

CCASE:  
SOL (MSHA) V. MILLER MINING  
DDATE:  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

MILLER MINING CO., INC.,  
RESPONDENT

Civil Penalty Proceeding

Docket No. WEST 81-267-M  
A.O. No. 04-94295-05001W

Miller Mine

DECISION

Appearances: Debra L. Gonzalez and Marshall P. Salzman, Attorneys,  
U.S. Department of Labor, San Francisco, California,  
for the Petitioner ; Michael Miller and Arnold Kopelson,  
Esquires, Los Angeles, California, for the Respondent

Before: Judge Koutras

Statement of the Case

These proceedings concern a proposal for assessment of civil penalty 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 a civil penalty assessment for an alleged violation of an Order issued pursuant to Section 103(k) of the Act.

Respondent filed a timely answer contesting the alleged violation, denying that it operates a "mine" subject to the Act, and requesting a hearing. A hearing was convened in Sacramento, California on April 1, 1982 and the parties appeared and participated fully therein. Posthearing briefs were filed by the parties and the arguments presented therein have been full considered by me in the course of this decision.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., and in particular sections 104(a) and 103(k).

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of

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previous violations, (2) the appropriateness of such penalty of 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.

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

#### Issues

The basic issue is whether a violation occurred, and if so, should the respondent be held accountable for that violation and assessed a civil penalty in accordance with the criteria set forth at section 110(i) of the Act. Additional issues raised by the parties are identified and discussed in the course of this decision.

#### Stipulations

The parties stipulated to the following (5-8; Exh. JE):

1. Respondent Miller Mining Company, Inc. is and at all relevant times was the owner and operator of the Miller Mine.
2. Respondent Miller Mining Company, Inc., and the Miller Mine, are, for the purpose of this proceeding, subject to the jurisdiction of the Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq.
3. Miller Mine is an underground gold mine.
4. Copies of the subject citations, modifications and terminations of the violations in issue are authentic and may be admitted into evidence for the purpose of establishing their issuance.
5. True and correct copies of the citations were served upon representatives of the operator.
6. Imposition of a reasonable civil penalty or that proposed by MSHA will not affect the Respondent Miller Mining Company, Inc. ability to continue in business.
7. During the two year period prior to September 5, 1980, Respondent Miller Mining Company, Inc. had no assessed violations.
8. Respondent Miller Mining Company is a small or medium sized operator.

Discussion

The facts in this case show that on August 8, 1980, a fire broke out in the main mine tunnel approximately 520 feet from the portal. The fire resulted from a spark from a cutting torch igniting a bale of straw. MSHA inspectors were dispatched to the scene, and at approximately 4:00 p.m. that same date, a section 103(k) Withdrawal Order, No. 379711, was issued ordering everyone out of the mine (Exh. P/R-1). The order was subsequently modified the next day, and as modified, it prohibited persons from entering the mine portal without authorization from MSHA's Western District Manager, and it required that any modifications or alterations of the mine fan ventilation system be monitored by the MSHA inspector on duty (Exh. P/R-2). The order was modified again on September 2 and 3, 1980, and the modification of September 3 permitted persons to enter the portal to establish a permanent bulkhead near the fire (Exhs. P/R-5 and P/R-6).

The initial withdrawal order of August 8, 1980, states as follows:

A mine fire started in the main tunnel about 2:20 p.m. The fire occurred approximately 520 ft. from the portal.

The modified order of August 9, 1980, states as follows:

Original order should read -- Type of inspection 030. Added to condition or practice should be -- No person shall enter the mine portal without direct authorization from MSHA's Western District Manager. Any modification or alterations of the mine fan ventilation system shall be monitored by the MSHA inspector on duty.

On September 2, 1980, after receiving authorization from MSHA and state mining officials, one four-man rescue team consisting of company employees was permitted to enter the mine. After advancing for a distance in excess of 100 feet, they turned back because it was too smoky and they could not see. That evening, a hole approximately 2 by 2 feet was cut into the 42-inch ventilation line about 10 feet from the surface fan in an attempt to exhaust the smoke from the mine. Beach balls and an umbrella were pushed down the vent line and the fan was turned on; however, the ball would not travel down the vent and it determined that the line was plugged underground at station 4á58. A decision was made to discontinue efforts to unplug the vent line until the next morning, September 3, and at approximately 11:30 p.m., September 2, the portal was secured, except for the security guards, the assistant safety director, and the crew working in the shaft.

On the morning of September 3, the vent line which had been cut to facilitate the attempts to exhaust the smoke from the mine was repaired, and when the fan was turned on again, it began exhausting smoke from the mine. At approximately 2:00 p.m.,

after receiving permission from

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MSHA and state officials, a four-man rescue team entered the mine. One of these men was MSHA inspector Felix Muniz. Upon exiting the mine at approximately 2:30 p.m., Mr. Muniz indicated that he had found that a hole approximately 2 by 2 feet had been cut into the 42-inch ventilation line at the 4á58 station. He surmized that it had been cut with a sharp tool, and he took pictures of the hole which had been cut into the line, as well as some foot-prints which he observed (Exh. P-2). Subsequently, work progressed to establish a temporary bulkhead, but was discontinued because of the lack of sufficient oxygen. Thereafter, on September 5, a meeting was held with MSHA and state inspectors to discuss additional work required, and that same day company officials, state officials, and MSHA inspectors entered the mine again to evaluate the bulkhead and to investigate a suspected unauthorized mine entry and an MSHA special investigator was with this group (Exh. R-2). Mr. Muniz issued his section 104(a) Citation No. 0601832 at 5:00 p.m., on September 5, 1980 (Exh. P/R-8). He issued the citation because he believed that someone had entered the mine between the time it was secured on the evening of September 2, and the morning of September 3, and cut a hole in the ventilation line at the 4á58 station. Since Mr. Muniz believed this was an unauthorized entry contrary to the conditions imposed by the original section 103(k) withdrawal order, as subsequently modified, he based his citation on a violation of that order.

The citation issued by Mr. Muniz on September 5, 1980, describes the following condition or practice:

On the day September 3, 1980, at approximately 1400 hours it was apparent that 103-K order # 379711 had been violated by one or more persons entering the mine and performing work which endangered human life.

