FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 29 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding	
	Docket Nos.	Assessment Control Nos.
v.	KENT 79-264	15-01554-03005
	KENT 79-265	15-01554-03006
	KENT 79-370	15-01554-03008 V
EDDIE COAL COMPANY, INC., Respondent	KENT 80-131	15-01554-03010
	No. 14 Mine	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Herman W. Lester, Esq., Combs and Lester, PSC, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 18, 1980, as supplemented on April 28, 1980, a hearing in the above-entitled proceeding was held on June 3, 1980, in Pikeville, Kentucky. The four Proposals for Assessment of Civil Penalty involved in this proceeding allege a total of 59 violations of the mandatory health and safety standards. Toward the end of the first day of hearing, evidence had been received and bench decisions had been rendered as to eight of the 59 alleged violations. Following a recess, counsel for the parties stated that they had reached a settlement agreement with respect to the remaining 51 alleged violations. Thereafter, counsel' for the Secretary of Labor filed on December 9, 1980, a motion for approval of settlement with respect to the 51 violations as to which no bench decision had been rendered.

The-first portion of this decision will be a final issuance of the bench decisions rendered at the hearing with respect to the eight contested violations. The remaining portion of the decision will discuss the motion for approval of settlement. Under the parties' settlement agreement, respondent has agreed to pay reduced penalties totaling $2,850 in lieu of the penalties totaling $7,025 proposed by the Assessment Office.

The bench decisions reproduced below pertain entirely to the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-264. The bench decisions appear throughout the transcript following the completion of evidence with respect to the eight contested violations. The transcript pages on which the bench decisions begin are shown following the headings for each contested violation. The introductory paragraphs which appear below under the heading "Contested Violations" are applicable to all of the bench decisions (Tr. 21).

Docket No. KENT 79-264

Contested Violations

This consolidated proceeding involves four Proposals for Assessment of Civil Penalty filed by the Secretary of Labor. The Proposals in Docket Nos. KENT 79-264 and KENT 79-265 were both filed on September 13, 1979, and seek assessment of civil penalties for 20 and 19 violations, respectively, of the mandatory health and safety standards by Eddie Coal Company. The Proposals in Docket Nos. KENT 79-370 and KENT 80-131 were filed on October 17, 1979, and February 11, 1980, respectively, and seek assessment of civil penalties for 3 and 17 alleged violations, respectively.

The issues in a civil penalty case are whether violations occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Some of the criteria may be considered in a general manner so that the consideration of those criteria become applicable for an entire proceeding, such as this one, which involves a large number of alleged violations.

At least two of thecriteria may be considered on a general basis in this case. As to those tuo criteria, there has been a stipulation by the parties. As to the criterion of the size of the operator's business, the parties have stipulated that respondent in this case is a small operator which produces at the present time about 134 tons of coal per day. It was first stated that payment of penalties would not cause the operator to discontinue in business (Tr. 5). [After the settlement conference, however, the parties stipulated that payment of penalties would have an adverse effect on respondent's ability to continue in business and a period of 90 days within which respondent would be required to pay the settlement penalties was requested (Tr. 185).]

Citation No. 712092 dated 2/13/79, Section 75.517 (Tr. 23)

Findings. Section 75.517 requires, among other things, that power wires and cables shall be insulated adequately and be fully protected. The violation alleged in Citation No. 712092 occurred because the operator had failed to use additional insulation where a cable passed through a permanent stopping before it connected to a water pump located in the main intake airway. The violation was nonserious and the operator was nonnegligent. It was stipulated that the operator made a good faith effort to achieve rapid compliance.

Conclusions. Although the former Board of Mine Operations Appeals has held that an operator is conclusively presumed to know what the mandatory health and safety standards are, the violation in this instance involves something that an operator would not necessarily have known that he was required to do, because the wire in this instance was in good condition and did not have any worn places on it. The wire

did have insulation on it so that the operator could have concluded that this particular wire was insulated adequately and was fully protected at the point where it passed through a permanent stopping. However, the inspector says that it is his policy to cite this type of violation any time there's a possibility that stress and wear on a wire might expose bare wires and bring about a possible shock or electrocution.

The purpose of the Act and the regulations is to make a mine just as safe as possible for the miners. Therefore, the inspector's motive was good and it undoubtedly is a worthwhile practice to have every possible protective step taken to assure that no one will be shocked or electrocuted. However, in assessing a penalty for this particular violation, I think that a very nominal penalty should be assessed in view of the circumstandes that I just recited. Consequently, a penalty of $1 will be assessed for this violation.

Citation No. 712094 dated 2/13/79, Section 75.303 (Tr. 61)

Findings. Section 75.303 provides, among other things, that belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun and that "such mine examiner shall place his initials and the date and time at all places he examines." I find that no violation of section 75.303 was proven in this instance because the inspector cited a violation of that section based on his conclusion that no adequate preshift examination had been made. The violation which occurred, if any, was that the section foreman had failed to make an examination of the belt conveyor during the shift which was being worked at the time the'inspector cited the violation.

Conclusions. I have run into this particular alleged violation on other occasions and each time the inspectors either cited a violation based on the fact that the section foreman had failed to make an onshift examination by omitting the checking of the conveyor belt or the inspector cited the operator for failure to make a preshift examination based on the fact that the inspector was unable to find the initials and date and time showing that the preshift examination had been made.

In this instance, the inspector says that the section foreman indicated that he had so much work to do in the mine that he had been unable to make an examination of the belt at the time the inspector was talking to the section foreman. The difficulty with citing the violation the way the inspector has done it is that he has based it on a conclusion that the section foreman must place his initials and the time and the date at the places examined when he makes an onshift examination of the conveyor belt. The way the sentence is worded in section 75.303, the examination of the belt conveyor is something that has to be done after the shift begins, but the mine examiner is required to place his initials and the date and the time at all places he examines and that initialing requirement connects back to the mine examiner who was involved in making a preshiftexamination.

It is my conclusion that the sentence about examining belt conveyors after the shift has begun is out of context with the requirements set forth in section 75.303 for the obligations and duties of the preshift examiner. I think that Citation No. 712094 so mixes the obligation of the preshift examiner with those of the section foreman, who was making the onshift examination, that it's an improper conclusion to assume from the fact that the inspector was unable to find these initials and the date along this conveyor belt that the onshift examination of the belt conveyor had not been made or wouldn't have been made on this particular day. As counsel for the operator has observed, the section foreman was with the inspector during part of the shift and, therefore, his inspection of the belt at that time may not have been done because he was with the inspector.

The inspector does not claim that the entries in the preshift examination book had not been made. Since there is no allegation that the examinations were not being made and were not being recorded, I cannot find that a violation occurred merely because the inspector was unable to find more dates along the conveyor belt than he did on February 13, 1979.

