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Federal 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. LAKE 80-216 A.O. No. 11-00609-03016
v.	
SOUTHWESTERN ILLINOIS COAL CORPORATION, RESPONDENT	Captain Strip Mine

DECISION

Appearances: Thomas Lennon, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner ;
Brent L. Motchan, Esq., St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding was initiated by the petitioner against the respondent through the filing of a petition for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing penalties for two alleged violations of certain mandatory safety standards promulgated pursuant to the Act. A hearing was held in St. Louis, Missouri, on February 18, 1981, and the parties appeared and participated therein. Although given an opportunity to file posthearing proposed findings and conclusions, the parties opted to waive such filings and none were filed. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues are identified and disposed of in the course of this decision.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. The Administrative Law Judge has jurisdiction over this matter.

2. Ronald Zara was a duly authorized representative of the Secretary of Labor when he issued the citations in question.

3. Respondent demonstrated good faith in correcting the alleged conditions.

4. Respondent has been assessed with 114 violations during the 2-year period preceding the issuance of the citations involved in this proceeding.

5. Respondent's Captain Mine has an annual tonnage of 1.4 million and Southwestern Illinois Coal Corporation has an annual tonnage of 7.7 million.

6. The effect of the proposed assessment for both citations will not harm respondent's ability to continue in business.

Citation No. 777767, issued November 5, 1979, citing a violation of 30 C.F.R. 77.1710(g), states as follows:

> George Salger, groundman on the Marion 6360 shovel, was observed working in an area where a danger of falling existed, without a safety belt. Mr. Salger was on his knees, installing a lubrication line on the end of the steering arm on the South-west corner of the 6360 Marion shovel. Mr. Salger was

approximately 12-15 feet above the ground on a platform approximately 2 feet wide, with no handrails or other protection.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Ronald G. Zara testified that he conducted an inspection of the mine on November 5, 1979, and pursuant to that inspection he issued a citation for a violation of 30 C.F.R. 77.1710(g). He testified that the citation was based upon his observation of George Salger working without the use of a safety belt or safety line on a section of a Marion 6360 shovel where there was a danger of falling (Tr. 10-14). A picture of the shovel was marked to indicate the position where Mr. Salger was working (Tr. 16, Exh. P-2). Mr. Salger was repairing a broken grease line while standing on the steering arm of the machine which was about 18 inches wide. The inspector estimated that the arm was about 12-15 feet above the ground, and he concluded that both the possible movement of the machine and an accumulation of grease on the working surface could contribute to a fall from the steering arm. He observed no protective devices but suggested that the operator might use handrails, safety belts, and safety lines as a means of safeguarding the worker. He concluded that a worker risked the probability of a fatal injury if he fell from the steering arm. The inspector testified that he made no finding of negligence because there was no foreman in the immediate area, and he felt, therefore, that he could not prove negligence on the part of the operator (Tr. 16-22).

On cross-examination, Mr. Zara again stated that his measurements of the machine were only estimates, and from his vantage point, he could not ascertain whether there was grease on the working surface. He also acknowledged that an operator is supposed to signal before moving the shovel, and while he was aware that safety belts were available at the mine, he did not know if one was located on the shovel (Tr. 24-25).

In response to bench questions, Mr. Zara stated that he observed Mr. Salger finish his work, get up from his kneeling position, and walk down onto the crawler part of the shovel. The inspector spoke about the use of a safety belt to Mr. Salger, who offered no excuse for not wearing one, and the inspector suggested that the operator might use a mobile crane with a hanging basket to hold a worker, if the nature of the work was so infrequent that it did not warrant the construction of handrails (Tr. 30-34).

Steve Graul, master electrician and chairman of the union's safety committee at the time the citation issued, stated that "the company's safety belt rule, * * * is one of the least enforced and least stressed of all the safety rules we have" (Tr. 84-85). He also testified that when he worked on an identical steering section on the opposite side of the machine, he stood on scaffolding and wore a safety belt. In his opinion, the area marked in the picture, where the grease fittings were located, presented a danger of falling. He estimated that this area was

about 2 feet wide. He further

testified that while he is aware that some supervisors do not hold safety meetings, his particular supervisors make it a practice to hold them (Tr. 84-88).

In response to bench questions, Mr. Graul agreed that it is not practical to set up scaffolding for day-to-day tasks, and he stated that scaffolds are more likely to be used for jobs extending for a period of 24 hours to 2 weeks (Tr. 88-89).