Mr. Muniz's citation was subsequently modified on March 2, 1981, by another MSHA inspector, and that modification states as follows (Exh. P/R-12):

This citation is modified in order to clarify the violation. The Miller Mining Company submitted a mine re-entry plan to the M.S.H.A. inspectors at the mine property on or about August 13, 1980. This plan stated that qualified mine rescue personnel consisting of two separate 5 man teams be established, trained and briefed on the mine and mine fire before entering the mine. This plan was answered by letter to Mr. Michael Miller on August 28, 1980, by Tom Lukins, Western District Manager. The district manager's letter clearly stated the condition to be followed before anyone could re-enter the mine. The company plan to enter the mine and the MSHA re-entry conditions letter were both violated in that during the early morning hours of September 3, 1980, the mine was entered by persons unknown after all personnel and guards

had been removed by company directions. The cautionary procedures as stipulated were not taken, nor were back-up crews present. The entry was in violation of good common sense, established fire fighting practices, and complete disregard for human life.

Work in the tunnel resumed on September 8, 1980, and continued during the months of September and October 1980, and according to MSHA's report of investigation (Exh. R-2), the fire was either extinguished or isolated from the main tunnel, and on November 24, 1980, the section 103(k) order was terminated. The report notes that "no personal injuries were sustained during the entire incident". The citation issued by Mr. Muniz was subsequently terminated on January 7, 1981, it states as follows (Exh. P/R-11):

On September 3, 1980, at approximately 1400 hrs. it was apparent that the 103-K order no. 379711 had been violated by one or more persons entering the mine and performing work which endangered human life. The citation was abated after management was made aware of the danger and public law 95-164.

Testimony and evidence adduced by the petitioner

MSHA Inspector Nicholas Esteban testified as to his background and experience, and confirmed that his duties included the inspection of the mine in question from June 1979 to approximately December 1981. He was at the mine when the fire started, left for a short while, and then returned and found that the portal area had been sealed. He then issued a section 103(k) order, served a copy on general manager Benny Licari, and explained it to him. No one was trapped in the mine, and since the operator sealed it, the section 103(k) order was issued to insure MSHA control of the mine, and to insure the health and safety of anyone entering the mine, as well as to insure that anyone entering the mine did so with permissible and approved equipment. The fire presented a danger of Carbon Monoxide poisoning and possible explosion (Tr. 18-26).

On cross-examination, Mr. Esteban confirmed that he was at the mine on August 7, 1980, the day before the fire, but was not sure whether he actually went into the mine. On August 8, 1980, he did go underground as part of the continued inspection started the day before, but does not recall issuing any citations for violations of any standards. He confirmed that he issued the control order in question on August 8, 1980 (Exh. P/R-1). He also confirmed that he marked the block on the citation form "see reverse", and his intent was to call the operator's attention to the information on the reverse side of the citation form (Tr. 27-37). Mr. Esteban stated that he had orders from his district supervisor to go to the mine and close it down. If there were anyone underground, the mine would have been completely taken over by MSHA. He explained that when there is a fire in a mine, he is told to issue an order (Tr. 47).

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Mr. Esteban identified a copy of a modification of his order, issued by Inspector Gene Ainslie (Exh. P/R-2), but he indicated that he was not at the mine when Mr. Ainslie issued the modification and Mr. Ainslie probably received orders from the district manager to issue the modification (Tr. 50). Mr. Esteban confirmed that his original order did not include a requirement that the mine operator first seek the district manager's permission before entering the mine portal (Tr. 62). He also identified copies of three additional modifications to his order which he issued (Exhs. P/R-3, P/R-4, P/R-5). He also confirmed that he and Mr. Ainslie conducted an investigation of the fire and prepared a report (Exh. R-2). The respondent and its personnel were cooperative with MSHA during the investigation (Tr. 76).

Mr. Esteban testified that he did not participate in the investigation conducted September 2, 1980, to determine who may have entered the mine. An MSHA special investigator was called in, and Mr. Esteban stated that he did not know the identity of the individual who may have made the unauthorized entry into the mine (Tr. 77).

MSHA Inspector Felix Muniz confirmed that he was with Inspector Esteban on August 8, 1980, when the section 103(k) order was issued. He also confirmed that he was at the mine on the evening of September 2, 1980. Respondent's mine personnel, Mike Miller, Benny Licari, and Dean Hansen were attempting to determine the cause of a ventilation tube plugging up. The tube was located at the portal and it is hooked to the ventilation fan and goes down the portal decline. Work stopped approximately 11:30 pm., and Mr. Miller told everyone to go home and to return the next morning. Mr. Muniz then left the mine site with Mr. Esteban and two other MSHA representatives. Before leaving, Mr. Miller informed him that he should post a security guard at the portal to insure that no one would go in. Mr. Hansen and Mr. Licari stayed at the mine, and Mr. Muniz indicated that to his knowledge no MSHA personnel returned to the mine during the period between 11:30 a.m. and 8:00 a.m., the next morning (Tr. 78-88).

Mr. Muniz stated that he returned to the mine at 8:00 a.m., September 3, 1980, and he went straight to the portal where he found Mr. Licari parked by some bales of hay at the mine entrance. Shortly thereafter, the ventilation fan was turned on, and it started sucking smoke from the portal. He found this unusual, and it was obvious to him that someone had unplugged the ventilation tube since smoke was coming out. Mr. Muniz then entered the mine at approximately 2:00 p.m. to evaluate the temporary or permanent seal and also to investigate the circumstances connected with the underground portion of the ventilation tube. He was accompanied underground by three individuals, all of whom were certified in mine rescue by MSHA, and established procedures for going underground at that time were followed (Tr. 88-92).

Mr. Muniz confirmed that while underground, he was at the

approximate area of the fire, and he observed footprints and an "opening hole on the vent tube". He took pictures and identified them for the record

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(Exh. P-2). The hole in the vent tube was approximately 20 to 30 inches in diameter, and from his observations, it appeared that someone used a sharp tool to cut the hole in the tube (Tr. 94). In his opinion, had someone entered the mine without following MSHA's established procedures, the person could have been subjected to a potential explosion or to being overcome by gas. In addition, they could have encountered ground control problems, such as a falling rock, and become entrapped in a gaseous atmosphere (Tr. 97). He had never observed the vent tube in question prior to his entry into the mine on September 3rd (Tr. 98). Had the hole in the vent tube been there the previous day, the fan would have been working. The vent was apparently blocked by some concrete which had been poured into the area from the surface (Tr. 99).

