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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. SE 82-48 A.O. No. 01-00722-03034 V
v.	Shannon Mine
BLACK DIAMOND COAL MINING CO., RESPONDENT	

DECISION

Appearances: George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the petitioner
Barry V. Frederick and Harry L. Hopkins, Esquires, Birmingham, Alabama, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing regarding the proposal was held on February 1, 1983, in Birmingham, Alabama, and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, were afforded the opportunity to make arguments on the record, and those arguments have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

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

Additional issues raised by the parties in the course of these proceedings are identified and disposted of in the course of my findings, conclusions, and rulings made in

Discussion

The citations in question in this proceeding were issued by MSHA Inspector Milton Zimmerman during the course of inspections at the mine on November 12 and 16, 1981. Both citations (withdrawal orders) were issued pursuant to section 104(d)(1) of the Act, and in both cases Mr. Zimmerman made findings that the conditions or practices cited as alleged violations were "significant and substantial". Mr. Zimmerman articulated these "S & S" findings by marking the appropriate "block" on the face of the citation forms which he served on the respondent at the conclusion of his inspections. Citation No. 0758739, issued on November 12, 1981, cites a violation of 30 CFR 75.400, and the alleged violative conditions or practices are described as follows:

> Loose coal was allowed to accumulate under and along the 1st South Belt line for a distance of more than 400 feet. The accumulation was 1 foot to 4 feet 7 inches deep and 4 feet to 10 feet wide where the belt crossed the track. The accumulation of float dust and coal dust was 10 inches deep and 20 feet wide for 80 feet. The accumulation was up to the return belt and idler rollers for the distance of the belt. This belt is inspected by the foreman on two shifts each day.

Citation No. 0758127, November 16, 1981, cites a violation of 30 CFR 75.200, and the alleged violative conditions or practices are described as follows:

> On the 1st South Section the crosscut between the No. 1 left and 2 left entry was 28 feet wide and an area of roof 8 feet wide and 14 feet long was unsupported. The face of the No. 2 left had been advanced 15 feet deep. The mouth of the No. 2 left face was 22 feet wide for a distance of 25 feet. Two posts had been knocked and were not replaced. The entire crew has been traveling through this area for more than a week.
>
> This is in violation of the approved roof control plan. The crosscut between No. 1 and 2 entry was to be only 20 feet wide. The room entry is to be a maximum of 20 feet.

Both citations in issue in this case are "unwarrantable failure" withdrawal orders issued by Inspector Zimmerman pursuant to section 104(d)(1) of the Act. The instant civil penalty case did not arise from a direct challenge or notices of contests filed by the respondent concerning the validity of the two section 104(d)(1) orders of withdrawal which are the subject of petitioner's civil penalty proposals. Although respondent had a right to file timely challenges contesting the validity of the orders pursuant to the statutory scheme of enforcement concerning the "unwarrantable failure chain", it did not do so. Section 105(d) of the Act allows a challenge to such orders, but only if the contest is filed within 30-days of the receipt of the order. On the facts of this case, one of the orders was served on the respondent by Inspector Zimmerman on November 12, 1981, and the other was served on November 16, 1981, and there is no evidence that the respondent filed its notice of contest challenging those orders within the 30-day period required by section 105(d). Respondent's "contest" came on when it was served with a copy of MSHA's proposed civil penalty "special assessments" for the violations detailed in the orders, and this was apparently done on June 1, 1982, when the respondent advised MSHA that it wished to contest three of the five citations which were the subject of the proposed assessments.

At the beginning of the hearing held in this case, the parties began discussing certain proposed stipulations and agreements, including certain references to the "underlying section 104(d)(1) citation", whether there was an "unwarrantable failure" to comply, and whether the citations were "significant and substantial". Since it was obvious to me that the respondent may have believed that the parameters of the hearing would include issues touching on the validity of the unwarrantable failure findings made by the inspector, as well as his "significant and substantial" findings, the parties were afforded an opportunity to be heard on these preliminary matters. During the course of these discussions on the record, counsel for the parties expressed agreement with my ruling that the parameters of the instant civil penalty case would not include questions concerning the validity of the orders (Tr. 15, 17-18, 22, 23). To the extent that respondent's counsel may still be under the impression that he would be permitted to go into the question of the validity of the section 104(d)(1)

citations in this civil penalty proceeding, my ruling that his failure to contest these issues within the time frames permitted by the Act and the Commission's rules is hereby reaffirmed, and any exceptions taken to this ruling by the respondent is preserved for any appeal rights he may wish to exercise on this issue.

The petitioner's proposal for assessment of civil penalties filed in this matter was docketed with the Commission on July 6, 1982. Included with this initial pleading were certain documents labeled "Exhibit A", which purportedly listed the alleged violations which were contested by the respondent and which formed the basis for the petitioners civil penalty proposals. One of the documents listed citations 0758739, 11/19/82, 75.400, showing a penalty assessment of $750, and citation 0758127, 11/16/82, 75.200, with an assessment of $500 indicated. A second document is an MSHA "Proposed assessment" form listing five citations, including 0758739 and 9758127, for which civil penalties totalling $2500 were assessed. Also included as attachments are copies of the two citations/orders, 0758739 and 0758127, and copies of miscellaneous correspondence.

