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SOL (MSHA) V. JOSEPH NECESSARY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

JOSEPH B. NECESSARY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. VA 84-17
A.C. No. 44-00246-03502A-A-59

J W L Construction Co., Inc.,
Pocahontas No. 1 Mine

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
William B. Talty, Esq., Tazwell, Virginia, for
Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding brought by the petitioner against the respondent pursuant to 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c), charging the respondent an alleged "knowing" violation of mandatory safety standard 30 C.F.R. 77.200. At the time of the alleged violation, the respondent was employed by the J W & L Construction Company, an independent contractor doing some repair work on a mine refuse storage bin located at a mine owned and operated by Island Creek Coal Company. Respondent was the site foreman in charge of the repair work. Following a structural collapse of the structure, resulting in the death of three miners, and following an investigation by MSHA, the contractor, mine operator, and the named respondent in this case were charged with violations.

On November 9, 1982, a section 104(d)(1) citation, No. 2043640, was issued to both the mine operator and the independent contractor. Both were charged with a violation of 30 C.F.R. 77.200, and the condition or practice cited is described as follows:

The mine refuse storage bin and supporting structure for the aerial tramway system was not maintained in good repair to prevent accidents and injuries. Repair and maintenance work performed by an independent contractor, J W & L Company, Inc., during miners' vacation (June 20 - July 11, 1982) resulted in the facility being left structurally unsound because two of the six bin support columns (stub columns) were not positioned during reinstallation to align with the main support columns. A resultant structural collapse of the facility occurred on August 24, 1982, fatally injuring three miners. James D. Lafon and Joe Necessary were the responsible officials for J W & L Company, Inc., during the repair work. Joe Shortt (plant foreman) and Mike Cole (Assistant maintenance foreman) were the responsible officials for the Virginia Pocahontas Preparation Plant facilities during the repair work. This citation is issued jointly to both the production operator (Citation No. 2043639 dated 11-9082) and the independent contractor (Citation No. 2043640 dated 11-9-82) for the violation described above.

On or about January 16, 1984, pursuant to 30 C.F.R. Part 100, MSHA's Office of Assessments served the respondent with a proposed civil penalty assessment of \$1,000 for the foregoing violation under section 110(c) of the Act. Respondent was charged with knowingly authorizing, ordering, or carrying out the independent contractor's violation of 30 C.F.R. 77.200, as cited in the aforementioned citation. He contested the citation, and MSHA filed the instant proposal for assessment of civil penalty against him.

According to the information furnished by MSHA's counsel during the hearing in this case, Island Creek Coal Company, the operator of the Pocahontas Mine, has paid a civil penalty assessment in the amount of \$240, in satisfaction of the citation (Tr. 4). Counsel also advised that in a proceeding before Commission Judge Gary Melick, Docket VA 83-47, the Judge on or about January 13, 1984, approved a settlement calling for the contractor to pay a civil penalty assessment of \$9,000 in satisfaction of the citation (Tr. 5, 25).

Issues

Whether respondent Joseph B. Necessary, acting as an agent of the contractor mine operator, knowingly authorized, ordered, or

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carried out the aforesaid violation under section 110(c) of the Act, and, if so, the appropriate civil penalty which should be assessed against him individually pursuant to section 110(a) of the Act.

Additional issues raised by the parties are identified and discussed in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq

2. Commission Rules, 20 C.F.R. 2700.1 et seq.

3. Sections 110(a) and 110(c) of the Act. Section 110(a) provides for assessment of civil penalties against mine operators for violations of any mandatory safety or health standards, and section 110(c) provides as follows:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) (emphasis added).

30 C.F.R. 77.200, provides as follows:

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

An "agent is defined in Section 3(e) of the Act (30 U.S.C. 802(e)) to mean "any person charged with responsibility for the operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine."

