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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 Proceeding	
	Docket No.	Assessment Control No.
v.	KENT 81-77	15-07295-03019
	KENT 81-78	15-07295-03020
MARTIKI COAL CORPORATION, RESPONDENT	Martiki Surface Mine	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, for Petitioner

William G. Francis, Esq., Francis, Kazee and Francis, Prestonsburg, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 16, 1982, a hearing in the above-entitled proceeding was held on April 20 and 21, 1982, in Prestonsburg, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

After the parties had completed their presentations of evidence each day, I rendered the bench decisions which are reproduced below (Tr. 218-245 in Docket No. KENT 81-77 and Tr. 227-242 in Docket No. KENT 81-78):

DOCKET NO. KENT 81-77

> The proposal for assessment of civil penalty filed on March 16, 1981, in Docket No. KENT 81-77 seeks assessment of civil penalties for five alleged violations of the mandatory health and safety standards. The parties succeeded in reaching a settlement agreement as to three of the violations and the other two have been the subject of a hearing at which both MSHA and respondent have presented witnesses.
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> Since there are both contested and noncontested violations involved in this proceeding, I shall first consider the contested violations. The remaining part of my decision in Docket No. KENT 81-77 will consist of a discussion of the settlement agreement and indicate whether the settlement agreement should be accepted.

Contested Violations

Citation No. 731280 (Exhibit 2), October 6, 1980, 77.1605(a)

The information given below constitutes findings of fact with respect to the alleged violation of Section 77.1605(a) in Citation No. 731280.

1. The parties have stipulated in Exhibit 9 that respondent operates the Martiki Surface Mine and that it is a large operator. Respondent demonstrated good faith in achieving rapid compliance with respect to the violations which were settled, as well as the ones which are contested. The parties further stipulated that any penalty which may be assessed in this proceeding will not adversely affect respondent's ability to continue in business.

2. On October 6, 1980, Inspector Andrew Reed, Jr., made an examination of the Martiki Surface Mine. At that time, he wrote Citation No. 731280 alleging a violation of section 77.1605(a), which provides, "cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

3. The condition given in the inspector's Citation No. 731280 was that the cab windshield in Caterpillar Loader 992C (Company No. 309) is not in good condition. The windshield contained a shattered place in the upper left side with approximately 14 cracks extending from the shattered place. Three of the cracks extended all the way across the window and about five cracks were observed in the area traversed by the windshield wiper blade.

4. The operator of the No. 309 end loader was Raymond Maynard and it was his opinion that the cracks were not bad enough to obstruct his vision. He indicated that there was, in his opinion, only a small place, which he described as a crack, where a rock had hit the windshield and that some small lines extended out from the initial point of impact. He didn't think there were as many cracks or lines as the inspector thought existed in the windshield. Maynard reported to his supervisor, Bill Houser, that there was a cracked place in the windshield and the report to that effect was given to Houser orally by means of a short wave radio, which was in one of the trucks which Maynard was loading. Maynard testified that it is a company practice to have anything that's wrong with a vehicle reported in writing on a card, but he could not recall whether there was a card available on the morning that this windshield was cracked. Therefore, he did not write on a card the fact that the windshield was cracked.

5. The lead supervisor on the midnight-to-8:00 a.m. shift, which was the shift on which the citation was written, was Bill Houser. He testified that he had received a call from Maynard about the existence of a cracked windshield in loader No. 309, but

since Maynard did not feel that the cracks were bad enough to keep him from operating the vehicle, he did not have the equipment taken out of service. Consequently, the equipment was used on the first part of the shift and Maynard was still in the end loader at the time it was examined by the inspector in the neighborhood of 4:00 a.m. The citation, itself, was written at 6:55 a.m. but the cracked windshield had been observed prior to that time. Houser testified that if the operator of a piece of equipment thinks that a given defect is sufficiently bad to interfere with the operation of the equipment that he generally leaves that up to the judgment of the operator of the equipment. If the defect, or problem that's reported to him is anything that Houser considers to be of a serious nature, such as the brakes giving a problem, he personally goes to the equipment and checks it to be certain that there is no endangering hazard associated with the problem, if the piece of equipment is continued in service for the remainder of the shift.

Those are the primary facts that were given by the witnesses in this case as to Citation No. 731280. A great deal of testimony was given by the three witnesses, Reed, Maynard, and Houser, but most statements are sufficiently diverse in nature to make it necessary to discuss them in deciding whether a violation occurred and, if so, whether the penalty should be of a moderate nature or perhaps a fairly large penalty.

There was a motion made by counsel for respondent after all the testimony was given, urging that Citation No. 731280 be dismissed because the inspector's testimony had failed to show that the windshield was in other than good condition. As I have indicated previously, the violation involves section 77.1605(a) which provides that "[c]ab windows shall be of safety glass, or equivalent, in good condition and shall be kept clean." Respondent's counsel has emphasized that there's no dispute but that the windshield was made of safety glass, or equivalent and that the glass was clean. The only question is whether the windshield with 14 cracks in it was in good condition. It is the position of respondent's counsel that although there were some cracks in the windshield, I should give considerable weight to the testimony of the operator of the equipment, who was of the opinion that the cracks, although admittedly present, were not sufficiently bad to cause him any problem in operating the equipment. So, the issue before me, really, is whether, or at what point, cracks in a windshield become severe enough to be considered not in good condition, as was alleged by the inspector.

