

CCASE:
SOL (MSHA) v. ISLAND COAL
DDATE:
19810223
TTEXT:

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

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

Civil Penalty Proceeding
Docket No. KENT 79-336
A/O No. 15-02129-03053 V
Hamilton No. 1 Mine

ISLAND CREEK COAL COMPANY,
RESPONDENT

DECISION

Appearances: Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner
William K. Bodell II, Esq., Island Creek Coal Company, Lexington, Kentucky, for Respondent

Before: Judge Cook

I. Procedural Background

On October 9, 1979, the Mine Safety and Health Administration (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act), alleging violations of two provisions of the Code of Federal Regulations. On October 25, 1979, an answer was filed by Island Creek Coal Company (Respondent). (FN.1)

Pursuant to a notice of hearing issued on March 7, 1980, and an amended notice of hearing issued on April 17, 1980, the hearing was held on June 26, 1980, in Evansville, Indiana, with representatives of both parties present and participating. Following the presentation of evidence, a schedule was

~510

set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. Additionally, the parties were instructed to file a stipulation on or before July 10, 1980, setting forth Respondent's size in terms of total tons of coal produced annually.

On July 14, 1980, Petitioner filed a motion requesting that the tonnage report attached thereto be used to verify the size of Respondent's business in view of the fact that the report was not available at the time of the hearing. No response or objection to the receipt of the report in evidence was filed by Respondent. Therefore, on August 6, 1980, an order was issued marking the report as Exhibit M-7 and receiving it in evidence.

Petitioner and Respondent filed posthearing briefs on September 12, 1980, and September 22, 1980, respectively. Neither party filed a reply brief.

II. Violations Charged

Order No.	Date 30	C.F.R. Standard
796000	March 22, 1979	75.1303
796081	April 12, 1979	75.518

III. Witnesses and Exhibits

A. Witnesses

Petitioner called as its witnesses Jesse O. Allen, a section foreman at the subject mine on April 12, 1979, but unemployed at the time of the hearing; Dennis M. Padgett, an underground unit mechanic at the subject mine; and Charles F. Clark, a Federal mine inspector (electrical).

Respondent called as its witnesses Ben F. Brinkley, maintenance superintendent of Respondent's River Division; Harold M. Gamblin, Sr., assistant superintendent of the subject mine; and Raymond Ashby, director of safety for Respondent's West Kentucky Division.

Additionally, both Petitioner and Respondent called Federal mine inspector Ronald L. Goldsberry as a witness.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout from the Directorate of Assessments listing the history of previous violations at Respondent's Hamilton No. 1 Mine for which assessments have been paid, beginning April 13, 1977, and ending April 12, 1979.

M-2 is a copy of Order No. 796081, April 12, 1979, 30 C.F.R. 75.518, and a copy of the termination thereof

~511

M-3 and M-4 are copies of the inspector's statements pertaining to Order No. 796081, April 12, 1979, 30 C.F.R. 75.518.

M-5 is a copy of Order No. 796000, March 22, 1979, 30 C.F.R. 75.1303, and a copy of a modification thereof

M-6 is a copy of the termination of Order No. 796000, March 22, 1979, 30 C.F.R. 75.1303.

M-7 is a report showing the size of Respondent's business in terms of tons of coal produced annually.

2. Respondent introduced the following exhibits in evidence:

O-1 is an electrical diagram for a 750 KVA nitrogen filled, wheel mounted transformer.

O-2 is a copy of the maintenance request dated April 11, 1979, submitted by Jesse O. Allen.

O-3 is a copy of a report dated April 12, 1979.

3. The following exhibits contain reproductions of various drawings made on the blackboard by various witnesses during the course of their testimony as relates to Order No. 796081, April 12, 1979, 30 C.F.R. 75.518:

X-1 contains the reproductions of the drawings made by Inspector Goldsberry (No. 1) and Inspector Clark (No. 2).

X-2 contains the reproduction of the drawing made by Mr. Brinkley.

IV. Issues

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

V. Opinion and Findings of Fact

A. Stipulations

1. The Administrative Law Judge has jurisdiction in this proceeding (Tr. 11-12).

~512

2. Federal mine inspector Ronald L. Goldsberry was a duly authorized representative of the Secretary of Labor when the subject orders were issued (Tr. 11).

3. The assessment of civil penalties in this proceeding will not affect Respondent's ability to remain in business (Tr. 12).

