FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 20 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 81-17-M
	:	A.O. No. 01-0027-05017 F
v.	:	Ragland Plant
NATIONAL CEMENT COMPANY, INC., Respondent	:	

DECISION

Appearances: Murray A. Battles, Attorney, U.S. Department of Labor, Birmingham, Alabama, for the petitioner; J. Ross Forman, III, Esquire, Birmingham, Alabama, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on January 30, 1981, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on July 14, 1981 in Birmingham, Alabama, and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, but were afforded the opportunity to make arguments on the record and they have been considered by me in the course of this decision.

Issues

The principal 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 penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty 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 raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, 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, (3) whether the operator was negligent, (4) of the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

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

2. Section 119(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 CFR 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. National.Cement Company, Incorporated is the owner and operator of the Ragland Plant located in Ragland, St. Clair County, Alabama.

2. The inspector who issued the subject order and termination was a duly authorized representative of the Secretary of Labor.

3. A true and correct copy of the subject order/citation and termination were properly served upon the operator in accordance with section 107(d) of the 1977 Act though National denies it is subject to Act.

4. Copies of the subject order/citation and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

5. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that in 1979, the Ragland Plant produced 353,981 man-hours per year, and the controlling company, National Cement Company, Inc., had annual man-hours of 402,353.

6. The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 80 and the total number of inspection days in the preceding 24 months.

7. The alleged violation was abated in a timely manner and the operator demonstrated good faith in attaining abatement.

8. The assessment of a civil penalty in these proceedings will not affect the operator's ability to continue in business.

The jurisdictional question.

During the course of the hearing, respondent's counsel for the first time asserted that the Ragland Plant is not a "mine" within the meaning of the Act, and he contended that the respondent conducted a "milling operation" which is outside MSHA's jurisdiction (Tr. 91). Although Commission Rule 29 CFR 2700.5, requires an operator to deny any jurisdictional facts as part of its answer, respondent has never asserted that it is engaged in a milling operation which is outside MSHA's jurisdiction. Although its answer filed February 17, 1981, contains a denial that respondent operates "any coal or other mine", respondent admits that it operates "a limestone quarry, the products of which enter commerce within the meaning of the Act."

I take note of the fact that respondent's history of prior violations reflects that it has been served with a total of 87 citations for the period October 29, 1978 through October 28, 1980, and that respondent has paid these assessments without prote t. Further, the inspector who issued the citations testified that the mine has been regularly inspected by MSHA and that the respondent has never objected or contended that the inspectors were acting without enforcement authority or jurisdiction over its mining operations (Tr. 15, 56). I also take note of the fact that MSHA Form 1000-179, which is attached as "Exhibit A" to the petitioner's initial proposal for assessment of civil penalties, filed January 30, 1981, contains a notation that prior to December 4, 1979, the Ragland Plant was known as the "Ragland Quarry and Mill".,

Section 3(h)(l) of the Act defines "coal or other mine" as including, inter alia, "lands, excavations, structures, facilities, equipment, machines, tools, or other property * * * used in, or to be used in, the milling of * * * minerals, or the work of preparing * * * minerals."

The legislative history of the 1977 Act clearly contemplates that jurisdictional doubts be resovled in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

"Milling" is defined in pertinent part by the Mining Dictionary, (pg. 707), as "the grinding or crushing of ore", and 30 CFR 56.2 defines a "mill" as including "any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine".

The Ragland Plant is in the business of producing cement, the principal ingredient of which is the limestone which is mined from a nearby quarry owned by the respondent. The extracted limestone is used in the production of the cement which occurs at the plant site in question. The term "cement" is defined, amongst several definitions, as "a finely ground powder which, in the presence of an appropriate quanity of water, hardens and adheres to suitable aggregate, thus binding it into a hard agglomeration that is known as concrete or mortar." A Dictionary of Mining, Mineral, and Related Terms (U.S. Department of the Interior, Bureau of Mines) (1968) at p. 186.

Inspector Wilkie testified that respondent's quarry is located approximately seven miles from the plant, and that the limestone material is blasted at thequarry, loaded onto contract trucks by front-end loaders, and then hauled and dumped at the plant, where it is ultimately processed into cement. He described the cement-making process, which includes the screening and crushing of the quarried material for the production of cement and mortar, The finished raw product is then bagged and shipped by railroad cars or trucks. Plant production does not include the making of brick, pipe, or other concrete pre-fabricated products (Tr. 56-59). He also alluded to the fact that prior to 1980 respondent used another quarry which was approximately a mile from the plant and that the limestone from that quarry was crushed, loaded, and conveyed to the plant in question by conveyor belts. However, that quarry was flooded and is no longer used, but respondent never objected to any inspections which he had previously conducted at that facility (Tr. 61).

Inspector Wilkie described the plant operation in question as a milling operation and indicated that it had a separate MSHA mine identification number than the respondent's pit and quarry, and he confirmed the fact that'he has inspected other similar cement plant operations in the State of Alabama and Georgia and that MSHA has enforcement jurisdiction over these operations (Tr. 61). The plant or mill area itself covers an area of approximately two and one-half acres, and Mr. Wilkie characterized it as a limestone milling operation (Tr. 94).

Limestone is a form of sedimentary rock, and the term "crushed stone" is defined as the "product resulting from the artificial crushing of rocks, boulders, or large cobblestones, substantially all faces of which have resulted from the crushing operation," and is a "[t]erm applied to

irregular fragments of rock crushed or ground to smaller sizes after quarrying." Op cit., p. 284. These definitions suggest that cement production at the plant in question requires, at a minimum, the crushing of limestone to produce a finely ground powder used in the finished product. This being the case, I believe that the respondent's plant may also be characterized as a "crushed stone operation" subject to the mandatory regulatory requirements of Part 56, Title 30, Code of Federal Regulations.

The record adduced in this proceeding reflects that the crushed limestone for the plant comes from company-owned quarry, that the cement was produced by the dry process, and the finished product was stored in silos for shipment in bag and bulk. The kiln which is used for a part of the cement making process is fueled by coal which is processed through the coal feed hopper where the accident in question occurred. (Tr. 92-93).