Stipulations

The parties stipulated as to jurisdiction, and the fact that the respondent was employed by the independent contractor

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in question as a foreman during work performed by the contractor at the mine site in question in June and July 1982. They also agreed that the refuse bin structure in question collapsed on or about August 24, 1982, and that following an MSHA investigation, the respondent was cited for the violation which is the subject of this case (Tr. 6-7).

The parties stipulated as to the authenticity of MSHA's official report of investigation, exhibit P-1, and they agreed that the citation issued by MSHA Inspector Jerry Wiley in this case was the result of the investigation conducted by MSHA (Tr. 7). MSHA's counsel pointed out that the report (exhibit P-1), was issued on August 24, 1982, but that a final report was not released until March 2, 1983, after the citation issued. Counsel explained that the August 24, 1982, "preliminary report," including the date contained therein, formed the basis for the issuance of the citation by Mr. Wiley. Counsel also indicated that Mr. Wiley had no independent knowledge of the facts leading to the collapse, other than the report of investigation, and the parties agreed not to call him as a witness in this proceeding since the author of the report, MSHA Inspector Dale Cavanaugh, would testify (Tr. 9-10).

Petitioner's Testimony and Evidence

Ernest M. Cole, Yard Foreman, Island Creek Coal Company, testified that at the time of the accident he was employed at the mine as the Assistant Outside Maintenance Foreman. During the miners' vacation period in 1982, he was responsible for maintenance and repair work at the preparation plant, and he confirmed that he occasionally observed the work being performed on the bin structure in question. He confirmed that he was aware of the fact that the top of the bin had been removed for repairs, and that during the removal process the crane used to lift it off collapsed. He also was aware of the fact that Mr. Necessary was the site foreman for the J W & L company performing the work on the bin (Tr. 33-37).

Mr. Cole stated that he was concerned that the repair work would not be completed by the contractor by the time miners' vacation ended, and he indicated that once the bin was removed and on the ground, work was not progressing during the second week (Tr. 37). Mr. Cole confirmed that the bin stub columns were welded to the structure while it was on the ground, and he indicated that he was aware of no engineers from the contractor or Island Creek reviewing the work being performed by the contractor (Tr. 38).

Mr. Cole stated that once the bin was replaced, he went to the top to make sure that the belt was operable so that

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the preparation plant could operate. He did not believe that he had any responsibility to inspect the structural integrity of the work performed by the contractor, and his concern was that the belt at the top of the bin was operational. He confirmed that prior to the repair work, the bin had a large hole in it which caused some spillage of waste materials (Tr. 41).

Mr. Cole identified exhibit P-1 as a copy of MSHA's accident investigation report, and he confirmed that he is the same Mike Cole referred to in the report. He described what he saw when the structure collapsed (Tr. 42-44). He confirmed that any knowledge he had that any of the bin support columns were misaligned came from his reading of MSHA's report (Tr. 45), and he had no prior personal knowledge that the support columns were misaligned (Tr. 46).

On cross-examination, Mr. Cole described the hole in the bin, and he confirmed that spillage was cleaned up with an end loader. He also confirmed that there was a concrete pad at the base of the bin structure, and that it was not muddy, but it would be wet on occasions when the plant was washed down (Tr. 56). He stated that he was not aware of the condition of the bottom half of the bin structure prior to the repair work (Tr. 56-57).

Mr. Cole indicated that the bin was used to store refuse such as rock and slate which had been removed from the coal. He explained the procedures used to process the coal through the preparation plant and into the bin (Tr. 58-60). He also explained that "filter cake," or the finer particles from the refuse, finds itself into the bin, and it is either wet or dry (Tr. 62). He stated that he is not aware of any "proper procedure" for freeing up such material which may "hang in" the bin, and he confirmed that the only way he is aware of for freeing the material is to "beat on" the bin (Tr. 63). When this is done, the material falls through the bottom of the "cone shaped" end of the bin onto a feeder and into a hopper (Tr. 64). He confirmed that "beating on" the bin has been a long standing method for freeing such material from the bin (Tr. 64-65).

