

CCASE:  
SOL (MSHA) V. BETHLEHEM MINES  
DDATE:  
19840423  
TTEXT:

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. PENN 83-198  
A.C. No. 36-05065-03507

v.

Windber Mine 78

BETHLEHEM MINES CORP.,  
RESPONDENT

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
R. Henry Moore, Esq., Rose, Schmidt, Dixon  
& Hasley, Pittsburgh, Pennsylvania, for  
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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). The petitioner seeks a penalty assessment of \$650 for an alleged violation of mandatory safety standard 30 CFR 75.1105, as noted in a Section 104(a) notice no. 2015155, served on the respondent on January 18, 1983, by MSHA Inspector Samuel J. Burnatti.

The respondent filed a timely answer in this matter and a hearing was conducted in Johnstown, Pennsylvania, on December 1, 1983.

Issues

The principal issue presented in this proceeding is (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed in this proceeding, and,

~1012

if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation 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.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

#### Stipulations

The parties stipulated to the following (Tr. 6-10):

1. Respondent is a coal mine operator subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
2. The Section 104(a) citation in issue in this case, as well as a subsequently issued Section 104(b) order, were duly served on the respondent's agents at the mine in question by an authorized representative of the petitioner.
3. Respondent's Windber Mine 78 produces coal on an intermittent basis and at the time the citation issued its annual coal production was 417,145 tons. The parent corporation, Bethlehem Mines Corporation had an overall 1982 annual coal production of over seven million tons, but that its 1983 coal production is expected to be significantly reduced.
4. Assuming the fact of violation is established, a reasonable civil penalty assessment will not adversely affect the respondent's ability to continue in business.
5. From approximately 1976 to December 1, 1983, MSHA has issued no prior Section 104(b) Orders at the Winder Mine 78.  
During the two-year period preceding the date of the issuance of the citation in issue in this case, respondent has been assessed for 84 violations, none

of which were for violations of mandatory standard 30 CFR 75.1105.

6. During the period 1976 to December 1, 1983, 37 different MSHA inspectors inspected the Windber Mine 78, during 688 inspection days.

During the period between February 10, 1982, and January 18, 1983, the North Main Section of the Windber Mine 78 was inspected on 16 occasions and no citations or orders were issued for alleged violations of mandatory standard 30 CFR 75.1105, with respect to the battery charging station.

#### Discussion

Citation No. 2015155 states the following condition or practice:

When checked with a smoke cloud the current of air ventilating the North Main charging station was not being coursed directly to return in that the current of air was entering the #3 intake entry and coursing up into the working section.

The inspector fixed the abatement time as 8:00 a.m., January 19, 1983.

On January 19, 1983, at 8:50 a.m. the inspector issued a Section 104(b) Order No. 2015156, in which he stated as follows:

Little or no effort was made to direct the current of air ventilating the North Mains battery charging station to return.

On January 20, 1983, a second MSHA inspector, David B. Alsop, terminated Citation No. 2015155, and the justification for this action states as follows:

The current of air ventilating the North Main charging station was being coursed into the return air course. A 14 foot piece of plastic pipe 3 inches in diameter was extended out into the charging station and extending back to the 4 inch vent pipe in the stopping wall. Also, an 8 foot

piece of deflector canvass was installed on the outby side of the charging station. A hole was left in the 4 inch pipe at the stopping to allow air to enter there and also at the end of the 3 inch pipe.

Petitioner's testimony and evidence

MSHA Inspector Samuel J. Burnatti testified as to his background and experience, which includes service as a ventilation specialist since May 1983. He confirmed that he conducted an inspection at the mine on January 18, 1983, and that he issued the citation in issue for a violation of section 75.1105, exhibit P-1. He also confirmed that at the time of his inspection he was accompanied by respondent's representative Tom Korber, and UMWA representative Rex Morgart (Tr. 17-20).

Mr. Burnatti stated that he issued the citation after observing a battery charging unit partially out in the intake entry, and the current of air that was ventilating the unit was not being coursed to the return. He confirmed this by making four smoke tube readings. He identified exhibit P-7 as a sketch of the area and the charging unit in question. He stated that he drew the sketch, and he explained the notations on the sketch as the locations where he made the smoke tube tests. He stated that four of the tests indicated that the air used to ventilate the unit was going into the intake, but that a test made directly at the wall at the back of the charging station and directly in front of a pipe protruding from the wall, indicated that the air at that location went out through the pipe (Tr. 20-23).

Mr. Burnatti testified that section 75.1105 requires that all ventilation of the battery charging station will be coursed directly to the return, and since his smoke tests indicated that it was not, he issued the citation. He indicated that the intent of the cited section is to insure that any hydrogen gas from the batteries, or any smoke which may result from any equipment fires would be pulled through the pipe in the wall into the return air and out of the mine (Tr. 24).

Mr. Burnatti stated that at the time he observed the cited condition the charging unit was energized with the power on, but that no equipment was in the charging station itself. He indicated that the "three inch vent pipe" notation on his sketch was an error, and that the pipe was a four inch pipe (Tr. 25). He identified exhibit P-5 as a copy of notes which he made, and he explained his notations (Tr. 28-31).

~1015

Mr. Burnatti confirmed that he made several suggestions as to how the violation could be abated, and these included the use of a "fly curtain," and extending the pipe further out from the wall. He also suggested moving the unit from out in the entry to a location along the left side wall of the station, but not in the corner, or moving it across the station to the right side wall. He indicated that moving the unit was not necessary to abate the citation, and he denied that he insisted that it be moved. Although he indicated that he was not totally familiar with the state law requirements for venting the charging unit, he did state that the state inspectors do not want the unit in by the batteries being charged because it creates a hazard (Tr. 31-33). He indicated that the respondent could have moved the unit "into the left side" of the charging station "or moved it across to the right side," and that this would have abated the citation and would have also complied with state law (Tr. 33). He marked these locations with an "x" mark on his sketch (Tr. 35).

Mr. Burnatti stated that he has observed other battery charging units in the mine, and that they are placed "basically in the same area, but they are not outby, the end of this tin or the rib." He stated that the other units he has observed "are in by the crosscut in by the tin" (Tr. 36).

Mr. Burnatti indicated that in the instant case the location of the charging unit was a violation of section 75.1105, because the way it was positioned the intake air was going directly over it, and since "it was slightly outby the edge of the tin, as long as that air is passing over, and going up into the section, I can't see how you could achieve compliance" (Tr. 37). Under the circumstances, the smoke tests he made were "a formality" (Tr. 36).