It is human nature for a person to see events which

will ultimately be used to make conclusions which are consistent with that person's position in life. The inspector wanted to show that the cracks constituted a violation of section 77.1605(a) and there

fore he very meticulously counted the number of cracks in the windshield. Since his manual apparently indicates that cracks in the area which is traversed by the wiper blades are especially likely to be where a person's vision would be affected, he counted the number of cracks in the area where the windshield wiper traversed the windshield. He also noted that three of the cracks were long enough to go clear across the windshield.

In opposition to the inspector's observations of the windshield, we have the loader operator's testimony. He said that the cracks were perhaps long enough to extend 6 inches, that they didn't traverse the area where the windshield wipers passed across the windshield, and that his vision was not blocked in any way.

We have to keep in mind, of course, that these cracks were observed by both the inspector and the loader operator about 4:00 a.m., when darkness prevailed and during foggy weather conditions. Consequently, I can certainly believe that Maynard would have been less inclined to see the cracks than the inspector because Maynard didn't set out to establish any specific type of condition. It is significant, though, that Maynard thought that these cracks were sufficiently noticeable for him to take the time to report them to his supervisor, Houser.

Both of the operators of end loaders who testified in this proceeding indicated that the Company wants any kind of defects in its equipment reported. Both witnesses gave respondent a high grade for the effective and conscientious maintenance that's done on the equipment. Consequently, this is not a case in which we have a respondent which is dilatory about fixing equipment or a case in which equipment operators are encouraged not to report defects in equipment. Nevertheless, I think that the testimony, when viewed from the standpoint of the position of each person who has testified, would have to support a finding that the cracks were of sufficient nature to keep the windshield from being in good condition. For that reason, I find that there was a violation of section 77.1605(a) and that respondent's motion to dismiss should be denied. Having found that a violation occurred, a civil penalty must be assessed, based on the six criteria for assessing penalties as those criteria are given in section 110(i) of the Federal Mine Safety and Health Act of 1977. As Finding No. 1 above shows, the parties have already stipulated as to three of the six criteria, in that, they have agreed that respondent is a large operator, that respondent's ability to continue in business will not be affected by the payment of penalties, and that all of the violations were abated rapidly.

In my past decisions, and in the assessment formula described in 30 C.F.R. 100.3, the criterion of good-faith abatement has been used in the following manner: if a violation is found to have been abated in a normal fashion, that is, within the time given by an inspector for abatement, the penalty is neither increased nor decreased under the good-faith abatement criterion. If the violation is not abated within the time given by the inspector, then up to 10 penalty points are added to the penalty, otherwise assessible under the other criteria, and the penalty is therefore increased. On the other hand, if an operator abates a violation in less time than was given by the inspector, then it's considered rapid abatement and up to 10 penalty points are subtracted from the penalty which would otherwise be assessible and the penalty is therefore decreased.

It is not often that I find parties stipulating that a respondent has demonstrated good faith in achieving rapid compliance. With respect to each of the violations involved in this case, the inspector's statement, which is Exhibit 3, in one instance, and Exhibit 5 in the other instance, the inspector states that the operator abated the violation in about one-eighth of the time that he had set. Therefore, whatever penalty is assessed in this case should be reduced considerably because of the rapid abatement. I have discussed the rapid abatement criterion first because it happens to be among those matters which were stipulated by the parties, but it can't be applied until some determination has been made with respect to the other criteria. In other words, you have to determine an amount before you can deduct anything from it.

Exhibit 1 shows that the number of previous violations of section 77.1605(a) amounts to one in the 24-month period preceding the occurrence of the violation alleged in this case. Exhibit 1 shows in the second portion on the right side that there've been three violations alleged but only one of them has been paid, and the other two, I'm told by counsel, are the ones involved in this proceeding. It's been my practice over the years to add some amount to a penalty when I find that there has been a previous violation of the same section which is before me in a given case. In this instance there is the minimum that can exist, which is one, and that one occurred over a period of 24 months. Consequently, I do not feel that a very large amount needs to be assessed for a single violation in a 24-month period. Therefore, whatever penalty is assessed, $20 will be assessed under the criterion of history of previous violations.

The next criterion which has to be considered is negligence. The evidence shows that there was a very

low degree of negligence because, first of all, the crack in this particular windshield had not been in existence long enough for it to have been reported prior to the shift on which it was reported by Maynard, the operator of the end loader. Since Maynard did report the cracked windshield at

the beginning of his shift to the supervisor, and since it cannot be determined for certain whether that would have been sufficient to have brought about the replacement of the windshield during the day shift, I can hardly find on the evidence that respondent was negligent in not having replaced the windshield before it was cited by the inspector.

The reason for the foregoing conclusion is that the citation was issued on a midnight-to-8:00 a.m. shift and the Company relies on an independent contractor to replace windshields. As it turned out, the windshield, in this instance, was replaced within 3 or 4 hours after it was cited by the inspector. There's no evidence in the record to show, for a certainty, that it might not have been replaced even if the inspector had not written a citation about it. In any event, there was a very low degree of negligence so that I think the most that I should assess under that criterion would be $10.