Rufus W. Young, welder, JW & L Construction Company, testified that he and Mr. Larry Stewart worked on the bin which is the subject of this case. He described the work performed in removing the top of the bin structure, and he indicated that each of the six stub columns were cut through with a welding torch in order to remove the top of the bin. He indicated that the top of the bin which was removed was cut off above the support columns at the top of the ring which is at the bottom cone portion of the bin. He stated that

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the main columns supporting the structure from the ground up to the location where the bin was cut off were large columns which did not continue up to support the top of the structure. The upper support columns were smaller four or five inch columns different from the bottom ones (Tr. 73).

Mr. Young stated that Mr. Necessary was supervising the work he and Mr. Stewart were performing. He also confirmed that this was the first time he had ever taken a top off a bin structure and replaced it after repairs, and he indicated that in his past experience the entire bin structure was simply replaced. The job for Island Creek was the first time he had ever taken off the top of a bin above the funnel. He confirmed that the new portion of the bin which he worked on had been prefabricated in two pieces, and that he and Mr. Stewart simply welded them together while it was on the ground. They also added the stub columns which had been cut off the old bin. Mr. Young was not present when the old bin was lifted off and lowered to the ground (Tr. 74-76).

Mr. Young explained how the six stub columns were welded to the bin structure while it was on the ground, and he indicated that measurements and "plumbing" were done to insure that they were on straight. This work was finished late in the second week of the vacation period. Once the columns were on, the crane lifted the bin in place on top of the structure, and once one of the columns was aligned, he and Mr. Stewart began the welding process from inside the bin, working their way around. He described the process as follows (Tr. 79-82):

Q. When you put that bin in place with six columns, you assumed that the other five were in line because this one was in line?

A. Yes, I would say that's what we done because there was no way of setting it and telling because it wasn't a perfect circle. We had to draw it in in places. In some places it would stick out, and in some places it would be on the inside.

Q. It did not quite fit; did it?

A. No, not perfect. I have never put anything together like that that did [sic].

Q. I am sorry, I didn't get your last answer.

JUDGE KOUTRAS: He said he has never known one to fit in perfect. He tried to in perfect.e tried to align it the best he could. Is that what you said?

A. Yes, sir.

Q. How was the new bin marked for the columns to be put on? This is when it was down on the ground.

A. We just got the center of one column and started with it and marked the rest of them as we went around, mark the centers.

Q. Was the mark put on the bin for the center of the column or the edge of the column?

A. Well, we got the center of the column and then we measured the thickness of the beam and marked the edges so we could see. If it had been the center, you wouldn't have able to put it on there right, so we marked it for the edges of the beams.

Q. When you set the new bin on top of the old columns, you only lined up one column?

A. Well, that's all we could line up at the time.

Q. After it was put in place, lined up on that one column, did the crane disconnect from the bin and you started your welding process?

A. No, sir. We left the crane hooked to it until we worked it around and got it all the way around.

Q. The crane was in place holding the bin while you did the welding around the structure?

A. On the inside.

Q. On the inside?

A. Yes, sir.

Q. So you got inside the bin and you welded a circle around the bin where it joined with the cone?

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A. Yes, sir.

Q. At that point you had not done anything with welding the columns; right?

A. No, sir.

Q. So the inside was fully beaded?

A. Yes, sir.

Q. Did the crane go away then after you finished that?

A. To the best of my recollection it did.

Q. Is this one of the long days that you worked?

A. That we welded?

Q. Yes.

A. Yes, sir.

Q. Putting the bin in place.

A. Yes, sir.

Q. Is that the day you worked about 20 hours?

A. Probably so.

Q. You welded the whole inside?

A. Yes.

Q. Did you start welding the outside that day?

A. No, sir.

Q. You went home when you finished on the inside?

A. Yes, sir, we went home when we got the inside made up and the belt put back on top and they started running rock through. They started it up. We did the work on the outside while they was running.