On cross-examination, Mr. Muniz confirmed that while he was at the portal on September 2, it was sealed with plywood and plastic and small amounts of smoke was coming out of the seal. Respondent's safety representatives were monitoring the gasses and smoke coming from the portal along with him (Tr. 101, 132). He confirmed that he did suffer a headache from the smoke coming out of the mine, that he had occasion to go within 10 or 20 feet of the portal, but issued no orders requiring people to stay away from a certain distance of the portal (Tr. 100). With regard to the footprints which he observed, Mr. Muniz stated that they could not have been caused by a team which entered the mine on September 2, because that group only went in approximately 127 feet and returned. The area where he observed the footprints was approximately 200 feet into the mine. Prior to the September 2d entry by a rescue team, MSHA had given no one permission to enter the mine, and to his knowledge no one entered subsequent to the August 8th closure (Tr. 104, 117, 118).

Mr. Muniz confirmed that he issued the citation for an illegal entry on September 5, 1980, and he waited a few days because the special investigation was going on. Mr. Muniz did not interview any mine personnel to determine the identity of the person who may have entered the mine (Tr. 128).

Allan White testified that he was employed by the respondent in September 1980 as a security guard, and that on September 3, 1980, he was on duty on the "graveyard shift", 12:00 midnight to 8:00 a.m. He arrived at the mine at approximately 11:45 p.m. and reported to work at the main gate. His specific area of responsibility and post was "the patrol truck which was stationed next to the plaza area in front of the portal" (Tr. 135). Two other security guards were also at the mine during his shift. When he went to his post at the plaza, company safety personnel were present, as well as the "swing" and "graveyard" miner work shifts who were coming and going (Tr. 135). At approximately 12:30 a.m. he received a radio call from his supervisor Ron Schmidt who informed him that mine manager Licari was coming to his area to issue some orders to the miners working there and that he (White) was to insure that they were carried out. When Mr. Licari arrived, he instructed the graveyard shift foreman to send his men home for the rest of the evening and

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the crew left. Mr. Licari instructed him to remain in the area and to insure that all the miners left, but gave him no reasons for these instructions (Tr. 129-137).

Mr. White stated that after all the miners left the plaza area, the only people who remained were himself and graveyard safetyman Alan Koepke. Shortly thereafter, Mr. Schmidt arrived at the plaza post and ordered Mr. Koepke to leave the area. Mr. Schmidt then directed him (White) to secure the plaza area and to move his guard post from the plaza area to the top of the hill by the mine access road, and he did so at approximately 12:45 to 1:00 a.m. Mr. White stated that from his new guard post he had a partial view of the lower plaza area but could not see the portal or actual entry to the mine (Tr. 141). While at his new post, Mr. White stated that Mr. Schmidt would drive by for a routine check of the area every hour or half hour, and that he would drive to the lower plaza area and remain there for five minutes or so and then would leave. Mr. Schmidt directed him not to let anyone else past his guard post on the hill. Sometime between 3:30 and 4:00 a.m., Mr. Schmidt went to the lower plaza area and stayed there for 15 to 20 minutes. No one else crossed his post, but Mr. Koepke attempted to, and explained that he needed to obtain some air sample test tubes from the supply trailer in the plaza area. Mr. White advised him that he was under orders not to let anyone pass, and Mr. Koepke left to find Mr. Schmidt at the main gate to obtain his permission to pick up his air samplers (Tr. 144).

Mr. White believed it unusual for Mr. Schmidt to be at the mine during the graveyard shift. Mr. White also stated that he observed surface foreman Dean Reed there also during the shift at approximately 4:00 a.m., at the main gate, and that he was looking for Mr. Schmidt. Mr. Reed did not enter the mine area, and Mr. Schmidt was not on the property at that time. He did not know what Mr. Reed was doing there, and he found his presence unusual since Mr. Reed was seldom seen in the mine hour after hours (Tr. 145).

On cross-examination, Mr. White confirmed that when he left work at approximately 8:00 a.m., September 3, 1980, he had some discussions with the security personnel who were relieving him, and he recalled mentioning the fact that his post had been moved from the plaza area to the top of the hill, that Mr. Schmidt had been there most of the night, and that the incoming security shift would have to await further instructions (Tr. 148). He testified that the mine plaza area could be entered from areas other than the access road, namely through a stockpile area which was lighted. However, he could not observe anyone coming that way from his vantage post on the hill (Tr. 152). Mr. White confirmed that he did not know who may have entered the mine, but "rumor and scuttlebutt" indicated four possibilities, namely, Mr. Reed, Mr. Licari, surface superintendent Billy Canapa, "and possibly even Ron Schmidt" (Tr. 160). The basis for these rumors was the fact that "there had been things that were appropriated for going into the tunnel on a safe means and they had all of a sudden disappeared" and the fact that Mr. Reed was there at night

when he was never known to show up at those hours (Tr. 161).

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Mr. White confirmed that he was no longer employed by the respondent, and he left its employ on October 11, 1980, after a dispute over a suspension he received for disciplinary reasons and two of his company paychecks which "bounced" (Tr. 161). He also confirmed that while he was on duty during the aforementioned night in question, he personally observed no one enter the mine portal (Tr. 162).

Dean Hansen, testified that in September 1980, he was employed by the respondent as the underground superintendent. He confirmed that he was part of the approved group who entered the mine on September 2d at approximately 11:00 a.m., for the purpose of checking the fire to determine how to contain it so that mining could be resumed. The group had MSHA's approval, they were all equipped with Gregor mine rescue units, and a back-up team certified by MSHA in mine rescue was standing by (Tr. 165). He described the conditions underground on that day, and the evening was devoted to attempts to clear up the fan ventilation tubing which had been blocked. He returned to the mine the next morning, September 3d, at approximately 8:00 a.m. He met Mr. Licari, and Mr. Licari asked him "to go for a ride where we could talk without being interrupted" (Tr. 170). Mr. Hansen related the conversation which took place, as follows (Tr. 171-174):

Q. What did you talk about?

A. Dreams and the force.

Q. Could you explain that? Could you explain what the conversation was?

A. Yeah, I can pretty well repeat it. It sounds pretty silly. He said -- Benny told me that he'd had a dream.

Q. Benny Licari?

A. Yeah. That the Force was with him. That a rock fell out of the back of the tunnel and put a hole in the fan line. And I asked him if he was all right.

Q. What did you mean when you asked him if he was all right?

A. Well, he talked incoherently. I never heard of such a positive dream projection, and he wanted me to go turn the fan on before I done anything else.

Q. Did he ask you to turn the fan line on?

A. Yeah, and the Force was with him. So I said, I'll turn the fan line on. I was going to turn it on to humor him. And lo and behold, the fan run just fine.

Q. What else do you remember from the conversation that you had with Mr. Licari that morning? Was there

any other explanation or any other --

A. No. Just that he had that dream, that there was a hole in the fan line, that a rock fell out of the roof at the tunnel and put a hole in the fan line and he just knew it happened.