The certificate of service attached to the petitioner's penalty proposals were served by certified mail on the respondent's President, C. B. Blair, on July 1, 1982. By letter dated July 29, 1982, and docketed with the Commission on August 2, 1982, respondent's counsel filed an answer to the petitioner's civil penalty proposals, and the answer states in pertinent part as follows:

> The proposed assessment is an error as a matter of fact, no violation occurred, and the proposed fine did not follow the statutory guideline for assessment.

In view of the contradictory information contained in the petitioner's civil penalty proposal, I issued an Order on August 12, 1982, directing the petitioner to clarify its proposal. Petitioner responded and asserted that the respondent contested only citations 0758127 and 0758739. However, petitioner submitted a copy of MSHA's "Narrative findings" covering five citations and these included one section 104(d)(1) citation and four section 104(d)(1) orders.

On September 3, 1982, respondent filed an amendment to its answer and requested a hearing on MSHA's civil penalty proposals. At no time has the respondent's answers indicated any request for a review of the inspector's unwarrantable failure findings, his "S&S" findings, or the legality of the withdrawal orders, including the section 104(d)(1) "unwarrantable chain".

At the hearing, petitioner's counsel asserted that he had no information that the respondent ever filed a notice of contest pursuant to section 105 of the Act challenging the inspector's "unwarrantable failure" findings, his "significant and substantial" findings, or the inspector's actions in issuing the withdrawal orders. Further, petitioner's counsel

asserted that he had no information that the respondent ever challenged or otherwise sought to contest the underlying section 104(d)(1) citation No. 0758737, issued by the inspector on November 12, 1981, and that the respondent paid the civil penalty assessment in that case. This citation concerned another coal accumulations violation of section 75.400, and respondent's witness Paul Province confirmed that the respondent paid that citation because it could not rebut the inspector's findings concerning the existence of float coal dust in the area cited by him in that citation. In short, the respondent apparently paid the civil penalty assessed for that citation after making a judgment that the citation could not successfully be defended at a hearing.

The respondent did not dispute the fact that at the two locations described by the inspector on the face of the citation in the instant case that the width of one entry at a crosscut was 28 feet, and the mouth of the face area at the second location was 22 feet wide. Further, the respondent did not dispute the fact that at those two locations the roof was unsupported. The first area of unsupported roof was at the location of the 28 foot wide entry, and the inspector observed a roof area 8 feet wide and 14 feet long which was not roof-bolted or otherwise supported. The second location of unsupported roof was at the location where the mouth of the face was 22 feet wide and the inspector observed two posts which had been dislodged and not vertically in place where they were supposed to be.

MSHA's testimony and evidence - Citation No. 0758739, 30 CFR 75.400

MSHA Inspector Milton Zimmerman confirmed that he conducted an inspection at the mine on November 12, 1981, and issued the citation for coal assumulations. He described the conditions which he observed, and he believed that the conditions had accumulated over four or five production shifts prior to the time and date of his inspection. He confirmed that the mine superintendent advised him he was working "shorthanded" and had no personnel available to clean up the cited coal accumulations (Tr. 24-29; 45).

On cross-examination, Mr. Zimmerman confirmed that company representative Paul Province was with him during his inspection, and he testified as to the depth and extent of the accumulations which he cited, and confirmed that at some locations rock was under the coal, but at other locations, such as the area inby the track and the tail piece, the accumulations were coal. He described the accumulations as "damp", and confirmed that at "the area around the piles" there was an accumulation of water (Tr. 32). In response to a question as to whether he walked the entire 400 feet of belt as described in his citation, he answered that "I did walk the belt line", and he was sure that Mr. Province was with him when he did this (Tr. 33). He believed the entire length of the belt line was more than 400 feet, and he confirmed that the accumulations he described in the citation extended the entire 400 feet in question (Tr. 34).

Mr. Zimmerman confirmed that he cited an "S&S" violation, but indicated that under MSHA's "new instructions" for "significant and substantial"

he would not now consider the accumulations to be "S&S" (Tr. 34). He saw no evidence of anyone working on the belt line at the time he issued the citation, and he believed that the coal accumulations were combustible (Tr. 35). He confirmed that the belt line was equipped with fire sensors and alarms, but his concern was over the fact that had the accumulations been allowed to remain there was "a chance of combustion". However, he saw no evidence of any frozen or overheated belt rollers or motors (Tr. 36).

