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SOL (MSHA) V. J. MILLER
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. WEST 81-244-M A.O. No. 48-00155-05072-A
v.	
J. D. MILLER, WILBUR VANDERPOOL, RESPONDENTS	Docket No. WEST 81-245-M A.O. No. 48-00155-05073-A Alchem Trona Mine

DECISION

Appearances: J. Philip Smith, Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner ; John A. Snow, Esquire, Salt Lake City, Utah, for the respondents.

Before: Judge Koutras

Statement of the proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the petitioner against the individually named respondents pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c). The respondents were charged with "knowingly" authorizing, ordering or carrying out three alleged violations which are detailed in an imminent danger order issued by an MSHA inspector on November 12, 1979, pursuant to sections 107(a) and 104(a) of the Act.

The respondents filed timely answers to the proposals, and pursuant to notice, hearings were conducted in Green River, Wyoming, December 2-3, 1981, and the parties appeared by and through counsel and participated fully therein. Post-hearing proposed findings and conclusions, with supporting arguments, were filed by the parties and I have considered those arguments in the course of these decisions.

Issues

The principal issue raised in these proceedings is whether the individually named respondents knowingly authorized, ordered, or carried out the alleged violations. If they did, the next question presented is the appropriate civil penalty which should be assessed against them for the violations. Additional issues raised by the parties are discussed in the course of the decisions.

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 110(c) of the 1977 Act, 30 U.S.C. 320(c).

3. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

The section 107(a) and 104(a) Imminent Danger Order No. 0575918 was issued on November 12, 1979, and the conditions or practices are described as follows on the face of the citation:

> (57.20-3, 57.20-9) An imminent danger in the 200 belt tunnel existed in that a large quantity of coal, and coal dust had spilled from the area conveyor belt. A quantity of diesel fuel was floating on the ground water in the area. This created an imminent fire hazard. (57.17-1) The stairway to the area was not lighted, so that during this shift, 1545 to 2345 hours, personnel could not safely use this stairway. Only personnel that are needed to correct these deficiencies are to enter this area.

The citation was abated on November 11, 1979, at 3:00 p.m., and the inspector's notice in this regard states as follows:

> The imminent danger in the 200 belt tunnel was abated (57.20-3, 57.20-9). The coal and coal dust in the area had been properly cleaned. (57.17-1). The area had been properly lighted.

Testimony and Evidence Adduced by the Petitioner

MSHA Inspector Gerry Ferrin testified as to his background and experience and confirmed that he conducted an inspection at the mine in question on November 12, 1979. He was accompanied by fellow inspector David Ainsbach, and he stated that the inspection was conducted as a result of a safety complaint made by miners at the mine and communicated through union President Terral Smith. The mine produces trona, which is a sodium carbonate compound. The citation which he issued concerned certain conditions at the mine coal handling facility used to unload and transport coal to certain storage areas and to the boilers which are used to operate the mine power plant. Coal was unloaded onto belts in two underground tunnels identified as the 200 and 201 tunnels, and the coal was transported on the tunnel conveyor belt system to either the storage areas or directly to the plant boilers (Tr. 7-20).

Upon inspection of the 201 tunnel area in question, he observed that the belt was running, that diesel fuel was present on top of water which had accumulated in the trenches along the belt areas, there was a

strong odor of diesel fuel, visibility was poor due to leaky steam, the lights on the tunnel stairway were out, and the belt idlers were running in the coal and coal dust which had accumulated along the belt. He issued an imminent danger order because he considered all of the conditions which he found and which are described on the face of the citation to be imminently dangerous. He identified six pictures (exhibit P-4), which he took at the time of his inspection as representative of the conditions which he observed. While there was some illumination in the area along the tunnel, visibility was poor due to the steam leak and he stated that he did not sample the coal accumulations which he observed. The area was not posted or dangered off and he measured the accumulations as ranging from zero to 10 inches. He observed no rock dust applied to the coal accumulations, and some of the accumulations were deposited on dry surfaces. The belt conveyor was at "table height" level off the floor and he observed "explosive coal dust" in the areas cited (Tr. 20-33).

Inspector Ferrin described the coal handling facility as including both the 200-201 tunnels and he described the area where the two belt tunnels came together as the coal transfer point where the coal being transported dumps from the 200 belt onto the 201 belt. He stated that he observed possible ignition sources in or near the coal accumulations, and these included the belt rollers and idlers, power cables which were present in the adjacent 200 tunnel, and a "faulty" electrical light circuit. However, he conceded that he did not trace the circuit out or otherwise determine what the problem was. His concern was over a possible explosion hazard due to the coal dust accumulations running in the belt idlers. He indicated that two maintenance men, Douglas Malone and Gary Dotson, were assigned to do some welding work on the steam leak in the area but that they did not do the work because they believed the conditions were dangerous and they refused to work there. It was their complaint that prompted the safety complaint to the union president, who in turn reported the conditions to MSHA. Inspector Ferrin stated that his investigation determined that the lighting conditions had existed for two days prior to his arrival on the scene. Although the mine is classified as gassy, his methane readings detected no presence of methane and the area cited was a "working place" within the meaning of the regulations. (Tr. 60-74).

With regard to the lack of lighting on the stairway leading to the 201 tunnel, Inspector Ferrin stated that the condition presented a slipping or falling hazard, and with the presence of steam in the area, a drop in temperature would have resulted in moisture freezing on the stairway, thus adding to the hazard. He indicated that Mr. J. D. Miller was the power house superintendent in charge of the entire coal handling facility, which was part of the power plant, and that the particular shift foreman in charge was Mr. J. W. Vanderpool. Mr. Ferrin was of the opinion that the shift foreman was responsible for dangering off or posting any area that is hazardous and not known to other employees. He saw no barricades or danger sign in any of the areas in question, and he detailed what he believed to be the

area which would be affected by any fire from the accumulations of materials which he cited (Tr. 74-88).

Mr. Ferrin could not estimate the time required to correct the illumination problems which the respondent was having, and he described the abatement efforts made after the order issued (Tr. 90). The diesel fuel problem has not been totally abated and he detailed the problems connected with the original fuel spill in the area, and indicated that the problems connected with the spill had been lessened to a great extent, and with the removal of the ignition sources which he observed the mere presence of any remaining fuel from the spill would not be an imminent danger since he was more concerned with the build-up of coal accumulations. He also indicated that the diesel fuel problem is a long term problem and that company management has diligently applied itself to solving it (Tr. 89-98).

On cross-examination, Mr. Ferrin reiterated the procedures connected with the coal handling tunnels, and indicated that the coal handling areas are not part of the gassy portion of the mine in question. He defined "float" coal dust as "airborne" dust, and while such airborne dust was in the 200 tunnel, that was not his immediate concern at the time of his November 12th inspection. Mr. Ferrin referred to his previous deposition of November 20, 1981, and conceded that he stated that he did not believe that the airborne or float dust in question was an explosion hazard, but that it was a fire hazard (Tr. 114-119). He went on the describe what he believed were ignition sources, and stated that because of the dust present any dust control or collection devices were not working, but he conceded he made no effort to determine the presence of any such dust collecting devices (Tr. 123).

Mr. Ferrin testified that the welders who were sent in to the tunnel to do some work were not under the supervision of Mr. Miller or Mr. Vanderpool, but that they would have requested welders to work on and repair any steam leaks. However, he saw no work orders for such work which may have been signed by these individuals, and he had no knowledge as to whether the welders consulted or advised them they were going into the tunnel (Tr. 126-127). He also described the responsibilities of the powerhouse and section foremen (Tr. 129-133).

In response to questions from the bench, Mr. Ferrin confirmed that he would not have issued an imminent danger order had the belt been shut down and the area dangered off. His citation for a violation of 57.20-3, would normally be a "housekeeping" situation for failure to clean up accumulations which presented a falling, slipping, or tripping hazard. However, on the day in question, he was concerned with a combination of conditions which he believed presented a possible disaster and that is why he issued an imminent danger withdrawal order (Tr. 139-143).

Mr. Ferrin described the extent of the coal accumulations which he found along the entire length of the 200 belt tunnel and stated that they were a combination of spillage and accumulations (Tr. 144). He based his opinion that Mr. Vanderpool knew of the conditions on the fact that he had admitted to him that the cited

area needed clean up but he

refused to send anyone there because of the lighting situation. He did not consider Mr. Vanderpool's refusal to send men to the area as unreasonable, but did consider the fact that he was not "thorough enough" (Tr. 147). As for Mr. Miller, he believed that he should have known about the conditions cited because the problems had existed for more than one shift and the area was not so large as to preclude periodic inspections (Tr. 148).