Q. Did you ask him how he knew it happened?

A. Yeah.

Q. What was the response?

A. He said he just knew it, that the force was with him and rock fell out of the back of the tunnel and put a hole in the fan line. And he asked me to convince the other miners that that's how a hole got put in the fan line.

Q. And did you eventually go turn on the fan?

A. Yes.

Q. And did it work?

A. Yes.

Q. What was -- can you describe how Mr. Licari was having this conversation with you? Was he excited?

A. Yes, he had to be pretty excited. And real enthused. I mean like there was no doubt.

Q. Do you know where Mr. -- well, whether Mr. Licari lived on the mine property?

A. Yes, I do, I did.

Q. Could you tell us where he lived on the property?

A. He lived, when you approach the line he had a patrol in the guard shack, it's right in here -- let me look at this a little closer. (Witness examines document.) This is the guard shack --

\* \* \*

Q. Did you -- did you find your conversation with Mr. Licari that morning unusual?

A. Yeah, found it real strange. I wasn't too sure -- I really thought maybe he had a load on, I thought maybe he'd been drinking a little bit through the night. And later when I turned the fan on and it run I got quite angry with Mr. Licari out in the parking lot. And I got angry because I told him that I felt using the powder would have been a hell of a lot better way it was done, the hole got put in the fan line.

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Q. How -- after you turned the fan on and it worked --

A. Mm-hmm.

Q. What conclusion, if any, did you draw from that?

A. Well, I knew the fan line was open. That somebody had to have went in there and I accused Benny of doing so.

Q. That morning you accused him of doing so?

A. Yes. I got very hostile about it and the safety director, Sandy was there. And I told him, I said, you're going to have us all in court over this thing. And that's were [sic] we're sitting today.

Mr. Hansen confirmed that he was part of the rescue team that went underground with Inspector Muniz on September 3, 1980, after the vent tube was unclogged. He observed two sets of footprints, part of a broken axe and a piece of fanline in the area where the vent tube had been cut, and he assumed the axe was used to cut the tubing, but did not believe it could have been made by falling rock (Tr. 176). He also confirmed that Mr. Licari and Mr. Canapa were scuba divers, and he observed scuba tanks and gear stored at Mr. Licari's house. He also stated that Mr. Licari had previously asked MSHA and the state inspectors whether scuba gear could be used to enter the mine because the Gregor rescue units were not at the site, but the state officials indicated that it could not be used (Tr. 178).

As for the identity of the person or persons who may have entered the mine, Mr. Hansen stated that Mr. Koepke told him the next day, September 4, 1980, that it was Mr. Licari and Mr. Canapa. Mr. Hansen stated further that Mr. Koepke told him that he saw Mr. Licari, Mr. Canapa, Mr. Reed, and quarry superintendent Ron Frasee at the portal area on the morning in question, but that he did not actually see anyone enter the mine portal or punch a hole in the portal seal (Tr. 180-181).

On cross-examination, Mr. Hansen confirmed that he personally does not like Mr. Licari, and he related that Mr. Licari had made some statements regarding the operation of the mine to the local press, and that Mr. Hansen and the respondent are involved in a court suit concerning "defamation of character". Mr. Hansen also confirmed that he is a party to another court suite concerning moving costs connected with his employment with the respondent (Tr. 183). He testified further as to the conditions of the underground mine the day he entered it with the rescue team, indicated that it was intensely hot on September 2d, but that it had cooled down after the smoke was vented the next day.

Mr. Hansen stated that he mentioned the axe which he observed underground to MSHA investigator Juan Wilmouth some ten days later when Mr. Wilmouth came to his house to speak with him.

Mr. Hansen also confirmed

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that he is a party to another court suit concerning moving costs connected with his employment with the respondent (Tr. 183). He testified further as to the conditions of the underground mine the day he entered it with the rescue team, indicated that it was intensely hot on September 2d, but that it had cooled down after the smoke was vented the next day.

Mr. Hansen stated that he mentioned the axe which he observed underground to MSHA investigator Juan Wilmouth some ten days later when Mr. Wilmouth came to his house to speak with him. Mr. Hansen also confirmed that he resigned his job with the respondent on September 8, 1980, and that he gave his "quit" to Mr. Licari. He also confirmed that after he quit, he was involved in an automobile accident on mine property and was charged with felony drunk driving (Tr. 190). Mr. Hansen stated that to his knowledge none of the certified rescue team members, including himself, entered the mine between the hours of 12:00 midnight and 8:00 a.m., September 3, 1980. He also indicated that Mr. Licari, Mr. Canapa, and Mr. Schmidt are not certified in mine rescue by MSHA (Tr. 193). To his knowledge, none of these individuals entered the mine at the time in question (Tr. 194). He also conceded that the maximum age for one to serve on a rescue team is fifty, and that at the time he served on the team he was fifty-two (Tr. 194). However, he indicated that MSHA authorized his entry and excepted him from the age requirement (Tr. 195). Mr. Hansen also stated that when Mr. Licari told him about the "force", he felt that Mr. Licari knew that a hole had been cut in the fan line (Tr. 200).

Testimony and evidence adduced by the respondent

Arnold Kopelson, testified that he is an attorney, that his firm represents the respondent, and he confirmed that he is a co-partner with Mr. Miller in the ownership of the mine in question. He testified that he and Mr. Miller were at the mine site on September 2, 1980, and they went there to ascertain a manner in which to gain entrance to the portal for the purpose of putting out the fire. He confirmed that he participated in the conferences with MSHA representatives that day and also confirmed the fact that a mine entry was made that day by a rescue team. He was standing 30 or 40 feet from the portal, but was moved back to a distance of 250 to 300 feet on orders by company safety officer Sandy Rettagliata. Sometime during that evening he started to feel nauseous and dizzy, and experienced severe headaches and a burning in his nose and throat, and decided that he had to leave the area. He spent the next day in bed. He expressed a concern for the safety of the people in the area, and expressed his view that 250 to 300 feet from the portal would be a safe distance for people to be. He asked Mr. Miller to convey these views to Mr. Licari so that he could keep people away from the portal (Tr. 225-228).

Mr. Kopelson stated that he did not give anyone permission to enter the mine portal, except as authorized by MSHA. Mine management specifically told Mr. Licari to stay away from the mine portal because of the smoke, and this included security

personnel. He did this out of concern for the

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safety of his people. He also stated that the mine employed approximately 105 people and was the second largest employer in Calaveras County. The community was concerned that the mine would go out of business, and in view of the potential economic disaster on the community. Mr. Kopelson believed that "anyone could have gone down that hole" (Tr. 229).