Citation No. 712095 dated 2/13/79, Section 7.5.1725 (Tr. 78)

Findings. Section 75.1725 provides that mobile and stationary machinery and equipment shall be maintained in a safe operating condition and machinery or equipment in unsafe condition shall be renoved from service immediately. A violation of section 75.1725 occurred because the inspector observed on a 3,000-foot conveyor belt 36 bottom rollers which were stuck. The violation was moderately serious in the circumstances because none of the rollers were touching coal on the mine floor and the majority of them were in areas where there was moisture. The operator had failed to observe the stuck rollers during the preshift or onshift examination and they're easy to see and should have been located. Consequently, there was a rather high degree of negligence. The operator demonstrated a good faith effort to achieve rapid compliance.

Conclusions. Inasmuch as the violation was moderately serious., that there was a high degree of negligence, and that a small operator is involved, a penalty of $50.00 is appropriate. There is no history of previous violations to be considered, according to Exhibit No. 45.

Citation No. 712098 dated 2/13/79, Section 75.523 (Tr. 99)

Findings. Section 75.523 provides that electric face equipment shall be provided with devices that will permit equipment to be deenergized quickly in the event of an emergency. A violation of Section 75.523 occurred because the operator of the Joy loading machine had moved the panic bar on the machine to an upward position so that it would not quickly deenergize the equipment in the event of an emergency. The violation was serious in that it would be possible for an equipment operator to be caught and crushed against a rib because of his inability to reach the panic bar in an emergency situation. Some-equipment

operators have a practice of placing the panic bar in an upward position to prevent accidental deenergization of the equipment. Unfortunately, when the panic bar is placed in an upward position, it is then not close enough to the operator to facilitate immediate usage of the panic bar in an emergency. The equipment operators' practice of placing the panic bar in an upward position has made it difficult for respondent to prevent the type of violation cited in this instance. The evidence indicates that respondent demonstrated a good faith effort to achieve rapid compliance.

Conclusions. As Mr. Taylor pointed out in his summary, the provisions of section 75.523-2 indicate that movement of no more than 2 inches should have to be made in order to actuate the deenergization device. There is no real argument in this instance as to whether the violation occurred. The question is whether a large penalty should be assessed because of the fact that the violation resulted from something that the equipment operator himself brought about. The Commission has recently held that mine operators are liable for violations regardless of fault, and the Commission has been very strict in requiring that a penalty be assessed in anv situation where a violation has occurred because the philosophy behindthe use of civil penalties is that penalties do deter the mine operators from allowing repeat violations.

In a situation such as this, I can sympathize with Mr. Lester's argument that it's difficult to replace miners and that a mine operator can't discharge one every time he violates a safety regulation. The only thing he can do is to insist upon stricter supervision by the section foreman over people who do not take safety as seriously as they should. But I think that the precedents would require me to assess a fairly large penalty in this instance in order that repeat violations of this nature are discouraged in every possible way. So, primarily, on the basis of the seriousness of the violation and recognizing that the operator is not guilty of a high degree of negligence in this case, a penalty of $50.00 will be assessed.

I notice under the criterion of history of previous violations that Exhibit 45 shows that the operator has two previous violations of section 75.523. It has been my practice to increase penalties when there is shown to be a history of previous violations. Therefore, -considering the fact that a small operator is involved, the penalty will be increased by $10.00 under the criterion of history of previous violations to a total penalty of $60.00.

Citation No. 712099 dated 2/13/79, Section 75.400 (Tr. 133)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall not be permitted to accumulate in active workings. A violation of section 75.400 occurred because the inspector found isolated pockets of loose coal ranging in depth from 1 to 3 inches

in entries 1 through 7. The accumulations were near the ribs and were in an area which was 150 feet from the working face. The area was rock dusted except for the accumulations and, consequently, the violation was only moderately serious. Respondent had a program providing for cleaning in the area and apparently the accumulations resulted from shooting from the solid so as to cause coal to fall from the ribs. The evidence indicates that the operator showed a good faith effort to achieve rapid compliance.

Conclusions. The Commission in Old Ben Coal Company, 1 FMSHRC 1954, (1979), held that the mere existence of accumulations of combustible materials is a violation. The Commission said the purpose of the Act is to prevent fire and explosions as a result of accumulations of combustible materials.

In this instance, however, we have some very small accumulations and, although there is evidence that there are some permanent splices that existed in this working area, the fact remains that these particular accumulations were close to the rib and that the working area was wet except for the area close to the rib where the accumulations existed. Consequently, I feel that there was little chance of fire or an explosion from these particular accumulations, particularly since no methane has been detected in this mine. Therefore, I think that a small penalty should be assessed in this instance of $25.00. Exhibit 45 shows that respondent has previously violated section 75.400 on two occasions, so the penalty will be increased by $10.00 under the criterion of history of previous violations to a total of $35.00.

Citation No. 712100 dated 2/13/79, Section 75.601 (Tr. 151)

Findings. Section 75.601 requires, among other things, that disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified, so that disconnection of such devices can be easily determined through visual observation. A violation of section 75.601 occurred because the inspector found that, although the disconnecting devices for the trailing cables for the roof-bolting machine, the loading machine, and the shuttle car had been plainly marked at some time, the disconnecting devices were not plainly marked on the day that he wrote Citation No. 712100.

The violation was serious because, if a person had been asked to disconnect a given cable so that the electrician, for example, could work on the cable at a splice or for another reason, the failure of the person to disconnect the correct cable could result in a possible shock or electrocution.

There was ordinary negligence in this instance because the operator had at one time marked these cables and it is a question of fact as to how well marked they were at this time. There's always the

possibility for the electrician to feel that his markings were still legible but might not have been-legible to some other employee who might have been asked to disconnect these devices. The evidence shows that there was a good faith effort made to achieve rapid compliance.

Conclusions. Inasmuch as a small operator is involved, that the violation was serious, and'that there was ordinary negligence, a penalty of $55.00 would be assessed, but Exhibit 45 indicates that the operator has a history of one previous violation of section 75.601. Therefore, the penalty will be increased by $5.00 to $60.00 under the criterion of history of previous violations.

Citation No. 712703 dated 2/13/79, Section 75.200 (Tr. 174)

Findings. Section 75.200 requires that each operator submit a roof-control plan applicable to his mine. Respondent's roof-control plan required that a pry bar be provided for each roof-bolting machine in the mine. A.violation of section 75.200 occurred because the pry bar was unavailable on the machine at the time the inspector asked about it. The violation was moderately serious and the operator was guilty of ordinary negligence. There was a good faith effort made to achieve rapid compliance.