Mr. Burnatti stated that he initially fixed the abatement time at "roughly twenty-two hours" (Tr. 32), but that when he returned to the area the next day, he observed that a three inch pipe had been inserted into the existing four-inch pipe and extended outby from the wall, and he identified its location on his sketch. He also described an opening or gap between the two pipes, and confirmed that he made another smoke tube test at that time (Tr. 38). He stated that a Kersey battery powered tractor was in the station, and when he took smoke readings directly over the tractor battery and the charging unit itself, he determined that the air exiting the charging station was going back into the intake escapeway (Tr. 39). When he inquired as to why the condition had not been corrected, Mine Foreman Andy Salata advised him that some work had been done on the pipe and that he "assumed it was okay" (Tr. 39).

~1016

Mr. Burnatti confirmed that he issued the Section 104(b) order because he believed that extending the time further would pose a possible fire or ignition hazard, and the Kersey battery was being charged at this time. He also believed that the respondent was not diligent in attempting to meet his initial abatement time because it took little time to install the three-inch pipe, and a smoke test would have indicated where the air was going. He denied that the issuance of the order had a disruptive effect on mining operations, and he believed that general laborers could have been used to achieve timely abatement and work could have continued at the face while the corrections were being made (Tr. 41).

Mr. Burnatti explained his "negligence" and "gravity" findings on the face of his citation as follows (Tr. 41-42):

Q. With reference to the negligence, you have marked low, could you explain to the Court, what made you decide that the negligence with reference to the 104a, was originally low?

A. Well, I felt in this case, here, that due to the fact that you are talking slight movement or low volume of air, to detect it, you almost need a smoke cloud and that's why my--normally, without the use of a smoke cloud, it wouldn't be detected by a foreman, or anybody else, and the smoke clouds are not normally carried with them.

Q. So that's why you considered the negligence low?

A. Yes.

Q. With reference to gravity, would you explain to the Court, why you marked the reasonably likely box, and the lost work days, or restricted duty?

A. I felt that it would be reasonably likely, was the fact that this condition would continue to exist, and the fact that that area was dry, and you have electrical equipment and cable, and the fact that the number three entry is the primary intake escape way, for the north mains section, was my reasons there, then the lost work days, and restricted duty, I felt that possibly, it would be the smoke, I don't feel that it would be fatal or permanent disabling,

~1017

due to the fact that the section does employ another escapeway, an alternate escapeway, and this unit, I think, I believe is only four or five cross cuts outby the working section.

Q. And you have the number 7, indicating the number of persons affected, are those the same seven people you talked about working at the face?

A. Yes.

Mr. Burnatti explained that the location of the charging unit placed it slightly past the tin wall of the charging station into the number 3 entry, and that when he returned to the area the day after he issued the citation the unit had not been moved (Tr. 44). He further explained his negligence" findings as follows (Tr. 45):

JUDGE KOUTRAS: You have never seen a mine operator take a smoke cloud reading to determine whether or not the movement of air over a battery charger station?

THE WITNESS: No, I've never seen it.

JUDGE KOUTRAS: Are you suggesting from that, had they taken one, and detected that the air was not being forced into the return, that they should have alerted them, they should have done something to the battery charging station?

THE WITNESS: Yes, and I feel that the fact, the way that the charging unit itself is positioned, should alert them.

On cross-examination Mr. Burnatti conceded that the sketch of the location of the charging unit which is in his notes, exhibit P-5, seems to place it further within the area of the tin wall than it appears on his sketch made in August 1983, exhibit P-7. The later sketch places the unit further into the entry, and he conceded that the two sketches "are slightly different" (Tr. 50). He indicated that the later sketch represented the location of the unit on both January 18 and 19, 1983 (Tr. 49).

Mr. Burnatti stated that he was certain that the pipe he observed at the time the citation issued on January 18, 1983, was a four inch pipe, rather than a three inch pipe as initially noted (Tr. 51-52). He also indicated that the



~1018

pipe he first observed at the back wall of the charging station, while "slightly" protruding from the wall, was "flush" to the wall. He reiterated that the purpose of that pipe was to vent the battery charging station, which he described as a "three-sided tin enclosure" (Tr. 53-54).

Mr. Burnatti stated that on the day he issued the citation there were three or four miners on the section, but that mining was not taking place on that shift (Tr. 57). He confirmed that he checked the battery charging unit and found nothing wrong with it (Tr. 58), and he explained his concern over a possible fire and gas hazard as follows (Tr. 58-60):

Q. Fire hazard, now did you check the battery charging unit, to see if it was defective in any way?

A. I checked in a general way, yes.

Q. And was it--it was perfectly okay?

A. I wouldn't say it was perfectly, but it was found to be okay.

Q. Did you find anything wrong with it?

A. No.

Q. Now, if this event occurs, well, are you saying that the actual occurrence of a fire, is reasonably likely here?

A. If the condition would stand uncorrected, yes.

Q. Well, the condition that you saw was improper ventilation, how does that cause a fire?

A. That would take your smoke, or your hydrogen gas, out into your intake entry, which in turn travels up into your working section.

Q. Then you are not saying that the occurrence of a fire, or the occurrence of production of hydrogen gas is reasonably likely, you are just saying if--in the event that those occur, the smoke might go up the intake?

A. Yeah, or with the hydrogen gas, you could have an explosion.

Q. But if those events occurred, well, the first day that you were there, there wasn't anything being charged, was there?

A. No, no equipment was being charged.

Q. So without anything being charged, the first day that you were there, there was no hydrogen gas, obviously?

A. No, sir.

Q. And you didn't take any samples to test that first day?

A. No, sir.

Q. The second day that you were there, there was a unit on charge, did you take any samples that day to see if there was hydrogen gas being produced?

A. No, sir.

Q. So you don't know the second day whether or not, there was any being produced at all?

A. No.

Q. In addition to hydrogen--isn't hydrogen sulphite produced by batteries sometimes, when they are being charged?

A. I'm not sure, I just know that they emit hydrogen gas.

Q. And of course, to have an explosion from hydrogen gas, you have to have a source of ignition, do you not?

A. Yes, sir.

Q. And in this case, the source of ignition is the battery charging unit, if it is close to the hydrogen gas, is that correct?

A. Well, it doesn't necessarily have to be close, if that gas is passing over it, and it should short, or the piece of equipment itself, short out, that's your ignition.

