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SOL (MSHA) V. DAVIS COAL
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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
v.
DAVIS COAL COMPANY,
RESPONDENT

Civil Penalty Proceedings

- Docket No. WEVA 80-565
- Docket No. WEVA 81-106
- Docket No. WEVA 81-249
- Docket No. WEVA 81-377
- Docket No. WEVA 81-429
- Docket No. WEVA 81-449
- Docket No. WEVA 81-457
- Docket No. WEVA 81-458
- Docket No. WEVA 81-459
- Docket No. WEVA 81-460
- Docket No. WEVA 81-461
- Docket No. WEVA 81-462
- Docket No. WEVA 81-504
- Docket No. WEVA 81-505
- Docket No. WEVA 81-506
- Docket No. WEVA 81-600
- Docket No. WEVA 81-601
- Docket No. WEVA 82-25
- Docket No. WEVA 82-24

Marie No. 1 Mine

DECISIONS

Appearances: Covette Rooney, Attorney, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the petitioner Paul E. Pinson,
Esquire, Williamson, West Virginia, for the respondent

Before: Judge Koutras

Statement of the Proceedings

These consolidated dockets concern petitions for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking penalty assessments for a total of 176 alleged violations of certain mandatory safety and health standards promulgated pursuant to the Act.

Respondent filed answers and contests to the civil penalty proposals, and pursuant to an agreement by the parties, all of the dockets were consolidated for hearing in Charleston, West Virginia, during the term

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May 18-19, 1982. The parties were afforded a full opportunity to present oral arguments concerning their respective positions, and they waived the filing of any posthearing briefs and/or proposed findings and conclusions.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for each alleged violation based upon the criteria set forth in section 110(i) of the Act. In these proceedings, the crucial question presented is whether or not the assessment of civil penalties against the respondent for the violations in question will have an adverse impact on its ability to remain in business.

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the Marie No. 1 Mine and both are subject to the provisions of the Act.
2. The Administrative Law Judge has jurisdiction to hear and decide these dockets pursuant to the Act.
3. All of the citations issued to the respondent in these consolidated dockets, including any terminations, abatements, or modifications, were properly served on the respondent by duly authorized representatives of the petitioner, and all copies of the citations in question in these proceedings which are attached to and made a part of the proposals for assessment of civil

penalties are authentic copies of the original
citations duly served on the respondent or its agents.

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4. The respondent is a small coal mine operator producing 87,251 production tons of coal annually, when the Marie No. 1 Mine is operating.

5. The Marie No. 1 Mine is not currently producing coal.

Except for three dockets in which testimony was taken concerning the fact of violations, the parties stipulated as to the fact of violations in the remaining cases. They also stipulated as to the civil penalty criteria found in section 110(i) of the Act as to each of the violations, and these stipulations are discussed at the appropriate places indicated in these decisions. In addition, the parties are in agreement that none of the citations which were issued in these proceedings concern fatalities, injuries, or accidents involving miners or equipment.

Findings and Conclusions

Docket No. WEVA 80-565

Fact of Violations

This docket concerns 14 violations served on the respondent in December 1979, and March 1980. Two were issued for failure to properly insulate power cables; two for failure to guard a belt conveyor; four for failure to record results of weekly electrical examinations; and the remaining ones for miscellaneous infractions concerning ventilation, an inoperative methane monitor, and failure to designate stationary equipment on a mine map. The parties stipulated that all of the violations occurred, and they are all AFFIRMED.

Gravity

The record establishes that the gravity and probability of harm occurring as a result of all of the citations, with the exception of Citations 677862, 677863, 673591, 673592, ranged from low to moderate. As for the four citations noted, the parties stipulated that they were all serious infractions.

Negligence

The record reflects that all of the citations, except for 677861, resulted from the respondent's failure to exercise reasonable care, and that all of these violations constitute ordinary negligence. With regard to Citation No. 677861, the parties have stipulated that the negligence was low because previous inspections had not revealed any problems with the inoperative methane monitor which was cited.

Good faith compliance

The record reflects that the respondent demonstrated extraordinary good faith compliance concerning Citations 677798,

677799, 677861, 677862, and 677863 in that correction and abatement of the cited conditions was

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achieved immediately. As for the remaining citations, the respondent achieved compliance by abating the conditions within the time fixed by the inspectors.

History of prior violations

For purposes of this docket, the parties stipulated that respondent has no history of prior violations of section 75.313, 75.300-4(a), 77.508, or 77.502-2. One prior violation of sections 75.517, 75.703, and 77.800-2 are noted; as well as five prior citations of 75.1722, eight for violations of 75.1722, four for violations of section 75.200, and two for section 75.512.

Docket No. WEVA 81-106

Fact of Violations

This docket concerns 16 citations served on the respondent during April and May 1980. Three were issued for failure to keep records of examinations made in the mine; two were for improper fittings on power cables; three concerned permissibility violations on mining equipment; two were guarding violations for failure to guard machine parts; two were for failure to provide adequate fire suppression devices on a shuttle car and roof bolter; and the remaining ones were for miscellaneous electrical violations. The parties stipulated that the violations occurred, and all of the citations are AFFIRMED.

Gravity

None of the violations were deemed to be serious. The gravity and probability of harm occurring with respect to all of the citations ranged from medium to low, and citations 910981, 910982, and 910983 were deemed to be technical recordkeeping infractions.

Negligence

All of the citations with the exception of six, resulted from the respondent's failure to exercise reasonable care. Citations 910981, 910984, 910986, 910990, 910992, and 910994 all constituted low degrees of negligence in that some of the cited conditions were not readily apparent or occurred through inadvertence. In any event, all of the citations in question resulted from ordinary negligence by the respondent.

Good faith compliance

With regard to Citations 910989, 910990, 910992, the record establishes that respondent exhibited extraordinary compliance in that the cited conditions were immediately corrected and abated. As for the remaining citations, respondent exhibited good faith compliance by promptly correcting the conditions.

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History of prior violations

For purposes of this docket, the parties stipulated that the respondent had no prior violations of section 75.305, 75.1722(a), and 75.605; 11 prior citations of section 75.400; six for section 75.303; five for section 75.515; three for section 75.701; seven for section 75.503; four for section 75.604; and one citation of 75.1107.

Docket No. WEVA 81-249

Fact of violations

Two of the citations were issued for accumulations of coal dust and small amounts of oil on equipment, one was for failure to follow the ventilation plan in that 8 permanent stoppings needed repairs, one for failure to guard a belt drive, one for an inadequate methane monitor on a continuous mining machine, and one for failure to adequately rock dust the roof. The citations are all AFFIRMED.

Gravity

The gravity and the probability of harm occurring as a result of all of the citations ranged from very low to moderate. The repairs needed for the stoppings were minor, the mining machine was permissible, was not overheated, and was equipped with operative fire fighting equipment, the mine floor was rock dusted, no methane was detected in the mine, and no ignition sources were present in the areas where the accumulations were observed.

Negligence

Citations 910319, 911658, 911659, and 911660 all resulted from a low degree of negligence on the part of the respondent in that the conditions cited were either beyond the control of the respondent or were not readily detectable. The remaining citations resulted from ordinary negligence.

Good faith compliance

Respondent demonstrated extraordinary good faith in abating the accumulations citation by immediately stopping production until the condition was corrected, and immediately repairing the continuous mining machine methane monitor. The remaining citations were abated within the time fixed by the inspector.

History of prior violations

Respondent has a history of eight prior violations of sections 75.316, and 75.400, and no history of prior citation of the other sections cited in this docket.

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Docket No. WEVA 81-377

Fact of Violations

All four of these citations resulted from the failure by the respondent to submit required respirable dust samples for certain areas of the mine. They are all AFFIRMED.

Gravity

The gravity and probability of harm occurring as a result of all of the violations described in the Citations were low in that failure to submit the samples of the areas for the bi-monthly periods, would not per se be likely to lead to harm to an employee.

Negligence

All of the citations constituted ordinary negligence in that the respondent failed to exercise reasonable care in insuring that the required samples were submitted.

Good faith compliance

The respondent was unable to abate the violations since the bi-monthly sampling period had passed. Accordingly, no abatement was required.