The sixth criterion is gravity, or seriousness. As to that criterion, there is little persuasive evidence because most of the testimony as to gravity is based on speculation. The inspector did get into the cab of the end loader and did look through the place where the windshield wiper traverses the windshield. It was the inspector's opinion that his vision was slightly reduced by the five cracks across the windshield, but the inspector said that there was no discoloration around the cracks, there was no accumulation of dirt in the cracks, and his most adverse statement about the cracks was that there might have been some refraction of light from the cracks at certain times of the day or night. Therefore, the evidence as to impairment of one's ability to see through the windshield ranges from the inspector's belief that his vision would have been slightly reduced by the cracks to the equipment operator's belief that his vision was not affected at all by the cracks.

In evaluating the gravity of the cracked windshield, there is a second factor to be considered, namely, the inspector's belief that the cracks in the windshield weakened the windshield structurally so that an additional rock or other object that might have flown against the windshield at a subsequent time would necessarily have exposed the operator to an additional hazard because some flying glass might come off a windshield which had already been weakened by cracks as compared to a new windshield, or a windshield which has no cracks in it. On structural weakening, I think that the inspector's conclusion is supported by the record because his testimony shows that there were 14 cracks in the windshield, some of which extended all the way across the windshield, and there were five in the area

where the windshield wiper traversed the windshield. So, there would have to have been a weakening of a windshield which

has that many cracks in it. Consequently, I find that the violation was moderately serious and that a penalty of $30 should be assessed under the criterion of gravity.

On the basis of the foregoing discussion, $20 should be attributed to history of previous violations, $10 should be assessed under negligence, and $30 should be assigned under gravity, for a total of $60. As I indicated previously, since there was very rapid abatement of the violation in this instance with the windshield being replaced so quickly that the day shift could go ahead and use the end loader on the next shift, I believe that the penalty already assessed should be reduced by half. Therefore, the penalty should be $30.00 in this instance for the violation of section 77.1605(a) alleged in Citation No. 731280.

Citation No. 951482 (Exhibit 4), October 6, 1980, 77.1605(a)

The findings of fact with respect to Citation No. 951482 alleging a violation of section 77.1605(a) are given below.

1. During the same inspection on which the inspector wrote the citation considered above, the inspector also examined another Caterpillar 992C loader, having Company No. 313, and the inspector also cited that Caterpillar loader for a violation of section 77.1605(a). His citation, in this instance, states that the cab's windshield was not in good condition because approximately seven cracks were present in the windshield.

2. When the inspector started testifying in detail about the seven cracks in the windshield of loader No. 313, he was unable to be nearly as explicit as he had been when he described the cracks in the windshield of loader No. 309. He was sure only of the fact that he had counted seven cracks in the windshield. He thought that the cracks were caused by an object falling off the bucket of the end loader and hitting the right side of the windshield, thereby causing seven cracks in the windshield. The inspector was not sure whether those seven cracks were in the area traversed by the windshield wiper blades, although he concluded that if one looked through the windshield, those seven cracks would be in his line of vision, or at least some of them would be. He emphasized, in connection with the seven cracks, the fact that end loader No. 313 was being used in an area where there were several lights which were strong and which, upon hitting the windshield at various angles, might cause light refractions which could distort vision through the windshield. But even as to that allegation or conclusion the inspector was not sure what hazard the

seven cracks would cause, because he only looked through the windshield while the end loader was stationary. In that single position, no light refractions showed on the windshield.

3. The operator of loader No. 313 was Chester Lacey. Lacey had worked for Martiki for about 5-1/2 years, but he'd been operating heavy equipment for many years longer than that. It was his opinion that the crack in the windshield did not cause any problem in his being able to see through the windshield. His description of the crack was completely different from that of the inspector. He testified that the only crack in the windshield was a half moon crack about 10 inches long in the lower left corner of the windshield. It was his testimony that the half moon crack did not extend up from the windshield's bottom for more than 4 inches. As he described the area traversed by the windshield wiper blades the windshield wiper would not have come closer to the top of the windshield than 6 inches or closer to the bottom of the windshield than 6 inches. Since the crack extended up from the bottom 4 inches, the crack did not come within the area traversed by the windshield wiper blades.

4. Lacey emphasized that the crack was so low in the windshield that he would not normally look through that portion of the windshield to do anything, because if he were loading the bucket he would look, approximately, through the center of the windshield. When he loaded a truck, or dumped materials out of the bucket into a truck, which are very large trucks, he would be looking only through the top of the windshield. Lacey also testified that although he had seen the crack in the windshield at the time he began his shift, that he is a type of operator who is known as a general mine utility person, who can operate practically any equipment at the mine, except the drag line. Therefore, he said that he had only about 10 minutes to inspect this piece of equipment. By the time he had finished inspecting it, the lead supervisor, Bill Houser, had already left. The only way he then had for reporting the crack to Houser would have been to have had a truck driver report it over the truck's radio. Since Lacey wanted to get busy operating the end loader, he did not orally report this particular crack in the windshield because his supervisor had already left and because he didn't think it was very serious, and he was confident it would not obstruct his vision.

