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SOL (MSHA) V. PYRO 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

v.

PYRO MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 83-186
A.C. No. 15-10339-03514

No. 11 Mine

Docket No. KENT 83-187
A.C. No. 15-10815-03510

Wheatcroft Mine

DECISIONS

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
William Craft, Assistant Director of Safety,
Pyro Mining Company, Sturgis, Kentucky, for
Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for five alleged violations of mandatory health standard 30 CFR 70.220.

Respondent filed timely contests taking issue with the citations and pursuant to notice hearings were convened in Evansville, Indiana, on November 2, 1983, and the parties appeared and participated fully therein. The parties waived the filing of post-hearing written arguments and made them orally on the record during the course of the hearing.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing mandatory standards as alleged in the proposals

~271

for assessment of civil penalties filed in the proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties at the hearing are discussed and disposed of in the course of my decisions.

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

Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.
2. Section 110(a) of the Act, 30 U.S.C. 820(a).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

KENT 83-186

This proceeding concerns two section 104(a) citations served on the respondent on November 16, 1982, for violations of mandatory health standard 30 CFR 70.220.

Citation No. 2075605 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-18-82, showing mmu 011-1 nonproducing effective 10-18-82. Production records show mmu 011-0 operated approximately 67 production shifts in 40 days during the Sep.-Oct. 1982 cycle with an average production of over 650 tons per shift. Included during this period were at least 9 production shifts on Oct. 26, 27, 28, 29, and 30, 1982. Also records show mmu 011-1 has operated at least 15 production shifts in 9 days during Nov. 1982 with an average production of over 600 tons per shift. The attached computer print-out dated 11-8-82 shows no respirable dust samples were submitted for the Sep.-Oct. 1982 cycle. Responsibility of Tom Hughes Dust Tech.

~272

Citation No. 2075606 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-18-82, showing mmu 012-0 non-producing effective 10-18-82. Production records show mmu 012-0 operated approximately 23 production shifts in 23 days during the Sep.-Oct. 1982 cycle with an average production of over 600 tons per shift. Included during this period were at least 9 production shifts on Oct. 20, 22, 23, 26, 28, 29, and 31, 1982. Also records show mmu 012-0 has operated at least 5 production shifts in 3 days during Nov. 1982 with an average production of over 630 tons per shift. Responsibility of Tom Hughes.

KENT 83-187

This proceeding concerns three section 104(a) citations served on the respondent on November 16, 1982, for violations of mandatory health standard 30 CFR 70.220.

Citation No. 2075602, describes the cited condition or practice as follows:

The operator submitted the attached status change form dated 10-19-82, showing mmu 003-0 in abandoned status effective 9-1-82. Production records show mmu 003-0 operated approximately 18 production shifts in 11 days during the Sep.-Oct. 1982 cycle, with an average production of over 700 tons per shift. The attached computer printout dated 11-8-82, shows no respirable dust samples were submitted for this cycle. Records show citations for exceeding the dust standard were issued for mmu 003-0 no less than three times within the past year. Responsibility of Dennis Travis Dust Tech.

Citation No. 2075603 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-25-82, showing mmu 005-0 in nonproducing status effective 9-1-82. The status form also states the unit is spare, nonproducing, and has not run five production shifts during the sampling cycle. Production records show mmu 005-0 operated approximately 73 production shifts in 40 days during the Sep.-Oct. 1982 cycle with an average production of over 600 tons per shift.

~273

The attached computer printout, dated 11-8-82 shows no respirable dust samples were submitted for this cycle. Records show citations for exceeding the dust standard were issued for mmu 005-0 no less than two times within the past year. Responsibility of Dennis Travis Dust Tech.

Citation No. 2075604 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-19-82, showing mmu 006-0 abandoned effective 9-1-82. Production records show mmu 006-0 operated approximately 21 production shifts in 13 days during the Sep.-Oct. 1982 cycle with an average production of over 750 tons per shift. the attached computer printout, dated 11-8-82, shows no respirable dust samples were submitted for this cycle. Records show at least one citation for exceeding the dust standard was issued for mmu 006-0 within the past year. Responsibility of Dennis Travis, Dust Tech.