~1020

Q. Okay, the first day, there wasn't a piece of equipment according to you, and the charging unit seemed to be in good condition, is that correct?

A. Yes.

Mr. Burnatti confirmed that the respondent made some effort to timely abate the citation, but he believed it was a "little effort." He also confirmed that company officials advised him that they could not move the charging unit "because the state said that they couldn't." He indicated that company officials asked him to speak with the state inspector who was there at the time the order was issued, but that he did not do so (Tr. 62). He also indicated that he did not check the Kersey machine that day to see if there was anything wrong with it (Tr. 63).

Mr. Burnatti stated that he was on the same section on January 14, 1983, prior to the time the citation was issued, but since he was in the face area he "probably" did not visit the cited battery charging station and would not have walked past it (Tr. 65). He confirmed that he did not measure the amount of air going by the charging station in the intake at the time he issued the citation, but he agreed "there was probably a considerable amount of air" present (Tr. 65).

Mr. Burnatti confirmed that after issuing the citation he discussed with Mr. Korber ways to correct the conditions, and these included installing "a solid check up, and enclosing it, a fly check to redirect the air current, or to move the charging unit itself, or enlarge the pipe." He also suggested that the pipe in the wall be extended or enlarged (Tr. 66-67). He explained how the tractors and scoops travel to the charging station, and he confirmed that the sizes of the vent pipes which he noted were approximate, and while he had a ruler in his possession, he did not measure the pipes in question (Tr. 67-71). He explained that the four inch pipe in the wall was about four and a half feet off the floor, and the extended three inch pipe was hung from the ceiling with a wire (Tr. 72).

Mr. Burnatti explained the direction of the air ventilating the charging station, and estimated the dimensions of the station as 16 feet deep and 20 feet wide (Tr. 74-78). He stated that power for the charging unit comes from a trailing cable from the section load center power station located inby in the working section. No batteries are stored in the charging station, and all of the batteries are charged

~1021

while on the equipment. The charging unit is on skids and can be moved by pulling it with a tractor or by hand (Tr. 96-97).

David Alsop, MSHA training specialist, testified that prior to April 1, 1983, he worked on ventilation and respirable dust for eight years. He testified as to his MSHA training and background, and he confirmed that he visited the mine in question on January 19, 1983, to conduct a respirable dust inspection (Tr. 109-111).

Mr. Alsop identified exhibits P-2 and P-4 as copies of the terminations of the citation and order issued by Inspector Burnatti. He explained that since he was at the mine, mine management asked him to look at the work done to abate the order. After checking with his supervisor at MSHA's district office, he did so and abated the citations. He stated that he observed that the respondent had installed a canvas check curtain and extended a three inch pipe some 14 feet to force the air ventilating the battery charging station into the return. He confirmed this by means of a smoke tube, and since compliance was achieved, he terminated the order (Tr. 114-116).

Mr. Alsop identified the 14 foot long extended pipe as a plastic pipe extending from a four inch pipe in the wall. The extended plastic pipe extended out over the top of the charging unit, and when he checked the air current at several locations in the station he found that it was going into the pipe (Tr. 117). He explained the location of the pipe and curtain by marking it on the sketch (Exhibit P-7, Tr. 118).

On cross-examination, Mr. Alsop stated that when he abated the order, a UMWA representative was with him, and he expressed satisfaction over the respondent's abatement efforts (Tr. 120). He terminated the citation because that is what he believed had to be done in order to process the citation through the assessment office (Tr. 124-125).

Rex A. Morgart, testified that he is employed by the respondent and that he serves as the Chairman of the UMWA Mine Safety Committee. He confirmed that he was the walkaround representative who accompanied Mr. Burnatti during his inspection on January 18, 1983. He stated that he could not recall whether a tractor or a scoop was parked in the battery charging station at the time the citation was issued. He also stated that the charging unit was on, but that Mr. Korber tagged it out when Mr. Burnatti advised him that there was a problem (Tr. 256-257).

~1022

Joseph D. Hadden, Jr., Senior Mining Engineer, Ventilation Division, MSHA Pittsburgh Health and Technology Center, testified that he has been employed in the ventilation division for eleven years. He stated that he holds a BS degree in mining from the University of Pittsburgh, and that he has first and second grade mine papers in the State of Pennsylvania, mine foreman papers from the State of West Virginia, and that he is a registered professional engineer in the State of Pennsylvania (Tr. 261).

Mr. Hadden confirmed that he is familiar with the facts and testimony in this case, and that based on his interpretation of section 75.1105, all of the air (100%), used to ventilate the battery charging station is to be directed directly into the return air course (Tr. 262). When asked how that was possible, he offered the following suggested methods (Tr. 262-263):

A. One method would be is what was discussed here earlier today. Moving the stopping wall back so that the crosscut is deeper so, that this turbulent zone would be further removed from where the equipment would be at.

Another method would be to increase the size of the pipe, the vent pipe, so that it would increase the air quantity that was flowing in the crosscut into the return.

A third possibility would be to enclose the front of the charging station, with a door. And, through that door have a small opening. It would act as a regulator, to allow a measured quantity of air to flow into the enclosure and then out the vent pipe and into the return.

Q. And, upon what do you base those ideas or that criteria? Has that been tested by MSHA, or has that ever been done anywhere else?

A. The third idea, there were a series of tests run eight or nine years ago, and there is publication out on it. Called, "Controlling smoke from a fire-proof structure underground." And, this was the basis of those tests.

So, if a fire did develop, say, in the battery charging station, the fire or combustion couldn't enter the intake air stream where it would be transported up to the face.

~1023

On cross-examination, Mr. Hadden further explained his recommendations for achieving compliance with his citation (Tr. 263-272; 275-280).

#### Respondent's testimony and evidence

Thomas F. Korber, respondent's shift mine foreman, testified as to his background and experience, and he confirmed that he accompanied Inspector Burnatti during his inspection of January 18, 1983. After examining Mr. Burnatti's sketch, exhibit P-7, he stated that the cited charging unit was located "right at the corner" of the charging station tin wall and that it did not extend beyond that point. He also indicated that a three inch pipe which extended from the station wall, over and across the belt, and into the return, was a "normal setup" for a battery charging station at the mine. The only difference from other mine charging stations was the fact that other stations were deeper (Tr. 129-131).