5. Insofar as the crack in the windshield of loader No. 313 is concerned, Houser testified that he hadn't received any report about the windshield in this instance, but that when the inspector cited the violation he, of course, had the windshield replaced. The significant part of Houser's testimony was that if he personally had seen a half moon crack in the bottom of the windshield, 10 inches long, he would have had the windshield replaced. It was also his testimony that the Company does have a practice of checking windshields on its own initiative and when it does find

one that's excessively scratched, or in need of replacement, the Company does so on a regular and routine basis.

Those are the findings of fact which are significant with respect to the windshield cracks in end loader No. 313.

Respondent's counsel also made a motion to dismiss, with respect to Citation No. 951482. He stressed the same factors in his motion with respect to the instant citation as he did with respect to Citation No. 731280, except that he emphasized that there was even less reason to find that this windshield was not in good condition than there was with respect to the preceding alleged violation. He emphasized, correctly, that when Lacey was testifying about the cracked windshield in loader No. 313, he stated that he had the citation read to him, or showed to him by the Company's safety supervisor the next day or so after it had occurred. Lacey said that when he read the inspector's description of the windshield on his loader No. 313, he thought the inspector had made a mistake and had described the wrong windshield for his loader No. 313 because the inspector's description of seven cracks in the windshield did not coincide or track with his recollection of the crack in any way at all. Therefore, respondent's counsel emphasizes that there was not enough wrong with this particular windshield to justify a conclusion that the windshield was in other than the good condition required by section 77.1605(a).

Counsel for the Secretary of Labor and MSHA opposes the motion to dismiss and he emphasized that Lacey, the operator of the end loader, did acknowledge and did know that there was a crack in the windshield that was 10 inches long and that a crack in a windshield is sufficient to show a lack of the required good condition.

This particular citation has given me a great deal of concern because I am somewhat in agreement with respondent's counsel that there must be some minor thing that can be wrong with a windshield and still be considered in good condition. I believe it was the operator of the previous vehicle, No. 309, who stated that if a windshield didn't have anything at all wrong with it, he'd consider it to be in excellent condition, and if it had a few cracks in it, he'd still consider it to be in good condition. I think that that's pretty much what respondent's counsel feels about the meaning of the phrase " good condition".

I'm inclined to want to agree with him, except that I cannot get it out of my mind that if a crack in a windshield is not reported and the windshield is not replaced at the time the crack is first observed, I don't know whether it would get replaced at all until it really does become a serious hazard. At the time the windshield was cited, the question of safety was

not as pronounced a consideration as it would have been, for example, if the inspector had alleged that a violation of section 77.1606(a) had occurred. In that section, there's a reference to equipment defects affecting safety which should be reported to the mine operator. I would assume

that if the crack in the windshield had been very severe that the inspector might have gone so far as to cite it as a defect affecting safety, but he didn't go that far. Instead, he said that the windshield was not in good condition.

I believe that the phrase "good condition" will have to be rather liberally construed in order to do what the Act was intended to do, that is, make certain that a piece of equipment is safe and that there won't be anything about the equipment that will result in a possible injury just because a given operator doesn't see very well in a moment of using the equipment in a certain position. For example, even though Lacey, the operator of end loader No. 313, stated that the crack didn't cause him any problem at night, and that he didn't think there was enough reflection of artificial light to cause a problem, he felt that in the daytime you might get a rainbow effect, as he called it, which might cause an obstruction in vision, or a probability that you would not see as well through the windshield as you would like to see.

Since Houser, the supervisor, indicated that he would have had the windshield replaced if he had seen the same crack on his own, it looks to me as if I shall have to find, on the evidence as a whole, that even if I ignore the inspector's testimony that there were seven cracks in the windshield and I accept only Lacey's testimony that there was one half-moon crack, 10 inches long, that I would still have to find that this was a windshield that was not in good condition. Houser's testimony shows that he would have replaced this particular windshield if he had seen it. I think that also shows that he would find it not to be in good condition or he would not replace it.

I recognize that on redirect examination, counsel for respondent asked Houser if he would rely on the equipment operator's opinion if the equipment operator thought that a windshield was in good condition. Houser said he would have, and that he thought Lacey's opinion was based on sound experience and discretion. The fact remains that Houser had already given his opinion that a windshield with a 10-inch crack should be replaced before he was asked that question. Since the testimony as a whole supports a finding that the windshield was not in good condition, I find that there was a violation of section 77.1605(a) with respect to end loader No. 313.

Having found a violation, it's necessary for me to assess a penalty. Some of the six criteria have already been considered above and it is unnecessary for me to repeat those details, other than to observe that it has already been found that respondent is a large

operator, that payment of penalties will not cause it to discontinue in business, and that the violation was rapidly abated.

I have already found that there has been one prior violation of section 77.1605(a). It is true that the violation I am now considering is a third violation and one could find that there are two previous violations, but I believe that the Act means what it says when it refers to "previous" violations. I don't think that two violations found by the inspector within a few minutes of each other can be considered a "history" because the operator has no opportunity to benefit from having been told twice within a 30-minute period that a certain condition constitutes a violation of a mandatory health or safety standard. There was simply not enough time between the citations for management to take any action that would keep the second violation from happening, based on the fact that a previous one had been cited a few minutes prior to that. Therefore, I shall make the same conclusion here with respect to history of previous violations that I did before, namely, that $20 should be assessed under the criterion of history of previous violations.