Testimony and evidence. KENT 83-187.

MSHA Inspector Arthur L. Ridley, testified as to his background and experience, and he stated that section 70.220 of the mandatory standard requires that certain changes on the status of certain coal producing and sampling units be reported to MSHA within three days of the time the change occurs. He stated that changes of producing units to nonproducing or temporary nonproducing, or abandoned areas must be reported. He identified exhibit P-1 as a status change form executed by respondent's mine technician Dennis Travis showing that the mechanized mining unit at the Wheatcroft Mine, No. 003 was placed in an abandoned status effective September 1, 1982, and that it was filled out and signed by Mr. Travis on October 19, 1983 (Tr. 17-20).

Mr. Ridley explained that a "mechanized mining unit" in this case consists of a certain amount of equipment used for coal production, such as a cutting machine, a loading machine, and shuttle cars, all of which are used in one set of rooms for coal production purposes. The exhibit in question is a form supplied by MSHA, and section 70.220 requires that it be filled out by an operator and filed with MSHA. The form in question came to his office as a routine matter and he has previously examined the original copy on file in his office. He saw no form previous to the one filed in this case. He also confirmed that exhibit P-1, page one, is a copy of Citation No. 2075602 issued by MSHA Inspector

~274

Thomas M. Lyle, and he explained that such a citation would be issued after a review of the status change form to ascertain whether it was timely filed (Tr. 24).

Mr. Ridley stated that the original citation issued by Mr. Lyle contained no negligence findings on the face of the form, but that he (Ridley) modified the citation on January 7, 1983, to include a negligence finding. He stated that he made this finding after reviewing the status form and finding that a month and a half had gone by since the unit in question was reported abandoned, and he believed that the respondent was negligent in not submitting the form sooner (Tr. 25).

On cross-examination, Mr. Ridley confirmed that MSHA's regulations do not require a mine operator to file a daily coal production report for each coal producing unit (Tr. 29). He also confirmed that while it is not a common practice for MSHA's health staff to delve into company production records, it has been done in the past, but infrequently (Tr. 30). He also confirmed that an inspector is instructed to make any negligence and gravity findings by filling out the appropriate places on the citation form at the time he issues the citation (Tr. 31). He conceded that his modification of the citation by filling out the negligence portion of the citation form issued by Inspector Lyle 52 days after the initial service of the citation on the respondent in this case "was a long period of time" (Tr. 32). Mr. Ridley also confirmed that his supervisor Charles E. Dukes instructed him to modify the citation to show a "high degree of negligence" (Tr. 35). Mr. Ridley stated further that had he issued the original citation, he would have made the same negligence finding (Tr. 36).

Mr. Ridley explained that under MSHA's dust sampling procedures, an operator must take five valid dust samples within each two month period (Tr. 37). He agreed that if the respondent sampled during the September-October sample cycle and then abandoned the unit on September 25, he could legally do this since the sample cycle had not run its course (Tr. 40).

Respondent's testimony and evidence

Dennis Travis, testified that he was familiar with the three citations issued by MSHA Inspector Lyle on November 16, 1982, concerning the filing of the mine status change forms in question. Mr. Travis confirmed that he was employed as an environmental health technician at respondent's Wheatcroft Mine. With regard to Citation No. 2075602, Mr. Travis stated that mine records indicated that coal was produced on the

~275

unit in question during the first 10 days of September, but not after that date. When asked to explain the circumstances surrounding the filing of the form in question, he responded as follows (Tr. 56-57):