4. Respondent is a large operator (Tr. 12).

5. Respondent is operating in interstate commerce (Tr. 12).

6. The size of Respondent's West Kentucky Division is rated at 4,399,525 tons of coal per year (Tr. 365).

B. Order No. 796000, March 22, 1979, 30 C.F.R. 75.1303

Occurrence of Violation

Federal mine inspector Ronald L. Goldsberry visited Respondent's Hamilton No. 1 Mine on March 22, 1979, as part of his regular inspection (Tr. 288). After completing his preliminary duties on the surface, he proceeded underground accompanied by Mr. Elroy Mills, his supervisor, Mr. Everett Miller, the union representative, and Mr. Harold M. Gamblin, Sr., the assistant superintendent of the mine (Tr. 289-290). Inspector Goldsberry issued Order No. 796000 at approximately 9:45 a.m. citing Respondent for a practice in violation of mandatory safety standard 30 C.F.R. 75.1303 in that: "[p]ermissible explosives were not being used in a permissible manner in Nos. 1 through 6 entries on No. 9 Unit, ID070, South off 3 west in that there were [sic] evidence that the explosives had been detonated on solid. The drill holes were drilled from 10 to 40 inches deeper than the faces were undercut" (Exh. M-5). Throughout the hearing, the practice of detonating explosives on solid was referred to as "shooting on solid," and will be so referenced throughout this decision.

The use of explosives is an integral part of the coal mining method known as conventional mining. Conventional mining is defined as the "cycle of operations which includes cutting the coal, drilling the shot holes, charging and shooting the holes, loading the broken coal, and installing roof support." Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at p. 259. According to Inspector Goldsberry, shooting on solid occurs when the shot holes are drilled deeper than the undercut (Tr. 293-294). An individual who has accidentally drilled past the undercut can prevent shooting on solid by putting some stemming in the shot hole to bring the explosive out to the outby end of the undercut (Tr. 310). The inspector testified that shooting on solid is not permitted without a permit (Tr. 299), and that Respondent does not have a permit authorizing it to shoot on solid (Tr. 300).

~513

The inspector did not observe the actual drilling, undercutting and blasting operations (Tr. 300). Rather, his determination that shooting on solid had occurred was based upon a series of measurements and visual observations. His testimony, as set forth below, establishes by a preponderance of the evidence that shooting on solid had occurred in the Nos. 2, 3, 4 and 5 entries. (FN.2)

The inspector's opinion as an expert that shooting on solid had occurred in these four entries is entitled to great weight in view of his extensive experience in coal mining. It is important to bear in mind that the inspector had shot on solid in the 1940's (Tr. 299). It can therefore be concluded that his familiarity with shooting on solid, based on his own first hand experience, enabled him to properly identify the physical evidence produced when one engages in such practice.

The inspector's testimony as relates to blasting practices in general indicates the following: Proper blasting procedures entail drilling and undercutting to the proper depth. Additionally, proper blasting procedures envision having an 18 inch burden in all directions, if the height of the coal permits (see, e.g., Tr. 300-301). If these procedures are employed, the new face will occur at the end of the cut after the shots are fired (Tr. 306). Failure to provide the 18-inch burden in all directions will result in the presence of overhangs (Tr. 300-301). If the shot holes are drilled deeper than the undercut, the extent of the overdrilling will be present on the new face (Tr. 307). The presence of mushroomed shot holes on the face would indicate that such holes had been drilled on solid (Tr. 306-307). A mushroomed shot hole is one whose diameter is largest on the outside, i.e., largest where the face is broken off even with the cut (Tr. 300-304).

In the instant case, the inspector examined the shot holes in the face of the Nos. 2, 3, 4 and 5 entries. The holes were mushroomed and penetrated

~514

deeper than the face of the coal (Tr. 300-304). Measurements were taken which revealed the following: In the No. 2 entry, the left side hole was 16 inches deeper than the undercut, and the left center hole was 22 inches deeper than the undercut (Tr. 303-304). In the No. 3 entry, the left center hole was 18 inches deeper than the undercut, the left side hole was 20 inches deeper than the undercut, the right center hole was 23 inches deeper than the undercut, and the right side hole was 36 inches deeper than the undercut (Tr. 305). In the No. 4 entry, the left center hole was 22 inches deeper than the undercut, the left center hole was 30 inches deeper than the undercut, the right side hole was 36 inches deeper than the undercut, and the right center hole was 18 inches deeper than the undercut (Tr. 307). In the No. 5 entry, the drill holes on the right rib were 31 inches deeper than the undercut, the left center hole was 22 inches deeper than the undercut, and the left rib was 43 inches deeper than the undercut (Tr. 309).

In view of the foregoing, it is found that shooting on solid had occurred in the Nos. 2, 3, 4 and 5 entries as alleged in the order of withdrawal. (FN.3) The testimony of Mr. Raymond Ashby, director of safety for Respondent's West Kentucky Division, is insufficient to rebut the inspector's opinion as an expert that shooting on solid had occurred.