Q. So the actual welding of the stub columns took place--

A. While they was running rock in the bin.

Q. After miners' vacation?

A. Yes.

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Mr. Young explained the work which was performed on the outside of the bin once the inside work was done, and his testimony is as follows (Tr. 83).

Q. You did another weld on the outside of the bin all the way around?

A. Yes.

Q. How did you match up the columns, the stub columns?

A. They were matched when they come around, all except one was a couple inches off. One of the two bins weren't the same size. When we drew it around it was a slight bit larger, so it threw one of the columns off a couple of inches, to the best of my remembrance.

Q. Did you bring that to Mr. Necessary's attention?

A. Yes, sir, later in that week we did.

Q. Did you do the welding of that column before he knew about it?

A. I don't recall. I am not sure.

Mr. Young was shown a copy of a signed statement he gave to MSHA's special investigator on July 9, 1984, and he acknowledged that it is his statement (Tr. 84; exhibit P-2). A portion of the statement was read into the record, as follows below, and Mr. Young acknowledged that it was true (Tr. 85-86):

We started welding on the top part of the bin and when we got all the way around to the last column, I, the other welder, Stewart and Gillespie and the foreman Joe Necessary noticed the top H-beam was off center about two inches.

Mr. Young explained that he noticed the columns were out of line the week after the vacation period ended, and he explained further as follows (Tr. 86-89):

Q. What I am trying to understand is when did you first notice that they were out of line? The week after the vacation was over?

A. While we was working on the outsides of the bin, we noticed a bludge inside the bin.

Q. In other words, by the time the miners' vacation was over this job had not been completed yet; is that right? You were still working on it, the miners were back and they were running material up this belt?

A. Yes, they were running material up the belt while we were working.

Q. You were working doing what around the outside of it?

A. Welding around the outside.

Q. Welding what?

A. Welding the top part of the beam to the support ring and the column.

Q. What was holding this bin up while they was dumping?

MR. FITCH: Interweld.

THE WITNESS: We made a complete weld on the inside all the way around. They started up, and we went on the outside and started to work on the outside of the bin.

BY JUDGE KOUTRAS:

Q. It was when you were doing this work on the outside to finish this job is when you saw that one of the H-beams--

A. Yes, sir, that's when we were out there. That's the only time we were in a position to see it.

Q. That is the first time you noticed it?

A. Yes, sir.

Q. How does it come to pass that Mr. Stewart and Mr. Gillespie and Mr. Necessary were all there and noticed it too?

A. We were just working there and we talked about it, we noticed it--

Q. About two inches?

Q. One column?

A. To the best of my memory, one column about two inches.

Q. Then the statement goes on to say: "We discussed the condition with Necessary and he told us to put a plate to help support the bin. We put the plate on after they had already started putting rock in the bin. Necessary was the only one I saw"--What is that next word?

MR. FITCH: Inspect.

BY JUDGE KOUTRAS:

Q. "Inspect the bin after the work was completed." So after you noticed that it was two inches off, this one column, what is this business about a plate?

Q. Well, we would have had to put a plate in anyway because where we burnt we had to straighten it up. There would have been a gap between the two beams. We would have had to put the plate in there anyway.

Q. What you said in this statement to the man who took it from you on July 9th, is as you remember it back when you finished the job; is that correct?

A. Yes.

Mr. Young explained how he welded half-inch plates under the column which was two inches off center, and he referred to Drawing 4, which appears at page 12 of MSHA's accident report to explain how the plates were welded to the column. He also testified as to certain "scrapes" which appear on the pictures shown on page 13 of the report, as well as the seams and bolt holes which appear in the photographs (Tr. 98-100). Mr. Young could not recall whether plates were welded on all six support columns, "or just the ones that had the gap in it where we couldn't weld it" (Tr. 102). However, he conceded that "it was possible" that more than one plate

Mr. Young stated that to the best of his recollection only one of the stub columns was off two inches, and since it was already welded onto the bin, there was nothing that could have been done to move it over (Tr. 109). The column was left in that position when the plates were welded on (Tr. 117). The plates simply filled the gap under the column, and had nothing to do with it being two inches off center (Tr. 118).

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Mr. Young stated that during the course of his welding work on the bin structure, he did not do any bolting work, and he reiterated that at no time were any of the stub columns off center by eight inches (Tr. 126). He conceded that when the repair work was completed, the one column was still two inches off center (Tr. 126).

On cross-examination, Mr. Young stated that at no time during his work on the bin structure was he ever rushed or pushed to work faster, and he believed he had adequate time to do the work as he believed he should do it (Tr. 128). He stated that during the time he was performing work on the structure, some of the concrete footers at the base of the structure were under water. He also indicated that he did not notice whether all of the "X" cross or lateral support beams at the base of the structure were in place (Tr. 129).

Larry S. Stewart, testified that he is employed by JW & L Construction Company as a welder, and he confirmed that he participated in the repairs made to the bin in question in this case. He confirmed that he welded the old stubs which had been taken off the old bin to the new bin while it was on the ground. He stated that he and Mr. Young measured the old beams while the bin was on the ground, and that Mr. Necessary was present and observed how these measurements were made. He described how this was done and confirmed that once the columns were welded to the new bin, he helped install it to the structure and helped "line it up" (Tr. 131-133). He described what he did as follows (Tr. 135-145):

A. Well, we was--a couple of us like was on one side and maybe two or three on the other side and we sort of tried to get them all lined as we set it down. Then we started at that one and got it real close and as best, you know, in line and then worked our way around, drew the bin in, because part of it would be bulged out a little bit because where you welded it it would give a little.

Q. It was not a precise fit when you put it back?

A. No.

Q. As you welded it it bulged around?

A. What I was talking about is when they put the stub columns on the ground it might have drawn in a little bit. That is the reason we had to pull it on in to make it fit.

* * * *

Q. When you say "draw it in," can you explain what you mean by draw it in.

A. We had had a ring, you know the ring, part of it was sticking over just a little bit so we had to make something to put on it and then tack it and draw it in so it would fit flush and worked our way around.

Q. So the bin was too big, but not by much or what? I am trying to understand what you are trying to tell me and I am not quite clear. It wasn't a simple easy bead around. You had to make it fit?

A. Yes, had to sort of--you had to draw it in.

Q. What kind of equipment did you use to draw it in?

A. We had some big 12-inch C-clamps. You know, you could draw the metal down. We cut part of it off and made a foot and put it at the bottom and we tied to the part that was like this, out, and then drew it, you know, just kept screwing. We had like three or four drawing it into a fit and then we would tack it, then we would go back and weld.

Q. When you finished that process, how many of the outside stub columns had been welded to the other columns; do you know?

A. I know one had for sure.

Q. How many did you actually weld?

A. I can't remember. Maybe two or three. I don't remember if I welded all of them.

Q. Do you remember coming across a stub column that was not lined up with the column above it?

A. Yes, that was two or three days after we had done put it up. They was running refuse in the bin.

Q. Tell me what happened that day; what did you see?

A. It wasn't directly over top of it. I thought it was--by looking, you know, I thought it was like a couple inches off.

Q. Did you talk to anybody about that?

A. I didn't, no.

Q. Who did?

A. Mostly I worked with Rufus. He usually talked to Joe and then he would tell us everything to do.

Q. That was Joe Necessary and Rufus Young?

A. Right.

Q. Mr. Necessary would tell you what to do--or he would tell--

A. Mr. Young would tell us, you know, what we would be doing, you know.

Q. Did you do the welding for the column that you say did not line up?

A. I don't remember. I can't remember.

Q. You do not remember putting a plate in and--

A. Yes, I remember we put plates in. We put the plates in. I am not for sure--we was in a basket when we was putting them back.

* * * *

Q. I have told you and you have heard in the testimony today the investigation indicated with respect to Drawing Number 3 that Columns Number 4 and 5 were offset 8 1/2 and 8 inches, respectively, and that is a drawing to give a representation of how the stub column did not align directly with the main column.

A. They didn't line up, but to the best of my knowledge, I don't think it was off no eight inches. Which when they came and talked to me a year ago, the first time, they only said one

column. Now you all say there was two. I told them then that I thought it was just off like a couple inches. I didn't think this drawing was right.

Q. Well does that drawing look like the work you did?

A. Yes, we put plates in here. We did put plates.

Q. And you beaded those plates to the lower column and you beaded them to the stub column and you beaded them to the bin?

A. We welded all the way around this ring, see. This is a separate one. There were two going to the top of that. See, because when I cut it loose, there was one coming up that stopped here, and there was an old plate in there to start with, then that stub column set on it. See, this ring, it wasn't one solid made ring. It came on both sides of this main support beam. Then there was a plate. I know some of them was over top of it.

Q. The stub column was welded to the plate?

A. Welded to the plate and that is the way we welded them back. The reason we had--some of them had like a thicker gap--some of the beams was more cut out when it was taken down--Well, I cut most of them out and then some of them I went back and cut again because like one of them come loose. That is the reason why we had a couple plates in some of them.

* * * *

Q. Is that diagram and the previous diagram, which is Page 11, Drawing Number 3 that shows the offset and in Drawing Number 2 on Page 10 which shows how it should have been--Do you recall welding those two stub columns, Column 4 and Column 5, at an offset without having the beam directly centered on the stub column?

A. I can remember welding on them, yes. I know of one being off, but I don't think it was off no eight inches.

Q. You never measured it; did you?

A. No, I didn't measure but I could almost tell by looking it wasn't no eight inches. I would call it about two inches or two and a half. Eight inches would be that (indicating).

Q. Do you recall that that occurred on one or two columns?

A. I just recall it on just one, to the best of my knowledge.

Q. You indicated that you and Mr. Young were the people that did the welding on the outside and you were hanging in a basket doing this work; right?

A. Yes, part of it you could get out and walk. We had a scaffold built you know, on the outside. Part of it we got on the platform and welded and part of it we got in the basket and worked around.

Q. Mr. Stewart, are you aware of whether or not Mr. Necessary saw that column that you maintain was misaligned?

A. He came out while we was working on it, you know, and was talking to us and telling us what to do--like I say, mostly he talked to Rufus, like, you know, tell him what to do. But I am almost sure that he saw it off.

Q. Did he get in the basket? Was he on the scaffold?

A. You could come up the bin, you could climb down, you could go walk around it. You know, you could go around it.

Q. On the scaffold?

A. Yes.

Q. You saw him in the presence of that one column that you recall?

A. I believe, I can't really swear to it, you know, that positively that I know he saw it.

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Q. Did you receive any instructions from Mr. Young or Mr. Necessary as to how to weld the column that you recall was not aligned?

A. We were told, you know, to put our plates in there to bridge that gap, which like I told the guy when he came and talked to me that you would have had to fill that gap and you would have had to put a plate in there.

On cross-examination, Mr. Stewart stated that the reason the new bin was "slightly off" when it was replaced was that the entire bin and cone were not replaced. He indicated that the cone was "eat up," and he believed it should have been replaced. He described how the old bin top was cut off the structure, and he indicated that the newly repaired portion of the bin was welded to the cone on the inside. He also indicated that the old bin cone ring had been "riveted on" and "stiched on," and that the rivets are similar to bolts spaced a foot apart. He also indicated that the ring was not a solid weld where it fit to the cone, and that the rivets make holes in the side of the bin (Tr. 145-150).

Mr. Stewart stated that he did not feel "rushed" during the time he worked on the bin, and he confirmed that some of the structure concrete footers were under water (Tr. 155). He also indicated that the structure had X-braces and lateral supports, and he could not recall whether any of them were missing (Tr. 156). He was not present when the structure collapsed (Tr. 157).

In response to questions from the bench, Mr. Stewart testified as follows (Tr. 158-165):

Q. When you welded the new bin onto the pressure ring, the idea is to get the stub column directly over the existing I-beam that is under it; right, so that one will support the other; is that right?

A. Yes.

Q. To the best of your knowledge, did you achieve that objective, did you get all that lined up to where you thought it should be lined up?

A. No, we didn't--there was one like I--

Q. The one that was two inches off?

A. I think it was about two.

Q. How many of the stub columns had you welded? I understand you put the first one in, but how many had you welded after you came back after the Sunday and they were operating and they were pouring material into that bin; do you recall?

A. At least four. Well, I know positively we welded one on Sunday, the one we started from.

Q. Did you ever perform any welding work from the scaffold while they were pouring material into that bin?

A. Yes.

Q. Did that concern you at all?

A. It was no problem to me.

Q. I see this scenerio, you and some of your fellow working welders up there on the scaffolding and only one column is in place and you are in the process of welding the rest of them and they are pouring all this material in the bin; weren't you concerned that the outside support columns, stub columns, were not in place yet?

A. After we welded up on the inside, they was pretty well in line then. They was over the top of the other one and the bin was set in the tank. Well, I say the tank, it was on the ring real--setting on it good and I didn't think it was going to come off.

Q. Now, the theory of the Government's case here is after you fellows completed your job, there were two columns that were off eight inches and within a week or two after you finished--

MR. FITCH: Five weeks.

BY JUDGE KOUTRAS:

Q.--five weeks after you finished something happened to cause this thing to collapse. My curiosity is aroused as to if it took five weeks for it to collapse after all the stub

columns were in place, why did it not collapse when only one was in place and you fellows were working on it and they were pouring material into it? Do you have any explanation for that or any opinion or anything?

A. Well, that's what I thought, it looks like--with those columns we didn't even have welded, it looks like it would give then. The way I feel about it, I think they got it too full and all that weight come down. I believe that cone come loose from the bottom it tore loose from that ring and it shoved out. I thought about it before, you know, like if that cone give out because, see, they didn't replace that cone. It was eat up and you had all that weight coming down in that thing. I either feel that one of them bottom main support beams either gave down then it peeled off, it would have to peel off, or either that cone come out from under the bottom.

* * * *

A. I believe the bottom gave down and it turned over. I thought that they should have replaced that bottom part. The coal company I thought Island Creek should have replaced the whole thing.

Q. Aside from that, the Government's theory here seems to be that the thing gave way because two beams were misaligned. Be that as it may. You were not concerned when you were up there and they were dumping all that stuff.

A. I didn't think it would--what we would have done would have give away, no. But I thought about that bottom part coming out, which I talked about, you know, to Mr. Young.

Q. Who is Mr. Young?

A. Rufus Young, the one that was working with me. I told him that bottom--I thought it might shuck out if it got full.

Q. When was that? When did you talk to him about that?

A. When he was working, doing the job.

Q. Did you mention that to anybody else?

A. I mentioned it to--not until after it fell.

Q. Who did you mention it to after it fell?

A. The investigators when they came about a year or so--I didn't even know anybody had got killed.

* * * *

Q. Had you ever done any of this kind of work before?

A. Yes, I have.

Q. Cutting the top off of a bin like this?

A. Yes, I have welded up water tanks we have set them up, I have welded lugs on, we have picked them up with a crane and set them and welded all kinds of belt structures, stock piled coal.

Q. So what you are saying, if you had to do this all over again if you were the man that wrote the work order, you would have taken the whole contraption down and put a new one up there; is that right, rather than cutting it off?