Well, coming back to the 18th of October I realized that this production unit, 003-0 was not going to be running any longer and I knew that it had run a few days in the month of September which is the first month of the bi-monthly sampling cycle. At that time I knew that there would have to be some samples taken to comply with the respirable dust law which requires us to submit five accurate samples during a bi-monthly period. I also knew that it was impossible to do that because the equipment had been moved out of that area. At that point, to keep from either receiving a violation stating that I did not send in accurate respirable dust samples and to try to find out exactly what needed to be done at this point because of the abandonment of the area, I called the MSHA Office in Madisonville to talk to the health specialist, the desk specialist supervisor which was Mr. Dukes. I felt that Mr. Dukes would be the one to answer my questions since he was the supervisor and--So I spoke to him about the matter, told him what the situation was, and I had a few days in the first part of the sampling cycle that had produced coal on that unit but yet the unit wouldn't be producing any longer; and asked him, at that point, what needed to be done.

I knew that a status change form should be submitted, I felt like it should. And I asked him at that point if that's what I should do. And he informed me, and advised me to send in a status change form abandoning the section and dating it at the beginning of the bi-monthly sampling cycle to avoid any confusion. And abandoning it at that point.

In response to further questions, Mr. Travis confirmed that he submitted the form in question for Unit 003-0 on October 19, 1982, but that the effective date of the status change was September 1. No form was submitted during the period September 1 through October 19, 1982, and when asked why he did not comply with the three-day reporting requirement of section 70.220, he responded as follows (Tr. 61-62).

A. I wasn't wanting to avoid taking samples. If the unit had been in production the last two weeks of this month the samples would have been taken, I was advised by the MSHA Supervisor, Mr. Dukes, to date it at that particular time. If I had dated it three days prior to the 19th of October which would've been 10/16--

Q. Uh-hm.

A.--then I could have been and probably would have been cited for failure to submit samples during that bi-monthly sampling cycle even though the unit was down and abandoned, and the status change submitted at the proper time.

Q. Okay. If I understand your testimony the unit was not down during the period.

A. During the first eleven days, that's correct.

Q. So if it was producing during the first eleven days, withdrawing of course, do you understand the bi-monthly cycle of respirable dust requirements to dictate that if you produce coal at all during the two month period you have to submit the samples.

A. No, sir. I do not.

Q. What do you understand that to require?

A. It has to be filed four shifts, four production shifts, to be required to submit samples during that time.

Q. At any time during that period of time.

A. That's correct.

Q. Did you produce any five shifts?

A. Yes, sir.

Q. During that time?

A. Yes, sir.

Q. And did you submit any respirable dust samples?

A. No, sir.

Mr. Travis confirmed that mining unit 003-3 was permanently abandoned on October 17 or 18, 1982, and that from September 11, 1982, until it was abandoned it was in a "technically temporarily abandoned" status. Although the unit was not producing coal during this time, the equipment was still there, the area was being ventilated, and Mr. Travis characterized the unit as a "spare" to be used "as needed" (Tr. 63).

Respondent's counsel asserted that all of the remaining citations at issue in these proceedings concern the same factual setting (Tr. 86). MSHA's counsel confirmed that Citation No. 2075603, exhibit P-3, concerns a mine status change form submitted by Mr. Travis on October 25, 1982, and the form shows that the 005-0 mining unit in question was "nonproducing" effective September 1, 1982. MSHA counsel took the position that the form should have been filed by September 4, 1982, and he also asserted that Mr. Ridley modified this citation, and that if called to testify he would confirm that he received the same instructions to mark if "high negligence," and that the reason he did so was because of the time lapse from September 1 to October 25, 1982 (Tr. 87-89).

Respondent's counsel confirmed that the 005-0 unit was in fact nonproducing on September 1, 1982, and that it was in the same status as the previously cited unit. He explained that the mine was being abandoned in order to start a new mine, and the mining units in question were being moved around while renovations and overcasts were being constructed (Tr. 89). He conceded that the notation on the citations that a search of company records reflected that there were 73 production shifts during a forty-day period during September and October 1982 "were probably right" (Tr. 90). He also confirmed that the 005-0 mining unit consisted of five pieces of equipment (shuttle car, cutting machine, loading machine, reel, and roof bolter), and that this unit was assigned to the cited mine location to produce coal (Tr. 91).