The principal question presented is whether shooting on solid constitutes a failure to use permissible explosives in a permissible manner in violation of mandatory safety standard 30 C.F.R. 75.1303. Petitioner contends that Part 15 of Title 30 of the Code of Federal Regulations expressly states that the practice at issue is a failure to use permissible explosives in a permissible manner. (Petitioner's Posthearing Brief, pps. 8-9). Respondent's position as relates to Part 15 of Title 30 is phrased in terms of adequacy of notice (Respondent's Posthearing Brief). An analysis of the relevant provisions of Part 15 and Part 75 of Title 30 reveals the following:

Mandatory safety standard 30 C.F.R. 75.1303 is a verbatim restatement in the Code of Federal Regulations of section 313(c) of the Federal Coal Mine

Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970) (1969 Coal Act). The standard provides, in part, as follows:

Except as provided in this section, in all underground areas of a coal mine only permissible explosives, electric detonators of proper strength, and permissible blasting devices shall be used and all explosives and blasting devices shall be used in a permissible manner.

For the purpose of Part 75 of Title 30, the term "permissible" as applied to explosives, shot-firing units, or blasting devices used in a coal mine refers to explosives, shot-firing units or blasting devices which meet specifications which are prescribed by the Secretary, 30 C.F.R. 75.2(c)(2), and as applied to the manner of use of equipment or explosives, shot-firing units, and blasting devices, means the manner of use prescribed by the Secretary. 30 C.F.R. 75.2(c)(3). Part 75 of Title 30 does not contain a provision characterizing shooting on solid as a failure to use permissible explosives in a permissible manner, and does not contain a cross reference to any provision of the Code of Federal Regulations containing such a characterization. However, Part 15 of Title 30 contains a permissibility section specifically addressing explosives, and Petitioner points to the provisions of such part as containing the Secretary's determination that shooting on solid is an impermissible blasting practice.

Part 15 of Title 30 bears the heading "Explosives and Related Articles." The regulations in Part 15 of Title 30 "state the requirements for certification of explosives as permissible for use in underground coal mines; provides standards for the examination of explosives previously certified to check conformance to their basic specifications; and provide for miscellaneous tests not leading to certification." 30 C.F.R. 15.1. "An explosive certified as permissible under [Part 15] is permissible in use so long as it meets" five enumerated requirements. 30 C.F.R. 15.19. One of the five requirements mandates that the explosive be "in all other respects used in conformance with the regulations specified in the most recent edition of the applicable Federal Mine Safety Code." 30 C.F.R. 15.19(e). The following provision is set forth immediately after 30 C.F.R. 15.24:

Section 15.19 of Part 15 deals with the use of permissible explosives, and paragraph (e) of that section incorporates the "regulations specified in the most recent edition of the applicable Federal Mine Safety Code." Except for provisions which impose requirements now expressly dealt with in, or which are inconsistent with, the Federal Coal Mine Health and Safety Act of 1969, these regulations are as follows:

Blasting practices in bituminous coal and lignite underground mines are addressed immediately following this passage. Article IV, section 5, paragraph 3 thereof states that "[w]here the coal is cut, shots shall not be fired if the blast hole is drilled

beyond the limits of the cut."

Respondent challenges all references to Part 15 of Title 30 on both substantive and procedural grounds. Both grounds are phased in terms of adequacy of notice.

Respondent correctly observes that neither the order of withdrawal issued by the inspector nor the pleadings filed by Petitioner makes reference to the provisions of Part 15 of Title 30 as forming a basis for the charge that shooting on solid is an impermissible blasting practice within the meaning of 30 C.F.R. 75.1303. Additionally, Respondent argues that it was not informed by Petitioner, in any manner, prior to the hearing that the provisions of Part 15 of Title 30 were involved in this proceeding. Accordingly, Respondent argues that such actions on Petitioner's part are wholly unacceptable and improper for two reasons.

First, Respondent argues from a substantive standpoint that Part 75 of Title 30 contains all of the mandatory safety standards applicable to underground coal mines, as reflected by its heading. Therefore, Respondent argues that any definition of or criteria for permissible use of explosives in underground coal mines should be set forth in Part 75 of Title 30, not in Part 15 of Title 30, or, in the alternative, that 30 C.F.R. 75.1303 should contain an appropriate cross reference to the appropriate provisions of Part 15 of Title 30. However, Respondent does not cite any authority in support of this position. Second, Respondent asserts from a procedural standpoint that Petitioner failed to give it proper and timely notice prior to the hearing of the standard Respondent is alleged to have violated. In support of its position, Respondent cites the decisions of the Interior Board of Mine Operations Appeals (Board) in *Old Ben Coal Company*, 4 IBMA 198, 82 I.D. 264, 1974-1975 CCH OSHD par. 19,723 (1975); and *Eastern Associated Coal Corporation*, 1 IBMA 233, 79 I.D. 723, 1971-1973 CCH OSHD par. 15,388 (1972); and the provisions of section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. 554(b)(3) (1978).