Referring to a sketch of the scene (exhibit P-1), Mr. Zimmerman described the areas where he believed the coal accumulations in question existed at the time the citation was issued (Tr. 37-41). He confirmed that the section was in production when he was there, and that the belt was in operation (Tr. 44). He checked the preshift examination books, and found no notations reflecting the presence of any coal accumulations. Abatement was achieved by cleaning up the accumulations and rock dusting the affected area (Tr. 46). The accumulations were shoveled onto the belt and taken away, and he confirmed that he determined the depths of the accumulations by measuring them with a tape (Tr. 27). He was satisfied that the operator addressed the problem immediately by beginning clean-up (Tr. 48).

Respondent's testimony and evidence

Paul Province, underground foreman, confirmed that he accompanied Inspector Zimmerman during his inspection on November 12, 1981, and while he indicated that the belt distance which was cited was 400 feet, he confirmed that he only accompanied the inspector for 150 feet of the belt line. He confirmed that the total distance of belt line which he actually walked and could visually observe was approximately 220 feet (Tr. 53). While he was aware that Mr. Zimmerman wrote up the entire 400 feet of belt line for coal accumulations, he stated that Mr. Zimmerman told him "if this part of it looks like this, I know the rest of it needs to be cleaned up" (Tr. 53).

Mr. Province stated that most of the cited materials under the belt line was either rock, or fire clay, or coal mixed in with this material. He described the materials under the belt idlers as "muck", and indicated that the fire clay from the coal seam was mixed in with this material. He confirmed that when he grabbed a handful of the material and squeezed it through his fingers "it will run out to the side of your fingers. That's how wet it was" (Tr. 54). He confirmed that union representative Robert Perry was with him when he picked up this material to test it (Tr. 54). Mr. Province described the remaining material along the belt line as 80% rock, that it was wet to the consistency of mud, and he confirmed that one man was assigned at the start of the shift to clean up the accumulated materials (Tr. 56).

Mr. Province described exhibit R-1 as a weekly map of the section which was cited, and he described the amount of rock which was present in the coal seam which was being mined at the time of the inspection

(Tr. 55-69). When asked whether he disputed the fact that accumulations of coal were present on the cited belt line, he responded "enough to cause a problem, yes, sir, I dispute that" (Tr. 69). Although he insisted that 80% of the accumulations was rock, he conceded that the remaining 20% was coal (Tr. 70). However, he also believed that the violation was improper because that 20% of coal was wet and mixed with fire clay, and therefore would not burn (Tr. 70). Mr. Province stated that he discussed this with the inspector, and that the inspector observed a man shoveling the rock and muck material onto the belt (Tr. 71).

Mr. Province conceded that it was possible that Inspector Zimmerman walked the belt alone beyond the 150 feet after he left him to inform the section foreman to shut the section down (Tr. 72-73). He conceded that he went to the area beyond the 150 feet location, and that he observed a "small accumulation", but that it was wet (Tr. 73). Mr. Province confirmed that he was not in the area when the citation was abated and terminated (Tr. 74). He also confirmed that he did observe float coal dust and coal dust in the middle of the track where the belt crossed the track, and he conceded that Inspector Zimmerman was correct when he cited these accumulations. In response to bench questions concerning the conditions cited by Inspector Zimmerman, Mr. Province testified as follows (Tr. 77-79):

> JUDGE KOUTRAS: I want you to tell me, does the Inspector not cite, as part of the conditions here, the fact that he thought he saw some float coal dust?
>
> THE WITNESS: Yes, sir. He says, "Float dust, and coal dust".
>
> JUDGE KOUTRAS: Okay. Did you see any float dust, or coal dust?
>
> THE WITNESS: Yeah, of that minute quantity that you're talking about, around the belt structure.
>
> JUDGE KOUTRAS: Did you see any float coal dust, at all, that day that he issued the Citation?
>
> THE WITNESS: Yes, sir. I saw some float coal dust, yes, sir.
>
> JUDGE KOUTRAS: Okay. Did you see coal dust?
>
> THE WITNESS: A small amount in the track, yes, sir. In the middle of the track, where the belt crosses the track.
>
> JUDGE KOUTRAS: So, you saw some coal dust, and you also saw some float coal. So, he's not wrong on that, is he?

THE WITNESS: No. No, sir, on that part of it he is not wrong.

JUDGE KOUTRAS: But you are quibbling over the extensiveness of the cite?

THE WITNESS: Yes.

* * * * * * * * * *

JUDGE KOUTRAS: ... So, your testimony is, regardless of whether it was rock or coal, you saw some accumulations, you saw some float coal dust, and you saw some coal dust accumulated along this belt line.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And your contention is that the coal that you saw was incombustible, because you squeezed it, and water came out of it, okay? Is that right, so far?

THE WITNESS: Essentially, yes, sir.

