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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. WEVA 82-387
A. C. No. 46-01816-03501

v.

Gary No. 50 Mine

U. S. STEEL MINING CO., INC.,
RESPONDENT

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia, Penn-
sylvania, for Petitioner
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for Respondent

Before: Judge Steffey

A hearing in the above-entitled proceeding was held in Beckley, West Virginia, on May 10, 1983, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. Simultaneous initial posthearing briefs were filed on July 13, 1983, by counsel for both petitioner and respondent. Counsel for petitioner filed on July 25, 1983, a reply to respondent's brief.

Issues

The petition for assessment of civil penalty filed on October 27, 1982, by the Secretary of Labor in Docket No. WEVA 82-387 seeks to have civil penalties assessed for one alleged violation of 30 C.F.R. 75.1106-2(c) and two alleged violations of 30 C.F.R. 75.1003. Counsel for the Secretary stated at the hearing that one of the citations (No. 1066939) alleging a violation of section 75.1003 had been vacated and moved that the petition for assessment of civil penalty be withdrawn with respect to that alleged violation. I granted the motion at the hearing (Tr. 5) and indicated that my decision would reflect the Secretary's withdrawal of the petition to that extent.

Counsel for U. S. Steel Mining Co., Inc. (USS) indicates in her brief (p. 2) and stated at the hearing (Tr. 6) that she is not contesting the question of whether violations of sections 75.1106-2(c) and 75.1003 occurred, but only that the

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circumstances cited by the inspector did not constitute "significant and substantial" violations as that term has been defined by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

The second issue raised by the petition for assessment of civil penalty is the amount of the civil penalty which should be assessed for each violation. Counsel for USS contends in her brief (p. 6) and argued at the hearing (Tr. 6-7) that a judge is required to assess the civil penalty of \$20 provided for in 30 C.F.R. 100.4 if the judge finds that an alleged violation is not significant and substantial.

Findings of Fact and Decision as to Citation No. 1066938 dated May 6, 1982

Findings

The parties entered into four stipulations which apply to consideration of both violations. Those are as follows: (1) The administrative law judge has jurisdiction to hold a hearing and decide the issues. (2) USS and the Gary No. 50 Mine are covered by the Act. (3) USS is a large operator and the No. 50 Mine is a large mine. (4) During the 24 months preceding the occurrence of the violations here involved, USS was cited for 288 alleged violations and there were 1,086 inspection days.

The preponderance of the evidence supports the following findings of fact:

1. Earl Barnett, a duly authorized representative of the Secretary for the past 14 years and with 34 years of mining experience before becoming an inspector, works out of MSHA's Princeton, West Virginia, subdistrict office (Tr. 9-10).

2. Barnett was requested by his supervisor to make a haulage survey after occurrence of a fatal accident involving a collision of vehicles in the Gary No. 50 Mine (Tr. 29; 98).

3. Barnett arrived at the No. 50 Mine on May 6, 1982, about 7 a.m. and checked some personnel haulage equipment just before the mantrips were due to enter the mine at about 8 a.m. (Tr. 23; 120). Barnett observed on the floor of one of the buses used to transport people into the mine a cylinder of oxygen and a cylinder of acetylene (Tr. 23; 110; 124). Barnett advised Russell Burge, USS's senior mine inspector, that the cylinders would have to be removed from the bus or mantrip and Burge instructed some men to remove them from the mantrip. The cylinders weigh about 50 or 60 pounds and are about 4-1/2 to 5 feet in length (Tr. 23; 78; 90; 123).

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4. Inspector Barnett wrote Citation No. 1066938 alleging a violation of section 75.1106-2(c) because that regulation provides that "[l]iquefied and nonliquefied compressed gas cylinders shall not be transported on mantrips."

5. The bus or mantrip in which the cylinders were found was about 18 feet long and consisted of three compartments (Tr. 35; 149). The two end compartments were covered, while the center portion was open (Tr. 46; 69; 123). From 3 to 4 persons could ride in either end of the bus, but up to 8 miners could ride in the uncovered or center portion of the bus (Tr. 95).

6. Both Barnett and Floyd Cox, a UMWA safety committeeman who accompanied Barnett on his inspection and who has worked as a welder for USS for about 6-1/2 years, understood that when the two cylinders were taken from the bus or mantrip, they were taken to USS's shop (Tr. 23; 75; 91-92; 115). As a matter of fact, however, when the cylinders were removed from the bus, they were placed in another vehicle exactly like the bus from which they were removed except that the vehicle in which they were placed had no cover over any part of it because the top had been removed to facilitate use of the other vehicle by shop personnel (Tr. 123). Since the vehicle in which the two cylinders were placed after removal from the bus had no top to interfere with placement of long objects in the vehicle, the two cylinders were placed in a semi-upright position and were steadied on the way into the mine by the mechanics who rode in the same compartment with the cylinders (Tr. 123; 127).

7. Burge said that the cylinders were transported into the mine in the second vehicle along with personnel because he had been advised by an MSHA supervisory inspector from MSHA's Pineville Office that oxygen and acetylene cylinders could be transported in a jeep or other vehicle, so long as the cylinders are in a separate compartment, and provided the persons who ride in the vehicle with the cylinders are among the group of persons who are going to be using the cylinders (Tr. 122). It was Burge's opinion that Barnett's requiring him to remove the cylinders from the bus or mantrip resulted in USS's taking the cylinders into the mine in a less safe manner than they would have been transported if the cylinders had been taken into the mine in the mantrip where the cylinders were first placed (Tr. 126-127).

8. Barnett, who was from MSHA's Princeton Office, said that he was unaware of the policy expressed by the supervisor from the Pineville Office and that if he had seen USS taking the cylinders into the mine in the manner described by Burge, he would have cited USS for another violation (Tr. 63-64). As a matter of fact, USS violated the policy which had been expressed by the Pineville supervisor because that policy was

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that the cylinders had to be transported in a separate compartment (Tr. 122), but Burge stated that the two cylinders had been taken into the mine with the cylinders standing in a semi-upright position and that mechanics were riding in the same compartment with the cylinders and steadying them as they went into the mine (Tr. 127).