Mr. Korber stated that when he first went to the charging station area on January 18, 1983, a Kersey tractor or scoop was being charged, but coal was not being produced that day. Two men were on the section, and they were bolting (Tr. 133). Mr. Korber stated that when he saw that Inspector Burnatti had questioned the charger unit, he pulled the power from the section power center and tagged out the charging unit plug so that it would not be energized (Tr. 134). However, he did not remove the equipment which was being charged.

Mr. Korber testified that when Inspector Burnatti tested the air with his smoke tube, it was not going out of the pipe in the wall very well, and there was "very little suction." Mr. Korber checked and found that one of the pipe joints was loose, and after putting it back together the air was "drawing better at that point," but Mr. Burnatti was not satisfied since he insisted that all of the air had to be vented through the pipe (Tr. 135).

Mr. Korber stated that in the past most MSHA inspectors did not use smoke tubes, and they simply put their hand over the pipe to determine if there was any suction. If suction was present, they never questioned the ventilation. He stated that a three-inch pipe was at the wall, and he told Mr. Burnatti he would install a larger one to induce better suction (Tr. 136).

Mr. Korber stated that after the citation issued he contacted his supervisors Andy Salata and Bobby Breck, and they advised him not to move the charging unit "because

~1024

we would have trouble with the state." Prior MSHA inspectors who looked at the mine charging stations "out where it was located here" never advised him that he was in violation of the law (Tr. 138).

Mr. Korber stated that his boss instructed him to get material so that the next shift could remove the three inch pipe from the wall and install a four inch pipe. He returned to the charger unit location the next day with Mr. Burnatti and the power plug was still out, but the tractor or scoop was still parked at the charger. Mr. Korber indicated that Mr. Burnatti was upset because the charger had not been moved "inside" and that he indicated that "we do very little to show good faith to abate his violation" (Tr. 139). Mr. Burnatti informed him that he wanted the charger moved in because he was still going to take his smoke test over the charger, the unit, and the batteries. Mr. Korber was of the opinion that the air flow on the next day improved with the installation of the larger pipe (Tr. 140).

Mr. Korber stated that it was difficult to see where the smoke was going when the tube was broken because of air swirling caused by turbulence. The fourteen foot piece of pipe was installed after Mr. Burnatti left on the day after the citation issued (Tr. 141). However, Mr. Korber was not present when Mr. Alsop abated the violation (Tr. 142). He explained his actions the day after the citation issued as follows (Tr. 142-143):

Q. Now, you weren't there when the actual, when Mr. Alsop came in to abate the violation, were you?

A. No.

Q. What was done to abate it, as far as you know?

A. After Mr. Burnatti left, myself and Mr. Salata discussed what we would do. We saw, in order to, so that we could use that piece of equipment that was being charged, which it wasn't being charged then because, I had the power off. But, so that we could get it out of there and start using it again, and start charging pieces of equipment again, we decided, you know, we better put that fourteen foot extension on there to satisfy the federal. So, that's, and then we put a check across, partially across the intake there.

Q. As it is shown on P-7?

A. Yes.

Q. Now, just to clarify things. The second day, when you went in there the Kersey, or the tractor, or the scoop was still there, was it charging?

A. Not the second day, no.

Q. You said you tagged it out, or put a piece of paper, with your name on it?

A. Yes.

Q. When you unplugged it, what was your intention by doing that?

A. I saw that we was going to have a problem, you know, with the federal, and I didn't want to, anything to be disturbed there, so I took the power off of it. I figured the power better be off of it, and stay off of it until we settled this dispute here, and you know, I told everybody not to bake the tractor, or the scoop out of that charging station, just leave everything alone.

Q. When you say you told everybody, who did you tell?

A. Well, my tag on the plug, nobody could put it back in. It had my name on it so I had to remove it. But, I told the other shifts, the foreman on the other shift, and then there would be no question about it.

On cross-examination, Mr. Korber described the battery charging station tin walls as follows (Tr. 143-144):

Q. Mr. Korber, with reference to the tin wall that was in the battery charging station, did that tin wall extend out into the crosscut, out into the intake entry?

A. No.

Q. Was it flush with the rib, I mean, did it end exactly where the rib ended?



A. It was, it come out, the whole way out the crosscut, it just made somewhat of a curve. Not clear out into the intake entry, no.

Q. But, it did not stop at the rib line? The tin wall?

A. It come out, more or less, right beside the rib line, it just made a curve, it just, the last piece of tin, what I'm saying, was just bent to make the curve.

Q. And, where did the charging unit end? Did it follow that curve?

A. It was right at the end of the tin?

Q. Where the tin ends, when you say the end of the tin, do you mean the curve?

A. Right at the curve piece, right at the curve piece.

Q. Where it started to curve?

A. Um-hmm.

Mr. Korber stated that after the four inch pipe was installed he did not test the air ventilating the charging station, but he believed that the next shift did. However, he did not know whether records were made of the tests, and he was not aware of the test results. He indicated that one of the shift foremen told him that the larger pipe was drawing out more of the air (Tr. 145-147).

Mr. Korber confirmed that no one moved the charger unit to ascertain whether moving it would take care of the problem (Tr. 154). In response to further questions, Mr. Korber testified as follows (Tr. 154-158):

JUDGE KOUTRAS: So, why didn't, on an experimental basis, was it ever suggested to anyone, "Hey, let's move it in and see if it works?" Because, if you moved it in and it didn't work, no one did that did they?

THE WITNESS: No.

JUDGE KOUTRAS: No one actually moved this unit back to see whether that would take care of the problem?

THE WITNESS: No, sir. Right.

JUDGE KOUTRAS: Okay. And, the reason you didn't is because you were afraid that you were going to run afoul the state people, right?

THE WITNESS: Yes.

JUDGE KOUTRAS: You indicated earlier that on prior inspections, when other MSHA inspectors were in there, all they did was go up and put their hand on the pipe to see if there was suction, that satisfied them?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Mr. Burnatti was the only one that went in there and used a smoke tube?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So, as far as I know, the first inspectors that went in there, and put their hand against suction, didn't know whether that air that was ventilating, whatever the heck it was ventilating, and it actually went out that return, did they?

THE WITNESS: Not in the sense of looking at smoke, no. But, also, I'm not saying that they didn't check. They did check both sides of the pipe.

JUDGE KOUTRAS: My point is this, if there's a scoop, or a piece of equipment in that area, being charged, and an inspector walks in there, sees two batteries being charged by this very same unit, and he walks up and puts his hand against that pipe that's on that wall, and feels that there is some suction there, are you suggesting to me, that in that situation you won't get a citation? That inspector is perfectly content that the air is being ventilated in that?