Mr. Ferrin testified that the illumination problem had existed for at least two days prior to the issuance of the citation and that Mr. Miller admitted to an MSHA conference officer that he and Mr. Vanderpool had discussed the problem just prior to beginning of the shift (Tr. 149). Mr. Ferrin had no knowledge as to the specific circuit problems connected with the lack of illumination (Tr. 151).

Inspector Ferrin's Deposition

In his deposition of November 30, 1981, (pg. 9), Inspector Ferrin stated that he observed coal and coal dust built up on the belt conveyor table so that the belt and idlers were actually running in the coal. He considered this condition to be a fire hazard and a hazard to personnel entering the area due to a possibly "slick or occluded or blocked stairway" (pg. 10). He also observed large quantities lying on the floor, spilled or in unconsolidated piles in the walkway at the foot of the drop shoot, and at other unconsolidated areas through the 200 tunnel. The walkways going from the 200 to the 201 tunnel areas were working areas where men would be working (pgs. 12-14). The accumulations in the walkways ranged from zero to eight inches (p. 14). He considered the accumulations of coal and coal dust to be hazardous because they constituted a fire and ignition hazard and a possible slip and fall injury (p. 15). Methane readings indicated zero (p. 16).

Nowhere in his deposition does Mr. Ferrin refer to float coal dust. However, at pg. 16, when asked whether he made any determination that the coal dust was at an explosive level, the matter of float dust was first introduced by respondent's counsel snow, and Mr. Ferrin made the following responses:

> Q. Did you make any determinations as to whether the coal was at an explosive level?
>
> A. Would you please define "dust". You're talking about float dust? lying dust? what?
>
> Q. Let's go with the dust in the air, float dust.
>
> A. Okay. It was very hard to make a determination because of steam and other--it was a pretty blind area to walk into.

Q. Do you have an opinion whether or not that was an explosive area?

A. I don't believe the aerial borne, or float dust, was a hazard.

Q. For explosive purposes?

A. I don't believe for explosive purposes, right.

Q. What about the dust on the ground? I forgot what you called it.

A. On the conveyor table.

Q. What about that dust?

A. Yes, I did consider that as a very serious hazard.

Q. A fire hazard?

A. Yes.

Q. How come?

A. It burns.

Q. Well, what's the--

A. It's very easily ignitable.

Q. Very easily ignitable?

A. Yes.

Q. What is the ignition source?

A. Conveyor idlers, conveyor belts, hot bearings.

Virtually anything. People working in the area.

Inspector Ferrin went on to state that at the time of his inspection he had a "quick discussion" with Mr. Vanderpool, but he could recall no discussion with Mr. Miller. Mr. Vanderpool told him that he had instructed two of his people to stay out of the tunnel area because of the lighting problem. The track mobile operator and belt operator confirmed the fact that Mr. Vanderpool had instructed them to stay out of the area because of the lighting problems and that they were advised not to clean up the area because of the lighting problem (pgs. 22-23).

Mr. Ferrin confirmed that he inspected the tunnel upon abatement of the order. The tunnel had been cleaned up, the lights were working, but he did not know whether the diesel fuel problem has been taken care of since he has not been back to the mine for over a year. However, as of the time the abatement took place, the ground water and diesel had subsided to a "lesser degree" and the diesel odor was not as strong (pg. 25).

Douglas Malone testified that in November 1979, he was employed at the mine as a maintenance mechanic. On November 12, 1979, at approximately 5:00 p.m. at the start of his shift Foreman Larry Youngbird assigned him and Gary Datson to go to the area of the 201 tunnel to weld a leak in the steam system. This leak was in the transfer point where the 200 and 201 tunnels come together. Mr. Malone had been in the area for two days prior to November 12 working on revisions in the heating system. He proceeded to the stairway leading to the 200 belt. The stairway lights were out, and after going down two or three steps his glasses fogged up from the steam which was present in the area and he observed airborne coal dust mixed with the steam. He also observed large accumulations of coal and oil at the bottom of the stairwell, and the belt was running (Tr. 156-160).

Mr. Malone testified that after observing the conditions in the area of the 200 tunnel stairwell he concluded that had he proceeded to weld at the area of the steam break an explosion or fire would have occurred due to the presence of the coal accumulations and dust and he immediately left the area and informed Mr. Youngbird that he believed the conditions were hazardous and that he would not work there until such time as the area was cleaned up. Mr. Youngbird said nothing about the conditions and Mr. Malone did not believe that Mr. Youngbird would have sent him to the area to weld had he known about the hazardous conditions in the area. (Tr. 160-164).

Mr. Malone stated that due to the extent of the coal accumulations, the conditions probably existed for five days prior to November 12. He also indicated that the area had not been barricaded or dangered off. He also believed that the area cited was the responsibility of the power house superintendent, Mr. Miller and that Mr. Vanderpool was the shift supervisor. Mr. Vanderpool supervised seven to nine men and that Mr. Miller had approximately 30 men under his supervision (Tr. 164-168).

Mr. Malone stated that he complained about the conditions which he found to Mr. Gary Datson who was his union shop steward at the time and that Mr. Datson in turn reported the matter to Mr. Terral Smith, the local union president, and Mr. Smith went to the area to inspect the conditions. Mr. Malone believed that Mr. Vanderpool and Mr. Miller should have been aware of the conditions present in the 200 tunnel because they were responsibile for the area. Mr. Malone also alluded to several fires which had occurred in the area a year or so earlier, but he indicated that they were quickly extinguished. He also believed that a new wire was installed to correct the illumination violation. (Tr. 168-177).

On cross-examination, Mr. Malone explained the process for obtaining a "welding permit", and stated that it is issued after the process and maintenance foreman had examined the area where the work was to be performed. On the day in question, he had such a permit "for outside the 200 area" (Tr. 177). He stated that Mr. Vanderpool would normally issue such a permit, but on the day in question he had no such permit for the 200 tunnel and he admitted that he went to the tunnel in question without a permit. He further admitted that he went there "to look" and not to weld (Tr. 179). He also admitted that he would not have welded without such a permit and that normal procedures would have required Mr. Vanderpool to inspect the area before issuing a permit (Tr. 179).

Mr. Malone stated that some of the lights in the 201 tunnel were on, some were out, and two light globes were covered with coal dust. He had no knowledge that Mr. Miller or Mr. Vanderpool issued any work orders for the repair of the steam leak, but did say that Mr. Youngbird asked him to weld the steam leak since he would be in the area anyway (Tr. 181). Mr. Malone described the fire sprinkler deluge system installed in the tunnels and indicated that it was a good system (Tr. 182). He did allude to two past minor fires in the tunnels caused by a rag and some insulation burned by a welding torch (Tr. 183). He also indicated that welding is often done without permits and that it was not unusual for any number of workmen to be in the 200 and 201 tunnels (Tr. 185).

Mr. Malone stated that he believed Mr. Vanderpool to be a good safety foreman, but that he should have dangered the cited area off and was neglectful for not doing so (Tr. 186). Mr. Malone believed that a fire would have occurred had he lit his welding torch in the areas in question (Tr. 186). He also believed that Mr. Miller had been relieved of his duties at one time for not insuring that the tunnel areas were kept clean (Tr. 197). He also alluded to past complaints made to MSHA for failure to clean up the tunnels and stated that citations had been issued for these conditions in the past (Tr. 199).

Terral J. Smith, employed by Allied Chemical, testified that he has been president of the local union for three years, and was in that capacity on November 12, 1979. He confirmed that he had received a complaint from Gary Datson, the union steward, by telephone call to his house, concerning the conditions in the 200 belt tunnel. Mr. Datson informed him that he and another man had been assigned to do some maintenance work in the tunnel, and when they went there they had no lighting and had to use their flashlights. They found steam and coal dust all around the area and felt it was an unsafe imminent hazard and asked Mr. Smith, for some help. Mr. Smith stated that he then called MSHA that same evening and asked for an investigation of the tunnel conditions in the coal handling area, which he described as encompassing both the 200 and 201 tunnels. He described the 200 tunnel as the unloading area and the 201 tunnel as the transfer tower. As the result of his complaint, Insepctor Ferrin came to the area to conduct an inspection, and he (Smith) went to the

plant and proceeded to the 200 tunnel area. After proceeding down the stairs, he observed a great deal of steam in the tunnel, went back up the stairs, and proceeded to the top of the 201 tunnel where he observed coal dust "stacked up" and "peaked

on the handrails". Dust was on the lights and under the belt, and the sump was full of water and coal dust, and he believed the belt was running. Although he observed lights at the 200 belt line tail pulley, and he saw none on the stairway. The light at the top of the stairs was not working, and he observed float coal dust in the air as well as coal dust piled in the area (Tr. 210-216).