Robert Towry, respondent's Director of Safety and Plant Engineering, testified that he went to the First South Belt section of the mine on the morning of November 12, and for the first 100 to 150 feet he observed "a pretty good pile of slabby rock" (Tr. 87). He also observed "a lot of wet coal, and the pyramiding effect behind the belt wiper". He estimated that 75 to 80% of the accumulated material was rock and that the rest was wet fire clay, and he determined that it was wet by touching it at two or three places, and he sampled the material (Tr. 88). He stated that the coal being mined was a coking coal rather than a steam coal, and that "its not very easy to set it on fire" (Tr. 89). As for the extent of the accumulations which he observed, he stated as follows (Tr. 90-91):

Q. Okay. Now, the portion that Paul says the Inspector did not walk, what was there?

A. There was no accumulation, anything like what was in, say, from the track to just in by the overcast, or say, 150 to 200 feet. It more or less petered out, and there was -- I've never seen a coal mine where it was completely clean, but it was a wet area under that belt, and just a minimal amount of accumulation of any kind. Some rock, and some coal.

> Q. All right. I will just ask you a couple of general questions. Why did you decide to contest this Citation, or this Order?
>
> A. We considered that there were certain things in the -- (pause) --
>
> Q. Did you feel there was a violation?
>
> A. No, no, because we considered that the vast majority of this material was incombustible, to start with -- in other words, rock. And then that which could be argued to be combustible -- in other words, coal -- was too wet to have, you know, burned. It was just sopping wet.
>
> Q. Did the description in the Citation, have any effect on your decision?
>
> A. Yes. That and the Inspector's back-up sheet, and also the narrative which accompanied the original assessment, which, by the way, was $1,000 and not the either $750, or $500, that was mentioned earlier. Yes, it would be what we considered inaccuracies on these documents that we really wanted to contest, you know, rather than the fine.

Mr. Towry confirmed that the mine does not liberate methane, and he confirmed that he was not with the inspector when he issued the citation, but that he did go to the area approximately 45 minutes later and the conditions had changed since clean-up had begun (Tr. 96-97).

David Hatter, section foreman, testified that he was involved in the clean-up and rock dusting of the cited belt in question, and he described the material as "mostly mud" and "wet" (Tr. 100). He confirmed that his clean-up was limited to a 70-foot area at the cross-cut, and stated that the material was shoveled onto the belt (Tr. 101-102). He confirmed that the day shift had already cleaned up the other belt area, and that his clean-up was confined to the crosscut, and that his crew began rock-dusting the whole belt line while waiting for the inspector to come back "to get the belt okayed" (Tr. 103).

Inspector Zimmerman was recalled by the petitioner, and he stated that the accumulations in question could have been 30 to 50% rock, but that there was a substantial amount of coal accumulations (Tr. 105). most of the rock which he observed was located from the track inby towards the discharge point where rock had been shot out to install the belts. He also confirmed that had all of the accumulations been rock, he would not have issued the citation (Tr. 106). No samples were taken because he is not required to take samples to substantiate an accumulations

citation. In the instant case, the accumulations looked like coal to him and coal is combustible. Although the law makes a distinction between anthracite and bituminous coal, MSHA does not distinguish between coking coal and steam coal (Tr. 107).

Mr. Zimmerman conceded that it was possible that he did not walk the entire 400 feet of belt line, and after issuing the citation he later modified it to permit production to continue so that the belt would not be stopped at the transfer point (Tr. 109). He did this after determining that a substantial amount of the accumulations had been cleaned up the same evening that he issued the citation, and he terminated the citation four days later after returning to the mine. He confirmed that the accumulations were consistent along the entire area he cited, and even if the accumulations were half coal and half rock, there would still be a violation (Tr. 112).

Mr. Zimmerman could not recall seeing anyone in the process of cleaning the area at the time of his inspection, and he indicated that had he seen clean up going on he would not have issued the citation (Tr. 115). He confirmed that some of the muck was wet and not combustible, but it was still an accumulation which had to be cleaned up (Tr. 116).

MSHA's testimony and evidence - Citation No. 0758127, 30 CFR 75.200

Inspector Zimmerman confirmed that he issued the citation in question during an inspection conducted on November 16, 1981, and he described the areas where he found wide places and unsupported roof (Tr. 148-150). He confirmed that the roof control plan, exhibit P-2, provided for maximum widths of only 20 feet at crosscuts and entries (Tr. 151). He indicated that the problems could have been taken care of by installing timbers to narrow the areas down to the 20-foot width requirements, and he could remember no roof bolt machine being in place at the cited locations, but that one could have been "within a couple of crosscuts of the area" (Tr. 154). He was certain that people were working in the areas and that mining was taking place (Tr. 155).

Mr. Zimmerman testified that there was a danger of a roof fall in the cited areas and that "a couple of rock falls were noted close to this area, on the mine map" (Tr. 155). He confirmed that he observed two posts lying near the mouth of the entryway which was cited, and that the roof control plan requires that any posts knocked down be reinstalled (Tr. 156).