On cross-examination, Mr. Kopelson stated that prior to September 2, he and Mr. Miller had made many trips to the mine, but except for the day the fire started, he could not recall being as close to the portal as he was on September 2 (Tr. 233).

Jean Baudizzan, testified that he is employed by the respondent as a security guard, and that on September 3, 1980, he was working the graveyard shift from 12:00 midnight to 8:00 a.m. He was assigned to shack guard post Number 2. During that evening he had occasion to see Mr. Koepke while making his security rounds. He first saw him at his guard post at 12:00 midnight when he came to speak with the miners, and later saw him in his pick up truck some 60 feet from his post. Mr. Koepke came and went at various times, and was also asleep in his vehicle for about two hours during the time in question (Tr. 237).

Mr. Baudizzan confirmed that from his guard post he could not see the portal entrance to the mine. He also confirmed that he was interviewed by MSHA personnel concerning the alleged entry to the mine on September 3, and that his supervisor discussed the matter with him and advised him to tell the truth to the investigator (Tr. 239). Mr. Baudizzan stated that he heard rumors that "practically every employee there and past employees had gone into the mine at one time or another", but that he heard no actual names mentioned (Tr. 240).

On cross-examination, Mr. Baudizzan confirmed that the "rumor" he heard about concerned people allegedly entering the mine "after the mine was supposed to have been entered", after September 3d (Tr. 242).

Michael Miller, confirmed that he was at the mine on September 2, 1980, and that he was with Mr. Kopelson during most of the day and evening. He observed a great deal of smoke coming out of the portal seal, and he too was ill that evening and the next day. He testified that no one, including himself, ever gave anyone working for him permission to enter the mine. Prior to the instant citation, the mine had a perfect safety record since ground was broken on March 1, 1979. Mr. Miller stated that he has no knowledge as to who may have entered the mine, and has seen no credible evidence as to the identity of the person who allegedly entered the mine. He confirmed the fact that the mine operation had a significant impact on the economy of the county, and that his payroll was approximately \$200,000 a month. He also confirmed that he had received numerous phone calls from people telling him that "they would be only too happy to go into that mine and just knock the damn fire out", but that in each instance, these offers were rejected. To the best of his knowledge, "we followed the rules and regulations" (Tr. 245).

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On cross-examination, Mr. Miller testified that he visited the mine approximately 10 times during the period August 8 through September 3, 1980. He also confirmed that he made no offers to have the people who volunteered to enter the mine become certified in mine rescue procedures (Tr. 246).

In response to further bench questions concerning the issuance of the order and the modifications, Mr. Miller stated as follows (Tr. 247-249):

THE WITNESS: That is correct. I mean, I will testify to an opinion. I found MSHA to be inaccurate in the conclusions they reached, I found them to be obstructionist, I found them to be extremely uncooperative. And I'm not talking about Mr. Esteban, who is our regular inspector. I'm talking about the entire team of people who came down. I consider the behavior of MSHA on this case disgraceful.

JUDGE KOUTRAS: In what regard now?

THE WITNESS: We were getting orders all the time and modification of orders, and we were being -- one time, Your Honor, we had made a request that we would try and get members of the San Francisco Fire Department, who are trained fire fighters, to come down and help us to end this fire, which we believed was a smouldering fire, and that offer was refused. Every time we turned to try and make what we considered to be a carefully considered suggestion as an appropriate method for dealing with this fire, some reason was found as to why we could not do it. I also find the orders inconsistent. A lot of the conclusions reached were based upon hearsay, circumstance, and very inconsistent with themselves.

I also must say, Your Honor, that under the circumstances, with the pressure that everybody understands that I was under, the Company was under, I took a look at the letter of the 28th of August and I did see what I thought to be a statement that you may enter the mine as long as four conditions are complied with. We recommend that the portal be sealed, we recommend -- twice, they stated -- that the portal be sealed. But we forbid anybody from entering this mine unless the following four conditions are met. Then there is a circumstantial case that someone did enter the mine. I don't think that anybody in his right mind would question the fact that somebody must have gone into the mine.

But the issue is, it was never linked to this Company, which had a perfect safety record up until that date, cooperated with the investigation, has never seen one shred of credible evidence to establish who went in, the circumstances under which they went in, and whether

it violated the letter of August 28. You put all those facts together and I don't understand why I'm here today.

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Mr. Miller confirmed that he did not contest the withdrawal order, and that he tried "to work with the people in complying with the order" (Tr. 251).

Benjamin J. Licari, testified that he is a graduate geologist and that on September 3, 1980, he was serving as mine project manager. The only persons senior to him were the mine owners, and Mr. Hansen was the underground superintendent working under his supervision. Mr. Hansen was responsible for the direct construction of the shaft and tunnel, and Mr. Licari conceded that during the period of September 2 or 3, 1980, he and Mr. Hansen were not getting along. He confirmed that he too received offers from members of the community to help put out the fire, that he considered these offers to be serious, but that he never engaged any of these people in the fire fighting activity (Tr. 254-257).

Mr. Licari stated that mine management at all times did their best to insure the safety of their personnel and to comply with all of the agency regulations in attempting to put out the fire, and that at no time did Mr. Miller or Mr. Kopelson ever give him authority, permission, or directions to violate any order, rule, or regulation of any state or federal safety agency (Tr. 257).

Mr. Licari confirmed that he had a discussion with Mr. Hansen at the mine on the morning of September 3, 1980, and that during that conversation he expressed his displeasure over any attempts to use dynamite in the tunnel because of the fact that MSHA and OSHA had advised him that the gasses in the tunnel were approaching the lower explosive limits. He explained to Mr. Hansen that the use of beach balls and umbrellas should be discontinued because he (Licari) had drafted a schedule for reopening the mine. With regard to Mr. Hansen's testimony regarding the "force", Mr. Licari denied that he had mentioned any "dreams" to Mr. Hansen, and explained that he generally used the phrase "may the force be with you" in greeting or saying goodbye to people. He denied that he entered the mine, and stated that he had no knowledge as to who may have entered the mine contrary to MSHA instructions (Tr. 259).

On cross-examination, Mr. Licari confirmed that he no longer was employed with the respondent company, but is employed with Demex International, who in turn is doing work for the respondent. He also confirmed that at the time of the incident in question, he was not trained in mine rescue, but is now. He also confirmed that he is a certified advanced scuba diver and that he had scuba equipment stored on the mine site at the time of the entry in question (Tr. 261). He stated that at the time of the alleged illegal entry, he did order security personnel out of the mine portal area (Tr. 261).