In this instance, there probably is a slightly higher degree of negligence because the operator of loader No. 313 was not as careful and prudent in reporting this particular crack as the operator of loader No. 309 had been. Of course, one must take into consideration that the crack in the windshield in loader No. 313 was less noticeable than the crack in the windshield in No. 309. The inspector had more difficulty in describing the extent of the crack in No. 313 and the operator of No. 313 found the crack to be so insignificant that it almost merited no reporting of it at all. Still the operator said he would have reported it if he'd had a radio in the vehicle to use for that purpose. The fact that the operator did not report it has to be considered slightly more negligent than the other one which was reported. Consequently, I think that a penalty of $30.00 should be assessed under the criterion of negligence in this instance.

As to the criterion of gravity, this violation of section 77.1605(a) was not as serious as the previous one because the inspector agreed that these cracks were much less significant. He saw no light refractions when he looked through the windshield, and since he was in some doubt about the exact location of the cracks, I can hardly find from his testimony that a person's vision would have been distorted by the cracks. While the inspector felt that the windshield had been weakened by the cracks, the fact remains that seven cracks would have weakened this windshield less than 14 cracks weakened the other windshield. The foregoing conclusions assume that an ordinary layman can make such conclusions based on the evidence that I have. Of course, the testimony of the operator of loader No. 313 is that there was only one small crack at the lower

corner of the windshield. Consequently, I can only find that this violation was less serious than the other one, bordering on a finding that it was nonserious. Based on the discussion above, I find that a penalty of $10 should be assessed under the criterion of gravity.

Since the windshield here involved was replaced with the same promptness that characterized replacement of the other one, I find that the criterion of rapid abatement should be given a great deal of weight. Therefore, the penalty of $60 which would otherwise be assessed under the criteria of history of previous violations, negligence, and gravity will be reduced by 50 percent to $30.00.

Settlement Agreement

As explained in the introductory part of this decision, the parties agreed to a settlement with respect to the other three violations alleged in Docket No. KENT 81-77. The findings with respect to the contested violations are also applicable to the settlement agreement insofar as three of the six criteria are concerned. It has already been stipulated that the operator is a large operator, that payment of penalties will not cause it to discontinue in business, and that the violations were rapidly abated.

Counsel for the Secretary placed into the record this morning the basis for the settlement insofar as the remaining three criteria are concerned. The first violation was alleged in Citation No. 950537 stating that a white Chevrolet explosives truck loaded with various explosive materials was not securely blocked or braked so as to prevent the truck from rolling, as required by section 77.1302(j). It is said that the violation was accompanied by ordinary negligence because the foreman knew about the truck's condition and had not taken steps to secure it thoroughly. It is also said that the violation is accompanied by moderate seriousness because there was a possibility that the truck could have rolled away from its parking place and might have caused a hazard to anyone who might have been in the area.

The Assessment Office evaluated the criteria of negligence and gravity in about the same way that it was described on the record by the Secretary's counsel. Exhibit 1 in this proceeding doesn't show that there's been a previous violation of section 77.1302(j). Consequently, I find that the penalty of $130 proposed by the Assessment Office was derived under the six criteria in an acceptable manner and that respondent's agreement to pay the proposed penalty in full should be approved.

The next citation involved in the settlement agreement is No. 950538, which alleges a violation of section 77.1302(f) because the explosives truck, the same one that was involved in the previous alleged violation, was found loaded with explosives, detonators, and detonating cord which had been left on the truck during a previous working shift. The inspector concluded that

the materials were left in the truck by personnel working on the previous shift because the types of detonators and explosives left on the truck were the types used on the previous shift, but were not the kinds used on the shift during which he made his inspection which

was the midnight-to-8:00-a.m. shift. The inspector considered that the violation was associated with ordinary negligence because the supervisor knew about the explosives on the truck.

The violation was moderately serious because the truck was being used for transportation of personnel. Consequently, the Assessment Office found that the violation was moderately serious and proposed a penalty of $122. I find that to be an appropriate penalty and that the settlement agreement should be approved with respect to the alleged violation of section 77.1302(f). I should emphasize that all of the violations in this proceeding were rapidly abated so that the penalties otherwise assessible under the six criteria have been appropriately reduced to a lower amount than they would have been if the operator had not shown rapid abatement.

Finally, the settlement agreement deals with a Citation No. 951485 which alleged that a violation of section 77.1110 had occurred, in that the fire extinguisher on Caterpillar Dozer No. 429 had been discharged and had not been recharged with the appropriate chemicals and, therefore, was not in an operable condition. Counsel for the Secretary stated that there was ordinary negligence involved in this violation because an examination of the fire extinguisher would have disclosed that it had been discharged and wouldn't operate. He indicated that the violation was only slightly serious because the dozer was located in an area which is above ground where the possibility of fire is not associated with the hazards which exist in an underground mine where coal dust or methane can be ignited by any fire that does start.

The Assessment Office took into consideration that this violation was not as serious as the other ones mentioned above and proposed a penalty of $78. In view of the operator's rapid abatement, I believe that that penalty was also appropriately derived by the Assessment Office. Therefore, the motion for approval of settlement will be granted and the settlement agreement will be approved.