History of prior violations

The respondent has a history of one violation for 30 C.F.R. 70.207(a).

Docket No. WEVA 81-429

Fact of Violation

The violation issued after the inspector observed scaling of the roof in a portion of the track area of the mine. The citation is AFFIRMED.

Gravity

The gravity and the probability of any harm resulting from the cited condition were moderate.

Negligence

The violation resulted from a low degree of negligence in that the deterioration observed by the inspector cannot be controlled by the operator.

Good faith compliance

The respondent demonstrated ordinary good faith compliance by correcting the condition within the time specified by the

inspector.

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History of prior violations

Respondent has no history of prior violations of section 75.205.

Docket No. WEVA 81-449

Fact of Violations

One citation concerns the failure by the respondent to maintain a roof bolter in permissible condition. The remaining four were issued because the respondent failed to submit respirable dust samples for certain designated sampling cycles. They are all AFFIRMED.

Gravity

The gravity concerning the roof bolter citation was minimal since no methane was present in the area and the probability of harm was remote since only one bolt was missing on the machine. The gravity connected with the sampling citations was low since it was improbable that any exposure to dust during the sampling cycle could result in any harm.

Good faith compliance and negligence.

The respondent demonstrated extraordinary good faith abatement to achieve compliance regarding the permissibility citation in that power was immediately removed from the machine and it was repaired. With regard to the sampling citations, no abatement was required since the sampling period had passed. All of the citations resulted from ordinary negligence.

History of prior violations

For purposes of this docket, the parties stipulated that the respondent has a history of five prior violations of section 75.503; one prior violation of section 70.207(a); and three prior violations of section 208(a).

Docket No. WEVA 81-457

Fact of Violations

This docket concerns 20 citations issued to the respondent during November and December 1980. Five were issued for inoperative fire sensor alarms on the conveyor belt line; two were for inoperative water deluge systems; four were for the failure to record the results of certain preshift and on-shift examinations; three for failure to remove combustibles (grass, weeds, and oil cans) found near certain equipment; four were electrical violations for improper fittings and bushings on cables; and two were roof control violations for improper roof bolts and failure to provide an approved torque wrench. The parties stipulation that all of the violations occurred, and the citations are all AFFIRMED.

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Gravity

The gravity and probability of harm occurring as to all of the citations ranged from low to moderate.

Negligence

None of the violations in question resulted from gross negligence by the respondent, and all of the conditions or practices cited were the result of low or ordinary negligence.

Good faith compliance

With regard to 11 of the citations, respondent demonstrated extra-ordinary good faith compliance by immediately correcting the conditions and abating the violations. As for the others, abatement was achieved through prompt corrections of the conditions within the time fixed by the inspectors.

History of prior violations

For purposes of this docket, the record reflects that the respondent has no prior citations for violations of sections 75.323 75.1103-8(b), 75.305, 75.901(a), and 75.1101-3. Two prior citations are reflected for section 75.512, four for sections 75.515 and 75.200, one each for 77.504 and 75.1103, and eight prior violations of section 75.400.

Docket No. WEVA 81-458

Fact of violations

This docket concerns twenty citations served on the respondent during December 1980, and January and February 1981. The citations were issued for a variety of infractions dealing with accumulations of combustible materials, violations of the mine ventilation plan, improper fittings on power cables, failure to have an up-to-date mine map, the existence of stumbling hazards in a surface shop, an unsafe roof bolter, storage of compressed gas cylinders in an outside shop area without proper valve covers, lack of insulation and proper bushings on certain power cables, failure to record examination results in an approved book, failure to lock a gate on a power substation, and the accumulations of combustibles on certain mine equipment. All of the conditions or practices cited are a matter of record, and the parties stipulated that the violations did in fact occur. Accordingly, all of the citations are AFFIRMED.

Gravity

The parties stipulated that Citations 918006, 918008, 918009, 876570, and 910293 were all serious violations. They also stipulated that that the gravity connected with the remaining citations were in four cases minimal, and as to the others the gravity was low or null, and that these were all nonserious infractions.

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Negligence

The parties agreed that Citations No. 912395 and 912396 were the result of no negligence on the part of the respondent. They also agreed that Citations 918322 and 918324 through 918328 resulted from a low degree of negligence on the part of the respondent, and that the remaining citations resulted from ordinary negligence. I conclude and find that except for the citations indicating no negligence, the remaining violations demonstrated a lack of reasonable care and therefore constitute ordinary negligence.

Good faith compliance

The parties stipulated that the respondent demonstrated extraordinary good faith compliance by immediately correcting the conditions cited in Citations 918008 and 918328. As for the remaining citations, they agreed that the respondent promptly corrected the conditions and achieved abatement within the time frames specified by the inspectors.

History of prior violations

For the purposes of this docket, the parties stipulated that the respondent has a history of 14 prior violations of section 75.400; two for section 75.1104; three for section 75.1101-3; four for section 75.1725; five for section 75.701; 13 for section 75.316; six for section 77.505; three for section 75.1200; five for section 75.504; six for section 75.212; three for section 77.502; and no prior citations of sections 75.1725(2), 75.1400-4, 77.205(b), 77.509(c), and 77.208(e).

Docket No. WEVA 81-459

Fact of Violations

This docket concerns 20 citations issued to the respondent on February 17 and 24, 1981. Two citations concern an inoperative methane monitor on a continuous mining machine; four are permissibility violations concerning loose bolts in a roof bolter panel, a loose light, and improper openings in a panel box; three are for accumulations of combustible materials on a bolter and in the roadway; three concern improper bushings on a cable and broken conduit; two are for improper identification for a belt head and a miner power connector; one was issued for a disconnected fire suppression system on a scoop; one for an inoperative deenergizing device on a scoop; and two were issued because of a missing wheel cover and a bolt on a scoop. The parties stipulated to the fact of violations, and all of the citations are AFFIRMED.

Gravity

The parties stipulated that two of the citations (917629, 917636), were serious. Eight of the remaining citations were nonserious, with a low degree of gravity in that it was

improbable that any injuries would result, and the remaining citations were of a minimal degree of gravity.

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Negligence

The parties stipulated that Citations 917622, 918337, 918338, 918339, 918340, and 917627 were the result on no negligence on the part of the respondent. They agreed that Citation No. 917630, concerning accumulations along the entire mantrip roadway for a distance of 8,650 feet resulted from respondent's "extreme negligence" but that no ignition sources were present. Further, they stipulated that the remaining citations were the result of respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Good faith compliance

The record reflects that the respondent demonstrated normal good faith compliance in promptly correcting the cited conditions within the time fixed by the inspectors in all but one citation. That citation, No. 917631, was abated through rapid compliance by the respondent.

History of prior violations

For purposes of this docket, the parties stipulated that the respondent has no prior citations for violations of sections 75.1107-16(b) or 75.523-2(c); 17 prior citations of section 75.400; two citations of sections 75.313 and 75.904; three citations of section 75.515; and one citation of section 75.1725(a).

Docket No. 81-460

Fact of violations

I take note of the fact that Citation No. 917642, February 24, 1981, was assessed at "zero" by MSHA's assessment office, and a notation on the pleadings filed by the petitioner reflects that the citation was subsequently vacated. Under the circumstances, this citation is dismissed.

With regard to the remaining 19 citations issued in this docket, the record reflects that three were guarding citations for failure to provide adequate guards for equipment; ten concerned miscellaneous citations for failure to properly insulate power cables, improper cable bushings, and failure to install power cables on proper insulators; two were for failure to provide fire extinguishers; two were for improper electrical guarding devices; and one for failure to vent a battery charging station. The parties stipulated that all of the violations occurred, and the citations are all AFFIRMED.

Gravity

The record reflects that the gravity and probability of harm occurring as a result of all of the citations which have been affirmed in this docket ranged from low to moderate.

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Negligence

With the exception of Citation No. 917651, the record establishes that all of the remaining citations constituted ordinary negligence and resulted from the respondent's failure to exercise reasonable care. With regard to citation 917651, the record reflects that the negligence was low inasmuch as the cited loose cable bushing resulted from inadvertent machine vibration.

