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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 84-10 A.C. No. 46-01283-03526
v.	
WESTMORELAND COAL COMPANY, RESPONDENT	Hampton No. 3 Mine

DECISION

Appearances: Kevin C. McCormick, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
F. Thomas Rubenstein, Esq., Big Stone Gap, Virginia, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled proceeding was held on June 12, 1984, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of presentation of evidence by both parties, I rendered a bench decision.

Before the transcript of the hearing had been received, counsel for respondent filed on June 22, 1984, a motion for reconsideration of the bench decision. A copy of the motion for reconsideration was served on counsel for the Secretary of Labor. The Secretary's counsel filed on August 8, 1984, a letter in which he stated that he did not intend to submit a reply to respondent's motion for reconsideration.

The substance of my bench decision is first set forth below (Tr. 274-289). Thereafter, respondent's motion for reconsideration is denied for the reasons given.

This proceeding involves a petition for assessment of civil penalty, alleging a violation of 30 C.F.R. 75.200 by Westmoreland Coal Company. The issues in a civil penalty case are whether the violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Before I form a conclusion regarding the question of whether a violation occurred, I shall make some findings of fact which will be set forth in enumerated paragraphs.

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1. Inspector Baisden went to the Hampton No. 3 Mine on September 16, 1982. On his inspection he was accompanied by the chairman of the safety committee, Charles Egnor. The mine foreman was also with the inspector and Egnor when they began their inspection, but the mine foreman had to check into a malfunction of the tailpiece on the conveyor belt. Consequently, the inspector and Egnor went to the face area unaccompanied by the mine foreman.

2. When the inspector and Egnor were close to the face of the No. 3 entry, the inspector noticed that there was no curtain in the crosscut to the right of No. 3 entry. The inspector investigated the absence of the curtain and found that there was a hole on the right side at the face of the crosscut, and he concluded that that made the need for installation of a curtain unnecessary. But while he was examining that aspect of the ventilation, he noticed that the crosscut had been developed for a distance which appeared to be greater than could have been cut with a continuous-mining machine without the machine's operator having proceeded inby permanent supports.

3. The inspector determined that a measurement of the area should be made in order for him to ascertain whether the operator of the continuous-mining machine had proceeded inby permanent supports. Therefore, he tied a hammer to the cloth tape measuring device that he carried with him and he tossed the hammer through the hole at the end of the crosscut and he asked Egnor to go to the No. 4 entry, into which the hole extended, and retrieve the hammer, and thereby enable the inspector to make an accurate measurement. Egnor was cautioned to make sure he did not go out from under permanent supports.

4. Egnor proceeded outby the No. 3 entry through the crosscut outby the one in which the measurement was made and proceeded into the No. 4 entry and came to the place where the hole had been made near the face of the No. 4 entry. Egnor held the tape and it was determined that the distance from the last permanent support in the crosscut through the hole in the end of the crosscut was 23 feet, but the inspector wanted to get a measurement only to the most inby place in the crosscut from which coal had been extracted by the continuous-mining machine. Therefore, he withdrew the tape after Egnor had untied it from the hammer, and when the tape came out of the hole and fell on the mine floor, the inspector made a determination that the distance from the face of the crosscut to the second roof bolt from the right of the crosscut was 22 feet. The inspector believed that the second bolt from the right rib in the crosscut was in line with the other three bolts in that same line of bolts and therefore did not take additional measurements.

5. The operator's roof-control plan provides, "Continuous miner runs are made on alternate sides until the face has been advanced a maximum distance which will permit the miner operator to remain under bolted roof and not advance the controls of the miner inby the last row of bolts." Therefore, the inspector wrote Order No. 2037676, which is exhibit 2 in this proceeding. The condition or practice stated in Order No. 2037676 is as follows:

> The last open crosscut between No. 3 entry and No. 4 entry has been mined 22 feet deep. From cutter head to the controls measures 19 1/2 feet, putting the controls of the miner inby the last row of permanent support. This crosscut was mined on 2nd shift, 9/15/82. The Onshift and Daily Report Book indicates Roger McMicken as section foreman on said shift. See page 19, line 1 of approved plan or Drawing 1, page 17 of approved plan.

6. Raymond Watts was the operator of the continuous-mining machine on the second shift, that is, 4:00 p.m. to midnight on September 15, 1982, when the condition described by the inspector occurred. Watts had previously been working in 1979 when a roof fall occurred in the Hampton No. 3 Mine, at which time two miners were killed and Watts narrowly escaped being killed himself. The occurrence was so unsettling that Watts was unable to work for approximately 14 months. Therefore, he testified in this proceeding that it was not his practice or intention ever to do his job in a manner which would expose him or anyone else to possible injury. He testified that when he advanced the continuous-mining machine into the crosscut here at issue, he found that it was off center and that it was necessary for him to move his continuous-mining machine at an angle to the right rib in order to straighten the crosscut. He stated that it was his practice to look through a screen at the front of the canopy under which he sits and that when he saw the last roof bolt, or the roof bolt in the last row of permanent supports come into view in that screen, that he stopped running the continuous-mining machine because that way he knew he would not go inby the last row of supports. He testified that that was what he recalled having done on the night of September 15. He did recall that when he finished cleaning up the entry and backed his continuous-mining machine out of the crosscut he did see a hole in the face of the crosscut.

7. When Watts came to work on the following day he learned from the superintendent of the mine that a withdrawal order had been written on the day shift because of his having advanced the controls of the miner inby the last row of permanent supports.

