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

THE NEW RIVER COMPANY,
CONTESTANT-RESPONDENT

v.

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

Contest of Citations and Order

Docket No. WEVA 82-93-R
Docket No. WEVA 82-94-R
Docket No. WEVA 82-95-R
Docket No. WEVA 82-96-R
Docket No. WEVA 82-97-R
Docket No. WEVA 82-98-R
Docket No. WEVA 82-99-R

Civil Penalty Proceeding

Docket No. WEVA 82-173
A.O. No. 46-01297-03059

Siltix Mine

DECISIONS

Appearances: C. Elton Byron, Jr., Esquire, Beckley, West Virginia,
for the contestant; Aaron M. Smith, Attorney, U.S. Department
of Labor, Philadelphia, Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Case

These consolidated proceedings concern contests filed by the
contestant challenging the propriety and legality of the
captioned citations and order issued to the contestant pursuant
to Sections 104(a) and 104(b) of the Federal Mine Safety and
Health Act of 1977. The civil penalty case concerns a proposal
filed by MSHA seeking civil penalty assessments for the alleged
violations in question. Hearings were held in Charleston, West
Virginia, and the parties appeared and participated fully
therein.

Issues Presented

The issues presented in these proceedings include the
question of whether the violations in fact occurred, whether the
times fixed for abatement were reasonable, whether the inspector
abused his discretion in issuing the withdrawal order in
question, whether the back-dating of the citations was proper,
and the appropriate civil penalties which should be imposed for
the violations which have been affirmed. Additional issues
raised by the parties are identified and disposed of in the
course of these decisions.

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 (Tr. 6-7):

1. The new River Company is the owner and operator of the Siltix Mine, and the mine is subject to the Act.
2. The presiding Administrative Law Judge has jurisdiction to hear and decide these cases.
3. The inspector who issued the citations and order which are the subject of these proceedings is a designated authorized representative of the Secretary of Labor.
4. True and correct copies of the citations and order were served upon the operator.
5. The copies of the citations and order (exhibits G-1 through G-6) are authentic copies and may be admitted as such, but not for the truth or relevance of the statements made therein.
6. Contestant-respondent's history of prior violations for the 24-month period preceding the issuance of the citations in these cases consists of 176 violations. Eight of these violations are violations of mandatory standard section 75.1722(a), 30 are for violations of section 75.400, and 22 are for violations of section 75.503.
7. Payment of the penalties assessed in these proceedings will have no effect on the operator's ability to continue in business.
8. The Siltix mine had an annual coal production of 175,000 tons, and the mine employs approximately 135 individuals.

The parties are in agreement that citation no. 888867, October 29, 1981, citing a violation of section 75.400, is no longer in issue in these proceedings because the contestant did not contest the civil penalty

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assessment made by MSHA and has paid the assessment. Contestant's counsel agreed that Docket No. WEVA 82-99-R, may be dismissed since contestant no longer contests the citation in question.

The parties were also in agreement that none of the citations which were issued by the inspector in these proceedings (exhibits G-1 through G-5) are "significant or substantial" violations under the Act.

Contestant's counsel asserted that except for the section 104(b) order of withdrawal (exhibit G-6), contestant does not contest the fact of violation with respect to the remaining citations issued by the inspector in these proceedings. That is, contestant does not dispute the fact that the conditions or practices described by the inspector on the face of the citations which he issued constitute violations of the cited mandatory safety standards (Tr. 13).

MSHA's testimony and evidence

MSHA Inspector William R. Stevens testified that he has been employed as a mine inspector in the Mt. Hope, West Virginia, office since August 1977, and that prior to that time he was an inspector trainee and engineering technician at that office from May 1974 to August 1977. During his employment he has participated in a number of inspector training programs, including attendance at the Mine Safety Academy at Beckley, West Virginia. During his tenure as an MSHA inspector he has conducted approximately 700 to 800 mine inspections.

Mr. Stevens confirmed that he conducted an inspection at the mine in question on October 28, 1981, as part of a regular inspection of the mine which began on October 14. He arrived at the mine at approximately 7:30 a.m., and after checking the preshift examination books he proceeded underground to conduct his inspection, and he was accompanied by a union representative as well as the company's safety inspector Michael Hess. They entered the mine through the slope-bottom (incline drift) and proceeded up the number 2 belt entry toward the Number 3 left working section.

Mr. Stevens identified exhibit G-1 as citation No. 888861 which he issued for a violation of section 75.1722(a), after he observed that a guard for the No. 2 conveyor belt tail roller had been removed from the equipment and was lying nearby. Mr. Hess could not explain why the guard had been removed, but he immediately replaced it and fastened it in place with a piece of wire. Mr. Stevens advised Mr. Hess that the temporary fastening of the guard would suffice temporarily but that "it would have to be done better" at a later time. He asked Mr. Hess as to how much time was needed to properly correct the condition, but Mr. Hess did not know, Mr. Stevens then fixed the abatement time as November 3, 1981, after he had gone back to the mine and confirmed that the condition cited had been corrected. At the time he observed the condition no one was in the area (Tr.

15-24).

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Mr. Stevens confirmed that he issued citation No. 888862 (exhibit G-2) after observing that a piece of rubber conveyor tail roller guarding had been turned up, thereby exposing the roller. The rubber guard had been fastened to the structure with one bolt and Mr. Hess merely turned it down, thereby guarding the roller. Mr. Stevens conceded that he advised Mr. Hess that he would accept the rubber guarding as abatement of the citation at that time, but he also indicated that he advised Mr. Hess that a metal guard was needed to replace the rubber one and that it could be constructed at a later time.

Mr. Stevens stated that at the time he observed the second guarding condition no one was in the area, and the area is not one where miners have to travel through to get to their work stations. In addition, normal operating procedure calls for the belts to be shut down when they are cleaned, and in these circumstances he believed the likelihood of any injury resulting from the violation to be remote. He also believed that the operator should have been aware of the guarding condition through the preshift inspection process which is required (Tr. 24-27).