MSHA's counsel identified exhibit P-4 as a copy of Citation No. 2075604, issued by Inspector Lyle on November 16, 1982. The citation states that the required MSHA change form was dated October 19, 1982, indicating that mining unit 006-0 was abandoned effective September 1, 1982. The form submitted by Mr. Travis identifies the "unit" as "designated occupation code 036," which is for the "high risk" continuous miner operator (Tr. 115-116). Respondent's counsel confirmed that the section where the miner had been operated was abandoned, and the miner machine was moved someplace else (Tr. 117). Respondent's counsel also indicated that if called to testify, Mr. Travis would explain the circumstances as follows (Tr. 117-119):

JUDGE KOUTRAS: So you abandoned the 006-0 section where this miner was operating?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: And that's a change in the status of the mine, isn't it?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: It is also a change in the status of that particular mining machine, is it not?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: It was moved someplace else?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: And on both of those changes in status with both the mine where the coal was being mined to when it was abandoned and the continuous miner being moved someplace else, that miner wasn't abandoned, it was simply rerouted someplace else. That's also a change in status isn't it?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: Both of those circumstances have to be reported on the 70.220, do they not?

MR. CRAFT: According to law.

JUDGE KOUTRAS: Okay. Now, let's say you've got this one. Is it the same type of a thing?

MR. CRAFT: Exactly. If you call Mr. Travis back to the stand he will tell you exactly what he told you before.

JUDGE KOUTRAS: Is that Mr. Travis didn't know that 006-0 section was abandoned, they were not mining coal, he didn't know that the continuous mining machine was being moved someplace else.

MR. CRAFT: Mr. Travis--

JUDGE KOUTRAS: When he finally learned that he picked up the phone and called MSHA. Is that what he's testifying to?

MR. CRAFT: Mr. Travis will tell you that the status while we were starting these two mines and abandoning these two mines we swapped equipment around like a yo-yo.

JUDGE KOUTRAS: He did that.

MR. CRAFT: He would do exactly like you said. When he learned of it he would call MSHA, that's exactly what he did.

JUDGE KOUTRAS: On this particular citation, is this the case?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: He didn't know that this continuous mining machine was being moved out.

MR. CRAFT: He didn't know when. They only ran, I'm sure you have, they ran the first 13 days of September, they didn't run anymore. He didn't know that they wouldn't be running until management told him we're moving it out, abandon the section. We're moving it and it won't be back.

JUDGE KOUTRAS: And you didn't know then you were going to move the 006-0.

MR. CRAFT: He wouldn't have any way of knowing. The health specialist doesn't manage the coal mines. He works, he superintends the mines.

JUDGE KOUTRAS: Well, maybe you ought to give the responsibility of filling out these forms to somebody else other than Mr. Travis.

Testimony and evidence. KENT 83-186.

MSHA's counsel identified exhibits P-5 and P-6 as copies of Citations 2075605 and 2075606, and copies of the MSHA mine status change forms in support of the citations. The parties agreed that Inspector Ridley modified these citations to indicate a "high degree of negligence," and that if called to testify he would confirm that Inspector Lyle made no such negligence findings, and that Mr. Ridley modified the citations on instructions by his supervisor Mr. Dukes (Tr. 140-142).

~280

Exhibit P-7 is a computer print-out of the history of prior citations for respondent's No. 11 Mine, and by agreement of the parties it was made a part of the record (Tr. 142). MSHA's counsel agreed that his case in this docket was being submitted as a "documentary case," and the parties made the following arguments in support of their case (Tr. 143-147):

MR. STEWART: Your Honor, the theory is that the Pyro Mining Company, No. 11 mine, failed to submit a status change subsequent to the ones that are associated with citation 205 which indicates that the mine was abandoned on, I believe, on October 18th; and with respect to citation 606 showing that the mine was abandoned, that the mining unit was abandoned on October 18th. In fact it recites that coal was produced subsequent to those days on numerous shifts, and we should've been notified that it was not in a producing status.