On cross-examination, Mr. Zimmerman confirmed that he probably was at the area cited during his previous inspection of November 12, and had he noticed the wide places at that time he would have cited them. He confirmed that he had no way of knowing when the conditions first occurred, but conceded that someone may have told him that they had occurred at the end of the night shift before his inspection (Tr. 159). He believed the two timbers must have been in place on the 12th or he would have cited them, confirmed that rib rolls were not unusual in the

mine, and he conceded that after pointing out the conditions to the respondent, someone may have mentioned the fact that a roof bolting machine was on its way to bolt the roof (Tr. 160).

Respondent's testimony and evidence

Paul Province testified that he did not take issue with the inspector's description of the wide areas, the unsupported roof area, or the fact that two posts had been knocked down (Tr. 170). He stated that a rib roll occurred at the end of the previous evening shift prior to the inspector's arrival on the section, and that prior to this time the crosscut widths were in conformance with the roof control plan (Tr. 171). He also indicated that prior to the rib roll, there were no areas of unsupported roof, and any such areas which had not been cleaned up could not be considered unsupported until they were in fact cleaned up (Tr. 174). He testified that the day shift cleaned up the roll, but since there were two to three shuttle cars of materials, and no one could walk through the area, clean up couldn't start until about 8:30 a.m. (Tr. 176).

Mr. Province stated that after learning of the violations the bolting crew was taken from the One-Left section and moved to the cited area to bolt the roof, and the crew had advised him that the area would have bolted "on cycle". At the time he was made aware of the violation, the bolting crew was located about 50 feet away, but a line curtain may have obstructed the inspector's view of the crew (Tr. 181). According to the bolting crew, they intended to roof bolt the unsupported roof area even before he was made aware of the violation (Tr. 181).

On cross-examination, Mr. Province discussed the mining cycle as it progressed at the time the violation was cited by Inspector Zimmerman, and he conceded that the roof conditions were "not the best nor the worst" (Tr. 186). He conceded that he was not present at the time of the rib roll to see how much of the rib had fallen off (Tr. 189-190). He confirmed that the inspector measured the wide places as reflected on the face of his citation, and that he measured from one rib to the point on the other rib where the roll had occurred, and that it in fact measured 28 feet wide (Tr. 195-197). He confirmed that this distance was eight feet wider than permitted under the roof control plan (Tr. 197).

Mr. Province conceded that the other wide place cited, namely the 22 foot area, was also present, and he indicated that the same rib roll also affected that wide area (Tr. 206). He stated that the two timbers cited were installed to take care of the wide area, but that they must have been knocked down by the rib roll or while clean-up was taking place. He conceded that the initial 22-foot wide area was apparently created by driving the entry too wide (Tr. 207). He did not dispute the inspector's finding that the two timbers were lying down and not in place (Tr. 208).

David Hatter, testified that he was the section foreman on the evening shift when the rib roll occurred on November 15, 1981, and he confirmed that it occurred at approximately 10:40 p.m. He stated that

he had no time to clean it up because it would have necessitated keeping men over on overtime. He told the fire boss about the condition, and indicated that no one could walk under the unsupported roof where the rib had rolled because the coal was five feet deep where it had rolled off the rib and no one could walk around the area (Tr. 221). To his knowledge, no one walked under the unsupported roof as the crew left the section (Tr. 222). Prior to the rib roll, the roof was not unsupported (Tr. 223).

Inspector Zimmerman was recalled, and testified as follows concerning the rib roll (Tr. 231-235):

> Q. You have heard the testimony of Respondent's witnesses here with regard to the prior knowledge of this condition. Is there anything you can tell me about this? Elaborate on it? Did you have any conversation with anybody from management? Did they explain to you that they were aware of the fact that they had had a rib roll, that they had cleaned the rib roll up, and that they were waiting for the normal roof bolt cycle to come in that area to take care of the unsupported roof, at the 28 foot distance that you had noted on the face of your Citation?
>
> A. Something like that might have been said. I can't be positive.
>
> Q. What do you mean, it might have been said? I mean, do your notes reflect that?
>
> A. No, my notes don't reflect it. That was in 1981, and we might have discussed the fact that maybe it was possible that a rib had rolled off, and causing the place to be wide --
>
> Q. What does your narrative statement -- Did you fill out a narrative statement on this Citation.
>
> A. I'm sure I did.
>
> Q. An Inspector's statement?
>
> A. I'm sure I did.
>
> Q. Do you have that available?
>
> A. Whatever was discussed at the time of the violation, wasn't sufficient for me not to write it.
>
> Q. Well, but that's not, you know --

MR. PALMER: Your Honor, here's a copy of that --

JUDGE KOUTRAS: Let me see that for a minute.

MR. PALMER: Okay.

JUDGE KOUTRAS: Let the record show that I have asked for the statement, and Mr. Palmer has produced it for me.

BY JUDGE KOUTRAS: (Resuming)

Q. Would you look at that statement, again? Is that the narrative statement that you filled out with respect to this violation.

A. (Witness examines document.) Yes, sir.

Q. Okay.

JUDGE KOUTRAS: Have you had an opportunity to see this, Mr. Frederick?

MR. FREDERICK: Yes.