THE WITNESS: They were.

JUDGE KOUTRAS: That's what happened?

THE WITNESS: They were, yes, sir. I went with many of them, and yes, they did. That's exactly what they did.

JUDGE KOUTRAS: That's exactly what they do. But, this man that came in there to inspect, used something else, he used a smoke tube?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And, he found that it wasn't going through that pipe, all of it wasn't going through?

THE WITNESS: Not enough to suit him, yes.

JUDGE KOUTRAS: To suit him. I could care less whether it suits him or not. I'm concerned whether it suits the--

THE WITNESS: No, but, what I'm saying is that the other inspectors that came into the mine, and I accompanied many of them, it suited them the way it was.

JUDGE KOUTRAS: What, in your opinion, is the proper way to check to see whether or not air is going through the return? Put your hand against the pipe, or to break smoke tubes?

THE WITNESS: We've never broke any smoke tubes, no.

JUDGE KOUTRAS: I didn't ask you that. What do you think is the proper way to determine?

THE WITNESS: Well, I am saying, my proper way, if I had a three or four inch pipe there, and it wasn't broken anywhere, and it was drawing, yes, that would satisfy me.

JUDGE KOUTRAS: That would satisfy you?

THE WITNESS: Yes.

With regard to Mr. Burnatti's smoke tube tests, Mr. Korber stated as follows (Tr. 162-164):

JUDGE KOUTRAS: When he tested it, he said that he tested it in five different places. You heard his testimony?

THE WITNESS: Yes.

JUDGE KOUTRAS: He broke five smoke tubes?

THE WITNESS: That's what he says, yes.

JUDGE KOUTRAS: On the 18th?

THE WITNESS: Yes.

JUDGE KOUTRAS: Do you question that? Did he break five?

THE WITNESS: I wouldn't say five. He broke smoke tubes.

JUDGE KOUTRAS: He broke smoke tubes. Did he break some over the batteries that were on the scoop?

THE WITNESS: Yes.

JUDGE KOUTRAS: And, where did the smoke go?

THE WITNESS: When he broke the smoke tube over the batteries on the scoop, some smoke would go out the pipe, some would swirl around and it was hard to say where it was going.

JUDGE KOUTRAS: This was visually?

THE WITNESS: Yes. It was, you have an amount of turbulence in that crosscut where your charger is, any charger is, and it's hard to say where the smoke goes.

JUDGE KOUTRAS: Was there turbulence over the batteries?

THE WITNESS: Yes.

JUDGE KOUTRAS: Why was there turbulence over the batteries?

THE WITNESS: That's about halfway in the crosscut.

JUDGE KOUTRAS: So, the batteries--

THE WITNESS: Back, way back against the wall you won't have turbulence, no.

And, at Tr. 166-168:

THE WITNESS: I'm telling you, the way it swirls, some is going to swirl around and start going out the pipe, and some is going to swirl around and go down the intake.

JUDGE KOUTRAS: The same thing would apply to the battery charging unit, wouldn't it?

THE WITNESS: Yes.

JUDGE KOUTRAS: It will swirl. Some will go one way, and some will go the other?

THE WITNESS: On the charging unit?

JUDGE KOUTRAS: Right.

THE WITNESS: Most of it would swirl around and go down the intake because, it's further out.

JUDGE KOUTRAS: None of it would go in the return?

THE WITNESS: I'd say, very little.

JUDGE KOUTRAS: Okay. Now, it's stated, it says that air currents used to ventilate that the assembly requires you to ventilate the batteries and the battery charging unit, and it says it has to go to the return. So, would you agree that in that situation with the swirling going down the entry, none of it goes to the return?

THE WITNESS: Just over the batteries.

JUDGE KOUTRAS: Over the charging unit?

THE WITNESS: Over the charging unit, yes. Very little would go to the return.

JUDGE KOUTRAS: Very little would go to the return, right?

THE WITNESS: Yes.

JUDGE KOUTRAS: It would be a violation, wouldn't it?

THE WITNESS: According to that day, I would say, yes.

JUDGE KOUTRAS: Why was he insistent that you move that unit, do you know?

THE WITNESS: Well, because when he was breaking his smoke tube over top of it, most of the smoke was going down the intake.

JUDGE KOUTRAS: So, he assumed that if you moved the unit, and then he broke his tube, most of it would go through the return, is that a fair assumption?

THE WITNESS: I would say that's what he assumed.

JUDGE KOUTRAS: But, nobody did that to see if he was right or wrong?

THE WITNESS: No, we didn't.

JUDGE KOUTRAS: Wouldn't that be a logical step for you to take, and if he was proved right then you would have the state people on your hands, right?

THE WITNESS: Yes.

JUDGE KOUTRAS: So what? Now, you've got the federal people on your hands. So, who are you going to pacify?

THE WITNESS: Yeah but, then your just playing a game, when the state comes you just pull it back out, and when the federal comes you just push it back in.

Andrew Salata, mine foreman, respondent's mine 78, testified as to his background and experience, including the preparation of mine ventilation plans (Tr. 199-201). Mr. Salata stated that he first learned about the citation on the afternoon of January 18, 1983, when Mr. Korber informed him that Inspector Burnatti wanted the charging unit moved. The state inspector was at the mine that day, and Mr. Salata indicated that he discussed the matter with him "a little bit" (Tr. 202). Mr. Salata informed Mr. Korber that the charger couldn't be moved because "I can't violate the state law" (Tr. 201).

Mr. Salata confirmed that he did not discuss the violation with Mr. Burnatti on January 18, but the next day he met with him at the charging station and Mr. Burnatti informed him that he was not satisfied with the amount of air going into the return.

~1032

Mr. Salata explained his problems with the state mine inspector's as follows (Tr. 205-206):

Q. Now, to your knowledge, had any other inspector required Mine 78 to move it's charger further into the crosscut?

A. At first, we kept our chargers right back against the stopping. In 1978, the state come out and they said they do not want the chargers there because, there's a good potential for an ignition.

They say, "you take your charger, move it out into the intake air. You charge your batteries in your regular charging station."

We had it sitting out there for, approximately, two and a half to three years. This was the way that it was always done.

Then it come around, about three years ago, they said you just move them, just inby, move them just inby.

JUDGE KOUTRAS: This was the state?

THE WITNESS: The state and the federal all agreed to this, they agreed. They'd walk by it constantly. And, we've never had a problem with the charging stations.