DOCKET NO. KENT 81-78

Citation No. 951770 (Exhibit 6), October 7, 1980, 77.1005(a)

When Inspector R. C. Hatter was at Martiki Coal Corporation's surface mine on October 7, 1980, he wrote a citation alleging a violation of section 77.1005(a). The findings of fact, which should be made in connection with whether a violation was shown to exist, will be set forth below in enumerated paragraphs.

1. The conditions which the inspector described in connection with Citation No. 951770 began with an observation that the lowest bench on a highwall was about 40 feet high. The inspector believed that there were loose materials along the top of the bench in the

form of sandstone and rocks, ranging in size from a fist to a hard hat. The inspector first noticed what he thought were hazardous conditions when he was looking at the bench from the pit area beneath it. In order to get a better view of the materials, the inspector went to the top of the bench and walked along the top of the bench. The area traversed by the inspector is shown in three different pictures, which have been identified and admitted in evidence as Exhibits A, B, and C. In each of those pictures, a hump is shown in the top of the bench, about halfway across the bench, and approximately midway in each of the pictures. The inspector walked all the way across the top of the highwall to the hump, and then stood on the hump and looked at the remaining part of the top of the bench. At one place, about a quarter of the way across the bench, the inspector lowered himself to the ground and, using his foot, eased off of the highwall one sandstone about the size of a hard hat. He examined the place where the stone landed in the pit area beneath the bench, and found that that place was about 10 or 12 feet from the base of the bench, and that the rock had broken up somewhat, but not completely.

2. The inspector decided that there had been a violation of section 77.1005(a) which provides as follows: "[h]azardous areas shall be scaled before any other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work."

3. The inspector was advised that work had been done in the pit area for about 2 days, and he felt that the failure to scale the materials along the edge of the top of the bench was an obvious condition that was hazardous and should have been scaled further, before work was done in the pit area. Therefore, he initially wrote Citation No. 951770 as an unwarrantable-failure citation.

4. The Company's Safety Director, Donald McConnell, was of the opinion that no violation had occurred and that it was certainly improper for the citation to have been written as an unwarrantable-failure citation. McConnell asked Inspector Hatter's supervisors to come to the mine and make an inspection of the area described in Citation No. 951770. In response to that request, the Sub-District Manager, Bill Coleman, and a Surface Supervisor named Webb, came to the mine and made an examination of the top of the bench involved. It was their opinion that Inspector Hatter should not have written the citation as an unwarrantable-failure citation. The inspector thereafter modified the citation to show that it had been issued under section

104(a). Therefore, we are here concerned with a citation written under section 104(a), rather than 104(d)(1).

5. Inspector Hatter was of the opinion that the highwall in general, which was about 200 feet high, and which had four or five benches above the lowest one here involved, had been well constructed and did not have hazardous materials on them. But he still felt that the lowest one, shown in Exhibits A, B, and C, was a hazardous condition, at the time he observed it.

6. The inspector was of the opinion that the additional loose material that he was concerned about could have been removed by use of a cherry picker or by using a crane of some sort to drag a piece of dozer track along the top of the bench. Apparently, the Company did not agree that that was a safe way to deal with the situation and, therefore, the inspector and the Company compromised on abatement, whereby a berm was constructed at the base of the highwall, at a distance of about 20 feet from the highwall, and for the entire length of the bench, so that equipment could not get any closer to the bench than about 15 or 20 feet.

7. The Company abated the condition very rapidly, succeeding in putting the berm entirely across the base of the bench by the end of the shift on which the citation was written.

8. Four witnesses appeared in this proceeding on behalf of respondent. The first one was James David Lewis, who was the lead foreman during the production phase. He agreed that there were some rocks along the feathered edge, but he did not get up on top of the bench to check whether there were any fissures or cracks in the top of the bench. He also agreed that the materials at the top of the bench were composed of sandstone and slate, and that slate deteriorates more rapidly than sandstone. But it was his opinion that the materials at the top of the bench did not constitute a hazardous area. He emphasized that the end loaders, which worked at the bottom of the pit, in loading coal and cleaning off the coal, were equipped with heavy tops which were adequate for not only roll-over protection, but also to protect the operator from any falling materials.

9. The next witness who testified on behalf of the Company was Ralph Hodson, who was also a lead supervisor. He had made an inspection of the bench before work was begun on October 7. It was his opinion that no hazardous conditions existed along the top of the highwall. He was familiar with the fact that there was loose material on the feathered edge, but he believed that the top of the bench had been constructed in a safe way, by having a bulldozer scrape it first, and following up with a shovel. He had been a shovel

operator prior to becoming a lead supervisor, and he believed that the few rocks and loose materials that were left were not hazardous. He believed that proper techniques had been used to construct the bench. He emphasized that the bench, at its top, was not wide enough, after the shovel operation, to permit a dozer to go back and clean it again. In other words, it would have been unsafe to have done so.