Conclusions. The inspector's testimony indicates that he believes the violation was serious because he said, without the pry bar being available to the operator of the roof-bolting machine, it might have been possible for the operator to leave loose material on the roof or in an overhanging rib which would otherwise be taken down, if the pry bar were available. The inspector also referred to the existence of kettle bottoms in this part of the mine.

Respondent's witness stated that 75 to 80 percent of the roof in the No. 14 Mine is sandstone and that the need for prying down materials such as slate is not a common requirement in this mine. Additionally, respondent's witness indicated that people, other than the operator of the roof-bolting machine, do take the pry bars for other purposes, even though respondent provides one for each'roof-bolting machine.

In such circumstances, a penalty of $25.00 would be assessed, but Exhibit 45 shows that Respondent has three prior violations of section 75.200. Since a small operator is involved, the penalty will be increased by $15.00 to $40.00 under the criterion of history of previous violations.

Noncontested Violations

Docket No. KENT 79-264

Evidence with respect to Citation No. 712702, alleging a violation of section 75.523, was introduced on transcript pages 154 through 165, but I granted a request by respondent's counsel that no bench decision be

rendered with respect to that alleged violation until respondent's counsel could call a witness to testify with respect to the violation (Tr. 164). After the parties entered into a settlement agreement, I granted their request that they be permitted to include the violation of section 75.523 among the violations which became a part of the settlement agreement (Tr. 186). On page 4 of the motion for approval of settlement, I am requested to rely upon the proof submitted at the hearing in approving the parties' settlement agreement with respect to Citation No. 712702. That citation alleged that respondent violated section 75.523 by having an inoperative panic bar on its battery-powered tractor. The Proposed Assessment sheet in the official file shows that the Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, and proposed a penalty of $106 which respondent has agreed to pay in full. The evidence introduced at the hearing would support the findings made by the Assessment Office. Therefore, the parties' settlement agreement should be approved with respect to Citation No. 712702. The evidence which respondent would have introduced if a settlement had not been reached might have caused me to make different findings from those made above, but since the parties agreed to settle the issues raised by Citation No. 712702, my review is limited to determining whether the settlement agreement is reasonable, rather than whether a violation occurred and whether respondent's evidence, if it had been introduced, would require different findings from those which were originally made by the Assessment Office.

Evidence was presented on transcript pages 176 to 184 with respect to Citation No. 712704, alleging a violation of section 75.517, but that alleged violation also became a part of the settlement agreement (Tr. 185). The motion for approval of settlement, at page 4, asks that I approve the parties' settlement agreement on the basis of the evidence received at pages 176 to 184. Citation No. 712704 alleged that respondent had violated section 75.517 by failing to reinsulate four small cracks in the trailing cable to the coal drill. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, and proposed a penalty of $90 which respondent has agreed to pay in full. The testimony at the hearing shows that the potential hazard was greater than it was considered to be by the Assessment Office because the inspector stated that the coal drill was sitting in water and that its trailing cable was lying in water when he first observed the coal drill (Tr. 180). Of course, the inspector did not make his examination of the drill and its cable until the drill and its cable had been removed from the water, but he said that the cracks in the cable exposed any person who did touch the cable to possible electrocution. Inasmuch as the parties agreed to make this alleged violation a part of their settlement agreement before respondent cross-examined the inspector or presented any evidence with respect to the alleged violation of section 75.517, it would be improper for me to find, on the basis of the inspector's testimony alone, that the Assessment Office erred in failing to assign more penalty points than it did to this alleged violation under 30 C.F.R. § 100.3. It is sufficient, for settlement purposes, that

the findings of the Assessment Office be supported by the evidence in the record. I find that the settlement agreement under which respondent has agreed to pay the full penalty of $90 proposed by the Assessment Office should be approved since the evidence supports the Assessment Office's findings.

No evidence was presented at the hearing with respect to any of the other 49 violations alleged in this proceeding. Therefore, from this point to the conclusion of this decision, the only considerations are those which are normally considered in a settlement proceeding, that is, whether the motion for approval of settlement gives adequate reasons for approving the amount of the penalties which respondent has agreed to pay.

Citation No. 712705 alleged that respondent had violated section 75.1722(b) by failing to provide a guard at the conveyor belt's tail pulley. The Assessment Office found the violation to have resulted from a high degree of ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $140. Respondent has agreed to pay a reduced penalty of $60. The motion for approval of settlement states that a reduced penalty is warranted because it was unlikely that a person could be injured by the tail pulley here involved and that the operator was entitled to a reduction in assignment of penalty points under the criterion of good faith abatement because the conveyor belt was stopped immediately after the citation was written and a guard was installed. I find that adequate reasons have been given for approving the reduced penalty.

Citation No. 712706 alleged that a violation of section 75.313 had occurred because the methane monitor on the loading machine was inoperative. The Assessment Office found the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $52. Respondent has agreed to pay a reduced penalty of $17. The motion for approval of settlement claims that the reduction is primarily justified by the fact that respondent's mine has no history of ever having released any methane and the fact that respondent stopped production to achieve compliance, thereby becoming entitled to maximum consideration for making an outstanding effort to achieve rapid compliance.

Citation No. 712707 alleged that a violation of section.75.604 had occurred because the trailing cable to the loading machine had permanent splices-which were not effectively sealed to exclude moisture. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $90. Respondent has agreed to pay a reduced penalty of $30. The motion for approval of settlement states that the reduced penalty is warranted by the fact that, if a hearing had been held, the evidence would have shown that the cable was adequately insulated. It is also stated that respondent is entitled to a reduction of the penalty proposed by the Assessment Office because respondent stopped production until further work could be done to insulate the trailing cable.

Citation No. 712708 alleged that a violation of section 75.604 had occurred because the trailing cable to the coal drill had four permanent splices which were not effectively insulated to exclude moisture. The Assessment Office found the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal period of time, and proposed a penalty of $90. Respondent has agreed to pay a reduced penalty of $30 which the motion for approval of settlement justifies for the same reasons referred to above with respect to Citation No. 712707.

Citation No. 712709 alleged that a violation of section 75.200 had occurred because respondent had failed to provide straps in several entries where kettle bottoms were present in the roof. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106. Respondent has agreed to pay a reduced penalty of $30. The reduced penalty is said to be warranted by the fact that respondent stopped production to install the necessary additional roof support.. The Assessment Office failed to give any consideration for rapid abatement.

Citation No. 712710 alleged that a violation of section 75.503 had occurred because a burst conduit to the batteries on a tractor prevented the tractor from being in permissible condition. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $66. Respondent has agreed to pay a reduced penalty of $20 which is said to be warranted primarily by the fact that respondent took extraordinary steps to gain compliance,-whereas the Assessment Office gave insufficient consideration to respondent's effort to achieve rapid compliance.