Testimony and Evidence Adduced by the Respondent

Steve Edwards, director of safety and training, indicated that a copy of respondent's safety rules and regulations is given to each employee at the mine (Exh. R-1). The rules specifically require the wearing of safety belts and lines where there is a danger of falling. Mr. Edwards also described the various types of safety-training programs which are given at the mine. Using Mr. Salger as an example, he explained that both UMWA contract training and MSHA-approved training emphasized the importance of safety belts. Mr. Salger completed his MSHA training on June 12, 1979 (Exh. R-3). In conjunction with the 1979 training, Mr. Edwards prepared some slide commentaries which further emphasized the importance of safety belts (Exh. R-2). Furthermore, the company showed a movie on the use of safety belts in 1979, and also encouraged their foremen to hold weekly "toolbox" safety meetings. He cited Exhibit R-4 as evidence that Mr. Salger attended a toolbox meeting where the topic of discussion was safety belts (Tr. 39-44). The exhibit is a record of Mr. Salger's attendance at that meeting.

On cross-examination, Mr. Edwards testified that Rule No. 8 of the company's safety rules, states that "safety belts and lanyards shall be worn as necessary." He indicated that this rule must be read with Rule No. 9 which states that "safety belts and lines shall be worn at all times where there is a danger of falling" (Exh. R-1). While he agreed that Slide No. 41, which states that "anytime there is a danger of falling, the people who are going to be working off high places must wear a safety belt," accompanies a picture of a man working on a drill mast 30-40 feet high, he felt that this picture was not misleading. Ultimately, he maintained, the need to wear a safety belt is a matter of employee discretion. With regard to enforcement of the safety rules, Mr. Edwards testified that three of the 50 miners who have been disciplined were cited with safety belt violations. He also indicated that the company's records show that the weekly toolbox meetings are held approximately 95 percent of the time (Tr. 45-51).

Tom Rushing, mine safety director, acknowledged having issued George Salger a notice of violation after the company received its MSHA citation (Tr. 60-62, Exh. R-5).

On cross-examination, Mr. Rushing testified that five of the 40-50 citations he has issued were in response to an MSHA inspection and citation. He also noted that not all supervisors would issue a notice of violation for the

same set of circumstances, and they are authorized to instruct a miner on proper procedures in accordance with Federal standards and laws, as well as company rules (Tr. 64).

In response to bench questions, Mr. Rushing stated that Mr. Salger's greasing work was not necessary more than once a year. He agreed that a cherry picker could be used for the task if the worker requested one (Tr. 70). In response to additional questions, he stated that the area where Mr. Salger was kneeling measured 47 inches wide and the ground below him consisted of broken and loose coal (Tr. 72). He agreed that the Red "X" on the photograph (Exh. P-2), indicating Mr. Salger's position, showed him to be kneeling on the steering cylinder. He conceded that he had not measured the cylinder but had instead measured the wider steering arm (Tr. 74-75). He also indicated that there were safety belts on the machine at the time the citation was issued, and in his opinion, there was no need for Mr. Salger to wear one (Tr. 77-78). He conceded that he gave Mr. Salger a notice of violation even though he felt there was no danger of falling, but claimed that it was the company's practice to issue a violation notice to the employee responsible for a citation issued by MSHA.

Citation No. 777770, issued November 6, 1979, cites a violation of 30 C.F.R. 77.505, and, as amended, states:

> The energized 4160 volt A.C. power cable, entering the metal frame of the switchbox #C-1506-3, located on the high-wall of the 2570 pit, did not enter the box through proper fittings. The switch box and cable were supplying power to the 181 Marion coal loader, which was in use at the time. The wooden fittings, which protect the cable from the sharp metal edges of the box, were not in place.

Testimony and Evidence Adduced by the Petitioner

Inspector Ronald Zara confirmed that he issued the citation in question upon observing an energized power cable measuring approximately 3 to 3-1/2 inches in diameter, entering a 6- by 6-inch opening of a metal switchbox without a proper fitting. The inspector described the sides of the metal opening as being sharp as though it had been cut with a hacksaw or a metal cutting device. The inspector discussed the dual purpose of the wooden fitting, and indicated that it provides strain relief by keeping the cable from straining on the connections within the box when it is moved or pulled. This prevents electrical shocks or the possibility of a fire if the cable shorts out. The fittings also prevent chafing of the cable against the metal edges of the box. The inspector testified that the rope arrangement, depicted in Exhibit P-5, prevents excessive strain on the connections but does not prevent chafing of the cable, and he indicated that chafing may cause the cable to wear on one side, thereby exposing energized conductors or possibly causing the cable to blow out. He explained that the ground-monitoring system should deenergize a circuit, but he referred to a prior citation as evidence that

these systems can become disconnected (Exh. P-8). He further testified that

the lack of a proper fitting should have been noticed either during an onshift examination or a monthly electrical examination, and he concluded that an electrical shock could be fatal due to the voltage involved. The condition was abated by the respondent when it installed a proper fitting (Tr. 91-102).