Mr. Stevens confirmed that he issued citation No. 888862 (exhibit G-3) after discovering the presence of float coal dust along the No. 7 belt conveyor for a distance of some 20 feet. He discussed the condition with Mr. Hess, and while Mr. Stevens did not believe that float coal dust per se was hazardous, he believed it would be if it were placed in suspension and ignited by a spark. This could result in a possible fire or explosion. However, since nearby electrical cables were properly insulated, and he detected no stuck belt rollers, he believed that the possibility of an accident or an "occurrence" to be remote.

Mr. Stevens stated that he advised Mr. Hess that a citation would be issued for the float coal dust condition, and that he also advised him that the area cited should be rock-dusted. Since no rock dust was readily available and needed to be brought in to the area, he fixed the abatement time for the next day, October 29th. He terminated the citation on that day at 9:00 a.m. when he confirmed that the area had been rock-dusted, and he believed that the operator exhibited very good faith compliance in correcting the conditions within the time fixed for abatement. He also believed that the operator should have been aware of the presence of the cited float coal dust through a preshift examination (Tr. 27-31).

Mr. Stevens confirmed that he issued citation No. 888864 (exhibit G-4) after observing an accumulation of loose coal and coal dust 3 to 18 inches deep along the sides and under the conveyor belt in the 3rd left section in an area where a roof fall had occurred. The remaining roof had been timbered and supported and the conveyor belt was installed to run over the fall and under the newly supported roof. The accumulations extended for a distance of approximately 100 feet.

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Mr. Stevens stated that he discussed the accumulations condition with Mr. Hess and advised him that the area needed to be cleaned up. He asked Mr. Hess how much time he required for abatement, and Mr. Hess informed him that he did not know and that he would have to first discuss the matter with mine management, but that the conditions could probably be taken care of "in the morning".

Mr. Stevens stated that while the accumulations conditions he cited presented a possible fire hazard, he considered this occurrence to be remote because all electrical cables in the area were properly insulated and he detected no stuck conveyor rollers. Mr. Stevens stated that he fixed the abatement time as 8:30 a.m. the next morning, October 29, and he believed that this was a reasonable time because the area where the accumulations were present was not that extensive and he believed that one man working one shift could have cleaned up the area and achieved abatement (Tr. 31-34).

Mr. Stevens confirmed that he issued citation No. 888865 (exhibit G-5) after finding a permissibility violation in the 3 left section. He found that there was an opening present on a continuous mining machine contactor panel in excess of .004 inches, and he detected this by means of a feeler guage which he inserted into the opening. He discussed this condition with Mr. Hess, and an electrician was immediately summoned to the area. The electrician closed the opening, and after inserting his guage and determining that it could not penetrate the panel area, Mr. Stevens was satisfied that abatement had been achieved. Mr. Stevens stated that the operator achieved rapid compliance, and since he detected no methane present in the area he determined that any hazard resulting from the violation was improbable.

Although Mr. Stevens stated that weekly permissibility examinations are required, he conceded that the condition he cited may have occurred during the intervening weekly inspections and that the operator may not have known about the excess opening (.005 inches) in the equipment panel in question.

Mr. Stevens stated that after the completion of his inspection during which he observed all of the conditions which resulted in the issuance of all of the five citations in question, he came out of the mine and proceeded to write all of the conditions down on paper from notes which he had made during his inspection. He discussed all of the conditions with Mr. Hess, and he was satisfied that Mr. Hess was aware of the conditions which he found and what was needed to achieve compliance. However, upon discovering that he did not have a supply of citation forms with him, he advised Mr. Hess that he could return to his office to obtain some, simply write them down on paper, or return the next day and issue them in writing on the citation forms. Mr. Stevens stated that Mr. Hess agreed with this procedure, and that mine Superintendent Bays voiced no objections.

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Mr. Stevens testified as follows concerning the conversation with Mr. Hess and Mr. Bays (Tr. 37-38):

Q. Well, how did the inspection -- after you issued this citation, how did the inspection proceed from that point?

A. Well, after we finished that, we -- I can't exactly remember what we did after that, but we came outside and I wrote out my citations on my paper, and when I got ready to transfer them to my citation forms, I discovered that I had run out. So I discussed this with Mike.

Mr. Bays wasn't in the room at the time, but I talked to Mike and told him, I said, "I've run out of forms". I said, "now, would it be all right if I issue these tomorrow and backdate them for today?" Mike said, "Well, I'll have to check with Van", and we talked to Mr. Bays, and he came in, and we discussed it, and I told him about them. He said, "Well, is Mike aware of the violation, he knows where they are?" I said, "Yes, sir."

And he said, "Well, it's okay with me." And I told him, I said, "If you want, I will go back to the office and get the forms, and do them now." He said, "That's all right." I said, "Well, if you want me, I will write them down on a piece of paper and hand them to you that way." I said, "Would that be sufficient?" He said, "No, that's all right, just so Mike knows where they are, so everything is understood." And then we agreed on abatement times and everything, sitting there in the mine office, outside.

* * *

Q. Both agreed that that procedure would be fine?

A. Yes, sir.

Mr. Stevens testified that he returned to the mine on October 29th, and checked the areas which he had inspected the previous day. He determined the float coal citation had been abated by rock-dusting the affected area. The permissibility citation had already been abated on October 28, and the guarding citation for the No. 7 belt tail roller had also been abated to his satisfaction that same day. The other guarding citation for the No. 2 belt tail roller still had until November 2, to be abated and he did not check it out on October 29, although he subsequently terminated the citation on November 3, after confirming that the condition had been corrected (Tr. 34-40).