9. Barnett said that carrying unsecured cylinders loose on the floor of a mantrip exposed the miners to a possible mine fire or an explosion. A fire could occur if the cover on the valve on an oxygen cylinder should be shaken loose and fall off so as to expose the valve which might be knocked off in a collision or derailment so as to allow the highly compressed oxygen to be released suddenly, thereby transforming the cylinder into a projectile which could fly through the air and injure or kill a miner riding in the bus (Tr. 25; 70-71; 76). Although the valve on an acetylene cylinder is located in a depression in the cylinder so as to require no cover, Barnett said that the valve could become loose from vibration and allow highly explosive acetylene to escape into the atmosphere where it could be ignited by sparks from the trolley wire (Tr. 24; 73).

10. Cox supported Barnett's belief that transporting oxygen and acetylene cylinders was hazardous, but he believed that a collision in the mine or a derailment could cause the cylinders to move about with sufficient force to kill or injure anyone riding in the bus with the cylinders (Tr. 97; 112). Cox referred to the fatal accident which occurred on April 5, 1982, and said that cylinders like the ones involved in this case were found along the rib after that accident. While he did not think that the valves on the cylinders involved in the accident had become loose enough to allow acetylene or oxygen to escape into the air, he still believed that hauling the cylinders in the bus with people going in to work was hazardous (Tr. 98-100).

11. Cox, who is a welder, said that they had tried to accommodate with USS's policy that the haul the cylinders in the vehicle in which they enter the mine when they comprise the crew which is going to be using the cylinders, but he did not think that was a safe practice because the cylinders are not properly secured when so transported and can injure anyone riding in the vehicle with the cylinders in case of derailment or collision (Tr. 96-97; 110).

12. Burge expressed the opinion that transporting the cylinders in a covered mantrip was not reasonably likely to result in a reasonably serious injury. He believed that if the miners had transported the cylinders into the mine in the covered bus or mantrip, there would have been no likelihood of the cylinders causing an injury because the cover or top on the mantrip would have protected the cylinders from coming into contact with any possible falling of electrical wires and from the possibility

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of the roof or rib falling upon the cylinders so as to cause them to rupture (Tr. 127; 145).

13. The cylinders which Inspector Barnett had USS remove from the mantrip had been placed in covers made of plastic reinforced with nylon strands (Tr. 124-125). The bags were very thin and Barnett expressed the opinion that the bags were not substantial enough to comply with the regulations [75.1106-2(b)] requiring that such cylinders be transported in well insulated containers and the inspector said that he would have issued a citation for another violation as to the kind of covers being used if he had not required the cylinders to be removed from the bus before the cylinders could be transported into the mine in the mantrip (Tr. 73-74). The bags were used primarily by USS as carrying devices and neither Barnett, Cox, nor Burge believed that the bags provided the tanks with any significant impedance from rolling, or would have reduced the extent of injury to anyone who might have been hit by a cylinder thrown about in a collision or derailment (Tr. 70; 76; 94; 99; 124-125).

Consideration of Parties' Arguments

USS's counsel stated at the hearing (Tr. 6) that she was not contesting the question of whether violations had occurred, but only whether the violations were "significant and substantial" as that term has been defined by the Commission in *National Gypsum*, supra. Citation No. 1066938, here under consideration, alleges that a violation of section 75.1106-2(c) occurred because oxygen and acetylene cylinders were being transported in a mantrip (Finding No. 4, supra). USS's brief (p. 2) claims that the self-propelled personnel carrier [75.1403-6], in which the cylinders had first been placed, is not actually a "mantrip" as that term has been defined by MSHA's Pineville Office which has advised USS that a mantrip is one or more cars pulled by a locomotive. The Pineville Office has further advised USS that it may haul oxygen and acetylene cylinders in its buses so long as they are placed in a separate compartment and are accompanied by the personnel who are going to use the cylinders in the mine (Finding No. 7, supra).

USS's brief (p. 2) relies on the Pineville Office's oral interpretation of section 75.1106-2(c) to argue that it could have transported the cylinders in this instance in the bus in which they had been placed if the only persons who had been going to accompany the cylinders had been the personnel who were going to use them (Br. 2). While USS argues that the personnel who would have gone underground in the bus with the cylinders had not yet entered the bus, it is a fact that USS's witness Burge testified (Tr. 122) that he made a specific inquiry to find out who was going to ride in the bus and he said that the people standing around while the inspector examined

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the bus consisted of "* * * a roof bolter, or mason, or both, and there were mechanics there." Later Burge stated that the cylinders were removed from the first bus and placed in another bus exactly like the one from which the cylinders were removed, except that the second bus had no tops over the end compartments, and that the cylinders were taken into the mine in the second bus by "[t]he same people that had them in the first bus" (Tr. 123). Subsequently, Burge testified that he had specifically inquired of MSHA's Pineville Office whether a mason could be among the personnel who ride with cylinders and he was advised that the mason would not be one of the persons who would be using the cylinders and that the mason, therefore, could not go into the mine in the same vehicle in which the cylinders were to be transported (Tr. 128).

The only conclusion which can be reached from the above-described contradictory testimony is that either the mason did not go into the mine with the personnel who rode with the cylinders in the second bus, or Burge did not know the occupations of the persons who intended to go into the mine in the first bus. There would have been no reason for Burge to make a specific inquiry as to the occupations of the personnel who were standing around the first bus other than to persuade the inspector that USS would not be violating section 75.1106-2(c) by hauling the cylinders in the first bus because the persons who would be riding in the bus with the cylinders would be the personnel who were going to be using the cylinders. When Burge found that one of them was a mason or a roof bolter, or both, he knew that if that person intended to ride into the mine with the cylinders, USS would be in violation of the Pineville Office's interpretation of section 75.1106-2(c). Therefore, Burge had the cylinders moved to the second bus and the "same personnel" who rode with the cylinders in the second bus necessarily had to exclude the miner whose occupation was roof bolter or mason, or both.