10. The third witness who testified on behalf of respondent was Robert Dixon, who was Assistant Safety Director at the time the citation involved was written. He had been with Inspector Hatter when the inspection first began. He had been down in the pit area when the inspector advised Dixon that the inspector believed that the top of the bench was hazardous. While Dixon did not agree with the inspector, it was his duty to stay with the inspector and, therefore, he accompanied the inspector to the top of the bench, and he walked part of the way across the top of the bench with the inspector. He saw the inspector push the hard-hat-sized rock off the top, and noted that it landed about, in his opinion, 8 feet out from the bottom of the bench. He saw only one crack in the top of the bench, which he said was parallel with the bench above the lowest one which is involved in this case. Dixon had also made an inspection of the bench area before the inspector made his examination, and he, like the other two witnesses, whose testimony has been described above, felt that there was nothing hazardous about the bench which is under consideration here.

11. The fourth witness who appeared on behalf of respondent was Donald McConnell who, on October 7, 1980, was the Director of Health and Safety, but who no longer works for the Company, having left on January 28, 1982. It was his testimony that he also inspected the bench on October 7, 1980. He, like the three witnesses whose testimony have been described above, agreed with them that there were no hazardous conditions existing on October 7. McConnell was called back to the pit area when Dixon advised him that the inspector was of the opinion that a citation should be written about the bench.

12. McConnell had participated in the construction of the entire 200-foot highwall and he was particularly concerned about the construction of a highwall and benches which would be free of any kind of hazards. It was his opinion that no hazardous conditions existed. He believed that the feathered edge was a necessary aspect of the lowest bench, because he knew that the top of the bench consisted of slate and materials that would have a tendency to be loose. He believed that by using the dozer in advance of the shovel to feather the edge, any loose material would remain at the top of the bench and, if they did fall, they would fall directly below, without any hazard to people below, because of the small consistency of the materials. He also believed that the equipment that the Company used was sufficiently protective in the way it was designed to prevent any injuries to anyone who might be working in the pit at the time any loose material might come down.

I believe those are the primary findings that should be

made in this proceeding with respect to the alleged violation of section 77.1005(a).

Respondent's counsel has stressed the fact that, while there mayhave been some loose material at the top of the bench, that the construction of the bench was of such a nature that it could not be considered to constitute a hazardous condition.

The Secretary's counsel has emphasized that respondent has placed undue emphasis on the type of equipment used by the Company, in that the Company seems to be of the opinion that its equipment is so well made and so adapted to the kind of operation involved, that no hazard exists when work is being done below the bench here involved.

The crucial aspect of proof of the violation lies in the first sentence of section 77.1005(a), and that is that I must first start off with a finding that a hazardous area existed, because the sentence reads "[h]azardous areas shall be scaled before any other work is performed in the hazardous area." The question of whether there was a hazardous area is an extremely difficult determination to make, based on the evidence that exists in this case. It is particularly difficult, because I have the testimony of four witnesses working for the Company, and I only have the testimony of one inspector. It is his position that it was a hazardous area and it is their position that it was not a hazardous area.

If the inspector had simply cited the operator for having loose material along the top of the bench, I suppose even the Company's witnesses would have to concede that that was true, because all of the witnesses agreed that there was some loose material at the top of the bench. The difference in interpretation is whether that loose material would fall and, if it did, whether the danger is so obvious and so great that I should label the bench area as hazardous.
I don't really have a difference in facts here. I have four Company witnesses and one inspector, all of whom agree that there was a feathered edge at the top of the lowest bench, and they all agree that there was some loose material in that feathered edge. The difference in interpretation is the question which is before me for decision.

The inspector examined the same physical features of the bench which were scrutinized by the Company's four witnesses and he concluded that the area was hazardous, while the other four men looked at the same conditions and concluded that the area was not hazardous. To the inspector's credit, of course, must be noted the fact that he is the only one of the witnesses who walked along the top of the bench over to the hump in the middle of the bench as shown in Exhibits A, B, and C. Dixon is the only witness who was on top of the bench

with the inspector and Dixon is the only Company witness who was in a position to say whether there were or were not cracks or fissures in the top of the bench. Dixon agreed that there

was one crack in the top of the bench in the distance that he walked, which was anywhere from a quarter of the way to the hump, to half of the way. The inspector said there were other fissures in the top of the bench, between the place where Dixon stopped walking and the hump where the inspector stopped walking.

I would be inclined to agree with the four men, who reached the conclusion that the loose material at the top of the bench was not a hazardous condition, if it were not for the fact that I've read several Commission decisions in which people have been killed from having been at the bottom of a highwall when there were materials that fell off the highwall. In one of those cases, Consolidation Coal Company, 2 FMSHRC 3 (1980), an assistant superintendent and a foreman-trainee were working at the bottom of a highwall when a landslide occurred and killed the foreman-trainee.

I believe that I should interpret the mandatory safety standards in the fashion which will bring about maximum safety for the miners. I find that the preponderance of the evidence in this case shows that there were loose materials at the top of the bench and that there was a possibility that these materials could fall below. The fact that those materials existed for 400 feet along the top of the highwall supports a finding that there was a hazardous area here.

The cracked windshield in the end loaders involved in the violations previously considered in this decision were in the same type of end loader which was being operated below the bench involved in this case, that is Caterpillar 992C end loaders. In each of the prior cases, the windshields had been cracked by the fall of a piece of material from the bucket down to the windshield, which would only have been a distance of from 15 to 20 feet. Now, if a rock falling off a bucket can crack a windshield, then it seems to me that a rock falling from the top of a bench, a distance of 40 feet, is certainly capable of going clear through a windshield and causing an injury to the person operating an end loader.