With regard to respondent's assertion that it conducts a milling operation, it seems clear to me that those activities would still be subject to the Act, as well as to MSHA's enforcement jurisdiction. Section 3(h)(l) of the Act states that: "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delgaation to one Assistant Secretary of all authority with respect to the health and safety of miners at one physical establishment."

Since mineral milling or preparation is not specifically defined by the Act, the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) have entered into an agreement by which they define their respective jurisdictions. 39 Fed. Reg. 27382, April 22, 1974, superceded by 44 Fed. Reg. 22827, which became effective on March 29, 1979. Pursuant to this agreement, safety and health infractions which occur on mine sites and in milling operations, such as cement plants, come under the enforcement jurisdiction of MSHA and its mandatory safety and health standards. In those instances where the provisions of the Act and the implementing standards found in Parts 55, 56, 57 do not cover safety and health hazards on mine or mill sites, OSHA has enforcement jurisdiction.

It seems clear to me that the statutory definition of a mine establishes that it was Congress' intent that MSHA regulate any milling activity which is an integral part of a mine, since mines fall within the specialized jurisdiction of MSHA and since mine employees typically operate such facilities. On the facts of this case, it also seems amply clear to me that the respondent's cement plant, even if it can be classified as a milling operation, is still an integral part of its limestone mining operation. Without the raw mineral material (limestone) respondent could not produce cement. Therefore, it seems further clear to me that respondent's operations, whether they be characterized as a crushed stone operation or a milling operation, are both subject to the Act as well as to MSHA's enforcement jurisdiction, and my conclusions in this regard are based on the statutory aforementioned definition of the term "mine" as well as the MSHA-OSHA memorandum of understanding.

Respondent has presented no evidence or testimony to rebut the petitioner's assertion that the plant is subject to the Act as well as to MSHA's enforcement jurisdiction. Under the circumstances, and in view of the aforementioned discussion with regard to this issue, respondent's jurisdictional arguments are REJECTED.

Discussion

The citations in issue in this case were served on the respondent after the conclusion of an investigationconducted by MSHA to ascertain the circumstances concerning a fatal accident which occurred at the plant in question on October 29, 1980. The official accident report is a part of the record (exhibit P-3), and briefly stated, the fatality occurred when an employee fell into a coal feed hopper while apparently attempting to free a coal.hang-up and became entrapped in the coal and suffocated. Citation No. 082769, issued on October 31, 1980, charges a violation of section 56.16-2(b), and the condition or practice described is as follows:

> A fatal accident occurred at this operation on October 29, 1980, when an employee entered a coal feed hopper and became entrapped and suffocated. The grizzly on which the man normally would have stood to free a hang-up had been removed.

Citation No. 082768, October 31, 1980, cites a violation of 30 CFR 56.16-2(c), and the condition or practice described is as follows:

> A fatal accident occurred at this operation on October 29, 1980, when an employee entered a coal feed hopper without shutting off and locking out the discharge equipment. Additionally, the victim was not wearing a safety belt or harness, when the bridged coal collapsed, the employee because entrapped and suffocated:

Testimony and evidence adduced by the petitioner

MSHA Inspector William L. Wilkie testified as to his mining background and experience and confirmed the fact that he had conducted an accident investigation at the subject plant in October of 1980. He detailed the procedures he followed in conducting the investigation, summarized the statements taken from persons at the plant during the course of the investigation, and identified photographs of the hopper in question as well as a copy of the investigative report which he compiled (Tr. 15-23, exhibits P-11 through P-19, P-3, R-5).

Mr. Wilkie characterized a "grizzly" as the vernacular term for a grate, and he indicated that it was not in place over the hopper when he arrived at the plant and that he could not see one anywhere in the immediate

area. However, he did observe 6 or 9 steel supports inside the hopper which served as a support for the grizzly when it was in place. Mr. Wilkie testified that he interviewed shift foreman Howard Burnham and recorded in his notes what he believed Mr. Burnham told him about the accident (exhibit P-4), and that he also wrote up a statement for his signature describing the accident (exhibit P-6). Mr. Burnham told him that the accident victim Norris Johnson was standing on the coal in the hopper attempting to free up some coal with a long rod, and that after inserting his rod into the coal two times the bridged coal gave way and buried Mr. Johnson up to his hips. Mr. Burnham attempted to free Mr. Johnson from the coal, but after 10 to 15 minutes he became exhausted, shut down the vibrator, and went for help. Two or three men jumped into the hopper and frantically attempted to uncover Mr. Johnson from the coal while a man was attempting to push Mr. Johnson's legs up through the bottom of the hopper. Mr. Johnson was extracted from the coal and the rescue squad arrived on the scene, administered oxygen and CPR, all to no avail (Tr. 23-33).

Mr. Wilkie testified that Mr. Burnham admitted to him that there was no safety belt at the hopper, and that it was kept in a locker in the kiln control room. Mr. Burnham also told him that he did not instruct Mr. Johnson to get into or out of the hopper, and Mr. Burnham made an admission that both he and others had often stepped out onto the coal pile to unclog it (Tr. 36).

Mr. Wilkie confirmed that he issued the citations in questions, and he stated that a fellow inspector, R. L. Everett assisted him during the investigation and that Mr. Everett assisted him in filling out the inspector's narrative statements (exhibits P-l, P-2, Tr. 39-45).

Inspector Wilkie explained the reasons for the issuance of the citations in this case as follows (Tr. 45):

> A. All right. The reason I issued these citations, I was obligated to issue them under the standards that I'm obligated to carry out. And had either one of these items been used; had there been a grizzly on the hopper bin, there would have been no accident. Had there been a safety belt used, there would have been no accident.
>
> Q. But the grizzly now -- there is no standard as such that a grizzly has to be on there, is that true?
>
> A. The grizzly was used, in this case, as a sizing device.
>
> Q. Yes. But it was also used -- well --
>
> A. It was used as a walkway.
>
> Q. It would have been an adequate walkway under the standard.
>
> A. It would have. We would have accepted it.