Mr. Smith testified that the tunnel areas he visited were not dangered off, and that the responsibility for dangering the area off was with Mr. Miller and Mr. Vanderpool. He was of the opinion that the area should have been dangered off, and he believed the conditions he observed constituted an imminent danger and that is why he lodged a complaint with MSHA (Tr. 217-220). He examined a copy of the citation issued by Inspector Ferrin and agreed with his findings. He also believed that the coal accumulations presented a fire and explosion hazard and described the ignition sources which were present in both tunnels (Tr. 222). He confirmed that similar citations had been issued for similar coal build-ups in the tunnel and believed that Mr. Miller and Mr. Vanderpool were responsible for seeing to it that such conditions did not occur again (Tr. 223). Mr. Vanderpool admitted to him that he was aware of the coal and coal dust build-up as well as the fact that there was no lighting on the stairway in question. As for Mr. Miller, Mr. Smith stated that there was no way he could not have known about the conditions cited since he is responsible for everything in the area as well as for the work of his supervisors (Tr. 226). Mr. Smith referred to several "Labor-Management Safety Inspection Reports", exhibit P-10, to support his contention that mine management was aware of the conditions concerning the coal build-ups and lack of lighting (Tr. 226-247).

Mr. Smith testified that Mr. Malone told him that he (Malone) and Gary Datson had gone to the 200 and 201 belt tunnels on November 12, 1979, to do some welding work on a steam leak. Mr. Smith reiterated that he too went there that same day and found the light on the entry to the 200 stairway leading into the 200 tunnel was out. The purpose of the light is to illuminate the stairway, and he did not believe that the lack of light would have prevented anyone from going down the stairway to clean the area because they could use cap lamps and flash lights to find their way down the stairway (Tr. 261-264). Further, when he went to the area of the 200 tunnel during the inspection the lights along the belt where the coal piles were located were all on, and Mr. Smith's concern was that "they sent machanics down there to fix something, to do welding, in an area that had coal dust and piles of it all around, where they could have set off the whole damn place" (Tr. 268). The belt was running at that time, and only Mr. Vanderpool and Mr. Miller had the authority to shut it down (Tr. 270). It was also their responsibility to danger the area off (Tr. 274).

On cross-examination, Mr. Smith conceded that the conditions in the 200 tunnel which are the subject of the instant case have been a continuing problem spanning several years, and he alluded

to several of the inspection reports which he previously identified and testified to

(Tr. 292-303). Mr. Smith indicated that he had been to the 201 tunnel three or four times during the period June 1, 1979 and November, 1979, and he confirmed that the tunnel should be cleaned up daily or small quantities of coal will accumulate over a couple of shifts. If left unattended, larger build-ups will occur (Tr. 306). He also indicated that with the belt running, coal will be dispersed into the air, but if the belt is operating properly not too much will disperse (Tr. 310).

In response to further questions, Mr. Smith stated that the coal moved along the belt tunnels in question is used to run the plant boilers and electrical generators, and he explained the coal dumping and transfer procedures to accomplish this task (Tr. 311-315). He believed that the accumulations of coal in the tunnel areas in question probably accumulated over a period of three or more shifts (Tr. 316). He also identified exhibit P-4 as a photograph of the 200 belt coal handling area and described the coal and coal dust accumulations on and about the belt rollers (Tr. 317-318).

Inspector Ferrin was recalled and confirmed that on the day of his inspection on November 12, 1979, the belt was running and this would contribute to the worsening of the build-up of coal and coal dust. He also believed that if the foreman or powerhouse superintendent were aware of the accumulations, the belt should have been shut down. He also confirmed that the stairway light was out and since someone could have fallen down the stairs, that condition was an imminent danger in and out of itself. Since the light was intended to light the access way, this was no excuse for not cleaning up the accumulations which were present in the tunnel. He identified several ignition sources which were present as portable lights, cap lamps, miner's lights, and belt rollers. The shift supervisor, Mr. Vanderpool and the plant superintendent, Mr. Miller had the authority to shut the belt down, and he confirmed that all of the violations were abated in less than 24 hours (Tr. 320-328). He also confirmed that when he first went to the 200 tunnel at 6:00 p.m., and discovered the conditions which he believed were an imminent danger the lights were on and the belt was running (Tr. 341).

Testimony and Evidence Adduced by the Respondent

Robert Gary Datson testified that he is presently employed by Allied Chemical Company as a maintenance foreman and on November 12, 1979, he was employed as a mechanic and also served as a union steward. He stated that he visited the 200 tunnel coal handling facility area on November 12 at approximately 4:30 p.m. after receiving a complaint that the tunnel area was dirty. He asked Doug Malone, his working partner and also a union steward to check the area out since he and Mr. Malone had been there the day before, November 11, and Mr. Malone reported that the area was "just as bad" on the 12th of November as it was on the 11th. Mr. Datson stated further that he walked into the tunnel area with the MSHA inspectors when they were there and he confirmed that there was oil and

water present, coal accumulations built up along the belt rollers, and a "tremendous amount of steam" in the area. He also stated that all of the tunnel lights were out except for those at the top of the tunnel stairway. In his opinion, the conditions in the tunnel coal handling area were a fire hazard, and had any welding work been done in that area the cutting torch would have been an ignition source (Tr. 342-348).

On cross-examination, Mr. Datson stated that he and Mr. Malone had worked in the 201 tunnel on November 11, and as he walked through the 200 tunnel to get to the 201 tunnel he observed the conditions which MSHA's inspectors had cited and considered hazardous. He confirmed that he has heard of sparks being generated along the belt line, that welding could cause sparks, and he indicated that he had in the past ignited a fire while working in a similar coal load-out area. He also testified that Mr. Youngbird did not assign him to do any welding work on November 12, but did assign him some work in the 201 tunnel on November 11, in order to fix a steam leak in the area. Mr. Datson stated that he would not perform any work in the 200 tunnel because he considered the conditions there to be hazardous. He also stated that on November 11, the 201 tunnel belt was running and that the area had not been barricaded. After his crew complained to him, he in turn complained to union president Terral Smith on December 12, 1979. He also indicated that Mr. Malone was not one of the people who complained to him.

Mr. Datson stated that shift foreman Vanderpool would have been directly responsible for the tunnel coal handling area at the time in question, and that Mr. Miller, as the power house superintendent, would have had the overall responsibility for the tunnel areas in question since they are considered part of the power house operations.

Mr. Datson testified that the stairway light leading to the 200 tunnel was working and lit on both the 11th and 12th of November, but that the lights used to illuminate the tunnel area were not operating on those days. In addition, he believed that the coal accumulations which were cited by inspector Ferrin had to have existed for at least two days prior to the inspection, that the conditions were present on both November 11 and 12th and that on the 12th they were getting worse rather than better. He also believed that the accumulations were present for at least one full shift prior to November 11. He observed no airborne coal dust, has no idea what float coal dust is, and as far as he is concerned the conditions cited posed a fire hazard rather than an explosion hazard (Tr. 348-370).

Wilbur Vanderpool testified that he is employed by Allied Chemical as the power house operations foreman and that he had been in this position since ths spring of 1974. He confirmed that he was the shift foreman for the 4 p.m. to midnight shift on November 12, 1979, and indicated that his duties as foreman were to oversee the power house and coal handling facility operation. He identified Mr. J. D. Miller as his immediate supervisor,

and he stated that his shift is normally used to unload coal at the coal handling facility in question and the morning or day shift is normally used for clean up. Mr. Vanderpool described the coal unloading operation and stated that company policy dictates that no one is to be in the tunnel areas while coal is being unloaded, and no one is to be there for clean up while the belt is running. He was not sure whether the policy he alluded to is in writing, but indicated that it is his normal operating procedure (Tr. 370-374).

Mr. Vanderpool stated that he arrived at the mine on Monday, November 12, 1979, at approximately 3:20 p.m. and went to the foreman's office where he spoke with the previous shift foreman, Stan Daniels. He discussed the coal handling situation with Mr. Daniels and Mr. Miller, and in particular they discussed the fact that the coal handling tunnel areas had not been cleaned up. Mr. Vanderpool explained that they were experiencing problems with the lights and illumination in the tunnel areas in question and stated that he did not barricade the areas because he was trying to get the lights repaired and had specifically instructed the coal handler and track mobile operator not to go into the tunnel areas in question. These two men were normally assigned to the tunnel, and since the decision had been made to run coal on his shift, and since his men were under instructions to stay out of the area, he saw no need to barricade the areas (Tr. 375-387).

Mr. Vanderpool confirmed that he went to the tunnel area cited at approximately 4:00 or 4:15 p.m., after his discussion with Mr. Daniels, and observed the accumulations of coal and coal fines touching the belt rollers. He conceded the fact that coal is a combustible product and that a hazard was present in the areas in question. He also believed that in such an operation there was always a fire hazard present, but he did not believe that the conditions "were that bad", and that a water deluge system along the belt line would help in a fire situation. He also alluded to the fact that weather conditions will affect the coal handling process and that a chute plug which malfunctions may cause the tunnel areas to be literally buried in coal which is being dumped on the belts (Tr. 387-392).