On cross-examination, Mr. Zara stated that he stood approximately 18 inches to 2 feet away from the cable when he observed it. In his opinion, a "pothead," in the absence of proper fittings, could not provide proper strain relief. He admitted that he had not tested the "pothead" on this particular cable to determine its effectiveness, and agreed that section 77.505 includes various options to satisfy the requirement of a proper fitting (Tr. 102-111).

On redirect examination, Mr. Zara stated that he believed the standard permitted only suitable substitutes, that he would not accept a rope-restraining device in lieu of a fitting or bushing, and that in his opinion it should take only 5 minutes or less to install proper wooden fittings when the cable is inserted into the switchbox (Tr. 112-117).

Testimony and Evidence Adduced by the Respondent

Steve Edwards used a diagram to show the manner in which a loading shovel ties into a main system power source (Exh. R-1). He pointed out that any excess cable is looped, thereby eliminating stress on the cable (Exh. R-5). He also explained that the cables contain conductors which are insulated. This factor, combined with the cable's metallic shield, should prevent the system from causing a shock if the cable is cut. In Mr. Edwards' opinion, a cable which is adequately tied down would not touch the metal edges of the switchbox (Tr. 125-127, Exh. P-5).

On cross-examination, Mr. Edwards clarified his position on the cable loops, asserting that the loops are cast off to allow slack in the cable, thereby alleviating strain on the head. He was not certain whether the "pothead" was larger than the openings in the switchbox (Tr. 127-135).

Kenneth Adams, chief electrical engineer, testified that there should be no tension on either the connections or the cable coming out of the switchbox (Exh. R-1). He reasoned that since the cable weighs over 2 pounds per foot it would take extremely heavy weight to pull it against the connections as it was coming out of the switchbox. He testified that the top wooden block, which was not present in the picture, served only to keep rodents and small animals out of the electrical enclosure (Tr. 138-139, Exh. P-5).

On cross-examination, Mr. Adams testified that the rope arrangement was an industry-wide practice for about 30 years, and that strain on the cable and connections would only occur if the cable is not clamped or tied off. He explained that the two halves of the wooden block are normally attached by hinges which fall off when they are initially used (Tr. 138-142).

In response to bench questions, Mr. Adams stated that the cable is often disconnected from the switchboxes, and this procedure requires removing the wooden blocks (Tr. 148-150).

Mitchell Wolfe, respondent's safety technician, stated that he accompanied Mr. Zara on his safety inspection and that he was in charge of the abatement which he accomplished by calling an electrician to install the top portion of the wooden fitting. He also confirmed Mr. Adams' contention that the two wooden blocks, when put together, merely prevented rodents and other animals from passing through the enclosure (Tr. 153-160). He determined that it takes approximately 15 minutes to replace the fittings when a cable is removed (Tr. 164).

Safety director Tom Rushing described a similar cable connection and switchbox in use at the mine which had no wooden fittings, but was tied off. This box passed the inspection scrutiny of both Inspector Zara and Mr. Hinkel, the electrical inspector (Tr. 167, Exh. R-9).

Inspector Zara was recalled by the bench and testified that he would issue a citation for incomplete fittings if he found the top portion of the wooden block missing. He pointed out that providing there is sufficient strain relief, a smooth device around the cable protecting it from sharp edges, would fulfill the safety requirement of the cited standard (Tr. 171-174).

Findings and Conclusions

Fact of Violation

Citation No. 777767, November 5, 1979, 30 C.F.R. 77.1710(g)

Respondent was cited here for the failure by the shovel groundman to have a safety belt or line attached to his person while he was performing work at the end of the machine-steering mechanism located some 12 to 15 feet above the ground. Section 77.1710(g) provides that mine employees shall be required to wear safety belts and lines where there is a danger of falling, and the standard states as follows:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> * * * * * * *
>
> (g) Safety belts and lines where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered. [Emphasis added.]