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With regard to the coal accumulations citation No. 888864, Mr. Stevens testified that when he went back to the area on October 29, he found that no work had been done to clean up the cited accumulations. He discussed the matter with Mr. Hess, and was informed by Mr. Hess that the shift foreman had advised him that the accumulations condition had been taken care of. Since Mr. Stevens saw no evidence of any clean-up or rock-dusting efforts regarding the accumulations, he orally advised Mr. Hess that a section 104(b) withdrawal order was on the 3rd left belt conveyor section, and he did so at 9:22 a.m. Mr. Stevens then continued his inspection, and after coming out of the mine that same evening he reduced all of the citations, including the section 104(b) withdrawal order and the terminations for the abated citations, to writing on the MSHA citation forms, and gave them to Mr. Hess. Mr. Stevens conceded that prior to this time, none of the citations were reduced to writing and none were served on the operator in writing, and but that he verbally advised Mr. Hess when they were underground on October 28th, that citations for the violations would be issued.

With regard to the accumulations citation No. 888864, Mr. Stevens stated that while they were "not that bad" when he returned to the mine on October 29th, he was concerned that if the conditions were permitted to continue, any resulting additional accumulations would eventually pile up against the belt and pose a hazard. He issued the 104(b) closure order because he found this action necessary to insure the safety of miners in the section. As for the abatement time to correct the conditions initially cited in the underlying citation No. 888864, Mr. Stevens maintained that he did not fix the time for abatement as 8:30 a.m., October 29th, but that Mr. Hess told him the conditions would be corrected on October 29th. The subsequent abatement and clean up after the order issued took approximately an hour and 15 minutes.

Mr. Stevens could not recall when he came out of the mine on October 29, since he conducted a noise survey and other inspection chores. He also stated that at the time he reduced all of the citations and the order to writing, Mr. Hess said nothing to him. Mr. Stevens also confirmed that on past inspections of other mines, he has had occasion to serve citations by certified mail, but that in these instances the mine operator was not on the premises when those inspections were conducted (Tr. 40-45).

On cross-examination, Inspector Stevens testified that the citations in question are the first ones that he has issued orally to the New River Company and then back-dated, and he confirmed that he has never mailed any citations to the company. He also confirmed that he issued the modifications to the citations on November 2, 1981, to reflect that they were initially issued verbally and then reduced to writing and that he did so on instructions from his supervisors in MSHA's district office.

With regard to the guarding citation (888861), which he

terminated on November 3, 1981, he confirmed that it was possible that the condition

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was corrected earlier, but November 3 was the next opportunity to confirm that abatement had been achieved. As for citation 888862, the guarding citation for the No. 7 conveyor tail roller, he confirmed that Mr. Hess immediately corrected the condition and that he (Stevens) told Mr. Hess that he would accept that correction or repair as abatement of the citation. Mr. Stevens also stated that the Union normally conducts the preshift examination on the section and he had no reason to believe that the examination was not made.

Mr. Stevens stated that at the time he observed the float coal dust condition (citation 888863), he informed Mr. Hess that a citation would be issued, but that he did not specifically inform him that he was issuing a verbal citation while underground at the location of the infraction. He also confirmed that he had no evidence that the required preshift examination had not been made. With regard to the permissibility citation (888865), Mr. Stevens acknowledged that he did not consider this to be a serious violation because the condition could have occurred between the weekly required inspections, and he had no evidence that such inspections were not made. He also confirmed that Mr. Hess took immediate action to correct the cited condition.

With regard to four of the citations which he issued, namely the two guarding citations, the float coal citation, and the permissibility citation, Mr. Stevens acknowledged that they were all timely abated in good faith by the operator and that the likelihood of any injury or occurrence as to all of these citations was remote.

With regard to the accumulations citation which he issued (888864), Mr. Stevens indicated that there may have been some confusion because the written citation which he subsequently issued on October 29, does give the impression that the accumulations at the roof fall area extended for a total of 125 feet. However, he maintained that while underground on October 28, he did show Mr. Hess where the accumulations were present around the fall area, and going in by toward the face from the fall for an approximate distance of 100 feet. He left no written notation of this condition with Mr. Hess on the day of the inspection, but did advise him that a citation would be issued (Tr. 46-59).

Mr. Stevens testified that when he returned to the mine on October 29, and went underground to the location of the accumulations which he had observed the previous day, he found no evidence that any clean-up had taken place. He found no evidence of any partial abatement, and maintained that nothing had been done to correct the conditions in question. He remained in the area while the accumulations were cleaned up to abate the citation, and abatement was achieved by the first shift crew and he terminated the citation at 10:38 a.m., that same day.

Mr. Stevens confirmed that he discussed the conditions he observed on October 28 with Mr. Hess as well as with mine

superintendent Bays. He informed them that he did not have a supply of citation forms with

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him, but that he could return to his office in Mt. Hope, some five miles from the mine, to obtain some. Mr. Bays said "no problem", but he also may have said "handle it any way you want", but he was not certain about these statements. Mr. Stevens stated that MSHA policy is that an inspector does not take the "citation book" of forms underground during the inspection and that they are "verbally" issued underground and then reduced to writing on the surface from notes made while underground, and copies are given to the operator or his representative. Mr. Stevens stated that when he discussed the cited conditions with Mr. Hess after the inspection on the surface, he was left with the impression that Mr. Hess knew precisely what he had cited and what needed to be done to abate the conditions in question. He also stated that he advised Mr. Hess that he would return to the mine the next day, October 29, and would serve the written citations to him at that time (Tr. 60-77).

Testimony and evidence adduced by the contestant-respondent

Michael Hess, safety inspector, testified that this was the first time that an inspector had issued verbal citations and then reduced them to writing the day after the inspection. He confirmed that he accompanies Mr. Stevens during his underground inspection of October 28, and that they were underground approximately 4 to 6 hours. He and Mr. Stevens discussed the conditions which were observed underground after they came to the surface at approximately 2:30 or 3:00 p.m., and that Mr. Stevens had pointed out to him the areas of the mine which he found objectionable. Mr. Bays was present during the discussions on the surface after the inspection, and Mr. Stevens advised them that he did not have a supply of citation forms with him. Mr. Hess confirmed that the mine "had five citations", but that Mr. Bays advised Mr. Stevens that "we do not accept verbal citations". When Mr. Stevens asked Mr. Bays what he wanted him to do, Mr. Bays replied "I am not your supervisor and cannot tell you what to do".