On cross-examination, Mr. Vanderpool confirmed that the foreman's book entries for November 10, 1979, reflect that work was done on the coal spills in the coal handling facility. He also confirmed that he was required to inspect the area in question at least once during his shift, and that he was in fact the shift foreman during the period in question and that while he was not generally aware of the provisions of 30 CFR 57.18-2, requiring on-shift inspections, he acknowledged that his supervisors have told him that he is to inspect his area and to "watch out for the safety of my people" (Tr. 394-398).

Mr. Vanderpool stated that he and the previous shift foreman discussed te tunnel lighting problems on November 10, and that the problems were intermittent, at least through the swing shift of November 11, and that he inspected the 200 belt area that day as well as at 4:00 p.m. on November 12th,

and that coal and coal dust were found that day (Tr. 399-410). He stated that company policy dictated that mechanics, laborers, or electricians were not to go to the coal handling areas for clean-up or maintenance while the belts were running, and that if welding work was to be done in the area a permit was required to be obtained from him or another operating foreman (Tr. 414).

Mr. Vanderpool stated that he visited the area cited by the inspector at least once at the start of his shift at 4:00 p.m., and at least once thereafter before 6:00 p.m., and that he was concerned with any existence of float coal dust. He observed that the dust-collecting system was not operating, and after finding that it had been shut off ordered his people to turn it back on (Tr. 419). He did not know whether the fire deluge system was on or off during the time in question (Tr. 420). In his opinion, during the time he examined the 200 tunnel between 4 and 6 p.m. on November 12, 1979, the conditions which he found did not present a fire hazard which is "not any more than usual (Tr. 423). He confirmed the fact that his principal concern on the day the citation issued was to insure that coal was loaded into the storage bunkers because they were getting low (Tr. 429).

Mr. Vanderpool testified that any operator in the belt area in question had the authority to shut the belt down in the coal handling facility if they encountered any trouble, and that while his permission was not required to do this he would ordinarily be informed of the fact that the belts were shut down (Tr. 431). He explained the decision to run coal on his shift during the day in question as follows (Tr. 443-434):

> Q. -- what was the criteria used in deciding to go forward with unloading coal cars, on your shift?
> A. We decided to, because of the lighting situation, to go ahead and unload coal, keep the people out of the area, because we felt because of this intermittent problem with the lights at this time that we did not want people in the area cleaning up -- I personally felt that I didn't want my people to go down in that area with the light situation the way it was, be working in that area, and in those conditions, and have the lights go out.
>
> Q. Were the electricians at that time working on the lights?
>
> A. I was told that they would be working on my shift until dark, by the electrical foreman. I did not observe, personally observe any electricians in the area of the tunnels when I went down there.
>
> Q. Was that a factor that was used in the decision to unload coal?

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A. Yes sir. I would say that would be one of the factors we made the decision to go ahead and unload coal, yes, sir.

Q. I'm trying to say what -- was that discussed at your meeting with Mr. Daniels and Mr. Miller?

A. That the electricians would be working on the lights? Yes, sir.

And, at pages 435-436:

A. I'm not saying that just because we have to produce that plant that I'm going to produce it come hell or high water. What I'm saying is, I felt that the coal spillage problem was not a real big hazard.
It was dirty, it was filthy, it was a tripping hazard, yes. Any coal spillage, whether it's that one or one on top of the mine, is a tripping hazard, if you have people going into that area.
I felt that the thing to do at the time -- J. D. Miller felt the same way -- was for that particular shift, because of the lighting problem, to keep the people -- my people, now, the operating people, to stay out of the problem. If they had a problem they were to call me and we would go ahead and unload coal that shift, hopefully, because we were told that there would be electricians down there working on the circuit. We were told this --

I don't personally view electricians down there. I was told that they'd be in the area.

In response to bench questions, Mr. Vanderpool testified that on the evening the order issued he was in the cited tunnel areas on two occasions and observed the accumulations of coal in question (Tr. 446). He conceded that he failed to barricade the area, and in hindsight candidly admitted that he should have barricaded the area to keep people out and then proceeded to unload coal (Tr. 450).

J. D. Miller testified that he is presently employed by Allied Chemical as engineering superintendent and has held that position since October 1, 1981. He was power plant superintendent from February, 1973 to February, 1978, a maintenance engineer from February 1, 1978 to June 28, 1979, and was temporarily assigned as power plant superintendent from June 28, 1979 to December 1, 1979, filling in for the regular superintendent who was sick. Mr. Miller stated that he holds a B.S. degree in mechanical engineering from Texas Tech and prior to being employed by Allied was employed by Texas Utilities for 19 years and his experience includes the operation of coal handling areas, boilers, dryers, and coal sampling.

With regard to the citation and order which was issued by Inspector Ferrin on November 12, 1979, Mr. Miller stated that he arrived at the mine on Monday, November 12, at approximately 7:45 a.m. He met with shift foreman Dan Daniels who informed him that the lights were out in the coal handling areas, and that the areas were dirty and had not been cleaned up since Saturday. Mr. Miller stated that he called for an electrician to check the lights but was advised that none would be available until the afternoon 4 p.m. shift. Under the circumstances, the men assigned to Mr. Daniel's coal handling shift were assigned to clean the tripper room and other areas and no coal was unloaded during that shift.

Mr. Miller states that sometime between one and three p.m. he proceeded to the 201 tunnel area with a flash light. He then climbed up a ladder looked into the 200 tunnel area with the aid of his flashlight and also observed coal accumulations in that tunnel. The lights in both tunnels were out and he decided that it would be hazardous for men to clean-up the accumulations without any tunnel lights. He discussed the situation with Mr. Daniels, and the decision was made to unload and run coal on Mr. Vanderpool's 5 p.m. shift. He believed this would not be hazardous because the two men normally assigned to the tunnels would not be working there and normal company operating procedures required that men not work in the tunnels while the belts were running.

Mr. Miller stated that at the time he initially viewed the coal accumulations, he was not concerned with any explosion hazard because the belts were not running and therefore there were no ignition sources present, and the belt idlers were made of rubber. Mr. Miller stated further that he did not work on Saturday and Sunday, November 10 and 11, and was not aware of the conditions in the tunnel. He was aware of the leaking steam problem but did not consider that hazardous and stated that it aided in keeping the coal accumulations moist and wet. He believed that it would have been unsafe for men to clean-up the coal accumulations while the tunnel lights were out (Tr. 45-1467).

On cross-examination, Mr. Miller confirmed that he went into the coal handling area on the afternoon of November 12, 1979, sometime between one and three-thrity in the afternoon. The belt was not running while he was there since no coal was run that day. He stayed in the area for about 20 minutes and could not say whether the belt was running at other times during the day. However, he did indicate that even though coal was not run, the belt could still be running, and the decision not to run coal was made by him and Mr. Daniels at 8:15 that morning. He also indicated that when Mr. Vanderpool's shift began that day, the decision was made to run coal (Tr. 467-472).

Mr. Miller confirmed that during the day shift on November 12 when he went to the coal handling area he observed coal and coal dust accumulations and he described the area as "dirty". He also observed "quite a bit of steam in the atmosphere", and saw

no float coal dust because the belt was not running. He gave the order to run coal on Mr. Vanderpool's shift, and normal procedure is to run coal until the coal storage

bunkers are filled and then the belt is shut down. He confirmed that the acculations of coal and dust he observed were "more than normal", four to five inches in places, and that it was possible that once the belt started up again the accumulations would increase because of possible spillage (Tr. 473-475).

Mr. Miller stated that it was his understanding that men would work on the tunnel lights during the 4:00 to 12:00 shift on November 12, when he told Mr. Vanderpool to run coal during that same shift, and that the belt would be running (Tr. 477). He also indicated that when he visited the area he saw no lights at all and "the whole thing was dark" (Tr. 481). He could not see the stairway entry of the 200 tunnel from where he was positioned and did not know whether that light was out (Tr. 483). He confirmed that he last visited the 200 and 201 coal handling tunnel areas on the Friday afternoon of November 9, and the area was clean. He specifically went there to check the area out because of coal unloading difficulties which were encountered all week and he wanted to see if the area had been cleaned. He indicated that normal procedures call for daily clean-up, but that intermittent problems which began with the lighting on the evening of November 9 and continuing to November 12, prevented clean up (Tr. 484-487). Once the order issued, extra people were put on the clean-up detail and he believed the conditions cited were corrected during the next shift and possibly into the one after that (Tr. 488). He was not at the mine during the intervening Saturday and Sunday and was informed of no problems on those days. He and Mr. Vanderpool decided to run coal on November 12 because they believed the lighting problems in the tunnel areas precluded clean-up and he did not want people in there cleaning up with no lights (Tr. 489-490). No coal was run on Monday during the day shift because the bunkers were full (Tr. 492).