Mr. Licari stated that when he discussed his mine reentry plan with Mr. Hansen, he had prepared it sometime between the hours of 12:00 midnight and 8:00 a.m. (Tr. 265). He stated that the original portal seal was airtight and composed of sand and

other materials, but that the seal was removed to facilitate the entry of the authorized mine rescue team, and to his knowledge this was the first time anyone had entered the mine

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since the fire started (Tr. 267). He stated that in view of the fact that safety director Rettagliata was hospitalized on September 3, for carbon monoxide inhalation, and the fact that smoke was coming from the sael into the plaza area, he believed it was best to post security people at a safe distance to keep people away from the portal (Tr. 268). Mr. Licari stated that he gave Inspector Esteban a copy of his mine reentry plan on the morning of September 3 (Tr. 273).

#### Petitioner's arguments

The facts presented in this case are detailed in the post-hearing "proposed findings of fact" submitted by the petitioner in support of its case, and they are as follows. On August 8, 1980, a fire broke out in the underground portion of the mine and it was apparently started when a spark from a torch ignited bales of hay stored underground. Shortly after the fire started, an MSHA inspector appeared on the scene and issued a withdrawal order pursuant to section 103(k) of the Act, withdrawing mine personnel from the mine and prohibiting anyone from reentering until such time as MSHA determined that any hazards connected with the fire had been eliminated. The original order was modified several times by MSHA inspectors, and the gist of these modifications prohibited anyone from reentering the mine without direct authorization from MSHA's Western District Manager.

In response to the modified order, respondent issued a plan for reentering the mine, and MSHA's district manager responded to that plan and advised the respondent that MSHA would not permit mine reentry unless four conditions were met. The conditions were (1) all persons were to use approved 2-hour self-contained oxygen breathing devices; (2) all persons entering the mine must be currently certified by MSHA in mine rescue procedures; (3) the persons entering the mine must consist of a minimum of four properly equipped persons and a back-up team of four additional persons to be maintained in immediate readiness to enter the mine if necessary; and (4) industry recognized mine rescue procedures and techniques must be followed by all persons entering the mine. Respondent agreed to comply with these conditions.

On September 2, 1980, in an attempt to facilitate mine reentry, respondent made an effort to remove smoke from the mine by use of a ventilation fan. During this process, the fan somehow became blocked, and attempts to unblock it by various methods were unsuccessful. All surface mining activities ceased, attempts to unblock the fan were discontinued, and all mine personnel were instructed to leave the mine site. At approximately 12:30 a.m., September 3, 1980, all mine personnel had left the mine, and the mine security staff was instructed to secure the mine protal area and to insure that everyone left the area. Once this was done, certain mine security personnel were instructed to relocate their security post away from the mine portal area to an area near the entrance to the mine property, and they were further instructed not to allow anyone past the guard post other than the chief of security.

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On the morning of September 3, 1980, shortly after 8:00 a.m., the ventilation fan was turned on and smoke began to be removed from the mine. At approximately 2:00 p.m. that same day, an approved rescue team consisting of an MSHA inspector and mine personnel entered the mine portal and the inspector discovered that someone had cut a hole in the underground ventilation tubing, thereby facilitating the venting of the smoke from the mine. The inspector believed that this was done sometime within the hours of midnight and 8:00 a.m., that same day, and since MSHA had no knowledge of this, and since it was obvious to the inspector that an unauthorized entry had been made contrary to the terms of the orders which had previously been issued, he issued the citation which is the subject of these proceedings.

Petitioner concludes that the respondent failed to adequately safeguard against persons reentering the mine and thus violated the 103(k) order issued on August 8, 1980, and as modified on September 2, 1980. Since the respondent has not challenged the validity of the order in question, petitioner asserts that the only issue presented is whether the respondent, either by actions or inaction, violated section 103(k) of the Act.

In support of its case, petitioner argues that there is no question that one or more persons entered the mine between the hours of 12:45 a.m. and 8:00 a.m. on September 3, 1980, and cut a hole in the fan line, and that respondent's president Michael Miller conceded that this is the case. Petitioner asserts that there is an abundance of facts from which the logical inference can be made that the individuals who entered the mine on September 3, 1980 did not comply with the four conditions set forth by MSHA's letter dated August 28, 1980. First of all, if the persons who entered the mine were intending to meet MSHA's requirements, there would be no logical reason to commit the entry in the twilight hours. More specifically, it would have been necessary for eight persons (4-person rescue team and 4-person back-up team) certified in the mine rescue to have participated in the entry in order to meet the second-and third-enumerated MSHA conditions. However, the individuals certified in mine rescue by MSHA, namely respondent's Underground Superintendent Dean Hansen, Mark Gentry, Robert Holbrook, Charlie Smythe and MSHA Mine Inspector Felix Muniz, were not present at the mine on September 3, 1980 between the hours of 12:45 a.m. and 8:00 a.m. In addition, the individuals who were present at the mine on that day and at that time, namely respondent's Project Manager Benny Licari, Security Director Ron Schmidt and Surface Foreman Dean Reed, were not at that time certified in mine rescue by MSHA. If the persons who entered the mine were interlopers, it is highly unlikely that they were MSHA-certified in mine rescue.

Petitioner maintains that it is improbable that the persons who entered the mine wore MSHA-approved self-contained oxygen breathing apparatus because the respondent did not have any MSHA-approved self-contained breathing apparatus readily available at the mine and it is

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inconceivable that interlopers intending to enter the mine without the knowledge of the respondent would concern themselves with procuring self-contained breathing apparatus approved by MSHA.

Petitioner argues that the section 103(k) withdrawal order issued by MSHA's inspector placed a duty on the respondent to exercise a high degree of care to insure that no persons entered the mine. Respondent was ordered "to cause immediately all persons . . . to be withdrawn from, and to be prohibited from, entering" the mine, and the August 9, 1980 modification of the original withdrawal order prohibited "any person from entering the mine portal without direct authorization from MSHA's Western District Manager." The district manager's letter of August 28, 1980, which was incorporated by reference into the September 2, 1980, modification of the original withdrawal order, stated that MSHA would "not allow persons to re-enter the mine" unless the enumerated conditions were met. Thus, petitioner maintains that the withdrawal order and the subsequent modifications did not limit their scope to "miners" or "operator's employees". Instead, the word "persons" was used in the withdrawal order and its subsequent modifications, and respondent's duty of care extended not only to its miners and its employees, but extended to all individuals.