Now, again, they want to move it in. This is why I talked with Frank Bahopin that day. And, he says, "You can't move them in any. The closer you put them the closer to the ignition source you're going to be."

Also, I mentioned the pipe, he definitely would not buy the pipe because, they have a flier out on that since 1978.

I can't, you suggested in making a choice, if I made a chance, if the air would have passed over, we'd have kept it going, if I'd had an ignition, I'm just as liable with the state as I am with the federal.

Referring to Inspector Burnatti's sketch, exhibit P-7, Mr. Salata described the air flow and ventilation system through the charging station, and he stated that since the

~1033

air is swirling it would be impossible to test to see what amount is going in one direction and what amount is going in the other (Tr. 209).

On cross-examination, Mr. Salata indicated that a larger sized pipe against the wall of the charging station would remove more air into the return, and that where possible, charging stations are located directly against the return. He conceded that the state now allows him to move the charging unit "a little bit more inby," and that this occurred "two weeks later." He also indicated that Mr. Burnatti only suggested that the charging unit be moved, and he did not say that he had to move it in order to abate the citation (Tr. 215-216).

Steven P. Sanders, respondent's chief mine electrician, testified as to his mine experience and training. He confirmed that he was familiar with the battery charging station, and he explained how the charging unit functions. He confirmed that it was an A.C. unit, and he stated that the type of charging units used in the mine produce very little gas. As compared to a D.C. unit, the A.C. unit produces less heat and the units are provided with several short circuit protective devices, including fusing devices (Tr. 216-223). He also confirmed that the charging units are inspected weekly, and that his records indicate that the unit in question was last inspected January 3 and 12, 1983, prior to the issuance of the citation (Tr. 223). The inspections did not reveal any dangerous conditions on the units (Tr. 223). None of the units at the mine have ever caught fire, and none "never even get hot" (Tr. 224).

On cross-examination, Mr. Sanders stated that while he didn't open the charging unit in question on January 18, 1983, he conducted a visual inspection and detected no bare or frayed edges, and "everything was restrained properly." He did not recall a piece of equipment being charged that day (Tr. 224-225).

Charles F. Ream testified that he was the second shift mine foreman on the day the citation was issued, and he stated his prior mine experience (Tr. 225-227). Mr. Ream described the work that was performed to abate the citation, and it included the dropping of electrical trolley wires, the use of 120 feet of pipe, the knocking out of a six-inch solid block wall with a sledge hammer, and sealing it with cement. He indicated that two men worked four hours to do the work, and that the entire job took eight man hours to complete (Tr. 228-229). After the four inch pipe was installed, he



~1034

tested the air with smoke tubes, and he did so over the batteries of the tractor or scoop which was at the charging station, as well as over the charger itself, and he indicated a 60% improvement in the air flow over what it was with the three inch pipe (Tr. 230).

On cross-examination, Mr. Ream conceded that he did not take a smoke test directly over the battery charging unit, but took it inside the charging station "up towards the wall," about ten feet from the wall. He confirmed that he also used a smoke tube to test the air before he took the three inch pipe out, and he did so to determine how much of an improvement he would have with the four inch pipe (Tr. 232). He confirmed that he was not present on January 18 or 19, 1983, when Mr. Burnatti was at the mine (Tr. 234).

Robert DuBreucq, mine superintendent, testified as to his background and experience, and he confirmed that he and the mine foreman drafted and approved the mine ventilation plan (Tr. 2340-236).

Mr. DuBreucq stated that after he was informed that the citation was issued, he instructed Mr. Ream to install a larger pipe, and he confirmed that charging stations at the mine were set up identically to the one cited by Mr. Burnatti. Mr. DuBreucq confirmed that he called state inspector Frank Behopin on the evening of January 18, 1983, and he came to the mine the next day to speak to Mr. Burnatti, but missed him (Tr. 238).

Mr. DuBreucq identified exhibit R-1 as a State of Pennsylvania memorandum dated June 13, 1978, and he explained the interpretation concerning the location of charging units as follows (Tr. 239-241):

Q. Do you know who Walter J. Vicinelly is?

A. Director of Deep Mine Safety.

Q. That's for the State of Pennsylvania?

A. Yes.

Q. This memo is dated June 13, 1978?

A. Yes.

Q. Now, I direct your attention to the second page of this. Well, prior to going any further, I would move for Respondent's Exhibit 1 into evidence. I think the relevance has been shown that it was handed to him by the state inspector as a body, and the interpretation of state law.

Q. On the second page of this, the paragraph that is underlined here, "accordingly, whenever the charging battery in the chargers are ventilated by the same split of air, the air must pass first over the charger, and then over the batteries before entering the return air." Now, that document doesn't say that they have to be as far apart as possible, or that they have to be at the beginning, at the entrance to the crosscut. Did Mr. Behopin discuss that with you at all, as to--

A. No, his interpretation of this, and the prior, according to what I'm told anyway, the prior state inspector of '78, their interpretation was, you put the charger out on the corner, the batteries as far back the wall as possible. The more you maximize the distance between the two, the less likely you ever have a problem of the charger igniting gasses off the battery.

Q. Did Mr. Behopin, on January 19th, tell you what position he would take on the moving of the charging unit?

A. He said he didn't want it moved. And, that he would talk to the federal people about it.

Q. Did Mr. Behopin say that he would take any action if you did move?

A. He said it was the old cop routine again, you know, he don't want it moved and that's it. But, he will, you know, Frank is a reasonable man, and Frank said he would talk to the federal and get this resolved, you know.

Q. Do you know whether he talked to Mr. Burnatti that day?

A. He talked to Burnatti, and other people, what they said, they never told me.

Q. Now, did there come a time, sometime later, when Mr. Behopin said that he would permit you to move the chargers further into the crosscut?

A. This issue here went on for at least two weeks. And, then again, there was conversation between the state and MSHA, at least what I'm told,

I don't know directly of them, but, there was conversations on this daggone thing that we're on, and about three weeks later, the issue disappeared. That's how it is. It isn't that we radically moved the charger anywhere, or radically did anything. The issue simply disappeared.

Mr. DuBreucq stated that prior to Mr. Burnatti's inspection, other MSHA inspectors would check the vent pipe to determine whether the air was going through the pipe. This was done by breaking a smoke tube near the pipe, and no one expected all of the air in the station to vent through that pipe (Tr. 245).

Inspector Burnatti was recalled by the bench, and he stated that on January 18, 1983, his notes reflect that no equipment was in the charging station, but that at the time the order issued the next day, a Kersey tractor was there (Tr. 285). He also stated that he was not present when the respondent was abating the condition, and he explained as follows (Tr. 287-289):

JUDGE KOUTRAS: Right. So, as far as you were concerned, since they still didn't have the--and the broke some additional smoke tubes, and you found that they were still having the same problem, as far as you were concerned they hadn't achieved compliance?

THE WITNESS: No.

JUDGE KOUTRAS: And, based on what you saw, you didn't think that they did very much work there?

THE WITNESS: Um-hmm. Little or none.

JUDGE KOUTRAS: Little or none? Had Mr. Ream told you, or had you inquired of Mr. Ream, and he told you that they did four hours, that they dropped the trolley wire, they did all these things, and he testified too, would your position be different?

THE WITNESS: No.

JUDGE KOUTRAS: Why?

THE WITNESS: Because, I don't feel that's an honest effort to correct the condition.

JUDGE KOUTRAS: Well, what else can they do, as of that point?

THE WITNESS: Well, for one thing, I made suggestions, you know, I don't want to keep harping on this charging unit but, as long as you continue to let that unit sit there, okay? There is no way in hell, excuse the expression, that you're going to gain compliance.

JUDGE KOUTRAS: Well, that's the whole point though. So, you did stress the moving of the unit?

THE WITNESS: Oh, yes.

JUDGE KOUTRAS: And, that's why I asked them why they didn't do it to experiment.

THE WITNESS: I also suggested deflective canvas, building a wall, they suggested building a wall across the entire intake entry, which is ridiculous. But, again, if they want to do it that way that's their prerogative.

JUDGE KOUTRAS: All right. You heard the testimony about the swirling. That due to the location of this place, some of the air is going to go down the entry, and all of it is not going to go through the exhaust pipe, that's true isn't it? And, that's why you issued the citation?

THE WITNESS: Yes. Like he testified, like Mr. Hadden testified, that's standard, that's true.

JUDGE KOUTRAS: And, your interpretation is that a hundred percent, that every bit of air that goes in is used to ventilate the battery charging station, or the batteries, has to go out that?

THE WITNESS: Yes, that's my training, CMI training, that's what it was. The air current ventilating the charging station must be directed to the return, and that's the air current. If it's out there in that turbulence, I can't help that. That's the air current.

JUDGE KOUTRAS: So, your theory was that that was part of the problem stationed where it was, and had they moved it further in it wouldn't be sitting there, is that right?

THE WITNESS: That's true. Possibly.

JUDGE KOUTRAS: Would that cause them a logistical problem?

THE WITNESS: I don't know what you mean.

JUDGE KOUTRAS: What I'm saying is, is the position of the battery charging unit, why does the operator insist on having it there?

THE WITNESS: Well, their reasoning was due to the state.

JUDGE KOUTRAS: Forget the state. Does it make it easier, or more difficult to charge a piece of equipment? Does it make any difference?

THE WITNESS: It doesn't matter. The piece of equipment comes with so many lengths of cable, to reach the machine, so, it can be positioned anywhere. And, does it matter? No, I'd say it's no matter of a convenience for anybody.

#### Findings and Conclusions

In this case the issue is whether or not the respondent violated the provisions of cited mandatory standard 30 C.F.R. 75.1105, which states as follows:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

The petitioner's proposal for assessment of civil penalty seeks a penalty assessment of \$650 for the violation cited in the section 104(a) Citation No. 2015155, issued by Inspector Burnatti on January 18, 1983. The subsequent section 104(b) Order issued by Inspector Burnatti when he found that the cited

~1039

conditions were not abated to his satisfaction is not in issue in this civil penalty case, and the petitioner does not include that Order as part of its proposal for assessment of civil penalty. However, while the question of timely abatement and whether or not the inspector abused his discretion in not extending the abatement time is not directly at issue in this case, I have taken respondent's abatement efforts into consideration in considering the element of good faith compliance found in section 110(i) of the Act. In short, I have considered this question in the assessment levied by me for the violation in question.

#### Fact of violation

In defense of the citation, the respondent argues that since the three-inch pipe was drawing some air to the return on January 18, there was no violation. Respondent asserts that MSHA's interpretation of the second sentence of section 75.1105, that all air currents used to ventilate areas enclosing a battery charging station shall be coursed into the return is a "new" interpretation and contrary to its previous policy which did not require all air currents to be vented into the return. According to the respondent, this prior policy was consistent with the evidence at hearing that it was not possible to course all air currents to the return.

Respondent's defense is rejected. I cannot conclude from the record here that the respondent has established that MSHA's policy was that all air need not be coursed into the return. Simply because other inspectors prior to Mr. Burnatti's inspection saw fit not to utilize smoke tubes to determine where the air was being coursed is insufficient to establish any such asserted policy. To the contrary, I find the testimony of MSHA's witnesses on this issue to be credible, and I accept their interpretation of the standard in this case. The designated language of section 75.1105, requires air currents used to ventilate such battery charging areas to be coursed directly into the return. The language seems clear to me, and respondent has not established that the intent of the cited standard was to permit less than all of the air to be coursed into the return.

Section 75.1105 requires that air used to ventilate battery charging stations be directed into the return. The standard is clear on its face. It does not state that only "some of the air" or "most of the air" must be coursed into the return. It simply states "air." The inspector's interpretation is that all such air must be coursed into the return, and I accept this

~1040

as a logical interpretation and application of the standard. Respondent concedes that all of the air was not coursed into the return. Further, petitioner has established a prima facie case by a preponderance of the credible testimony presented to support the citation, and the respondent has not rebutted this showing by the petitioner. Accordingly, the citation IS AFFIRMED.

Although I recognize the respondent's plight in attempting to pacify certain State mining inspectors who insisted that the cited battery charging unit not be moved from the location where the inspector found it, this fact does not excuse the citation, nor may it serve as an absolute defense to the citation, nor may it serve as an absolute defense to the citation. However, I have considered this fact as mitigating the respondent's culpability, and I have taken it into consideration in negligence findings.

#### Good Faith Compliance

In their posthearing briefs, the parties include the question of the validity of a section 104(c) Order of Withdrawal, No. 2015156, issued by Inspector Burnatti on January 19, 1983, after he found that "little or no effort" was made to abate the conditions which prompted him to issue his section 104(a) citation, No. 2015155, on January 18, 1983.