Good faith compliance

With regard to Citation No. 917639, respondent demonstrated extraordinary good faith compliance by immediately removing power from the equipment and repairing the cable insulation. The same applies for Citations 917640 and 917643, where the respondent immediately removed the equipment from service and installed a guard on the feeder coupler, and immediately placed an identification tag on the cat head. As for the remaining citations, the record establishes that the respondent demonstrated good faith compliance by correcting all of the cited conditions and practices within the times specified by the inspectors.

History of prior violations

For purposes of this docket, the parties stipulated that respondent has four prior violations of section 75.515, one prior citation of section 75.807, and no prior citations for the remaining cited mandatory standards.

Docket No. WEVA 81-461

Fact of Violations

Citation No. 917753, March 6, 1981, citing 30 CFR 75.515, was vacated by MSHA on June 1, 1981, after completion of a further investigation.

With regard to the remaining 19 violations, four were issued for inadequate guards on belt conveyor pulleys; eleven were for improper motor cable bushings, lack of insulators on cables, and failure to guard power cables; two were for missing bolts on a motor and a scoop; one for failure to provide a good fire extinguisher on a belt conveyor; and one roof control violation for loose roof bolts. The parties stipulated that all of the violations occurred, and all of the citations are AFFIRMED.

Gravity

Except for citations 917750, 917751, 917755, and 917761, which the parties agreed were serious, the gravity regarding 15 of the remaining citations was low, and one involved moderate gravity. All of these concerned improbable nonserious hazards.

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Negligence

All of the citations were the result of respondent's failure to exercise reasonable care, and they all constitute ordinary negligence.

Good faith compliance

Respondent corrected all of the cited conditions within the time fixed for abatement, and demonstrated ordinary good faith compliance as to all of the violations.

History of prior violations

The record reflects six prior citations of section 75.1725(a); 10 prior violations of section 75.515; four citations for section 75.1722(a); six for section 75.506; seven for section 75.517; five for section 75.807; 16 for section 75.200; and no prior citations for violations of sections 75.516.2(c) or 75.1100.2(e)(1).

Docket No. WEVA 81-462

Fact of violations

Two of the citations were issued for coal dust accumulations along the belt head, one for failure to provide a proper bushing for a switch power cable, one for failure to guard a tail piece roller, one for failure to adequately support the roof along the track slope, and one for failure to provide a bumper block at the raw coal dump. All of the citations are AFFIRMED.

Gravity

The gravity and the probability of harm occurring a result of five of the citations ranged from low to moderate. No methane was detected in the areas of the coal accumulations, but the presence of an ignition source could have resulted in a fire. The roof support violation was serious in that the existing roof bolts were not providing adequate roof support and someone could have been seriously injured had a roof fall occurred.

Negligence

All of the citations resulted from ordinary negligence on the part of the respondent.

Good faith compliance

Respondent demonstrated good faith compliance as to four of the citations by abating the conditions within the time fixed by the inspector. Regarding the bumper block citation, respondent demonstrated extraordinary efforts to comply by immediately installing a bumper at the raw coal dump.

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History of prior violations

Respondent has a history of 18 prior violations of section 75.400, 10 prior violations of section 75.515, four violations of section 75.1722(a), 16 violations of section 75.200, and one prior violation of section 77.1605(1).

Docket No. WEVA 81-506

Fact of violations

One of the citations was issued for failure to provide fuse protection on a piston pump at the slope bottom, and a second one was issued for failure to provide a fire extinguisher in the maintenance shop. These are both AFFIRMED.

Gravity

The degree of gravity with regard to both citations was moderate.

Negligence

Both citations resulted from the respondent's failure to exercise reasonable care, and this constitutes ordinary negligence.

Good faith compliance

Respondent demonstrated extraordinary compliance by immediately providing a fire extinguisher for the shop, and by promptly providing fuse protection for the pump in question.

History of prior violations

Respondent has a history of two prior violations of section 77.506, and one prior violation of section 77.1109(a).

Docket No WEVA 81-601

Fact of violation

This docket concerns Citation No. 911888, issued on June 2, 1981 for a violation of 30 CFR 75.316, for failure by the respondent to submit an annual review of a ventilation plan to MSHA. The parties agreed that a violation occurred, and the citation is therefore AFFIRMED.

Gravity

The parties stipulated that inasmuch as the respondent did in fact have an effective ventilation plan at the time the citation issued, the fact that it failed to submit a copy to MSHA had a minimal gravity level, and the violation was not significant or substantial.

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Negligence

The parties are in agreement that the violation resulted from ordinary negligence on the part of the respondent.

Good faith compliance

The plan was subsequently submitted to MSHA for review within the time allotted by the inspector. Therefore, the respondent demonstrated good faith compliance.

History of prior violations

The parties stipulated that the respondent has a history of eight prior violations of section 75.316.

Docket No. WEVA 82-25

Fact of violations

This docket concerns eight citations served on the respondent during the period May through August 1981. Three citations were issued for failure by the respondent to submit respirable dust samples for certain sampling periods; one was issued for inadequate rock dusting; one for permitting combustible materials to accumulate; one for failure to install a power cable on insulators; one for having shields off a battery car and the batteries were cracked; and one for failing to maintain a second floor travelway safe in that a floor board was missing, thereby exposing a hole. The parties stipulated that all of the violations occurred, and therefore, the citations are AFFIRMED.

Gravity

The parties agreed that none of the citations were significant or substantial, and that the gravity or probability of harm occurring as a result of the violations was minimal or moderate.

Negligence

The record establishes that all of the citations resulted from the respondent's failure to take ordinary care, and that this amounts to ordinary negligence.

Good faith compliance

With regard to the respirable dust citations, the parties stipulated that abatement could not be achieved since the sampling cycle had passed at the time the citations issued. As for the remaining citations, the parties stipulated that respondent demonstrated ordinary good faith compliance by correcting all of the conditions cited by the inspectors within the time fixed for abatement.

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History of prior violations

For purposes of this docket, the parties stipulated that the respondent has a history of 18 prior violations of section 75.400; seven prior violations of section 75.750 and 75.1725(a); one prior violation of section 77.205(a); and six prior violations of section 70.208(a).

Docket No. WEVA 82-24

Fact of violations

This docket concerns four citations issued to the respondent in December 1980, for (1) failure to submit an escape and evacuation plan to MSHA, (2) failure to submit a plan for emergency medical assistance, (3) failure to provide a deenergization device on a machine, and (4) failure to provide adequate illumination in locations of the preparation plant. The parties stipulated that the violations occurred, and therefore all of the citations are AFFIRMED.

Gravity

The parties stipulated that Citation No. 918012 was serious, but that the probability of harm occurring as a result of the remaining three citations was minimal or moderate.

Negligence

All of the citations resulted from the respondent's failure to exercise reasonable care, and this amounts to ordinary negligence.

History of prior violations

The parties agreed that for purposes of this docket, respondent has a history of no prior citations of sections 75.1101-23(a), 75.1713, or 77.207, and three prior violations of section 75.523.

Docket No. WEVA 81-504

This docket concerns a section 107(a) imminent danger order issued by MSHA Inspector Edward M. Toler, on December 9, 1980, charging the respondent with an alleged violation of mandatory safety standard 30 CFR 77.701, for failure to properly ground a water pump (Ex. P-1). In support of the violation, MSHA presented the testimony of Inspector Toler. He confirmed that he inspected the mine on the day in question and that he issued the citation after determining that the frame ground wire on the pump was not connected to a ground. The condition was detected after he observed slate picker Fred Brewer being shocked from contacting the pump. Mr. Brewer stated that he had received a shock from the pump when he attempted to prime it, and the pump was being used to pump water to the tipple. A company electrician accompanying him on the inspection confirmed the

violation and discovered that the ground was not connected. The electrician advised him that he was not

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aware of the condition, and Mr. Toler stated that he could find no evidence that the monthly electrical examinations had been made, but he conceded that mine operator Davis was not at the mine. The inspector conceded that such examinations are generally conducted by visual examinations rather than the dismantling of the equipment. The inspector confirmed that abatement was achieved within 45 minutes or an hour of the issuance of the order (Tr. 8-24).