And, at pages 95-97:

Q. Now, on the first citation here, 082769, which is Petitioner's Exhibit 1, when you cited them for a violation of 56.16-2(b), I take it you did so on the theory that the grizzly also served as a suitable walkway or passageway and since it was not there, since it had been removed and not replaced, that they didn't have a suitable walkway or passageway. Is that the theory on which you issued the citation?

A. Yes, sir.

Q. Would Subsection (c), that first sentence, also suffice to describe the function of the grizzly, and if a grizzly were not present could you also have cited them with (c), which says where persons are required to enter, et cetera, that a platform or staging shall be provided?

A. Yes, sir. I would have issued that (c) since they did not cut off the discharge and they did not use the safety belt.

Q. Well, leave the safety belt and discharge aside now, and let's just concentrate on whether or not that first sentence, which requires them to have a ladder or platform or staging. Would that first sentence under (c) also have sufficed for a missing grizzly?

A. Yes, sir, it could have.

Q. Now, look up under "1" of the standard, where it says, "Shall be equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials."

Would the grizzly fall into the category of "equipped" with mechanical devices or other effective means?

A. It would fall under "effective means." It would serve as a walkway there.

* * * * * * * * * * * *

Q. So you could have used either "1" or (c), but you chose (b), right?

A. Right.

Q. Now, let me ask you this. Isn't it true this grizzly is not a walkway or passageway in the usual understanding of that term, is it?

I mean, people don't usually egress?

A. No. In this case, the reason is the bin was enclosed on three sides; there was no other way to get in there except to step over and either stand on those supports or walk the grizzly to free a hangup.

Had the grizzly been in there, there would have been no accident. Had the grizzly been out and the man had to free a hangup like it was, had he had on a safety belt there would have been no accident.

Inspector Wilkie testified that Mr. Burnham told him that the grizzly had been removed for four or five months, and although Mr. Wilkie had conducted prior inspections at the plant, he could not state with any certainty if he observed the grizzly in place (Tr. 47). The citations were abated as soon as the investigation was completed and a new grizzly was purchased and installed over the hopper (Tr. 51). A safety rope and belt were installed at the hopper bin and a cable was also installed inside the hopper to facilitate the coupling of the belt or rope (Tr. 53). These actions remedied both of the citations (Tr. 79).

On cross-examination, Inspector Wilkie stated that he could not specifically recall inspecting the hopper during any of his prior inspections. He confirmed the fact that there is no specific safety standard that requires a grizzly to be installed, and stated that a grizzly is a grating device to size the coal and keep out extraneous materials. He also indicated that a grizzly may serve as a walkway and that MSHA has accepted this, but conceded that if coal were piled on top of the grizzly, a person would have to walk over it (Tr. 65). Mr. Wilkie described the hopper area, and he confirmed the fact that Mr. Burnham was emotionally upset at the time that he interviewed him shortly after the accident. He also described the operation of the vibrator feeder pan at the bottom of the hopper and he believed that it vibrated the walls of the hopper (Tr. 66-77).

In response to further questions, Mr. Wilkie stated that Mr. Burnham advised him that the grizzly supports which are fixed to the walls of the hopper are used for employees to stand on when freeing up coal hang-ups in the hopper (Tr. 86).

MSHA Inspector Barton Collinge testified that he discussed the citations with Mr. Wilkie before they were issued, and he stated that there is no mandatory safety standard which requires a hopper of the type in question to have a grizzly installed on it (Tr. 113). He indicated that the purpose of the grizzly is to facilitate the sizing of the coal which was dumped into it and to prevent hang-ups. He explained the purpose of the hopper, and indicated that it constituted a "screening process", and that from his experience, when coal is hung up in the hopper it is freed up by someone barring it down from the top. Usually, one stands on the grizzly and places the bar between the openings for this purpose, and in the instant case he did not know whether it could have been freed up by someone standing on the hopper edge (Tr. 114-116).

With regard to a question as to why the "walkway or passageway" subsection was cited, Mr. Collinge responded as follows (Tr. 117):

> THE WITNESS: Travelways -- bringing it under travelways, it isn't really a travelway as such. It's not meant to be a walkway. However, it is an area to do a function, and the function was to free the hangup, and this is a normal function in hoppers.
>
> To be very honest, we put it under this section because this standard deals with bins and hoppers. We have had too many fatalities in our area in bins and hoppers. We're very sensitive to them.

And, at pages 121-122:

> THE WITNESS: Underground. But, if you'll pardon me, I know a word here and there is important, but coming back to the fact, the fact remains that there was a place to work, whether they call it a platform or a walkway, and the men would work on there, I would work on there. If it was your job to make sure that coal went through there, and to make sure the bin didn't hang up, as it would at times with damp coal, to go out and punch it down and get out of there. [sic]
>
> Now, if the term "platform" would have been better, maybe I couldn't argue that point. But "walkway", "platform", the function remained the same.

In further explanation as to why a separate walkway citation was issued, Mr. Collinge stated that the removal of the grizzly resulted in the removal of the walkway (Tr. 136-137), but he conceded that the grizzly could also be classified as a platform under subsection (c), and that the use of the two terms "is a matter of choice of words" (Tr. 144). Further, explanation as to the issuance of a separate citation is reflected in the following trial colloquy (Tr. 154-155):

> JUDGE KOUTRAS: In this case, it seems to me that the three conditions that were cited: the grizzly not being there, failure to lock out, failure to provide a balt or lanyard, all theoretically could come under (c) --
>
> MR. BATTLES: I agree with that.
>
> JUDGE KOUTRAS: And since two of them only came -- the belt and failure to lock out is in one, why wasn't the other also included in there and then we just have one citation. See?

And that's what one of the defenses is, is that here you're coming at us with a double barrel for a $20,000 assessment for essentially a violation of (c) rather than (b) and (c). And that's simply what I'm trying to understand, is the theory as to why it was split out the way it was.

Anything further, Mr. Battles, from the Government?

MR. BATTLES: No, that's all, Your Honor. But looking at these, they do seem to be ambiguous and overlapping. Talking about the first one is walkways and passageways --

JUDGE KOUTRAS: Just a minute. What's ambiguous and overlapping?

MR. BATTLES: (b) and (c).

JUDGE KOUTRAS: That's all right; there's nothing unusual about that.