Douglas Malone was recalled in rebuttal by the petitioner and testified as to where he performed work in the coal handling facility on November 11, 1979. He stated that he did some work on the steam leak and he drew a diagram of the areas where he was at (exhibit ALJ-1). He described the area as the "tail end of the 201 belt way", within three feet of the 200 belt way. He confirmed that Mr. Datson was with him at that time and they finished the welding work, and that the lights in both areas were on at that time (Tr. 495-496). He stated that he was assigned to go back to the same area on November 12, and when he returned to the area between four and six-thirty he observed coal and coal dust accumulations, as well as float dust and the belt was running. Some of the lights were on and others were convered with coal dust. He entered the area from the entryway into the 200 tunnel and the stairway light was off, but the 201 tunnel lights were on. Although he could recall no coal on the belt, the belt was running, and he could not recall coal unloaded on either day (Tr. 501). After viewing the conditions he complained to Mr. Datson, and made no attempts to do any welding due to the conditions which were present (Tr. 503), and he was concerned that the entire 200 and 201 tunnel areas were a fire hazard (Tr. 505).

Findings and Conclusions

These civil penalty proceedings were instituted by MSHA against both named respondents pursuant to section 110(c) of the Act, which provides as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, order, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) (emphasis added).

An "agent" is defined in Section 3(e) of the Act (30 U.S.C. 820(e)) to mean "any person charged with responsibility for th operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine."

In order for civil penalties to be assessed against the named respondents, MSHA must first establish that the violations which have been cited and charged against the respondents in fact took place, and that the respondents "knowingly authorized, ordered or carried out such violation(s)". In these cases, both respondents are charged with violations of mandatory safety standards 30 CFR 57.20-3, 57.20-9, and 57.17-1, which provide as follows:

> 57.20-3 Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.
>
> 57.20-9 Mandatory. Dusts suspected of being explosive shall be tested for explosibility. If tests prove positive, appropriate control measures shall be taken. 57.17-1 Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

The interpretation and application of the term "knowingly" as used in both the 1969 and 1977 Acts has been the subject of litigation and interpretation by the Commission. In MSHA v. Kenny Richardson, BARB 78-600-P, a case arising under section 109(c) of the 1969 law, the Commission, in its decision of January 19, 1981, held that the term "knowingly" means "knowing or having reason to know". The Commission rejected the respondent's assertion that the term requires a showing of actual knowledge and willfulness on the part of the respondent to violate a mandatory standard. Further, the Commission adopted the following test as set forth in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (D.S.C. 1950), to section 109(c) of the 1969 Act:

> "[K]nowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

In Richardson, the Commission held that the aforesaid interpretation of the term "knowingly" was consistent with both the statutory language and the remedial intent of the 1969 Coal Act, and expressly stated that "if a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." On February 24, 1981, the Commission issued its decision in a second section 109(c) case and following its rationale in the Richardson case, reaffirmed its "knowingly" test; see: MSHA v. Everett Propst and Robert Stemple, MORG 76-28-P.

In its post-hearing brief, petitioner argues that the respondents knowingly authorized, ordered, or carried out the corporate violations of mandatory standards 57.20-3 and 57.20-9, within the meaning and scope of the Richardson case, supra. In support of this conclusion, petitioner asserts that both respondents knew or had reason to know about the accumulations of coal and coal dust in the cited areas at the start of Respondent Vanderpool's shift on November 12, 1979. However, rather than seeing to it that the accumulations were cleaned up, petitioner argues that respondents decided to run coal during the shift, knowing that, with the belt running, said accumulations would get worse, and that they used the lighting problems as an "excuse" for not sending men into the area to clean up. Further, petitioner argues that both respondents knew or had reason to know that the accumulations were a tripping hazard and an imminent fire hazard, and that in view of the extensive accumulations present in the cited areas knew or had reason to know that proper control measures were not being maintained to control a potential coal dust explosion which could have been ignited by a fire. Since both respondents were in a position of authority, petitioner maintains that they had the responsibility

to abate the continuance of the violative conditions, and that their failure to take proper corrective action to abate the cited conditions establishes that they knowingly violated the cited standards.

Although respondents' post-hearing brief does not address the issue of the "Corporate Operator Violations" as any condition precedent to the filing of charges against individual agents, petitioner points out that Allied Chemical has already paid a civil penalty for each of the subject violations. Citing the Richardson decision, petitioner asserts that due process does not require a determination of the corporate mine operator's violation in a proceeding separate from or prior to a section 110(c) proceeding involving an agent. Further, petitioner cites additional case precedents holding that a mine operator is absolutely liable for a violation occurring at its mine regardless of fault, and that an agent's violation is imputable to the mine operator under the Act.

Fact of violations

30 CFR 57.17-1 - Illumination

By motion filed simultaneously with its brief, petitioner moves to dismiss the charges against both respondents regarding the alleged violations of mandatory safety standard section 57.17-1 on the ground that the evidence adduced at the hearing does not support the conclusion that respondents knowingly authorized, ordered, or carried out the violation. The motion is GRANTED, and this charge IS DISMISSED as to both named respondents.

30 CFR 57.20-3

Section 57.20-3 requires that all workplaces and passageways be kept clean and orderly, and that the floors in such areas be kept clean and, so far as possible, dry. It seems clear to me that the coal tunnel load-out areas in question are "working places" within the meaning of the standard. After the coal is unloaded, it is transported along a network of tunnels on conveyor belts for storage and subsequent use as fuel for the boilers at the plant, and maintenance and other work requiring the presence of men and materials takes place in those tunnel areas.

The "conditions or practices" referred to on the face of the citation issued by Inspector Ferrin makes reference to mandatory standards 57.20-3 and 57.20-9, and they are bracketed together. After describing the conditions concerning the coal and coal dust which "had spilled from the area conveyor belt", the inspector concludes that "this created an imminent fire hazard". There is nothing in the citation to suggest that the inspector was concerned with a tripping or slipping hazard for failure to keep the tunnel floors free and clear of coal and coal dust accumulations. However, in his deposition taken November 30, 1981, Mr. Ferrin testified that in addition to a fire hazard, he considered the accumulations he found to be a hazard to personnel entering the area "on a possibly slick or occluded or blocked stairway" and that they presented "a possible slip and fall" injury. In his inspector's "narrative statement" made at or near the time he issued the citation, Mr. Ferrin's noted concern is

with a possible "slip or fall" incident. At the hearing, he conceded that any citation for a violation of section 57.20-9 would "normally" be issued for "housekeeping" situations for failure to maintain workplace floors free and clean of coal accumulations which presented "slip and fall" possibilities. However, he maintained that

aside from any "housekeeping" concerns, at the time he issued the citation he was concerned with a "possible disaster" and that it was prompted him to issue the imminent danger order of withdrawal. In short, while Mr. Ferrin separated the conditions he found into three specific violations, it seems clear to me that his overall concerns centered on the fact that he believed that all of the conditions he observed, taken as a whole, presented a situation which he obviously believed amounted to an imminent danger calling for a withdrawal order isolating the area until it could be cleaned up.

Aside from the question as to whether the conditions cited presented an "explosion" hazard, I believe it is clear from the record in this case that the reason Mr. Ferrin cited a violation of section 57.20-3, was his belief that the accumulations presented a slipping and falling hazard, that someone could possibly trip on the accumulations while attempting to make their way along the beltway and possible catch their hand or clothing in the moving belt, and that the accumulations would contribute to the propagation or spread of a fire in the event one occurred. I conclude that the preponderance of the evidence adduced in this case supports a conclusion that this is the principal reason why he included a reference to section 57.20-3 in his order. Further, there is a strong inference in this case that since the Part 57 health and safety standards contain no specific provision for the clean up of coal and coal dust accumulations which may occur in a metal and nonmetallic mine, similar to the mandatory standards applicable to coal mines, the inspector did the best that he could by relying on a so-called "housekeeping" provision to cover such a situation.