Watts was very much surprised at hearing he had been charged with having done that and expressed his doubt that it was so. The roof-control plan was read to him and it was explained that the company was considerably upset about whether he had gone inby the last row of permanent supports.

8. Roger Bias was also working on the evening shift on September 15 and on that particular evening he acted as the helper for the operator of the continuous-mining machine. He has no specific recollection of whether the mining machine went inby the last row of permanent supports, but he said that one of his duties was to help the operator of the continuous-mining machine in order to see that he did not go inby the last row of supports and, so far as he could recall, Watts did not go inby the last row of permanent supports. He also recalls that there was a hole at the face of the crosscut, but he did not see it until after Watts had cleaned up the crosscut and had backed out the continuous-mining machine.

9. Roger McMicken was the section foreman on the evening of September 15, 1982. He testified that he saw a hole at the face of the crosscut when he was making his last check of the section, but he did not notice anything unusual other than that. He was not aware that a charge had been made against Watts for going inby the last row of permanent supports until he reported for work the following day and also was advised by the mine superintendent that the withdrawal order had been written. One of the actions McMicken made was to go into the section and measure the distance between the last row of bolts and the face of the crosscut and his measurements showed that the distance was 19 feet from all of the bolts, except the first and second bolts from the right rib. He found the distance from the second bolt from the right rib to the face to be 22 feet, the same distance measured by the inspector, but he said that he did not think that the second bolt was in line with the others and that he believed it was outby the others by a considerable distance. That misalignment, together with the hole at the face of the crosscut, in McMicken's opinion, accounted for the fact that that particular measurement was 22 feet. The distance from the first bolt from the right rib to the face was measured by McMicken as being 20 feet (Exh. B).

10. Richard Sparks was the operator of a scoop on the day shift on September 16, 1982. He testified that he was operating the scoop to clean up the No. 4 entry and that he was so engaged at the time that Egnor came into the No. 4 entry and went up to the face of the No. 4 entry in order to assist the inspector in the measurement which the inspector made prior to issuing his withdrawal order. Sparks claims that he saw Egnor put his hand on the rib and reach clear through the hole in the end of the crosscut in order to retrieve something, but he did

not know exactly what Egnor was doing and did not see the hammer in Egnor's hand and did not know what had transpired until he was later advised that Egnor had been at the face of the No. 4 entry in order to assist the inspector in the measurement. Sparks also testified that Jake Henry was a continuous-miner helper on the day shift and it is claimed that Henry was in the crosscut when the inspector made his 22-foot measurement and that Henry observed Egnor reach through the hole in the end of the crosscut. Sparks did not see Egnor walk past him in the No. 4 entry and only observed him, he says, after he was already situated at the hole on the left side of the No. 4 entry. Sparks accounted for his failure to see Egnor walk past him by stating that he has to move back and forth in the entry in his process of cleaning with the scoop. Egnor testified on rebuttal that no one was in the No. 4 entry when he went there to assist the inspector and that he would have remembered it if anyone had been running a scoop because he would have had to have flagged down the scoop operator in order to go past him.

11. Jim Kiser is the manager of Westmoreland's health and safety program and he, among other duties, conducts accident investigations of all serious violations which are alleged by any of MSHA's inspectors. Kiser considered the withdrawal order here issued to be a serious one because it was written under the unwarrantable-failure provisions of the Act and is, therefore, considered to be more serious than an ordinary citation might be. His investigation of the matter took a couple of weeks to complete and resulted in a conclusion by Kiser that Westmoreland's personnel were not at fault in the occurrence and consequently did not recommend that any of the people involved be disciplined, although it is Westmoreland's practice to discipline people who do violate the mandatory safety standards if the investigation shows that violations occurred.

Counsel for the Secretary and Westmoreland made concluding arguments and they both stressed the fact that there are credibility problems involved in the testimony.

The Secretary's counsel emphasized the fact that the inspector has no particular reason to cite a violation he has not actually seen, that the chairman of the safety committee has no reason to be biased against the company for which he works, and that their testimony should be given greater weight than that of Westmoreland's witnesses who were obviously aware of the fact that they might receive some discipline if they were considered to be at fault in the issuance of Order No. 2037676.

Westmoreland's counsel stressed the fact that Watts is an individual who has an excellent reputation in the company and the fact that the section foreman has not previously known him

to violate any provisions of the roof-control plan and that Watts, having just nearly escaped death himself in a roof fall, would not be one who would have knowingly violated the roof-control plan. Counsel for Westmoreland also stressed the fact that Egnor, despite his position as chairman of the safety committee, still went to the face of the No. 4 entry and necessarily was inby the last permanent support in assisting the inspector to obtain his desired measurement, and that the inspector set a very bad example by asking Egnor to participate in such a fashion in making the measurement.

I agree with Westmoreland's counsel that the way the measurement was made seems to have left something to be desired in the way of safety and I hope that similar acts will not occur in the future so that one person is perhaps endangered while proving that someone else was in a hazardous position. Even Egnor admitted in his testimony that once a hole is made in a coal face, which is only about a foot thick, that additional coal may slough off and that it's not a very safe place to be. Of course, both Egnor and the inspector denied that Egnor was at anytime in any danger.

One of the duties which a judge has is making credibility determinations and one of the ways a judge does that is based on the demeanor of the witnesses as well as the consistency of their testimony. Based on the demeanor of the witnesses in this case, I believe that the inspector and Egnor have an edge on credibility. I found a number of questions answered by Westmoreland's witnesses with qualifications that they were not sure of the facts and with the assertion that it has been almost 2 years since this matter occurred. Even the section foreman stated that he thinks that the crucial bolt from which measurements were made was out of line.