Citation No. 712711 alleged that a violation of section 75.202 had occurred because several overhanging brows had not been taken down or supported. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106. Respondent has agreed to pay a reduced penalty of $30. The reduced penalty is said to be warranted by the fact that respondent was having a difficult problem in connection with brows left by shooting coal from the solid, that is, without use of a cutting machine. Respondent was attempting to eliminate the problem at the time the inspection was made and respondent stopped production to achieve rapid compliance.

Citation No. 712714 alleged that a violation of section 75.202 had occurred because several timbers along the roadway had been dislodged and had not been replaced. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106. Respondent has agreed to pay a reduced penalty of $30. The reduced penalty is said to be warranted primarily because of management's taking extraordinary steps to achieve rapid compliance.

Citation No. 712715 alleged that a violation of section 75.512 had occurred because respondent had failed to record the weekly examination of electrical equipment since no entries had been made in the book for 11 days preceding the inspection. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $52. Respondent has agreed to pay a penalty of $17 which is said to be warranted by the nonserious nature of the violation and the fact that the Assessment Office failed to give respondent as much consideration'for rapid abatement as the facts would warrant if a hearing had been held to develop all extenuating cicumstances.

Citation No. 712716 alleged that a violation of section 75.316 had occurred because respondent had not submitted an updated version of its ventilation, methane, and dust control plan. The Assessment Office found the violation to have resulted from ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $38. Respondent has agreed to pay a reduced penalty of. $12 which is said to be warranted by the fact that respondent submitted an updated plan on the day following the writing of the citation and thereby became entitled to maximum consideration for having achieved rapid compliance.

Most of the reductions in penalties under the settlement agreement for the violations alleged in Docket No. KENT 79-264 have been justified in the motion for approval of settlement on the basis that the Assessment Office gave no consideration for respondent's having taken extraordinary steps to achieve rapid compliance. I would normally consider a settlement agreement to be somewhat contrived by relying upon that aspect of the criteria to such a great extent if it were not for the fact that the testimony at the hearing supports such reliance (Tr. 159; 182-183). Therefore, for the reasons given above, I find that the settlement agreement as to the violations alleged in Docket No. KENT 79-264 should be approved.

Docket No. KENT 79-265

Citation No. 712717 alleged that a violation of section 75.1202 had occurred because respondent had failed to keep its mine map up to date by making temporary notations thereon. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $38. Respondent-has agreed to pay a reduced penalty of $5. The motion for approval of settlement states that the reduced penalty is warranted primarily because respondent stopped production to achieve rapid compliance, whereas the Assessment Office allowed for only normal abatement in assigning penalty points under 30 C.F.R. § 100.3.

Although the motion for approval of settlement does not discuss it, there is built into the Assessment Office's method of assigning penalty points under section 100.3 a practice which can be difficult to appraise in some cases. The practice I am talking about is the Assessment Office's

method of assigning penalty points under the criterion of history of previous violations. It should be noted that all violations alleged in Docket No. KENT 79-265 have assigned to them eight penalty points under the criterion of history of previous violations based (1) on the fact that an average of from 11 to 20 violations were cited at respondent's mine each year during the 24 months preceding the occurrence of the violations alleged in this proceeding, and (2) on the fact that from nine-tenths of a violation to one violation was written at respondent's mine each time an inspector spent 1 day making an examination at respondent's mine. Assignement of eight penalty points under the criterion of history of previous violations causes each penalty in Docket No. KENT 79-265 to be assessed a minimum amount of $16, apart from any amount to be assessed under the other five criteria.

The difficulty in adjusting for the Assessment Office's method of computing penalties under the criterion of history of previous violations is illustrated with respect to Citation No. 712712 here under consideration. The violation consists of the operator's failure to make temporary notations on a mine map. The parties' settlement agreement has recognized the non-serious nature of the violation and has agreed on a nominal penalty of $5, but it is difficult to justify such a small penalty under the Assessment Office's penalty formula described in section 100.3 because, under the single criterion of respondent's history of previous violation, the Assessment Office has proposed a penalty of $16 attributable solely to respondent's history of previous violations. There was introduced in evidence at the hearing as Exhibit No. 45 a computer printout which shows that respondent has not previously violated section 75.1202. Therefore, in my opinion, respondent, in this instance, should be assessed no penalty under the criterion of history of previous violations. If one bears in mind, in this instance, the need to eliminate the basic penalty of $16 built into the Assessment Office's formula under the criterion of history of previous violations, and then if one invokes the Assessment Office's formula for evaluating the criterion of good-faith abatement, by recognizing. that respondent should be given full credit for its rapid achievement of compliance, as claimed by the motion for approval of s tlement, the parties' settlement agreement, under which respondent has -eed to pay a penalty of $5, can be approved.

Citation No. 712718 alleged that respondent ad violated section 75.316 by failing to provide a water spray at the dumping point. The Assessment Office considered the violation to have resulted from ordinarv negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $52, whereas respondent has agreed to pay a penalty of $17 which is said to be warrented primarily by the fact that respondent stopped production to achieve compliance and is therefore entitled to maximum consideration for rapid abatement.

Citation No. 712724 alleged that respondent had violated section 75.516-1 by using unapproved insulators to install Dower conductor. The Assessment Office found the violation to have resulted from a relatively high degree of ordinary negligence, to have been serious, to have involved a lack of good-faith effort to achieve compliance, and proposed a penalty of $275, whereas

respondent has agreed to pay a reduced penalty of $100. The motion states that the reduced penalty should be justified primarily on the fact that the violation was corrected immediately. The evidence does not permit me to approve the reduced penalty on the basis alleged on page nine of the motion for approval of settlement because Exhibit No. 3 in Docket No. KENT 79-265 shows that the inspector issued Withdrawal Order No. 712741 when respondent failed to take prompt action to abate the alleged violation. Respondent did not abate the violation until July 27, 1979. The order of termination stated that the improperly suspended cable was replaced with a new cable which could carry a much higher voltage than the cable originally cited for improper suspension.

I believe that a reduced penalty of $100 should be approved. The amount of $16 assigned by the Assessment Office under the criterion of history of previous violations can be eliminated because Exhibit No. 45 in this proceeding shows that respondent has not previously violated section 75.516-1 or any subsection of that section. The finding that respondent failed to make a good-faith effort to achieve compliance can also be eliminated along with the penalty of $20 associated with application of the criterion of respondent's effort to achieve rapid compliance. Additionally, the gravity of the violation was not as great as it was considered to he by the Assessment Office. Both of the aforementioned reductions are supported by the fact that the inspector's order was modified to permit respondent to continue to use the improperly suspended cable for 3 months before a new cable was installed. If the violation had been as serious as it was considered to be by the Assessment Office, the inspector could not have extended the time for compliance for a 3-month period. In such circumstances, I find that respondent's agreement to pay a penalty of $100 should be approved.