Mine owner and operator Winford Davis testified in defense of the citation. He testified that the problem with the pump was not with the grounding unit, but rather, with the power cable coming to the pump ground. He was unaware of the fact that the ground wire had come loose, but conceded that the slate picker advised him of a "slight shock" when he touched the pump. The condition was abated in a matter of minutes, and he has qualified electricians on the site to take care of such problems. He had no knowledge of the condition because it could not be detected by visual examination, but he acknowledged that monthly checks were required, and he surmized that this was being done. Mr. Davis also alluded to some problems with the local power company's power system (Tr. 24-37).

Fact of violation

Upon consideration of the testimony concerning this violation, I conclude and find that MSHA has established a violation of the cited mandatory safety standard. Section 77.701, requires the grounding of metallic frames, casings, and other enclosures of electric equipment. I conclude that the testimony of the inspector established that the water pump in question was not properly grounded, and that this constitutes a violation of the cited standard. Accordingly, Citation No. 918017 is AFFIRMED.

Gravity

I conclude and find that this citation was extremely dangerous. The slate picker in question was observed receiving a shock from the water pump which was not properly grounded. Mine operator Davis confirmed that the slate picker had advised him that he was "slightly shocked" when he touched the pump. However, what may be a "slight shock" one day may well be a fatal one the next.

Negligence

I conclude and find that the conditions cited as a violation should have been detected by the mine through the required electrical inspections. While it may be true that the condition was caused by a loose ground wire which was not readily observable, testing of the equipment during the required examinations would probably have revealed the cited condition. Under the circumstances, I conclude that the respondent failed to exercise reasonable care and was negligent.

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Good faith abatement

The condition was corrected in some 45 minutes after the issuance of the withdrawal order, and compliance was achieved by reconnecting the loose ground wire.

History of prior violations

The solicitor stated that for the 24 month period prior to the issuance of the instant citation on December 9, 1980, respondent had been assessed for three prior violations of section 77.701 (Tr. 135).

Docket No. WEVA 81-505

This docket concerns eight citations served on the respondent during November and December 1980, charging the respondent with five violations of mandatory safety 30 CFR 77.506, and one violation of sections 75.302-1, 75.301, and 77.701. One citation was issued pursuant to section 104(d)(1) of the Act, and seven were section 104(d)(1) "significant and substantial unwarrantable failure withdrawal orders.

Inspector Toler confirmed that he inspected the mine on November 18, 1980, and issued section 104(d)(1) Citation No. 916590, citing a violation of section 75.302-1, because a ventilation line curtain where mining was taking place was not installed for a distance of at least 10 feet from the face (Ex. P-2). he measured the distance in question and found that the curtain was approximately 35 feet from the face. The mining machine was in operation and mine management should have been aware of the condition (Tr. 38-42).

Mr. Toler believed that the conditions were hazardous because the weather was cold, the mine was extremely dusty, and it has a history of methane. There was a likelihood of an explosion, and seven people working at the face would have been affected by the hazard (Tr. 42).

On cross examination, Mr. Toler conceded that there had never been a fire or explosion at the mine, but that the presence of methane has been confirmed by test analysis of air samples taken in the mine. He also confirmed that there was an excessive amount of dust suspended in the atmosphere on the day in question, and that the ventilation requirements of the approved plan were violated. The purpose of maintaining the curtain 10 feet from the face is to sweep away noxious gases and dust from the face area (Tr. 43-49). Abatement was achieved within 15 minutes and the curtain was extended to the required distance toward the face (Tr. 50).

Inspector Toler confirmed that he also issued withdrawal order 916591 on November 18, 1980, citing a violation of section 75.301 (Ex. P-3). He did so after determining that the face ventilation in the No.1 room, 014 No. 1 section where a continuous miner was operating

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and mining coal was inadequate. The ventilation was measured with an anemometer and smoke tube and no measurement could be made as there was no movement of the smoke, and .2 percent methane was present at the last roof bolt from the working face. Section 75.301 requires 3,000 cubic feet of air a minute at the end of the ventilation curtain (Tr. 50-52).

Mr. Toler stated that Don Davis was operating the mining machine, and since he was part of mine management, he should have been aware of the ventilation plan requirements. Lack of ventilation presented a hazard of methane, and with the dust in suspension, and an explosion was likely (Tr. 53). Seven men would have been affected, and the violation occurred in the same area as Citation No. 916590 (Tr. 54).

On cross-examination, Mr. Toler confirmed that the order issued after the curtain was extended the required distance to abate the previous citation be issued, but the required amount of ventilation could not be induced. He explained that the curtain was not wide enough and he described it as "a piece of junk". Although he noticed the condition of the curtain as it was being installed, he said nothing about it and then issued the order (Tr. 56). However, at the time, it was his understanding that the curtain in question was the same one installed to terminate the previous citation (Tr. 57).

Mr. Toler stated that abatement was achieved after additional line curtain was brought into the mine, and repairs were made to insure that it extended far enough (Tr. 59).

Mr. Toler confirmed that he issued section 104(d)(1) closure order No. 918015 on December 9, 1980, citing a violation of section 77.701, after observing that electrical equipment in the mine preparation plant was not provided with frame grounding for the metal frames and enclosures (Ex. P-4). He closed down all of the preparation plant electrical equipment. He detected the violation after discovering that a 440 A.C. electric motor, with three phases and a ground did not have the required four wires, with one connected to the ground lug. He also determined that none of the plant motors were grounded because the grounding wire from the tibble to the transformer station was not connected, and therefore, no grounding could be maintained within the plant (Tr. 61-62).

Mr. Toler believed that the conditions cited should have been detected through the monthly electrical inspections. The conditions constituted a shock hazard, and it was likely that two men would have been exposed to this hazard. The plant is exposed, and the rain and snow contributed to the hazard (Tr. 64).

Mine operator Winford Davis testified that he believed the grounding system for the plant in December 1980 was adequate to preclude any shock hazards. He attributed the violation to a loose neutral wire behind the switch box panelling which was not visible. The wire was actually

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cut, but all of the equipment was grounded through the plant neutral grounding system. In order to abate the citation, individual wires had to be installed from each piece of equipment directly to the transformer. The tipple was 40 years old, and it had to be completely rewired. He had not been previously advised by the plant electrician that the grounding was faulty (Tr. 67-71).

On cross-examination, Mr. Davis conceded that he was aware that monthly electrical examinations must be made and that the equipment must be tested. However, he is not an electrician (Tr. 72).

MSHA Inspector Harold E. Newcomb confirmed that he issued order of withdrawal number 0640145 pursuant to section 104(d)(1) of the Act on December 10, 1980 (Ex. P-5). He cited a violation of section 77.506 when he found that proper overload and short circuit protection was not provided for the No. 12 conductor cable supplying power to the 480 volt A.C. clean coal elevator located on the third floor of the plant. The fuses protecting the circuit were "bridged out" with stranded wire. Mr. Newcomb stated he has a B.S. degree in electrical engineering and confirmed that he conducts MSHA electrical inspections and assists in "electrical problems". He testified that a 25-amp fuse should have been protecting the circuit, rather than the No. 8 stranded wire, which probably provided 45 or 50 amps. The original fuse had at some prior time blown out and someone replaced it with the stranded wire which is not an approved fuse device. A proper fuse would have deenergized the circuit in the event of an overload, but the wire would not and the circuit could have overheated and melted the wire (Tr. 74-77).

Mr. Newcomb stated that the monthly electrical examination should have revealed the fuse condition, and he believed the hazard in question presented a fire or electrical shock hazard to at least one employee, and the prior citation concerning lack of proper grounding contributed to the gravity. The condition was abated after a proper sized fuse was purchased for the circuit in question (Tr. 78). He also confirmed that Mr. Davis conceded to him that the plant was "electrically run down", but Mr. Davis made no statement that he was aware of the fuse condition in question. A qualified electrician, however, should know that a fuse should not be replaced with a piece of wire (Tr. 82), but anyone could have replaced the fuse with a piece of wire (Tr. 83).