As noted in Finding No. 8, supra, the inspector who wrote the citation was from MSHA's Princeton Office and had not heard of the Pineville Office's interpretation of section 75.1106-2(c) and stated that if he had known that USS took the cylinders out of one bus and placed them in a second bus, also lacking proper restraining devices, he would have cited USS for another violation [75.1106-2(a)(1)]. It should also be noted that USS violated the policy expressed by the Pineville Office in any event because Burge stated that the cylinders had been placed in the second bus in a semi-upright position and that mechanics rode in the same compartment with the cylinders so as to steady them on the way into the mine. Under the Pineville Office's interpretation, the cylinders were required to be placed in a separate compartment from the personnel who were riding with the cylinders (Finding No. 8, supra).

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Burge is correct in arguing that the way the cylinders were actually taken into the mine was more hazardous than the way they would have been taken into the mine if the inspector had not required the cylinders to be removed from the first bus. At least, if they had been taken into the mine in the first bus, the cylinders would have been transported in a compartment with a top over it. While Burge implies that no one would have ridden in the same compartment with the cylinders if Barnett had not required the cylinders to be removed, there is no certainty that miners would not have ridden in the first bus in the same compartment with the cylinders because Barnett said that only three miners were in the bus at the time he examined it and that other miners standing around the bus had not yet been loaded into the bus to make the trip underground (Tr. 24; 68; 72).

There is another flaw about USS's claim that it could lawfully transport the cylinders in the mine under the Pineville Office's oral interpretation of section 75.1106-2(c). That flaw comes from the fact that there is nothing to prevent MSHA from holding that USS's bus is a self-propelled personnel carrier if it is not a mantrip under the Pineville Office's definition of a mantrip being mine cars pulled by a locomotive. As to self-propelled equipment, section 75.1106-2(a) provides as follows:

(a) Liquefied and nonliquefied compressed gas cylinders transported into or through an underground coal mine shall be:

(1) Placed securely in devices designed to hold the cylinder in place during transit on self-propelled equipment or belt conveyors;

Barnett could just as easily have cited USS for a violation of section 75.1106-2(a)(1) as he did for a violation of section 75.1106-2(c) because the latter section requires that the cylinders not be transported at all on mantrips, whereas USS can only transport such cylinders on its self-propelled personnel carrier if they are "* * * [placed securely in devices designed to hold the cylinder in place during transit". Obviously, propping the cylinders in a semi-upright position, steadied by mechanics, is not in compliance with section 75.1106-2(a)(1).

USS's brief (p. 2) asserts that the cylinders "* * * present no hazard if properly secured in correct containers (73)", but USS cites Barnett's testimony in support of that assertion and in that testimony, transcript pages 73 and 74, Barnett states that USS failed to secure the cylinders and that the plastic bags in which USS placed the cylinders were not in compliance with the regulations (Finding No. 13, supra).

USS's brief (p. 5) states that "[i]n order for oxygen and acetylene cylinders to become a hazard during transportation into the mine, they have to receive a blow significant enough

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to break the gauges on the ends (24, 25)". While it is true that Barnett emphasized the worst possible hazards which can be expected to occur from transporting unsecured cylinders into the mine, such as a valve being knocked off an oxygen cylinder or gas leaking from an acetylene cylinder so as to be ignited by a spark from a trolley wire (Finding No. 9, supra), Cox testified that the unsecured cylinders could injure a person just by being thrown against him in a collision or derailment (Finding No. 10, supra). Although Cox agreed that the cylinders which were thrown along the rib after a head-on collision occurring on April 5, 1982, did not explode or leak, the fact remains that they left the vehicle in which they had been placed and a 50- or 60-pound cylinder flying through the air in a collision could certainly injure or kill a person who may happen to be in the cylinder's trajectory.

One must keep in mind that the cylinders in this case were first merely laid on the floor of a bus. Then they were removed from that bus and placed in another bus in a semi-upright position. They were actually transported into the mine with mechanics riding in the same uncovered compartment in which the cylinders had been placed. The seats in the buses used by USS are not vertical like those in an automobile, but are built in a reclining position so that the floor of the bus is not a flat place like that in an automobile (Tr. 111-112). In a collision or derailment, there is no seat to protect the person riding with the cylinders from the movement of the heavy cylinders. When miners are riding beside the cylinders, they are exposed to almost certain injury of some kind in case of an accident or even a sudden stopping or starting of the bus.

USS's brief (p. 5) also argues that Barnett could not explain why cylinders hauled into a mine are going to leak as compared with identical cylinders which are hauled daily at construction sites without rupturing. Contrary to USS's claim, Barnett was not bereft of an explanation for the alleged difference in hazards between haulage of cylinders into a mine and haulage of cylinders at a construction site because he stated that cylinders transported at construction sites are "properly secured" (Tr. 70). MSHA's reply brief (p. 2) cites 29 C.F.R. 1926.350(a) in support of the inspector's claim that cylinders used at construction sites have to be "properly secured". That section provides for cylinders transported in powered vehicles at construction sites to be secured in a vertical position. Of course, as previously noted, section 75.1106-2(a)(1) requires USS to place the cylinders "* * * in devices designed to hold the cylinder in place during transit on self-propelled equipment". Therefore, OSHA's and MSHA's requirements for haulage of cylinders are consistent.

The final defense in USS's brief as to its method of transporting cylinders is as follows (p. 6):

The un rebutted testimony in this case is that the MSHA district has advised the mine that they can transport these cylinders into the mine if the only people on the vehicle are people who will use the tanks underground (122). If MSHA honestly believes transportation of cylinders on the track mounted vehicles is reasonably likely to result in a reasonably serious injury, it is incomprehensible that it is acceptable if mechanics are injured but not continuous miner operators. Practical experience has shown that a collision of track mounted vehicles is not sufficient to injure the valves on cylinders (98), so there is no reason to believe that the vibration of a portal bus on the track will damage the valves.

I have already pointed out the fallacies inherent in the above allegations, but I shall briefly summarize them at this point. First, the Pineville Office's instructions as to how USS could transport the cylinders was not followed in this case because that Office advised USS that the cylinders could be transported in a vehicle if they were placed in a separate compartment from the mechanics or welders who were going to be using the cylinders, whereas Burge stated that mechanics sat in the compartment beside the cylinders and steadied them on the way into the mine (Finding No. 8, supra).