Citation No. 712729 alleged that respondent had violated section 77.1301 by allowing dry grass and paper boxes to accumulate around the magazine used for storage of explosives and detonators. On page nine of the motion for approval of settlement, a request is made that the Proposal for Assessment of Civil' Penalty be dismissed in Docket No. KENT 79-265 to the extent that it seeks assessment of a penalty for a violation of section 75.1301 on the ground that, if a further hearing had been held, the evidence would have shown that the combustible materials had accumulated a considerable distance from the explosives magazine and did not create a condition prohibited by section 75.1301. I find that good cause has been shown for granting the motion to dismiss, as hereinafter ordered.

Citation No. 712725 alleged that a violation of section 75.503 had occurred because the insulation was frayed on both sides of a cable reel on a shuttle car. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $66, whereas respondent has agreed to pay a penalty of $21. The motion states in effect that a reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office and that respondent should be given maximum consideration for good-faith abatement because production was stopped until the condition could be corrected.

Citation No. 712726 alleged that a violation of section 75.703 had occurred because respondent had not provided a frame ground for a shuttle car. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $90, whereas respondent has agreed to pay a penalty of $75. The motion seeks to justify the reduced penalty on the ground that respondent is entitled to maximum consideration for rapid abatement. Additionally, the Assessment Office assigned eight penalty points under the criterion of history of previous violations,'whereas Exhibit No. 45 shows that respondent has not previously violated section 75.703.

Citation No. 712727 alleges that a violation of section 75.1303 had occurred because respondent was using a shooting cable containing a temporary splice which had not been insulated at all. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $30. The motion states that the reduction is warranted because of respondent's rapid abatement. Additionally, Exhibit No. 45 shows that respondent has not previously violated section 75.1303.

Citation No. 712728 alleged that a violation of section 75.1704 had occurred because water had accumulated in the No. 3 entry to a depth of from 8 to 10 inches. The No. 3 entry is a haulage roadway and a return air escapeway. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $35. The motion states that the reduced penalty is warranted by management's having taken extraordinary steps to achieve compliance. Also respondent is entitled to a reduction in the penalty because Exhibit No. 45 shows that respondent has not previously been cited for a violation of section 75.1704.

Citation No. 712625 alleged that a violation of section 75.400 had occurred because respondent allowed some cardboard boxes to accumulate around the explosives magazine located 150 feet from the working face. On page 10 of the motion for approval of settlement it is requested that the Proposal for Assessment of Civil Penalty in Docket No. KENT 79-265 be dismissed to the extent that it seeks assessment of a penalty for an alleged violation of section 75.400 on the ground that the inspector who wrote the violation subsequently vacated the citation as having been issued in error. I find that the motion for dismissal should be granted as hereinafter ordered.

Citation No. 712626 alleged that a violation of section 75.1306 had occurred because respondent had allowed the wagon used to haul explosives to be parked in the shuttle car roadway while loaded with powder and detonators and with the shuttle car's trailing cable resting against the explosives wagon. The Assessment Office considered the violation to have resulted

from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $30. The motion states in effect that the reduced penalty is justified by the fact that the violation was not as serious as it was considered to be by the Assessment Office and by the fact that respondent is entitled to maximum consideration for rapid abatement. Additionally, respondent has not previously violated section 75.1303.

Citation No. 712627 alleged that respondent had violated section 75.512 by failing to maintain a bell on a scoop in an operable condition. On page 11 of the motion for approval of settlement it is requested that the Proposal for Assessment of Civil Penalty be dismissed to the extent that it seeks assessment of a civil penalty for an alleged violation of section 75.512 because the inspector who wrote the citation later vacated it as having been issued in error. I find that the motion to dismiss should be granted as hereinafter ordered.

Citation No. 712628 alleged that respondent had violated section 75.1704-2(d) because a map to show designated escapeways from the working section to the main escape system had not been provided. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $40, whereas respondent has agreed to pay a penalty of $13. The motion states that a reduced penalty is warranted because respondent is entitled to maximum consideration for good-faith abatement. Also, Exhibit No. 45 shows that respondent has not previously violated section 75.1704.

Citation No. 712629 alleged that respondent had violated section 75.1704 by failing to mark the second escapeway properly. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $40, whereas respondent has agreed to pay a penalty of $13. The motion gives the same reasons for allowing a reduced penalty with respect to Citation No. 712629 as were given above with respect to Citation No. 712628.

Citation No. 712630 alleged that respondent had violated section 75.200 by failing to provide canopies for two main entries as required by respondent's roof-control plan. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a penalty of $50. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it wasconsidered to be by the Assessment Office and that respondent is entitled to maximum consideration for having achieved rapid compliance.

Citation No. 712631 alleged that respondent had violated section 75.1001 by failing to remove some rocks and trees from a highwall. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $78, whereas respondent has agreed to pay a penalty

of $25. The motion states that the reduced penalty is warranted because respondent is entitled to consideration for rapid abatement. Additionally, Exhibit No. 45 shows that respondent has not previously violated section 75.1001.

Citation No. 712632 alleged that respondent had violated section 77.1102 by failing to post warning signs to prohibit smoking and open flames near a storage area for combustible liquids. The Assessment Office considered the violation to have been the result of ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $40, whereas respondent has agreed to pay a penalty of $5. The motion states that the reduced penalty is warranted on the ground that the employees were aware of the location of the storage area and knew not to smoke in that area. It is also alleged that respondent is entitled to maximum consideration for rapid achievement of compliance. Finally, Exhibit No. 45 shows that respondent has not previously violated section 77.1102.

Citation No. 712634 alleged that respondent had violated section 75.303 because respondent had failed to note at seals in the mine that weekly inspections of the seals at an abandoned area had been made. The Assessment Office considered the violation to have been the result of ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $66, whereas respondent has agreed to pay a reduced penalty of $15. The motion states that the reduction in penalty is justified because the operator had examined the majority of the seals. It is alleged that the violation was not as serious as it was considered to be by the Assessment Office because the mine has never been known to release any methane.- It is also claimed that respondent is entitled to maximum consideration for rapid abatement. Additionally, respondent has not previously violated section 75.313, according to Exhibit No. 45.

Citation No. 712635 alleged that respondent had violated section 75.200 by failing to provide additional roof support for a return airway which is used to transport employees and supplies. The Assessment Office found the violation to have resulted from a high degree of ordinary negligence, to have been serious, to have involved a lack of good-faith effort to achieve compliance, and proposed a penalty of $305 which respondent has agreed to pay in full. The motion states that the Assessment Office properly evaluated the criteria in this instance and that the full amount proposed by the Assessment Office should be paid.