In their post-hearing brief, respondents do not dispute the existence of the coal spillage and accumulations cited by Mr. Ferrin, nor do they dispute the fact that a hazard existed. Their defense to the citation of a violation of section 57.20-3, rests on an assertion that respondents could not send employees into the tunnels to clean without lights, "especially with the conditions as bad as they were", and that they decided not to risk unnecessary injury and opted to run coal until such time as the lighting problem could be corrected. Given these circumstances, and relying on Secretary of Labor v. Alabama By-Products Corp., SE 80-121, 2 MSHRC 1399 (1981), respondents argue that sending men into the tunnel areas to clean up without sufficient illumination would have endangered them further. In these circumstances, they suggest that this fact is a defense to the citation, and by sending men into the area to clean with insufficient illumination would have subjected the respondents to violations of section 57.17-1, which requires sufficient illumination to provide safe working conditions in loading, dumping and work areas. As for the suggestion by petitioner that flashlights and cap lamps could have been used to facilitate clean-up, respondents rejects this notion out of hand, and quite frankly, I agree with this position. I fail to understand how MSHA can expect a miner to shovel and clean an area while holding a flashlight in his hand. Further, I fail to comprehend how this could be accomplished efficiently and safely simply with the

illumination from a cap lamp. I believe that the illumination requirements of section 57.17-1, are intended for just such chores, and if fully complied with, should provide the full measure of illumination for cleaning up coal accumulations along a belt line.

Respondents concede, in hindsight, that they should have barricaded the area and taken care of the accumulations problems. They also concede that they were aware of the conditions of the tunnel and the need for it to be cleaned. They nonetheless assert that they "wisely" elected not to risk injury to men cleaning the tunnel in the dark. Of course, what they do not concede is that this course of action would have resulted in an interruption to the coal handling production run requiring that the belt system be shut down. In my view, had the decision been made to shut down the belt and immediately correct the illumination problem, the coal accumulations could have been cleaned up, the problem would have been resolved, and the possibility of subjecting miners to hazards of cleaning up in the dark would never have been presented.

After careful consideration of all of the evidence adduced in this case, I conclude and find that petitioner has the better part of the argument with regard to the alleged violation of section 57.20-3. Respondents reliance on the Alabama By-Products Corp., supra, holding as an absolute defense is rejected. I find that petitioner has established by preponderance of the evidence presented that the accumulations of coal and coal dust cited by the inspector constitutes a violation of section 57.20-3, in that the tunnel floor was not clean, that respondents knew or had reason to know that the conditions existed, and that their failure to take corrective action in the circumstances constituted a knowing violation. The citation, insofar as this violation is concerned, IS AFFIRMED.

30 CFR 57.20-9 Explosive dust

Section 57.20-9, requires that appropriate control measures be taken in the event explosive dusts are encountered in the mine. The language of the standard requires that (1) dusts suspected of being explosive be tested. Once tested, if they prove positive, then appropriate control measures must be taken. Aside from the ventilation and radiation requirements found in Part 57, I can find nothing in the standards which specifically address the "appropriate control measures" required to be taken when accumulations of coal or coal dust are encountered in a coal handling facility such as the one in question. Although petitioner argues that coal dust is one of the many dusts covered by section 57.20-9, (Brief pg. 21), that conclusion is based on the inspector's testimony that "dust is dust" (Tr. 40). In any event, it seems clear to me that petitioner's position is that the corrective action that should have been taken by the respondents was the cessation of production and the clean-up of the accumulations.

Respondents Arguments

In their post-hearing brief, respondents argue that any evidence concerning any explosive conditions in the tunnel area in question should be excluded because the Order issued by Inspector Ferrin makes no reference to any explosion hazard and is limited to an alleged fire hazard. Further, respondents point

out that in his deposition taken prior to hearing, Mr. Ferrin testified that any float coal dust which may have been present at the time

of his inspection was not an explosive hazard. Respondents maintain that the Order issued by the inspector as well as the pleadings led them to believe that the issue presented was whether or not the coal accumulations were a fire hazard (not an explosive hazard) in the tunnel. They contend that not until after the deposition of Mr. Ferrin, and in fact at the hearing, were they informed that Mr. Ferrin was concerned with the possibility of an explosion in the tunnel, and they maintain that their mistaken belief in this regard is demonstrated in their Answers to the charges where they deny the existence of a fire hazard, and make no reference to explosive conditions.

Respondents argue further that were they appraised of the concern of an explosive hazard, they could have conducted and produced tests of the environment in the tunnel. However, because of the failure of MSHA and the Order issued by Mr. Ferrin to appraise them of the true conditions which gave rise to the Order, respondents maintain they were barred from fully developing a defense. Accordingly, respondents assert that MSHA should have been excluded from producing any evidence as to explosion potential in the tunnels, and if that evidence is excluded, MSHA will not have proved a violation of section 57.20-9.

Aside from their due-process and lack of notice defense, respondents maintain that petitioner simply has not established by a preponderance of any credible evidence or testimony that an explosion hazard existed in the 200 tunnel. In support of this conclusion, respondents point to the fact that MSHA did not sample the subject coal or coal dust which was actually in the tunnel to determine if the dust was explosive, and that Mr. Ferrin stated he did not need to take any samples because he basically knew what the explosivility of the coal was, based upon a test which had been conducted previously. Respondents also point out that Mr. Ferrin's knowledge as to the explosibility of the coal accumulations is based on a letter dated January 8, 1976, which refers to explosive coal conditions at the coal stock pile at Allied (as opposed to the 200 tunnel), and a group of documents, one of which is an Analysis of Dust Samples prepared in March of 1979 (exhibits P-5 and P-6).

With regard to the aforementioned documents, respondents assert that no weight should be afforded to these exhibits because the letter (P-5) was prepared three years before the subject Order, and concerned dusty coal conditions at the transfer points at the storage pile. Accordingly, the document is not material to the conditions which existed in the 200 tunnel on November 12, 1979.

As to the Analysis, respondents assert that it was issued in connection with Citations No. 336487 and 336488. (Part of Ex. No. P-6). Citation 336488 concerns coal at the transfer house, which is not in the same area as the tunnels. (Tr. p. 392). Citation No. 336487 concerns coal and fuel oil accumulation in the sump in the 201 tunnel. Respondents argue that the sample of coal which was taken for the Analysis is not identified by Mr.

Ferrin, nor does the record in fact show that the coal or coal conditions were the same. Although Mr. Ferrin testified it was the same coal, respondents maintain this conclusion is based upon the

speculative belief that the coal was from the same mine. (Tr. p. 45). However, nowhere in the record does Mr. Ferrin demonstrate or lay the foundation for his conclusion that the coal was the same. Furthermore, since Mr. Ferrin testified that the coal could have come from two different mine locations of the same company (Tr. p. 21), which contradicts his testimony that the coal was from the same mine, respondents conclude that he clearly did not know where the prior sample was obtained or whether the coal in the 200 tunnel was the same as the coal subject to the Analysis.

With regard to the Analysis in question, respondents point out that there is no evidence of any nature which shows what it means, either in the abstract or in relationship to the specific environment in the 200 tunnel. Conceding that coal dust is explosive, respondents nonetheless maintain that it is so only in the proper environment, and the fact that the Analysis stated the coal tested in the past was 17.1% incombustible, there is no evidence that the environment in the 200 tunnel was in fact explosive. If it was not, then there was no violation of the cited standard because "appropriate controls" would have been achieved.

Petitioner's arguments

In response to respondents arguments concerning any lack of notice regarding Inspector Ferrin's concern for an explosive hazard connected with the coal accumulations which he observed, petitioner notes that since he cited section 57.20-9 it is obvious that this was one of his concerns because that safety standard deals exclusively with a dust explosive hazard. Conceding the fact that the order issued by Mr. Ferrin makes no mention of an explosion hazard, and that his testimony and prior statements indicated his concern for a fire hazard, petitioner cites his testimony during the hearing which indicates that while his primary concern was the possibility of a fire, his secondary concern was the potential for an explosion (Tr. 119-120; 135-136). Petitioner concludes from this that Mr. Ferrin believed the fire hazard was imminent and that the coal dust explosion hazard was potentially there because of the fire hazard. Petitioner concludes further that since it is well known that coal dust will enter into and propogate an explosion when placed in suspension, the specific reference to the fire hazard in Inspector Ferrin's order of withdrawal was in effect an implicit reference to the coal dust explosive hazard since a fire could have served as a definite ignition source for a potential coal dust explosion.

Petitioner asserts that Allied Chemical obviously had no problem with the specificity of the charges since it paid the civil penalty for the violation of 57.20-9, and that respondents had to be aware of this fact. Finally, petitioner points out that the proposal for assessment of civil penalty specifically charges the respondents with violations of section 57.20-9, and since this standard deals exclusively with a dust explosive hazard, they were clearly put on notice as to this charge.

In response to the arguments that petitioner has failed to establish that any explosive hazard existed in the cited tunnel, petitioner states that "it has long been well known in the mining industry that coal dust will enter into and propogate an explosion when placed in suspension". In support of this conclusion petitioner cites the legislative history of the 1969 Coal Act, which states in pertinent part as follows:

> Tests, as well as experience, have proved that inadequately inerted coal dust, loose coal, and any combustible material when placed in suspension will enter into and propogate an explosion. The presence of such coal dust and loose coal must be kept to a minimum through a regular program of cleaning up such dust and coal .... Tests and experience have shown that an incombustible content of 65% is necessary to prevent dust from entering into an explosion (with the exception of anthracite coal dust, which will not propogate an explosion when dispersed in the air due to its low volatile ratio). [S. Rep. 91-141, 65-66; Legis. Hist. at 191-192].