Second, USS knows that it is using a self-propelled vehicle and both the Pineville Office and USS know, or should know, that section 75.1106-2(a)(1) specifically provides that the cylinders shall be "[p]laced securely in devices designed to hold the cylinder in place during transit on self-propelled equipment". Third, Cox, one of USS's own welders who has been persuaded to haul the cylinders in accordance with the Pineville Office's instructions, testified at the hearing that he believed that taking the cylinders into the mine in accordance with the Pineville instructions is hazardous simply because the cylinders may be thrown against a person in case of a collision or derailment. Cox certainly did not believe the valves had to be knocked off the cylinders before they became a hazard (Finding No. 10, supra).

USS also expresses its inability to comprehend why the Pineville Office would give it instructions as to transporting cylinders which expose mechanics to serious injury if the inspectors from the Princeton Office believe that transporting cylinders in a mantrip would expose a continuous-mining machine operator to serious injury. Although it is obviously hazardous to transport the unsecured cylinders in any vehicle, the Pineville Office's proviso as to the occupational speciality of the personnel who can accompany the cylinders relates to the fact that welders and mechanics who are actually trained in the use of the cylinders will be less likely to be injured in handling

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and transporting them than continuous-mining machine operators who normally do not receive training in the handling and use of oxygen and acetylene cylinders.

Insofar as USS appears to defend its placement of the cylinders on the floor of the bus on the Pineville Office's interpretation of section 75.1106-2(c), the Commission has held in Old Ben Coal Co., 2 FMSHRC 2806 (1980), and in King Knob Coal Co., Inc., 3 FMSHRC 1417 (1981), that an inspector is not bound by the provisions of MSHA's inspection manual because the manual is not officially promulgated and does not prescribe rules which are binding on an agency. In the King Knob case, however, the Commission said that there was some merit to King Knob's claim that it had relied upon the provisions set forth in the manual. Inasmuch as the manual fails to state that it is not a source of law binding upon MSHA or the Commission, the Commission said that MSHA's confusion in application of the law in that instance might be taken into consideration in evaluating the criterion of negligence in determining a civil penalty under section 110(i) of the Act.

In this instance, of course, the Pineville Office's interpretation was given orally by a supervisor in that office. At the hearing I granted the request of MSHA's counsel that the record be subject for 72 hours to receipt of additional testimony if an inquiry he was going to make should show an error in USS's representation of the Pineville Office's interpretation of section 75.1106-2(c) (Tr. 185). Since no request was ever made for receipt of further testimony, I assume that USS made a correct statement as to the interpretation given by the Pineville Office. As pointed out above, since the Commission has held that provisions in MSHA's manual do not have the force of binding law, it follows that oral instructions from a single MSHA office do not have sufficient authority to overcome the clear meaning of the regulations themselves.

For the reasons given above, I find that USS did violate section 75.1106-2(c) when it placed the unsecured cylinders in the mantrip or bus for the purpose of transporting them into the mine.

The following definition of a "significant and substantial" violation was given by the Commission in its National Gypsum decision (at page 825):

* * * we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

As Finding Nos. 9 and 10, supra, indicate, there was a reasonable likelihood that the cylinders could be tossed about in a collision or derailment and cause a serious injury even if the valves did not get knocked off or become loose so as to expose the miners to being hit by a jet-propelled oxygen cylinder or to being injured by an explosion of leaking acetylene. Barnett said that the jeep in which he was riding was derailed on the day he wrote the citations involved in this proceeding (Tr. 72). The No. 50 Mine has 46 miles of track in it (Tr. 71). It is reasonable to expect that collisions and derailments will occur on a transportation system as extensive as the one here under consideration. Cox testified that "[a]ny time I go into the portal of that mines I'm aware of the fact that there could be a bad accident in the jeep that I'm in" (Tr. 98). The preponderance of the evidence clearly supports a finding that it was reasonably likely that hauling unsecured cylinders in the mantrip or bus could contribute to the cause and effect of a mine safety hazard which could result in an injury of a reasonably serious nature. Therefore, the inspector who wrote Citation No. 1066938 properly considered the violation of section 75.1106-2(c) to be a "significant and substantial" violation.

Assessment of Penalty

Having found above that a violation of section 75.1106-2(c) occurred, it is necessary that a civil penalty be assessed under the six criteria listed in section 110(i) of the Act. As to the criterion of the size of the operator's business, the parties have stipulated that USS is a large operator and that the No. 50 Mine is a large mine (Tr. 4). Therefore, any penalty assessed should be in an upper range of magnitude to the extent it is determined under the criterion of the size of the operator's business.

As to the criterion of whether the payment of penalties will have an adverse effect on USS's ability to continue in business, the parties made no stipulation and USS presented no financial evidence. In *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (1983), the Commission indicated agreement with the holdings of the former Board of Mine Operations Appeals in *Buffalo Mining Co.*, 2 IBMA 226 (1973), and *Associated Drilling, Inc.*, 3 IBMA 164 (1974), to the effect that if an operator fails to produce any financial evidence, a judge may presume that payment of penalties will not cause the operator to discontinue in business. In the absence of any facts to support a contrary conclusion, I find that payment of the penalties assessed in this proceeding will not cause USS to discontinue in business.

The parties stipulated that during the 24-month period preceding the citing of the violations involved in this proceeding, USS had been assessed for 288 alleged violations in a total of 1,086 inspection days. Those figures support a finding that USS has a favorable or moderate history of previous

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violations. Therefore, only a very small part of the penalty should be attributed to the criterion of respondent's history of previous violations.

Barnett testified that USS demonstrated a good faith effort to achieve rapid compliance after he cited the violation by abating the violation within the time given in his citation (Tr. 20; Exh. 3). It has always been my practice to lower any penalty which I would otherwise assess under the other five criteria if I find that an operator has made an unusual effort to achieve rapid compliance. If the operator abates the violation within the time allowed by the inspector, I neither reduce nor raise the penalty under the criterion of good-faith abatement. Of course, if an operator refuses to abate a violation and has an insufficient reason for failing to abate within the time given, the penalty otherwise assessable under the other five criteria is raised accordingly. In this instance, the inspector wrote the citation at 8:05 a.m. and gave USS until 8:15 a.m., or 10 minutes, within which to abate the violation (Exh. 3). Inasmuch as USS only had to remove the cylinders from the bus or mantrip in order to abate the violation, I find that the inspector provided a sufficient time for abatement and that the penalty should neither be raised nor lowered under the criterion of good-faith abatement.

The fifth criterion to be considered is the degree of negligence which should be assigned to the occurrence of the violation. As I indicated above, the Commission held in the King Knob case that if MSHA's enforcement of a given standard has caused confusion so that the operator violated the standard in the belief that its method of operation was in compliance with MSHA's interpretation of the standard, the inconsistent application of the standard should be taken into consideration in evaluating the criterion of negligence. As has been shown in the preceding portion of this decision, the Pineville Office had interpreted section 75.1106-2(c) in a fashion which caused USS to believe that the cylinders could be transported in a self-propelled personnel carrier so long as the cylinders were placed in a separate compartment and provided the miners in the vehicle carrying the cylinders were a part of the crew of workers who would be using the cylinders.

As I have also indicated above, both the Pineville Office and USS should have been aware of the provisions of section 75.1106-2(a)(1) to the effect that cylinders can be transported in self-propelled vehicles only if "[p]laced securely in devices designed to hold the cylinder in place during transit", but the fact remains that the Pineville Office did mislead USS in giving an interpretation of section 75.1106-2(c) with which the MSHA inspector who wrote the citation did not agree. On the other hand, USS did not actually comply with the Pineville Office's interpretation of section 75.1106-2(c) in that USS failed to place the cylinders in a separate compartment (Finding Nos. 7 and 8, supra).

In such circumstances, I believe that the violation was associated with at least ordinary negligence because USS did not justify its actions in light of section 75.1106-2(a)(1) which clearly does not allow USS to transport cylinders in self-propelled vehicles without placing them in devices designed to hold them in place during transit. The former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434, 442 (1974), that an operator is conclusively presumed to know what the mandatory health and safety standards are. Therefore, before I can find that USS was not negligent at all in violating section 75.1106-2(c), I would need some explanation from USS's witness as to why he did not inquire of the Pineville Office whether transporting unsecured cylinders in a self-propelled vehicle would be in violation of section 75.1106-2(a)(1), assuming that the Pineville Office did not know the difference between a self-propelled personnel carrier and a mantrip which the Pineville Office defined as a locomotive pulling cars designed to transport people, as opposed to transporting coal or supplies.

The final criterion which requires consideration is the gravity of the violation. In this instance, the cylinders were removed from the bus before it traveled underground, but the only reason the cylinders were removed before being transported was that the inspector observed them lying loosely on the floor of the bus and asked that they be removed. In National Gypsum, supra, the Commission noted that the hazard associated with the violation should be analyzed in terms of whether the violation could cause a danger to health or safety. As Finding Nos. 9 and 10, supra, show, transporting the unsecured cylinders in the bus exposed the miners to serious injury or death if the event which section 75.1106-2(c) is designed to prevent had actually occurred.

In view of the fact that a large operator is involved, that payment of penalties will not cause it to discontinue in business, that the operator has a moderate history of previous violations, that the operator showed a good-faith effort to achieve rapid compliance, that the violation was associated with ordinary negligence, and that the violation was serious, I find that a penalty of \$250 is appropriate. It should be noted that both MSHA's initial and reply brief suggested that a penalty of \$170 be imposed because that was the amount proposed by MSHA in its petition for assessment of civil penalty. Actually, MSHA proposed a penalty of only \$119 because the amount of \$170 was reduced by 30 percent because USS had abated the violation within the time fixed in Citation No. 1066938. The Commission has held many times that penalty cases before a judge are de novo and that the Commission and its judges are not bound by the penalty formula, set forth in Part 100 of Title 30 of the Code of Federal Regulations, and used by MSHA in proposing penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal

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Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); Co-Op Mining Co., 2 FMSHRC 784 (1980); and Sellersburg Stone Co., 5 FMSHRC 287 (1983)).

In its brief (p. 6), USS argues that a judge must assess the \$20 penalty provided for in 30 C.F.R. 100.4 if he finds that a violation has been improperly evaluated as "significant and substantial" by an inspector. USS acknowledges, however, that if MSHA derives its proposed penalty under section 100.3, as it did in this instance, and the judge agrees with MSHA's finding of "significant and substantial", the judge is not bound by the provisions of section 100.3. Therefore, it is unnecessary in this proceeding for me to discuss USS's contention that I am required to assess a penalty of only \$20 if I find that a given violation is not "significant and substantial".

Findings of Fact and Decision as to Citation No. 1066940 dated May 6, 1982

The parties' stipulations which have been summarized at the beginning of the findings of fact for the previous citation are, of course, also applicable to the issues raised by the parties with respect to Citation No. 1066940. The witnesses who testified with respect to both alleged violations were identical, viz., MSHA Inspector Barnett, UMWA Safety Committeeman Cox, and USS's Senior Safety Inspector Burge. Their full names and mining experience have been given above with respect to the previous violation and will not be repeated in this portion of my decision.

The preponderance of the evidence supports the following findings of fact (numbering of paragraphs is continued from previous findings, supra).

14. Inspector Barnett, while engaged in a haulage survey in USS's No. 50 Mine on May 6, 1982, traveled to the B Panel Section. He was accompanied by Cox and Burge. When the jeep in which they were riding reached B Panel, the jeep was brought to a stop behind the portal bus or mantrip which had already delivered miners to the working section. The mantrip was sitting about 40 feet outby the end of the track (Tr. 12; 41; 128; 175). When Barnett got out of the jeep, he observed that the trolley wire was unguarded except for the first 10 or 12 feet of the wire at the end of the track (Tr. 20; 47; 128; 148). Therefore, Barnett wrote Citation No. 1066940 alleging a violation of section 75.1003 because "[t]he trolley wire at the end of the supply track in the B panel section where men and supplies are unloaded was not adequately guarded" (Tr. 11; Exh. 1).

15. Section 75.1003, in pertinent part, provides as follows:

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* * * Trolley wires and trolley feeder wires shall be guarded adequately:

- (a) At all points where men are required to work or pass regularly under the wires;
- (b) On both sides of all doors and stoppings; and
- (c) At man-trip stations.

16. Since neither Barnett nor the two men traveling with him had seen the miners on the working section get out of the portal bus or mantrip, none of the witnesses knew for certain where the bus had been sitting at the time the men exited the bus (Tr. 81; 150; 158). It was assumed that the men got off the mantrip at the end of the track because that would have been the safest place for unloading, inasmuch as a guard for the trolley wire had been provided for 10 to 12 feet at the end of the track (Tr. 129). The bus or mantrip was 18 feet long (Tr. 35; 149). The bus had a covered compartment at each end, but the central compartment in the middle of the bus was open or topless (Tr. 46; 155). Each covered end compartment has room for three or four persons and the middle or open compartment will accommodate eight people (Tr. 95; 106). The open part of the bus was exposed to the unguarded trolley wire for part of its length and was exposed to the guarded part of the wire for the remainder of its length (Tr. 155). The jeep in which Barnett rode to the B Panel had no top at all and the persons who got out of the jeep at B Panel were exposed to the unguarded, energized trolley wire when they left the jeep (Tr. 55-56).

17. Barnett considered the violation of section 75.1003 to be a "significant and substantial" violation because he believed that it was reasonably likely that an accident would occur which could reasonably be expected to cause an injury of a reasonably serious nature (Tr. 18). Barnett based the aforesaid conclusion on the fact that the mantrip had been unloaded where a portion of unguarded trolley wire existed, as discussed above, and because he saw supplies along both sides of the track. In such circumstances, he concluded that the miners who unloaded the supplies did so under the unguarded, 250-volt, energized trolley wire (Tr. 16-17). Barnett also believed that the miners from the working section would at some time during each working shift come to the area with the unguarded wire for the purpose of obtaining supplies, such as timbers, rock dust, hydraulic oil, roof bolts, and header boards (Tr. 13-14; 36). In Barnett's opinion, the miners would be beneath unguarded, energized trolley wire when obtaining such supplies (Tr. 45; 54; 56; 84).

18. Burge gave several reasons for his belief that failure to guard the trolley wire was improperly considered by Barnett to be a "significant and substantial" violation. He said that

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there was a cut-off switch for turning off power to the trolley wire without affecting the power supply used to run coal-producing equipment (Tr. 132). Burge said that the cut-off switch was located only 160 feet outby the end of the track and that the miners would cut off all power to the trolley wire at any time they found it necessary to obtain supplies which were located close to the trolley wire (Tr. 133; 143-144).

19. Burge testified that he had never heard of any miner who had been injured by contacting an unguarded trolley wire in the No. 50 Mine (Tr. 138). He said he himself had come in contact with an energized trolley wire on one occasion, but the wire hit his miner's safety hat and caused no problem. He also stated that the wire he touched was guarded and that he felt a person was more likely to contact a guarded wire than an unguarded wire because the guarded wires are harder to see than the unguarded wires (Tr. 142; 150).

20. Burge additionally observed that the guards for trolley wires are open at the bottom. In this instance, the 10 to 12 feet of guarding consisted of yellow neoprene (Tr. 140). Burge maintained that the neoprene hangs down on each side of the wire and will protect a person walking along beside the track from coming into contact with the wire, but the opening directly under the guard has to allow for passage of the trolley pole and provides no protection whatever to anyone coming up directly under the guard (Tr. 141-142).

21. Burge described the exact procedure which is used to cut off power to the trolley wire when it is necessary to obtain supplies at any place along the track where supplies are close to the trolley wire. He said that the section foreman will come to the supply area and will direct a miner to turn off the power at the cut-off switch located outby the end of the track. He said that the miner will take the closest vehicle and ride to the switch by going into the track entry at the point where the track ends (Exh. A). When the miner reaches the switch, he will turn off the power to the trolley wire and the lights on his vehicle will go out and he will call out that the power is off. He will stay at the switch to be sure the trolley wire is not reenergized while supplies are being loaded. Then the foreman will tell the scoop operator to get the supplies from along the track. After the supplies have been obtained, the foreman will tell the miner to reenergize the trolley wire and he will turn the power on and the lights on his vehicle will come back on and he will drive his vehicle back to the end of the track (Tr. 164).

22. The hearing in this proceeding was held on May 10, 1983, but both citations under consideration in this case were written on May 6, 1982. Therefore, the hearing was held over a year after the citations were written. Barnett said that this

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was the first time he had ever inspected the No. 50 Mine and that his memory of the location of the various types of supplies was not very good (Tr. 29; 34; 173). He was, nevertheless, positive that he saw timbers, rock dust, roof bolts, barrels of oil, grease, and header boards along the track and he insisted that some of them were on the "tight" side, or left side, of the track where the trolley wire was closer to the ribs than the trolley wire was on the "wide" side, or right side, of the track where the wire was farthest removed from the ribs (Tr. 15-16; Exh. 2). Burge was certain that he had observed hydraulic oil in barrels at a point marked with the word "oil" on Exhibit A. Burge marked four other places with the letter "B" on Exhibit A to show where he saw supplies (Tr. 146). Burge also marked a double "X" at the end of the track to show where he had observed six or eight timbers, two bundles of wedges, and four or five cap pieces (Tr. 135; 147).

23. While Barnett conceded that he was not certain as to which side of the tracks he saw various types of supplies (Tr. 34-35; 53), he was certain that some of them were on the "tight" side as well as the "wide" side (Tr. 16; 46; 82; 168; 172-174). While Burge appeared to be certain about all the physical evidence in existence at the time the unguarded trolley wire was cited, he did vary his estimates as to the distance that some supplies were from the trolley wire. For example, he first stated that the hydraulic oil was from 8 to 10 feet from the trolley wire (Tr. 136) and later estimated the distance from the wire to be 17 feet (Tr. 157). Additionally, Burge first said that there were six or eight timbers, two bundles of wedges, and four or five cap pieces at a point marked with a double "X" on Exhibit A (Tr. 135) and later stated that he saw eight timbers and six or eight cap pieces at that same location (Tr. 147). Although a considerable amount of cross-examination was used in trying to discredit Barnett for his lack of memory as to which kinds of supplies were on the "tight", as opposed to "wide", side of the track, Barnett's inability to recall that precise information is not of great importance because Burge testified during direct examination that some supplies were within 3 or 4 feet of the trolley wire and that is close enough to make the loading of supplies a hazardous type of work (Tr. 134).

24. Another aspect of the testimony which conflicted was that Burge stated that there was no stopping at a point one break out by the end of the track as shown by the letter "A" on Exhibit A (Tr. 133; 182). On the other hand, both Barnett and Cox said that there were permanent stoppings between each and every pillar of coal extending along each side of the track entry at the place where the unguarded trolley wire was observed (Tr. 39; 175). Here, again, the variances in the witnesses' recollection as to the existence or nonexistence of the stopping makes no essential difference in determining whether the violation was "significant and substantial" because Burge agreed with Barnett

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that it would be reasonable to expect the miners on the working section to pick up some of the supplies by having the scoop operator come into the track entry from the end of the track rather than having the scoop operator come into the track entry through the disputed opening between two pillars (Tr. 133; 144; 161).

25. The unguarded trolley wire was about 5 feet above the mine floor. The beds of the rail cars from which supplies were unloaded were 2-1/2 to 3 feet above the mine floor (Tr. 15; 84). Therefore, when the miners were unloading supplies from the rail cars, their operating space between the beds of the cars and the trolley wire was only about 2-1/2 feet. The floor of the mantrip or jeep in which personnel ride is closer to the mine floor than the beds of the supply cars, so Barnett estimated that miners getting out of a mantrip or jeep have a space of about 4 feet in which to move when getting out of the cars (Tr. 84). They would be in a stooped position when getting out of the cars (Tr. 62). If they should become unbalanced, the normal reaction for a person off balance is to throw his hands up in the air to try to regain his equilibrium. Consequently, a miner could easily get his hand against the trolley wire if he should lose his balance while getting out of a jeep or mantrip (Tr. 63). Even Burge conceded that the miner who moved the bus or mantrip out of the supply area to facilitate the loading or unloading of supplies would be entering or leaving the bus while the unguarded trolley wire was still energized (Tr. 149).

26. Another time when a miner could be exposed to an unguarded, energized trolley wire would be when he goes to the cut-off switch to deenergize the trolley wire before supplies are obtained along the unguarded trolley wire. The basis for the aforesaid observation is that the cut-off switch is on the "tight" side of the track entry where there is little space between the wire and the ribs (Exh. A). A miner taking a vehicle, as described in Finding No. 21, supra, to the cut-off switch would have to travel under the energized wire from the end of the track to the switch, or travel down the opposite "wide" side of the track and then cross the track beneath the unguarded, energized trolley wire, in order to get to the switch. He would have the same exposure to the energized trolley wire while traveling back to the end of the track after reenergizing the trolley wire. Moreover, as Burge recognized (Tr. 161), the scoop or other vehicle driven to the cut-off switch could touch the energized trolley wire so that its frame would be energized. As long as the miner driving the vehicle remained in the vehicle, he would be insulated from the shock hazard by the rubber tires on the vehicle (Tr. 161), but if he should step out of the vehicle to turn off the switch while the frame of the vehicle was still energized, he could be injured or electrocuted when his feet touched the mine floor if any part of his body happened to remain in contact with the scoop's energized frame. Even if he should stay in the energized vehicle, he could be shocked when his hand touched the grounded frame of the cut-off switch to deenergize the trolley wire.

Consideration of Parties' Arguments

USS contends that its failure to guard the trolley wire did not result in a violation which can be considered to be "significant and substantial" as that term has been defined by the Commission in the National Gypsum case, *supra*. Inspector Barnett based his belief that the violation was "significant and substantial" on his claim that people were exposed to the unguarded, energized wire when they got out of the portal bus or mantrip or any other vehicle, that they were exposed to the wire when they unloaded supplies from the rail cars, and that miners were exposed to the wire when they went to the area of the unguarded wire to obtain supplies which had been unloaded in the vicinity of the track (Finding Nos. 16 and 17, *supra*).

USS counters Barnett's bases for concluding that the violation was "significant and substantial" by arguing that the guard is open at the bottom and therefore does not protect anyone, such as a motorman, who might touch the wire as a result of rising up directly under the wire (Finding No. 20, *supra*). USS also contends that only 1 percent of the length of trolley wires is guarded and that, in the vast majority of instances, miners ride under unguarded wires all the time and get out of vehicles under unguarded wires when they work along a track (Br., p. 5).

Although Barnett agreed that the only fatality he could recall resulting from a miner's coming in contact with a trolley wire was "last year" when a motorman contacted a wire and was killed, he still believed that a guard protects a motorman when it is present (Tr. 43). While Barnett also agreed that the guard was not designed to protect the motorman, since he travels under an unguarded wire most of the time, he still believed that the guard protected the motorman for the 1 percent of the time when the guard is present (Tr. 43). Of course, as Barnett emphasized, the citation was written for USS's failure to guard the wire "where men and supplies are unloaded" (Exh. 1). Section 75.1003 does not require guarding for 99 percent of USS's track, so the violation consisted of USS's failure to guard part of the 1 percent of trolley wire which is required to be protected.

For the foregoing reasons, USS's claim that the guard is not designed to protect motormen has little relevance in showing that Barnett improperly classified the violation as being "significant and substantial".

USS stakes its contention that the unguarded wire was not a "significant and substantial" violation on three other claims which are not supported by the preponderance of the evidence. First, USS contends that the bus in which miners traveled to the working section was covered at each end so that the miners riding in each end were protected from the unguarded wire when leaving the bus. No one challenges the fact that the miners

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riding in each end of the bus would have been protected, but it is a fact that the center portion of the bus is open and up to 8 miners may ride in the center or open portion of the bus (Finding Nos. 5 and 16, supra). Additionally, USS claims that, in this instance, since the first 10 or 12 feet of the wire was guarded, the open portion of the bus was entirely under the portion of the wire which was guarded (Br., p. 2). USS cites Barnett's testimony at transcript page 36 in support of that assertion, but USS's own witness, Burge, specifically stated that part of the open section of the bus was under unguarded wire (Tr. 155). Therefore, USS's claim that no one was exposed to a portion of unguarded wire when leaving the bus on the day when the citation was written is not supported by the preponderance of the evidence (Finding No. 16, supra).

Second, USS argues that the trolley wire is always deenergized before supplies are unloaded under the wire and that Barnett did not take into consideration USS's policy of deenergizing the wire when he made his determination that miners had unloaded supplies under the unguarded, energized wire (Br., p. 3). Assuming that the miners always deenergize the trolley wire before unloading supplies brought from outside the mine and before obtaining supplies for use on the working section, the miners are still exposed at times to traveling on a regular basis under the unguarded, energized wire. The cut-off switch is on the "tight" side of the unloading area (Finding No. 23, supra; Exh. A). Therefore, miners bringing in supplies on a rail car would have to get off the car under the unguarded, energized wire to turn off the power and, in doing so, would come within 2-1/2 feet of the wire when getting off the car, and would have to repeat that process in order to turn the power back on after unloading the supplies (Finding No. 25, supra).

Any time the miners move the portal bus to facilitate the loading or unloading of supplies, they have to get in and out of the bus under the unguarded, energized wire for the purpose of moving the bus (Tr. 149). If the miners want to obtain supplies located along the track at a point where entry to the track area would have to be from the end of the track, the miner who is ordered to cut off the power and turn the power back on would be exposed to passing under the wire or getting close to it (Finding Nos. 21 and 26, supra). Finally, any time people come to the working section, as Barnett, Cox, and Burge did on May 6, 1982, they are exposed to the unguarded, energized wire when they get out of and return to the jeep in which they have traveled to the section (Finding No. 16, supra).

Another argument USS makes in support of its claim that the violation was not "significant and substantial" is that in order for anyone getting out of a mantrip to come in contact with a trolley wire, he would have to fall backward and up before he could contact the wire (Br., p. 1). That a person might fall

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back and up and thereby come into contact with the unguarded, energized trolley wire is an event which is reasonably likely to occur as I have pointed out in Finding No. 25, supra.

USS's claim (Br., p. 5) that its miners would have to forget all of their training in order for an unguarded, energized trolley wire to constitute a "significant and substantial" violation is rejected as not supported by the preponderance of the evidence. Finding Nos. 14, 16-17, and 25-26, supra, clearly show that the violation of section 75.1003 alleged in Citation No. 1066940 occurred and that it was reasonably likely that the violation could have resulted in an injury of a reasonably serious nature. I find that the inspector properly considered the violation to be "significant and substantial" as that term has been defined by the Commission in the National Gypsum case, supra.

Assessment of Penalty

Findings applicable to the instant violation have already been made with respect to three of the six criteria which are required to be used in assessing civil penalties. Specifically, it has already been shown above in assessing a penalty for the previous violation of section 75.1106-2(c) that USS is a large operator, that the Gary No. 50 Mine is a large mine, that payment of penalties will not cause USS to discontinue in business, and that USS has a favorable or moderate history of previous violations.

As to the fourth criterion of whether USS demonstrated a good-faith effort to achieve compliance after the violation of section 75.1003 was cited, Barnett testified that the violation was abated within the time allowed (Tr. 20) and the termination sheet also states that the violation was abated within the time allowed (Exh. 1). As I explained above, it has been my practice neither to increase nor decrease a penalty otherwise assessable under the other five criteria if I find that an operator has abated a violation within the time allowed by the inspector.

As to the fifth criterion of negligence, there is no allegation in this instance, as there was with respect to the previous violation of section 75.1106-2(c), that MSHA's enforcement of section 75.1003 has been confusing because of conflicting interpretations of the same standard. The reason that the trolley wire had not been guarded for the distance required to protect the miners getting into and out of mantrips and other vehicles and while working in the supply area was that the track had been pulled back from the working face. The only guarding consisted of 10 or 12 feet which still existed following the action of removing some of the track closest to the faces of the working section which was engaged in retreat mining at the time

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the citation was written (Tr. 34; 133). The fact that 10 or 12 feet of the guarding still remained should have been a reminder to the person in charge of shortening the track that the guarding needed to be extended for a considerable distance outby the place where it then existed. Failure to extend the guarding in such circumstances was the result of a high degree of negligence.

There has already been an extensive discussion of the sixth criterion of gravity. The preponderance of the evidence clearly shows that failure to guard a 250-volt trolley wire which is only 2-1/2 feet above a supply car and 4 feet above personnel carriers is a serious violation because there is always a chance that the miners' protective hats and shoes may not be an adequate shield against shock or electrocution if they happen to touch the energized trolley wire (Tr. 150). After all, even a motorman, under USS's theory, is protected by his hat and shoes from a shock hazard, yet a motorman was killed by coming into contact with a trolley wire (Tr. 43). Miners were also exposed to coming into contact with the unguarded, energized wire when they went to the cut-off switch to turn the power on and off (Finding Nos. 21 and 26, supra). In such circumstances, the preponderance of the evidence supports a finding that the violation was serious.

In summary, the evidence shows that a large operator is involved, that payment of penalties will not cause it to discontinue in business, that it has a moderate history of previous violations, that the violation was associated with a high degree of negligence, and that the violation was serious. Those findings support assessment of a penalty of \$750 for the violation of section 75.1003.

WHEREFORE, it is ordered:

(A) The granting (Tr. 5) of the motion by counsel for the Secretary of Labor to withdraw the petition for assessment of civil penalty to the extent that it alleges a violation of section 75.1003 in Citation No. 1066939 is confirmed and the petition is deemed to have been withdrawn with respect to the violation of section 75.1003 alleged in Citation No. 1066939.

(B) U. S. Steel Mining Co., Inc., shall, within 30 days from the date of this decision, pay civil penalties totaling \$1,000.00 for the violations of section 75.1106-2(c) alleged in Citation No. 1066938 (\$250) and section 75.1003 alleged in Citation No. 1066940 (\$750).

Richard C. Steffey
Administrative Law Judge