Inspector Zara testified that he issued the citation after observing groundman George Salger in a kneeling position at the end of the steering arm of the Marion shovel performing some maintenance work and that he was not wearing a safety belt or line. Since he was some 12 to 15 feet off the ground

and was not otherwise protected, Mr. Zara was concerned that he might fall off the machine to the ground below and sustain injuries. Mr. Zara estimated the width of the area where Mr. Salger was working to be some 18 inches, and he concluded that a sudden movement of the shovel and an accumulation of grease in the working area would result in a fall. Mr. Zara had no actual knowledge of the presence of any grease in the area because he did not climb out to the location in question, and his 18-inch estimate of the width of the area where Mr. Salger was standing was an estimate based on Mr. Zara's visual observation from ground level looking up at the steering arm.

Inspector Zara did not believe that the respondent was negligent in this case because he observed no supervisor present when Mr. Salger was positioned on the steering arm. As a matter of fact, Mr. Zara stated that when he first observed Mr. Salger, he was some distance away, and as he approached the shovel, Mr. Salger was on his way back and had climbed down from his position by the time he reached the scene. This would seem to indicate that Mr. Salger took it upon himself to walk to the end of the steering arm without a safety belt or line. Whether he believed he was in any danger of falling remains unanswered since he was not called to testify and he offered no explanation to the inspector as to why he was not wearing a belt or line.

Respondent's witness Tom Rushing testified that a day before the hearing he measured the area where Mr. Salger was purportedly kneeling on the day the citation was issued and he found it to be 47 inches wide. This area was the steering arm, but he did not measure the steering cylinder, which he estimated to be anywhere from 36 to 47 inches. Mr. Rushing indicated that he made his measurements from under the machine after climbing a ladder to reach it from the underside. And, while he expressed the opinion that he personally would have no fear of falling from the area in question, he could not state that this would be the case in the event another individual had to walk out to the area to perform some work. He candidly conceded that belts are located on the shovel "for-men to use in an area where they think there is a danger of falling" (Tr. 77).

In North American Coal Corporation, 3 IBMA 93, 106-109 (1974), the operator was charged with a violation of 30 C.F.R. 75.1720(a) after an inspector observed two miners performing tasks hazardous to the eyes without wearing the required protective goggles. The pertinent portion of this safety standard reads as follows:

> Each miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:
>
> (a) * * * face shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles. [Emphasis added.]

In holding that a violation of 30 C.F.R. 75.1720(a) did not occur, the former Board of Mine Operations Appeals stated as follows at 3 IBMA 107, 108:

> A violation of this regulation occurs where an operator does not "require" a miner to wear safety goggles. North American contends in substance, and we agree, that an operator, in order to comply with the regulation, must establish a safety system designed to assure that employees wear safety goggles on appropriate occasions and must enforce such system with due diligence. Where the failure to wear glasses is entirely the result of the employee's disobedience or negligence rather than a lack of a requirement by the operator to wear them, then a violation has not occurred.
>
> * * * * * * *
>
> On the basis of the existing record we find that North American did in fact have a safety system: (1) designed to assure that all reasonable efforts are employed to insure that miners wear safety goggles at appropriate times and places; and (2) enforced with due diligence. We further find that the preponderance of the evidence indicates that the failure to comply with the operator's clear safety requirement in this case was due solely to the negligence of the employees involved rather than to any enforcement omission on the part of the operator. It is, therefore, the judgment of the Board that North American overcome [sic] the Government's prima facie case and that the subject notice of violation must be vacated.10 [Emphasis added.]

The footnote reference in North American states:

> Where a miner intentionally, knowingly, recklessly, or negligently fails to comply with a requirement designed solely for his own protection, and where such failure does not endanger or create a hazard to anyone but himself, and where the operator has not condoned such conduct, we do not believe a violation may properly be charged to the operator. Cf. Cam Industries, Inc., CCH Employment Safety and Health Guide par. 15,113 (1972).

In Webster County Coal Corporation, 7 IBMA 264 (1977), the Board reversed a judge's dismissal of a petition for assessment of civil penalty after the judge found that an operator could not be held liable for a violation caused by the negligence of a miner who was fatally injured. In dismissing the violation, the judge relied on the aforementioned North American footnote.

In Webster County Coal Corporation, the Board observed as follows at 7 IBMA 267-268:

> The question of whether an operator can be liable for civil penalties even though there is no showing of negligence on his part, was never discussed in North American, supra, nor raised or argued by the parties.

> The operator's contention in North American was that he had fully complied with the cited regulation and therefore was not in violation of 30 CFR 75.1720. The regulation directed the operator to require a miner to wear goggles. On the facts of that case, the Board found that the operator had complied with the standard by providing glasses and replacements, by having a system designed to assure the wearing of glasses, and by enforcing his requirement with due diligence. Based on the express provision of this regulation, the Board found that the operator was in compliance.
>
> The footnote to North American, relied upon by the Judge, was not intended to, nor did it in fact, set out any rule of law contrary to the holding in the case.* * *
>
> Rather than setting out a rule of law, its intent was merely to reflect that a similar result was reached by OSHRC and to suggest that the result may be different where any operator condones the intentional, or negligent non-use of safety glasses by a miner. In such event he may be held to be in violation of not fulfilling his obligations under the standard. [Emphasis added.]