Petitioner concedes that MSHA took no samples of the coal dust in the tunnel loadout area at the time the order of November 12, 1979, was issued. In explanation, petitioner states that a previous test taken of the same coal source in March 1979 to support two previous citations for violations of section 57.20-9, showed that the tested coal dust was combustible and explosive and Inspector Ferrin believed it would have been superflous to conduct another test on November 12 for the purposes of section 57.20-9.

With regard to the coal sample of March 1979, petitioner maintains that it was not even necessary to have taken that sample because everyone knows that coal dust placed in suspension will propogate an explosion. Further, petitioner states that coal dust is one of the many dusts covered by section 57.20-9 and because of the long standing tests and experiments conducted on this type of dust, no new specific tests were necessary to determine the explosibility of the coal dust in the coal loadout area of the Alchem Trona Mine. In this connection, petitioner points out that Inspector Ferrin testified that the only reason that the Green River, Wyoming Office of MSHA's Metal/Nonmetal Mine Division took a coal dust sample from the coal loadout area and had it tested in March 1979, was to familiarize their inspectors with the combustibility and explosibility of coal dust since the 1977 Act was relatively new to the MSHA metal/nonmetal mine inspectors. Otherwise, it is not and was not normal practice for MSHA to test coal dust in a coal handling facility of a trona mine for the purposes of 30 CFR 57.20-9.

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Lack of adequate notice

While it may be true that prior to the hearing in this case Inspector Ferrin failed to specifically articulate his concern for any explosive hazard connected with the coal accumulations which he cited, I conclude and find that on the facts presented here respondents have not been prejudiced. As correctly argued by the petitioner, both the order and proposal for assessment of civil penalty filed in this case make specific reference to section 57.20-9, and if respondents had any doubts in this regard they could have been resolved through the discovery process by means of a specific interrogatory. I agree with respondents assertion that Inspector Ferrin's pretrial deposition reflects no direct concern about any explosive hazard and that the matter was initially brought up at the hearing by petitioner's counsel as part of his case. Leaving aside for the moment the question as to whether petitioner has established that the coal dust in question was in fact explosive within the meaning of the cited standard, I conclude and find that the interjection of the issue as to whether the coal dust conditions found by the inspector when he issued the order were in fact explosive during the hearing did not adversely affect respondents ability to defend themselves. If the evidence adduced supports a conclusion that the coal accumulations were explosive, petitioner will prevail on this issue. If they do not, then the respondents will. Further, I can deal with any credibility questions which may arise as a result of this issue. Since the petitioner bears the burden of proof in this case, it also bears the risk of raising issues for the first time at a hearing two years after the fact.

Explosibility of the coal dust accumulations.

I take note of the fact that the withdrawal order issued by Inspector Ferrin was based on the fact that he believed that all of the conditions which he observed on November 12, 1979, in combination presented a situation which constituted an imminent danger. In addition, when viewed in perspective, and taking into account the prior problems concerning the diesel oil spill, prior dust problems at the coal transfer point, prior union complaints concerning failure to clean up coal accumulations, all of which are a matter of record in this case, I am persuaded that Mr. Ferrin was not oblivious to all of these prior events at the time he issued the order. This is not to say that an imminent danger did not exist. However, this is an issue that Allied Chemical could have challenged in a contest proceeding pursuant to section 107(a) of the Act. The question of any imminent danger is separate and apart from the question of whether MSHA can establish the specific violations noted in this civil penalty proceeding. In this regard, faced with the prospect of either proving or defending each alleged violation at an evidentiary hearing held two years after the fact, counsel for both sides are prone to indulge in what I have often characterized as "back-filling" to support their respective positions.

Petitioner's assertion that the March 1979 coal sampling and test made at the coal handling facility in question was for the

purpose of familiarizing metal and nonmetal mine inspectors with the combustibility and explosivility of coal dust is simply without foundation. The sample analysis (exhibit P-6) on its face states that it was taken to substantiate

the two citations for violations of section 57.20-9. Therefor, while it may be true that MSHA's normal practice is not to test coal dust in a coal handling facility of a trona mine for the purpose of section 57.20-9, it seems obvious to me that in this case the March 1979 sample was taken to specifically establish violations of this particular mandatory standard. Further, it is also obvious to me that once a sample of coal dust is tested at this facility, MSHA believes they may rely on that particular sample, not only to establish that the coal dust is explosive, but to support citations for any violations of section 57.20-9 at any time.

I take official notice of a 1976 publication apparently used at MSHA's National Mine Health and Safety Academy during the training of its inspectors, Volume I, Work Book, Coal Dust, NMHSA-CE-009. Page 11 of that instructional booklet contains a discussion dealing with the explosive nature of coal dust, and it highlights the fact that explosiveness depends upon several factors which are itemized as follows:

1. The size of the dust particles.
2. The composition of the dust (how much of the dust is coal dust).
3. The amount of gas (including both oxygen and combustible gas) in the air.
4. The source of ignition.
5. The concentration of dust.
6. Surrounding conditions.

In the case at hand, it is clear that no one sampled the coal dust accumulations in the 200 tunnel on the day the order issued, even though the standard clearly states that samples are to be taken of "suspected" explosive dusts. Inspector Ferrin confirmed that prior to the inspection in question he had never inspected a coal mine (deposition, pg. 18). His knowledge concerning the explosive nature of coal dust was based on his belief that its "fairly common knowledge throughout the population", a course at MSHA's training academy, and a review of an MSHA report concerning the coal used by Allied Chemical (deposition, pg. 18).

Inspector Ferrin confirmed that the coal handling facility in question is not underground, is not part of any "gassy" portion of the mine, and the fact that the mine itself may be classified as "gassy", this did not concern the coal handling facility (Tr. 116-117). He also confirmed that he tested for methane in the cited tunnel area at the time of the inspection and found no methane present.

With regard to the presence of diesel fuel in the tunnel, Mr. Ferrin conceded that this has been a long-standing problem in the area and Allied Chemical and MSHA were jointly addressing the problem and that this problem was not his principal concern at the time the order issued. As for the presence of any "float" coal dust, Mr. Ferrin described it as "airborne" dust, and testified in his deposition that while this condition presented a

fire hazard, he did not believe that it presented an explosion hazard.

Although Mr. Ferrin made references to several inoperable dust collecting devices, he conceded that he made no determination as to where they may have been located in the area. And, while he alluded to several

dry floor areas, he also conceded that some of the coal accumulations were wet and that the tunnel area in general was wet and damp. Mr. Vanderpool testified that when he inspected the tunnel area he found a dust-collecing device turned off, but he had it turned back on, and although he testified that he did not know whether the fire deluge system was on or off during the period November 10 through 12, 1979, petitioner introduced no credible testimony or evidence to establish that this system was not operating during the time of Mr. Ferrin's inspection. Further, Mr. Miller testified that the steam and moisture present in the tunnel area contributed to keeping the coal accumulations moist and wet. Mr. Ferrin's concern that a drop in temperature in the tunnel area could have resulted in the stairways freezing due to the moisture and steam which was present, thus added to any tripping or slipping hazard, supports a conclusion that the conditions in the tunnel area where the coal accumulations were found were far from dry.

When asked whether a potential explosion hazard was present, Inspector Ferrin answered "if we had an ignition source, yes sir" (Tr. 71). Although he alluded to the presence of several potential ignition ignition sources, it seems clear to me from the record that Inspector Ferrin made no detailed examination of such sources and his cursory conclusions in this regard as tesfieid to during the hearing reflect a subjective after-the-fact attempt to justify a conclusion that the coal dust accumulations, as well as the 200 tunnel environment, presented an explosion hazard. For example, although Mr. Ferrin states that the problems with the illumination in the tunnel were due to a "faulty" electrical circuit, characterized by petitioner's counsel as a source of ignition, Mr. Ferrin admitted that he did not trace the circuit out, nor did he make any attempt to ascertain what the problem was. When asked to describe the presence of any ignition possibility with regard to the purported faulty circuit, he responded that he didn't "trouble shoot" (Tr. 89) and "I didn't take the time to finish tracing out, because of the imminency of this situation" (Tr. 71). As for the presence of "various and sundry electric lines" lying on the floors in adjacent tunnels leading into the 200 tunnel, Mr. Ferrin testified that they were not bushed or properly supported and in the event they became damaged this could have created an ignition source.