Petitioner states that there are several factors which indicate that the mine entry on September 3, 1980, was accomplished with the knowledge and involvement of respondent. In support of this conclusion, petitioner points out that top-level mine management, who were not ordinarily at the mine during the graveyard shift, were at the mine on September 3, 1980, at the time the entry occurred. On the morning following the entry, respondent's Project Manager, the highest level on-site manager, made statements which indicated that he at that time already had knowledge of the hole in the fan line and knew the fan would function properly. Furthermore, petitioner points out that it was respondent who had the most to gain from the entry to the mine because it would have been impossible to put out the fire without making a hole in the fan line.

Petitioner asserts that participation by the respondent in the entry of the mine would constitute gross negligence because it would be a reckless disregard of an order issued by MSHA for the purpose of insuring the health and safety of all persons in the area. In the alternative, petitioner argues that the respondent certainly failed to exercise reasonable care to prevent the entry of persons into the mine. In support of these conclusions, petitioner points out that immediately after the mine fire began, the portal area was sealed off and a permanent security post was established at the portal area. Additionally, respondent had received numerous offers, which respondent considered sincere, from people in the local area volunteering their assistance in extinguishing the mine fire. Thus, petitioner concludes that it is obvious that respondent recognized the danger of an unauthorized entry to the mine if the portal area were left unguarded and realized the importance of

having constant security in the area. Despite this knowledge, respondent nevertheless removed its security guard from the portal area on September 3, 1980 to a post where the guard could not see the portal. Petitioner maintains that the removal of the security guard to a location where he had no view of the portal at the very least constituted ordinary negligence.

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#### Respondent's arguments

In addition to the arguments advanced during the hearing in this case, respondent points out in its post-hearing brief that prior to the fire which occurred at the mine on August 8, 1980, respondent had never been issued any order or citation by MSHA. Respondent also points out that it voluntarily evacuated the mine, reported the fire to MSHA, and that at the time the inspector issued the withdrawal order on August 8, 1980, no one was in the mine.

Respondent's arguments include a recitation of the facts surrounding the issuance of the order and the subsequent modifications, including respondent's agreement to comply with MSHA's four conditions before reentering the mine. Respondent asserts that investigations conducted by MSHA as well as the respondent failed to determine the identity of the person or persons who may have entered the mine, the training of any such person, the equipment used by such persons, or any circumstances surrounding the alleged entry. Further, respondent maintains that persons other than mine officers or employees had strong motives to aid the respondent by an entry into the mine. However, respondent concludes that no evidence was adduced to prove that it enticed, solicited, encouraged, allowed, permitted, or suffered any person or persons to enter the mine during the time in question.

Respondent maintains that it took reasonable and responsible precautions to prevent any unauthorized entry in violation of the withdrawal order, and that it did not violate that order, as modified.

#### Findings and Conclusions

##### Fact of Violation

The respondent in this case is charged with a violation of section 103(k) of the Act, and the theory of MSHA's case is that someone made an unauthorized entry into the underground mine tunnel on September 3, 1980, contrary to the conditions and prohibitions imposed on the respondent by the section 103(k) order and modifications.

Section 103(k) of the Act states in pertinent part:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

MSHA's regulations dealing with the reporting and investigation of mine accidents, Part 50, Title 30, Code of Federal Regulations, states as follows in the "definitions" found at section 50.2(h)(6):

"Accident" means,

\* \* \* \*

An unplanned mine fire not extinguished within 30 minutes of discovery;

It seems clear to me that section 103(k) clearly authorized the issuance of the initial order of August 8, 1980, withdrawing miners from the mine. The fire in question is clearly an "accident" within the meaning of the regulations requiring that it be reported, as well as the authority of MSHA to conduct the investigation which took place in this case. In addition, I conclude and find that the issuance of the subsequent modifications to the initial order were within the authority granted the inspectors by section 103(k), were properly and validly issued, and that the respondent was obligated and bound by the conditions set forth in those modifications. See: MSHA v. Eastern Associated Coal Company, HOPE 75-699, IBMA 76-98, 2 FMSHRC 2467, 2472, September 2, 1980, where the Commission held that an inspector is not restricted to enforcing only mandatory safety standards or preventing imminent dangers. Eastern Associated Coal concerned the very same statutory section 103(k) provision in issue in the instant case.

Section 110(a) of the Act, 30 U.S.C. 820(a), provides in pertinent part that "/t/he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary . . ." (emphasis supplied). In the instant case, respondent is charged with a violation of the conditions imposed upon it by the validly issued modified withdrawal order issued pursuant to section 103(k). If MSHA can establish by a preponderance of the credible evidence adduced here that the terms of the modified order have been violated, then it has established a violation of section 103(k), and a civil penalty assessment may be made for that violation. Therefore, the first question to be addressed is whether or not MSHA has carried its initial burden of establishing the violation as charged. Secondly, if a violation has been established, the next question is whether or not the respondent Miller Mining Company should be held accountable and responsible for that violation and assessed a civil penalty.

Respondent does not dispute the fact that someone entered the mine on September 3, 1980, and that MSHA's district manager had not approved this mine entry. In addition, it is clear that respondent understood and agreed to abide by the conditions imposed by the district manager before reentering the mine (Exhs. P/R-3 and P.R-4). In addition, as argued by the petitioner in its post-hearing submissions, it seems clear to me from all of

the evidence presented in this case that there is a strong inference that the person or persons who made the mine entry did not follow MSHA's conditions precedent at the time the entry was made. The

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thrust of respondent's defense is that MSHA produced no credible evidence to establish that the person or persons who entered the mine were employees of the respondent or that the respondent authorized or otherwise permitted the illegal entry. This is a matter bearing on the respondent's negligence, and it may not be used as an absolute defense to the question of whether a violation has occurred.

It is clear from the case law, that under the 1977 Mine Act an operator may be held liable for a violation which occurs on mine property regardless of fault; United States Steel Corp., 1 FMSHRC 1306, 1 BNA MSHC 2151, 1979 CCH OSHD 23,863 (1979); El Paso Rock Quarries, Inc., 3 FMSHRC 35, January 28, 1981; Nacco Mining Company, 3 FMSHRC 848, April 29, 1981, (1969 Coal Act).