BY JUDGE KOUTRAS: (Resuming)

Q. Your remarks on this, and let me just quote them here:

"This crosscut had been mined several weeks ago, and appeared to have been left too wide. The section had been -- has been back in this area for approximately two weeks, and have been travelling this area daily. This area is preshifted three times a day, and the on-shift is made by the foreman twice daily, this condition being examined five times daily ..." -- and I can't make out the rest of that.
The gist of this is -- Do you now recall any conversation with anybody in mine management, about their explaining to you the circumstances under which this area was left unsupported.

A. Yeah. Well, I recall it, but it had to be more than 20 feet wide already, because of where the rib roll was. It had to be more than 20 feet wide, for it to be 28 feet wide, because the bolts were approximately five feet from the rib already, and it was only eight feet from the bolt to the rib, so it had to be at least 25 feet wide already. Before the rib roll even.

Q. What if mine management had told you at that point in time, that they were aware of the rib roll, that they knew that the entry was wide, but someone was going to get on it right away, and they are on their way, but you just beat them to the punch.

What if they had told you that, and you specifically remembered that? What action would you have taken? Would you have done anything different?

A. By virtue of the fact that they all had gone into the section, and travelled through that area, I would have given them a Citation, because they should have corrected it, prior to them going through.

Q. I believe you testified earlier that if you had noticed a violation previous to that date, you would have written them up on the width violation.

A. I sure would have. Had I measured it and found it to be wide, I would have. Definitely.

Q. And I believe you testified initially on this violation, that you did not know when the width violation first occurred.

Is that your testimony in the record?

A. I didn't know. I didn't know. I don't know when it first occurred.

Findings and Conclusions

Fact of Violation - Citation No. 0758739, 11/12/81, 30 CFR 75.400

Respondent is charged with a violation of mandatory safety standard section 75.400, which provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Respondent's defense to the accumulations citation is based on Mr. Province's testimony that what he saw was primarily an accumulation of rock and wet muck which he believed to be incombustible. However, Mr. Province only walked 150 feet of the belt line, and he confirmed the presence of float coal dust and coal dust in the middle of the track and on the belt structure itself. He conceded that Inspector Zimmerman was correct in the citation of these conditions and he confirmed that he was not present when the conditions were abated.

During the hearing, respondent's counsel asserted that Mr. Zimmerman's narrative description of the alleged accumulations which he cited are "blantently wrong" (Tr. 123). Counsel also raised an issue concerning the alleged failure of Mr. Zimmerman to provide mine management with an opportunity to accompany him on the inspection beyond the 150 feet point after Mr. Province left his company (Tr. 123). Counsel argued that if Mr. Zimmerman advised Mr. Province that he did not need to walk the remaining 250 feet of belt line, one can assume that he did not. If he did, then counsel maintained that he did so with no one from mine management present (Tr. 123).

Mr. Zimmerman testified that at the beginning of the inspection, mine management was advised of his presence and Mr. Province and union walkaround representative Perry accompanied him on the inspection (Tr. 126). Mr. Zimmerman confirmed that at the time he advised Mr. Province that he was going to issue an accumulations citation Mr. Province left the area to make a telephone call "to get some people down to start cleaning on it". At that point in time, Mr. Zimmerman conceded that he had not walked the entire 400 feet of belt line and that he had only reached "at least three crosscuts of it" (Tr. 127). He then indicated that he walked the remainder of the belt line and was sure that the walkaround man was with him, but he was not sure about Mr. Province being present. In any event, no one objected, and management's concern was that he was citing an unwarrantable failure violation (Tr. 128).

In Old Ben Coal Company, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), the Commission held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist, "1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." See also: MSHA v. C.C.C. Pompey Coal Company, Inc., 2 FMSHRC 1195 (1980), and 2 FMSHRC 2512 (1980).

Turning to the evidence and testimony adduced in this case, I conclude and find that the preponderance of the evidence establishes the existence of accumulations of combustible loose coal, coal dust, and float coal dust as cited by the inspector in this case. Respondent does not dispute the inspector's findings concerning the existence of float coal and coal dust as cited in his citation. Even if I were to accept the respondent's assertion that most of the cited accumulations of loose coal was rock and muck, the fact is that the petitioner has established by credible evidence the existence of accululations of coal dust and float coal dust which had not been cleaned up at the time the inspector observed the conditions. With regard to the accumulations of loose coal, respondent concedes that the inspector was not totally wrong in citing loose coal. Its dipute is over the alleged extensiveness of the accumulations. However, since Mr.

Province left the inspector after walking only 150 feet of

the belt line, and was not present during the abatement process, he had no real basis for concluding that what the inspector observed was an accumulation of rock rather than loose coal. Having observed the inspector on the stand during the course of his testimony, I find him to be a credible witness. He described the accumulations he observed, confirmed that he made certain measurements as to their depth and extensiveness, and in my view has supported the existence of the conditions cited.

In view of the foregoing, I conclude and find that the petitioner has established the fact of violation, and the citation IS AFFIRMED. I reject the respondent's assertion that mine management was not given the opportunity to accompany Inspector Zimmerman during his inspection rounds. In this regard, I take note of the fact that the respondent had not previously raised this issue as part of its pleadings filed in this matter. In any event, it seems clear to me that Mr. Province opted to leave the inspector after he had walked the 150 feet of belt line in question for the purpose of initiating abatement. As far as I am concerned, it is clear that for this initial 150 foot distance, management did in fact accompany the inspector, and absent any evidence that it objected to the inspector finishing his inspection rounds without Mr. Province present, I cannot conclude that Inspector Zimmerman acted arbitrarily by continuing to walk the remaining portion of the belt line without Mr. Province being present.

Fact of Violation - Citation No. 0758127, 11/16/81, 30 CFR 75.200

Inspector Zimmerman confirmed that he issued the citation in question because the respondent failed to follow its approved roof control plan in that upon inspection of the cited underground mine he found that certain areas had been driven too wide and lacked the required roof support called for by the approved plan. It is clear that the failure by a mine operator to comply with a provision of its approved roof control plan constitutes a violation of section 75.200, Peabody Coal Company, 8 IBMA 121 (1977); Affinity Mining Company, 6 IBMA 100 (1976); Dixie Fuel Company, Gray's Knob Coal Company, 7 IBMA 71 (1976).

I find Inspector Zimmerman's testimony in support of the cited conditions to be totally credible and believable, and it fully supports the issuance of the citation in question. Respondent's defense goes more to the mitigation of the gravity and negligence of the cited conditions, and its testimony does not rebut the existence of the wide places and unsupported roof areas cited by Inspector Zimmerman. Accordingly, I conclude and find that the petitioner has established the fact of violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Negligence - Accumulations - 30 CFR 75.400 Citation

Inspector Zimmerman testified that he observed the belt line "date board" and it had been dated and initialed, indicating that "the

belt had been made" but that nothing had been done to clean up the accumulations which were present. He also checked the preshift books and the accumulations which were present. Based on his observations of the accumulations and the date board, he concluded that the respondent knew or should have known about the conditions, but did nothing to clean them up prior to his issuance of the violation (Tr. 128). Further, his testimony that the mine superintendent told him that he was working shorthanded and had no personnel available to clean up the cited accumulations remains unrebutted. Under all of these circumstances, I conclude and find that the cited conditions resulted from the respondent's failure to take reasonable care to insure that the cited accumulations were cleaned up, and that this failure on its part constitutes ordinary negligence.

Gravity - Accumulations - 30 CFR 75.400 Citation

While it is true that the respondent began abatement immediately, the fact is that at the time the inspector observed the conditions the belt was running and the section was in production. However, the inspector saw no evidence of any frozen or stuck rollers, and the belt line was equipped with fire sensors and alarms, and respondent's safety director indicated that there was no methane detected on the section. Given these circumstances, and the fact that the accumulations of loose coal were wet, and in some areas mixed in with rock, I cannot conclude that the conditions were grave or extremely serious. As a matter of fact, Inspector Zimmerman candidly admitted that given the same circumstances today, he could not conclude that the cited conditions were "significant and substantial". Accordingly, I have considered these circumstances in the assessment of the penalty for the citation in question.

Negligence - Roof Support - 30 CFR 75.200 Citation

The inspector testified that he could not state how long the unsupported roof areas and wide entries existed before he found them during his inspection on November 16, 1981. However, his "inspector's Statement", exhibit ALJ-1, states as follows under item 2, "Remarks":

> The crosscut had been mined several weeks ago and appeared to have been left too wide. The section had been back on this area for approximately two (2) weeks and have been traveling this area daily. This area is preshifted three (3) times a day and the on shift is made by foreman twice daily. This condition being examined 5 times daily was surely noticed. This was the main intake and escapeway.

When asked to explain or reconcile his "remarks", which clearly imply or infer that the wide places existed for several weeks and were not corrected until November 16, 1981, the inspector stated that his

notes do not reflect any information in this regard, and he again stated that he did not know how long the cited conditions may have existed prior to his arrival on the scene. When asked whether anyone from mine management offered any explanation or excuse for the cited conditions, the inspector confirmed that his notes do not reflect that it did, and he also indicated that "they may have", but he could not remember.

Respondent's counsel asserted that while he does not dispute the existence of the conditions cited by the inspector, his primary concern is over the information used by MSHA in the assessment of the initial penalty for the violation. Specifically, counsel stated that the basis for the inspector's finding that the violation was "unwarrantable" are simply not true, and that the conclusions made by the special assessments MSHA official in his "narrative findings" that "the violation was observable readily and should have been seen during the preshift and on-shift examinations" were obviously based on the erroneous remarks made by the inspector in his "inspector's statement". In short, counsel asserted that this is the reason why respondent chose not to pay the proposed civil penalty and to "contest" the matter by requesting a hearing before this Commission.