MR. BATTLES: That's what I'm saying. This doesn't surprise me.

Testimony and evidence adduced by the respondent

Harold Burnham testified that he was the shift foreman on October 29, 1980, and the accident victim, Norris Johnson, was employed as a general laborer working under his supervision. Prior to the accident, he had instructed Mr. Johnson to unstop the coal hopper, and this is normally done by inserting an air lance from the bottom underside of the hopper at the vibrator pan, and freeing the coal by air pressure. Mr. Johnson had unstopped it once during the shift, but when it was clogged a second time, he instructed Mr. Johnson to go back to the hopper to check it out again, but he did not go with him, since he had to continue making his shift rounds (Tr. 160-167).

Mr. Burnham testified that when he drove up the incline to the hopper entrance and got out of his truck, he observed Mr. Johnson on the west side of the hopper standing on the metal ledge with a short bar, and the coal was banked up inside the hopper. He identified the location where Mr. Johnson was standing by reference to photographic exhibits R-l and R-4. Mr. Burnham stated that as he approached the hopper on foot, Mr. Johnson had moved to the east side of the hopper and appeared to be standing on the hopper ledge which serves as a support for the grizzly. Mr. Johnson was using a long pole in his attempts to free up some coal which had apparently clogged in the hopper, and as he worked the pole through the coal it "caved out" and caught Mr. Johnson as he was standing on the coal. Mr. Burnham reached over the hopper ledge and grabbed Mr. Johnson's arm in an attempt to free him, but the

coal had him pinned against the side of the hopper (exhibit R-2). Mr. Burnham then left the scene to turn the vibrator off and to summon assistance, and in two or three minutes he had returned with three other persons to assist Mr. Johnson (Tr. 167-171).

Mr. Burnham testified that the accident was an instantaneous occurrence, and just as Mr. Johnson stepped out onto the coal pile and inserted the rod, the bottom coal fell out. The use of the air lance from underneath the hopper had apparently created a cavity under the coal pile, and when the pole was inserted it gave way and caught Mr. Johnson (Tr. 173). Mr. Burnham stated further that he had in the past stood on the hopper ledge to free up coal which had lodged in the hopper, but that he had never instructed anyone, including Mr. Johnson, to walk out onto the coal pile itself. The usual practice was to free any stoppage from the underside with the air lance, and that "seventy-five percent of the time it'll break loose from the bottom with an air lance" (Tr. 174). He did not believe that the fact that the vibrator was on contributed to the severity of the accident, and he knew that the grizzly had been removed, and he assumed that it was off for some four or five months (Tr. 175).

On cross-examination, Mr. Burnham stated that bars are kept at the hopper location to facilitate the freeing up of clogged coal when it cannot be freed up from the underside by means of the air lance. He conceded that he knew that the grizzly had been removed from the hopper for four or five months and that no life lines or safety belts were around the hopper area during this time. He did not know whether any safety belts or lines had ever been used during the time the grizzly was off the hopper, and he personally never observed any in use (Tr. 177). He conceded that a belt or a line could have been tied off on a nearby catwalk handrail, but that he had never had any occasion to use safety belts or lines because the majority of the time, any clogged coal could be freed up by use of the air lance (Tr. 178).

Mr. Burnham confirmed that Mr. Johnson was standing inside the metal edge or ledge of the hopper at the moment the coal gave way, and he identified the metal supports which hold the grizzly in place as those which are depicted in photographic exhibit P-19, indicated that they are located all around and inside the perimeter of the hopper and that he has stood on them while attempting to free up clogged coal, and he candidly admitted that he did not use a safety belt (Tr. 181).

Mr. Burnham stated that he did not know why the grizzly was removed, but he did state that it was too small and slowed down the payloader which dumped the coal into the hopper, and due to constant bumping by the payloader, the grizzly was "in bad shape" (Tr. 182). With regard to the vibrator, Mr. Burnham stated that it does not touch or shake the hopper itself, but works independent of it (Tr. 183).

In response to further questions, Mr. Burnham indicated that the function of the grizzly was to keep excess debris out of the coal which dumped into the hammer mill and that at times the payloader would shake

or bump the grizzly so as to break up the large lumpy coal which was dumped on top (Tr. 184). He also indicated that as a general laborer, Mr. Johnson worked on different shifts on a rotation "as needed" basis. He considered Mr. Johnson to be an excellent employee and he never had any problems with him (Tr. 199). Mr. Burnham stated that it never occurred to him to provide a safety line or belt at the hopper during the time the grizzly was off (Tr. 200), and he stated that in the event maintenance were required everything would be shut down (Tr. 202). In response to a question as to why he believed the accident happened, Mr. Burnham stated as follows (Tr. 205):

> A. Well, there's the possibility that he could have been in a little too big of a hurry and he misjudged the ledge that he supposedly thought he was standing on.
>
> Q. Let's assume that he were standing on the ledge, do you think that's a good practice, for someone to stand on that ledge and take a pole and stick it down in that coal?
>
> A. Well, I have done it myself, but I've never told anybody to, no, sir.
>
> Q. You know, people sometimes do things and later reflect on it. Would you do it again? Stand inside on that ledge and poke a stick down there without a life line or a belt?
>
> A. No, sir.
>
> Q. Do you normally shut down or lock out that equipment when you poke from under with the air line?
>
> A. No. sir.
>
> Q. You don't require them to do that?
>
> A. No, sir. There's nothing there to.

Robert A. Daffron, Assistant Administrative Supervisor, and Plant Safety Director, testified as to his duties as safety director, and he indicated that they include safety inspections, monthly meetings with employees and supervisors, and the correction of safety deficiencies as they are brought to his attention. He detailed the procedures he follows in considering safety complaints which are brought by the safety committee, and he produced a copy of the company's safety rules and practices (exhibit R-7). Mr. Daffron also stated that as a general rule both he and the union safety representative accompany all MSHA inspectors on their safety inspections, and that safety notices and similar materials are posted on a bulletin board maintained in the canteen, as well as other plant locations. He also indicated that copies of 'the part 56 mandatory safety

requirements have been furnished to the employee union safety committee as well as to all union officers. With regard to the grizzly in question in this case, he testified that no one ever complained that the hopper was unsafe because the grizzly had been removed, no safety reviews have ever been requested because of any asserted hazard connected with the hopper, and he indicated that he was not aware of the fact that the grizzly had been removed (Tr. 211-220).