JUDGE KOUTRAS: Okay. Mr. Craft, what say you about these two citations?

MR. CRAFT: Basically, your Honor, when they were abandoned, they were abandoned. They weren't producing 18, 19, 20, 21, 22; and the fact that the negligence wasn't checked till 52 days later. And that they were terminated five minutes, the one in question was terminated, written at 9:10 and terminated at 9:20.

JUDGE KOUTRAS: And the other one was written at 9:30 and terminated at 9:45.

MR. CRAFT: That's right, your Honor.

JUDGE KOUTRAS: And again I take it that Mr. Stewart can you explain why the time frames are so short here? Is it that once the citation was served the operator submitted the report. It says on here, correct status change form was placed in the back and production status was filed. Is that--Now wait a minute--Will be submitted in the shifts.

MR. STEWART: Will be submitted. Yes.

JUDGE KOUTRAS: Have the reports been submitted, do you know?

MR. STEWART: To my mind they have been.

JUDGE KOUTRAS: Okay. And do you dispute the fact that these units were in production as noted on the condition of practice here, Mr. Stewart, Mr. Craft.

MR. CRAFT: Your Honor, I'd like to clarify one point. On these terminations, he wrote the citation on 11/16/82 on 605. Right?

JUDGE KOUTRAS: On what? Yes, okay.

MR. CRAFT: On his termination he says, "the correct status change form placing MMU 011 back in the producing status 11/15." If we would've submitted that form on 11/15, the citation shouldn't have been written on 11/16. He wrote the citation on 11/16 and he terminated it on the same. We submitted in on 11/15. That would've been a case where he could've cited us for as being late.

MR. STEWART: Your Honor, there is no provision for being late. The status says that he didn't submit it within three days of the change of status. The face of the citations indicates that coal was being produced--

MR. CRAFT: But, your Honor--

MR. STEWART:--two weeks prior to November 15th.

MR. CRAFT: The problem is, your Honor, that is he submitted the status change on 11/15, why were we cited on 11/16?

MR. STEWART: Your Honor, it's the same argument that he proves in the subsequent proceeding. That the status change was submitted on October 19th and he went and wasn't cited till November something. I don't think that that goes to whether there was a violation or not.

MR. CRAFT: When Mr. Ridley modified it for high negligence he should've modified the termination point.

JUDGE KOUTRAS: Okay. But do you dispute the fact that these units were in fact in production on the dates stated on the face of these citations?

MR. CRAFT: I don't dispute the facts that they were in production. I contend that they were stand-by units and we were acting under instructions from MSHA.

JUDGE KOUTRAS: On instructions from MSHA to do what?

MR. CRAFT: To submit the form, you know, because of the stand-by units and then put it in that status until we got it plumb out and then abandon it permanently which we did later.

JUDGE KOUTRAS: Okay. Anything further? Do you wish to present any evidence on these?

MR. CRAFT: No, sir.

JUDGE KOUTRAS: On these citations. Do you have anything else Mr. Stewart?

MR. STEWART: No, your Honor.

Findings and Conclusions

Fact of Violations

Section 70.220 states in pertinent part as follows:

(a) If there is a change in the operational status that affects the respirable dust sampling requirements of this part, the operator shall report the change in operational status of the mine, mechanized mining unit, or designated area to the MSHA District Office or to any other MSHA District Office designated by the District Manager. Status changes shall be reported in writing within 3 working days after the status change has occurred. (Emphasis added).

Section 70.220(b) defines each specific "operational status" which is required to be reported for (1) the mine, (2) the mechanized mining unit, or (3) the designated area. These general categories are further reduced to define whether they are "producing," "nonproducing," or "abandoned."

Each of the five citations in these proceedings charge the respondent with failure to timely report the status of certain designated mechanized mining units ("mmu's"). The citations were issued by MSHA Inspector Thomas M. Lyle, and at the time of the hearings in these cases he was unavailable for testimony because he was on disability sick leave. The information on which Mr. Lyle based his citations was furnished by MSHA Inspector Robert Smith. Mr. Smith was not present at the hearings because he was attending an MSHA training class at Beckley, West Virginia.