Mr. Newcomb confirmed that he also issued section 104(d)(1) orders of withdrawal Nos. 0649146, 0640147, and 0640148 on December 10, 1980, citing violations of section 77.506. The first citation was issued because overload and short circuit protection was not provided for the No. 12-4 conductor cable extending from the main plant switch box to the 480 volt water pump and coal belt located on the third floor. The circuit was protected with a 200-amp fuse, which is not the proper size in that it was too large. The second citation issued after he found the fuses on the power cable supplying 480 volts a.c. to the 10

horsepower vibrator had been bridged out with a piece of wire. A 20 amp fuse should have been used. The third citation also involved a fuse which had been bridged

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out with a piece of wire on the circuit for the No. 10-4 conductor cables supplying power to the 15 H.P. circulating pump. The proper fuse was one of 45 amp capacity, and the stranded wire did not provide this. All of the citations were issued for failure to provide proper overload and short circuit protection (Exhs. P-6 through P-8; Tr. 86-95). Mr. Newcomb stated that the cited conditions concerning the fuses should have been discovered by mine management through the required monthly electrical examinations. He also believed that the conditions cited presented shock and fire hazards.

MSHA Inspector Michael L. Deweese confirmed that he is an electrical inspector and that he issued section 104(d)(1) withdrawal order 876569 on December 10, 1980, at the preparation plant (Exh. P-9). He cited a violation of section 77.506 after finding that overload and short circuit protection was not provided for the No. 12 wire supplying 200 volts to the "gas pump" located on the second floor. Three 200 amp fuses were being used to protect the circuit, and 20 amps is the proper size. The condition was hazardous in that in time, the circuit could have become overloaded and the resulting short circuit caused by the failure of the fuses to function properly could cause a fire or shock hazard to one person. The operator's monthly electrical examinations should have detected the condition (Tr. 98-101).

On cross-examination, Mr. Deweese stated that Mr. Davis conceded that the plant was in a run-down electrical condition, but he did not state that he knew the cited condition existed. Mr. Deweese had no idea how long the over-sized fuse had been in the equipment, and indicated that it would take about a minute to change it (Tr. 105).

Mine Operator Winford Davis testified in regard to the aforementioned five electrical citations concerning improper overload and short circuit protection. He stated that the company regularly purchases proper sized fuses for use by its employees, and they are kept in the supply house. Fuses are supposed to be stocked for emergencies, and employees are instructed to stop by the supply house and obtain them if they are needed. They were also authorized to purchase them at a local hardware store. Mr. Davis stated further that the tipple in question was originally constructed in 1941 and 1942, and at the time of the MSHA inspection the plant still had the original wiring. Practically all of the electrical equipment in the plant had to be replaced and money was in short supply at the time. Fuses were not expensive, but switch boxes and line starters were. All of the cited conditions were eventually abated (Tr. 106-109). He had no idea that improper fuses were being used and they too were replaced with proper fuses (Tr. 110).

Fact of violations

I conclude and find that MSHA has established by a preponderance of the evidence that each of the violations cited in this docket occurred as charged in the citation and orders

issued by the inspectors. The testimony and evidence adduced by MSHA supports each of the citations and orders issued, and they are all AFFIRMED.

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Gravity

I conclude and find that all of the citations in question in this case were serious violations. The electrical citations presented possible shock and fire hazards, and the others presented mine ventilation hazards as well as possible methane and coal dust explosions or fires.

Negligence

I conclude and find that the respondent was negligent in failing to discover the cited conditions which resulted in the issuance of the citation and orders in this case. Properly conducted pre-shift and on-shift examinations of the mine, the plant, and the electrical equipment in question would have detected the cited conditions.

Good faith compliance

Although it is true that the respondent corrected and abated all of the conditions and practices cited in this case, several of them almost immediately, the fact is that they were abated as a result of withdrawal orders issued by the inspectors. In any event, there is no evidence of any lack of good faith compliance on the part of the respondent.

History of prior violations

The solicitor stated that for the 24-month period prior to the issuance of the citations in question in this case, the respondent had one prior assessed violation of section 75.302-1, two for violations of section 75.301, three for violations of section 77.701, and five for violations of section 77.506.

Docket No. WEVA 81-600

MSHA Inspector Thomas B. Marcum testified that he issued section 104(d)(2) withdrawal orders 917653 and 917657, on March 2 and 4, 1981, during a regular inspection of the mine (Ex. P-10 and P-12). The first order cited a violation of section 75.807, after he found that an 800 foot long voltage cable from the No. 6 belt head to the section was not hung or placed properly so as to protect it from damage. The cable was a 4,160 volt cable, and it was lying on the mine floor alongside the section mantrip roadway, and it had been run over by the man trip in several areas, and he observed the tracks where it had been run over. The roadway was used daily by the three shifts coming and going. He believed that the cable had been on the roadway for some time, and the operator should have been aware of its location because the roadway is traveled everyday, and it should have been detected during any pre-shift examination. The cable should have been hung on J-hooks, and the failure to do so presented a shock hazard in the event the cable became damaged (Tr. 118-122).

On cross-examination, Mr. Marcum confirmed that most of the cable in question was properly hung on J-hooks, but that the

cited 800 foot portion was not. The man-trip vehicle is a rubber tired vehicle, and

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the cable is insulated with armored-shell steel which provides high protection. He has never seen this type of cable being penetrated by running over it with rubber tired equipment, and the cable was the main power source coming from the outside underground. He saw no J-hooks installed along the places where the cables was lying, and no one explained to him why it was not hung properly (Tr. 123-127).

With regard to the second order, Mr. Marcum stated that he cited a violation of section 75.518 after discovering that the S & S scoop charger for the 014 Section was not provided with fuse protection in that a fuse had been bridged out with a wire (Tr. 127). The wire was installed alongside by a fuse but he did not know whether the fuse was blown out or not. Even if the fuse were working, the presence of the wire next to it was not proper because this would permit more current to flow through the cable. He believed the condition constituted a shock or burn hazard, and in the event of a fire or smoke, the men on the section would be exposed to a hazard (Tr. 130-131). Mr. Marcum stated that the fuse was located inside the scoop battery charger, and he discovered the condition when he found that the charger lid only had one bolt in it when it should have had three. He opened the lid and found the condition in question. He conceded that he had sometimes bridged fuses in the same manner when he worked as a miner, but that a new fuse was promptly installed to replace the defective one (Tr. 132).

Gravity

I conclude and find that both of the citations which have been affirmed were serious violations. While it is true that the cable in question was constructed of very durable material and showed no visible signs of damage, it was nonetheless lying on a main travelway where men and equipment passed by on a daily basis coming and going from the mine. Further, the inspector saw evidence that the cable had been run over by the mantrip, and even though it was rubber-tired and not likely to penetrate the cable, such a practice is serious. As for the bridged fuse on the scoop charger, this presented a possible shock and fire hazard because the circuit it served was improperly protected.

Negligence

Both citations resulted from the respondent's failure to take reasonable care. The cable was in full view of personnel coming and going from the section, and the fuse condition should have been detected during the required examinations, particularly since the missing lid bolts which led to the discovery of the condition by the inspector were plainly visible.

Good faith compliance

The cited conditions were abated after the issuance of the orders, and the respondent demonstrated good faith in achieving compliance.

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History of prior violations

The solicitor indicated that the respondent had three prior assessed violations of section 75.807, and no prior violations of section 75.518.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business. (Applicable to all Dockets).

The parties have stipulated that the respondent is a small mine operator, and that its annual coal production has been approximately 87,000 tons. With regard to the question of respondent's current financial condition, including the effect of any civil penalties on its ability to remain in business, respondent presented the testimony of its owner, and his testimony follows below.

Mine Operator Winford Davis testified that he began mining in 1964, that the Marie No. 1 Mine was initially started in 1971, and since that time this has been his only active mining operation. However, the mine ceased to operate on December 29, 1981, and it has not been an actively producing mine since that time. He testified that during the years prior to 1974, the mine was profitable, and he conceded that his "before taxes" profits in 1975 was "a little over \$1 million", but that since that time the mine has lost money. The profits from his operation in 1974 was used to purchase new equipment and to go expand the mine. Income for the mine, in terms of profit, for the years 1975 and 1976, was approximately \$300,000, before taxes, but the mine lost \$11,000 in 1977.

