fact of violation or (2) to apply the doctrines of collateral estoppel or res

judicata.(FN.7) Under the generally recognized rules of law, these doctrines are applicable in such cases to eliminate wasteful, time-consuming and possibly disruptive repetitive decisions. The application of the rules of collateral estoppel or res judicata in the instant case would not contravene any overriding public interest or result in manifest injustice. The application of these doctrines should not, therefore, be qualified or rejected as urged by Windsor. This narrow ruling in regard to the issue of "fact of violation" is that Respondent is estopped from having the fact of violation determined for a second time under the circumstances of this case.

In view of the above, Petitioner's motion for partial summary disposition is granted. A violation of 30 C.F.R. 75.316 has been established.

Assessment of Civil Penalty

Since Windsor was in violation of a mandatory safety standard, the Act requires that it be assessed an appropriate civil penalty. In assessing this civil penalty, consideration must be given to the six criteria contained within section 110(i) of the Act. The facts serving as basis for a determination of those statutory criteria, with the exception of the effect of a penalty on the ability of the operator to remain in business and the operator's history of previous violations, were stipulated by the parties. In the absence of indication in the record otherwise, it is found that the penalty assessed herein will not affect the ability of Windsor to remain in business. The amount of the penalty assessed will be as if the operator had no history of previous violations.

The Beech Bottom Mine was above average in size with 288 employees producing 575,935 tons of coal during 1979.

In the absence of evidence to the effect that the operator knew or should have known of the inadequate quantity and velocity of air in the Six West section on May 11, 1979, it is found that the record will not support a finding of negligence on the part of Respondent. The parties stipulated that the foreman stated that the cutting machine had quit cutting about one-half hour previously and that there were 4,100 cfm of air reaching the No. 5 face and about 4,000 cfm of air reaching the face of the other entries. The times of the air measurements and who made the measurements upon which the foreman's statement was based were not stipulated.

As noted in the stipulations, at the time the inspector took his readings, the miners working the 8:00 a.m. to 4:00 p.m. shift had left the section and those working the evening shift had yet to arrive. Two miners remained on the section to repair the feeder during the pertinent time period. Two of the faces were ventilated in accordance with the plan. A third face received only slightly less than the required amount of air. The ventilation at the remaining three faces was substantially less than that required by the plan. There is no indication that, because of the reduced air volume or velocity, methane had been allowed to accumulate or, in the absence of any actual cutting, mining, loading or roof bolting that there was any mining activity which would be likely to cause or increase the liberation of methane. Although the operator was in violation of 30 C.F.R. 75.316 for failure to provide the prescribed volume and velocity of air for ventilation, there is no indication that such failure for an undetermined, but possibly a short time, actually failed to dilute, render harmless, and carry away, flammable, explosive, noxious, harmful gases, dust, smoke, and explosive fumes. It is accordingly found that the probability of an accident resulting in injury was low.

In the absence of any explanation why the required volume of 3,000 cfm was not restored in entries 5 and 6 within the time set by the inspector for abatement, it is found that Respondent did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the findings of fact and conclusions of law contained in this decision, an assessment of $50 is appropriate under the criteria of section 110 of the Act.

ORDER

It is ORDERED that Respondent pay the sum of $50 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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(FOOTNOTES START HERE.)
~FOOTNOTE_ONE

1 Section 110(i) of the Act provides:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the

Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

~FOOTNOTE_TWO
2 Section 303(o) of the Act, reproduced in the regulations as 30 C.F.R. 316, reads as follows:

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

~FOOTNOTE_THREE
3 Windsor cited Russell v. Place, 24 L.Ed 214 (1876), which involved a suit for patent infringement, and in which the U.S. Supreme Court stated:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record * * * the whole subject matter of the action will be at large, and open to a new contention, unless this certainty be removed by extrinsic evidence showing the precise point involved and determined." [Emphasis added.]

~FOOTNOTE_FOUR
4 Even if the judge in that decision had not taken cognizance of the issue of roof bolting and after due consideration found a violation on a different theory, there would still be no litigable issue in this case as to whether roof bolting was in progress at the time the air readings were taken because of the stipulations of the parties. The parties have effectively disposed of this issue by stipulating that spot roof bolting was concluded in the applicable area at approximately 3:25 p.m. (Stipulation No. 9) and air readings by the inspector were commenced at about 3:45 p.m. By these stipulations read in context, the parties have therefore agreed that roof bolting was concluded before the air measurements were taken. There is, therefore, nothing left to litigate on this issue.

Moreover, Windsor is aware that there was never a litigable issue as to whether roof bolting was actually in progress at the time the air readings were started. In footnote 2 to its allegation that the judge had not made findings relative

to roof bolting at the time the air readings were taken, Windsor stated: "Because the Secretary never alleged that the roof was being bolted at the subject faces at the applicable times, for the purposes of this case the "cut, mined or loaded" language in the ventilation plan can be considered as identical to that in 30 CFR 75.301-1 and 30 CFR 75.301-4(a)."

While this acknowledges that no such issue on which the judge was required to make findings existed, it is not a correct statement. Although the additional requirement in the ventilation plan for ventilation while the roof was being bolting was not raised as a factual issue in this case, that requirement may have a bearing on whether ventilation is required only at those times, continuously, or during the entire mining cycle.

~FOOTNOTE_FIVE

5 Sections 303(b) and 303(c)(1) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act) provide:

"(b) All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be nine thousand cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be nine thousand cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be three thousand cubic feet a minute. Within three months after the operative date of this title, the Secretary shall prescribe the minimum velocity and quantity of air reaching each working face of each coal mine in order to render harmless and carry away methane and other explosive gases and to reduce the level of respirable dust to the lowest attainable level. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. Within one year after the operative date of this title, the Secretary or his authorized representative shall prescribe the maximum respirable dust level in the intake aircourses in each coal mine in order to reduce such level to the lowest attainable level. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

"(c)(1) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this

requirement, where such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately." [Emphasis added.]

Section 303(b) of the Act has been reproduced in the regulations as 30 C.F.R. 75.301. Section 303(c)(1) of the Act has been reproduced in the regulations as 30 C.F.R. 75.302(a).

~FOOTNOTE_SIX

6 30 C.F.R. 75.301-4(a), the other regulation cited by Windsor in its footnote, concerns the velocity of air and provides as follows:

"(a) On and after March 30, 1971, except in working places using a blowing system as the primary means of face ventilation or in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and carry away methane and to reduce the level of respirable dust to the lowest attainable level by the Coal Mine Safety District Manager, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined, or loaded from the working face with mechanical mining equipment, and (2) in any other working place designated by the Coal Mine Safety District Manager for the district in which the mine is located in which excessive amounts of respirable dust are being generated by any type of mechanical mining equipment." [Emphasis added.]

~FOOTNOTE_SEVEN

7 In a footnote to its argument, Windsor states:

"Considerable confusion seems to exist regarding when the doctrine of res judicata is applicable and when the doctrine of collateral estoppel. Collateral estoppel, unlike res judicata, does not necessitate an identity of causes of action. See IB Moore's Federal Practice 0.411[2] at 3777. Both doctrines are discussed herein."

If confusion exists, it need not be infused into the instant proceeding. The doctrine of collateral estoppel is clearly applicable. The doctrine of res judicata may also be applicable.