Rushton Mining Company, 8 IBMA 255, decided February 16, 1978, concerned mandatory safety standard 30 C.F.R. 75.1714-2(a), which requires that self-rescue devices shall be worn or carried on the person of each miner. In affirmaing a judge's finding of a violation based on the company's admission that the cited miner was not wearing the protective device at the time he was observed by the inspector, the Board rejected the operator's argument that it did all that was expected of a reasonably prudent mine operator in insuring that each miner possessed a device before entering the mine.

In view of the foregoing case law, I believe that it is clear that in an appropriate factual set of circumstances, the issue decided in the North American decision, supra, would be a defense to the violation in issue in the instant case. As a matter of fact, I so held in MSHA v. Peabody Coal Company, Docket No. DENV 77-77-P, decided August 30, 1978, where I vacated a citation charging the operator with a violation of section 77.1710(g), on the ground that the operator established that it had a viable safety program requiring its employes to wear safety belts which it provided for their safety and that the company enforced its requirements in this regard with due diligence. After discussing and distinguishing the aforementioned precedent cases and the rather broadly worded mandatory safety standards which use the regulatory language "shall be required to wear," I specifically invited MSHA to seriously consider amending section 77.1710(g) to clearly and precisely mandate that an employee wear a safety belt (see pp. 14-15 of my decision). As far as I know, nothing has been done in this regard and MSHA has obviously opted to continue litigating this safety standard on a case-by-case basis, and I have subsequently issued additional decisions concerning this very same standard. See MSHA v. Kaiser Steel

Corporation, Docket No. DENV 77-13-P, decided October 10,

1978, affirmed by the Commission on May 17, 1979, and MSHA v. Peabody Coal Company, Docket No. VINC 79-67-P, decided March 29, 1979.

In Kaiser Steel, supra, while the company established that it had a comprehensive safety program for its employees, including a requirement that they wear safety belts, and enforced this rule with due diligence against its own employees, the facts also established that the company did not extend or enforce this rule in the case of employees of contractors who were on its property performing work for the company. In these circumstances, I concluded that the company could not avail itself of the North American defense, and that it should be held accountable for its failure to insure that the contractor's employees who are on mine property are furnished a safety belt by the contractor before commencing work. In affirming my decision and rejecting Kaiser's defense to the fact of violation based on the North American holding, the Commission stated as follows:

> In the present case, under the rationale of the Board's decision in North American Coal Corp., supra, Kaiser was required to establish that the deceased employee's failure to wear a safety belt tied-off to a lifeline was contrary to an effectively enforced requirement. Kaiser does not dispute that its safety equipment requirement did not extend to its contractor's employees. Furthermore, Kaiser did not establish that the employee's failure to wear appropriate safety equipment was contrary to an effectively enforced requirement imposed by its contractor. To the contrary, the evidence in this case leads to the inference that the contractor had no such effective requirement. Accordingly, a violation of the standard was established for which Kaiser, as owner of the mine, can be held responsible.(6)

In the cited Kaiser Steel footnote, the Commission observed that: "[B]ecause Kaiser has not established the proof required under North American, we need not reach the question of whether we agree with the rationale of that decision."

In my second Peabody Coal Company decision, supra, I affirmed a citation for a safety belt violation and in fact increased the proposed assessment recommended by MSHA. In that case, I concluded that the company failed to establish that it had a clear and readily understandable safety policy in effect with respect to employee use of safety belts. I also concluded that the company's safety rules failed to adequately inform the employees of the requirements for wearing safety belts while working in elevated areas where there was a danger of falling, and that company supervisors were inconsistent in the manner in which they enforced the safety belt rules. Coupled with the practice of permitting each individual miner to decide for himself when he should wear a belt, I simply could not conclude that the company met the tests laid down in the North American case.