Among the documents of record (exhibit P-2), are copies of additional section 104(a) citations issued at the time of the inspection of November 12, 1979. Citation 0575919 was for a violation of section 57.12-38, for a defective take-up reel for a trailing cable on a tripper car. Citation 0575920 was for a violation of section 57.11-1, for two hoses or wires lying on a walkway along the 201 tunnel. Citation 337399 was for a violation of section 57.20-3, for accumulations of coal dust at the 201 belt tail pulley. Citation 337398 was for a violation of 57.4-10 for an inadequately insulated cable passing through an opening in the 201 belt pit area. Aside from the fact that the citations reflect that they were issued after the withdrawal order in question, in each of the instances cited the "conditions

or practices" noted in the citations reflect fire or tripping hazards.

I have carefully considered the testimony of maintenance mechanic Douglas Malone and Terral J. Smith and cannot conclude from their testimony that it supports a finding the the prevailing conditions in the cited tunnel area constituted an explosion hazard. I am mindfull of Mr. Malone's concern for his safety and recognize his right to withdraw from the area and not to do any work in an area which he considered to be hazardous. However, there is no evidence in this case that the named respondents in this proceeding authorized Mr. Malone to do any work in the cited areas or that Mr. Malone had a work permit to do the welding work in question. Mr. Malone's testimony is that shift foreman Youngbird dispatched him to the area to perform some work. However, upon observing the conditions present, Mr. Malone left the area and reported the conditions to Mr. Youngbird, and Mr. Malone admitted on cross-examination that he had no permit to perform any welding work in the 200 tunnel area, that he went there "to look" and not to weld, that any welding work would have required a permit from Mr. Vanderpool, and that any concern that he may have had was the possibility of a fire.

With regard to Mr. Smith's testimony, I find nothing to support a conclusion that the coal accumulations presented any explosion hazard. I recognize Mr. Smith's concern for the health and safety of the miners who he represents as President of the local, and I also recognize his concern over the accumulations and conditions in the tunnel in question on the day the order issued. I also take note of the fact that Mr. Smith indicated that he had visited the tunnel area on four occasions during the period June 1 and November 1979, and believed that the tunnel should be cleaned on a daily basis so as to preclude the build-up of accumulations. However, this is a matter that Mr. Smith is free to continue to pursue with the MSHA's inspectors who are assigned to inspect the mine in question. He is also free to continue to pursue with mine management any compliance problems connected with any safety standards found in MSHA's regulations, including a review of the procedures dealing with the issuance of work permits, as well as the question of miners performing unauthorized work in hazardous areas of the mine.

After a close scrutiny of Mr. Ferrin's testimony, the only credible ignition source which may have been present in the 200 tunnel were the belt idlers running in the coal accumulations. There is no evidence that the belt rollers or idlers were defective or hot. Although I can accept the notion that belt idlers running in accumulations of coal present a potential fire hazard, the question presented here is whether such a condition constituted an explosion hazard. Based on the record in this case, I find respondent has the better part of the argument, and I conclude and find that petitioner has failed to establish by a preponderance of any credible evidence that the conditions which prevailed at the time the order issued presented an explosive hazard in the cited 200 tunnel area, and that portion of the citation-order which alleges a violation of section 57.20-9 IS VACATED.

I believe that MSHA should seriously consider amending Part

57 to specifically and directly deal with hazardous accumulations of coal and coal dust at a surface coal handling facility which is part of a metal and nonmetallic mine. Only in this way will an inspector be able to effectively and consistently deal with such problems in those mines. In the case at hand I am convinced that Inspector Ferrin honestly believed

that, faced with the cumulative conditions which he observed in the tunnel on the day in question, swift action on his part required the issuance of an imminent danger withdrawal order. I am also convinced that Mr. Ferrin was not oblivious to the fact that miners had complained about the tunnel conditions in the past, that the diesel fuel spill was a long-standing problem being worked on collectively by MSHA and the mine operator, and that his very presence at the mine on the day in question resulted from a complaint filed by the representative of miners. Given these circumstances, Mr. Ferrin cited certain available safety standards which he believed addressed the perceived problems. However, faced with the prospect of proving the specific cited standards at a hearing two years after they were issued in a civil penalty proceeding brought by MSHA against two individual respondents, the inspector is exposed to much second-guessing by counsel for the parties, and I might add, by the presiding Judge.

The instant case is not the first time that an inspector has cited the so-called "housekeeping" section 57.20-3 to support a conclusion that accumulations of coal and coal dust present a fire hazard as well as a "slip and fall" hazard. As indicated earlier I have affirmed that portion of the order which cited this standard. However, with regard to the citation of section 57.20-9, I hold MSHA to strict proof of the specific language of this standard, and this includes the requirement that MSHA sample the coal and coal dust accumulations to establish with some degree of certainty that they are in fact explosive. On the record adduced in this case I reject the notion that such tests are simply made to assist in the training of inspectors who are unfamiliar with the nature of coal and coal dust. In my view, the fault lies not with the inspector, but with standards which all too often leave much to the imagination, and leave the inspector in the untenable position of trying to decide which standard comes "close to" a given situation.

Civil Penalty Assessment

I am in agreement with the petitioner's position that the following criteria should be considered in assessing a civil penalty against the two named respondents in this case for the section 57.20-3 violation which I have affirmed: (1) his history of previous violations under the Act, (2) his negligence, (3) the gravity of the violation, (4) his effort to abate the violation after the citation, and (5) his financial ability to pay a civil penalty. This complies in substance with section 110(i) of the Act, 30 U.S.C. 820(i). Daniel Hensler, 5 IBMA 115, 121 (1975). A 110(c) respondent's financial ability to pay is the equivalent of the two civil penalty criteria under 110(i) of the Act of the mine operator's size of business and its ability to continue in business.

History of Prior Violations

It was stipulated at the hearing that neither of the respondents herein has a prior record of individual violations

under the Act. (Tr. 113-114). I adopt this as my finding in this regard and have taken it into account in assessing the penalties for this violation.

Gravity

I conclude and find that the accumulations of coal and coal dust cited by the inspector in this case constituted a serious violation. In addition to a possible fire hazard, the accumulations along the belt line and at or near the stairway where there was little or no illumination presented a serious tripping or slipping hazard, particularly in light of the proximity of the accumulations near a moving belt line.

Good Faith Compliance

As correctly pointed out by the petitioner, Inspector Ferrin testified that both respondents participated in the abatement of the violation in question, and that their efforts in this regard were "very adequate after the fact," i.e., after Inspector Ferrin had issued his imminent danger order of withdrawal citing said violation. (Tr. 102-103). This fact has been taken into account by me in assessing civil penalties for the violation.

Respondent's Ability to Pay Civil Penalties

Petitioner submits that in view of the annual salaries of respondents Miller and Vanderpool of $50,000 and $34,500, respectively, both have the ability to withstand a substantial civil penalty in these proceedings, Miller more so than Vanderpool. I agree with the petitioner in this regard and conclude that the civil penalties assessed by me for the violation which I have affirmed will not adversely or unduly affect the respondents finaicially. Taking into account the circumstances presented in these proceedings, I conclude further that the penalties are reasonable and appropriate.

Negligence

Petitioner argues that both respondents were grossly negligent in allowing the violation in question. Further, petitioner submits that that this negligence was exacerbated by the fact that despite the dangerous accumulation of coal and coal dust which was building up in the cited areas, neither respondent took action to barricade or danger off the area to prevent persons from wandering into the area. Moreover, petitioner asserts that both respondents were specifically aware that electricians were scheduled to work on the lighting problem in the 200 and 201 belt tunnels during Mr. Vanderpool's shift and that both respondents had reason to know that welders might be working on the steam leak at the intersection of the two tunnels.

Respondents do not dispute that fact that they were aware of the conditions cited by the insector, nor do they dispute the fact that they probably should have barricaded the area to keep everyone out. Although it is true that there is no evidence to indicate that they were aware that welders were sent to the area in question and that the fact that the welders did not have a work permit remains unrebutted by the petitioner, the fact is that both respondents were aware of the existence of hazardous

accumulations of coal and coal dust, discussed the conditions between shifts, but opted to continue running coal rather than shutting down the belt line and correcting the immediate and obvious coal accumulations which were present. In these circumstances, I conclude and find that this

constitutes a reckless disregard of the mandatory safety standard in question. Under the circumstances, I find that the violation is the result of gross negligence on the part of both respondents and this is reflected in the civil penalties assessed by me for the violation in question.

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 that the following civil penalty assessments are reasonable and appropriate for the citation which I have affirmed, and respondents ARE ORDERED to pay the assessed penalties within thirty (30) days of the date of this decision and order.

Docket No. WEST 81-244-M
Respondent J. D. Miller

$800 for violation of 30 CFR 57.20-3

Docket No. WEST 81-245-M
Respondent Wilbur Vanderpool

$500 for violation of 30 CFR 57.20-3

George A. Koutras
Administrative Law Judge