I believe that the credible evidence requires me to find that there was a distance of 22 feet from the face of the crosscut back to the last row of permanent supports. Since exhibit 5 in this proceeding shows that the distance from the head of the continuous-mining machine back to the controls is 19 1/2 feet, then necessarily the continuous-mining machine operator would have had to go inby the last row of bolts in order to have made a cut of 22 feet.

I am taking into consideration the fact that it has been alleged that the continuous-mining machine operator was trying to straighten the crosscut by cutting at an angle, but I am also taking into consideration the fact that Egnor has had over 11 years of experience as an operator of a continuous-mining machine and I am relying upon his and the inspector's conclusions and certainty that there was no evidence to show that the crosscut had been cut at an angle so as to confirm or corroborate Watts' testimony to that effect.

Based upon the above considerations, I find that a violation of section 75.200 did occur as alleged in Order No. 2037676.

Having found that a violation occurred, I am required to consider the six criteria in assessing a civil penalty. The parties stipulated that Westmoreland is subject to the Act, that it is a large operator, that payment of a penalty would not cause it to discontinue in business, and that Westmoreland showed a good-faith effort to achieve rapid compliance once the violation was cited. Those stipulations take care of three of the six criteria.

The fourth one is the history of previous violations. Exhibit No. 7 is a computer printout which indicates that Westmoreland, at the Hampton No. 3 Mine here involved, has paid penalties for 29 violations of section 75.200 in the 24 months preceding the occurrence of the violation here involved. Counsel for Westmoreland pointed out that those violations were relatively minor in that they were alleged in citations issued under section 104(a) of the Act, except for one imminent-danger order and one unwarrantable-failure order. He also said that a check had been made of those 29 previous violations and that none of them involved an allegation that anyone had proceeded inby permanent roof support.

It appears to me that 29 previous violations in a 24-month period is a large number of violations and one reason I am troubled by that many is that when the Act was amended in 1977, one of the things that concerned Congress in its discussions of the need to modify the Act to make it stronger in its provisions was that in the Scotia mine the company had previously violated the ventilation provisions and yet the company had not been assessed increasingly large penalties based on those repeated violations. Congress thought that the Act was not being properly administered, or each succeeding violation would have received a higher civil penalty than the one before it. (FOOTNOTE 1)

I am inclined to temper my consideration in this instance because normally a judge does not get any information at all about the type of previous violations; he simply is presented with a number and he has no way to get a perception of the kind of violation involved. In this proceeding, however, there are statements that a check has been made of the previous violations and that they do not seem to be serious, or at least there is not a previous violation of having gone beyond permanent support. For that reason, I shall not make a severe increase in the penalty under the criterion of history of previous

violations, but I do think that some indication should be made that that is a rather large number of previous violations. Consequently, under that criterion I shall assess a penalty of $200.

The fifth criterion to be considered is negligence. Counsel for the Secretary has stressed the fact that the company should have made certain that its personnel did not violate the roof-control plan and that the company should be held to be guilty of a high degree of negligence for the fact that this violation did occur at all. Westmoreland's counsel, on the other hand, has taken the very same set of circumstances and facts and argued that the company should not be held to be guilty of a high degree of negligence because it has made very strenuous efforts to acquaint its personnel with the roof-control conditions and that it has made every effort that it can make to get its miners to proceed in a safe and lawful fashion.

There is a considerable body of testimony showing that Watts was a person who was safety minded and I believe in this instance that he did intend to mine in a safe manner and he did intend to stop before going inby the last row of permanent supports. It is possible for anyone to make a mistake and I believe that Watts did inadvertently cut farther than he intended. For that reason, and the fact that there is a lot of testimony showing that Westmoreland is trying to operate a safe mine and to make its employees safety conscious, I find that a very small degree of negligence should be attributed to management in this case.

I might point out that there are precedents for my finding here as to negligence. In Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), the Commission held that the operator was not liable for negligence for the acts of the rank and file miner when it comes to assessing a civil penalty, but that the operator is liable for the acts of the rank and file miner, when it comes to the finding of a violation, because a company, under the Act, is liable without fault for violations which occur in its mine. U.S. Steel Corp., 1 FMSHRC 1306 (1979). The testimony shows that Westmoreland has tried to instruct its miners in proper safety procedures and all witnesses who work for the company so testified. For the aforesaid reason I am not assessing any portion of the penalty under the criterion of negligence.

The final criterion to be evaluated is gravity. There is a great deal of testimony by the roof-control specialist, Inspector Eddie White, and by the inspector who wrote the order to the effect that a large number of fatalities each

year result from roof falls and from failure to comply with roof-control plans. Respondent's witnesses also testified that going beyond permanent roof supports is a serious violation. Consequently, the preponderance of the evidence supports a finding that this was a serious violation. It is true that the operator of the continuous-mining machine was under a canopy, and canopies undoubtedly do help protect operators from death. But as the inspectors testified, a slate roof is involved here and when such roofs fall, they are inclined to break up so that portions of rock can fall in on the operator, even though he is protected by a canopy because the canopies do not have sides on them to prevent such encroachments. Also the helper to the continuous-mining-machine operator testified that he works close to the operator and that makes him vulnerable to injury, if a roof fall should occur, because the fall will not necessarily terminate right at the canopy of the operator who is running the continuous-mining machine.

The discussion above shows that the violation must be rated as being very serious under the criterion of gravity. Based on that criterion, and the fact that a large operator is involved, I believe that the gravity of the violation warrants a penalty of $800. When the $200 portion of the penalty assessed under the criterion of history of previous violations is added, a total penalty of $1,000 will be assessed, as hereinafter ordered.

THE MOTION FOR RECONSIDERATION

Occurrence of a Violation

As indicated on page 1 of this decision, counsel for Westmoreland filed on June 22, 1984, a motion for reconsideration of the bench decision rendered at the conclusion of the hearing. A judge's bench decision is not a final decision until it has been issued after receipt of the transcript and given a date by the Commission's Executive Director in accordance with 29 C.F.R. 2700.65. Therefore, Westmoreland's counsel is not preclude under the Commission's procedural rules from filing a motion for reconsideration of a bench decision. Additionally, in C.C.C.-Pompey Coal Co., Inc., 2 FMSHRC 1195 (1980), the Commission held that a judge is obligated to reconsider any holdings made in a bench decision if, during the interim between the rendering of the bench decision and its issuance in final form, the Commission issues a decision establishing a precedent which conflicts with the ruling made by the judge in his bench decision. The ruling in the Pompey case is applicable in evaluating Westmoreland's motion for reconsideration because the Commission issued a decision in United States Steel Corp., 6 FMSHRC 1423 (1984), after I had rendered the bench decision in this proceeding. In the U.S. Steel decision, the

Commission majority reduced one of my penalties from $1,500 to $400 because my conclusions were not supported by substantial evidence (6 FMSHRC at 1432). Therefore, I am obligated, before issuing this decision, to show that my assessment of a penalty of $1,000 is supported by the evidence.

Westmoreland's motion first requests that I reconsider my finding that a violation occurred. The motion notes that Westmoreland presented the only testimony by eyewitnesses to the way the crosscut was mined and that their testimony showed that the hole in the face of the crosscut was caused by the "popping out" of coal as a result of the pressure exerted on the small amount of coal left standing between the face of the crosscut and the No. 4 entry (Exh. 4). Westmoreland agrees that the distance from the last permanent support to the face of the crosscut was 22 feet, as measured by the inspector, but Westmoreland claims that the alleged distance of 2 1/2 feet by which the operator of the continuous-mining machine proceeded beyond permanent supports was accounted for by Westmoreland's witnesses who said that the second roof bolt from the right rib was out of line with the other roof bolts by about 2 feet and that about 18 inches of coal had popped out of the face.

Exhibit 5 shows that if one measures obliquely from the left side of the cutterhead on the continuous-mining machine to the operator's controls located on the right side, the distance is 21 feet 10 inches, instead of the distance of 19 feet 6 inches obtained by the inspector who measured directly from the right cutterhead to the operator's controls which are on the right side of the continuous-mining machine. Westmoreland points out that the operator of the continuous-mining machine testified that the entry was off center and that he was cutting at an angle to bring the crosscut back into alignment. Westmoreland argues from the aforesaid facts that the operator of the miner was 21 feet 10 inches from the face because of the angle at which the crosscut was mined. That contention supports a conclusion that the operator, at most, was only 2 inches inby the last permanent support (22þ minus 21þ 10" = 2").

Westmoreland then points out that the hole in the face of the crosscut was caused by popping or crumbling of the coal. The crumbling effect, according to Westmoreland, made an indentation in the face of 18 inches. That indentation, it is said, should also be subtracted from the inspector's measurement of 22 feet because the head of the continuous-mining machine did not cut that 18-inch indentation. If one subtracts the 18-inch indentation from the 2-inch distance that 22 feet exceed 21 feet 10 inches, it will be readily seen that the operator of the miner, instead of being 2 inches inby the second roof bolt from the right rib, was actually 16 inches outby that roof bolt.

In my bench decision, I found that the testimony of MSHA's witnesses was more credible than that of Westmoreland's witnesses. For that reason, I do not accept Westmoreland's claim that the second roof bolt from the right rib was 2 feet outby the other roof bolts in that last row of permanent supports. The argument above, however, does not even include that portion of Westmoreland's evidence to the effect that the second bolt was 2 feet out of line with the other bolts because Westmoreland's argument is based on the 21-foot 10-inch oblique measurement from the cutterhead to the controls and the 18-inch indentation in the face of the crosscut. Westmoreland's argument as to the cutting of the crosscut at an angle is controverted, however, by the testimony of the inspector and the chairman of the safety committee who stated unequivocally that cutting at the drastic angle that would be necessary to bring the 21-foot 10-inch measurement into play would have resulted in the cutting of a large place shaped like a piece of pie in the right rib and both of the witnesses testified unequivocally that the right rib was smooth and free of any indications showing that the crosscut had been cut at an angle (Tr. 26; 52-53; 72-73; 257).

Exhibit 5 is a diagram of the continuous-mining machine. That diagram shows that the continuous-mining machine is 10 feet 10 inches wide and 23 feet 4 inches long. It was operating in a crosscut whose total width was 20 feet. An offset had been cut in the face on the right side. It is impossible for a machine 23 feet 4 inches long and almost 11 feet wide to be turned in a 20-foot entry so as to bring the oblique measurement of 21 feet 10 inches into play because the rear of the machine will come into contact with the left rib and prevent the machine from being turned at an acute angle. Additionally, it must be recognized that the helper to the operator of the continuous-mining machine testified that the ventilation curtain was in place both at the time they were mining and at the time they were cleaning up the crosscut (Tr. 187; 193-194). The ventilation curtain was 4 feet from the right rib (Tr. 193). The curtain therefore reduced the maneuverability of the continuous-mining machine by reducing the width of the entry to 16 feet. Moreover, exhibit 5 shows that the continuous-mining machine has a loading attachment on its rear end which is 9 feet 6 inches long and the helper further testified that he was involved in keeping the shuttlecars from becoming entangled in the continuous-mining machine's cable. While the loading apparatus on the continuous-mining machine will swing to the right and left to provide some flexibility in the way the continuous-mining machine is used, the fact remains that the machine's ability to turn at a dramatic angle was further reduced by the fact that it was delivering coal into shuttlecars.

It may easily be demonstrated why Westmoreland's motion for reconsideration dropped its contention that the second roof bolt from the right was about 2 feet outby and out of line with the other roof bolts in the last row of permanent supports. If that contention is added to Westmoreland's other arguments about an 18-inch indentation in the face and its contention that the operator's controls were 21 feet 10 inches from the face when the miner is being used at an angle, the result would be that the operator of the miner was 40 inches outby the last row of permanent supports, as shown in the calculation below:

22þ 0" = distance from second roof bolt from right rib to face of crosscut (Exh. 4).
%6821þ 10" = distance from left cutterhead to controls of machine (Exh. 5).
2" = distance operator was inby second roof bolt from right rib.

18" = indentation in the face caused by "popping off" of coal (which further reduces the inspector's 22-foot measurement).
%68 2" = distance which operator would have been inby second roof bolt if he were 21þ 10" from the face.
%68 16" = distance operator would have been outby the second roof bolt if indentation accounted for 18 inches of inspector's 22-foot measurement.
á24" = distance second roof bolt was out of line with other roof bolts in last row of permanent supports.
40" = distance operator would have been outby the last row of permanent supports if all of Westmoreland's contentions are applied to reduce the inspector's 22-foot measurement.

The inspector testified that he went into the crosscut to determine why no curtain had been erected in the crosscut. When he saw the hole in the face, he recognized that air would travel into the No. 4 entry, which was the return entry, and obviate the need to have a curtain installed, but then the inspector's attention was attracted to the fact that the crosscut had been mined beyond permanent support in violation of the roof-control plan (Tr. 17). If the operator of the continuous-mining machine had stopped cutting coal when the controls of the machine were 40 inches outby the last row of permanent supports, there is no likelihood that the inspector's attention would have been directed to the depth of the last cut of coal which had been removed from the crosscut because the operator of the machine could not have been close enough to the face for the controls of the machine to have been nearer to the face than the 19-foot 6-inch distance from the right cutterhead to the machine's controls (Exhs. 4 and 5).

There are other aspects of Westmoreland's evidence which cast doubt on the validity of its arguments. The person who made the measurements on which Westmoreland relies was Roger McMicken who was the section foreman on the second shift when the crosscut was mined. He testified that the first roof bolt from the right rib was 20 feet from the face of the crosscut (Tr. 204; Exh. B). McMicken did not claim that the measurement from the first roof bolt to the face was made to an indentation in the face. There is no way for the operator of the continuous-mining machine to have cut 20 feet inby the first roof bolt from the right rib without going at least 6 inches inby that roof bolt because the continuous-mining machine could not possibly have cut the extreme right side of the face to a depth of 20 feet without having the continuous-mining machine almost squarely against the face as claimed by MSHA's witnesses (Tr. 53; 72).

Westmoreland's contentions about nonoccurrence of the violation are further flawed by the lack of certainty shown in its witnesses' testimony. Raymond Watts was the operator of the continuous-mining machine on the night of September 15, 1982. Watts is classified as the helper to the operator of the continuous-mining machine (Tr. 141), but on the night of September 15, 1982, the regular operator did not report for work because of illness in his family (Tr. 157). Watts' helper was Roger Bias who was not familiar with the Joy miner which was being used at that time (Tr. 159). It is ordinary practice for the regular operator to make the first cut of the shift and for the helper to make the second cut. Then they generally alternate in that fashion throughout the shift, but Bias' inexperience prevented that sort of switching in assignments with the result that Watts made all of the cuts of coal which were mined on the evening shift of September 15 (Tr. 157-159).

Watts' testimony will not support many findings because he was not certain about his actions on September 15. He was only able to say that he "thinks" the bolts in the last row of permanent supports were out of line (Tr. 154). Watts agreed that the right side of the crosscut was definitely cut more deeply into the face than the left side, that he was the one who made both cuts, and that he believed the right side was cut from 10 inches to a foot deeper than the left side (Tr. 155). Watts also claimed that he was watching the curtain on the roof bolt closest to the right rib and that he did not go beyond that curtain (Tr. 145), but the section foreman found that it was 20 feet from that bolt to the face of the crosscut (Tr. 204). As indicated above, Watts could not have cut the extreme right corner of the crosscut to a depth of 20 feet without going inby that bolt by at least 6 inches. Despite Watts' contention that he had not gone beyond the last row of permanent supports, he did not bother to measure the distance to the face after the crosscut had been bolted (Tr. 179).

Watts' helper, Bias, was very unsure about what he had done when the crosscut was mined. He first stated that he was standing right beside Watts when Watts made the disputed cut, but then he added that he "believes" he was standing near Watts (Tr. 185). Bias had worked as Watts' helper only about 10 times, but so far as he could recall, he had not seen Watts go beyond permanent supports (Tr. 187). Bias said that the hole in the face could have popped out from pressure, but could also have been cut with the head of the continuous-mining machine (Tr. 186; 191). Bias did not recall which bolts he was watching when Watts made the cut on the right side, but he said that he ought to have been watching the two bolts nearest to the right rib (Tr. 190). Bias also testified that they did not take down the curtain before cleaning up the crosscut and that the curtain was still up when he left the section between 11:15 and 11:30 p.m. (Tr. 193).

The measurements on which Westmoreland relies were made by Roger McMicken, the section foreman who was on duty when the disputed deep cut was mined. He testified that he saw the hole in the crosscut when he made his last check of the face area on September 15, 1982. He saw nothing otherwise unusual about the way the crosscut had been mined (Tr. 199). His measurements were made the next night after the crosscut had been fully bolted, but he knew which bolt to use in his measurement because it had been marked (Tr. 201). Although he, like the inspector, obtained a 22-foot measurement from the second bolt from the right rib to the face, he said that one of the reasons the distance measured that much was that he had placed the end of the tapeline into the 18-inch indentation caused by the "popping" out of the hole in the face (Tr. 201). Yet he could not recall whether the hole was in line with the second bolt, or how far off the right rib the hole was, or whether the hole was on the left or right side of the cut (Tr. 203). After giving the distances which he measured, he said that he "believed" those were the measurements he obtained (Tr. 205). As to the 20-foot measurement from the first roof bolt from the right rib to the face, he testified that it was "maybe twenty foot" (Tr. 204). The aforesaid equivocations were made during his direct testimony.

On cross-examination, McMicken stated that the curtain was not up at 11 p.m. when he checked the crosscut (Tr. 208), but, as noted above, Bias stated that the curtain was still up when they cleaned up the crosscut. As to the offset in the face of the crosscut, which Watts said existed, McMicken testified that he could not recall whether the offset existed or not, but he would not say that it did not exist or that he had failed to see it (Tr. 211). Although McMicken believed that "more than likely someone was holding the tapeline" (Tr. 212) when he made his measurements, he could not recall who assisted him in making the

measurements. McMicken also could not recall whether the continuous-mining machine had made a square cut into the face on the right side (Tr. 213). Moreover, although McMicken based his belief that the distance from the second roof bolt from the right rib to the face measured 22 feet on a "belief" that the second bolt was out of line with the other bolts in the row by "maybe a foot or two" (Tr. 203), he did not examine the roof bolts sufficiently to be able to state what pattern of bolting or condition in the roof caused the misalignment, if any, or what was done by the roof-bolting machine's operator to compensate for having installed a roof bolt which was from 1 to 2 feet out of alignment (Tr. 217).

Although I noted in finding No. 10 of my bench decision that Egnor had gone to the face of the No. 4 entry where it could have been dangerous for him to go in order to assist the inspector in making his measurement, Westmoreland's claim that Egnor reached into the hole in order to obtain the inspector's hammer is based on the incredible testimony of Richard Sparks who alleges that he was operating a scoop in the No. 4 entry at the time Egnor came into the No. 4 entry. While Sparks claims to have seen Egnor reach into the hole for the purpsoe of getting something on the other side of the entry, Sparks' testimony is filled with unexplained gaps and inconsistencies. He first said that Egnor placed his hand on the rib and reached through the hole, but thereafter he was unable to state for sure which hand Egnor used to reach into the hole (Tr. 221; 225). He first said that he did not ask Egnor why he was doing such an unsafe act and then stated that he could not recall whether he asked Egnor anything about the hazardous act he had committed (Tr. 221; 226). Although Sparks was busy piling up coal at the very place where Egnor was said to have reached through the hole, Sparks testified that he did not see Egnor walk past him on his way to the face (Tr. 229-230). Although Sparks had an obvious interest in what happened in the mine, he professed not to be interested enough in what Egnor was doing to know what he obtained when he reached through the crosscut or to notice whether Egnor was carrying a hammer when he walked past him after he had reached through the hole to get something (Tr. 225; 230). Even though Sparks did not know why Egnor had come to the face of the No. 4 entry at the time Sparks claims to have seen him, Sparks claims that he asked someone later in the shift to find out what was going on, but cannot remember who it was that he asked (Tr. 227).

Additionally, Sparks claimed that Jake Henry, the helper to the continuous-mining machine operator on the day shift, was in the crosscut at the time the inspector made his measurement and Sparks stated that Henry told him it took the inspector two or three throws to get the hammer through the hole in the face of the crosscut (Tr. 223). Sparks then apparently realized that if Henry had seen the hammer go through the hole, it would

have been unnecessary for Egnor to reach through the hole to obtain the inspector's hammer as Sparks had previously testified (Tr. 220). Therefore, Sparks stated that the hammer must not have gone through the hole at all or he would not have been able to see Egnor reach through the hole to get it (Tr. 223).

The unconvincing nature of Sparks' testimony is adequate reason for me to reject it for lack of credibility. Sparks' testimony was rebutted by Egnor who stated that no one was in the No. 4 entry when he went there to assist the inspector in making his measurement. Egnor additionally stated that it would have been necessary for him to have flagged Sparks down so that he could proceed by him to the face of the entry (Tr. 259-260). Sparks stated that he did not see Egnor walk past him while he was operating the scoop because he had to move back and forth in the entry (Tr. 228). I find that Egnor's statement that he would have remembered flagging down the scoop's operator, if anyone had been operating a scoop, is more convincing and more credible than Sparks' statement that he was in the No. 4 entry and observed Egnor reach through the hole to obtain an unknown object.

I believe that the discussion above shows beyond any doubt that the inspector correctly concluded that the operator of the continuous-mining machine proceeded inby permanent supports when he mined the second cut on the right side of the crosscut on September 15, 1982. Having reexamined all of the evidence in light of Westmoreland's motion for reconsideration, I conclude that my bench decision correctly found that a violation of section 75.200 occurred as alleged in Order No. 2037676 dated September 16, 1982.

Assessment of Penalty

Westmoreland's motion for reconsideration uses my finding that the violation was associated with a low degree of negligence for the purpose of arguing that a penalty of $1,000 is excessive in circumstances where management is found to have made a sincere and concerted effort to teach its miners safe mining practices. Westmoreland claims that no witness was able to suggest anything that Westmoreland could have done to avoid the instant violation. If there is any part of my bench decision which is incorrect, it is my conclusion that no portion of the penalty should be assessed under the criterion of negligence. I shall hereinafter explain in detail why I did not assess any portion of the penalty under negligence.

There is evidence in the record to support a finding of a greater degree of negligence than I found in my bench decision if I had thought it would be fair to Westmoreland to emphasize such evidence. Inspector Baisden, for example, checked Item 20

in his order of withdrawal to indicate that he believed that the violation was associated with a high degree of negligence (Exh. 2). The inspector supported his checking of a high degree of negligence by testifying that a section foreman was on duty on the section during the cutting of the crosscut and that he should have made certain that the crosscut was not mined to a depth of 22 feet (Tr. 27). Before becoming an inspector, Baisden had been the operator of various types of underground mining equipment and had also worked as both a section foreman and assistant mine foreman (Tr. 6-7). Therefore, the inspector's belief that the section foreman should have prevented the cutting of the crosscut 2 1/2 feet beyond permanent supports is entitled to be given considerable weight.

Moreover, the section foreman, Roger McMicken, was clearly negligent in the way he performed his job on September 15, 1982. The operator of the continuous-mining machine was not the regular operator and the helper of the substitute operator was an inexperienced person in that capacity, at least insofar as cutting with a Joy continuous-mining machine is concerned (Tr. 156; 159). Therefore, McMicken should have been paying special attention to the way the entries were being cut because they were all cut on that shift by Watts who was classified as a helper to the regular operator (Tr. 159). McMicken's own testimony shows that he noticed the hole in the face of the crosscut, but stated that he did not see anything else unusual about the crosscut (Tr. 199). The inspector's attention had been directed to the crosscut by the absence of a curtain. When the inspector saw the hole in the face of the crosscut, he concluded that ventilation was satisfactory, but then he noticed that the operator of the continuous-mining machine would have had to go beyond permanent supports to mine an entry to the depth the inspector observed (Tr. 13-19). The section foreman should have been able to make an evaluation of the excessive depth of the crosscut and should have left special instructions for the section foreman on the next shift to see that the crosscut was bolted as soon as possible so that the excessive area of unsupported roof could be made safe without leaving the area unsupported any longer than necessary.

The inspector discussed the order he had written with both the section foreman on the day shift and the mine foreman. The inspector offered to remeasure the crosscut in their presence if they believed he had made an error, but they declined to have him do so. According to the inspector, the mine foreman's conclusion, after seeing the crosscut, was that the miners who had made the cut just "messed up" (Tr. 23-24). Westmoreland's last witness was Jim Kiser who is Westmoreland's safety manager (Tr. 230). He testified that the mine foreman intended to discipline the section foreman because the mine foreman believed that they were at fault in having violated the roof-control plan (Tr. 245).

Kiser investigated the violation cited by the inspector and concluded that Westmoreland's personnel were not at fault because he did not believe that a violation had occurred, based on the arguments about measurements discussed in the preceding section of this decision. Since Kiser had concluded that no violation occurred, he influenced the mine foreman sufficiently to cause the mine foreman to reverse his decision to discipline the personnel who had been on duty when the violation occurred (Tr. 245).

My decision not to assess any portion of the penalty under the criterion of negligence is based largely on the fact that Westmoreland's mine foreman would have disciplined the personnel involved had he not been influenced to do otherwise by Westmoreland's own safety department. I also took into consideration that Watts, the miner who made the cut beyond permanent supports, had nearly been killed in a roof fall himself and had an excellent reputation for being safety oriented. I believed that Watts was telling the truth when he stated that he did not think he had gone beyond permanent supports and did not intend to go beyond permanent supports. Additionally, I believed that the section foreman could reasonably have relied upon Watts' good reputation for safety in failing to keep a constant vigil over him while he was operating the continuous-mining machine on September 15. Taking all of the aforesaid matters into consideration, I believed that it would be unfair to Westmoreland to assess any portion of the penalty under the criterion of negligence.

There is additional testimony in the record, however, which shows that Westmoreland overstates its case when it argues that no witness was able to suggest anything which Westmoreland could do to increase safety awareness above that which it was already doing. The section foreman, for example, claimed that he had daily contacts with the miners to instruct them in safe mining practices (Tr. 197). On the other hand, Watts, the operator of the continuous-mining machine who cut 2 1/2 feet beyond permanent supports, testified that they had a weekly safety talk or meeting and that they discussed the roof-control plan "fairly often" (Tr. 146).

The discussion above shows that Westmoreland's management was not so entirely free from fault in the occurrence of the violation, that a penalty of $1,000 is completely unjustified when considered in conjunction with the fact that I did not assess any portion of the penalty under the criterion of negligence. In Nacco Mining Co., 3 FMSHRC 848 (1981), the Commission affirmed a judge's decision finding that the operator was not negligent, but the Commission also affirmed the judge's assessment of a penalty of $500 because of the seriousness of the violation and the fact that the operator had an unfavorable history of previous violations.

In my bench decision, I emphasized the fact that Congress believed that the penalty provisions of the Federal Coal Mine Health and Safety Act of 1969 were not being properly administered because MESA was not proposing increasingly large penalties when there was evidence that an operator was repeatedly violating the same mandatory health and safety standards. S.REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comment about using the criterion of history of previous violations in assessing penalties:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation. (FOOTNOTE 2)

Exhibit No. 7 shows 29 previous violations of section 75.200 at the Hampton No. 3 Mine during the 24 months preceding the occurrence of the violation cited in this proceeding. All but two of the violations were considered to be "significant and substantial". (FOOTNOTE 3) Six of the violations occurred in August and September 1982 and the violation here involved was cited on September 16, 1982. The fifth of those six violations was cited in an unwarrantable-failure order issued only 12 days before the instant violation occurred and MSHA proposed a penalty of $305 for that violation which was paid in full by Westmoreland. Therefore, my penalty of $1,000 is within the guidelines mentioned in the legislative history because it is three times the amount proposed by MSHA for one of the previous unwarrantable-failure violations of section 75.200.

Since the Commission has held in several prior cases and most recently in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, --- F.2d ----, 7th Circuit No. 83-1630, issued June 11, 1984, that the Commission and its

judges are not bound by MSHA's assessment formula, it has not been my practice in the past to refer to MSHA's proposed penalties when I am assessing penalties on the basis of evidence presented at a hearing. Nevertheless, since the Commission majority in the U.S. Steel case, hereinbefore cited, found that MSHA's proposed penalty of $400 was appropriate, whereas my penalty of $1,500 was excessive (6 FMSHRC at 1432), it now behooves me to show why I have assessed a penalty of $1,000 in this case although MSHA has proposed a penalty of only $395. The first obvious defect in MSHA's proposed penalty is that MSHA assigned only six penalty points pursuant to 30 C.F.R. 100.3(c) under the criterion of history of previous violations. MSHA assigned a total of 52 penalty points for the violation. If six penalty points are subtracted from that total, the penalty would have been only $275 when the reduced points are entered on the penalty conversion table in section 100.3(g) of the assessment formula. In other words, MSHA assessed $120 of the penalty under the criterion of history of previous violations. The violation here involved was the seventh violation of section 75.200 to have occurred at the Hampton No. 3 Mine within less than a period of 2 months. Consequently, it is obvious that MSHA is still not using the criterion of history of previous violations as Congress intended, or the proposed penalty would have been several times greater than the previous proposed penalties for violations of section 75.200.

Westmoreland's motion for reconsideration argues that my penalty of $1,000 is excessive because I assessed $800 of it under the criterion of gravity despite the fact that I failed to assess any portion of the penalty under the criterion of negligence. It is a fact, however, that gravity is a separate criterion and the Commission has not held in any case of which I am aware that a judge is precluded from assessing a penalty under the criterion of gravity wholly apart from any amount which he may think is appropriate under the criterion of negligence. It is certain that MSHA's assessment formula considers the criterion of gravity as a separate matter in section 100.3(e) of the formula from the criterion of negligence which is considered in section 100.3(d) of the formula. In this case, MSHA assigned 16 penalty points under the criterion of gravity. If 16 points are deducted from the total of 52 points assigned under the formula, it can be seen by application of those points to the conversion table in section 100.3(g) of the formula, that MSHA attributed $255 of the proposed penalty of $395 to the criterion of gravity.

The inspector testified that the violation was very serious (Tr. 30-36); the chairman of the safety committee testified that the violation was very serious (Tr. 76-80); MSHA's roof-control specialist testified that the violation was very serious (Tr. 119-123); Westmoreland's section foreman testified that the

violation was very serious (Tr. 198); Westmoreland's operator of the continuous-mining machine testified that the violation was very serious (Tr. 146; 182); and Westmoreland's safety manager testified that the violation was very serious (Tr. 245). While it is true that all of Westmoreland's witnesses claimed that the violation did not occur, the fact remains that they all agreed that going beyond permanent roof supports is a very serious violation. I have already shown that there is no merit to any of Westmoreland's arguments in which it has striven to show that the violation did not occur.

It is my function to consider the preponderance of the evidence in deciding cases. Failure to assess a substantial amount under the criterion of gravity in this proceeding would require me to ignore a vast amount of evidence to the effect that the violation was very serious. My failure to assess any part of the penalty under the criterion of negligence may be in error because I probably should not have given as much weight as I did to the ameliorating factors hereinbefore discussed, but my failure to assess a portion of the penalty under the criterion of negligence is certainly no reason for me to assess only a token penalty under the criterion of gravity when that criterion is considered in light of Westmoreland's very unfavorable history of previous violations and the fact that Westmoreland is a large operator which has stipulated that payment of penalties will not cause it to discontinue in business.

For the reasons given above, I conclude that my bench decision assessing $800 under the criterion of gravity and $200 under the criterion of history of previous violations to derive a total penalty of $1,000 should be affirmed.

WHEREFORE, it is ordered:

(A) Westmoreland's motion for reconsideration filed June 22, 1984, is denied.

(B) Westmoreland Coal Company, within 30 days from the date of this decision, shall pay a penalty of $1,000.00 for the violation of section 75.200 cited in Order No. 2037676 issued September 16, 1982.

Richard C. Steffey
Administrative Law Judge

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~FOOTNOTE_ONE
1 S.REP. NO. 95-181, 95th Cong. 1st Sess. 42-43 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 630-631 (1978).

~FOOTNOTE_TWO
2 Reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

~FOOTNOTE_THREE

3 In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.