In an "independent contractor" case arising under the 1969 Coal Act, Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977), the Court held that mine owners are absolutely liable for violations by independent contractors. Based on its analysis of the law, the Court held that the mine owner is liable for a violation regardless of who violated the Act or created the danger. The Court reaffirmed this holding in a per curiam opinion on December 24, 1981, dealing with a case arising under section 103(k) of the 1977 Act, Harman Mining Corporation v. FMSHRC, 4th Cir., No. 81-1189. My prior decisions in Harman, which subsequently became the final decisions of the Commission, are reported at 3 FMSHRC 45, January 2, 1981. Although the case at hand does not involve an independent contractor, the principal that a mine owner is liable for a violation occurring on mine property, regardless of fault, still applies.

In view of the foregoing, and on the basis of a preponderance of the evidence adduced in this case, I conclude and find that the petitioner has established a violation of section 103(k) of the Act as stated in the citation. Accordingly, Citation 0601832, September 5, 1980, IS AFFIRMED.

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

The parties stipulated that the respondent is a small to medium size mine operator and that a reasonable penalty will not adversely affect its ability to continue in business, and I adopt these stipulations as my findings on these issues.

History of Prior Violations

The record establishes that the citation issued in this case was the first one served on the respondent under the 1977 Mine Act, and that the respondent has had no previously assessed violations. I find this to be an exemplary safety record and this is reflected in the civil penalty assessed by me for the citation in question.

Gravity

The facts in this case reflect that no injuries resulted from the mine fire in question, and that at the time the order issued all personnel had been removed from the underground mine by mine management. In

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addition while it is true that no one knows whether the person or persons who entered the mine were protected from exposure to hazardous gasses or smoke, the fact is that the conditions at the mine portal on September 2 and 3, 1980, presented a hazard of exposure to smoke and gasses from the mine fire in question. I believe it is reasonable to assume that anyone entering the mine was exposed to these hazards. Accordingly, I conclude and find that the violation was serious.

#### Good Faith Compliance

The order issued in this case was terminated on January 7, 1981, after the respondent "was made aware of the danger and public law 95-164" (Exh. P/R-11). In addition, the record reflects that respondent cooperated with MSHA during the course of its investigation in this case, and the inspector's who prepared the report in this regard acknowledged this fact (Exh. R-2, p.6). I conclude and find that respondent demonstrated good faith compliance.

#### Negligence

Respondent argues that it took reasonable and responsible precautions to prevent any unauthorized entry into the mine in violation of the withdrawal order. Although respondent does not elaborate further in its posthearing written submissions, during the course of the hearing Mr. Miller and Mr. Kopelson testified that the decision to remove security personnel from the mine portal area was based on safety considerations because of the smoke and gasses being emitted from the portal. Both Mr. Miller and Mr. Kopelson testified as to certain ill effects they experienced while in close proximity (30 or 40 feet) to the portal, and testimony was also presented that the company safety director (Sandy Rettagliata) suffered from possible smoke inhalation and may have been hospitalized. Given these circumstances, respondent suggests that the decision to remove all personnel, including the security guard, away from the portal area for a distance of 250 or 300 feet, was to insure the safety of personnel, rather than to provide an opportunity for someone to enter the mine without being seen by the guard.

Former security guard Allan White testified that Project Manager Licari came to the portal area sometime after 12:30 a.m., September 3, 1980, and instructed him to remain in that area to insure that all miners left and that the area was secure. Mr. White claims that Mr. Licari gave him no reasons for those instructions, and that sometime later Security Chief Schmidt instructed him to remove himself from the portal plaza area and establish his guard post "on top of the hill". Although Mr. Smith had a partial view of the plaza area from this newly established position, he could not see the actual mine portal. He also indicated that no one crossed his guard post on the hill except for Mr. Keopke and Mr. Schmidt, but that there were other means of access to the plaza area which he could not observe.

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Although Mr. Schmidt and Sandy Rettagliata did not testify in this case, Mr. Licari could not recall ordering security personnel away from the plaza area, but "assumed" that he did (Tr. 262). He explained that he did so out of concern for the safety of all mine personnel, and that he was concerned even before Mr. Miller instructed him to secure the area. He also explained that the reason personnel were not removed from the plaza area prior to this time was that the period September 2-3, was the first time the portal was opened (Tr. 268).

Petitioner's arguments in support of a finding of gross negligence on the part of the respondent is based on certain circumstances and factors dealing with the control and posting of the guard force, the "unusual" presence of mine management personnel at the mine in the early hours of the morning, management's "motive" in wishing to see the fire extinguished, and the damaging testimony by Mr. Hansen, which petitioner concludes establishes a strong inference that Mr. Licari had prior knowledge of the hole in ventilation tubing and that the fan would exhaust the smoke once it was turned on.

Petitioner's alternative argument in support of a finding of ordinary negligence is based on an assertion that respondent's removal of security guard White from the portal plaza area to a position on a hill where he could not see anyone entering the sealed portal area at least constituted ordinary negligence, partially in view of the numerous offers of assistance from the nearby community to enter the mine and extinguish the fire. Petitioner argues that respondent had a duty to do everything reasonable to safeguard against anyone entering the mine, and petitioner obviously believes that removing a guard to a position where he could not observe anyone entering was unreasonable.

Considering all of the circumstances presented in this case, petitioner's "circumstantial case" arguments are plausible. That is, it is possible for one to conclude that mine management embarked on a "watergate" type conspiracy to set the stage so that someone could enter the mine and knock a hole in the ventilation tubing with an axe, thereby solving a problem that State and Federal Enforcement officials could not solve from the day the fire started in the mine. On the other hand, respondent's assertions that mine personnel were removed from the area for safety reasons is equally plausible. However, the one disturbing feature in respondent's explanation is that the one person who could have prevented the entry, the security guard, was ordered to withdraw to a position where he could not see the portal and do the job that he was hired to do, namely to insure that no one entered the mine. I am not convinced that the security guard could not have been positioned in such a manner as to insure his safety as well as to insure that absolute security against an illegal mine entry be maintained. In short, after careful consideration of all of the evidence in this case, I conclude and find that respondent had a duty to insure that no one enter the sealed mine portal, and that by ordering the security guard to reposition himself to an area where he could not maintain the area in question totally secure

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against an illegal entry, respondent failed to exercise reasonable care to prevent the violation. Failure to exercise reasonable care in these circumstances constitutes ordinary negligence, and that is my finding.

#### Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, including the fact that respondent has an excellent safety record, and voluntarily withdrew all miners and secured the mine when the fire started, I conclude and find that a civil penalty assessment of \$250 is reasonable for the citation which I have affirmed.

#### Order

Respondent IS ORDERED to pay a civil penalty in the amount of \$250 within thirty (30) days for the violation in question, and upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras  
Administrative Law Judge