Mr. Davis testified that during the period April through September 1977, the mine was flooded, and no coal was produced. A UMWA strike in November 1977, also affected coal production, and the strike lasted for about 90 days, or until February of 1978. Although flood insurance covered the larger portion of flood damage, he still lost approximately \$1.8 million in equipment, and had to borrow money to replace it. The mine was also flooded on three occasions during 1978 and 1979, and that curtailed coal production even further. In addition, while his mine is not a union mine, organizing efforts to unionize the mine during November 1980, resulted in vandalism and other trouble which also cut into his production. He absorbed the flood losses for 1979 because he was afraid to file further flood claims for fear that his insurance would be cancelled, and the mine was down for three months while the water was pumped out. As a result of all of these events, his losses for each of the years 1978 and 1979 was a half-a-million dollars per year. Similar losses were encountered in 1980 because of labor problems.

Mr. Davis identified his accounting firm and stated that he has retained them since 1974 to keep his books. Work is being performed on the report ending April 30, 1981, but he indicated that he has been unable to pay the firm for their accounting work since prior to April 1981, and the firm has filed for an

extension for him to pay his taxes for the year 1981. Since he has been unable to pay his accountant, he felt that

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he could not call upon him to testify in these proceedings. Mr. Davis indicated that he presently owes money to a great number of creditors, and some of these debts are as old as 1978. Since he has been in business for some 22 years, his creditors are being patient with him, but some have been creditors since 1974. He produced a copy of his accountant's report, dated April 30, 1981, and it is a part of the record.

Referring to his latest accountant's report, Mr. Davis testified that the net loss for the Davis Coal Company for the first four months of 1981 was \$191,443.47, and while he has not been provided with additional accountant's reports for the subsequent periods, he estimated his company's losses as \$500,000 for the calendar year 1981, and he lost approximately the same amount for each of the years during 1978 through 1980. Current indebtedness for the company is between \$2.3 and \$2.5 million, and the largest creditor is the Pikeville National Bank and Trust Company, which holds a note for an original amount of \$750,000, for a loan made in 1979. The balance due is now \$700,000, and it was reduced by \$50,000 through the sale by the bank of a continuous mining machine which it had repossessed. The proceeds from the sale of this machine were applied by the bank to reduce his current note liability. In addition, he testified that within the last year additional equipment had been removed from the mine and sold to settle company debts. The Ingersoll-Rand Company repossessed two mining machines, three shuttle cars, a scoop, and a feeder, all of which they intend to sell at public auction to settle a debt of \$360,000 which his company owes to that company. All of this equipment is located at Ingersoll-Rand's storage area in Charleston, and he no longer has it. In addition, the Long-Airdox Company met with him two weeks ago in an attempt to work out an agreement for payment of several roof bolters.

Mr. Davis stated that the mine ceased operation in December 1981 because he ran out of money, and he had no funds to pay his miners. Since that time the company has generated no income, and the only bank account it has is a checking account with the Pikeville Trust Company, and it has a deficit balance. During the year 1981, and part of 1982, he has put over \$100,000 of his own personal money into the company in an attempt to keep the company going. Neither he nor his family have received any income from the company during 1982, but he still works for the company in an attempt to settle his debts or negotiate additional capital to begin mining again.

Referring to his personal income tax statements which he had with him, Mr. Davis testified that for the year 1980 he and his wife had a joint gross income of \$79,632, and for the year 1981 their joint gross income was \$51,373. He still pays the phone bill from his own funds for the phone at the mine office, and other than two night watchmen which he personally pays to protect the equipment still in the mine, the company has no other employees. He pays the watchmen a combined salary of \$250 a week from his own personal funds, and while he wishes to get back into

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the mining business, he indicated that he cannot do this until he receives additional capital and pays off his debts. As an example, he indicated that he would need an immediate \$15,000 just to have the power turned on at the mine by the local utility company. He still owes the company \$5,000 for past utility bills, and they require an additional \$10,000 as a deposit before the power is turned on again. In addition, he would also have to pay back taxes amounting to \$18,000, and royalties, which are in arrears, before he can think about resuming mining.

Mr. Davis stated that while he has contemplated filing for bankruptcy, he has tried to avoid it up to this time, and that he requires approximately \$100,000 to start up mining again. He also alluded to the fact that he could not make anymore monthly payments of \$4000 to \$5000 which he had been making to MSHA to satisfy past assessed violations, and that as a result, the solicitor's Arlington, Virginia, office instituted collection proceedings against him within the past year and attached coal shipments he had made to the United Coal Company to collect \$8500.

Conceding that the total amount of civil penalties initially assessed by MSHA in the instant dockets amounts to approximately \$32,773, Mr. Davis stated that he recognizes his obligation to pay the penalties. However, he indicated that he has no assets or cash to pay these penalties, and if he were forced to pay, it would certainly have an adverse affect on his ability to stay in business. As for any suggestion that he sell some of his equipment to pay these assessments, he indicated that the liens held by the bank, as well as his state tax liabilities and debts, would absorb any revenue resulting from the sale of his equipment. Mr. Davis stated that when the mine was producing, they worked five days a week on two production shifts and one maintenance shift, and that he normally employed 50 miners. However, they are no longer working at the mine (Tr. 164-195).

On cross-examination, Mr. David confirmed that there are still several closure orders outstanding on the mine. He estimated the current value of the equipment still at the mine as \$500,000, and indicated that he has no interests in any other coal companies. Although Davis Coal Company owns the stock of a tipple facility (Burning Springs Collieries) where he used to load his coal, it is no longer operating and it is in fact the tipple plant immediately connected to the Marie No. 1 Mine. It is the same tipple plant where some of the citations in these proceedings were served. Mr. Davis confirmed that he has been attempting to negotiate with a bank for loans to resume active mining. He has no other employments, but may consider going into the building contracting business, but he does not contemplate going back into the coal mining business unless he can raise the necessary capital.

Discussion

I agree with the holding of the former Interior Board of Mine Operations in the case of Robert G. Lawson Coal Company, 1

IBMA 115, 117-118 (1972), a case decided under the 1969 Coal Act,
where it was held that:

We view the provisions of section 109(a)(1) as manifesting an intent by Congress to require a balancing process in arriving at an appropriate penalty to be assessed in any given case. Application of the criteria of section 109(a)(1) requires weighing the importance of imposing pecuniary penalties, as a measure of deterring insufficient concern for the health and safety of miners, against other deterrents specified in the act, such as closure orders. The amount of a monetary penalty imposed should be sufficiently high to deter any laxity of vigilance on the part of an operator to keep his mine in compliance with the Act. In our view, however, the imposition of a penalty which would cripple an operator's ability to continue his production of coal without a counter-balancing benefit to the safety of miners would not be appropriate.

* * * * *

We do not view the civil penalty assessment procedure as a tool to force closure of mines; we look upon it as an auxiliary tool to bring about compliance.

* * * * *

We believe Congress intended a balanced consideration of all statutory factors, including the size of mine and the ability to remain in business, to permit assessments which would be equitable and just in all situations but which would not have the effect of drastically curtailing coal production or employment of miners to the ultimate detriment of the public interest.

* * * * *

Where numerous violations are found and cited during a tour of inspection, the aggregate amount of the proposed assessments, even though each separate violation may be assessed at a nominal value, may be an amount beyond the operator's ability to pay, and thus, for no other reason than this, may be unreasonable. In such cases it is incumbent upon an Examiner and this Board to look at the total amount and impact of the monetary penalty in arriving at a fair assessment.

The former Board followed its Lawson Coal reasoning with respect to the question of the effect of civil penalties on small operators in two subsequent decisions, Newsome Brothers, Inc., 1 IBMA 190 (1972), and Hall Coal Company, 1 IBMA 175 (1972). I have applied this rationale on several occasions in deciding cases under the 1977 Mine Act, and these

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decisions have since become finalized as Commission decisions. See: MSHA v. Fire Creek Coal Company, Docket BARB 79-3-P, etc., April 5, 1979; MSHA v. G & M Coal Company, Dockets SE 79-128 and Dockets SE 81-12, etc., November 19, 1980 and April 7, 1981.