Mr. Daffron confirmed that a new grizzly was installed over the hopper on the day of the accident, and he identified a photograph (exhibit P-15) of the new grizzly. He stated that an MSHA inspection had been conducted in August of 1980, and no one said anything about the missing grizzly (Tr. 222).

On cross-examination, Mr. Daffron states again that he was unaware that the grizzly had been removed, and stated that 40% of his duties are devoted to safety matters. He did not know why the grizzly had been removed, and he confirmed the fact that he had received a copy of an MSHA safety publication (exhibit P-21), dated June 1980, dealing with bins and hoppers. He stated that the grizzly which had been removed from the hopper in question was not there for safety reasons (Tr. 222-224).

Regarding the company's safety record as reflected by MSHA's history of prior violations (exhibit P-10), Mr. Daffron commented that its "not good", and that "We strive for zero, but you never reach zero" (Tr. 226). In response to further questions, Mr. Daffron states that Mr. Johnson was a very good employee and that he never had any problems with him. He also characterized Mr. Burnham as a hardworking, concientious, and dedicated supervisor, but did state that the practice of an employee stepping to the edge of a hopper to unclog coal in the hopper was not a good practice (Tr. 227).

Gene Allen Sumner, testified that he is employed with the respondent as headquarters Secretary and Controller. He testified as to the company's corporate make-up, its competitors, and testified that the Ragland Plant is the only manufacturing plant owned by the respondent. He also testified as to the general market conditions concerning the supply and demand for cement, and stated that respondent does not mine any coal, but does purchase it. He also alluded to the fact that the respondent has expended in excess of 50 million dollars for capital improvements, including air and water pollution abatement (Tr. 228-235).

On cross-examination, Mr. Sumner confirmed that the respondent company is a totally owned subsidiary of a French company, and characterized the respondent company as a "small cement company" (Tr. 237). He also indicated that the company produces some 700,000 tons of cement annually and employs 150 permanent hourly employees in addition to temporary hourly seasonal people (Tr. 238).

Findings and Conclusions

Fact of violation - Citation No. 082769

The respondent in this case has been charged with two violations of the provisions of mandatory safety standard 30 CFR 56.16-2, which provides as follows:

> Mandatory. (a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be --
>
> (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials; and
>
> (2) Equipped with supply and discharge operating controls. The controls shall be located so that spills or overruns will not endanger persons.
>
> (b) Where persons are required to move around or over any facility listed in this standard, suitable walkways or passageways shall be provided.
>
> (c) Where persons are required to enter any facility listed in this standard for maintenance or inspection purposes, ladders, platforms, or staging shall be provided. No person shall enter the facility until the supply and discharge of materials have ceased and the supply and discharge equipment is locked out. Persons entering the facility shall wear a safety belt or harness equipped with a lifeline suitably fastened. A second person, similarly equipped, shall be stationed near where the lifeline is fastened and shall constantly adjust it or keep it tight as needed, with minimum slack.

Both of the citations which were issued by Inspector Wilkie in this case were the result of the same event, the accident of October 29, 1980. Citation 082768 charges a violation of subsection (c), and it was issued because the hopper had not been locked out and the accident victim was not wearing a safety belt of lifeline. The locking out of the equipment and the use of a belt or line are set out as separate and distinct mandatory requirements in subsection (c), yet the inspector issued only one citation covering both of these requirements. However, he issued citation 082769 as a separate citation because the grizzly had been removed and was not replaced.

Citation No. 982769 charges the respondent with a violation of subsection (b) of section 56.16-2, which requires that suitable walkways or passageways be provided where persons are required to move around or

over hoppers. The inspector issued this separate citation because the grizzly which normally would be in place over the coal hopper or bin in question had been removed and not replaced. The inspector considered the grizzly to be a "walkway or passageway", and since it was not in place, he believed that a violation of subsection (b) occurred.

The terms "walkway", "passageway", and "grizzly" are not further defined by the regulations, and the term "grizzly" is not even mentioned in section 56.16-a. However, the Dictionary of Mining, Mineral, and Related Terms, published by the Bureau of Mines, U.S. Department of the Interior, 1968. Ed., at pg. 513, defines "grizzly" as follows:

> a. Guardrails or covering to protect chutes, manways, winzes, etc., in mines. Fay. b. A device for the coarse screening or scalping of bulk materials. See also bar grizzly; grizzly chute; live roll grizzly, ASA MH4.1-1958. c. A rugged screen for rough sizing at a comparatively large size (for example, 6 inches or 150 millimeters); it can comprise fixed or moving bars, disks, or shaped tumblers or rollers. B.S. 3552, 1962.

Respondent's answer to the proposal for assessment of a civil penalty for this alleged violation denies that subsection (b) of the cited standard requires that a grizzly or grid be installed in the bin hopper or that a walkway is required over the area in question. Respondent also maintains that no employee is "required" to move on or over the hopper or bin, and argues that the grizzly is not a walkway or passageway within the normally acceptable meaning of those terms because the hopper is enclosed on three sides and mine employees do not traverse or pass through the area as a regular means of moving about the area. The inspector who issued the citation believed that men routinely were required to move over and about the grizzly when it was in place so as to facilitate the clearing out any blockage or unusually large chunks of coal by means of a long pole or rod which is inserted between the opening of the grizzly.

On the facts presented in this case, I believe it is reasonable to conclude that the accident would not have occurred had the grizzly been in place. I believe it is also reasonable to conclude that if a person walks out on a pile of coal which has been dumped into a hopper for the purpose of inserting a long pole or rod in it to free some of the coal which has been "hung up" in the hopper chute, he exposes himself to a hazardous situation and may become entrapped in the coal as it is freed up under his feet. The same may be said of the individual who may stand on a grizzly support bracket inside the hopper. He exposes himself to the danger of falling into the hopper. In both of these situations, I believe that the provisions of either subsection (a)(l) or the first sentence of subsection (c) of section 56.16-2, more directly fit the facts presented in this case, and my reasons for these conclusions follow.