Mr. Hess stated that the MSHA district office is approximately 2-1/2 miles from the mine site, and that when Mr. Stevens returned the next day, October 29, he first went underground, and then came to the surface later that day and wrote out all of the citations, and back dated them to show they were issued on October 28. Mr. Bays was present when this occurred, and he commented to Mr. Stevens "we will beat" or "we will win this one" because the citations were back dated. Mr. Hess stated that the instant case is the first time in his seven or years experience in the mines that an inspector has issued verbal citations, and then back-dated them.

With regard to the guarding citation for the No. 2 belt conveyor tail roller (888861), Mr. Hess stated that the condition was corrected by the evening shift on October 28, and the required repairs were "not that involved". Therefore, in his view, the conditions were corrected before the written citation was issued on October 29.

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With regard to the accumulations citation (888864), Mr. Hess testified that it was his understanding that on October 28th Mr. Stevens was concerned about coal accumulations which were present for a distance of approximately 100 feet, starting at the roof fall location, and going inby towards the working face. He recalled that he and Mr. Stevens walked over the fall and when they reached the inby area, Mr. Stevens verbally advised him that this was the area that needed to be cleaned up. Mr. Hess stated that after this conversation, he advised the evening shift foreman on October 28th that the area inby the fall needed to be cleaned up in order to abate the conditions which Mr. Stevens brought to his attention. When Mr. Stevens returned the next day, October 29, the inby side of the fall had been cleaned up for a distance of 75 to 100 feet, but that the outby side of the fall had not. When Mr. Stevens observed that the outby area of the fall had not been cleaned, he advised Mr. Hess that he was issuing a section 104(b) closure order, and that the affected area would include the outby and inby side of the fall. Additional people were brought to the area to clean-up at both locations, and after they came to the surface, Mr. Stevens wrote the order and abatement at approximately 2:00 p.m. on October, and served it on Mr. Hess (Tr. 77-90).

On cross-examination, Mr. Hess conceded that during the October 28th inspection and observations of the conditions which were subsequently reduced to writing, Mr. Stevens did advise him that the company would be cited for the violations in question. Mr. Hess also conceded that he understood exactly what he was being charged with, and that he also agreed with the abatement times discussed with Mr. Stevens. However, with regard to the accumulations citation, Mr. Hess stated that he did not return to that location until he accompanied Mr. Stevens back underground on October 29. Seven to ten men were assigned to clean up the area outby the fall on October 29, and it took approximately one hour to clean up accumulations on top of the fall, as well as on either side of the fall. He conceded that he understood why the order was being issued, but maintained that the normal practice was to issue a written citation after coming out of the mine, and that the issuance of verbal withdrawal orders was not the normal practice. He also confirmed that all of the citations, except for one belt guarding citation, which had several days yet to run for abatement, were terminated by Mr. Stevens on October 29 (Tr. 90-100).

Van Bays, mine superintendent, testified that he was aware of the fact that Mr. Stevens conducted an inspection at the mine on October 28, 1981, and acknowledged that Mr. Stevens informed him that the mine would be cited for certain violations. He also confirmed that Mr. Stevens advised him that he had no citation forms with him and that he would issue them verbally. When Mr. Stevens volunteered to go to his office to get his form book, Mr. Bays indicated that "I wasn't his boss, that I couldn't tell him what to do" (Tr. 103).

Mr. Bays stated that he never told Mr. Stevens that he would accept the written citations the next day, and he denied

acknowledging to Mr. Stevens that he would not object to the citations being written

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the next day and backdated. He also denied that he agreed to any abatement periods on October 28, and no one in his presence accepted the verbal citations on behalf of the company, nor did anyone agree to any abatement periods.

Mr. Bays stated that he had never previously been served with oral citations and this was his first such experience since he has been a mine superintendent. After his conversation with Mr. Stevens, Mr. Stevens told him that he discussed the cited conditions with Mr. Hess, advised him what had to be done, and left the mine. He returned the next day, and issued the written citations, to Mr. Hess (Tr. 103-104).

On cross-examination Mr. Bays acknowledged that on October 28 he knew that the mine had been inspected by Mr. Stevens, and he confirmed that the mine had been cited by Mr. Stevens. He also confirmed that he has never refused acceptance of written citations. He conceded that the violations found by Mr. Stevens on October 28 were discussed with Mr. Hess and were discussed with him. He also stated that this was normal procedure. He also indicated that at times he or the mine foreman routinely agreed to abatement times. In this case he was not in the mine with Mr. Stevens and did not know whether the mine foreman was there. Since Mr. Hess does not direct the mine force he has no jurisdiction to agree to any abatement times (Tr. 106).

Mr. Bays indicated that when Mr. Stevens returned to the mine on October 29, and handed the written citations to Mr. Hess he (Bays) protested and objected and told him "I'm going to beat you on these" (Tr. 107). He told Mr. Stevens that they were improperly issued (Tr. 108).

In response to bench questions, Mr. Bays stated that he complained to Company safety director Pennock. He also indicated that any judgment as to when a violation can be abated is usually made by the mine foreman, but anything dealing with "instant compliance" is left to Mr. Hess. He would expect Mr. Hess to advise him when abatement requires "lengthy time or more people" (Tr. 110-111).

Emmett Pennock, safety director, testified that he first learned about the citations on October 29, when general manager Buzz Basham advised him that Mr. Stevens had backdated the citations. Upon learning this he called MSHA's subdistrict manager on October 30, and discussed the matter with Mr. Stevens' supervisors (Tr. 114-116).

Inspector Stevens was recalled, and he testified that when he returned to the mine on October 29, all of the citations, except for the accumulations order and one roller guarding citation, had been abated (Tr. 124). With regard to the accumulations citation, Mr. Stevens conceded that his description of the condition indicating that the accumulations began "25 feet outby the fall and extending in for approximately 100 feet" would probably give one the impression that the accumulations extended for a distance of 125 feet (Tr. 127). He confirmed that the

starting point of his measurement was the fall itself where the belt was constructed.

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He indicated that it was possible that for a short distance on either side of the fall, there was an accumulation that was not cleaned up when he went back to the area on October 29 (Tr. 129).

Mr. Stevens confirmed that his notes reflect that the accumulations which had not been cleaned up extended inby for 75 feet beginning at the fall, and outby for 25 feet, for a total distance of 100 feet (Tr. 133). He also confirmed that his intent was not to cite the respondent for accumulations extending over a distance of 125 feet, and he conceded that any interpretation adding an additional 25 feet resulted from a misunderstanding or confusion (Tr. 134). However, he insisted that when he returned to the area on October 29, he saw no evidence that any clean-up had been done (Tr. 134-135).

Discussion

The section 104(a) citations issued in these proceedings, and the conditions or practices cited by the inspector are as follows:

Docket No. WEVA 82-93-R

Citation No. 888861, October 28, 1981, 8:55 a.m., cites an alleged violation of 30 CFR 75.1722(a), and the condition cited it as follows (Exhibit G-1):

The tail roller for the No. 2 belt conveyor was not guarded to prevent a person from coming in contact with the moving parts.

The time for abatement is shown as 8:00 a.m., November 2, 1981.

Docket No. WEVA 82-94-R

Citation No. 888862, October 28, 1981, 9:45 a.m., cites an alleged violation of 30 CFR 75.1722(a), and the condition cited it as follows (Exhibit G-2):

The tail roller for the No. 7 belt conveyor was not guarded to prevent a person from coming in contact with the moving parts.

The time for abatement is shown as 10:30 a.m., October 28, 1981, and the citation form contains a notation "abated 10-28-81, 10:30 a.m., tail roller for the No. 7 belt conveyor has been replaced".

Docket No. WEVA 82-95-R

Citation No. 888863, October 28, 1981, 9:47 a.m., cites an alleged violation of 30 CFR 75.400, and the condition cited it as follows (Exhibit G-3):

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Float coal dust was present on the surface along the No. 7 belt conveyor beginning from the tail roller and extending inby for approximately 20 feet from rib to rib.

The abatement time is shown as 8:00 a.m., October 29, 1981.

Docket No. WEVA 82-96-R

Citation No. 888864, October 28, 1981, 10:15 a.m., cites an alleged violation of 30 CFR 75.400, and the condition cited is as follows (Exhibit G-4):

Loose coal and coal dust 3 to 18 inches in depth were present along the 3rd left section belt conveyor beginning 25 feet outby the 2nd fall and extending inby for approximately 100 feet.

The abatement time is shown as 8:30 a.m., October 29, 1981.

Docket No. WEVA 82-97-R

Citation No. 888865, October 28, 1981, 11:40 a.m., cites an alleged violation of 30 CFR 75.503, and the conditions cited are as follows (Exhibit G-5):

The electrical face equipment 32 Lee Norse continuous mining machine serial no. 3686 approval no. 2F1769A-2 in the 3rd left section (018-0) was not being maintained in permissible condition in that an opening in excess of .004 inches (.005 inches) was present in the phone flange joint of the main contactor panel.

The abatement time is shown as 11:45 a.m., October 28, 1981, and the citation form contains a notation "Repairs were made to the electrical face equipment returning it to permissible condition. 10/28/81, 11:45."

Docket No. WEVA 82-99-R

Citation No. 888867, October 28, 1981, 11:30 a.m., cites an alleged violation of 30 CFR 75.400, and the condition cited is as follows (see copy of citation attached to the pleadings):

Float coal dust was present on the surfaces of the No. 7 entry return aircourse of 3rd left section beginning at survey station No. 8430 and extending outby for approximately 800 feet. This includes the connecting crosscuts.

The abatement time is shown as 8:10 a.m., November 2, 1981.

Section 104(a) of the Act states in pertinent part as follows:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act (emphasis supplied).

Although the parties were afforded an opportunity to file post-hearing proposed findings, conclusions, and supporting briefs, they declined to do so. However, counsel were afforded an opportunity to present arguments in support of their respective positions during the course of the hearing and their arguments in this regard have been fully considered by me in the course of these decisions. It should be noted that New River's counsel candidly conceded that the critical issue in these proceedings concerns the propriety of an inspector issuing verbal citations which can subsequently be converted to withdrawal orders. Counsel argued that the Act requires that all citations be issued in writing with reasonable promptness. In these proceedings, he contends that the effect of the inspector's withdrawal order was to close the mine down before the underlying citation was actually reduced in writing and served on mine management. Counsel argued that before a withdrawal order can issue an operator must be given a reasonable time to abate the conditions or practices cited by the inspector as violations. Here, counsel asserts that the withdrawal order was written and issued at the same time the underlying citation was issued (Tr. 145-147).

New River's counsel argues further that there is no evidence that the inspector ever communicated the abatement time for correcting the alleged accumulations violation to mine management, and that even if he did, there is nothing to suggest that mine management agreed or conceded that the time given to abate the conditions cited was reasonable or that mine management understood precisely what the inspector had alleged in terms of any alleged violation (Tr. 148). Conceding that Inspector Stevens may have assumed that Mr. Hess accepted 8:30 a.m., October 29th, as the time fixed for abatement, counsel argues that it is also reasonable to assume from the record that Mr. Hess also assumed that only the area inby the roof fall location needed to be cleaned, and that the confusion on the part of Mr. Hess and Inspector Stevens obviously resulted from the fact that

nothing was immediately reduced to writing on October 28, when Mr. Stevens initially observed the alleged accumulations which he cited as a violation (Tr. 149).

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MSHA's counsel argued that since the inspector ultimately issued the citations in writing to a representative of the mine operator within 24-hours of his observations of the conditions and practices which he believed constituted violations of the cited mandatory standards, he complied with the statutory mandate that they be issued with reasonable promptness. Further, counsel argued that the mine operator in this case was not ignorant or oblivious of the conditions which the inspector found during his inspection, nor was he ignorant of the fact that the inspector would return to the mine the next day and issue the citations in writing. Since most the conditions cited as violations by the inspector were immediately abated, counsel asserts further that the operator knew precisely what the inspector had in mind. In support of this conclusion, counsel points to the fact that four out of the five citations were abated the same day the inspector observed the conditions (Tr. 11-12).

During the course of the hearing, New River's counsel conceded that he was not concerned over the amount of the civil penalties initially assessed against the respondent for the citations, and that the company's concern is with the principle of an inspector issuing oral citations and then later reducing them to writing (Tr. 145). He does not assert that the penalties are unreasonable (Tr. 159). Counsel further asserted that the respondent is chiefly concerned over the withdrawal order being issued orally by the inspector, and he contended that the inspector's failure to reduce the underlying citation, as well as the order, immediately to writing has led to the confusion as to precisely what was charged as a violation and what had to be done to accomplish abatement within a reasonable time so as to preclude any unreasonable shutting down of mine production (Tr. 150).

New River's counsel candidly conceded during the course of the hearing that insofar as citations 888861, 888862, 888863, and 888865 are concerned, the respondent does not contest the fact that the conditions or practices observed by the inspector as stated on the face of the citations in question in fact existed (Tr. 13, 158). Counsel candidly admitted that the thrust of the contests, aside from the argument that the citations were not reduced to writing with reasonable promptness, focuses on the withdrawal order and the underlying citation which preceded it (Tr. 13).

Findings and Conclusions

Dockets WEVA 82-93-R, 82-94-R, 82-95-R, 82-97-R, and WEVA 82-173

With regard to the issue concerning the failure of the inspector to reduce citations 888861, 888862, 888863, and 888865 to writing immediately after he observed the conditions on October 28, 1981, I conclude and find that on the facts of these proceedings the inspector did not act illegally or unreasonably. He simply forgot his citation forms and verbally advised mine management's representative of his findings, specifically advised him that citations were in fact issued but would be reduced to writing the next day when he returned to the mine. Under these

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circumstances, I conclude and find that the inspector acted with "reasonable promptness" as required by section 104(a) of the Act. Further, from the record adduced in this case I cannot conclude that mine management was prejudiced or otherwise aggrieved by the inspector's failure to issue written citations on the afternoon of October 28 before he left the mine site. Even though mine superintendent Bays indicated that he specifically told the inspector that he would not accept oral citations, both he and Mr. Hess candidly acknowledged that the inspector discussed the conditions and practices cited in the aforementioned four citations with Mr. Hess and that Mr. Hess knew precisely what he was being charged with and what had to be done to accomplish abatement. Mr. Hess accompanied the inspector during his inspection rounds, was with him when the inspector pointed out the infractions, and Mr. Bays conceded that he was present in the mine office when the inspector discussed the conditions cited with Mr. Hess after they came to the surface.

I conclude and find that MSHA has established the fact of violations with respect to citations 888861, 888862, 888863, and 888865 by a preponderance of the credible evidence adduced in these proceedings. In addition, on the facts presented here with regard to each of those citations I further conclude and find that abatement was achieved almost instantaneously with respect to citations 888862 and 888865. Accordingly, I cannot conclude that the time fixed for abatement was unreasonable as to those citations. With regard to citation 888861 the inspector testified that the No. 2 belt conveyor tail roller condition was corrected when he returned to the section on November 3 and terminated that citation. He also indicated that the condition may have been corrected earlier, but that November 3 was the next opportunity he had to confirm the abatement. In these circumstances, New River has not established that the time fixed was unreasonable and I find that it was not. As a matter of fact, Mr. Hess conceded that the roller repairs were "not that involved" and that they were completed by the evening shift of October 28.

With regard to the float coal dust citation 888863, Inspector Stevens testified that when he returned to the mine on October 29, the area which he had cited had been rock-dusted and he terminated the citation that same day. New River has advanced no argument that the time fixed to abate these conditions were unreasonable and I conclude and find that it was not.

In view of the foregoing findings and conclusions, citations 888861, 888862, 888863, and 888865 are all AFFIRMED, both as to the fact of violations and the reasonableness of the times fixed for abatement. In addition, New River's contentions that these citations were illegally issued because they were not reduced to writing and served on the operator on October 28, before the inspector left the mine site are REJECTED.

Docket WEVA 82-96-R and 82-98-R

The question here is whether the failure by the inspector to

reduce the underlying citation to writing on the day of the inspection has resulted in prejudice to the respondent. Since the citation served

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as the basis for the subsequent withdrawal order for failure to timely abate the conditions cited, the circumstances surrounding the issuance of both documents becomes critical. Citation No. 888864 (Exhibit G-4), describes the "conditions or practices" as follows:

Loose coal and coal dust 3 to 18 inches in depth were present along the 3rd left section belt conveyor beginning 25 feet outby the 2nd fall and extending inby for approximately 100 feet.

The subsequent section 104(b) withdrawal order, No. 888866 (Exhibit G-6), states in pertinent part as follows:

No effort was made to remove the loose coal and coal dust from under and along the 3rd left section belt conveyor.

The conditions observed by the inspector while underground on October 28, resulted in the subsequent issuance of a section 104(a) citation charging the respondent with a violation of section 75.400 for failure to clean up certain accumulations of loose coal and coal dust. The inspector orally advised Mr. Hess on October 28 that he had cited the violation, but stated that he would reduce it to writing when he returned to the mine the next day. Upon his return the next day, the inspector returned to the location where he had previously observed the accumulations, and after concluding that no work had been done to clean them up he advised Mr. Hess that he was issuing a section 104(b) closure order. The written citation and withdrawal order were subsequently served after the inspector came out of the mine on October 29, and after the conditions were abated. In short, the inspector reduced the underlying citation, the withdrawal order, and the terminations all to writing simultaneously on October 29, but he back-dated it to show October 28, as the date of its issuance.

In support of his citation, the inspector testified that while underground with Mr. Hess on October 28, he pointed out to Mr. Hess the area where the accumulations were located. The inspector's testimony is that the accumulations were present "around the fall area, and going inby toward the face from the fall for an approximate distance of 100 feet". When the inspector reduced the citation to writing on October 29, he described the location of the accumulations as "beginning 25 feet outby the 2nd fall and extending inby for approximately 100 feet". Thus, I conclude that it is reasonable to infer that the inspector was concerned about coal accumulations extending over an area of approximately 100 feet, and that the basis for his belief that a violation of section 75.400 occurred was the fact that he saw coal accumulations present over that distance.

Mr. Hess testified that when the inspector pointed out the accumulations to him, it was his understanding that the accumulations were present for a distance of 100 feet, starting at the roof fall location and going inby

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towards the working face. Thus, at this point in time while both men were together underground on October 28, it would appear that there was a meeting of the minds. That is, both of them apparently conceded the presence of coal accumulations for a total distance of approximately 100 feet, starting somewhere around the fall area and proceeding inby toward the working face. Mr. Hess testified that while underground on October 28, he and the inspector walked over the fall, and after reaching the inby side of the fall location the inspector advised him that this was the area that needed to be cleaned up. Mr. Hess testified further that he advised the evening shift foreman that same day that the area inby the fall needed to be cleaned, and Mr. Hess assumed that this had been done by the time the inspector returned the next day.

The starting point of the location of the accumulations is most critical to any determination as to whether the respondent made any reasonable efforts to achieve compliance. It is also most critical to the question as to whether or not the inspector communicated to the respondent precisely what had to be done to achieve abatement. As previously noted, a reasonable inference to be drawn from the testimony of both Mr. Hess and the inspector is that when they were both underground on October 28, they agreed that coal accumulations were present at or near the location of the roof fall. However, the written description of the conditions cited by the inspector on the face of the citation when he finally reduced it to writing on October 29, gives the impression that the inspector started at a point outby the fall for some 25 feet and then added an additional 100 feet, thereby giving the impression that the affected area encompassed a total of 125 feet. As a matter of fact, during the hearing the inspector candidly conceded that this was the case. He also conceded that his written citation, made after the time he initially verbally discussed the matter with Mr. Hess, caused some confusion. What transpired after the inspector returned to the mine on October 29, supports a conclusion that there was some confusion and a discussion of this follows.

When the inspector returned to the mine on October 29, he went underground to re-examine the area where he originally discovered the accumulations. He maintains that no work had been done to clean up the accumulations. Mr. Hess maintains that the area inby the fall had been cleaned up but that the inspector was disturbed because the area outby the fall had not been cleaned, and that this is what prompted him to issue the withdrawal order. Significantly, Mr. Hess indicated that the order was terminated after the outby area, as well as the area on top of the fall, as well as the area on either side of the fall, was cleaned up. In short, Mr. Hess contended that the area which the inspector expected to be cleaned up on October 29, was not the same area that he had in mind when he verbally discussed it with him the day before. Mr. Hess indicated that the area which had been cleaned up encompassed 75 to 100 feet, and he obviously believed that abatement was achieved. On the other hand, if the inspector had an additional 25 feet in mind, as well as the area immediately on top of the fall and to either side, then there

obviously has not been a meeting of the minds as to precisely what was required to achieve abatement.

On direct examination, Inspector Stevens first testified that he fixed the abatement time for the clean-up of the accumulations as 8:30 a.m., October 29. He stated that he believed this time to be reasonable because the accumulations were "not that extensive" and that one man working one shift could have cleaned them up within the time allowed. He later testified that he did not personally fix that time for abatement but that Mr. Hess indicated to him on October 28th while they both were underground that the accumulations would be taken care of the next day (October 29). The inspector's "narrative statement" (Exhibit G-6), states that "A 104(a) citation had been issued the day before, and the operator said the condition would be corrected but no effort was made to correct it", and Mr. Stevens testified that when he asked Mr. Hess how long he needed to abate the conditions, Mr. Hess advised him that he did not know and that he had to check with mine management first, but that Mr. Hess assured him the conditions would be taken care of "in the morning".

Inspector Stevens testified that when he went back to the mine on October 29, to check on the accumulations which he had cited he found that they were "not that bad", and that after his withdrawal order issued it took approximately an hour and 15 minutes to clean up and abate the order. Mr. Hess testified that in order to abate the order seven to ten men were assigned to clean up the area outby the fall, and that it took an hour to clean up the accumulations on top of the fall, as well as to either side of that location. Given these circumstances, I can only conclude that the presence of coal accumulations at the fall location progressed from a situation which the inspector first considered was "not that extensive", to "not that bad", to a major clean-up operation requiring a crew of seven to ten men shoveling coal for approximately an hour or more both inby and outby the fall, as well as on top of the fall and to either side.

I conclude and find that the preponderance of the evidence establishes the existence of coal accumulations amounting to a violation of section 75.400. I cannot conclude that MSHA has established that the inspector fixed a reasonable time for the abatement of the cited conditions, nor can I conclude that he communicated this time to mine management. I further find and conclude that the failure by the inspector to reduce the section 104(a) citation to writing before he left the mine on October 28, at the conclusion of his inspection, prejudiced the respondent in that it resulted in a withdrawal order based on certain alleged conditions which were never fully communicated to mine representative Hess. I accept Mr. Hess's testimony that the area inby the fall location had been cleaned up and reject the inspector's assertion that the respondent made no effort to clean up the cited accumulations. Had the initial accumulation condition been reduced to writing by the inspector before he left the mine on October 28, even on a blank sheet of paper, he would have had a better case to plead. His failure to do so has prejudiced the respondent here since it subjected it to a withdrawal order for certain conditions which it reasonably believed had been taken care of.

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Although I have concluded that the failure to reduce the section 104(a) citation has prejudiced the respondent's ability to make any rational efforts at abatement and compliance, my finding in this regard is limited to that issue. Insofar as any violation of section 75.400 is concerned, I cannot conclude that the respondent was totally oblivious to the fact that a violation had occurred. As a matter of fact, respondent does not dispute the existence of accumulations of coal and the record establishes that it abated what it believed to be the violative conditions. Accordingly, I find that MSHA has established a violation of section 75.400, and to that extent the section 104(a) citation no. 888864 IS AFFIRMED.

In view of my findings and conclusions concerning the issuance of the withdrawal order, the section 104(b) withdrawal order, no. 888866 IS VACATED.

Size of Business and Effect of Civil Penalties on Respondent's Ability to to Continue in Business

The parties have stipulated that the Siltix Mine employed approximately 135 miners and had an annual coal production of 175,000 tons at the time of the issuance of the citations in question. I conclude that this was a medium sized mining operation, and I adopt the further stipulation that the penalties assessed for the citations which have been affirmed will not adversely affect the respondent's ability to continue in business as my finding on this issue.

Gravity

With regard to the two guarding citations (888861 and 888862), Inspector Stevens testified that no one was in the area at the time he observed the conditions, the area is not one which is heavily traveled, and that normal operating procedures call for the belts to be shut down when they are cleaned or serviced. In these circumstances, he believed that the possibility of any injury occurring was remote, and I conclude and find that the citations are non-serious.

With regard to the float coal dust citation (888863), while the inspector did not believe that the mere presence of such dust presented a hazard, if it were placed in suspension and ignited by a spark it could present a hazard. However, he indicated that nearby cables were properly insulated and he detected no stuck rollers. Under these conditions, he concluded that the possibility of any accident was remote. Since the affected area was not extensive, and taking into account the inspector's testimony, I find that the citation is non-serious.

Citation 888865 is a permissibility violation concerning an opening in a continuous miner contactor panel in excess of the required .004 inches. The opening was .005 inches, but the inspector detected no methane in the area, the machine was apparently shut down and an electrician summoned immediately to close the gap to the required measurement. Inspector Stevens

states that any hazard resulting from the condition cited was improbable and I find that this citation is non-serious.

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With regard to the coal accumulations citation (888864), Inspector Stevens testified that when he first observed the conditions no one was in the area, all of the electrical cables in the area were properly insulated, and he observed no stuck conveyor rollers. In addition, the area where the roof fall had occurred had been timbered and supported, and he considered the possibility of any fire to be remote. Under these circumstances and conditions, I find that this citation is non-serious.

Negligence

I conclude and find that the respondent should have been aware of the two guarding conditions, as well as the presence of float coal dust, and coal accumulations. These conditions should have been detected during the preshift examination and the respondent's failure to exercise reasonable care in this regard constitutes ordinary negligence as to citations 888861, 888862, and 888863, and 888864.

With regard to the permissibility citation (888865), Inspector Stevens testified that the respondent may not have known about the condition since it could have occurred during the intervening required weekly inspections of the electrical component in question. Under the circumstances, I cannot conclude that the respondent was negligent in this instance.

Good Faith Compliance

Respondent exhibited extraordinary good faith compliance by immediately correcting the belt roller guarding conditions and the excess gap in the miner contactor panel. Abatement of the float coal dust condition was achieved the same day the citation issued, and the accumulations were cleaned up the next day. I have taken this in consideration in assessing civil penalties for the aforementioned citations.

History of Prior Violations

The parties stipulated that for the 24-month period preceding the issuance of the citations in question in these proceedings the respondent had a history of 176 violations, eight of which were violations of section 75.1722(a), 30 for violations of section 75.400, and 22 for violations of section 75.503.

For an operation of the size and scope of the respondent I do not consider the overall history of prior violations to be particularly bad. However, it does indicate that respondent needs to give more attention to coal accumulations and to the permissibility requirements concerning electrical face equipment, and I have taken the history concerning prior citations for section 75.400 and 75.503 into account in assessing and increasing the civil penalties for the citations which have been affirmed in these proceedings.

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Docket No. WEVA 82-99-R

As pointed out earlier in these decisions, the parties agreed that the citation issued in this case, No. 888867, is no longer in issue since the respondent-contestant paid the civil penalty initially assessed by MSHA. The parties also agreed that the contest may be dismissed as moot. Accordingly, this contest IS DISMISSED.

Penalty Assessments

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

Docket No. WEVA 82-173

Citation No.	Date	30 CFR Section	Assessment
888861	10/28/81	75.1722(a)	\$ 85
888862	10/28/81	75.1722(a)	80
888863	10/28/81	75.400	75
888864	10/28/81	75.400	250
888865	10/28/81	75.503	50
			\$ 540

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me in the civil penalty case, in the amounts shown above, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, the case is dismissed.

IT IS FURTHER ORDERED:

1. By consent of the parties, Contested Docket WEVA 82-99-R, IS DISMISSED.
2. Section 104(b) Order of Withdrawal No. 888866, October 28, 1981, IS VACATED.
3. Section 104(a) citation nos. 888861, 888862, 888863, and 888865 are all AFFIRMED, and Contested Dockets WEVA 82-93-R, 83-94-R, 83-95-R, and 82-97-R, are all DISMISSED.

George A. Koutras
Administrative Law Judge