It is no secret to anyone that the Davis Coal Company has been the subject of several prior civil penalty proceedings before this Commission and its Administrative Law Judges. In MSHA v. Davis Coal Company, Docket Nos. 78-627-P, etc., March 7, 1980, the Commission, on its own motion, directed review of ten cases in which the judge had approved settlements pursuant to Rule 2700.30(c). Upon review of the record in those cases, the Commission, over the vigorous dissent of Commissioner Lawson, found no basis to conclude that the judges erred in approving the settlements, and their decisions were all affirmed.

Commissioner Lawson's displeasure with the affirmance of the settlements in question was based on his belief that the approval of a 90% reduction from the original civil penalties was unsupported by any credible evidence that Davis Coal Company was in such "dire" financial condition as to justify such drastic penalty reductions. Commissioner Lawson observed that the company was not required to come forward with any current financial information to determine what, if any, effect the payment of the initially proposed civil penalties would have had on Davis' ability to continue in business. Scrutinizing Davis' business operations for a time span covering 1976 to 1979, Commissioner Lawson took particular note of the fact that Davis was not required to file audited financial statements or tax returns to establish any business losses supporting a finding that the company could not afford to pay the full assessment amounts. He was also disturbed with the asserted lack of consideration given to Davis' history of prior violations and the lack of any discussion dealing with the deterrent effect of those violations.

I am not unmindful of Commissioner Lawson's concerns with respect to the issues raised in his dissent in the previous Davis cases. However, as the presiding Judge in the cases before me for decision, I am constrained to apply the facts of record in any decisions that I render in connection with these cases, including the civil penalty assessments that are warranted on the basis of those facts. Just as Commissioner Lawson saw fit to dissent in the previous cases, and just as the other Judges adjudicated their cases on the basis of the evidence and facts presented to them during the course of the hearings, so too will I decide these cases.

It should be noted at the outset that the instant cases do not concern settlement proposals agreed to by the parties. In most of these cases, respondent Davis Coal Company does not contest the fact of violations, and has admitted that the violations occurred. In three of the dockets, testimony was presented by both sides, and all of the citations in those cases have been affirmed. Further, in each of the cases, either the parties have stipulated to all of the statutory criteria found in section 110(i), except for the effect of the penalties on the

respondent's ability to remain in business, or I have made findings on these issues. The crucial question presented in all of these dockets is the appropriate civil penalties which I should assess in these dockets, taking into account all of the statutory criteria found in the Act, and in particular the question of respondent's ability to pay and the effect of any civil penalties on its ability to remain in business.

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It is clear that in litigated civil penalty proceedings, the determination of appropriate civil penalty assessments for proven violations is made on a de novo basis by the presiding judge and he is not bound by any assessment method of computation utilized by MSHA's Assessment Office, Boggs Construction Company, 6 IBMA 145 (1976); Associated Drilling Company, 6 IBMA 217 (1976); Gay Coal Company, 7 IBMA 245 (1977); MSHA v. Consolidated Coal Company, VINC 77-132-P, IBMA 78-3, decided by the Commission on January 22, 1980.

In the instant proceedings, the initial civil penalty assessments which appear as part of the petitioner's initial pleadings and civil penalty proposals in the form of "assessment worksheets" as exhibits to the proposals, reflect proposed penalty amounts derived from either the application of "points" assessed for each of the statutory criteria set out in section 110(i) of the Act, or from a "special assessment" made pursuant to Part 100, Title 30, Code of Federal Regulations. It is clear that I am not bound by those initial assessments, and the assessments which I have imposed have been made after full disclosure of all of the facts, and in particular evidence concerning the respondent's present financial condition and ability to pay.

The record adduced in this case reflects that the mine has been closed since December 1981, and is no longer actively producing coal. Petitioner's counsel confirmed the fact that the mine is in a "B" status, which means that MSHA considers that it is active but not producing coal. Counsel also indicated that since the mine has been closed, MSHA inspectors are no longer inspecting the mine, no production is going on, and far as MSHA knows, no power has been supplied to the mine since its closure (Tr. 159-160).

With regard to the respondent's financial condition, the unrebutted testimony of the mine operator reflects that the Davis Coal Company is on the brink of bankruptcy, that it is presently unable to resume active coal production because of the lack of additional capital, that some of its mine equipment has been repossessed and sold at auction to satisfy debts, that some equipment has been attached and removed from the mine by another creditor and is awaiting sale to satisfy debts, and that the remaining equipment at the mine is encumbered by a personal note in excess of \$500,000 held by a bank which advanced the money to purchase it. In addition, with the exception of two security guards being paid personally by the mine owner to protect the equipment from theft and vandalism, no one is working at the mine and the normal workforce of 50 miners have all been laid off since the mine closed approximately seven months ago.a2

After careful review of all of the evidence adduced in these proceedings, I conclude and find that the imposition of the full amount of the initial civil penalty assessments proposed by MSHA in these dockets, totalling approximately \$32,773, would have a further adverse impact on the respondent's ability to reopen the mine and continue its coal mining business. Considering the fact

that the respondent is a small operator and is in serious financial difficulties, as attested to by the unrebutted credible

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evidence adduced herein, I find that the imposition of the proposed civil penalties would, in the aggregate, jeopardize respondent's ability to remain in business. While it may be argued that, in view of the respondent's past history of violations, which reflects a poor compliance record, as well as a marginal mining operation, it would be better off for the respondent to stay out of the coal mining business, that is a judgment that I prefer not to make. As the principal enforcer of the Act and its mandatory safety and health standards, the petitioner has at its disposal ample statutory authority through the enforcement process to assure future compliance should the respondent resume production, or in the alternative, to close the mine down for non-compliance.

In addition to the financial condition of the respondent, and aside from the seriousness of some of the conditions or practices cited as violations in these dockets, I take particular note of the fact that none of the violations issued in these proceedings resulted in any injuries to miners; nor did they result in any mine fires or accidents (Tr. 146). In addition, in all instances, the respondent promptly corrected the conditions or practices cited, and in many cases respondent demonstrated extraordinary compliance by immediately correcting the conditions brought to its attention by the inspectors. Under the circumstances, I have also considered these factors, in addition to the effect of the initial assessments on the respondent's business, in assessing civil penalties for all of the violations which have been affirmed.

Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established as follows:

WEVA 80-565

Citation No.	Date	30 CFR Section	Assessment
0677798	11/30/79	75.517	\$25
0677799	11/30/79	75.517	25
0677861	12/04/79	75.313	25
0677862	12/04/79	75.1722	15
0677863	12/04/79	75.1722	50
0677865	12/06/79	75.316	50
0673584	3/06/80	75.512	25
0673585	3/06/80	75.300-4(a)	30
0673591	3/11/80	75.703	20
0673592	3/11/80	75.200	60
0673593	3/17/80	75.512	60
0673594	3/17/80	75.508	25
0673596	3/17/80	77.502-2	25
0673597	3/17/80	77.800-2	25

\$460

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WEVA 81-106

Citation No.	Date	30 CFR Section	Assessment
910981	4/24/80	75.324	\$15
910982	4/24/80	75.305	15
910983	4/24/80	75.303	15
910984	4/25/80	75.1704	10
910985	4/28/80	75.515	10
910986	4/28/80	75.701	20
910987	4/28/80	75.400	50
910988	4/28/80	75.1722(a)	20
910989	4/28/80	75.503	20
910990	4/30/80	75.503	20
910991	4/30/80	75.1107	15
910992	4/30/80	75.503	15
910993	4/30/80	75.605	30
910994	4/30/80	75.604	25
910995	4/30/80	75.1107	20
911000	5/08/80	77.400(a)	40

\$340

WEVA 81-249

Citation No.	Date	30 CFR Section	Assessment
910319	7/23/80	75.316	\$30
911658	7/23/80	75.400	20
911659	7/23/80	75.403	25
911660	7/23/80	75.313	15
912802	7/30/80	75.400	30
912803	7/30/80	75.1722(b)	40

\$160

WEVA 81-377

Citation No.	Date	30 CFR Section	Assessment
9915076	1/15/81	70.207(a)	\$20
9915114	2/17/81	70.207(a)	15
9915115	2/17/81	70.207(a)	15
9915116	2/17/81	70.207(a)	15