In each instance noted above, Inspector Lyle issued his citations because the status change forms which were in fact filed by the respondent's representative on October 18, 19, and 25, 1982, reported that the mechanized mining units in question were either "nonproducing" or "abandoned" when in fact MSHA had reason to believe they were operational and producing coal. MSHA's support for its assertion that the units were producing coal came from a search and review of certain company production records apparently volunteered to Inspector Smith, as well as certain MSHA records indicating that dust samples were not filed for the units in question, or that the respondent was out of compliance during certain sampling cycles. In short, MSHA's position seems to be that (1) the mechanized units reported as nonproducing or abandoned were in fact producing, and (2) the respondent here has filed erroneous reports.

Respondent's defense to the violations is based on its assertions that the cited mining units in question were not technically in production, but were somehow "temporarily abandoned" or on "standby" to be used periodically when the need arose. Respondent advanced the argument that the term "nonproducing" means the same as "abandoned," and that it did not report the status changes in question because it did not know for sure whether any particular unit would be permanently abandoned or simply idled while other mine work was being done (Tr. 63, 65).

Respondent's dust technician Dennis Travis, the individual who filed the reports in question, as well as respondent's trial representative William Craft, conceded that the failure to file the required changes within the three-day regulatory period when the sections in question were in fact in production constituted violations of section 70.220 (Tr. 60-66; 92-95; 106-107; 117-119).

From the record in this case, I am convinced that the respondent contested the citations because it believed that MSHA's enforcement office acted arbitrarily when it subjected the citations to the "special assessments" procedures. Respondent's testimony in its defense suggests that Mr. Travis may have been misled into believing that the status reports could be filed when he filed them, and that contrary to MSHA's position, Mr. Travis acted reasonably and in good faith. However, these are mitigating circumstances, and when taken in conjunction with other mitigating circumstances as discussed below, may be considered by me in the assessment of civil penalties for the violations. However, it seems clear that these mitigating circumstances may not serve as an absolute defense to the citations, nor may they serve as a basis for outright dismissal of the citations.

After careful review and consideration of all of the credible testimony and evidence adduced in these proceedings, I conclude and find that the petitioner has established by a preponderance of the evidence that the respondent violated the provisions of mandatory standard 30 CFR 70.220, by failing to accurately report the fact that the status of the cited mechanized mining units had changed. Failure to report such changes within the three-day period provided by the regulatory standard constitutes a violation. Accordingly, the five citations in question are all AFFIRMED.

History of Prior Violations

The history of prior paid assessments for the respondent's No. 11 Mine is reflected in the computer print-out, exhibit P-7 (KENT 83-186). The mine history for respondent's Wheatcroft Mine is shown in exhibit P-2 (KENT 83-187). For the periods April 7 and June 18, 1981, through November 15, 1982, neither mine had ever been cited for failure to comply with the reporting requirements found in section 70.220, and Inspector Ridley confirmed that this is in fact the case (Tr. 128-129).

The computer print-outs reflect that the No. 11 Mine had 12 prior citations for violations of sections 70.207(a) or 208(a), the standards dealing with bimonthly sampling of mechanized mining units and certain designated areas. With the exception of one \$60 assessment, the rest were "single penalty" \$20 assessments. The Wheatcroft Mine was cited for three violations of section 70.207(a), and one violation of section 70.208(a), and all of these were "single penalty" \$20 assessments.

In addition to the above-mentioned citations, the computer print-out reflects ten total prior citations at both mines for violations of the respirable dust standards found in section 70.100. However, since no evidence was adduced as to the facts and circumstances surrounding any of these prior dust citations, I have no way of evaluating whether the mines in question have a dust problem, or whether or not the respondent has failed to attend to these conditions. However, I do note the fact that the 15 dust citations noted above were among a total of 273 citations issued during the period shown on the print-outs. Taken at face value, and considering the size of both mining operations, I cannot conclude that respondent's prior compliance record is such as to warrant any additional increases in the civil penalties which I have assessed for the citations in questions. Further, the petitioner has advanced no credible arguments or presented any evidence to establish anything to the contrary.