Citation No. 712636 alleged that respondent had violated section 77.1104 because accumulations of grease, lubricants, and coal dust had been allowed to accumulate around the No. 1 belt conveyor drive located on the surface. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $66, whereas respondent has agreed to pay a penalty of $15. The motion states that the reduced penalty is warranted because the accumulated materials did not create a hazard on the surface of

of the mine and that respondent should be given credit for having achieved rapid abatement. Also,'Exhibit No. 45 shows that respondent has not previously violated section 77.1104.

I find that the reasons hereinbefore given provide adequate bases for approving the parties' settlement agreement with respect to the violations alleged in Docket Ho. KENT 79-265.

Docket No. KENT 79-370

Citation No. 712093 was written under the unwarrantable failure provisions, or section 104(d)(l), of the Act. The citation alleged that respondent had violated section 75.1100-l(a) because the water supply for the waterline running parallel to the belt conveyor was frozen. The Assessment Office waived the formula provided for in 30 C.F.R. § 100.3 and proposed a penalty of $500 on the basis of narrative findings emphasizing the criteria of negligence and gravity.

Order No. 712097 was written, under section 104(d)(l) of the Act, about 2 hours after the citation described above was issued. The order alleged that respondent had violated section 75.701 by failing to provide a frame ground for a power cable supplying power to a submersible pump located about 90 feet outby the section tailpiece. The frame ground wire existed, but it had not been connected because the section foreman had just not taken the time required to connect the wire when he installed the pump. The Assessment Office proposed a penalty of $500 for this alleged violation after making narrative findings emphasizing the criteria of negligence and gravity.

Order No. 712701 was written about 2 hours after the order described in the preceding paragraph was written. That order alleged that respondent had violated section 75.512 by failing to maintain the brakes on a battery-powered tractor in a safe operating condition. The order alleges that a rod had broken so that the master cylinder could not be actuated by the brake pedal. The inspector considered the violation to be serious since the tractor was used as a mantrip to take miners in and out of the mine. The Assessment Office proposed a penalty of $750 for this alleged violation after making narrative findings emphasizing the criteria of negligence and gravity.

The three violations described above constitute all the violations for which penalties are sought by the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-370. The motion for approval of settlement states that respondent has agreed to pay reduced penalties of $200, $165, and $369, respectively, for the violations alleged in the citation and two orders described above. The Primary reason given for reducing the penalties proposed by the Assessment Office is that, in each case, respondent immediately corrected the violations. The inspector's sheets evaluating negligence, gravity, and good-faith abatement show that respondent stopped production and immediately corrected the deficiencies cited in the citation and orders. The operator's prompt action is not as impressive as it might be since two of the violations were cited in withdrawal orders which would have caused respondent to stop production in any event.

As I have explained above, however, the evidence presented at the hearing held as to some of the violations involved in this proceeding showed that respondent stopped production in order to achieve rapid compliance with respect to ordinary citations. There is no doubt, therefore, but that respondent is entitled to maximum consideration for achieving rapid compliance. The question which remains, of course, is whether rapid good-faith compliance is a sufficient consideration to warrant approval of a settlement which reduces penalties proposed by the Assessment Office by 58 percent solely on the ground that respondent rapidly complied with the mandatory safety standards after having been cited for violating them.

Although the motion for approval of settlement does not point it out, Exhibit No. 45 shows that respondent has not previously violated either section 75.701 alleged in Order No. 712097 or section 75.1100-l(a) alleged in Citation No. 712093. Respondent has once before violated section 75.512 alleged in Order No. 712701. Section 75.512 refers to a general requirement of taking equipment out of service if it is not in safe operating condition. A previous violation of section 75.512 does not mean that respondent has necessarily previously failed to provide brakes for its tractor used as a mantrip.

The third aspect of the violations which merit acceptance of the settlement agreement is that a small mine producing only 134 tons of coal per day is involved. Consequently, moderate penalties are appropriate under the criterion of the size of respondent's business. Finally, as I have noted in the first part of this decision, respondent's financial condition is such that it has requested more than the usual 30 days within which to pay the settlement penalties agreed upon in this proceeding. In such circumstances, four of the six criteria show that reduced penalties are appropriate with respect to the three violations alleged in Docket No. KENT 79-370. Therefore, I find that the settlement agreement submitted by the parties in Docket No. KENT 79-370 should be approved.

Docket No. KENT 80-131

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-131 seeks assessment of civil penalties for 17 alleged violations. Citation No. 712712 alleged that respondent had violated section 75.1704 by allowing from 7 to 18 inches of water to accumulate in the main intake airway which was also designated as an escapeway. The Assessment Office found the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $180, whereas respondent has agreed to pay a reduced penalty of $60. The motion for approval of settlement states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office.

It should be noted in connection with the 17 violations alleged in Docket No. KENT 80-131 that the Assessment Office has increased the assignment of penalty points under the criterion of history of previous violations

to either 15 or 17 so that every penalty is assessed a minimum amount of $30 or $34 under that single criterion, whereas the Assessment Office evaluated all other violations alleged in this proceeding by assigning 8 penalty points, or $16, to each violation under the criterion of history of previous violations. Exhibit No. 45 in this proceeding shows that respondent has not previously violated section 75.1704. Therefore, some reduction in the penalties proposed by the Assessment Office is justified with respect to the violation of section 75.1704 and as to most of the violations alleged in Docket No. KENT 80-131.

Citation No. 712720 alleged that respondent had violated section 75.1100 by failing to provide 240 pounds of rock dust at a temporary electrical installation. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $35. The motion states in effect that a reduction in the penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office. Exhibit No. 45 shows that respondent has once before violated section 75.1100. The Assessment Office attributed $34 of its proposed penalty to the criterion of respondent's history of previous violations. I believe that no more tnan $10 should be attributed to respondent's history of previous violations when there is only one previous violation and a small operator is involved.

Citation No. 713477 alleged that respondent had violated section 75.523-2(c) because a force of more than 15 pounds was required to actuate the emergency deenergization switch,' or panic bar on respondent's No. 1 tractor. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a rapid manner, and proposed a penalty of $130, whereas respondent has agreed to pay a reduced penalty of $60. The motion states that a reduced, penalty is warranted because a mechanic had been working on the panic bar to improve its responsiveness and that the violation was corrected in about 1-1/2 hours. In such circumstances, it is obvious that respondent's negligence was not as great as it was considered to be by the Assessment Office and a greater allowance for the operator's rapid abatement than was made by the Assessment Office is justified under the criterion of rapid abatement.

Citation No. 713478 alleged that respondent had violated section 75.523-2(c) because a force of more than 15 pounds was required to actuate the panic bar on respondent's No. 2 tractor. The Assessment Office considered this second violation of section 75.523-2(c) to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $140, whereas respondent has agreed to pay a reduced penalty of $60. The same reasons as those given in the preceding paragraph warrant a reduction in the penalty proposed by the Assessment Office. The Assessment Office assigned 10 penalty points under the criterion of negligence for the preceding violation of section 75.523-2(c), but for some unexplained reason, assigned only 9 penalty points for the second violation of that section.

Also, the Assessment Office failed to consider that the second violation was abated rapidly even though the mechanic succeeded in correcting both of the violations within a time period of less than 4 hours, even though the inspector had given respondent until the following morning within which to achieve compliance. The sort of erratic assessment procedure shown by the Assessment Office in this instance makes one wonder why we should write hundreds of pages to justify acceptance of penalties which are lower than those proposed by the Assessment Office.

Citation No. 713479 alleged that respondent had violated section 75.1725 because the brakes on the roof-bolting machine were not operative. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $195, whereas respondent has agreed to pay a reduced penalty of $65. The motion states in effect that the reduced penalty is warranted because the violation was less serious than it was considered to be by the Assessment Office. Additionally, Exhibit No. 45 shows that respondent has not previously violated section 75.1725, so the Assessment Office's assignmentof $30 under the criterion of history of previous violations is excessive.

Citation No. 713943 alleged that respondent had violated section 75.604 by failing to maintain four temporary splices on the coal drill's trailing cable so that they would exclude moisture. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal fashion, and proposed a penalty of $114, whereas respondent has agreed to pay a reduced penalty of $37. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office. Also the Assessment Office attributed $30 of the penalty to respondent's history of previous violations, whereas Exhibit No. 45 shows that respondent has not previously violated section 75.604.

Citation No. 713944 alleged that respondent had violated section 75.316 because a water spray at the dumping point was inoperative. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $20. The motion states in effect that a reduced penalty is justified because the violation was not as serious as it was considered to be by the Assessment Office.

Citation No. 713946 alleged that respondent had violated section 75.517 because power conductors were exposed at four different places in the trailing cable supplying power to the coal drill. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been very serious, to have been abated in a normal manner, and proposed a penalty of $210 which respondent has agreed to pay in full. The motion states that the Secretary's position as to this violation is that it was very serious and resulted from a high degree of negligence and that the Assessment, Office appropriately determined that a relatively large penalty should be assessed in this instance.

Citation No. 713947 alleged that respondent had violated section 75.512 because the roof-bolting machine did not have operative headlights on either end. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $25. The motion states in effect that a reduced penalty is warranted by the fact that the violation was not as serious as it was considered to be by the Assessment Office.

Citation No. 713948 alleged that respondent had violated section 75.1100-2(e) because 240 pounds of rock dust had not been provided at a temporary electrical installation. The motion for approval of settlement requests that the Proposal for Assessment of Civil Penalty in Docket No. KENT 80-131 be dismissed to the extent that it seeks assessment of a penalty for this alleged violation because, if the hearing had been completed as to all alleged violations, the evidence would have shown that 240 pounds of rock dust were available at the temporary electrical installation here involved. That motion to dismiss will be granted as hereinafter ordered.

Citation No. 713949 alleged that respondent had violated section 75.1100 by having turned off the water valve through which water was supplied to the waterline running parallel to the belt conveyor. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $114, whereas respondent has agreed to pay a reduced penalty of $38. The motion states that a reduced penalty is warranted because some person had turned off the water valve for the waterline without respondent's management knowing of it. The motion concludes, therefore, that the violation did not involve as much negligence and was not as serious as it was considered to be by the Assessment Office.

Citation No. 713950 alleged that respondent had violated section 75.512 because a rear light on a tractor was inoperative. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $140, whereas respondent has agreed to pay a reduced penalty of $46. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office.

Citation No. 713951 alleged that respondent had violated section 75.1100-2 because it-had failed to provide as much fire-fighting equipment for the working section as was required. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been'moderately serious, to have been abated in a normal manner, and proposed a penalty of $130, whereas respondent has agreed to pay a reduced penalty of $42. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office.

Citation No. 714902 alleged that respondent had violated section 75.200 because it had failed to provide a bar of suitable length for prying down loose materials from the roof. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been very serious, to have been abated in a normal manner, and proposed a penalty of $240, whereas respondent has agreed to pay a reduced penalty of $40. The motion states in effect that the violation did not involve nearly as much negligence or gravity as was attributed to it by the Assessment Office. It is noted that pry bars of suitable length are located throughout the section and sometimes are removed from the roof-bolting machine where one is normally kept. The fact that respondent achieved compliance by providing an adequate bar within 10 minutes after the violation was cited shows that bars were readily available and indicates that respondent was entitled to a maximum reduction of penalty points under the criterion of rapid abatement.

Citation No. 714903 alleged that respondent had violated section 75.503 by failing to maintain a shuttle car in permissible condition. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $160, whereas respondent has agreed to pay a reduced penalty of $53. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office in view of the fact that no methane has ever been detected in respondent's mine.

Citation No. 714904 alleged that respondent had violated section 75.503 because it had failed to maintain the roof-bolting machine in a permissible condition. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $122, whereas respondent has agreed to pay a reduced penalty of $40. The motion states in effect that the reduced penalty is warranted for the same reasons given in the preceding paragraph.

Citation No. 714878 alleged that respondent had violated section 75.200 because several timbers had been dislodged and not replaced along the mantrip and haulage roadway. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $180, whereas respondent has agreed to pay a reduced penalty of $59. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office. The inspector's statement evaluating negligence and gravity shows that he thought the violation was very serious. -The only basis for allowing a reduction in the penalty of $180 proposed by the Assessment Office in this instance is that a small operator is involved and that its financial condition is poor. I am approving the settlement agreements in this consolidated proceeding largely for the reasons stated in the preceding sentence.

It should be noted that when evidence is introduced at a hearing by both parties, an evaluation of the criteria based on that evidence becomes entirely different from the routine application of the formula described in 30 C.F.R. § 100.3. The testimony of the various witnesses provides the occurrence of violations with many nuances of negligence and gravity which are not present apart from the impact of oral descriptions of events and responses by witnesses to detailed questions. The hearing in this proceeding demonstrates the effect that a hearing has on penalties determined on the basis of a formula as opposed to penalties based on testimony given at a hearing. The total penalties of $538 proposed by the Assessment Office for the eight contested violations which were the subject of the hearing were reduced in my bench decisions to a total of $246, or only 45 percent of the total amount proposed by the Assessment Office. The contested violations were not chosen by respondent as being those as to which the inspectors might be especially vulnerable. The eight contested violations just happened to be the first eight violations alleged by the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-264.

The 51 violations as to which settlements were reached involve a reduction in the total penalties of $7,025 proposed by the Assessment Office to $2,850, or only 40 percent of the amount originally proposed by the Assessment Office. The fact that the settlement amount is very close to the result which occurred with respect to the hearing held as to the contested violations makes me believe that the settlement agreements achieved a proper result in this proceeding with a great saving in hearing time and expense to both the Government and to respondent.

WHEREFORE, for the reasons herinbefore given, it is ordered:

(A) The motion for approval of settlement filed on December 29, 1980, is granted and the settlement agreements in each docket are approved.

(B) The motions for dismissal of the Proposals for Assessment of Civil Penalty are granted and the Proposals for Assessment of Civil Penalty in Docket Nos. KENT 79-264, KENT 79-265, and KENT 80-131 are dismissed to the extent that they seek assessment of civil penalties for the violations listed below:

Docket No. KENT 79-264

Citation No. 712096 2/13/79 § 17.1725(a) (Tr. 80)

Docket No. KENT 79-265

Citation No. 712729 2/28/79 § 77.1301
Citation No. 712625 2/27/79 § 75.400
Citation No. 712627 2/27/79 § 75.512

Citation No. 713948 5/15/79 § 75.1100-2(e)

(C) The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-264 is dismissed to the extent that it seeks assessment of a civil penalty for a violation of section 75.303 because the Secretary failed to prove that a violation of section 75.303 occurred (Tr. 61).

(D) Pursuant to the settlement agreements and my bench decisions, supra, respondent shall, within 90 days from the date of this decision, pay civil penalties totaling $3,096.00, of which an amount of $246.00 is attributable to penalties assessed in my bench decisions and the remaining amount of $2,850.00 is attributable to the settlement agreements hereinbefore described and approved. The penalties are allocated to the respective violations as follows:

Docket No. KENT 79-264

CONTESTED

Citation No. 712092 2/13/79 § 75.517	$	1.00
Citation No. 712094 2/13/79 § 75.303 (Dismissed)		--
Citation No. 712095 2/13/79 § 75.1725		50.00
Citation No. 712096 2/13/79 § 75.1725(a) (Dismissed)		--
Citation No. 712098 2/13/79 § 75.523		60.00
Citation No. 712099 2/13/79 § 75.400		35.00
Citation No. 712100 2/13/79 § 75.601		60.00
Citation No. 712703 2/13/79 § 75.200		40.00
Total Penalties Assessed in Bench Decisions	$	246.00

SETTLEMENTS

Docket No. KENT 79-264

Citation No. 712702 2/13/79 § 75.523	$	106.00
Citation No. 712704 2/13/79 § 75.517		90.00
Citation No. 712705 2/13/79 § 75.1722(b)		60.00
Citation No. 712706 2/13/79 § 75.313		17.00
Citation No. 712707 2/13/79 § 75.604		30.00
Citation No. 712708 2/13/79 § 75.604		30.00
Citation No. 712709 2/13/79 § 75.200		30.00
Citation No. 712710 2/13/79 § 75.503		20.00
Citation No..71271 1 2/13/79 § 75.202		30.00
Citation No. 712714 2/13/79 § 75.202		30.00
Citation No. 712715 2/13/79 § 75.512		17.00
Citation No. 712716 2/13/79 § 75.316		12.00
Total Settlement Penalties in Docket No. KENT 79-264	$	472.00

Docket No. KENT 80-265

Citation No. 712717 2/13/79 § 75.1202	$ 5.00
Citation No. 712718 2/13/79 § 75.316	17.00
Citation No. 712724 2/22/79 § 75.516-1	100.00
Citation No. 712729 2/28/79 § 77.1301 (Dismissed)	--
Citation No. 712725 2/23/79 § 75.503	21.00
Citation No. 712726 2/23/79 § 75.703	75.00
Citation No. 712727 2/23/79 § 75.1303	30.00
Citation No. 712728 2/23/79 § 75.1704	35.00
Citation No. 712625 2/27/79 § 75.400 (Dismissed)	--
Citation No. 712626 2/27/79 § 75.1306	30.00
Citation No. 712627 2/27/79 § 75.512 (Dismissed)	--
Citation No. 712628 2/27/79 § 75.1704-2(d)	13.00
Citation No. 712629 2/27/79 § 75.1704	13.00
Citation No. 712630 2/27/79 § 75.200	50.00
Citation No. 712631 2/27/79 § 77.1001	25.00
Citation No. 712632 2/27/79 § 77.1102	5.00
Citation No. 712634 2/28/79 § 75.303	15.00
Citation No. 712635 2/28/79 § 75.200	305.00
Citation No. 712636 2/28/79 § 77.1104	15.00
Total Settlement Penalties in Docket No. KENT 79-265	$ 754.00

Docket No. KENT 79-370

Citation No. 712093 2/13/79 § 75.1100-1(a)	$ 200.00
Order No. 712097 2/13/79 § 75.701	165.00
Order No. 712701 2/13/79 § 75.512	369.00
Total Settlement Penalties in Docket No. KENT 79-370	$ 734.00

Docket No. KENT 80-131

Citation No. 712712 3/13/79 § 75.1704	$ 60.00
Citation No. 712720 3/13/79 § 75.1100	35.00
Citation No. 713477 5/15/79 § 75.523-2(c)	60.00
Citation No. 713478 5/15/79 § 75.523-2(c)	60.00
Citation No. 713479 5/15/79 § 75.1725	65.00
Citation No. 713943 5/15/79 § 75.604	37.00
Citation No. 713944 5/15/79 § 75.316	20.00
Citation No. 713946 5/15/79 § 75.517	210.00
Citation No. 713947 5/15/79 § 75.512	25.00
Citation No. 713948 5/15/79 § 75.1100-2(e) (Dismissed)	--
Citation No. 713949 5/15/79 § 75.1100	38.00
Citation No. 713950 5/15/79 § 75.512	46.00
Citation No. 713951 5/15/79 § 75.1100-2	42.00
Citation No. 714902 5/15/79 § 75.200	40.00
Citation No. 714903 5/15/79 § 75.503	53.00
Citation No. 714904 5/15/79 § 75.503	40.00
Citation No. 714878 5/15/79 § 75.200	59.00
Total Settlement Penalties in Docket No. KENT 80-131	$ 890.00
Total Settlement Penalties in This Proceeding	$2,850.00
Total Civil Penalties Assessed in This Proceeding	$3,096.00

Richard C. Steffey

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

Distribution:

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