As noted in the preceding discussion, the Commission in Kaiser Steel avoided a review of the prior North American opinion by the former Board of

Mine Operations Appeals because it believed that Kaiser Steel did not establish the factual defense required by the North American decision. An inference can be made that the Commission agreed with the defense, but it specifically declined to address the issue. In a subsequent case concerning the requirements of section 75.1714-2(a) that miners wear or carry self-rescue devices while underground, the Commission rejected the operator's defense that it complied with the standard by establishing a program designed to assure that the devices were available to all employees, that all employees were trained in their use, and that the company enforced its safety program in this regard with due diligence. U.S. Steel Corporation v. MSHA, Docket Nos. PITT 76-160-P and PITT 76-162-P, IBMA No. 77-33, Commission decision of September 17, 1979. The Commission discussed the prior North American, Webster County, and Rushton Mining decisions, but declined to address the issue presented in those cases, and its rationale in this regard is stated in footnote 3 of its decision as follows:

> U.S. Steel's argument relying on North American Coal Corp., 3 IBMA 93 (1974), is not persuasive. The rationale of the Board's decision in North American has been limited to the language of the particular standard involved in that case, 30 CFR 75.1720. Webster County Coal Corp., supra. See also Rushton Mining Co., supra. The present case presents no occasion to determine whether we agree with the Board's interpretation of 30 CFR 75.1720.

Thus, on two occasions when faced with the opportunity to consider the former Board's opinion in the North American case, the Commission has declined to do so. In Kaiser Steel, the Commission obviously declined review because it believed that the record established that Kaiser had not met the test laid down by the North American decision. This being the case, I believe the Commission expressed a veiled agreement with that decision. Likewise, in U.S. Steel, the Commission avoided review by simply relying on the fact that the case dealt with a standard different from those which contain the loose "shall be required to wear" language.

In the instant proceeding, respondent's safety rules with regard to the use of safety belts are found at page 8 of Exhibit R-1, and they state the following:

* * * * * * *

> 8. Safety belts and lanyards shall be worn as necessary.
>
> 9. Safety belts and lines shall be worn at all times where there is a danger of falling. If belts or lines present a greater hazard or are impractical, notify your supervisor so that alternative precautions are taken.

As I pointed out in the aforementioned previous decisions concerning the safety belt requirements of section 77.1710(g), the regulatory language "shall

be required to wear" has prompted mine operators to adopt that rather broad language as part of its own company safety requirements, and following the reasoning of the North American decision, they have defended on the ground that they have complied fully with the standard by not only requiring its employees to use safety belts, but by disciplining those who do not. In the three cited prior decisions, I accepted the defense in one of the Peabody Coal cases, but rejected it in the second Peabody Coal case, as well as in the Kaiser Steel case, and I did so on the specific facts of those cases.

Turning to the facts in the instant case, I conclude that the record supports a finding that the respondent here has established and met the tests laid down in the North American Coal Corporation case, supra. While the two company safety rules quoted above are somewhat contradictory in that No. 8 states that belts are to be worn "as necessary," while No. 9 states they shall be worn "at all times" where there is a danger of falling, and while the decision as to when a belt should be worn is left pretty much to the discretion of the individual employee, I believe these results stem from the fact that the ambiguous regulatory language "shall be required to wear" lends itself to different interpretations. It seems to me that it should be a relatively simple matter for MSHA to amend the standard so that it directly states that safety belts and lines shall be worn where there is a danger of falling. Failure to address this regulatory ambiguity will only result in continued and protracted litigation on a case-by-case basis, along with the inevitable inconsistent and somewhat strained case-by-case adjudicatory decisions.

Respondent's unrebutted testimony and evidence reflects that a safety belt was provided for the shovel and was apparently available for use by the groundman. Further, respondent has established that it does have a safety program in effect and that its safety rules and regulations require employees to wear safety belts and lanyards "as necessary" and at all times "where there is a danger of falling." Although a safety committeeman testifying on behalf of the petitioner stated that the safety belt rule is the least enforced safety rule, his conclusion in this regard was not supported by any credible evidence other than his own opinion. He conceded that he always wore a safety belt while working in a comparable elevated position on the shovel steering arm. Further, while the safety committeeman disagreed that 95 percent of the mine supervisors held "toolbox" safety meetings with their crews, and that he knows of some who do not, he conceded that three of his supervisors, identified by name, do make it a practice to hold regular safety meetings (Tr. 88).

Respondent produced evidence and testimony that it has cited individual miners in the past for failing to wear a safety belt. Respondent's director of safety and training testified that approximately 50 disciplinary notices have been issued to miners for company safety violations, and that three of those were for safety belt violations, including one (Exh. R-5) which was issued to the same miner cited by the MSHA inspector in this case.