Gravity

Although Inspector Lyle did not consider any of the violations to be "significant or substantial," and the special assessment officer found that the gravity of each violation was "nonserious," the "narrative findings" supporting the initial assessments not only took into account the submission of "erroneous status change reports," but specifically took into account "the failure of the operator to take the dust samples required during periods of active mining." Because of this asserted "failure," MSHA's assessment officer concluded that during the period of active mining "excessively dusty conditions were allowed to go undetected" and that this in turn "could have allowed the miners to be continuously exposed to excessive concentrations of respirable dust."

While it is true some of the citations make reference to the fact that the respondent did not submit dust samples for several sampling cycles during the production shifts in question, and that several mining units had been cited for being out of compliance during the year preceding the citations in questions, petitioner presented no credible testimony to establish or support any conclusion that "excessively dusty conditions were allowed to go undetected." Further, the inspector who issued the citations made some rather low gravity findings on the face of all of the citations, and since he did not testify, I reject the petitioner's reliance on speculative second-guessing by its assessment office as stated in the "narrative findings."

It seems clear to me that the reporting requirements of section 70.220, are intended to provide MSHA with "tracking information" so as to insure compliance with the applicable dust standards found in Part 70 of its regulations. Since the use and location of mining equipment at any given time in the mining environment are critical in determining the potential respirable dust levels and exposures for certain critical occupations, MSHA has to be able to track the movement and use of such equipment in order to determine whether its dust standards are being complied with. However, in the instant cases there is no credible testimony or evidence to establish that the failure to accurately report the changes required by the cited standard in fact had a serious impact on miners. Accordingly, I have no basis for finding or concluding that the gravity of the violations is such as to warrant any additional increases in the penalties assessed by me for the citations.

However, given the rationale for requiring such reports, I do find that the citations were serious.

Negligence

During the course of arguments during the hearing, petitioner's counsel suggested that the respondent may have placed itself in a position of reporting certain status changes well after the three-day reporting deadline because it did not want to continue taking certain dust samples during the required sample cycle. In short, counsel implied that the respondent "took the lesser of two evils" because it was attempting to avoid a dust sampling cycle which may have shown the mines to be out of compliance. Respondent's representative vigorously denied any such suggestion.

After scrutiny of the record in this case, I find no credible testimony or evidence to establish that the respondent was attempting to circumvent or avoid the respirable dust requirements found in Part 70 of MSHA's regulations. Further, if the petitioner believed this was the case, it was incumbent on counsel to produce the witnesses to support such a proposition. Since it did not, I have ignored any such suggestions.

In each of the citations originally issued by Inspector Lyle, he made no negligence findings on the face of the citations. That is, he did not check any of the boxes provided in item 20 of the citation form. The boxes contain five degrees of negligence ranging from "none" to "reckless disregard." The record here establishes that the citations were subsequently modified 52 days later to reflect a "high" degree of negligence, and as a result of that the citations were "specially assessed" by MSHA's assessment office, with the resulting civil penalty monetary assessment of \$300 for each citation, totalling \$1500.

Inspector Ridley testified that he modified the citations issued by Mr. Lyle on January 7, 1983, some 52 days after they were issued, and he did so at the specific direction of supervising MSHA Inspector Charles Dukes. Mr. Ridley stated that Mr. Dukes instructed him to modify the citations to show a "high degree of negligence." When asked why Mr. Dukes did not issue the modifications himself, no explanation was forthcoming, and Mr. Ridley confirmed that the modifications were mailed to the respondent. I find Mr. Ridley's assertion that he would have made an independent judgment that the respondent exhibited a high degree of negligence to be self-serving, and they are rejected.