\$65

WEVA 81-429

Citation No.	Date	30 CFR Section	Assessment
912726	11/06/80	75.205	\$30

WEVA 81-449

Citation No.	Date	30 CFR Section	Assessment
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918334	2/17/81	75.503	\$25
9915203	3/17/81	70.207(a)	35
9915266	4/13/81	70.208(a)	20
9915267	4/13/81	70.208(a)	20
9915268	4/13/81	70.208(a)	20
			\$120

~1198

WEVA 81-457

Citation No.	Date	30 CFR Section	Assessment
916648	11/13/80	75.323	\$15
916581	11/18/80	75.512	20
916582	11/18/80	75.1103-8 (b)	20
916583	11/18/80	75.305	20
916584	11/18/80	75.515	15
916585	11/18/80	77.504	20
916586	11/18/80	77.1104	30
916588	11/18/80	75.200	35
916589	11/18/80	75.200	40
916592	11/19/80	75.901(a)	40
916593	11/20/80	75.1103	25
916594	11/20/80	75.400	25
916596	11/24/80	75.200	25
916597	11/25/80	75.400	35
916599	11/26/80	75.1103	30
916600	11/26/80	75.1103	30
918001	11/26/80	75.1103	30
918002	11/26/80	75.1101-3	20
918003	12/01/80	75.1101-3	30
918005	12/01/80	75.1101-3	30

\$535

WEVA 81-458

Citation No.	Date	30 CFR Section	Assessment
918004	12/02/80	75.1101-3	\$60
918006	12/02/80	75.1725	75
918007	12/02/80	75.400	50
918008	12/03/80	75.701	25
918009	12/04/80	75.316	75
876570	12/10/80	77.505	50
912395	1/06/81	75.316	20
912396	1/06/81	75.1200	20
910293	1/22/81	75.1725(a)	80
918321	2/12/81	77.205(b)	30
918322	2/12/81	77.208(e)	25
918323	2/12/81	77.504	30
918324	2/12/81	75.512	15
918325	2/12/81	75.1400-4	15
918326	2/12/81	75.1106-16(c)	15
918327	2/12/81	77.502	15
918328	2/12/81	77.509(c)	20
918329	2/12/81	77.504	45
918331	2/12/81	77.1104	25
917621	2/17/81	75.400	25

\$715

~1199

WEVA 81-459

Citation No.	Date	30 CFR Section	Assessment
917622	2/17/81	75.313	\$10
917623	2/17/81	75.503	20
918335	2/17/81	75.400	30
918336	2/17/81	75.400	30
918337	2/17/81	75.503	15
918338	2/17/81	75.503	15
918339	2/17/81	75.313	15
918340	2/17/81	75.503	15
917627	2/24/81	75.515	15
917628	2/24/81	75.1725(a)	20
917629	2/24/81	75.904	60
917630	2/24/81	75.400	100
917631	2/24/81	75.503	30
917632	2/24/81	75.1107-16(b)	20
917633	2/24/81	75.523-2 (c)	15
917634	2/24/81	75.1725(a)	15
917635	2/24/81	75.503	10
917636	2/24/81	75.904	50
917637	2/24/81	75.1725(a)	20
917638	2/24/81	75.400	25

\$530

WEVA 81-460

Citation No.	Date	30 CFR Section	Assessment
917639	2/24/81	75.514	\$35
917640	2/24/81	75.1722(a)	40
917641	2/24/81	75.1722(a)	30
917643	2/24/81	75.904	25
917644	2/24/81	75.1725(a)	20
917645	2/24/81	75.1105	30
917646	2/27/81	75.326	25
917649	2/27/81	75.516	20
917650	2/27/81	75.516	20
917651	2/27/81	75.515	10
917652	2/27/81	75.807	25
917654	3/02/81	75.807	20
917655	3/02/81	75.516	25
917656	3/02/81	75.514	30
917658	3/04/81	75.1100-2(e)	20
917659	3/04/81	75.515	25
917660	3/04/81	75.1100-2(e)	20
917741	3/04/81	75.515	30
917742	3/04/81	75.515	30

\$ 480

WEVA 81-461

Citation No.	DATE	30 CFR Section	Assessment
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917743	3/04/81	75.1725(a)	\$ 20
917744	3/05/81	75.1725(a)	20

~1200			
917745	3/05/81	75.515	\$20
917746	3/05/81	75.1722(a)	25
917747	3/05/81	75.515	25
917748	3/06/81	75.516	15
917749	3/06/81	75.516-2(c)	15
917750	3/06/81	75.517	15
917751	3/06/81	75.1722(a)	75
917752	3/06/81	75.515	65
917754	3/06/81	75.807	20
917755	3/06/81	75.200	60
917756	3/06/81	75.515	20
917757	3/06/81	75.516-2(c)	25
917758	3/06/81	75.807	25
917759	3/06/81	75.1100-2(e)(1)	25
917760	3/06/81	75.1722(a)	20
917761	3/06/81	75.1722(a)	60
917762	3/06/81	75.515	25

\$575

WEVA 81-462

Citation No.	Date	30 CFR Section	Assessment
917763	3/06/81	75.400	\$ 30
917764	3/06/81	75.400	30
917765	3/06/81	75.515	15
917766	3/06/81	75.1722(a)	45
917767	3/06/81	75.200	40
917768	3/17/81	77.1605(1)	35

\$ 195

WEVA 81-506

Citation No.	Date	30 CFR Section	Assessment
916587	11/18/80	77.506	\$ 35
918330	2/12/81	77.1109(a)	25

\$ 60

WEVA 81-601

Citation No.	Date	30 CFR Section	Assessment
911888	6/02/81	75.316	\$ 15

WEVA 82-25

Citation No.	Date	30 CFR Section	Assessment
918561	5/11/81	75.403	\$ 25
918566	6/24/81	75.400	65

~1201			
918567	6/24/81	75.516	\$20
918568	7/07/81	75.1725(a)	20
918570	7/09/81	77.205(a)	15
9915346	8/13/81	70.208(a)	10
9915347	8/13/81	70.208(a)	10
9915348	8/13/81	70.208(a)	10

\$ 175

WEVA 82-24

Citation No.	Date	30 CFR Section	Assessment
918010	12/08/80	75.1101-23(a)	\$20
918011	12/08/80	75.1713	15
918012	12/08/80	75.523	60
918013	12/09/80	77.207	15

\$ 110

WEVA 81-504

Citation No.	Date	30 CFR Section	Assessment
918017	12/9/80	77.701	\$ 250

WEVA 81-505

Citation No.	Date	30 CFR Section	Assessment
916590	11/18/80	75.302-1	\$ 95
916591	11/18/80	75.301	100
918015	12/09/80	77.701	85
0640145	12/10/80	77.506	90
0640146	12/10/80	77.506	90
0640147	12/10/80	77.506	95
0640148	12/10/80	77.506	95
876569	12/10/80	77.506	95

\$ 745

WEVA 81-600

Citation No.	Date	30 CFR Section	Assessment
0917653	3/02/81	75.807	\$ 85
0917657	3/04/81	75.518	95

\$ 180

TOTAL \$ 5740

ORDER

Citation No. 917642, February 24, 1981 (Docket WEVA 81-460), was vacated by MSHA prior to the filing of its civil penalty proposals, and it is therefore DISMISSED (Tr. 151-152).

Citation No. 917753, March 6, 1981 (Docket WEVA 81-461), was also vacated by MSHA prior to the filing of the civil penalty proposals, and it is also DISMISSED (Tr. 153; Exh. A).

Respondent IS ORDERED to pay the civil penalties assessed by me in these dockets, in the amounts shown above, totalling \$5740, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are DISMISSED.

George A. Koutras
Administrative Law Judge

~FOOTNOTE-ONE

a1. Citations 916581, 916582, 916583, 916585, 916586, 916588, 916589, 916592, 916594, 916596, and 916648.

~FOOTNOTE-TWO

a2. On June 16, 1982, petitioner's counsel advised me that the respondent has in fact now filed for bankruptcy.