Although this citation was issued after the MSHA citation was issued, it is at least indicative of the fact that the respondent does enforce its rule in this respect. While an inference can be drawn that the respondent may have issued its company notice of violation to Mr. Salger to mitigate its own liability

for the citation, since there is no indication that any supervisory personnel were present when Mr. Salger walked out to the end of the shovel steering arm when the MSHA inspector observed him, an inference can also be made that Mr. Salger took it upon himself not to use a belt and the inspector obviously believed that this was the case because he did not believe the respondent was negligent. Further, since Mr. Salger was not called as a witness by either party, I have no way of knowing why he was not wearing a belt when the inspector observed him, and although the inspector indicated that he spoke with Mr. Salger, no explanation was offered as to why he was not wearing a a belt.

After careful consideration of all of the evidence adduced in this case, I conclude and find that the respondent has met the guidelines established by the North American decision, that respondent has established that it was in compliance with the cited standard, section 77.1710(g), by requiring employees to wear belts and that petitioner has failed to establish by the preponderance of any credible evidence that a violation of the cited standard occurred. Accordingly, Citation No. 777767, issued November 5, 1979, is VACATED.

Fact of Violation

Citation No. 777770, November 5, 1979, 30 C.F.R. 77.505

In this instance, respondent is charged with a violation of section 77.505, which provides as follows: "Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."

It seems clear to me that the reason the inspector issued the citation in this case is the fact that he found the top half of the wooden device (Exh. R-4) used as a fitting to be missing at the point where the cable passes through the metal frame of the electrical compartment in question (see Exh. P-5). He stated that the top half of the device is usually hinged to the bottom half so as to provide some rigid stability for the cable so as to prevent its being pulled out and chafed against the side of the unprotected metal hole, which the inspector described as being sharp. His concern was that the chafing would, in time, cause the cable to wear and expose the inner conductors, thereby subjecting them to possible short circuiting or blow-outs, and presenting a shock hazard.

Respondent takes the position that the practice of using a rope as a restraining device is in fact the same as using a proper fitting or bushing for that purpose. In short, respondent argues that the use of a rope is a suitable substitute under the cited standard, and that the rope is in fact a strain insulator (Tr. 112-114). Further, in questioning Inspector Zara on the citation, respondent's counsel brought out the fact that MSHA's Inspector's Manual concerning the interpretation to be placed on section 77.505, describes a "proper fitting" as including devices

such as box connectors, packing glands, strain insulators, strain clamps, and counsel stated that he believed a rope can be considered to be a strain insulator (Tr. 110-111).

Petitioner's counsel took the position that the cited standard is not a performance standard, but rather, a specification standard that does not provide for so-called "suitable substitutes" (Tr. 112). Although Inspector Zara conceded that the use of a rope as a restraining device was in use at the mine and that section 77.505 included various options available to a mine operator so as to meet the requirements of a "proper fitting," he nonetheless stated that he would not accept such a rope-restraining device in the case at hand because a rope would not prevent the chafing or wearing of the cable against the metal unprotected edges of the hole where the cable entered the box. He also indicated that he would accept a rope restraint if the hole through which the cable passed was protected by a smooth-edging device or a complete wooden-block fitting to prevent the cable from chafing against the exposed metal edge of the hole.

The March 9, 1978, edition of MSHA's Inspector's Manual contains the following "policy" statement with respect to section 77.505:

> For the purpose of this part, a cable either single or multiple conductor is one that has an outer jacket in addition to the insulation provided for each power conductor. An electrical fitting is an accessory such as a clamp or other part of a wiring system that is intended primarily to perform a mechanical rather than an electrical function. The function of a proper electrical fitting for a cable entering a junction box, electrical panel, termination box, or other electrical enclosure is to prevent a strain on the electrical connections and to prevent chafing or other movement of the cable that might allow an energized electrical conductor to fault to the enclosure frame. Proper fittings would permit box connectors, packing glands, strain insulators, strain clamps, or metal or wood clamps, etc.
>
> Electric circuits that are made up of individual insulated wires that enter junction boxes, termination boxes or other electrical enclosures need not have fittings but must be provided with insulated bushings. Insulated wires that pass through metal walls within an electrical enclosure must also be provided with insulated bushings.