Respondent argued that the manner in which the citations were modified in these proceedings was unfair and arbitrary since they were issued some 52 days after the citations were

~287

issued. Further, respondent asserted that Mr. Ridley's modifications indicating that the respondent's negligence was high were not based on Mr. Ridley's personal evaluation and that Mr. Ridley simply carried out a direct order from his supervisor to amend and modify the citations. As a result of this, respondent asserted that all of the citations were "specially assessed."

MSHA's Inspector Manual Guidelines requires an inspector to complete the appropriate "Inspector's Statement" portion of the citation form to be completed as soon as possible during the same day when the violation is cited. The instructions advise that the inspector should fill in the portion of the statement which relates to gravity and negligence while the facts are fresh in his mind. The instructions also state that failure to adequately document the Inspector's statement will result in assessments that are inaccurate, either too high or too low, and thus ineffective.

Based on all of the testimony and evidence presented at the hearings in these cases it is my opinion that the statement made in MSHA's Narrative Findings for a Special Assessment that "the proposed penalty reflects the results of an objective and fair appraisal of all the facts presented" is simply not so. The sequence of events leading to the issuance of the citations leaves much to be desired. One inspector issued the citations based on record searches made by a second inspector. A third inspector modifies the citations based on direct orders from a fourth inspector who happens to be his direct supervisor. Further, there is no rational explanation as to why the first inspector made no negligence findings as required by MSHA's Inspector's Manual Guidelines (exhibit R-1), nor is there any explanation as to why Mr. Dukes did not modify the citations himself. The record reflects that he is an authorized inspector and has the authority to issue citations.

During the course of oral arguments in this case, respondent's representative suggested that Supervisory Inspector Dukes' role in the modification of the citations, as well as the instructions given to Mr. Travis as to when he should file the reports which resulted in the citations, was somehow out of retaliation for some personal grudge which Mr. Dukes purportedly harbored toward the respondent (Tr. 133-138). Respondent's representative was reminded from the bench that I view such accusations as serious matters, and that any suggestion that any MSHA official may have acted improperly should be directed to that agency.

In view of the foregoing, and on the basis of all of the credible testimony of record in these proceedings, I conclude that the violations resulted from the respondent's failure to take reasonable care to insure that the status forms in question were timely filed. While the record suggests that Mr. Travis may have acted in good faith and may have been misled or mistaken as to what was required of him, I am not convinced that mine management was totally oblivious as to the requirements of the regulations. I find that the citations all resulted from ordinary negligence by the respondent, and this is reflected in the civil penalties which I have assessed for the violations.

Good Faith Compliance

The citations issued by Inspector Lyle reflect that abatement and compliance was achieved the same day the citations issued, and that this was done by the respondent filing "up to date" status change forms to accurately reflect the status of the mining units in question. Accordingly, I find that the violations were rapidly abated prior to the time fixed by Inspector Lyle, and this is reflected in the penalties assessed by me for the violations.

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

Aside from some testimony that certain sections of the mine in question may have had a daily production of 700 tons, and that MSHA's "narrative statement" in support of the proposed assessments makes some nebulous references to the size of the mine and Pyro Mining Company, there is no direct testimony or evidence in this case as the coal production or size of respondent's Wheatcroft Mine. However, based on testimony presented in another proceeding where these parties and counsel were present (Docket KENT 83-101, heard November 2, 1983, in Evansville, Indiana), I conclude and find that the respondent is a fairly large mine operator and that the penalties assessed by me in these proceedings will not adversely affect its ability to continue in business.

Penalty Assessments

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

Docket No. KENT 83-186

Citation No.	Date	30 CFR Section	Assessment
2075605	11/16/82	70.220	\$75
2075606	11/16/82	70.220	\$75

Docket No. KENT 83-187

Citation No.	Date	30 CFR Section	Assessment
2075602	11/16/82	70.220	\$75
2075603	11/16/82	70.220	\$75
2075604	11/16/82	70.220	\$75

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above in the amounts shown for each of the citations, and payment is to be made to the petitioner within thirty (30) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge