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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. PENN 83-121 A.C. No. 36-00970-03516
v.	
U.S. STEEL MINING CO., INC., RESPONDENT	Docket No. PENN 83-128 A.C. No. 36-00970-03517 Docket No. PENN 83-136 A.C. No. 36-00970-03519 Maple Creek No. 1 Mine Docket No. PENN 83-129 A.C. No. 36-03425-03522 Docket No. PENN 83-137 A.C. No. 36-03425-03524 Maple Creek No. 2 Mine

DECISION

Appearances: Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., U.S. Steel Mining Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals 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 12 alleged violations of certain mandatory safety standards promulgated pursuant to the Act.

Respondent contested the proposed civil penalties, and pursuant to notice duly served on the parties, hearings were held in Uniontown, Pennsylvania. The petitioner filed post-hearing briefs, and the arguments and proposed findings and conclusions recited therein have been considered by me in the course of these decisions. Respondent opted not to file any briefs.

Issues

The principal issue presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of these decisions. Included among these issues is the question as to whether the cited violations were "significant and substantial."

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 violations.

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 that the respondent owns and operates the Maple Creek No. 1 and No. 2 Mines, and that the respondent and the mines are subject to the Act and to the jurisdiction of the Commission and the presiding judge.

The parties also stipulated that the respondent is a large mine operator and that the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business (Tr. 5).

Findings and Conclusions

Docket No. PENN 83-121

This case concerns two section 104(a) "S & S" citations issued by MSHA Inspector Francis E. Wehr on December 15, 1982, and January 12, 1983. The first citation, No. 2102682, asserts that 73 roof bolts were installed in the roof at two overcasts which had been shot down, but that no washers were provided between the 6 x 6 inch bearing plate and the 6-foot conventional roof bolt. The inspector believed that this was a violation of the roof control plan and mandatory safety standard 30 CFR 75.200.

The second citation, No. 2102696, asserts that a crosscut used as a shelter hole for the track haulage was obstructed with three 55-gallon oil drums and 22 stacked bags of rock dust. The inspector believed that a person would have trouble getting into the crosscut for shelter upon the approach of any haulage equipment, and he cited a violation of mandatory safety standard 30 CFR 75.1403.

During the course of the hearing, petitioner's counsel advised me that after further consultation with the inspector, citation No. 2102682 cannot be supported, and that the citation will be vacated (Tr. 6). Petitioner's counsel presented a full and complete argument in support of this action (Tr. 504-505).

With regard to citation No. 2102696, petitioner's counsel stated that upon further reflection, the inspector was now of the view that the violation was not "significant and substantial," and that he has agreed to delete that finding from the violation notice as originally issued. Petitioner's counsel presented a full argument in support of this proposed action by the inspector (Tr. 506-511).

Respondent's counsel asserted that the crosscut being used as a shelter hole was 17-feet wide and that there was room for persons to manuever in and out. Counsel pointed out that the only person in that area is a switchman, and that the chances that he will have to use the shelter are very slim (Tr. 508). Petitioner's counsel agreed that there was room enough for persons to manuever between the stated obstructions, and that is the reason why she believes the violation is not "significant and substantial" (Tr. 509).

After careful consideration of the argument presented, I affirm the inspector's vacation of citation No. 2102682, and that portion of the petitioner's civil penalty proposal seeking a penalty assessment for this citation IS DISMISSED, and the citation IS VACATED.

With regard to citation 2102696, I take note of the fact that the citation cites a violation of section 75.1403, which provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Inspector Wehr cited a previous safeguard notice, No. 391170, issued by Inspector Eugene W. Beck on March 1, 1979, to support the citation which he issued. The previous safeguard notice required that all shelter holes and crosscuts used as shelter holes be kept clean of loose coal, rock, supplies, and debris.

On the facts of this case, the respondent has not rebutted the fact that the crosscut in question was used as a shelter. Further, the respondent concedes that the obstructions as stated by the inspector on the face of his citation were in fact present. Accordingly, I conclude and find that the petitioner has established the fact of violation by a preponderance of the evidence. The previous safeguard notice served on the respondent required the respondent to maintain any shelter holes, or crosscuts used as shelter holes, free of debris and other materials so as to provide ready access into the shelter. Since this was not done here, petitioner has established a violation, and the citation IS AFFIRMED. The "S & S" finding IS VACATED.

Docket No. PENN 83-129

This docket concerns six section 104(a) "S & S" citations issued by MSHA Inspector Alvin L. Shade at the respondent's Maple Creek No. 2 Mine, and the conditions or practices cited are as follows:

> Citation 2102605. The energized trolley wire at 2 Flat 6 Chute track switch was not adequately guarded where men are required to travel under regularly, as guard boards were broken off the width of track haulage. Mine was idle at time observed.

Citation 2106208. The continuous mining machine serial no. JM 3476 approval no. 2 `G-3227 A-00 in 4 Flat right section was not maintained in permissible condition as the fluorescent light opposite the GM operator was not securely fastened to the machine as there were two bolts missing in mounting bracket.

Citation 2102609. The approved roof control plan was not being complied with in A entry 1 to 2, 4 Flat section, as temporary roof supports (jacks) were not installed according to the roof control plan as center jack was installed first and installed two jacks at same time.

Citation 2102611. The energized power wires serving power to the indicator lights for reck latch, and track haulage switch signal lights at mouth of 6 Flat A track switch were in contact with combustible material as reck latch lights were hung on wooden post and had wires taped to same. Also, switch signal lights were in contact with wooden cribs, wooden plank used to saddle beams, and roof coal.

Citation 2102618. The twin boom Fletcher roof bolter, serial no. 14242 approval no. 29-2607A-3 in 6 Flat 19 rm section was not maintained in permissible condition as there were two lights on the operator's side which were not secured to the machine as bolts were missing in the mounting.

Citation 2102619. There was a violation of the approved ventilation, methane and dust control plan in 20 rm 32 split 6 Flat 19 rm section as there was only 2400 c.f.m. of air reaching the end of the line curtain as measured with an anemometer while coal was being mined with a continuous mining machine and plan calls for 5,000 c.f.m.

Inspector Shade confirmed that he issued citation 2102605 after observing that an energized overhead trolley wire was not guarded at a point where it crossed over the main track where the locomotives, jeeps, and port-a-buses passed under (Tr. 14). The trolley wire at this point is approximately five to five and one-half feet above the ground, and it is usually guarded on both sides by boards to prevent anyone from coming in contact with the wire. The guard board had broken off at the point where the wire crossed the main track, thereby leaving the unguarded wire exposed and unprotected

for a distance of approximately six to eight feet (Tr. 16). The wire carries 550 DC volts, and at the time he observed the condition, the section was idle and coal was not being mined (Tr. 16). However, section foremen, mechanics, pumpers, and rock dust crews would be "in the area," and they would pass under the trolley wire since that was the normal way to get to the section (Tr. 17).

Inspector Shade testified that if anyone came into contact with the unguarded wire, they would likely suffer shock or burns. He also indicated that fatalities have occurred in cases where miners contacted such wires under "just the right conditions." He indicated that most of the trolley wires in the places he cited were lower than in other places, and that someone could contact a wire by walking under it or when getting out of equipment which has stopped in the area. He stated that he, as well as pre-shift examiners, walk under the wire at the location that he cited. He also indicated that during his inspection, the union walkaround representative advised him that someone at a neighboring mine had come in contact with an unguarded trolley wire and was taken out of the mine, but that the person was "all right." The inspector also alluded to two fatalities at another mine that he was aware of which were caused by persons coming into contact with unguarded trolley wires (Tr. 21). He identified the mine as the Mathies Mine, and confirmed that the accidents occurred about a year prior to his issuance of the citation here in question (Tr. 22).

On cross-examination, Mr. Shade conceded that 95% of the trolley wire in the mine is not required to be guarded, and while it may be true that miners are aware of the locations and hazards associated with trolley wires, they sometimes become complacent. Mr. Shade confirmed that an insulated hard hat would protect someone from shock if they came in contact with the wire with the hat (Tr. 29). He conceded that it is not necessary to stop a piece of machinery under the unguarded wire, and that there are other areas where the wire crosses the track where equipment can stop without any problems (Tr. 31). Someone sitting in a vehicle passing under the wire would be about two feet from it, but if he stands up for some reason, he may contact the wire (Tr. 32-33).

Respondent's Testimony

Respondent's counsel made a proffer that if called, Wayne Croushore would testify that the person performing the pre-shift examination in the area cited by Inspector Shade

would be riding in a vehicle rather than walking, and that Mr. Croushore would be of the opinion that during the time of the inspection it would be highly unlikely that anyone would ever be injured by a trolley wire (Tr. 374). He would also testify that he has no personal knowledge of anyone at the mine ever coming in contact with a trolley wire (Tr. 376).

Mr. Croushore testified in connection with a similar citation issued in Docket No. PENN 83-137, and his testimony there was that when he is in a piece of equipment traveling under a wire, he will duck his head to avoid contact with the overhead trolley wire. He indicated that he has heard of people "being hit" by such a wire, and when asked what injuries would result from one coming in contact with a 550 volt trolley wire, he responded "it would depend on how they hit it" (Tr. 381). He also admitted that he would not be surprised to learn that someone could be injured or killed after coming in contact with a 550 volt trolley wire, and he conceded that this was a lot of power and "you respect it" (Tr. 382).

Mandatory safety standard section 75.1003, requires in pertinent part that trolley wires be adequately guarded at any point where men are required to work or pass regularly under such wires. On the testimony and evidence adduced here, it seems clear to me that the portion of the overhead trolley wire which Mr. Shade cited was not adequately guarded. The guard boards usually in place had apparently fallen off and were not in place. It also seems clear to me that the location where the trolley wire passed over the track was in fact where men and equipment regularly traveled while going into the section, and that during this travel, men and equipment passed under the wire, either on foot or in a piece of equipment. I conclude and find that the petitioner has established a violation, and citation 2102605 IS AFFIRMED.

With regard to the two permissibility violations, citations 2102608 and 2102618, petitioner's counsel stated that Inspector Shade has agreed to delete his "significant and substantial" findings on the ground that he has now determined that the cited lights on the continuous mining machine and roof bolter in question were "instrinsicly safe" under MSHA's permissibility guidelines. Under the circumstances, MSHA's counsel was of the view that it was not reasonably likely that an accident or injury would occur as the result of the missing bolts on the mounting brackets for the lights in question (Tr. 73-80; 285).

The respondent does not dispute the fact that the conditions or practices stated in citations 2102608 and 2102618,

constituted violations of the permissibility requirements stated in mandatory safety standard section 75.503. Under the circumstances, the citations ARE AFFIRMED.

Inspector Shade confirmed that he issued citation 2102611 for a violation of section 75.516, after observing that certain signal lights which were hung up were in contact with wooden cribs, a wooden plank, and roof coal. He described the reck latch switch lights as a string of lights used to indicate where a derail device is located (Tr. 390). The lights were hung on a post and were strung down along side of the post, and the wire and lights were taped to the wooden post (Tr. 391). The wires were single insulated wires carrying 550 volts od DC power, and this was also true of the lights used for the track haulage signal (Tr. 393).

Mr. Shade stated that the reck latch lights in question are usually installed and hung on insulators, but that in this case he speculated that they had been torn down and someone simply put them back up by using plastic tape to tape them to the post (Tr. 393). As for the signal lights, they were hung where they usually are, but the wire was strung through the cribs used to support the roof, and the wire was strung over the crib plank and was in contact with the crib as well as the roof coal, and it too carried 550 volts DC power (Tr. 394).

Mr. Shade stated that the wires being in contact with the wooden cribs and roof coal presented a fire hazard, and that in the event of a broken wire, damaged insulation, or a short there would be such a hazard (Tr. 395). A trolley pole could jump off and damage the wires, although he conceded that it would not happen in the area where he found the wires in question (Tr. 395). He confirmed that the conditions were abated by hanging the reck lights on insulated hooks, and taking the other lights off the cribs and hanging those on insulated hooks also (Tr. 399).

On cross-examination, Mr. Shade stated that he believed the mine was idle when he issued the citation. However, there was power on the wires, and the wires were fully insulated. However, even so, he believed there is always a hazard because wires can be damaged by falling materials or the insulation could be damaged. However, he couldn't say whether there was any tension on the wires, and he did not observe that the wires were rubbing in any way (Tr. 401). He confirmed that the area was a haulageway on intake air, and that in the event of a fire it would have attracted someone's attention downstream of the air. He also confirmed that the area is

subject to a weekly electrical examination, and he had no reason to believe that the condition would not have been discovered at the next weekly examination (Tr. 404).

Mr. Shade admitted that he did not check the pre-shift books, and he had no idea how long the cited conditions existed (Tr. 421). He admitted that he is not an electrician, and he found no break in the wire insulation (Tr. 409).

Mandatory safety standard section 75.516, requires that all power wires be supported on well-insulated insulators and that they not contact combustible material, roof, or ribs. In this case, it seems clear from the unrebutted testimony of Inspector Shade that the wires on which the lights in question were strung were in fact touching wooden cribs, planks, and the roof coal, all of which is combustible material. Further, the reck lights were not hung on insulators, but were merely taped to a wooden post. Under the circumstances, I conclude and find that the petitioner has established a violation, and citation 2102611 IS AFFIRMED.

With regard to citation 2102619, Inspector Shade confirmed that he issued it after determining that only 2,400 cubic feet of air per minute was reaching the end of the line curtain where coal was being mined with a continuous mining machine. The ventilation plan, exhibit P-8, required that 5,000 cubic feet of air per minute be maintained (Tr. 443-445). The purpose of the air requirement is to sweep the face of any gases or dust (Tr. 446).

Mr. Shade stated that when he first arrived on the section, he and the foreman (Andy Peters) determined that there was 3,600 cubic feet of air at the end of the line curtain. However, since coal was not being mined at that time, this was not a violation. However, Mr. Shade reminded the foreman that he had to maintain 5,000 cubic feet of air when mining began, and the foreman knew this (Tr. 446). Mr. Shade then left the area. However, when he returned, coal mining had begun, and he noticed that dust was rolling back over the continuous miner operator. Mr. Peters informed him that he had 5,700 cubic feet of air, and Mr. Peters then left the area. Mr. Shade waited until the operator was finished loading, and after asking him to back the miner out, Mr. Shade took an air reading with an anemometer at the end of the line curtain and found 2,400 cubic feet per minute (Tr. 449).

Mr. Shade stated that after taking his reading, Mr. Peters repaired the line curtain, but he still got only 3,750 cubic feet of air. Mr. Peters then discovered that part of the line

curtain was against a rib, and after "framing it out," Mr. Shade took another reading and got 5,700 cubic feet of air (Tr. 451).

Mr. Shade testified that the mine liberates methane, and that it is on a section 103(i) inspection cycle. He had no knowledge as to how long the mine had been under such an inspection cycle, nor did he have any knowledge as to a purported previously issued order for methane accumulations (Tr. 457). He did confirm that he had previously issued a citation for methane accumulation, but could supply no details, and he had no knowledge whether it was on the same section or not (Tr. 460).

Mr. Shade confirmed that he made a methane check, and found one-tenth of one percent methane, and he conceded that it was not possible for a methane ignition to occur with this amount of methane present. He indicated that the explosive range of methane is five to ten percent (Tr. 463). He conceded that the time time he issued the citation there was no hazard of a methane ignition, and that he had no knowledge as to how much of the dust that he observed was "respirable dust" (Tr. 463).

Respondent's Testimony

Andrew Peters, Assistant Section Mine Foreman, testified as to the events which occurred at the time the violation in question was issued. He testified that he examined the face area, took methane readings, and found 4,000 and 5,000 cubic feet per minute at the place where mining was to begin. After receiving a complaint from the continuous miner operator with respect to dust rolling back over his machine, he took an air reading behind the curtain, and found less than 5,000 cubic feet per minute. He found that the air was being short-circuited, and he instructed that repairs be made. After this was done, he measured the required 5,000 feet and left the area (Tr. 486). He later determined that some brattice curtain had been knocked down, and that the air was interupted, and he believed that the miner operator and his helper should have been aware of this situation (Tr. 497-499). He had no opinion as to whether it was likely that an injury would occur as a result of the cited conditions (Tr. 491).

On cross-examination, Mr. Peters confirmed the air readings taken by the inspector to support the citation, and he even conceded that the inspector gave him the benefit of

the doubt by using a correction factor on his anemometer (Tr. 493-494). He also explained the circumstances surrounding the abatement efforts made to correct the cited condition (Tr. 496-500). Mr. Peters admitted to "a few methane ignitions" at the Maple Creek No. 2 Mine, but he indicated that they were face ignitions which did not result in any explosions (Tr. 500).

After consideration of all of the testimony and evidence here adduced, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. Accordingly, citation no. 2102619 IS AFFIRMED.

Inspector Shade confirmed that he issued citation no. 2102609, because the respondent violated its approved roof control plan when it installed two roof support jacks simultaneously inby unsupported roof after a center jack had been installed in an entry. The roof control plan does not permit the simultaneous installation of two jacks because it places the men under unsupported roof (Tr. 99). Mr. Shade identified exhibit P-3, drawing No. 2 as the particular roof control provision which he claims was violated (Tr. 102). He explained that the roof jacks are installed after the particular cut has been mined out, and that when he arrived on the section, a "short cut" had been mined, and the jacks were installed in preparation for roof bolting (Tr. 103).

Mr. Shade explained the roof control drawing, and he confirmed that the jacks labeled A, B, and C were in place, and he explained the sequence for installing the remaining ones (Tr. 105-107). He explained that with the A, B, and C jacks in place, the men next installed jack No. 2, the center jack, and then walked inby unsupported roof and installed jacks Nos. 4 and 6. This violated the plan, since jacks Nos. 1 through 6 should have been installed in sequence (Tr. 108; 111). The proper procedure is to install one jack, and then go to the next one. Here, the men installed two at a time, and they were exposed to more unsupported roof than was necessary (Tr. 109). He confirmed that the distance between the No. 4 and No. 6 jacks was approximately 9 1/2 feet (Tr. 110).

Mr. Shade described the roof as "abnormal," and that it had "potted in different places," and this is the reason why a "short cut" of approximately 12 feet had been mined. He also indicated that the roof in the entire section had "clay veins," and "they had slips which passed through a loose roof that fall out at any time" (Tr. 112). He believed that the respondent knew the roof was bad and that is why 12-foot

cuts were being mined (Tr. 113). Mr. Shade was aware of a roof fatality which occurred at the Maple Creek No. 1 Mine last summer, but he is not aware of any at the No. 2 mine (Tr. 115).

Mr. Shade stated that abatement was achieved by installing the jacks according to the plan, but he could not recall if the section foreman was present when the jacks were installed (Tr. 118). Mr. Shade confirmed that he observed the men walk in with the number 4 and 6 jacks and he called them back out of the area with the jacks, and he reviewed the installation plan with them (Tr. 119).

On cross-examination, Mr. Shade conceded that the roof control plan does not specifically state that two men may not install roof jacks at the same time, but that it does provide for a particular sequence in which the jacks have to be installed. He also indicated that one can only go under unsupported roof for a distance of five feet and that the plan provides "that you can only use the people to install jacks that you need to install jacks" (Tr. 127).

Mr. Shade confirmed that at the time he issued the citation, three jacks (A, B, C), were in place. The men then installed jack no. 2, then walked into the entry with jacks 4 and 6, and that is when he called them back out and advised them that they were out of compliance (Tr. 133, 139). He confirmed that when jack No. 2 was installed, it was within 5 1/2 feet of the last row of roof bolts, and that since a 12-foot cut was being mined, jack No. 2 would have been 6 1/2 feet from the face (Tr. 134). He stated that had the men installed jacks 1, 2, and 3 before going inby to begin installing jacks 4, 5, and 6 there would not have been a violation (Tr. 135).

Mr. Shade conceded that he made no measurements at the time he issued the citation, and he conceded that the men being four feet beyond the center jack would have been within 2 1/2 feet of the face (Tr. 140). He confirmed that at the time the citation issued, the area had been mined, and the roof was being supported in preparation for roof bolting. He conceded that it was possible that the reason a 12-foot cut was taken was that time ran out on the last shift, and that it was possible that the 12-foot cut had nothing to do with the roof conditions (Tr. 150).

Mr. Shade agreed that the roof control plan permits someone to go under unsupported roof to install temporary supports, and after the first row of jacks are installed, the roof is no longer unsupported, and a person may then go 5 1/2 feet inby the last support to install the next one (Tr. 153). He further explained the violation, as follows (Tr. 154):

> Q. So the man who set the center jack was in violation of the plan?
>
> A. Yes, he was.
>
> Q. Because he was beyond five and a half feet?
>
> A. Because he set that in the center of the entry. If he would have started with five and three, it wouldn't have been in violation; but he started in the center, which didn't put him within five feet of a rib or another jack.
>
> Q. If the two men setting No. 4 and No. 6 jack, what you call No. 4 and No. 6 jack, were within five and a half feet of the last row of bolts, there was no violation?
>
> A. Well, then they set both of these jacks, you sent more people in that is necessary and you cannot do this.

In response to further questions, Mr. Shade testified as follows (Tr. 160-163):

> Q. Mr. Shade, now, you testified that the first jack you actually observed being installed was jack No. 2 on Drawing No. 2 and then you next observed that two miners were going to install jacks No. 4 and 6. Now, how do you know that? What specifically did you see them do that led you to conclude that they were going to install jacks 4 and 6?
>
> A. I saw them going in there.
>
> Q. With what did they have with them?
>
> A. Two jacks. Each had a jack. They started to install them. They had them up in the roof and they pulled the jack and came back out.

Q. They actually started the installation process?

A. Yes.

Q. At the locations that you have already identified?

A. Well, they went in there with both jacks. What they do--

JUDGE KOUTRAS: Were the jacks set?

THE WITNESS: They weren't secured against the roof.

JUDGE KOUTRAS: Did they bring the jacks back out with them--

THE WITNESS: Yes.

JUDGE KOUTRAS:--when you called them back out?

THE WITNESS: I asked them what they were doing. I said they're in violation.

JUDGE KOUTRAS: What if they would have had the jacks already set, would you have forced them to take them back out?

THE WITNESS: No, I wouldn't have forced anybody.

JUDGE KOUTRAS: They had not installed it?

THE WITNESS: No.

JUDGE KOUTRAS: When you called them back out, did they carry the jacks back out?

THE WITNESS: Yes, that's what I have on my drawing.

BY MS. GISMONDI:

Q. Now, Mr. Shade, what specifically, to the best of your recollection, what was done to terminate this violation?

A. Well, in the first place, they got to have three jacks and the first--really three jacks, they installed those three jacks and then they went in and installed the other jacks.

Q. So they installed jacks 1 and 3?

A. Yes.

Q. Then they installed the row 4, 5, and 6; is that correct?

A. Yes.

Respondent's Testimony and Evidence

Joseph Skompski, assistant section foreman, testified as to his experience, and he confirmed that he was familiar with the mine roof control plan. He confirmed that he accompanied Inspector Shade during his inspection, and after referring to drawing No. 2 of the roof control plan, he stated that jack No. 2 was installed, and the men then "grabbed jacks 1 and 3 and they was going to set them and they went inby 2 a little bit" (Tr. 175). Mr. Shade then withdrew the men and discussed the roof control plan (Tr. 176).

Mr. Skompski stated that jack Nos. 2, 1, A, B, and C were in place at the time the citation issued, and it was his understanding that the violation was issued because two jacks were installed at the same time (Tr. 176). Mr. Skompski conceded that the roof plan requires that the roof supports be installed "in sequence, row by row" (Tr. 178). He stated that the men who were installing the jacks were experienced miners, and that it was his understanding that they intended to install jack Nos. 1 and 3, and he estimated that the center jack was 5 to 5 1/2 feet from the last row of roof bolts (Tr. 181).

On cross-examination, Mr. Skompski conceded that the roof conditions on the section "weren't the best conditions" (Tr. 182). He confirmed that under the approved roof control plan, temporary roof jacks are to be installed "rib-to-rib" (Tr. 183). He stated that he observed two men carrying jacks, and that they were going to install them at positions 1 and 3, as shown on the diagram, and that this would have placed them in line with jack No. 3 (Tr. 185). Referring to the diagram, Mr. Skompski confirmed that if two men started at jack No. 2 and installed jack Nos. 1 and 3 from either side of No. 2, they would be in compliance with the roof control plan as long as they stayed within 5 1/2 feet of jack No. 2 (Tr. 193).

Samuel L. Cortis, respondent's chief mine inspector, testified that part of his job is to prepare roof control plans for submission to MSHA. He identified drawing No. 2, and stated that it depicts two sets of roof control plans. He stated that during the mining phase, roof control is

accomplished by installing jacks A through D, 1, 4, and 7, as shown on the diagram (Tr. 214). Once mining is completed, and roof bolting begins, there is an eight-jack temporary roof support plan that is put into operation, and he explained this procedure (Tr. 214-217). He explained that drawing No. 1 depicts where temporary roof jacks are to be installed during certain sequences in the mining cycle, and he explained the procedures and confirmed that the ribs may be used as additional roof protection while installing the jacks (Tr. 220). He further explained how the jacks could be installed, and he indicated that they need not be installed in numerical sequence, as long as the distances between the jacks are maintained (Tr. 222).

On cross-examination, Mr. Cortis confirmed that as long as the next jack is kept within five feet of a person for protection, other jacks may be installed, regardless of the sequence (Tr. 223). He explained the procedures followed in the mine for the installation of jacks (Tr. 223-229), and he confirmed that the maximum allowable distance that anyone can go inby the last row of permanent roof supports to install temporary roof jacks is 5 1/2 feet (Tr. 237).

Petitioner's counsel acknowledges that under the roof control plan, a person may go out under unsupported roof to install temporary roof jacks as long as they are within 5 1/2 feet of the last temporary support. Counsel's understanding of the plan is that there are "two variables" that come into play with regard to how far a person may venture out under unsupported roof. Counsel asserted that one may go inby the last row of permanent supports (roof bolts), towards the face, for a distance of 5 1/2 feet. However, at all times, one must remain within five feet laterally of either rib or the next adjacent lateral jack (Tr. 230-231).

Referring to drawing no. 2, Mr. Cortis was asked certain questions regarding his interpretation of the jack installation sequence and he responded as follows (Tr. 241-246):

> JUDGE KOUTRAS: She asked you, Counsel has asked you a question before, what the maximum distance someone can walk under an unsupported roof and you said five and a half feet. Now, does that mean under five and a half feet from permanent supports or from temporary supports or both he can walk out from?

~1680

THE WITNESS: From both. It would be either permanent or temporary.

JUDGE KOUTRAS: What I have a problem understanding here is if a fellow walks out starting at the last row of supports and walks out from nine and a half feet to set post No. 4, he would be in violation of the rule that says you cannot be more than five and a half feet inby permanent supports; correct?

THE WITNESS: He would be, in that case.

JUDGE KOUTRAS: But wouldn't he be within five and a half feet of C, which is a temporary roof support?

THE WITNESS: That's correct.

JUDGE KOUTRAS: Then how is he in violation?

THE WITNESS: Well, only in, I guess, in what our interpretation of the plan would be.

JUDGE KOUTRAS: Now, Ms. Gismondi, did you follow that? Is he in violation?

MS. GISMONDI: Yes, I believe he is.

JUDGE KOUTRAS: Why?

MS. GISMONDI: As I said, it is my understanding that there are maximum allowable distances both from, you know, working both laterally, that is, how far you are from either the rib or the next adjacent lateral support and how far inby are you.

I mean, as I said, I think there are two variables going on. You have got to have protection to either side of you, you have to have protection behind you.

JUDGE KOUTRAS: Well, now, that is the point. Look, this second drawing, I have got permanent roof bolts nine and a half between the arrows.

MS. GISMONDI: Correct.

JUDGE KOUTRAS: Depending on how this man--let's assume he starts at point A and walks out here (indicating). Nine and a half feet with a jack over

his shoulder, he is going nine and a half feet out in unsupported roof in this direction and that violates the plan?

MS. GISMONDI: As far as the Secretary is concerned, yes.

JUDGE KOUTRAS: Because it is more than five and a half feet.

MS. GISMONDI: Regardless of how close to the rib he is.

JUDGE KOUTRAS: But if you've got temporary roof C set and the man walks under A and B and walks from this point, he is not under unsupported roof at any time, if you consider the permanent jack in place within five and a half feet?

MS. GISMONDI: I would say, yes, he is, Judge, because, again, he may have support to his left but he doesn't have any support behind him.

JUDGE KOUTRAS: My hypothetical says he got this far and that support and the rib is there (indicating).

MS. GISMONDI: He is still more than five and a half feet. As I said, I think there--

JUDGE KOUTRAS: From this reference point?

MS. GISMONDI: Right, which is the permanent bolt, right.

JUDGE KOUTRAS: That is what the parties understand Drawing No. 2 in this Roof Control is all about?

MS. GISMONDI: That is what I understand it to be.

JUDGE KOUTRAS: Is that your understanding, Mr. Cortis?

THE WITNESS: Yes.

JUDGE KOUTRAS: That is your understanding?

THE WITNESS: It is my understanding that we have to be within five and a half feet of support, permanent or temporary.

Inspector Shade was called in rebuttal, and he identified a copy of the notes he made at the time the citation issued (exhibit P-5; Tr. 254). He quoted from his notes, and he indicated that they reflect that the jacks identified as A, B, and C, were in place when he arrived, that jack 2 was then next installed while he observed the scene, and that the note "short cut installed both at once" confirmed that "they started installing" jacks 4 and 6 (Tr. 256). He believed that the miners who were going to install the 4 and 6 jacks were in beyond jack 2 further than four feet (Tr. 257).

Referring to roof plan drawing no. 2, Mr. Shade indicated that under the plan, miners may go 5 1/2 feet inby permanent roof supports to install temporary jacks, and that after that they may go four feet inby the temporary jacks to install the next row of temporary jacks (Tr. 258). He confirmed that the maximum allowable distance that a miner may go laterally from either the next adjacent rib or support is five feet (Tr. 258). On cross-examination, Mr. Shade further explained his notes, markings, and the observations which he made at the time the citation issued (Tr. 259-282).

Citation No. 2102609 charges the respondent with a violation of its approved roof control plan. Exhibit P-4 is a copy of the applicable complete roof control plan, and exhibit P-3 contains copies of pages from the plan, and in particular two pages labeled "Drawing No. 1" and Drawing No. 2." Although Inspector Shade failed to include in the citation a specific reference to the applicable roof control provision which he believed was violated, he testified that Drawing No. 2 was the particular plan provision which was violated. His contention is that the installation of two temporary roof jacks, simultaneously, is a violation of the plan because it exposes the miners installing those jacks to unsupported roof.

Apart from any roof control violation, mandatory section 75.200 prohibits anyone from proceeded beyond the last permanent roof supports unless adequate temporary support is provided. Thus, the question here presented is (1) whether the respondent has violated any specific portion of its approved roof control plan, and (2) absent a violation of the plan, was there a violation of section 75.200, when the two miners proceeded to install the two jacks in question.

The testimony in this case concerning the applicable roof control plan is most confusing. Drawings 1 and 2 are used

interchangeably, and respondent's witness Cortis, the man who drafted the plans for MSHA's approval, even went so far as to testify that Drawing No. 2 contains "two plans." By failing to state on the face of the citation the precise roof control plan provision allegedly violated, the inspector contributed to the confusion. Although the citation states that two jacks were installed simultaneously, the inspector conceded that there is nothing in the plan to prohibit this per se. Although the inspector characterized the roof condition as "abnormal," and indicated that this explained why a "short cut" was being taken, on cross-examination he conceded that it was possible that a "short cut" was taken because of a time factor rather than because of the roof conditions. Further, although the question of distances is critical here, the inspector conceded that he made no measurements, and his contemporaneous notes (exhibit P-5), shed no light on this. The notes simply reflect that one jack was installed first, and two others were installed at the same time.

Inspector Shade testified that three jacks were installed along the left rib of the entry in question, and these have been identified as jacks A, B, and C. He also testified that jack No. 2, which is the middle jack of three temporary jacks, was also installed at the time he viewed the area in question. Jack No. 2 was inby the row of permanent roof bolts which had been installed. Inspector Shade was concerned over the fact that two miners proceeded inby jack No. 2 to simultaneously install two additional jacks, which have been identified as Nos. 4 and 6. In the inspector's view, when this was done, the miners who were installing those jacks were under unsupported roof.

After careful review and consideration of all of the evidence and testimony adduced in this case, I cannot conclude that the petitioner has established by a preponderance of the evidence that the respondent violated its roof control plan. With respect to the question as to whether the two miners who started to install the two roof jacks in question were under unsupported roof, I can only conclude that the miner who intended to install roof jack No. 6 would have been under unsupported roof. Insofar as the other miner was concerned, I conclude that the rib jacks and permanent roof supports provided him ample protection when he ventured out into the entry to install roof jack No. 4. As for the miner who walked out with the intent to install roof jack No. 6, while he was protected on the diagonal by roof jack No. 2, he was not protected by any roof support outby and towards the permanent supports, nor was he protected by any roof support laterally. Accordingly, to that extent he was in fact under unsupported

roof, and it is on that basis that I affirm the citation. In short, I conclude and find that one of the two miners who simultaneously installed the two jacks in question within the view of the inspector, was under unsupported roof. Under the circumstances, this was a violation of section 75.200, and to that extent the citation IS AFFIRMED.

Docket No. PENN 83-128

Section 104(a) "S & S" Citation No. 2103081, charges that a Kersey battery-powered scoop was not maintained in a permissible condition in that an opening in excess of .005 inches (plane flange joint), was present in the lower right hand corner of the contactor compartment located in the operator's compartment. The inspector cited a violation of mandatory safety standard 30 CFR 75.503.

MSHA Inspector Okey H. Wolfe confirmed that he issued the violation in question, and explained why he did so (Tr. 511-516). He indicated that he found an opening between the cover and the contactor compartment of the scoop in question, and that the opening was .005, as measured by a feeler guage, and the allowable limit is .004 (Tr. 517). He described the batteries on the scoop as 240 volt DC, and he believed that the hazard presented by the violation was that the opening could be an ignition source for methane. He took methane readings, and detected none present (Tr. 520). He did confirm that the mine is on a "301(i) spot inspection status," which indicates that it liberates more than one million cubic feet of methane in a 24-hour period (Tr. 520). He explained the purpose of the permissibility requirements of the cited standard as follows (Tr. 520-522):

> Q. Mr. Wolfe, what is the purpose of the permissibility regulations providing that there be an opening no greater than .004 inches?
>
> A. Well, the idea of that is that these explosion-proof enclosures, none of them are air tight, and when a piece of equipment is in operation, it tends to warm up, which causes expansion of the air that's in the compartment, and therefore when it cools, it has a tendency to pull whatever atmosphere it happens to be in back into the compartment, and should that atmosphere contain an explosion mixture of methane, the idea of opening it is to provide a flame path, so that if methane were drawn back into the

compartment during the cooling stage and ignited by the arcing and sparking inside that compartment, that it would prevent it from getting to the outside atmosphere. It would be cooled sufficiently that it would not ignite methane once it exited the boss or enclosure.

Q. Now, is that purpose served where you have an opening in excess of .005 inches?

A. No, it is not.

Q. What would happen if methane were drawn into this piece of equipment as it exited when you issued the Citation?

A. In all likelihood, if once it was ignited within that compartment, it would escape to the outside atmosphere.

Q. Do you know whether or not there have ever been any excessive methane accumulations at Maple Creek No. 1?

A. There have been 107(a) orders issued for methane in excess of 1.5.

Q. What type of injury would result in the event of an explosion or a fire occurring as a result of this violation?

A. Well, the injuries that could result of a methane explosion would be concussion, burns, asphyxiation.

On cross-examination, Mr. Wolfe denied that at the time he issued the citation in question he was instructed that all permissibility violations should be considered as "significant and substantial" (Tr. 524). He explained his instructions in determining whether a violation was "S & S" or not, and he confirmed that at the time he issued the citation, he detected no methane in the area, there was adequate ventilation, and the scoop in question was three crosscuts outby the last open crosscut (Tr. 524-526). He conceded that there is a state law requiring a methane check at the face before any electrical equipment is taken there (Tr. 527).

Mr. Wolfe could not state whether anyone ever intended to use the scoop at the face on the day that he cited it,

but he did indicate that the scoops are normally used "to clean up and carry supplies around" (Tr. 529). He could not state how long a scoop would normally spend in the face area, and he has observed a scoop in operation during the entire cleanup cycle (Tr. 530).

Mr. Wolfe could not state how the opening in question was created, and he confirmed that abatement was achieved by merely tightening up the bolt. He confirmed that the equipment in question should be examined weekly, but he had no way of knowing how long the condition existed, and he had no reason to believe that the condition would not have been corrected during the next weekly examination (Tr. 531).

Mr. Wolfe stated that anytime there is mining in the Pittsburgh coal seam, there is a definite possibility that methane will be encountered, and he confirmed that the mine in question has only experienced face ignitions which did not result in any personal injuries or damage to property (Tr. 532). He further explained his concerns as follows (Tr. 533-534).

> Q. Now, didn't you testify that the ventilation on this section was perfectly adequate?
>
> A. Yes, ma'am.
>
> Q. Did you have any reason to believe this scoop was going anywhere but this particular section?
>
> A. No.
>
> Q. So, what led you to believe that there was going to be an accumulation of methane to the 5 to 15 percent range on this section?
>
> A. Well, methane can accumulate. There are a lot of reasons why methane can accumulate. I mean, at the time I was there, everything was fine as far as the ventilation was concerned and so on and so forth, but I don't know what is going to happen in the next hour or the next day or the next week.
>
> Q. Did you have any opinion as to what period of time it would take for this occurrence to take place?
>
> A. No, I did not.

> Q. Did you have any opinion as to how likely it was to happen before the next weekly electrical examination?
>
> A. No.
>
> Q. If you considered the factors that were present when you examined the scoop and considered the history of the mine and assumed that the condition would be corrected at the next permissibility examination, would you consider this violation to be significant and substantial?
>
> A. Those are not my instructions. I do not consider just that mine.

When asked why he believed the scoop would be used inby the last open crosscut, Mr. Wolfe replied that it was standard procedure in the mine to use such scoops for cleaning up the face areas and the returns, and his "guess" was that it was last used on the idle shift or on the last production shift, possibly to carry supplies to the face (Tr. 542-543).

Respondent's Testimony

Joseph Ritz, ventilation foreman, testified as to his responsibilities, and they include the examination of air courses, bleeders, and methane examinations in the returns. He confirmed that he has 13 years of mining experience, holds a degree in mining from Penn State University, and has been an active member of the mine rescue team for several years (Tr. 546).

Mr. Ritz stated that he was familiar with the mine ventilation plan, and he described the amount of air induced into the mine ventilation system, and the amount of methane taken out (Tr. 547). Since 1974, he could recall only one methane face ignition at the Maple Creek No. 1 Mine, and he described it as a frictional ignition where a miner cutting coal ignited a pocket of methane, and he indicated "it flashed and was out probably about as quick as it happened" (Tr. 548). He was of the opinion that the chances of a scoop igniting any methane, with the opening described, was remote (Tr. 548). He could recall no section 107(a) orders ever being issued at the mine for excessive accumulations of methane (Tr. 549).

On cross-examination, Mr. Ritz agreed that mine ventilation can be interrupted and there was no "guarantee" that this will not happen (Tr. 551). However, he explained the

various safeguards and systems in effect at the mine to indicate when ventilation is interrupted. He stated that the mine in question liberated under a million cubic feet of methane per 24-hours, but that this will vary as conditions change (Tr. 553-556).

When asked whether he had any doubts as to whether or not the scoop in question would be used inby the last open crosscut, Mr. Ritz stated that the use of the scoop varies, and that he had no way to determine whether it would be used on the next shift, or whether it was used on the previous shift. He was only sure that it was used on the shift when it was observed by the inspector (Tr. 558). Although he denied that the scoop is used primarily inby the last open crosscut, he conceded that it is so used at times for cleanup, and that it is also used to haul supplies outby (Tr. 559). He did confirm that on the day of the inspection, the mine was active, and that the cited scoop was the only scoop available for cleaning up at the face area (Tr. 560). He also agreed that the scoop had not been "tagged out" (Tr. 561).

When asked his view on the opening found in the equipment by the inspector, Mr. Ritz agreed that it was not wise to leave the condition uncorrected, that he would insure that it was fixed if he found the condition, and he conceded that in any permissibility violation, "Murphy's Law" applies. He explained by stating that "if it can happen, it will happen" (Tr. 565).

After careful consideration of all of the testimony and evidence adduced here, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. Mandatory safety standard section 75.503, requires that all electric face equipment taken or used inby the last open crosscut be maintained in a permissible condition. Here, the respondent does not dispute the fact that the cited piece of equipment was not maintained permissible. As for the question of whether or not it was "used or intended to be used inby the last open crosscut," I conclude and find that the petitioner has established that this was the case. Respondent's own witness (Ritz), admitted that the scoop was, in the normal course of business, used inby the last open crosscut, and that it was the only scoop available to perform cleanup of the face areas. Absent any evidence to the contrary, I conclude and find that the preponderance of the evidence establishes that the scoop in question "was used or intended to be used inby the last open crosscut." Under the circumstances, Citation No. 2103081 IS AFFIRMED.

In this case, MSHA Inspector Francis E. Wehr issued a section 104(a), "S & S" citation on December 14, 1982, citing a violation of mandatory safety standard 30 CFR 75.1003. The condition or practice cited is as follows:

> Adequate guarding was not provided for the energized trolley wire and trolley feeder, at the 37 crossover switch off C track haulage road. The guards on the inside were knocked down and lying on the mine floor on B track haulage.

Inspector Wehr confirmed that he issued the citation in question after finding that the overhead energized trolley wire at the C track cross-over switch was inadequately guarded. He stated that the guarding had been knocked off, and that he found it lying on the mine floor. The guarding was missing along a six-foot area which he described as the "V" intersection, at the point where the C track haulage and a cross-over from the B track haulage intersected. He identified exhibit P-1 as a copy of the citation, and the second page is a copy of his notes, including a rough sketch of the cited location (Tr. 319-329).

Mr. Wehr stated that the trolley wire was approximately five and one-half to six feet off the floor, and that it was a 550-volt DC wire. He confirmed that abatement was timely achieved by re-installing the section of guarding which was not in place. He also confirmed that the trolley wire guarding has been a problem in the mine in that it is often knocked off by the trolley "harps," particularly at the track switch-over locations. He also indicated that mine management is aware of the problem and makes an effort to constantly keep after the work force to be alert to the problem.

Mr. Wehr indicated that his principal concern was that the locomotive or mantrip operators who regularly passed under the wire would come in contact with the unguarded wire. If they did, it was his opinion that it was reasonably likely that a serious injury would occur. He confirmed that he was aware of the fact that past accidents or fatalities have occurred in the mining industry when miners came in contact with unguarded trolley wires similar to those which he cited in this case. Although he could not document any recent accidents at the mine, he did indicate that he had

heard that someone had recently come in contact with a trolley wire at the mine, but he had no specific details about the incident.

Mr. Wehr described the different types of vehicle conveyances which used the track haulage, and he believed that it was possible for a miner operating this equipment to come in contact with the overhead wire while in the equipment. Although he conceded that he did indicate on the face of his citation that only one person would be affected by the conditions he cited, he emphasized that under certain circumstances other persons would be in the area where he found the unguarded trolley wire, and he identified them as foremen, company inspectors, and pumpers (Tr. 333-334).

Mr. Wehr did not know how long the guarding had been down, and he stated that he checked the pre-shift books but found no notations that the guard was down. He also indicated that guards do get knocked down when a power pole jumps off the wire (Tr. 337).

On cross-examination, Mr. Wehr conceded that trolley guarding is a mine maintenance item and that it is not physically possible to keep up with it all the time (Tr. 342). He confirmed that at the Maple Creek No. 2 Mine, two men are regularly assigned to replace trolley guarding that has been knocked down (Tr. 346). He also conceded that persons riding a locomotive wear protective hats, and that these hats provide electrical protection (Tr. 351).

Respondent's Testimony

Paul Gaydos, construction foreman, testified that in his opinion, while it was possible that someone could be injured because the trolley guard board was down, it was not probable. He indicated that a small area of wire was unguarded, and that through training, safety meetings, and inspections, everyone is made aware of these situations (Tr. 354-356). Mr. Gaydos identified the types of equipment which would pass under the wire, and he indicated that he was six-foot-three and had often passed under the wire, but has not come very close to it (Tr. 357). He conceded that if one were in the largest piece of equipment, a 54-ton locomotive, his head may be 5 1/2 feet off the ground level (Tr. 358).

Mr. Gaydos stated that it is very unlikely that a power pole would come off the trolley wire at the crossing chute

location in question, and this is because one is not moving fast. If the pole does come off, one could stop the vehicle and retrieve the pole (Tr. 359). He indicated that the mine must be pre-shifted three hours preceding the next operating shift, and that this includes the trolley wire guards (Tr. 359-360). He could not remember how long the guard in question was down (Tr. 361). Mr. Gaydos could not state how serious an injury would result if one were to simply brush the wire, but conceded that he "respects it," and would not like to back into it (Tr. 364).

On cross-examination, Mr. Gaydos confirmed that short of someone committing suicide by intentionally grabbing the wire, he could not imagine anyone suffering fatal injuries while riding in a piece of equipment under the wire. He stated that it was his practice to duck his head while approaching an overhead wire, and he would expect that an experienced motorman would do the same (Tr. 365-366). He conceded that it was possible that the guards were knocked off by a pole coming off the wire, and he confirmed that under State law the trolley guard boards extend two inches below the wire (Tr. 370).

After carefuly consideration of all of the testimony and evidence adduced here, I conclude and find that the petitioner has established by a preponderance of the evidence that the guarding for the cited energized trolley wire at the location in question was inadequate, and that this constitutes a violation of section 75.1003. Accordingly, Citation No. 2102681 IS AFFIRMED.

PENN 83-136

MSHA Inspector Okey H. Wolfe confirmed that he issued Citation No. 2103084, on February 8, 1983, for a permissibility violation on a Fletcher roof bolter after finding that one of the bolts which secured the lid to the main contactor compartment was missing (Tr. 579). The function of the compartment is to distribute power to various parts of the machine after it comes in from the power source. He believed the mine was active the day the citation issued, and the bolter was required to be maintained in permissible condition. All bolts must be in place so as to preclude methane from entering the compartment or to confine any methane ignition inside the compartment (Tr. 581).

The parties agreed to incorporate by reference Mr. Wolfe's prior testimony concerning the methane liberation history of

the mine, as well as his rationale for finding that the violation was significant and substantial (Tr. 582). Mr. Wolfe was sure that the roof bolter was used inby the last open crosscut and that it was the only one available on the section (Tr. 583).

The parties agreed to proffer the testimony of Mr. Joseph Ritz on behalf of the respondent, and that if called he would testify that the cited roof bolter was parked two blocks outby the last open crosscut, there was no opening in the contactor compartment, the section was wet and well rock dusted, the ventilation was good, and there was no methane detected anywhere in the section (Tr. 592-593). Petitioner's counsel added that she would ask the witness to confirm that interruptions to the ventilation are always possible (Tr. 593).

While it may be true that the roof bolter was parked at the time it was cited by Inspector Wolfe, I find his testimony that it was used on the section for roof bolting to be credible. Respondent has offered no testimony or evidence to the contrary, nor has the respondent rebutted the fact that the missing bolt on the contactor panel was a permissibility violation. I conclude and find that the petitioner has established the fact of violation, and Citation No. 2103084 IS AFFIRMED.

Inspector Wolfe confirmed that he issued Citation No. 2103085 on February 8, 1983, citing a violation of section 75.606 after observing a shuttle car run over its own trailing cable (Tr. 594-595). The car was in operation and was coming off the loading point, and it ran over the cable one time. The cable is a 440-volt AC cable, and Mr. Wolfe issued the citation to Mr. Ritz as soon as he observed the car run over the cable.

Mr. Wolfe stated that the power was reduced, and the cable was inspected for damage. However, no visible damage to the cable or to the outer insulation was found (Tr. 596). Mr. Wolfe stated that the danger presented was a possible fire hazard due to cable damage not readily observable, and a possible shock hazard. He indicated that the cable is handled from time to time, and while he could not recall whether the area was wet, but he believed that the area was "normally pretty wet" (Tr. 597). His concern for a fire hazard stemmed from the fact that if there were internal cable damage, two leads could come together which would cause the cable to "blow," and that while AC cables are protected, "you would still have a momentary flash that would be pretty hot" (Tr. 598).

Mr. Wolfe believed that cable damage will result from a heavy machine running over it, and that "if it would continue, it is definitely going to cause damage to it eventually" (Tr. 598). He admitted that when he operated a shuttle car, there were times when he ran over his own cable, and normally, an operator can observe when this happens (Tr. 600). In the instant case, he had no way of knowing whether the operator had run over the cable prior to his observing it, nor did he know that the machine operator was even aware that he had run over his cable (Tr. 601).

Mr. Wolfe stated conceded that he was more concerned with a fire hazard rather than a shock hazard, and if a fire occurred, miners underground would be exposed to smoke inhalation and burn hazards. Also, toxic fumes could be given off from the burning insulation or neoprene cable jackets. He was aware of a previous fire in another mine caused by cable damage. A short circuit occurred in the cable, and when it was reeled up, it caught the car on fire. However, he did not know whether the short circuit was caused by the car running over the cable, and it was possible that the cable was damaged by fallen rock. The resulting fire filled the section with smoke (Tr. 603-605).

On cross-examination, Mr. Wolfe conceded that it "could well be possible" that the incident in question was a "freak accident" in that the cable got caught between the cable compartment lid and the side of the shuttle car, and that "perhaps" the operator did not realize what had occurred (Tr. 605). He also conceded that he permitted the car to continue in operation after the cable was inspected, and that it was not taken out of service (Tr. 606).

Respondent's Testimony

Joseph Ritz testified as to the circumstances surrounding the shuttle car operator's cutting of his own trailing cable. He stated that it happened when the car operator slowly drifted off the loading ramp while backing up and he and the inspector were standing nearby observing him (Tr. 633). Mr. Ritz indicated that the operator "drifted back" and the cable did not "pick up" on the reel because the hydraulic motor did not engage, and as a result "he just ran onto the cable" (Tr. 633). Mr. Ritz believed that the operator was aware of the presence of the inspector, and simply did not pay close attention to what he was doing (Tr. 634). Mr. Ritz immediately de-energized the machine, and he, the inspector, and the section mechanic, visually inspected the cable and found no visible damage. The power was put on again, and the shuttle car was put back in service (Tr. 635).

Mr. Ritz was of the opinion that there was no problem with the cable, and he personally has never observed a fire on an AC cable such as the one in question. Once the cable is put in service, he does not believe that anyone would handle it, and he did not understand why the inspector issued the citation (Tr. 688). The operator was admonished to watch out for his cable, and he continued operating the car after the cable was inspected (Tr. 639). Mr. Ritz stated that the section was wet (Tr. 631). He also indicated that had there been any critical damage to the interior of the cable the ground fault system would likely "kick out the power" and de-energized the cable (Tr. 643).

Respondent does not dispute the fact that the cited shuttle car ran over its own trailing cable. Petitioner affirmed that the theory of its case lies in the fact that the cited standard requires that trailing cables be adequately protected to prevent damage by mobile equipment (Tr. 646). Further, petitioner's counsel was of the view that the manner in which the car operator was operating the shuttle car at the time the inspector observed him run over the cable constituted the gist of the violation (Tr. 647, 651). As concisely stated by counsel, "the cable is supposed to be protected from damage. When you run over it, it is not protected from damage" (Tr. 651).

Mandatory safety standard section 75.607 requires that trailing cables be adequately protected to prevent damage by mobile equipment. In the instant case, it seems clear to me that the trailing cable in question was in fact run over by the shuttle car operator as he drifted back off the loading station in question. Since this happened in the full view of the MSHA inspector who was standing nearby with a company foreman, the inspector immediately informed the foreman that he was issuing a citation, the machine was de-energized, and the cable was visually inspected for damage. Since no damage to the exterior of the cable was detected, the inspector permitted the shuttle car to continue operating and "abatement" was achieved by merely instructing the machine operator to be more careful and to observe his cable.

The inspector here conceded that "it was possible" that the incident was a "freak" occurrence. As a matter of fact, during his testimony, he had no recollection as to how the incident occurred. Further, there is no evidence to suggest that the cable reel was defective, and although the inspector testified that it was not an unusual occurrence for a trailing

cable to "catch" between the cable compartment lid and the side of the shuttle car, he took no action to insure that this would not occur again. It seems to me that if this type of "cable hang-up" occurs frequently, the inspector should have required the respondent to take some preventive measures to insure that the cable was protected against any such future "hang-ups." In short, he required no physical alterations to the machine or to the cable-reeling device to insure against other cable "hang-ups." As a matter of fact, when asked this precise question, the inspector responded that "I honestly don't remember" (Tr. 611).

After careful consideration of the record in this case, I cannot conclude that the running over of the cable in question was other than an isolated one-time occurrence. Further, based on the testimony and evidence of record, I cannot conclude that the incident resulted from a failure by the respondent to insure that the cable was adequately protected against damage. Aside from the fact that the petitioner has not established that the cable was damaged, there is no credible evidence to establish that apart from the operator's inattention or failure to prevent the machine from drifting, there is no evidence that the respondent here failed to provide adequate protection to prevent damage to the cable. Further, there is absolutely no evidence that this respondent has a history of running over trailing cables, and there is no evidence to support any conclusion that the machine operator has done this in the past.

Inspector Wolfe was asked to explain what could have caused the cable to catch on the machine compartment. His initial response was that he had no notes on the incident (Tr. 623). Although he speculated that the incident may have occurred due to the lack of proper tension on the cable, he could not support this "theory," even though it happened right before his very eyes. As a matter of fact, he candidly admitted that he couldn't state precisely what caused the "hang-up," other than the machine "drifting" (Tr. 624). When asked whether he spoke with the machine operator, the inspector stated that "I don't remember" (Tr. 626). The machine operator was not called to testify by either side.

After careful review and consideration of all of the evidence and testimony adduced here, I conclude and find that the cable incident in question was a one-time inadvertent incident, and that the petitioner has failed to establish that the respondent failed to provide adequate protection to insure against cable damage. Accordingly, Citation No. 2103085 IS VACATED.

Negligence and Gravity Findings and Conclusions

PENN 83-121

Negligence

I find that the respondent should have been aware of the fact that the cited shelter hole was obstructed with oil drums and rock dust bags as noted by the inspector. A preshift examination should have detected these conditions, and the failure by the respondent to take the corrective action in advance of the inspector's arrival on the scene was due to a lack of reasonable care. Accordingly, I find that violation No. 2102696 resulted from ordinary negligence.

Gravity

The inspector testified that the shelter hole was 17 feet wide and there was room for a person to manuever in and out. MSHA's counsel pointed out that there was only one person in the area and that the chances of his having to use the shelter were slim. Under all of these circumstances, I find that this violation was nonserious.

PENN 83-129

Negligence

Inspector Shade was of the opinion that Citation No. 2102605 resulted from moderate negligence, and he stated that mine management usually guarded the overhead wires as soon as possible after that particular condition is brought to its attention. However, he did not know whether the guards were down at the time of the preshift examination (Tr. 24).

I find that Citation No. 2102605 resulted from the respondent's failure to take reasonable care to insure that the overhead trolley guards which were down were promptly discovered and the condition corrected before the inspector arrived on the scene. I conclude that the violation resulted from ordinary negligence.

With regard to Citation No. 2102619, the testimony and evidence presented by MSHA and the respondent is not in dispute. While it is true that the required amount of air was not reaching the end of the line curtain at the time the citation was issued, the facts show that the foreman in charge of mining was aware of the problem and was in the process of taking corrective action while the inspector was on the section. In

the circumstances, I believe that the foreman was taking reasonable steps to correct the problem and that the violation did not result from any negligence on the part of the respondent.

With regard to Citation No. 2102609, I conclude and find that the violation resulted from the respondent's lack of reasonable care to insure that the miner who was under unsupported roof was aware of that fact, and was aware of the provisions of the roof control plan. While I have commented that the roof control plan is rather confusing, it is the respondent's responsibility to insure that miners are aware of the plan provisions, particularly that portion which prohibits anyone from walking out under unsupported roof. I find that the violation resulted from ordinary negligence.

With regard to Citation No. 2102611 concerning the energized light power wires which the inspector found were not properly hung, the respondent should have been aware of the cited standard prohibiting the wires from coming into contact with combustibles. I find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

I conclude and find that all of the violations which have been affirmed in this docket were serious. In each instance, except possibly for the two permissibility citations (2102608 and 2102618), where the inspector found that the lighting circuits on the cited machines were "intrinsicly safe," the inspector found a hazard associated with each of the cited conditions (Tr. 38-41; 120). While it may be true that the permissibility standards in question are specifically intended to guard against loss of illumination, as I observed during the hearing, the missing bolt brackets in question could have caused the light fixtures to fall on the operators of the equipment in question while it was tramming, and in this event they would probably sustain injuries (Tr. 286-309). Under these circumstances, I conclude that these two citations were also serious.

PENN 83-128

Negligence

I find that Citation No. 2103081 resulted from the respondent's failure to take reasonable care to insure that the opening in the battery powered scoop was discovered and corrected. Accordingly, I conclude that this permissibility violation resulted from ordinary negligence by the respondent.

Gravity

Respondent's ventilation foreman conceded that mine ventilation could be interrupted, that methane is liberated in the mine, and that the opening found in the scoop contactor compartment is a condition which should have been attended to. He also conceded that in any permissibility violation of this kind, "Murphy's Law" would apply. Accordingly, I find that this violation was serious.

PENN 83-136

Negligence

I find that Citation No. 2103084 resulted from the respondent's failure to take reasonable care to insure that the missing bolt from the contactor compartment of the cited roof bolter was discovered and corrected. A pre-operational check should have discovered the missing bolt. I find that the violation resulted from ordinary negligence.

Gravity

For the same reasons that I found Citation No. 2103081 to be serious in PENN 83-128, I find the violation here is also serious. While it is true here that the section may have been wet and well rock dusted, and no methane was detected, the missing bolt which caused the permissibility violation presented a hazard of possible arcing and sparking in the contactor compartment when the machine was in operation.

PENN 83-137

Negligence

Inspector Wehr stated that the violation resulted from a moderate degree of negligence, and he indicated that he has spoken with mine management about the trolley wire guards so that they may institute a program of prompt reporting of the situation. I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

The missing trolley wire guards in question presented a possible shock hazard in an area where miners and equipment would have been present during the ordinary course of business. Accordingly, I conclude and find that this violation was serious.

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

The parties stipulated that the respondent is a large mine operator and that the proposed civil penalties will not adversely affect its ability to remain in business. I adopt these stipulations as my findings on these issues, and I further conclude that the penalties which I have assessed will not adversely affect the respondent's business.

History of Prior Violations

Exhibit P-9 is a computer print-out summarizing the number of violations assessed and paid by the respondent for violations issued at the Maple Creek No. 2 Mine for the period December 1, 1980 to November 30, 1982. The print-out also reflects the number of assessed and paid violations before December 1, 1980. The information on the printout is summarized by reference to the specific mandatory health and safety standard violated, rather than by any specific violation number. The printout reflects that for the two-year period noted, the respondent paid $81,036 in civil penalties for 485 violations. Fifty-two of the violations were for violations of mandatory standard section 75.200 (roof control), 48 were for violations of section 75.400 (accumulations of combustibles), and 81 were for violations of section 75.503 (permissible electric fact equipment).

Exhibit P-10 is a computer printout summarizing the number of assessed and paid violations at the respondent's Maple Creek No. 1 Mine for the same time periods noted above for the No. 2 Mine. The information reflects that for the period December 1, 1980 to November 30, 1982, the respondent paid $82,571 for 435 violations. Forty-three citations were for violations of section 75.200, 41 for violations of section 75.400, and 52 were for violations of section 75.503.

While I take note of the fact that the computer printout information for the violations issued at the No. 1 and No. 2 Mines prior to December 1, 1980, reflect that most of them were for violations of section 75.200, 75.400, and 75.503, absent any specific time frames or details concerning the listed violations, I am unable to conclude that this prior history reflects a good or poor compliance record by the respondent. Given the size of the respondent's business, its compliance record for the periods December 1, 1980 to November 30, 1982, insofar as the bulk of the standards noted are concerned does not appear to indicate a significantly poor record. However, I do take note of the number of permissibility and roof control violations and have taken this

into account in the civil penalties assessed by me for the violations which I have affirmed in these proceedings.

Good Faith Compliance

The testimony and evidence adduced in all of these proceedings reflects that all of the cited violations were timely abated by the respondent in good faith. Accordingly, I have taken this into consideration in the assessment of the civil penalties for the violations which have been affirmed (Tr. 340; 497-499; 522-523).

"Single Penalty" Assessment Arguments

During the course of the hearing, respondent's counsel argued that in those instances where a "significant and substantial" finding is rejected by the judge, a $20 civil penalty must be assessed by the judge. As an example, respondent's counsel argued that had MSHA's district manager not been following a policy that all permissibility violations are "significant and substantial," Citation No. 2102608 would have been assessed as a "single penalty" of $20 (Tr. 82). Counsel argued that since the "S & S" finding has been withdrawn, the civil penalty should "automatically" be assessed at $20, and that I must give deference to the Labor Department's regulations for assessing such penalties (Tr. 87-89).

Section 110(i) of the Act specifically authorizes the Commission to assess all civil monetary penalties provided in the Act. Section 110(i) mandates that in assessing these penalties, the Commission shall consider the six statutory criteria set forth in that section. While the last sentence of section 110(i) vests discretion in the Secretary of Labor to propose civil penalties based upon "a summary review of the information available to him," and does not require him to make findings of fact concerning the six statutory criteria, this discretion does not apply to the Commission, nor is it controlling in cases docketed before the Commission and adjudicated by its judges.

In any contested civil penalty case, including "single penalty" assessments, the Commission and its judges apply the six statutory criteria, and in exercising their respective independent adjudicatory authority, may do so without consideration of the Secretary's Part 100 regulations.

MSHA's revised Part 100 procedures for proposing civil penalties under the Act became effective on May 21, 1982,

47 Fed.Reg. 22286-22297. In the explanatory discussions concerning the Secretary's creation of the "$20 single penalty" concept as promulgated under 30 C.F.R. 100.4, the following statements appear at 57 Fed.Reg. 22291:

> This is a new section. It provides for the assessment of a $20 single penalty for violations which are not reasonably likely to result in reasonably serious injury or illness. Single penalty violations which are paid in a timely manner will not be included in the operator's history (emphasis added). * * * Under this proposal, this section was designated as the "minimum penalty" assessment procedure. In the final rule, MSHA has substituted the term "single penalty assessment" to clarify that $20 is the only penalty an operator could receive under this section (emphasis added).
>
> As proposed, this section provided for the assessment of a fixed single penalty of $20 for violations involving low level gravity and no negligence (emphasis added). In the notice of public hearing, MSHA included a refinement of the proposed single penalty provision which would apply the single penalty to those violations which are not reasonably likely to result in a reasonably serious injury or illness.

In promulgating and adopting the "single penalty" final rule now found in section 100.4, an assessment of $20 may be imposed by MSHA as a civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time fixed by the inspector. If the violation is not abated within the time fixed by the inspector, the violation is not eligible for the $20 single penalty assessment. Thus, it appears that the only requirements for the "automatic" assessment of a $20 penalty is that the violation be one which is not reasonably likely to result in a reasonably serious injury or illness, and that the violation is timely abated within the time fixed by the inspector. It would further appear that the prior proposed additional finding of no negligence as a condition precedent for such a $20 assessment has been deleted from section 100.4. Thus, even if an inspector were to find that there was negligence, regardless of the degree, the violation would still be assessed an automatic $20, as long as the two elements noted above were present (non S & S and timely abatement).

The Secretary's rationale for apparently deleting any consideration of negligence by the operator is found at the following discussion which appears at 47 Fed.Reg. 22292:

> * * * when the gravity factor is low and good faith is established through abatement, MSHA does not believe that an individualized analysis of the negligence, size and history criteria is appropriate or necessary.

Thus, in any given case where a violation qualifies for a $20 single penalty assessment, even if the inspector finds that the violation resulted from gross negligence, which is defined as "conduct which exhibits the absence of the slightest degree of care," the penalty will still result in an automatic $20 assessment by MSHA, even though the standard of care established under the Act imposes on an operator a responsibility for a high degree of care.

MSHA's promulgation and application of the single-penalty provision found in section 100.4, totally negates and ignores the statutory criteria of negligence and history of prior violations. Theoretically, a mine operator who has paid any number of "non-S & S" violations which resulted from gross negligence, could continue doing so with impunity, as long as they are timely abated.

Respondent's arguments that I am bound by MSHA's "single penalty" assessment regulations are rejected. See: Secretary of Labor v. United States Steel Mining Co., PENN 82-328, decided May 31, 1984.

"Significant and Substantial" Arguments

In Secretary of Labor v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), the Commission held that a violation of a mandatory safety or health standard significantly and substantially contributes to the cause and effect of a mine safety or health hazard when "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature," 3 FMSHRC at 825.

In National Gypsum, the Commission noted that the Act does not define the term "hazard," and it construed the term to "denote a measure of danger to safety or health," 3 FMSHRC at 827. The Commission also stated that a violation " "significantly and substantially' contributes to the cause and effect

of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial."

In Mathies Coal Co., 6 FMSHRC, PENN 82-3-R, etc. (January 6, 1984), the Commission noted that in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove:

> (1) the underlying violation of a mandatory safety standard;
>
> (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation;
>
> (3) a reasonable likelihood that the hazard contributed to will result in injury;
>
> (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

During its rulemaking on the revised regulatory criteria used by MSHA for proposed assessments of civil penalties, the rulemakers made the following statements with respect to the application of the term "significant and substantial":

> MSHA does not believe that further specific language governing the inspector's evaluation of hazardous conditions should be incorporated into the final rule. * * * MSHA will carefully review its policy for uniform application and consistency with this rulemaking (47 Fed.Reg. 22292, May 21, 1982).

Respondent's counsel asserted that MSHA's District Office has acted arbitrary in applying an interpretation of the term "significant and substantial" which goes far beyond the Commission's definition of that term as it was articulated in Secretary of Labor v. Cement Division, National Gypsum Co., supra. Counsel asserted that the inspectors who issued the violations and found that they were "significant and substantial," followed certain policy directives and instructions from their MSHA district manager. Respondent's counsel indicated that this policy is included in the comments made

the Secretary's rulemakers during the considerations which preceded the promulgation of the revised Part 100 criteria and procedures for proposed civil penalty assessments.

Respondent's counsel pointed out that MSHA's policy concerning "S & S" findings is articulated at 47 Fed.Reg. 22292, May 21, 1982, as follows:

> MSHA inspectors already make a determination as to which violations of the Act are of a serious nature. In making this determination, inspectors first evaluate whether an injury or illness is reasonably likely to occur if the violation is not corrected. Next, the inspector must evaluate whether the injury or illness, were it to occur, would be reasonably serious. In these areas, inspectors use their experience, background and training together with an evaluation of the actual circumstances surrounding the violation to arrive at an independent judgment. Where a violation is not reasonably likely to result in a reasonably serious injury or illness, a summary review and analysis of the condition or practice is conducted. However, when the gravity factor is low and good faith is established through abatement, MSHA does not believe that an individualized analysis of the negligence, size and history criteria is appropriate or necessary.

Inspector Shade explained his interpretation of an "S & S" violation as follows (Tr. 64-71):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: Let me ask the inspectors up front. What instructions, if any, do you receive from your district office as to how you interpret S & S?
>
> THE WITNESS: When we find a violation and we see it is reasonably likely that an accident would occur, that an accident would occur and it is reasonably likely that the accident would be serious before it could be terminated.

* * * * * * * * * *

> Q. Mr. Shade, isn't it true that your instructions are that you are to assume every violation will never be corrected?

A. Before it can be terminated, before it can be corrected, if we find a violation and we see that this violation will not be corrected in one night, we issue a citation.

Q. Isn't it true you are supposed to base your determination as to what is a significant and substantial violation on an assumption that the condition will never be corrected?

A. This was one of the criteria of S & S, but--

ADMINISTRATIVE LAW JUDGE KOUTRAS: I do not understand how anybody can come to the conclusion of an assumption that a violation found by the inspector will never be corrected.

MS. SYMONS: I don't, either, but that is what they have been instructed to do.

THE WITNESS: They said before it can be corrected, if we wouldn't find this violation, they assumed that this violation would not be corrected, so it would stay in the same position as if it wasn't found.

When asked to explain the procedures he follows in making a determination as to whether a violation is "S & S," Inspector Shade testified in pertinent part as follows (Tr. 423-433):

THE WITNESS: Well, we see a violation, and we usually have an escort with us, and we discuss the violation with the escort, but as far as information on it, whenever we have a violation that we think could cause an accident before this could be corrected or if it weren't corrected, then we have to mark S & S. These are our instructions.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Ms. Gismondi, I just don't understand that. Their instructions are, when they find a violation, they act under the assumption that had the inspector not found it, the mine operator would find it and likely not do anything about it, and therefore, since the inspector caught it and forced them to correct it through the citation process, that it is S & S.

The citation process itself requires the operator to abate. He is subject to withdrawal order, and if he doesn't abate it, then he is given a $1,000 a day penalty. I just don't understand this theory.

* * * * * * * * * *

MS. GISMONDI: I don't think it's so much a question, Your Honor, that the inspector assumes that the violation is not going to be corrected.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That's what he just said.

MS. GISMONDI: Well, what I'm trying to say it, I think that the significant and substantial determination is intended to be and is, in fact, keyed into the facts of the violation and the facts that are in existence at the time that it is cited and that can reasonably be expected.

* * * * * * * * * *

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Shade, what are your instructions as you understand them on S & S? What is your understanding of how you are to approach marking a violation S & S?

THE WITNESS: If this violation is reasonably likely to cause an accident.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Now, what instructions do you have to determine whether or not it is reasonably likely?

THE WITNESS: Let me finish. It is reasonably likely that it could cause an accident and that it is reasonably likely that it would be a serious accident if it were not corrected.

ADMINISTRATIVE LAW JUDGE KOUTRAS: If it were not corrected?

THE WITNESS: That's right.

ADMINISTRATIVE LAW JUDGE KOUTRAS: What does that mean? What is your understanding of "if it is not corrected"?

THE WITNESS: If the violation wasn't corrected.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Well, how can it not be corrected if you are there citing it? How is it not going to be corrected? How can the operator refuse to correct a violation that you have cited?

THE WITNESS: Well, they don't refuse to correct it as far as that goes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: How does that language play.

THE WITNESS: Well, to me it means that if it weren't corrected at any time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That presupposes that it existed for some period of time; isn't that true?

THE WITNESS: Yes, or that it would exist for some period of time. To me, that is what it means.

ADMINISTRATIVE LAW JUDGE KOUTRAS: So, in this case, had you not been there on January 13th to issue this citation, you are telling me that that violation probably existed that day and the next day, and then when you went in there and, let's assume you went in there on the 15th and found it, that you would find it S & S, because it hadn't been corrected?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Do you understand,

Miss Gismondi, what that means?

MS. GISMONDI: I'm not sure I understood just that little bit of dialogue.

ADMINISTRATIVE LAW JUDGE KOUTRAS: He said that his instructions are he marks S & S on the theory that the violation would not be corrected. That's part of the formula. What does that mean?

MS. GISMONDI: Well, I think that is the general terminology that is used in MSHA policies, but probably unfortunate, I think, that what it means--

ADMINISTRATIVE LAW JUDGE KOUTRAS: Tell me what it means. There is enough bureaucratic policies around that you and I don't understand. Is it written someplace? I want to know what it means.

MS. GISMONDI: I'm sure there is some kind of letter or statement of what the policy is written somewhere.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Tell me what it means in your mind.

MS. GISMONSI: What it means in my mind is that you make an S & S determination on the basis of the condition that you observe and that you cite.

ADMINISTRATIVE LAW JUDGE KOUTRAS: All right.

MS. GISMONDI: Now, obviously when you observe it and when you cite it, it is not corrected. I think that the inspector is, you know, this stuff about whether or not it's going to remain uncorrected forever, I think is misleading.

I think that the question is, you know, what is the likely effect of this violation as I'm looking at it, you know, as I cite it. As I said, obviously as you are citing it, it is not corrected. It is what it is.

ADMINISTRATIVE LAW JUDGE KOUTRAS: And is it S & S at that point?

MS. GISMONDI: I think it depends on the factors that we are talking about.

ADMINISTRATIVE LAW JUDGE KOUTRAS: What could happen if the inspector didn't appear and cause him to correct it?

MS. GISMONDI: Exactly.

THE WITNESS: As far as S & S is concerned, it is not necessarily permissibility. We have to look at it, first of all, is it a violation? If it's a violation, either the condition at the time or in our own knowledge through training and experience and using the entire country, you know, things that have happened throughout the entire country, let's put it that way, if the event should occur that we are citing, could it cause an injury or an illness?

Now, if it passes that test that we feel that it could create an illness or an injury, which we have also been instructed that that means that should a person lose one day's work or have to be reassigned for one day from his normal duties, then it would be considered a significant or substantial type injury, then it becomes S & S.

BY MS. SYMONS:

Q. So that any violation which could result in an injury over any period of time is significant and substantial?

A. Well, I left that out, I'm sorry. When we look at the violation, we also must in our own mind say, if the condition were left uncorrected--

Q. Okay, are you supposed to give any effect to the surrounding circumstances?

A. Well, there is some consideration given to the condition that we find, yes.

Additional Findings and Conclusions
Significant and Substantial Violations

PENN 83-129

Citation No. 2102605

Inspector Shade made his "S & S" determination because of the lack of overhead guarding on the trolley wire at the

"A Flat 6 Chute track switch." He determined that the violation was "S & S" because the wire was energized, it was five and one-half feet off the ground, and was located where the locomotives, jeeps, and other personnel carriers passed under the unprotected overhead wire. His concern was that someone standing up in the carriers, or alighting from the carriers, could contact the unguarded wires. Respondent does not dispute the fact that the guarding normally in place for the overhead wires had fallen or been knocked down, and that the trolley wire in question was not guarded or protected.

On the basis of all of the evidence adduced here, I conclude and find that the inspector's "S & S" finding is clearly supportable. The overhead trolley wire was not guarded, men and equipment regularly ran under it, and it would not be too difficult for a miner to reach up and contact the wire or inadvertently come into contact with it while riding in a conveyance or alighting from it when it stopped under the unguarded wire. Here, the inspector's "S & S" finding is rational and supportable, and IT IS AFFIRMED.

Citation No. 2102611

In this instance Inspector Shade found that the violation was "significant and substantial" because he believed that the light wires which were in contact with the wooden cribs and roof coal presented a fire hazard. In his view, in the event of a roof fall, the wire could be broken or damaged, and a short would result, thereby posing a fire hazard.

Inspector Shade believed that the mine was idle at the time the citation was issued. While he is not an electrician, he confirmed that the wires were fully insulated, he observed no breaks, and the wires were not rubbing in any way. He could not state whether there was any tension on the wires, and he conceded that he had no reason to believe that the cited conditions would not have been discovered during the regular weekly electrical inspection. He admitted that he did not check the preshift examination books, and had no idea how long the cited conditions had existed.

I conclude and find that Inspector Shade's belief that the roof would fall at some unspecified time in the future, thereby possibly damaging the wire and causing a fire is

speculative and unsupported. Given the aforementioned conditions which the inspector observed, I cannot conclude that it was reasonably likely that the wire resting on the crib or in contact with the roof presented the likelihood of an injury or hazard. While I have affirmed a violation of the cited safety standard, and have concluded that it was serious, I cannot conclude that it was significant and substantial. Accordingly, the inspector's finding IS REJECTED, and IT IS VACATED.

Citation No. 2102609

On the facts surrounding this particular violation, I cannot conclude that the inspector's "S & S" findings are supportable. Here, the area was roof bolted and additional support was provided along the left rib by means of roof jacks. The period of time which the miner spent under unsupported roof was at most a few seconds. When he walked out to install a jack, he was in full view of the inspector and a foreman, and he was immediately called back out. Given the fact that MSHA itself concedes that miners must go under unsupported roof to install roof supports, critical factors which must be considered include the amount of time a miner is under unsupported roof, the overall roof conditions, and whether or not the immediate area is supported. Here, I am convinced that the inspector made an "automatic" "S & S" finding simply because it involved roof support. Given the facts here, I find that the inspector's finding of "S & S" is unsupportable, and IT IS REJECTED and VACATED.

Citation No. 2102619

In this case, prior to the start of mining, the inspector and the foreman on the scene were both aware of the fact that the amount of air at the end of the line curtain was less than the required amount. The foreman took immediate remedial steps to insure compliance, and based on his air readings, more than the required amount of air was achieved and the inspector left. However, when he returned, an interruption to the air flow, caused by a collapsing curtain, and which had not been detected by the miners in the work area, caused the air flow to diminish. When informed of this fact, the foreman immediately discovered the problem and corrected it. Given these circumstances, I cannot conclude that the violation was "S & S." Given all of the prevailing circumstances, I fail to understand how the inspector could conclude that an injury or

accident was likely to occur. Here, both the inspector and the foreman were both aware of the problem from the outset, and steps were quickly taken to correct the problem.

I am convinced that the inspector here found an "S & S" violation on the basis of his belief that all such violations are "S & S." This theory of "S & S" is rejected. I conclude and find that the inspector must consider the prevailing conditions as well as the fact that the operator is on top of the problem and is attempting to make corrections. Accordingly, on the facts here presented, the inspector's "S & S" finding IS REJECTED, and IT IS VACATED.

PENN 83-128

Citation No. 2103081

In this case, Inspector Wolfe found that the citation was "significant and substantial" because he believed that the opening in the contactor compartment of the scoop which was cited posed a potential hazard of a methane ignition. Mr. Wolfe "believed" that no methane was detected in the area, that the ventilation was good, and that "it could well be" that the scoop was three crosscuts outby the last open crosscut. However, the scoop was often used for cleanup details and the hauling of supplies, and was used at the face. Given these variety of uses, as well as the fact that the scoop was required to be examined weekly, I believe it was reasonably likely that the loosened bolt which rendered the machine non-permissible would have gone undetected. Coupled with the fact that the mine had previously experienced methane face ignitions, and the fact that the mine is on a section 301(i) "spot inspection status" because of the amount of methane liberated, I cannot conclude that the inspector's "S & S" finding is unsupportable. As a matter of fact, in this instance, respondent's ventilation foreman Ritz expressed concern about an uncorrected permissibility violation of this kind, and he confirmed that ventilation can be interrupted at any time, and that the presence of methane is unpredictable. The "S & S" finding by Inspector Wolfe IS AFFIRMED.

PENN 83-137

Citation No. 2102681

Inspector Wehr made an "S & S" determination on the basis of his belief that an unguarded trolley wire could be contacted by a miner during the course of his regular travel in

the mine, whether it be by motorized conveyance or on foot. The guarding which was normally in place had been knocked down, and the inspector was concerned that a miner riding in one of the conveyances which normally passed under the wire could come in contact with the wire.

Inspector Wehr testified that he was concerned that a person running a locomotive could come in contact with the overhead unguarded wire while passing under it, and that shock or fatal injuries could result (Tr. 338). He also indicated that with the amount of traffic passing under the wire, it was reasonably likely that someone could come in contact with the unprotected wire (Tr. 339).

While it may be true that trolley poles do become dislodged from track haulage equipment from time-to time and that overhead guarding for trolley wires is a constant problem in the mine, the fact is that the respondent here does not dispute the fact that the cited trolley wire was not guarded. Further, based on the credible testimony by the inspector, which has not been rebutted by the respondent, it seems clear to me that men do pass regularly under the wire which was not guarded at the time the inspector observed and cited it. Given the fact that someone could readily contact or reach the unguarded energized wire, I conclude and find that the inspector's finding of "S & S" is supported. Accordingly, his finding in this regard IS AFFIRMED.

PENN 83-136

Citation No. 2103984

In this case, Inspector Wolfe issued the citation after finding that one of the bolts which secured the lid to the main contactor compartment of a roof bolter was missing. With regard to his "S & S" finding, the parties agreed to incorporate Mr. Wolfe's prior testimony regarding the permissibility violation concerning a scoop (Citation No. 213081), in support of his "S & S" finding concerning the roof bolter.

In defense of the citation, the parties agreed to accept a proffer by respondent's witness Ritz that the roof bolter in question was parked two blocks outby the last open crosscut when the inspector cited it, and that at the time the inspector observed the cited condition the section was wet and well rock dusted, that the ventilation was good, and that no methane was detected on the section.

In the previous scoop violation, the facts established that there was an opening in the contactor compartment which could have admitted methane, thereby sparking an ignition. In the instant case concerning the roof bolter, Mr. Wolfe confirmed that there was no opening present (Tr. 583). However, he believed that with the use of the machine, the heating and cooling process would allow methane to be drawn into the compartment. When asked how this was possible if there were no opening, Mr. Wolfe alluded to a possible warping process caused by "an ignition inside the compartment" (Tr. 585).

In response to further questions, Mr. Wolfe could not state how many bolts were required to be on the compartment. He "guessed" at a number between 18 and 24. While explaining his "flame path" theory, he "guessed" that the flame path for the particular compartment size in question was an inch and one-half, but he was "not sure," and simply stated that "it was close enough" (Tr. 586).

Further examination of the record with regard to this citation leads me to conclude that Inspector Wolfe made his "S & S" finding on the basis of his general belief that methane ignitions have resulted from permissibility violations. He conceded that in making his "S & S" determinations, he does not necessarily consider the particular prevailing mine conditions, and in fact conceded that he had no idea as to those conditions which may have prevailed when he issued the citation (Tr. 587-589).

On the facts in this case, I am convinced that Inspector Wolfe made his "S & S" determination on the assumption that this particular permissibility violation was per se "S & S," and that he did so on the speculative assumption that all permissibility violations cause methane ignitions. Given these circumstances, and the facts surrounding this particular citation, his "S & S" conclusions are simply not supportable. Accordingly, his finding in this regard IS REJECTED, and his "S & S" finding IS VACATED.

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:

PENN 83-121

Citation No.	Date	30 CFR Section	Assessment
2102696	1/12/83	75.1403	$115

PENN 83-129

Citation No.	Date	30 CFR Section	Assessment
2102605	1/7/83	75.1003	$205
2102608	1/12/83	75.503	125
2102618	1/24/83	75.503	150
2102611	1/13/83	75.516	120
2102619	1/24/83	75.316	75
2102609	1/12/83	75.503	125

PENN 83-128

Citation No.	Date	30 CFR Section	Assessment
2103081	1/19/83	75.503	$300

PENN 83-137

Citation No.	Date	30 CFR Section	Assessment
2102681	12/14/82	75.1003	$225

PENN 83-136

Citation No.	Date	30 CFR Section	Assessment
2103084	2/8/83	75.503	$125

ORDER

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

George A. Koutras
Administrative Law Judge