Respondent's argument is that the use of a rope-straining device falls within the "etc." portion of the "policy" statement found in the Inspector's Manual. This argument is rejected. The standard requires the use of proper fittings at the place where cables enter the frames of electrical compartments, and it seems clear that the intent of the standard is to prevent the chafing and deterioration of a cable when it passes through an opening which lacks the required protection called for by the standard. The "policy" statement simply emphasizes the intent of the standard and seems to itemize the types of devices acceptable for compliance. In the instant case, it seems obvious to me that the

respondent has opted to use wooden fittings of the types depicted by Exhibit R-4 and some of the photographic exhibits as a means

of compliance with the standard. The use of the rope device is, in my view, an additional device which the respondent opted to use to stabilize the cable, and the fact that its use is commonplace at the mine does not, ipso facto, establish compliance in this case. The inspector cited the violation because he found part of the wooden-fitting device missing and he was concerned with the fact that the cable could dislodge itself from the fitting and rub and chafe against the sharp edge of the opening to the electric compartment in question. The fact that a rope would assist in preventing this from happening is a matter that goes to mitigating the seriousness of the violation and may not, in my view, serve as an absolute defense to the citation. In short, I reject respondent's argument that the rope is a suitable substitute for a proper fitting of the type called for by the standard. Under the circumstances, I conclude and find that petitioner has established a violation and the citation is AFFIRMED.

Good Faith Compliance

The parties stipulated that the respondent exercised good faith in the abatement of the conditions cited, and I adopt this as my finding in this matter. The record reflects that the conditions cited were abated on the same day the citation issued and approximately 15 minutes prior to the time fixed by the inspector (Exh. P-4). This reflects rapid compliance by the respondent, and I have taken this into consideration in assessing a penalty for this violation.

Gravity

Although the inspector's narrative (Exh. P-9) reflects a notation by the inspector that he believed a "danger of electrical shock" was present, I cannot conclude that the facts adduced in this matter support such a conclusion. While it may be true that over a prolonged period of time it is possible for a cable to be rendered hazardous due to constant rubbing against a rough or sharp edge of an opening through which it passes, the facts adduced in this case reflect that the cable in question was in good condition, that it was protected to some degree by the rope-restraining device, as well as by a "pothead" device, and that the cable itself contained protective devices such as insulated conductors and metallic shields. In these circumstances, I cannot conclude that the missing portion of the wooden fitting presented a serious or grave situation. Accordingly, I conclude that on the facts presented here, the violation in question was nonserious.

Negligence

Although respondent's arguments concerning the use of a rope as a suitable substitute for a proper fitting suggests that respondent may not have been negligent because the use of such ropes may be commonplace at the mine, the fact is that petitioner established that on two prior occasions on September 11, 1979, respondent was cited for identical violations of section 77.505,

by Inspector Zara for failing to maintain proper cable fittings, and in both instances the citations concerned wooden block fittings such as the

one in issue here (Exhs. P-7, P-8). Since these two citations were issued prior to the one in issue here, respondent can hardly be heard to complain that it was totally oblivious of the requirements of section 77.505, and the interpretation placed on that standard by the inspector. If the respondent is not too enchanted with the manner in which MSHA has interpreted section 77.505, and believes that a rope-restraining device is a suitable substitute for a wooden fitting, then I suggest respondent seriously consider filing a petition for a modification or waiver of the standard pursuant to the Act so that the Secretary may have an opportunity to consider the merits of respondent's contention in this regard. As far as the instant proceeding is concerned, I conclude and find that respondent failed to exercise reasonable care to prevent the conditions cited by the inspector, conditions which I believe the respondent should have been aware of by closer inspection of or attention to its electric equipment, and its failure to exercise reasonable care in this regard constitutes ordinary negligence.

Size of Business and Effect of the Penalty on Respondent's Ability to Continue in Business

The information stipulated to by the parties with respect to the size of respondent's mining operation suggests that respondent is a large operator, and I conclude and find that this is the case. The parties agreed that the assessed penalties will not adversely affect respondent's ability to continue in business and I adopt this stipulation as my finding on this issue.

History of Prior Violations

The parties stipulated that for purposes of this case, respondent's prior history of violations consists of 114 prior violations issued by MSHA during the 24-month period prior to the issuance of the citation in question here. Considering the size of the respondent and the lack of any specific informatioin concerning the prior citations, I cannot conclude that respondent's overall prior history is so bad as to require any drastic increase in the initial civil penalty assessment made in this case. However, I have considered the fact that respondent was cited for two similar violations and conditions 2 months prior to the issuance of the citation and this reflects in the assessment made by me with respect to the citation which I have affirmed.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of $200 is reasonable and appropriate for Citation No. 777770, November 5, 1979, 30 C.F.R. 77.505, and respondent is ORDERED to pay the penalty within thirty (30) days of the date of this decision.

On the basis of the foregoing findings and conclusions with

respect to Citation No. 777767, November 5, 1979, 30 C.F.R. 77.1710(g), it is ORDERED

that the citation be VACATED, and petitioner's civil penalty proposal as to this citation is DISMISSED.

George A. Koutras
Administrative Law Judge