Subsection (a)(l) of section 56.16-2 specifically requires the use of mechanical devices or other effective means of handling materials so as to preclude persons from being entrapped by caving or sliding materials, and the first sentence of subsection (c) requires the use of platforms or staging where maintenance or inspections have to be performed. In my view, these sections are more directly applicable in this case, and strict application and enforcement of these subsections are more appropriate than the "walkway or passageway" requirement relied on by Inspector Wilkie.

Petitioner's counsel candidly conceded that the removal of the grizzly is not per se a violation of any mandatory safety standard, even though the inspector considered it to be an adequate walkway when it was in place (Tr. 221). Although recognizing that the inspector obviously believed that a grizzly which suffices as a platform may also be considered a walkway or passageway, he candidly questioned this conclusion, and agreed that the fact that someone has to stand on a grizzly doesn't necessarily transform it into a walkway in the normal sense of that word (Tr. 100, 104). He also conceded that the grizzly in question was not normally used as a travelway or walkway by miners, and he observed that while another safety standard covers "safe means of access" to working places, that standard was not cited in this case (Tr. 102).

Inspector Wilkie also conceded that there is no mandatory safety standard which requires that a grizzly be installed or maintained in place over a hopper or bin such as the one which has been cited in this case. On the facts of this case, it seems obvious to me that Mr. Wilkie views the terms "grizzly", "walkway", and "passageways" as interchangeable notwithstanding the fact that from his own admission a grizzly is another term for a grate or filter whose principal function is to size materials, and that the grizzly in this case was enclosed on three sides by the hopper walls and was not a normal travelway for miners to come and go from the area.

With respect to petitioner's comment in the course of the hearing that the respondent could have been cited with a "safe access" violation pursuant to section 56.11-1, that was precisely what was done in a recent case decided by Judge Steffey on December 1, 1980, in MSHA v. A.H. Smith Stone Company, Docket VA 80-2-M. In that case an employee was attempting to climb out of a crusher feeder after performing some maintenance, somehow lost his footing while standing on the grizzly, and fell into the crusher suffering fatal injuries. The company was charged with a violation of section 56.11-1, for failing to provide secure and safe footing or a handrail to facilitate the employee's safe exit out of the crusher. The circumstances presented in the Smith Stone case are similar to those which prevailed in the instant case, yet the inspector there chose to cite the safe access safety requirements found in section 56.11-1, rather than those dealing with bins and hoppers.

As indicated earlier, petitioner has conceded that the removal of the grizzly was not in violation of any safety standard (Tr. 221). Further, while Inspector Collinge expressed a concern over reported bin and hopper accidents, MSHA's safety publication dealing with the hazards connected with bins and hoppers (exhibit P-21) contains not one word about the necessity for maintaining grizzly's in place over such bins and hoppers. The emphasis in the publication is directed to the use of safety belts and lines, and to the deenergizing of the equipment, and not one of the sketches depicting miners standing over and inside hoppers and bins show a grizzly anywhere in sight. It seems to me that if bins and hoppers do in fact present hazardous situations in the every day mine work environment, then MSHA should promulgate a mandatory standard directed at the specific hazard surrounding the use of a grizzly. Reliance on walkway, passageway, and other such nonsensical standards to the facts of this case contribute much to confuse the issue and very little in terms of safety guidance.

In this case the petitioner has proposed maximum penalty assessments of $10,000, for each of the two citations. Although section 110(a) provides that "each occurrence of a violation of a mandatory health safety standard may constitute a separate offense", I do not believe that multiple violations stemming from the same event should be issued in such a manner as to result in arbitrary punitive sanctions. In this case, I believe that the inspector relied on subsection (b) because he believed that subsection (b) most nearly covered the situation at hand. In short, the inspector did the best he could with the standard as written, and while I symphathize with an inspector who often must choose among standards which may be imprecise, confusing, or contradictory, an operator should not be unduly penalized and subjected to an additional $10,000 civil penalty assessment because the inspector made the wrong choice. In my_ view, the purpose of a civil penalty assessment proceeding is not only to deter future violations, but it should serve to put the operator on notice as to what is required of him in terms of future compliance. Penalty assessments for alleged violations which come "close" to a mandatory standard simply do not achieve these goals. The best method that I can think of to cure such a problem is to clarify ambiguous standards through the promulgation and application of standards which make sense.

In view of the foregoing, and after careful consideration of all of the testimony and evidence adduced on the record, including the arguments made by the parties in support'of their respective positions, I conclude and find that the petitioner has failed to establish a violation of subsection (b) of section 56.16-2, as charged on the face of citation 082769. I believe that a reasonable interpretation of the terms "walkways" or "passageways" simply does not support the inspector's belief that the grizzly was such a walkway or passageway. Respondent's testimony establishes that the hopper in question was enclosed on three sides and that it was not regularly used as a means of travel by any mine personnel. In my view, the fact that someone must stand on a piece of equipment to perform some function does not necessarily transform it into a walkway or passageway. Citation No. 082769 is VACATED.

Fact of violation - Citation No. 082768

Citation No. 082768 charges a violation of subsection (c) of section 56.16-2, in that the hopper in question had not been locked out and the accident victim was not wearing a safety belt or lifeline when he entered the hopper to poke around with a pole in his attempts to clear out some coal blockage.

It seems clear to me from the testimony and evidence adduced in this case that Mr. Johnson was not wearing a lifeline or safety belt as required by the cited standard. Inspector Wilkie testified that he observed no safety belt or line at or near the vicinity of the hopper, but that one was available in the kiln room. Respondent's evidence and testimony in defense of the citation does not rebut the fact that Mr. Johnson was not wearing a belt or lifeline and shift supervisor Burnham admitted this. Although the standard does not require that a belt or lifeline be kept at a hopper or bin, it specifically requires a person entering such a facility to wear one, and it also requires that a second person be nearby to tend the line. Under the circumstances, I conclude and find that the petitioner has established the conditions cited by the inspector, and that said conditions constitute a violation of the cited standard.

With regard to the allegation that the hopper discharge equipment had not been shut off and locked out at the time Mr. Johnson attempted to dislodge the coal in the hopper, I also conclude and find that the petitioner has established this fact through a preponderance of the evidence adduced in this case. Respondent has offered no testimony or evidence to rebut this fact, and I find that the conditions cited also constitute a violation of the cited standard. Although there is some question as to whether the fact that the hopper vibrator had not been shut down and locked out contributed to the gravity of the violation, this may not serve as a defense to the citation, but may serve to mitigate the seriousness of the violation.

One of the respondent's defenses to the citation is the assertion that Mr. Johnson was not required to enter the hopper, and since the cited standard uses this language, respondent argues that the petitioner has not established that his supervisor Mr. Burnham gave him a direct order to enter the hopper, or otherwise required him to do so. This defense is rejected. It is clear from the facts of this case that Mr. Burnham instructed Mr. Johnson to go to the hopper facility to check out the coal blockage and to do what was necessary to take care of the problem. Although the usual method of freeing up coal from the hopper was to use an air device inserted from the underside of the hopper, it is also true that on several ocassions employees had to do this by means of long poles or rods which were kept at the hopper for the specific purpose of inserting them into the top of the coal to dislodge any coal which had hung up in the hopper. Mr. Burnham admitted that this was the case, and he also admitted that he himself has used this procedure in the past. He also admitted 'that he has stood on the grizzly

brackets which are'located along the inside top wall of the hopper and inserted the rods or poles into the coal for the purpose of dislodging large coal particles or hang-ups.

A second defense to the citation is the assertion by the respondent that Mr. Johnson had not entered the hopper at the time of the accident, but was merely standing outside or on the perimeter of a metal ledge or "lip" which served as a barrier for the endloader as it dumped the coal into the hopper. This defense is likewise rejected. I believe it clear from the testimony and evidence adduced in this case that Mr. Johnson was standing on a grizzly bracket located inside and along the top inner wall of the hopper when Mr. Burnham first observed him, that he stepped out onto the coal itself when he inserted the pole or rod, and that he was in fact on the edge of the coal pile when the bridged coal gave way and pinned him against the hopper wall. Mr. Burnham candidly admitted during testimony at the hearing that this was the case, and while it may be true that Mr. Johnson may not have been standing clearly out and in the middle of the coal pile as implied by the sketch which is a part of the accident report (exhibit P-3), I conclude and find that he was standing at the edge of the coal pile when it gave way and that this supports a finding that he had entered the hopper. Even if he were standing on the grizzly bracket, I would still find that he had entered the hopper.

One final defense suggested by the respondent during the course of the hearing is the suggestion that the accident was an unfortunate incident which resulted through no fault of the respondent, and that the respondent did all that was humanly possible to assist Mr. Johnson and to save his life. Assuming that this were the case, it is clear from the legislative history of the act, as well as some of the precedent decision that a civil penalty may be imposed on a mine operator for a violation even though the operator is without fault, J & H Coal Company, 2 IBMA 20 (1973); Valley Camp Coal Company, 1 IBMA 1976, 1 IBMA 245 (1972); Armco Steel Corporation, 6 IBMA 64 (1976). In other words, lack of negligence cannot excuse a violation, but it may be considered in mitigation of the amount of the penalty, Webster County Coal Company, 7 IBMA 264 (1977). See also: Heldenfels Brothers Inc., 1980 OSHD 24,606, where the Commission affirmed the decision of a Judge assessing a civil penalty against an operator even though he found that the driver of a mobile scraper was responsible for the accident that caused his death. On review by the Fifth Circuit on January 15, 1981, the Court affirmed the decision, Heldenfels Brothers, Inc. v. Marshall, et. al., Civ. No. 80-1607.

In view of the foregoing findings and conclusions, Citation No. 082768 is AFFIRMED.

Size of Business and Effect of Civil Penalty of Respondent's Ability to Remain in Business.

The parties stipulated that a civil penalty assessment in this case will not adversely affect the respondent's ability to remain in business. With regard to the size of the respondent's cement operation, there is a

dispute as to whether it is a large or small operation. Petitioner asserts that it is a large operation and its conclusion in this regard is based on the fact that respondent is a subsidiary of a larger foreign corporation whose annual man-hours and production were greater than that of the named respondent.

Respondent's secretary-controller characterized the Ragland Plant as a "small cement company", employing approximately 150 permanent hourly employees, producing some 700,000 tons of cement on an annual basis. The parties stipulated that for the year 1979, the Ragland site had 353,981 man-hours of production at that operation.

After consideration of all of the evidence and testimony adduced with regard to this issue, I conclude and find that the respondent is a medium-sized operator for purposes of any civil penalty assessment made by me in this case.

Good Faith Compliance

The parties stipulated that the violations issued in this case were abated in a timely manner and that the respondent demonstrated good faith in abating the conditions. I adopt this stipulation as my finding concerning this question.

History of hrior Violations

The respondent's history of prior violations is reflected in exhibit P-10, an MSHA computer print-out which shows that respondent has paid civil penalty assessments for a total of 86 citations issued during the time period October 29, 1978 through October 28, 1980. Although Inspector Wilkie characterized the respondent's prior compliance history as "poor" or "bad", I take note of the fact that the bulk of the prior citations concern non-compliance with two standards, namely, the guarding requirements of section 56.14-1, and the travelway safe-access requirements of section 56.11-1. The prior history reflects only one prior citation for a violation of section 56.16-2, for which the respondent paid an assessment of $210 on August 18, 1980, approximately two months prior to the accident in question. Since the details of that citation are not of record,' I have no way of evaluating the circumstances of that violation as they may reflect on the facts presented in the instant case. The same may be said of the 23 prior safe-access citations concerning section 56.11-1. Absent any information concerning the circumstances surrounding those citations, I have no way of determining whether those prior citations involved a hopper or bin of the type which is the subject of the instant proceeding.

Aside from the itemized listing of the prior citations, I have taken into consideration the testimony of Inspector Wilkie that the respondent has always been cooperative during his inspections (Tr. 15), that safety director Daffron has been courteous and cooperative on safety matters, and

has been eager to take corrective action where required (Tr. 83-84). I have also considered Inspector Collinge's testimony indicating his belief that the respondent's safety program needs improvement, that respondent's safety record, as compared to comparable operations is not too good, and the views expressed by both inspectors that safety director Daffron does not spend as much time as he should on safety matters (Tr. 131).

In view of the foregoing discussion, I cannot conclude that the respondent's overall safety record or prior history of violations is such as to warrant any additional increase in the civil penalty which I have assessed for the citation which has been affirmed. On the other hand, I cannot conclude that respondent's safety record is such as to warrant any special consideration or reduction in the civil penalty which has been assessed for the citation in question.

Gravity

The accident which occurred in this case resulted in the untimely and unfortunate death of a plant employee. Although the record supports a finding that his supervisor and fellow employees did all that they could to save his life, the fact is that the violation resulted in a fatality. While no one can say for certain that the use of a safety belt or life line would have prevented the victim's death; I believe that it may have' kept him from being covered with coal until more help arrived. Mr. Burnham's frantic efforts to keep the victim from sinking deeper into the coal pile came to an end after ten or fifteen minutes when Mr. Burnham became exhausted and could no longer hold onto to him. A safety belt or line tied to the victim would have permitted Mr. Burnham ample time to summon additional help and possibly save the victim's life. In these circumstances, I find that the violation was very serious and this is reflected in the civil penalty which I have assessed for the violation in question.

Negligence

On the facts presented in this case I conclude and find that the failure by the respondent to insure that Mr. Johnson had a safety belt or line attached to his person while he was poking around the coal piled on top of a hopper which had the grizzly removed for a prolonged period of time amounted to a reckless disregard for Mr. Johnson's safety, and that this constitutes gross negligence. While it is true that the accident may have been a sudden or spontaneous occurrence, the record in this case establishes that the g zzly which normally covered the hopper had been removed for a period of some four or five months and that Mr. Burnham was aware of this fact. More surprisingly, the safety director, Mr. Daffron, was unaware of this fact, and I can only conclude that his ignorance in this regard resulted from his failure to inspect the hopper. Although Mr. Daffron stated that the grizzly is normally installed to size and filter larger coal particles,. the fact is that it was at least used part of the time for men to stand on and poke down through the openings to free coal which had become lodged in the hopper. Once the

grizzly was removed, mine management, through Mr. Burnham, should have been aware of the fact that employees would likely stand on the grizzly supports inside the hopper so as to facilitate the use of the pole or rod to free up the coal, and poles and rods were kept at the hopper for this purpose. As a matter of fact, Mr. Burnham admitted that he had often done this without the use of a safety belt or line, and he watched Mr. Johnson do precisely the same thing on the day of the accident, and did not caution him or insist that he wear a safety belt, even though one was in the kiln room. The fact that he did not think to provide him with a safety belt or lineisno excuse.

With regard to the question of whether the failure to de-energize the hopper or vibrator contributed to the severity of the accident, petitioner's counsel candidly admitted that it was difficult to prove that this was in fact in case, and he did not believe that this particular element of the case was significant. Although recognizing the fact that the feeder vibrator was installed in conjunction with the hopper bin for a particular purpose, he nonetheless conceded that there is nothing in the record to conclusively establish that the fact that the vibrator was not shut down prior to the time Mr. Johnson entered it to try and dislodge the coal with a pole contributed to the gravity of the violation (Tr. 192-194).

The official accident report states that the vibrator and discharge pan were attached to the bottom of the hopper, and it also contains the inspectors' conclusions that "failure to de-energize and lock-out the discharge vibrator possibly contributed to the severity of the accident".

Inspector Wilkie described the feeder pan vibrator and identified it as depicted in photographic exhibits R-5 and P-12 (Tr. 76-77). He testified that the feeder pan vibrates and shakes the coal down into the pan, which in turn feeds it into the mill. He indicated that it was his understanding that the vibrator vibrates the walls of the hopper (Tr. 77). He also indicated that no one should enter a bin or hopper if the vibrator is on, and even if one were wearing a safety belt, that would not suffice for compliance if the vibrator is operating (Tr. 98).

Respondent's witness Burnham testified that the vibrator feeder pan is not attached to the hopper and does not touch it. However, he did indicate that the hopper fits down inside the feeder pan and has about an inch of clearance all around the pan. The coal drops from the hopper into the feeder pan where it is vibrated into a coal hammer mill for crushing by means of a belt, and he denied that the vibrator vibrates the hopper bin (Tr. 163-164; 183). He also expressed the opinion that the fact that the vibrator was on or off would have made any difference as to the severity of the accident which occureed (Tr. 174-175). However, Mr. Burnham did state that as a general rule it would be advisable to lock out the vibrator before entering the hopper (Tr. 207-208).

After careful consideration of the testimony and evidence adduced with regard to the failure to lock out the hopper, I cannot conclude that the respondent was grossly negligent, or that the failure to shut down the vibrator directly contributed to the severity of the violation. Mr. Burnham testified that the vibrator is not required to be de-energized when the air spike is used to dislodge coal from the hopper. Further, it seems obvious to me that when Mr. Burnham happened on the scene and saw Mr. Johnson engulfed by the coal in the hopper, his first reaction was to attempt to free him, and I cannot conclude that his failure to immediately shut down the vibrator constituted a serious omission on his part. Further, absent any testimony from the inspectors as to whether or not the energized vibrator contributed to the gravity of the violation, an increased assessment based on speculation in this regard is simply not warranted. On the facts of this case, I believe that the cone-shaped configuration of the hopper, as well as normal gravity did more to prevent Mr. Johnson's ready escape from the hopper than did the fact that the vibrator was not shut down, particularly in light of the unrebutted testimony by Mr. Burnham that the vibrator is not afixed to the hopper and did not affect the severity of the violation.

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 $7,500 is reasonable and appropriate for the citation which I have affirmed, and respondent IS ORDERED to pay the assessed penalty within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

Distribution:

Murray A. Battles, Esq., U.S. Department of Labor, Office of the Solicitor, 1929 S. Ninth Ave., Birmingham, AL 35256 (Certified Mail)

J. Ross Forman, III, Esq., 1600 Bank for Savings Bldg., Birmingham, AL 35203 (Certified Mail)