I disagree with Respondent's position for two reasons. First, the relevant provisions of Part 15 of Title 30 were duly published in the Federal Register on March 31, 1970, see 35 Fed. Reg. 5335-5339 (1970), and, accordingly, Respondent must be charged with constructive notice thereof. It is a well settled principle of law that the publication of regulations in the Federal Register gives legal notice of their contents to all who may be affected thereby. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-385, 68 S. Ct. 1, 92 L.Ed. 10 (1947); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974); *Federal Register Act of 1935*, 44 U.S.C. 1507 (1978). Accordingly, it must be concluded that Respondent had legal notice that shooting on solid was a failure to use permissible explosives in a permissible manner.

It should also be noted that 30 C.F.R. 15.14 sets forth, amongst other things, certain requirements for the packaging of permissible explosives. Paragraph (d) of 30 C.F.R. 15.14 provides that the Applicant for a certificate of approval for

permissibility "must warn the user by means of a case-insert that the explosive is permissible only when used in conformance with

~517

MSHA's requirements (15.19)." Thus, the purchaser of the explosives is to be notified of these requirements with a reference to 30 C.F.R. 15.19 which incorporates the specific requirement involved in this case.

Second, Respondent was timely informed of the matters of fact and law asserted in this case as required by section 5(b)(3) of the Administrative Procedure Act. Adequate notice is necessary to enable the mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." 4 IBMA 198 at 208. In a civil penalty proceeding, notice is adequate, even though it does not specify the particular section of the 1977 Mine Act or mandatory safety standard violated, if the alleged violation is described with sufficient specificity to permit abatement. At the stage where the operator is charged with a violation of law in a civil penalty proceeding, it is entitled to adequate and timely notice of the section of the 1977 Mine Act or mandatory safety standard involved so as to permit preparation of a timely and adequate defense. Old Ben Coal Company, supra; Eastern Associated Coal Corporation, supra. In determining whether adequate notice has been given, the inquiry need not be confined to the four corners of the citation or order. It is appropriate to consider other oral and written communications given to the operator. Jim Walters Resources, Inc., 1 FMSHRC 1827, 1 BNA MSHC 2233, 1979 CCH OSHD par. 24,046 (1979).

The subject withdrawal order alleged that shooting on solid had occurred in the Nos. 1 through 6 entries on the No. 9 Unit, South off 3 west, in violation of the requirement set forth in mandatory safety standard 30 C.F.R. 75.1303 that permissible explosives be used in a permissible manner. The fact that neither the withdrawal order issued by the inspector nor the pleadings filed herein reference the provisions of Part 15 of Title 30 does not amount to a failure to give due notice of the violation charged. As noted previously in this decision, Respondent is charged with constructive knowledge of the Secretary's determination that shooting on solid is an impermissible blasting practice based upon the publication of such determination in the Federal Register.

In view of the foregoing, I conclude that shooting on solid constitutes a failure to use permissible explosives in a permissible manner and, accordingly, is a violation of mandatory safety standard 30 C.F.R. 75.1303.

Negligence of the Operator

The best available evidence indicates that one cutting machine was used on the unit. At the time of the inspection, it was located in the No. 2 entry (Tr. 301, 304). There was nothing on the cutter machine that could have been used to measure the depth or angle of the shot holes (Tr. 321). Although the No. 1 entry had been drilled and undercut and water tamping dummies had been placed in each of the shot holes (Tr. 291), there is no

probative evidence in the record that water-tamping dummies were present or had been used in the Nos. 2, 3, 4 and 5 entries. The fact that shooting on solid

~518

had occurred in those four entries, as evidenced by the mushroomed shot holes, clearly indicates that water-tamping dummies had not been used. (See, e.g., Tr. 322-323).

The fact that the practice was extensive enough to encompass four entries indicates that it occurred over a sufficient period of time to have been detected by Respondent's supervisory personnel. Accordingly, Respondent knew or should have known of the practice. Ordinary negligence has been established by a preponderance of the evidence.

Gravity of the Violation

The inspector characterized the violation as a dangerous one because any number of accidents and fatalities can occur as a result of drilling on solid (Tr. 315). Although his testimony does not supply an exhaustive catalog of the types of occurrences and injuries that could reasonably be anticipated as a result of the cited practice, it appears that a methane ignition could occur as a result of shooting on solid (Tr. 315). However, his testimony indicates that no appreciable quantity of methane was detected on the No. 9 Unit (Tr. 325). Additionally, no testimony was elicited from the inspector as to the probability of occurrence or as to the number of persons who would have been affected by an occurrence.

Mr. Raymond Ashby, director of safety for Respondent's West Kentucky Division, approached shooting on solid principally from the standpoint of its effect on efficient production. According to Mr. Ashby, shooting on solid is not a good production practice because it causes more coal to fly down the room or entry, adversely affects coal preparation, makes the resulting face very erratic and unsquare, and makes the face much more difficult to prepare during the next mining cycle (Tr. 355-356). However, he testified that "the coal would have to be loosened in the face as such that it might be somewhat of a hazard to the shot firer the next time he went to tamp it up" (Tr. 356). Additionally, he conceded at an earlier point in his testimony that shooting on solid does not create the most ideal situation from a safety standpoint (Tr. 339).

In view of the foregoing, it is found that the violation was serious.

Good Faith in Attempting Rapid Abatement

Inspector Goldsberry characterized abatement of the violation as evidencing good faith on Respondent's part (Tr. 316). Accordingly, it is found that Respondent demonstrated good faith in attempting to achieve rapid compliance.

C. Order No. 796081, April 12, 1979, 30 C.F.R. 75.518

Inspector Goldsberry arrived at Respondent's Hamilton No. 1 Mine at approximately 3 p.m. on April 12, 1979, to continue a regular health and safety inspection (Tr. 22-23). While on the

surface, the inspector was

~519

apprised by Mr. Dennis Padgett, the mechanic on the No. 6 Unit, that the 1200 amp main circuit breaker on the No. 6 Unit's power center substation, or transformer, was not operating properly (Tr. 23-24). The inspector consulted company records and discovered that Mr. Jesse O. Allen, a section foreman, had submitted a maintenance request on April 11, 1979, indicating that the main circuit breaker would not drop out and thus deenergize the transformer when the power was pulled from and subsequently restored to such transformer (Tr. 26-27, Exh. O-2).

Inspector Goldsberry then proceeded underground, arriving at the transformer shortly before Mr. Padgett's arrival. The inspector testified that he requested Mr. Padgett to test the 1200 amp main circuit breaker in the manner Mr. Padgett had mentioned earlier (Tr. 27-28). It is therefore clear that Mr. Padgett, and not the inspector, selected the test to be performed. It is significant to note at this point that Inspector Goldsberry is not classified as an electrical inspector, that he had received only generalized training in electrical matters, and that he had received no specific electrical training as relates to the operation of electrical circuitry, circuit breakers or transformers (Tr. 13-19).

Mr. Padgett proceeded to the outby end of the transformer and, using the disconnect switch, pulled the power from the transformer, waited an unspecified period of time, and then restored power to the transformer. This test was performed several times and yielded the same results each time. The 1200 amp main circuit breaker was supposed to drop out and deenergize the transformer when the power was restored, but it did not do so (Tr. 28). The inspector thereupon issued Withdrawal Order No. 796081, citing Respondent for a violation of mandatory safety standard 30 C.F.R. 75.518 in that "the 1200 amp main circuit breaker serving the power center substation (transformer) on No. 6 unit was inoperative in that the circuit breaker would not provide short circuit protection nor overload protection for the 550-volt alternating current mining equipment being used on the unit" (Exh. M-2). The cited mandatory safety standard requires, in part, that "[a]utomatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads."

For the reasons set forth below, I conclude that the evidence fails to support the allegation that a violation of mandatory safety standard 30 C.F.R. 75.518 occurred. The most probative evidence was provided by the testimony of Mr. Dennis Padgett, Federal mine inspector Charles F. Clark, a Mine Safety and Health Administration electrical inspector, and Mr. Ben F. Brinkley, the maintenance superintendent of Respondent's River Division, because these witnesses possess the requisite education and experience to qualify as experts in the function and operation of electrical circuits, circuit breakers and transformers.

The transformer referred to in the withdrawal order was a

750 KVA transformer manufactured prior to the passage of the 1969
Coal Act, and purchased

~520

from the Ensign Electric and Manufacturing Company of Huntington, West Virginia (Tr. 160, 169-170). Twelve thousand four hundred seventy volts of electricity enters the transformer when its manually operated disconnect switch is closed (Tr. 161). It appears that the transformer contains various windings which are used to transform the voltage entering the unit into that needed to operate the various pieces of mining equipment supplied by the unit (Tr. 160-161). The transformer supplies power to the equipment by way of approximately 11 individual circuits, each of which contains a circuit breaker. Two of these circuits have 600-amp circuit breakers, two have 400-amp circuit breakers, and it appears that approximately six have 225 amp circuit breakers. The remaining circuit supplies the lights with current, and this circuit has a 30-amp circuit breaker (Tr. 163). These 11 circuit breakers directly provide overload and short circuit protection to the 11 respective pieces of equipment (Tr. 178).

The transformer contains bus bars which supply current to the 11 circuits (Tr. 192-193). The bus bars are uninsulated copper bars measuring approximately 2 inches in width and approximately three-eighths of an inch in thickness (Tr. 214-215). The 1,200-amp main circuit breaker is located immediately off of the bus bars (Tr. 161-162). According to Mr. Brinkley, the purpose of the 1,200 amp main circuit breaker is not to protect the individual pieces of equipment drawing power from the transformer through the 11 individual circuits, but to protect the bus bars (Tr. 169-170). It's main purpose is to provide overcurrent and short circuit protection to the bus bars, but it also provides undervoltage protection to the transformer by way of a 120-volt shunt trip picking up its power from a stepdown transformer (Tr. 169-172). It appears that a shunt trip is not a true undervoltage release (Tr. 170), but that shunt trips are accepted by the Federal Government as a means of providing undervoltage protection for circuits on transformers manufactured prior to the passage of the 1969 Coal Act (Tr. 170-172).

The shunt trip coil on the 1,200-amp main circuit breaker is hooked up so as to act as an undervoltage release upon a loss of voltage in the ground trip relay. It has a set of normally closed contacts, which indicates that the contacts are closed with the loss of voltage. These contacts set up a circuit to the shunt coil. When the power is interrupted, the 1,200-amp main circuit breaker remains up. When the power is restored, it appears that the 120 volt stepdown transformer is somehow energized, setting up a 120-volt shunt power on the shunt trip which, in turn, immediately operates the thermal unit which trips the 1,200-amp main circuit breaker (Tr. 172-173). According to Mr. Brinkley, the primary purpose of the shunt trip in the 1,200 amp main circuit breaker is to provide undervoltage protection for the bus bars (Tr. 183-184).

Additionally, each of the 11 circuit breakers on the circuits serving the 11 respective pieces of equipment are equipped with shunt trips. However, these shunt trips are not hooked up in the same way as the shunt trip in the 1,200-amp main circuit breaker. Rather, they operate when a ground fault

condition is created in the circuit. The ground fault will trip the shunt trip which, in turn, opens the breaker on the individual circuit affected (Tr. 173).

~521

The 1,200-amp main circuit breaker failed to operate during the test performed on April 12, 1979, because it was equipped with a 480-volt shunt trip instead of a 120-volt shunt trip (Tr. 203-204). According to Mr. Brinkley, replacing the 480-volt shunt trip with a 120-volt shunt trip had no effect on the overcurrent and short circuit protection afforded by the 1,200 amp main circuit breaker (Tr. 207).

The testimony of Mr. Brinkley establishes that the test performed on April 12, 1979, determined only that the undervoltage protection was inoperative. I find his testimony on this point to be credible, and I find the testimony of Mr. Padgett and Inspector Clark inadequate to establish a proposition contrary to the one advanced by Mr. Brinkley. The transformer in question was manufactured prior to the effective date of the 1969 Coal Act and, consequently, a shunt trip was employed on the 1,200-amp main circuit breaker to provide undervoltage protection in lieu of an undervoltage release. It is Mr. Brinkley's detailed familiarity with the particular transformer in question that renders his testimony credible.

According to Mr. Brinkley, the 1,200-amp main circuit breaker has more than one function (Tr. 184). Undervoltage, ground, short circuit and overload protection are separate functions (Tr. 180-181). The thermal magnetic trip device is the component that provides short circuit and overload protection (Tr. 179-180). According to Mr. Brinkley, the test performed at Inspector Goldsberry's request does not activate the thermal trip device, but tests only for undervoltage protection (Tr. 180-181). The presence of the 480 volt shunt trip in the 1,200-amp main circuit breaker had no effect whatsoever on the overcurrent and short circuit protection that the breaker afforded the system (Tr. 207).

Mr. Padgett opined that the 1,200-amp main circuit breaker acts as a backup for the circuit breakers serving the 11 individual circuits. According to Mr. Padgett, a dead short or a ground on one of these 11 breakers should activate the 1,200-amp main circuit breaker (Tr. 93, 97-98). However, his testimony is insufficient to establish the necessary correlation between the test performed and the nature of the violation. His testimony points to some type of malfunction in the circuit breaker, but he never affirmatively testified that the test performed was a proper one for purposes of determining whether the circuit breaker was providing short circuit or overload protection.

Similarly, Inspector Clark's testimony is insufficient to establish the requisite correlation between the test performed and the violation charged. Inspector Clark terminated the withdrawal order on April 13, 1979 (Exh. M-2). The type of test performed at Inspector Goldsberry's request comprised one part of the considerably more extensive test performed by Inspector Clark (Tr. 126-129). He testified that when he deenergized the transformer, the main circuit breaker remained in the "on" position, which indicated that it was equipped with a shunt trip, not an undervoltage (Tr. 131-132). When the power was restored

to the transformer, the circuit breaker dropped out, which indicated that the shunt coil was operative (Tr. 132). His testimony strongly implies that the 1,200-amp main circuit breaker's failure to trip when the

~522

power was restored to the transformer, on the day the order was issued, could have been attributable to an absence of undervoltage protection (Tr. 133-134). Additionally, it is significant to note that Inspector Clark testified that absent a complete test of the type performed by him on April 13, 1979, one cannot determine whether short circuit or overload protection is present (Tr. 130-131).

Accordingly, I find that the test performed on April 12, 1979, established that the 1,200-amp main circuit breaker was not providing undervoltage protection to the transformer or the various pieces of equipment obtaining current from the transformer. (FN.4)

The remaining question presented is whether a mine operator violates mandatory safety standard 30 C.F.R. 75.518 by failing to provide undervoltage protection for all electric equipment and circuits. I answer this question in the negative.

The cited mandatory safety standard makes reference only to short circuit and overload protection, and contains no mention of undervoltage protection. In contrast, mandatory safety standards 30 C.F.R. 75.800 and 30 C.F.R. 75.900 make express reference to undervoltage protection.

30 C.F.R. 75.800 requires high voltage circuits entering the underground area of any coal mine to be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such circuit breakers must be equipped with devices to provide protection against undervoltage, grounded phase, short circuit and overcurrent.

30 C.F.R. 75.900 requires low and medium voltage power circuits serving three-phase alternating current equipment to be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such circuit breakers must be equipped with devices to provide protection against undervoltage, grounded phase, short circuit and overcurrent.

The express reference to undervoltage protection in 30 C.F.R. 75.800 and 30 C.F.R. 75.900, coupled with the absence of such reference in 30 C.F.R. 75.518, clearly indicates that the failure to provide undervoltage protection does not constitute a violation of mandatory safety standard 30 C.F.R. 75.518.

In view of the foregoing, the proposal for a penalty will be dismissed as relates to Order No. 796081, April 12, 1979, 30 C.F.R. 75.518.

D. History of Previous Violations

The history of previous violations at Respondent's Hamilton No. 1 Mine for which Respondent had paid assessments between April 13, 1977 and March 22, 1979, is summarized as follows:

30 C.F.R. Standard	4/13/77 - 3/22/78	3/23/78 - 3/22/79	Totals
All Sections	438	590	1,028
75.1303	5	7	12

(Exh. M-1).

E. Size of the Operator's Business

The parties stipulated that Respondent is a large operator (Tr. 12) (see also, Exh. M-7). The parties also stipulated that the size of Respondent's West Kentucky Division is rated at

4,399,525 tons of coal per year (Tr. 365).

F. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

The parties stipulated that the assessment of civil penalties in this proceeding will not affect Respondent's ability to remain in business (Tr. 12).

VI. Conclusions of Law

1. Island Creek Coal Company and its Hamilton No. 1 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

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

3. Federal mine inspector Ronald L. Goldsberry was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the withdrawal orders which are the subject matter of this proceeding.

4. The violation charged in Order No. 796000, March 22, 1979, 30 C.F.R. 75.1303 is found to have occurred as alleged.

5. The condition cited in Order No. 796081, issued on April 12, 1979, does not constitute a violation of mandatory safety standard 30 C.F.R. 75.518.

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

VII. Proposed Findings of Fact and Conclusions of Law

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

VIII. Penalty Assessed

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

Order No.	Date	30 C.F.R. Standard	Penalty
796000	3/22/79	75.1303	\$1,500.00

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of \$1,500.00 assessed in this proceeding within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the proposal for a penalty be, and hereby is, DISMISSED as relates to Order No. 796081, April 12, 1979, 30 C.F.R. 75.518.

John F. Cook
Administrative Law Judge

AA

~FOOTNOTE_ONE

1 Respondent's prayer for relief requested the Judge to vacate the withdrawal orders, and Respondent has reasserted the request in its posthearing brief. It is well established that the validity of the issuance of a withdrawal order is not at issue in a civil penalty proceeding. Pontiki Coal Company, 1 FMSHRC 1476, 1 BNA MSHC 2208, 1979 CCH OSHD par. 23,979 (1979); Jewell Ridge Coal Corporation, 3 IBMA 376, 81 I.D. 624, 1974-1975 CCH OSHD par. 18,901 (1974); Coal Processing Corporation, 2 IBMA 336, 342, 80 I.D. 748, 1973-1974 CCH OSHD par. 17,978 (1978); Eastern Associated Coal Corporation, 1 IBMA 233, 236, 79 I.D. 723, 1972-1973 CCH OSHD par. 15,388 (1972).