Respondent's counsel did not dispute the fact of violation as stated by Mr. Zimmerman in his citation. Counsel pointed out that the rib roll was an "unintentional" roll, and that the conditions were not known to management until the inspector found the conditions and cited them. After that occurred, management took immediate action to abate the conditions. The section foreman who was assigned to the section at the time the citation issued is no longer employed by the respondent, and Mr. Province was not present at the time the area was cleaned up (Tr. 213).

The testimony of David Hatter, the section foreman on the evening shift of November 15, 1981, reflects that the rib roll occurred at approximately 10:40 p.m., at the end of his shift. Although he indicated that he brought it to the attention of the fire boss, he also indicated that men were not assigned to immediately support the roof because it would have entailed paying them overtime.

After careful consideration of all of the testimony and evidence adduced on this citation, I conclude and find that the cited conditions resulted from the respondent's failure to exercise reasonable care to insure that the areas which were too wide were fully roof supported in accordance with the approved roof control plan. I further find that these conditions should have been taken care of when discovered and reported by Mr. Hatter, and the failure by the respondent to correct the cited conditions, which it knew or should have known existed, constitutes ordinary negligence.

Gravity - Roof Support - 30 CFR 75.200 Citation

Respondent contends that due to the extent of the rib roll which caused the wide places, men could not walk through the area due to the piles of coal which were present as a result of the fall. While this may be true, respondent offered no such excuse for the unsupported roof area which was cited because the two roof support timbers were not in place. Insofar as that location was concerned, I find that the cited conditions were serious. As for the unsupported areas where the inspector found were too wide, the fact is that the conditions were permitted to remain between shifts, and the locations of unsupported roof were in fact in an area where miners traveled through, and respondent conceded that a roof bolting crew was working nearby. In these circumstances, I conclude and find that the cited conditions were serious.

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

Respondent conceded that its mining operation is subject to the Act. With regard to the size of its operation, respondent's counsel stated that in 1982 the annual tonnage mined at the mine site in question was 63,877, and that the mine worked 82,526 man hours. For the year 1980, total annual production for the parent company was 164,108 tons, and the mine in question had a production of 145,939 tons for that year, and 145,939 man hours were worked (Tr. 9-10).

I conclude and find that at the time the citations in question here were issued, respondent was a small-to-medium sized mine operator. Further, since respondent offered no evidence to the contrary, I conclude and find that the civil penalties which I have assessed for the two citations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Petitioner's history of prior violations is reflected in Exhibit P-3, a computer print-out covering the period November 12, 1979 through November 11, 1981. The print-out shows 136 paid citations, eight of which are for prior violations of section 75.400, and five of which are for prior violations of section 75.200. The print-out reflects further that all of these prior citations for violations of sections 75.200 and 75.400 are section 104(a) citations, and none involve imminent danger or other withdrawal orders. Considering the size of the respondent's mining operation, as well as the fact that the respondent has paid in full all of these prior citations, I cannot conclude that its history of prior citations is such as to warrant any additional increases in the civil penalties which I have assessed for the two citations in issue this case.

Good Faith Compliance

The record in this case establishes that the respondent rapidly abated the cited conditions and took immediate corrective action once

the conditions were called to its attention by Inspector Zimmerman, and this has been considered by me in the assessment of the civil penalties for the two citations which have been affirmed.

Petitioner's proposed civil penalty assessments

It is clear that I am not bound by the initial civil penalty assessments proposed by the petitioner as part of its pleadings in this case. However, I take note of the fact that in its initial proposal for assessment of civil penalties filed by the petitioner on July 6, 1982, petitioner proposed a civil penalty in the amount of $750 for Citation No. 0758739, and $500 for Citation No. 0758127. These proposed penalties were the result of MSHA's "special assessment" computations. However, in response to my Order of August 12, 1982, seeking clarification of MSHA's proposals, petitioner filed a letter dated August 24, 1982, and included copies of MSHA's "Narrative Statements" which were not included with its initial proposal. Included in these submissions were proposals for civil penalties in the amount of $1,000 for each of the two citations in question, as well as a copy of the previously filed proposals calling for assessments of $750 and $500.

The obvious confusion resulting from the aforementioned inconsistent pleadings and civil penalty proposals were discussed by me during the course of the hearing (Tr. 21-22). Also discussed was an apparent typographical error in the pleadings which reflected the year of the issuance of the citations as 1982 in one document, and 1981 in another (Tr. 138). No further clarification was forthcoming from the petitioner. Accordingly, I will assess civil penalties which I believe are reasonable and warranted in this case.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 CFR Section	Assessment
0758739	11/12/81	75.400	$ 650
0758127	11/16/81	75.200	400
			$1050

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above in the amounts shown within thirty (30) days of this decision and order, and upon receipt of payment by the petitioner, this case is DISMISSED.

George A. Koutras
Administrative Law Judge