So, even though respondent does have instructions to its employees not to get out of equipment near a highwall, and if they do get out of it, to exit on the outby side of the equipment, so that they'll be protected from any falls from the highwall by the equipment itself, the fact remains that there is a possibility of injury from anything falling off of the highwall. I cannot find that the inspector was incorrect in concluding that a hazardous area existed. Therefore, I find that a violation of section 77.1005(a) was proven.

Having found a violation, it's necessary that a civil

penalty be assessed. The Secretary's counsel, in his concluding argument, asked that a large penalty be assessed if I affirmed the citation.

The reason that he made that request is that I had pointed out, in some questions of McConnell, that people who work with a given condition, such as the construction of the highwall, might get complacent, or so used to seeing a certain condition, that they might fail to recognize its possible hazards. The purpose of civil penalties, of course, is to deter operators from violating a given section of the regulations. A large civil penalty, theoretically, has a better chance of keeping a person from forgetting that a violation occurred than a small penalty would. A large civil penalty, however, should be assessed only when a large penalty has been shown to be required after proper consideration of the six criteria set forth in section 110(i) of the Act.

As I pointed out in the previous portion of this decision in Docket No. KENT 81-77, some of the six criteria have already been the subject of a stipulation which is applicable to all the alleged violations. It has already been stipulated that the Company is a large operator, and that payment of penalties would not cause it to discontinue in business.
Exhibit 1 deals with the criterion of history of previous violations. And that exhibit shows that there's been one previous violation of section 77.1005(a) in the last 24-month period. I believe that that is about as minimal a history of previous violations as a company could have. Consequently, I shall assess a penalty of $20 under the criterion of history of previous violations.

The remaining three criteria are a good-faith effort to achieve compliance, negligence, and gravity. As to the negligence involved, I can find only a low degree of negligence, because all four supervisors involved in this case had inspected the highwall, or lower bench, before work was done that day, and all of them appear to be sincere and credible witnesses who did not feel that the material at the top of the bench constituted a hazardous area. Since I have had a lot of problems with being certain that it was a hazardous area, I certainly cannot fault them for having some doubts about it. Therefore, I shall only assess a penalty of $10 under negligence, because I feel there is a very low degree of negligence.

Insofar as gravity is concerned, there doesn't seem to be any doubt but that there was a possibility of a serious accident if some of this material at the top of the bench should have fallen and gone through a windshield or a side glass and hit an operator of an end loader. The inspector testified, and it was generally agreed, that an end loader, at the time the inspector first examined the bench, was working within a few feet of the bench, and the operator of the

equipment would have been, according to all the witnesses, within 12 to 15 feet of the bench. That would have been within the range of a rock that might have fallen from the bench. So I would have to find that it was a serious violation. At the same time, as I've

pointed out above, there does not seem to have been a strong likelihood that an injury would have occurred even if a berm had not been constructed for abatement of the citation. Consequently, under the criterion of gravity, I believe that a penalty of $100 is warranted.

It has been stipulated that the Company made a rapid good-faith effort to achieve compliance. The stipulation is supported by the testimony because the Company immediately started constructing the required 400-foot berm and had it completed before the inspector left the premises, or so nearly completed, that the inspector terminated the citation. As I have already pointed out in the preceding part of this decision, the criterion of rapid abatement has been used by the Assessment Office and by me as a reason for reducing a penalty reached under the other five criteria. In the discussion of the other criteria above, I have derived a penalty of $130 under the other criteria. I believe, as I indicated in assessing penalties for the violations of section 77.1605(a), that the amount of the penalty should be reduced by 50 percent under the criterion of rapid abatement. Therefore, a penalty of $65 will be assessed for the violation of section 77.1005(a) alleged in Citation No. 951770.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement with respect to three of the violations alleged in Docket No. KENT 81-77 is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, Martiki Coal Corporation shall, within 30 days from the date of this decision, pay penalties totaling $330.00 which are allocated to the respective violations as follows:

Docket No. KENT 81-77

Citation No. 950537	10/6/80	77.1302(j)	$ 130.00
Citation No. 950538	10/6/80	77.1302(f)	122.00
Citation No. 951485	10/6/80	77.1110	78.00
Total Settlement Penalties in This Proceeding			$ 330.00

(C) Within 30 days from the date of this decision, Martiki Coal Corporation shall pay civil penalties totaling $125.00 with respect to the violations which were contested. Those civil penalties are allocated to the respective violations as follows:

Docket No. KENT 81-77

Citation No. 731280	10/6/80	77.1605(a)	$ 30.00
Citation No. 751482	10/6/80	77.1605(a)	30.00
Total Contested Penalties in Docket No. KENT 81-77			$ 60.00

Docket No. KENT 81-78

Citation No. 951770 10/7/80	77.1005(a)	$	65.00
Total Penalties Assessed in Docket No. KENT 81-78		$	65.00

Total Contested Penalties Assessed in This Proceeding $ 125.00
Total Settled and Contested Penalties in This Proceeding $ 455.00

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