Although the issue of "good faith" compliance is relevant in this civil penalty case, the validity of the order is not an issue here. The question presented is whether or not the respondent violated section 75.1105, as alleged in the section 104(a) citation, No. 2015155, issued by Inspector Burnatti on January 18, 1983. MSHA's proposal for assessment of civil penalty is limited to that citation, and does not include the order. In short, I conclude that MSHA is bound by its pleadings, and may not now seek to expand on its civil penalty proposal by adding the order.

In its posthearing brief, MSHA argues that the respondent exhibited "bad faith" in abating the citation. MSHA's conclusion in this regard is based on the fact that Inspector Burnatti issued a section 104(b) withdrawal order. Further, MSHA asserts that the inspector was never informed of respondent's abatement efforts, nor was he informed concerning how many hours were spent on the abatement work, or whether a work stoppage had to occur in order to work on the abatement.

~1041

After observing the witnesses during the hearing, and upon close examination of all of the testimony in this case, I am convinced that Inspector Burnatti was chagrined because the respondent failed to move the cited unit to another location, and that the respondent initially resisted other recommendations which he purportedly suggested. For its part, the respondent resisted moving the unit because to do so would violate state law. MSHA concedes that the state law "is in conflict" with the Federal standards. Viewed in this context, I cannot conclude that on the facts of this case, respondent made "little or no effort" to abate the cited conditions.

While it may be true that the respondent should have conducted more extensive smoke tests once its initial abatement efforts were completed to insure that all of the air coursing over the unit was going out of the return, the record here does support a finding that the respondent did in fact perform work to achieve compliance.

The record here indicates that the respondent had never previously been issued a section 104(b) order for failure to abate any cited conditions in its mine, and this includes a period of some seven years during which the mine was inspected. I am convinced that Inspector Burnatti honestly believed that simply moving the unit would have achieved compliance. However, when this move met with resistance, he obviously believed that "little or no effort" was made by the respondent to achieve abatement. However, faced with an obvious conflict with the state mining inspectors, I cannot conclude that the respondent's reluctance to initially move the unit to another location constitutes "little or no effort" to abate.

Shift foreman Korber confirmed that as soon as the battery charging unit was cited, he pulled the power and tagged the unit power plug to prevent anyone from using it until the cited conditions could be corrected. Mr. Korber then immediately his supervisors who instructed him to obtain the necessary materials to abate the conditions. A new ventilation pipe was installed, and a check curtain was installed in an attempt to correct the cited ventilation problem.

Shift foreman Ream described the work which was performed in correcting the cited conditions, and this work included the use of 120 feet of pipe, the knocking out and re-sealing of a cinder block wall, and the re-arranging of certain wiring. He testified that it took two men four hours to do this work.



~1042

MSHA Inspector Alsop abated the citation on January 20, 1983. Since he did, I assume he was satisfied with the respondent's abatement efforts, and he confirmed that the UMWA walkaround representative expressed satisfaction over the respondent's abatement efforts.

In view of the foregoing, I conclude and find that the violation was abated in good faith, and this is reflected in the civil penalty assessed by me in this case.

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

Based on the stipulations by the parties, I conclude that the respondent, as a corporate operator, is a large mine operator. However, its Winber Mine 78 operation is a small-to-medium sized operation.

The parties have stipulated that a reasonable penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business. Since I believe that the penalty assessed by me for the violation in question is reasonable, I conclude and find that it will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties have stipulated to the respondent's prior history of violations, and this is recited at pages 2-3 of this decision. For an operation of its size, I cannot conclude that this compliance history warrants any additional increase in the civil penalty assessed by me for the violation in question.

Negligence

Inspector Burnatti conceded that he found "low negligence" in connection with the section 104(a) citation, and he explains his reasons for this finding (Tr. 41). Respondent has established through credible evidence and testimony, which is not rebutted by the petitioner, that it located the battery charger in question where it did because a State inspector insisted that it not be moved from that location. I have considered this fact in mitigation of the penalty assessed for the violation. However, I believe that with a little more diligence, including the use of smoke tubes as a preventive measure, as well as some experimentation concerning the possible relocation of the battery charging unit, the respondent may have avoided the MSHA

~1043

citation. Accordingly, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this supports a finding of ordinary negligence.

#### Gravity

Inspector Burnatti testified that when he first observed the battery charging unit, he visually inspected it and found nothing defective. He confirmed that since no equipment was being charged at that time, no hydrogen gas was present. He made no tests for the presence of any such gas, and this was true even when he went back the next day and found a piece of equipment being charged. His concern was that in the event of a fire, the ventilation which caused the air going over the charging unit to go down the intake rather than the return would carry smoke to the working section. He then indicated that even if this were to occur, no "fatal or permanent disabling" injuries would result because the section had a second alternative escapeway available for the miners working in the section.

Respondent's chief electrician Sanders testified that he visually inspected the battery charging unit the day the citation issued and found nothing wrong with it. He also confirmed that he had last inspected that unit on January 3, and 12, 1983, and found it to be in proper operating condition. He explained the operation of the unit, and detailed the functioning of the protective fusing and short circuit fuses and other devices which are engineered to preclude overheating and fires. UMWA walkaround representative Morgatt, who also serves as the chairman of the mine safety committee, testified that he was with the inspector when the citation issued, and that shift foreman Korber immediately tagged out the unit when informed of the citation. Mr. Morgatt could not recall whether any equipment was being charged at that time, and he did not indicate that he observed anything wrong with the unit itself.

After careful consideration of all of the evidence adduced in this case, I conclude and find that the violation was serious. In the event of any arcing or sparking during the battery re-charging procedure, it seems clear to me that any resulting fire or short circuiting would present the possibility of contaminated air being coursed into the working faces.

#### Significant and Substantial

I conclude and find that the inspector's finding that the violation was significant and substantial should be affirmed. Although I have considered the respondent's arguments concerning

~1044

the positioning of the battery charging unit in question, the fact is that any fire or other incident resulting from all of the air not being venting into the return would jeopardize the health and safety of miners on the section and would reasonably likely result in a hazard to the miners. Accordingly, the inspector's finding in this regard IS AFFIRMED.

#### Penalty Assessment

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 a civil penalty assessment of \$350 is appropriate for the violation in question.

#### Order

The respondent IS ORDERED to pay a civil penalty assessment of \$350 within thirty (30) days of the date of this decision, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras  
Administrative Law Judge