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SOL (MSHA) V. CO-OP MINING
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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 PROCEEDINGS Docket No. WEST 80-142 A.C. No. 42-00081-03011 Docket No. WEST 80-286 A.C. No. 42-00081-03014 Docket No. WEST 81-85 A.C. No. 42-00081-03022 Co-op Mine
v.	
CO-OP MINING COMPANY, RESPONDENT	

DECISION

Appearances: Katherine Vigil, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent

Before: Judge Vail

I. Statement of the Case

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter referred to as "the Act"). The violations were charged in 21 citations issued to respondent following inspections at its Co-op mine located at Huntington Canyon, Utah. Pursuant to notice, a hearing on the merits was held in Salt Lake City, Utah. The parties waived filing post-hearing briefs.

II. Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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III. Settlement Proposals

At the outset of the hearing, the petitioner moved that a settlement agreement entered into jointly by the parties be approved as follows:

Docket No. WEST 80-142

The petitioner contended that a reduction in the amounts of the four proposed penalties in the citations listed below were in order for the reason that upon review of the facts surrounding their issuance, it was found that respondent's negligence was not as great as originally assessed. The parties proposed the following:

Citation No.	30 C.F.R.	Proposed Penalty	Amended Proposed Penalty
789024	75.1103	$ 90.00	$ 72.00
789026	75.604	210.00	168.00
788576	77.202	170.00	136.00
788577	75.1106-3C	130.00	104.00

Docket No. WEST 80-286

The parties stipulated that the respondent had agreed to pay the full amount of the proposed penalties assessed in eight of the twelve citations listed below and that the reason for the petitioner proposing a reduction in the proposed penalties for the remaining four citations is that it was determined that respondent's negligence was less than originally assessed. The respondent agreed to pay the full amount of the proposed penalties in the following citations:

Citation No.	30 C.F.R.	Proposed Penalty
788834	75.316	$150.00
788835	75.316	140.00
788837	75.316	66.00
788838	75.316	72.00
788839	75.1715	52.00
788883	75.404	36.00
788885	75.1715	40.00
788886	75.1715	72.00

The parties stipulated and agreed that the penalties for the citations listed below would be amended as follows:

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Citation No.	30 C.F.R.	Proposed Penalty	Amended Proposed Penalty
788831	75.1801	$ 48.00	$ 38.00
788832	75.1803	48.00	38.00
788833	75.1806	48.00	38.00
788840	75.1725C	98.00	78.00

IV. Stipulations

The parties also entered into the following stipulations:

1. The Co-op mine produced between 127,300 and 163,671 tons of coal a year and employed approximately 20 people.

2. The mine experienced 143 inspection days in the 24 months preceding the issuance of the citations in WEST 80-142, and received 127 assessed violations.

3. The mine had approximately 123 to 150 inspection days in the 24 months proceeding the issuance of the citations in Docket No. WEST 80-286 and was issued 131 to 138 assessed violations.

4. The assessment of reasonable penalties in the present proceedings would not affect the respondent's ability to continue in business.

Upon due consideration, I conclude that the proposed settlements should be approved. Approval of the settlement proposals are reflected below in the final order.

After settlement of the above citations in these three consolidated cases, there remains five citations alleging violation of safety standards to be resolved. These are as follows: WEST 80-142, Citation Nos. 788573 and 788579; West 80-286, Citation Nos. 788884 and 788887; WEST 81-85, Citation No. 1020472.

Discussion

WEST 80-142

Citation No. 788573

Citation No. 788573 alleges a type 104(a) violation of standard 30 C.F.R. 77.208(e) which provides as follows:

> Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when cylinders are in use.

MSHA inspector Dick Jones testified that he issued the above citation during an inspection of the respondent's Co-op Mine after observing two cylinders of compressed gas at the tipple with the

hoses and gauges still attached. The cylinders were secured to one of the supports under the coal preparation plant and were not being used (Tr. 13-14).

The respondent does not dispute the fact that the cylinders were located at the place described by the inspector and without covers. However, Bill Stoddard, superintendent of the mine, testified that the two cylinders were located under the floor of the storage bin and that the bottoms of the cylinders were secured in round containers. The cylinders were further secured by two chains wrapped around the tanks to hold them in place (Tr. 36). Stoddard maintained that this was a permanent installation and that the tanks are protected from anything hitting or falling on them. The cylinders are used by the tipple foreman at different times for maintenance work when he is not busy with duties involving the tipple.

Respondent argues that the cylinders were being used continuously on a daily basis. The tipple foreman at the time of the inspection, had left this area where the tanks were located to go load a truck. It is respondent's contention that when the gas cylinders are in a location where they are being used, they do not fall under the provisions of the standard which provides for the hoses and gauges to be removed and covers put on when being "stored".

The petitioner contends that the inspector observed the two cylinders without covers on and that they were not being used at the time. He argues that under these circumstances they were being "stored" and required that covers be placed on the tops as there was a potential danger of something falling on top of or striking the cylinders and knocking off the gauges or hoses allowing the gas to escape.

The threshold issue here is whether the gas cylinders were being "stored" or "in use" when the inspector observed them. Part 77 of 30 C.F.R. does not define, "stored" or "in use". Webster's New Collegiate Dictionary 1977 Edition defines store (stored) as follows: "to lay away; to place or leave in a location (as a warehouse, library or computer memory): something that is stored or kept for future use."

In Western Steel Corporation, 5 FMSHRC 310 (March 1983), the Commission considered a similar factual situation under the standards for metal and nonmetal underground mines. In that case, the operator of an oxyacetylene torch welder had left the gas valves on the tank while he left the area to secure additional material. The standard cited in this instance stated as follows: "57.4-33 Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used."

The Commission upheld the Administrative Law Judge's vacation of this citation stating; "It must have been contemplated in the drafting of the standard that some reasonable lapse of time be permitted between the cutting and welding with the torch and closing of the tank valves." The Commission decided that the case required them to construe the meaning of the key phrase, "not being used." They stated that "use" has a temporal meaning because tasks extend over time. The Commission determined that the approximately 20-minute absence from the torch head was of temporary duration and directly related to the continuous performance of the specific welding task. However, in a footnote they stated that the above case did not require them to, and they did not decide whether a temporary laying aside of the torch welder for other work-related reasons or for such purposes as coffee breaks, trips to the lavatory, or the like, would require a different approach.

In light of the foregoing, it may be reasonably inferred that the decision in the Western Steel case can be applied to the facts being considered here. The evidence in this case is not explicit as to how long the tipple operator had been gone from the area where the tanks were located, or for what reason he left. Jones testified that when he arrived at the tipple he observed the two cylinders with the hoses and gauges still attached. Jones stated that he saw a truck loading at the tipple and when the truck left, the miner working at loading the truck came over and identified himself as the tipple foreman. He abated the alleged violation by taking off the gauges and putting on the covers. Jones testified that he did not know how long it had been since someone had used these cylinders (Tr. 18).

After a careful review of all of the evidence of record, I am persuaded that a violation of the cited standard occurred in this case. The respondent failed to identify any task the tipple foreman was performing prior to his loading the truck at the tipple. The thrust of respondent's arguments are that there was not a potential for danger from these tanks because of the location and manner in which they were located at the mine. Even assuming that the potential for an accident had been reduced considerably by reason of described precautions, the fact remains that the standard requires the covers to be placed on the tanks when they are not "in use" and are "being stored." There is no evidence that these tanks were being used by anyone prior to the arrival of the inspector so I am not presented with a factual situation similar to that posed in the Western Steel case. The evidence shows the tanks were kept at this location so that they were available for use by the tipple foreman whenever he had a task to do between his various duties at the tipple. However, when not in use, the standard requires that the covers be placed on these tanks, which the respondent had not done.

I do not find either the negligence or gravity serious in this violation for the tanks were placed in an area where there was some protection from external forces and they were tied down with chains to prevent them from falling over. The likelihood of a serious injury was small and usually only the tipple foreman would be in the area. Further, abatement was achieved immediately demonstrating a good faith effort to achieve rapid compliance. I assess a penalty of $35.00 for the respondent's violation of 77.208(e).

Citation No. 788579

During an underground inspection of respondent's Co-op Mine, Inspector Jones issued citation No. 788579 charging a violation of 30 C.F.R. 75.523(FOOTNOTE 1) and alleging as follows:

> The Joy roof bolter observed being operated in the belt entry of the 2-right working section was not provided with devices (panic bars) that will permit the equipment to be deenergized quickly in the event of an emergency.

Jones testified that he observed two miners roof bolting in the entry outby the face and noticed there were no panic bars or means provided to quickly deenergize the tramming motors on the roof bolting machine in the event of an emergency. Jones asked one of the miners if the equipment could be trammed from where he was standing and the miner answered "yes" (Tr. 22, 23). Jones was accompanied on this inspection by Ron Mattingly, respondent's employee responsible for electrical maintenance. Upon being shown the alleged violation, Mattingly agreed that the machine needed panic bars (Tr. 23).

Evidence shows that the roof bolting machine cited in this case was constructed from a frame originally manufactured by the Joy Manufacturing Company. Two booms manufactured by the Manson Company were attached to the front of the frame for drilling holes for installing roof bolts. Valves are located on each boom to operate the hydraulic pressure to run the drills. The procedure for roof bolting with this two-man bolter is for a miner to stand on each side to operate the controls on the boom. Each miner drills two holes for the roof bolts and then usually the miner on the right side goes to the cage located on that side to tram (move) the machine forward or backwards as needed (Tr. 55). The

testimony of several witnesses explained that the roof bolter was trammed by a hydraulic tramming motor. A pump turned by an electric motor provided pressure necessary to operate the tramming motor to move the machine as well as the drills on the two booms (Tr. 84, 85). The term "tramming motor" is defined in the Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms (1968) as follows: "May refer to an electric locomotive used for hauling loaded trips, or it may refer to the motor in a cutting machine which supplies the power for moving or tramming the machine."

Respondent sets forth essentially three arguments germane to the question of whether a violation of 75.523 occurred. First, that the roof bolting machine had two panic bars installed on the machine, painted fluorescent orange in color, and the inspector failed to see them. Second, that the inspector misunderstood the miner's reply to his question as to whether the machine could be trammed from where he was standing. Third, that the roof bolter could only be trammed from inside the cage on the machine and panic bars were unnecessary (Tr. 170, 171).

The specific issue to be decided is whether the machine cited in this case had devices installed on it which would allow it to be quickly deenergized in the event of an emergency. There is considerable divergent testimony as to whether there were panic bars installed on the machine with the inspector testifying he saw none and the respondent's employees claiming they were there and painted orange. The facts in this case must first be considered in conjunction with the sub parts of 30 C.F.R. 75.523 which provide the applicable provisions adopted by the Secretary in compliance with the statutory authority of the above regulation.(FOOTNOTE 2) 30 C.F.R. 75.523-1 provides in part as follows:

> Deenergization of self propelled electrical face equipment installation requirements.
>
> (a) Except as provided in paragraphs (b) and (c) of this section, all self-propelled electric face equipment

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> which is used in the active workings of each underground coal mine on and after March 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1) and (2) of this section, be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency. The requirements of this paragraph (a) shall be met as follows:
>
> (1) On and after December 15, 1974, for self-propelled cutting machines, shuttle cars, battery-powered machines, and roof drills and bolters;
> (2) On and after February 15, 1975, for all other types of self-propelled electric face equipment. (FOOTNOTE 3)

Additionally, 30 C.F.R. 75.523-1(a) must be read in conjunction with the requirements of 30 C.F.R. 75.523-2(a)(b)(c) which provides as follows:

> (a) Deenergization of the tramming motors of self-propelled electric face equipment, required by paragraph (a) of 75.523-1, shall be provided by:
>
> (1) Mechanical actuation of an existing push button emergency stop switch,
>
> (2) Mechanical actuation of an existing lever emergency stop switch, or
>
> (3) The addition of a separate electromechanical switch assembly.

(b) The existing emergency stop switch or additional switch assembly shall be actuated by a bar or lever which shall extend a sufficient distance in each direction to permit quick deenergization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated.

(c) Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the tramming motors of the self-propelled electric face equipment.

Turning to the merits of this case, the undisputed testimony of respondent's own witness shows that a violation of the Act occurred. Ron Mattingly testified that he was familiar with the condition of the panic bars on the day of the subject inspection and that one of the panic bars didn't function because of a faulty internal switch. It had been damaged and would not deenergize the equipment. Mattingly claimed there were two panic bars on the roof bolter, one on each side and that only one was working (Tr. 63, 64).

The thrust of the conflicting testimony in this case is misdirected towards two issues: First, whether the roof bolter could be trammed or moved from a position where the miners normally stood while operating the drills on the two booms. Second, whether there were panic bars on the booms to deenergize the equipment in case of an emergency. Three witnesses testified on behalf of the respondent that the machine could only be driven forward or backwards from the cage located on the right side and that the miner would have to get in the cage to do this. This evidence was uncontroverted.

The same three witnesses also testified that there were panic bars installed on the roof bolter with Mattingly stating that they were painted fluorescent orange. Jones stated that he did not see the panic bars described by the respondent's witnesses

However, assuming that the roof bolter was equipped with panic bars on each boom and could not be trammed or driven by a miner standing there, the respondent's defense must fail. Respondent's witness and electrical maintenance foreman testified that he knew one of the switches on the boom of the roof bolter used to deenergize the tramming motor was inoperative and that the switch had been on order for approximately two months (Tr. 63, 64).

I find that the lack of a device on one boom of this two man roof bolter is a violation of the standard, specifically that part of section 75.523-2(b) which states in pertinent part as follows: (b) The existing emergency stop switch or additional switch assembly shall ... permit quick deenergization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated." (emphasis added).

I find that the evidence clearly shows that the roof bolter could be "operated" from the booms. That is, the miners drilling holes turned the valves on the booms to operate the drills for installing roof bolts. It is vital in such a position that each miner be afforded a panic device to turn off the tramming motors powering the equipment in the event of an emergency.

Respondent argues that one of the switches was operative and that this is all the standard requires. I reject that argument for it is imperative that the device be available for quick deenergization of the equipment from both sides and requiring one miner to go around the equipment to the other side to turn off the switch defeats the purpose. Although, I find it unnecessary in this case to resolve the question as to whether there were panic bars on the machine, it is imperative and required by the standard that such bars be installed to give the miner an opportunity to quickly "hit" the switch should an emergency arise.

Penalty

The six criteria for assessing a penalty are set out in 30 C.F.R. 820(i). The size of the operator is medium. The assessment of reasonable penalties in this case will not affect respondent's ability to continue in business. I find that respondent was negligent in allowing the two man roof bolting machine to be operated with one faulty panic switch. Also, I find that the respondent knew of this faulty switch as its employee responsible for electrical maintenance testified he was aware of this for over a two month period prior to the inspection.

The probability of injury exists as the miner operating the drill was exposed to becoming entangled in the machine and being unable to switch it off. There is a likelihood that the other miner could deenergize the machine with his switch if he became aware of a need to do so, but this could take time. The injury could be serious and cause death. Only one miner at a time would be exposed to the risk. Respondent showed good faith in abatement of the violation. I find $150.00 is an appropriate penalty in this case.

WEST 80-286

Citation No. 788884

Citation No. 788884 charges a 104(a) violation of 30 C.F.R. 75.1725(c) which provides as follows

> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Inspector Ted Farmer testified that while inspecting the second right section of the first entry in the Co-op mine he observed a continuous miner being repaired while the power was on. The inspector testified that this created a dangerous situation because the employee doing the repairs was positioned under a cutting head containing sharp spikes which could have severely injured the employee had the power come on and the cutting head started running.

Respondent admits the above facts as described by the inspector but denies that a dangerous situation existed. It is respondent's position that even though power was connected to the machine, it was not running and the cutting head was blocked and would not move if the machine started up.

Scott Stoddard, respondent's mine foreman, testified that the conveyor chain was off the cog and he was under the machine trying to get it back on. He stated that the front of the machine was blocked up by a 6 foot crib and the switch to the power was off. He could not conceive of an accident happening because of the block and the switch being off (Tr. 142, 143). Stoddard contends that it was necessary to run the machine at certain times during these adjustments to get the holes in the chain lock to line up with the cog (Tr. 144). Respondent contends that there was no danger here and also that there is a provision in 30 C.F.R. 75.1725(c) which provides that power may be on "... where machinery motion is necessary to make adjustments."

I find that the above exception does not apply here. Testimony reveals that in order to complete the process of adjusting the cog to the chain, Stoddard, from his position outside the continuous miner, would direct the operator who was stationed in the cab of the continuous miner to run the cog. After he felt the cog was aligned properly, Stoddard would then go back under the head of the continuous miner to check the cog and chain for alignment (Tr. at 147). At this point, Stoddard would be under the cutting head while another man was in the cab at the controls with the power on. This presents a very dangerous situation. There is no reason why the power to the machine could not be turned off while Stoddard was going back under the head to check the alignment. If the cog required further adjustment, Stoddard could have backed away from the machine, power could have

been turned back on, and the cog rotated by the operator in the cab.

I therefore reject the Company's defense because it was not "necessary" that the power be on while the repairman was under the cutting head to check the alignment of the cog to the chain. The citation is affirmed.

Penalty

I find the respondent was negligent in not enforcing the safety regulation cited in this case and particularly where it is a mine foreman who was performing the alleged dangerous act. The probability and gravity appear high in that the cutting head would inflict serious and possibly fatal injuries to an exposed miner. Also, the machine could easily be activated while the repairs were being performed under the machine. The violation was quickly abated showing good faith on respondent's part. I find $275.00 is an appropriate penalty in this case.

Citation No. 788887

Citation No. 788887 charges a 104(a) violation of 30 C.F.R. 75.316. 30 C.F.R. 75.316 provides as follows:

> Ventilation system and methane and dust control plan. [Statutory Provisions].
>
> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

The facts related to this citation are not in dispute. In accordance with 75.316, respondent developed such a plan with the Secretary's approval. That plan required that brattice lines or curtains be installed anytime an entry exceeds fifty feet from a crosscut (Tr. at 134, 135 and P-8). When the inspector made his

inspection he saw an entry which had been mined 113 feet past the crosscut but was not equipped with a brattice line or curtain as the plan requires (P-10). While no brattice line was in place the inspector did observe marks in the roof which would indicate that sometime prior to the inspection a brattice line had been hung. The inspector also noticed some evidence of rib sloughage in the area where the curtain would have been hung. I find the inspector's testimony to be credible and accept these facts.

When an operator departs from his ventilation plan, a violation of 30 C.F.R. 75.316 occurs. Zeigler Coal Co., 4 IMBA 30 (1975), aff'd. 536 F. 2d 398 (D.C. Cir. 1976). The fact that the brattice line may have only been down for a short time or because of unusual conditions is not a defense. Consolidated Coal Co. 3 FMSHRC 2207 (September 1981). The citation is therefore affirmed.

I find that respondent was negligent in failing to enforce safety regulation 75.316 mandating brattice curtains in accordance with the operator's ventilation plan.

Concerning citation No. 788887, I find the probability of injury to be moderate, the gravity of the potential injury to be very serious, and the number of employees subject to this danger to be considerable. While the facts do not disclose that a methane explosion was likely, had one occurred the injuries resulting from such an explosion could be fatal or very serious and the number of miners affected would be high. I find $160.00 is an appropriate penalty in this case.

WEST 81-85

Citation No. 1020472

Citation No. 1020472 alleges a 104(a) violation of 30 C.F.R. 75.403 which provides in pertinent part as follows

> Maintenance of incombustible content of rock dust. [Statutory Provision]
>
> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum ....

With respect to this citation, the essential facts are not in dispute. During a general inspection of respondent's Co-op Mine, Inspector Farmer noticed that the coloration on certain areas of the mine were a bit dark. This indicated to Farmer that the percentage of incombustible content of rock dust might be low in this specific area. Farmer took a spot sample of the dust by scraping a rib with a brush, sifting the material through a screen, and sending the sifted material out for chemical analysis. The usual procedure, referred to as band sampling, would be to combine samples from the roof, floor and both ribs. On this occasion, because the floor and roof were too wet, Farmer only took samples from the ribs. The reason for this is that the moisture content of the floor would cause the test to be inaccurate as to the ribs. Farmer noted wet floor condition on the form which accompanied the samples when they were sent for analysis.

Four different samples from different areas were sent out for analysis. A dust sampling report was returned to Farmer with the results as follows: Spot #1 (sample taken from floor and ribs at an intake entry) 76%; Spot #2 (sample taken from ribs at a return entry) 73%; Spot #3 (sample taken from floor and ribs at a return entry) 73%; and Spot #4 (sample taken from ribs at an intake entry) 83% (Exh. P-4).

Co-op argues that the dust sampling report lacks a sufficient foundation because the inspector who testified to its findings had no personal knowledge of the testing procedures used to evaluate the sample. This identical defense was unsuccessfully raised by Co-op earlier in Co-op Coal Co., 3 IMBA 533 (1974), which also concerned admissibility of a dust sampling report on a 30 C.F.R. 75.403 violation. The Administrative Law Judge in that case admitted the report because it had the "earmarks of reliability" and held that such a report can "establish a prima facie case of violation." Co-op Coal, at 539. Dust sample reports have been admitted in several other cases involving alleged violation of 75.403 without testimony of the person conducting the actual chemical analysis. See Leechburg Mining Co., 1 FMSHRC 632 (June 1979), Itmann Coal Co., 3 FMSHRC 1221 (May 1981); and Old Ben Coal Co., 2 FMSHRC 2806 (Oct. 1980).

Beyond admissibility, Co-op also attacks the credibility of the report on the basis that the testing procedures employed by the inspector were irregular. Such an attack is indeed authorized under Co-op Coal Co., 3 IMBA at 539. It is argued that normal procedure dictated by the MSHA Underground Manual requires band or perimeter sampling. Band sampling entails collecting dust from the floor, roof and both ribs and then combining all the dust in one sample for a single reading.

This was not the method followed by Farmer in gathering the samples which generated the report in this case. Instead, the sample for Spot #2 was gathered only from the ribs and the sample for Spot #3 was gathered from the ribs and floor.(FOOTNOTE 4) It is undisputed that the floor at Spot #2 was "wet" within the meaning of 30 C.F.R. 75.402-1. Where a floor is "wet" there is no danger of combustibility and samples are not necessary. 30 C.F.R. 75.402. For this reason a floor sample was not included in the total Spot #2 sample. At the same time, it is also clear that moisture content will increase the percentage of incombustible material and must be considered as part of the incombustible content of such material. 30 C.F.R. 75.403-1. Respondent argues that they have been denied the benefit of the wet floor reading which might have added sufficient incombustible material to the aggregate sample to meet the 80% requirement and give a more accurate reading.

Failure of the inspector to follow his own internal guide lines on gathering dust report samples is not alone reason to discard the sample. Old Ben Coal, at 2809. Dust sampling reports based solely on rib samples have been held sufficiently accurate to support a 75.403 violation if there are reasonable grounds for the inspector's procedures. Itmann Coal, at 1226.

In the instant matter, the inspector testified that the roof was too high to obtain samples from there and the floor was too wet to sample. On further inquiry, however, the inspector revealed that a sample could have been obtained from the floor but that he felt it was not necessary because there was sufficient water to insure incombustible content over 80% (Tr. at 106). When asked if moisture content was to be included in the sample the inspector answered in the affirmative and added that this is why he noted the wet floor conditions on the form which accompanied the samples (Tr. at 105). However, in making the analysis which generated the 73% figure for Spot #2 I find that the condition of the floor was not factored into the percent reading whatsoever (Tr. at 105). Notwithstanding this, the Secretary bases his penalty solely on the percentage reading from the dust sampling report.

In essence the government is arguing, notwithstanding the clear mandate to include moisture content in its sample, it can take a sample but exclude high moisture content areas because they are clearly in the safe range. The government then proposes to use this data to prove that respondent does not meet the threshold of the safe range. I find this reasoning to be unsound. The Spot #2 reading is unnecessarily inaccurate. Itman coal, at 1226. If

the floor area was indeed too "wet" (as that term is used in 30 C.F.R. 75. 402-1) and was clearly in the safe zone then that specific area may be exempt from the rock dusting requirement altogether under 30 C.F.R. 75.402.

However, testimony does support a violation of the section based on sample #3 which did include samples from the floor area as well as the ribs. Co-op has not argued that one sample alone is insufficient to support a violation. Therefore, I find Citation No. 1020472 should be affirmed. Further, I find respondent's failure to maintain a sufficient level of incombustible material constituted negligence as the regulation requires an 80% level and respondent was maintaining a 73% level.

I find the probability of injury as to this violation to be low but the gravity of the injury, should one occur, to be serious. Also a number of employees would be subject to this danger. Two of the four tests showed the operator to be in compliance. However, one of the two tests were unacceptably inaccurate and one test shows the operator to be in violation but only by seven percentage points. I find that $50.00 is an appropriate penalty in this case.

Conclusions of Law

Based upon the entire record in these consolidated cases including the stipulations of the parties and upon the factual determinations reached in the narrative portions of this decision, it is concluded:

1. That the Commission has jurisdiction to decide these three cases.

2. Based upon the stipulation of settlement entered into between the parties, the following agreed settlements for the designated citations are approved as follows:

Docket No. WEST 80-142:

Citation No.	Proposed Penalty
789024	$ 72.00
789026	168.00
788576	136.00
788577	104.00
Total	$480.00

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Docket No. WEST 80-286:

Citation No.	Amended Proposed Penalty
788831	$ 38.00
788832	38.00
788833	38.00
788834	150.00
788835	140.00
788837	66.00
788838	72.00
788839	52.00
788840	78.00
788883	36.00
788885	40.00
788886	72.00
Total	$820.00

3. That the credible evidence of record establishes as follows: In Docket No. WEST 80-142, Citation No. 788573, respondent violated 30 C.F.R. 77.208(e) by failing to replace the covers on the tanks of compressed gas when not in use and that an appropriate penalty for this violation is $35.00. Also, in reference to Citation No. 788579, respondent violated 30 C.F.R. 75.523, in failing to have a device on one of the booms for deenergizing the tramming motors in the event of an emergency and that $150.00 is an appropriate penalty in this case.

4. In Docket No. WEST 80-286, Citation No. 788884, the evidence shows that respondent violated safety standard 30 C.F.R. 75.1725(c) by failing to turn the power off to the continuou miner while a miner was underneath the machine attempting to replace the conveyor chain on the cog. An appropriate penalty in this case is $275.00. As to Citation No. 788887, respondent violated 30 C.F.R. 75.316 by failing to follow its approved ventilation plan and an appropriate penalty for this violation is $160.00

5. In Docket No. WEST 81-85, Citation No. 1020472, I find that the evidence shows that respondent violated 30 C.F.R. 75.403 by failing to maintain rock dust in sufficient quantities to comply with the requirements set out therein. Although some of the tests were not valid and indicative of a violation, I find that sample #3 supports the petitioner's contention that a violation occurred and that an appropriate penalty is $50.00.

ORDER

Accordingly, based upon the foregoing findings of fact and conclusions of law, the respondent is ORDERED to pay the total of $1,970.00 within forty days of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTES START HERE-

1 Electric Face Equipment; deenergization. (Statutory Provision) An authorized representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency.

2 Although the inspector cited section 75.523, it is clear from both the meaning of the citation and the arguments of counsel for both parties that respondent was alleged to have violated subparts 1(a) and 2 (a)(b)(c) which generally set forth the requirements to comply with the main section. Respondent was charged with not providing devices (panic bars) that would permit the equipment to be deenergized quickly in the event of an emergency. There was never a doubt that respondent was aware of what it had been charged with in this citation.

3 The exceptions set forth at 30 CFR 75.523-1(b) and (c) provide as follows:

"(b) Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part, shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency."

"(c) An operator may apply to the Assistant Administrator-Technical Support, Mine Safety and Health Administration, Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203 for approval of the installation of devices to be used in lieu of devices that will quickly deenergize the tramming motors of self-propelled electric face equipment in the event of an emergency. The Assistant Administrator-Technical Support may approve such devices if he determines that the performance thereof will be no less effective than the performance requirements specified in 75.523-2."

4 Spots 2 and 3 from return aircourses are the critical samples because they both tested at 73% incombustible content and 30 C.F.R. 75.403 requires 80% for return aircourses. The remaining samples taken from intaking aircourses tested at 76% and 83% which is above the 65% minimum for intakes.