~FOOTNOTE_TWO

2 The evidence is insufficient to support the allegation that shooting on solid had occurred in the Nos. 1 and 6 entries. The inspector's testimony indicates that no evidence of shooting on solid was found in the No. 1 entry (See, e.g., Tr. 297). Additionally, the inspector's testimony indicates that he was unable to take measurements or make observations in the face area of the No. 6 entry because the area was not bolted and the face was too far away to see (Tr. 309).

The inspector did, however, testify that evidence of shooting on solid was observed in a crosscut off the No. 6 entry (Tr. 309-310). It is significant to note that the order addresses only the entries, and not this crosscut. It is even more significant to note that Petitioner's brief is confined to a consideration of the conditions existing in the Nos. 2, 3, 4 and 5 entries of the No. 9 Unit, and makes no reference to conditions existing in the crosscut off the No. 6 entry. Accordingly, it must be concluded either that the crosscut is not encompassed by the order or that Petitioner has abandoned any attempt to include the crosscut within the scope of the order.

~FOOTNOTE_THREE

3 The inspector appeared to indicate at one point in his testimony that the presence of overhangs was an indication that shooting on solid had occurred (Tr. 300-301). However, the presence of overhangs is not deemed a probative indication of shooting on solid, although it may point to other improper

blasting practices. The inspector's testimony indicates that the overhang condition could have been caused by drilling the shot holes without allowing for the 18-inch burden, i.e., by drilling the shot holes in the wrong location as opposed to drilling the shot holes to an excessive depth (Tr. 300-301, 309). Therefore, the presence of overhangs is not necessarily indicative of shooting on solid.

This determination does not affect the issue of whether shooting on solid occurred. The inspector's testimony points to the presence of an overhang in the No. 4 entry, but not in the Nos. 2, 3 and 5 entries. The characteristics of the shot holes in the four entries establish that shooting on solid occurred.

~FOOTNOTE FOUR

4 The transformer mentioned in the withdrawal order was associated with an accident that occurred on April 4, 1979. Substantial testimony was elicited by both parties as relates to the surrounding circumstances. It appears that the 225-amp circuit breaker on the circuit providing power to the cutting machine tripped several times. Following several unsuccessful attempts to locate the source of the trouble, Mr. Jesse O. Allen and Mr. Dennis Padgett removed the trailing cable from the reel on the cutting machine to perform a visible examination of the cable. They were unable to detect any visible signs of damage (Tr. 74-75, 95-96). Mr. Allen thereupon instructed Mr. Dennis Kirchner and another miner to station themselves at the transformer and reset the 225-amp circuit breaker (Tr. 74-75). It is unclear as to how many times Mr. Kirchner proceeded to reset it. Mr. Allen testified that he instructed them to reset the circuit breaker one time to see if it would remain up (Tr. 74-75). However, Mr. Harold M. Gamblin, Sr., the assistant mine superintendent, testified that Mr. Kirchner said that Mr. Allen had stationed him at the transformer in order to reset the breaker several times in rapid fashion in order to blow the cable (Tr. 275-279). Regardless of the instructions or how many times Mr. Kirchner reset the breaker, the results are not in dispute. The contacts in the 225-amp circuit breaker welded, and an arc, or explosion, occurred in the trailing cable. Mr. Allen sustained second and third degree burns on his leg, hands and arms (Tr. 69). Mr. Padgett sustained third degree burns on his hands while extinguishing the flames on Mr. Allen (Tr. 97).

The evidence presented fails to support the contention that the malfunction detected on April 12, 1979, was related to the injuries sustained on April 4, 1979. The 1,200-amp main circuit breaker was replaced after the accident, but prior to the April 12, 1979, inspection. Furthermore, Inspector Clark testified that it would not necessarily be the case that if the 225-amp circuit breaker failed to function properly and fused, that the 1,200-amp main circuit breaker should have solved the problem (Tr. 137-138).

One additional point is worthy of mention. The testimony of Mr. Allen indicates that on April 3, 1979, the then present 1,200-amp main circuit breaker was not affording undervoltage protection (Tr. 71-72). As noted in this decision,

the evidence presented indicates that the test performed on April 12, 1979, established only that the circuit breaker was not providing undervoltage protection. The testimony of Inspector Clark strongly indicates that the absence of undervoltage protection was not related to the April 4, 1979, accident (Tr. 137-138).