A. Yes, I would. I would have replaced that cone and all. I asked the inspectors about that water hole. I was wondering if they might have put--there's a settling pond there. I was wondering if it was put in after that bin. I thought maybe they might have put it in after it and undermined one of those footers, too. That run in my mind, if maybe one of them gave down and come over.

Dale R. Cavanaugh, Mechanical Engineer, MSHA Coal Mine Safety Division, Arlington, Virginia, testified as to his background and experience. He identified exhibit P-1, as the report of investigation which he and others published after the completion of the accident investigation in question. He stated that upon inspection of the storage bin parts which had been inventoried and marked by the respondents personnel, it was concluded that the bin columns had been misaligned, and the conclusion reached by MSHA in this regard was the result of the examination of these parts (Tr. 166-169). He

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confirmed that all of the bin stub columns were still attached to the bin sides, and that the cone section was attached to the insides on all locations that were used to determine what caused the bin to collapse. He also confirmed that measurements were made to support the conclusion that the stub columns shown in photographic exhibits C-4 and C-5 were misaligned, and he described how this was done (Tr. 170).

Mr. Cavanaugh stated that there was no doubt that two of the stub columns were misaligned by eight or eight and a half inches, and he explained how he made this determination, including a review of the blueprints of the structure supplied by the company who originally designed, manufactured, and installed the bin sometime in 1968, and interviews with representatives of that company (Tr. 171-172). Mr. Cavanaugh also explained how the misaligned columns affected the bin load capacity and weight distribution (Tr. 173-174).

Mr. Cavanaugh stated that his investigation did consider the possibility that the bin footings and the complete failure of the cone may have contributed to the collapse of the bin, but that these theories were discounted, and the cone was still attached to the bin sides on most of the pieces which were examined (Tr. 175-176). He also indicated that his engineering calculations, which were based on the misaligned columns, indicated that the structure could not support a fully loaded bin (Tr. 176). He believed that a reasonably prudent person would have insured that the misaligned columns were removed and reattached to the bottom columns so as to transfer the weight load to the support column, and that the failure to take this corrective action caused the collapse of the structure (Tr. 177).

Mr. Cavanaugh confirmed that MSHA's investigation determined that the crane accident did not affect the stability of the structure, and he concluded that anyone with knowledge of the way the bin was supported, and the fact that the columns were misaligned, should have known that "something was wrong" (Tr. 179).

On cross-examination, Mr. Cavanaugh confirmed that he is a trained mechanical engineer rather than a civil engineer. He conceded that it was possible that the original installation of the structure may not have been exactly how it is depicted in the blueprints which he examined (Tr. 187). He confirmed that his investigation did not disclose that any alterations were made to the structure after it was constructed (Tr. 188). He explained the function of the bin bolt holes as follows (Tr. 188-191):

A. There were bolts going through the column through the bin side pieces that would align those segments during construction so welding could be done. The bolts were through those holes and through the column when it was built and the way the one in VP-2 is built also, which there is a picture of it.

Q. What did you take the purpose of those bolt holes?

A. I felt that they were to help support the bin in place while the welding was to be done and also to keep the column close to the side of the bin to help facilitate welding.

Q. Did you inspect for bolt holes or, I guess they could be rivet holes as well, underneath or in the area of the four stub columns other than the two that you decided were misaligned?

A. Yes, we did.

Q. What did you find in regard to those holes?

A. They were aligned. They were aligned with the stub column as in the top picture.

Q. Would bolting the bin to the main support column be the only way of securing the bin to the main support column?

A. I am not sure what you mean.

Q. Could the bin be welded to the main support column as well as bolted?

MR. FITCH: Point of clarification. His testimony was it was welded after the bolts were put in.

THE WITNESS: The weld was holding the bin, not the bolts. Of course, the bolts would help it. They are not near strong enough to hold that bin up.

BY MR. TALTY:

Q. It was primarily the weld?

A. Right.

Q. Would it be possible that when the structure was originally erected that there was a slight misalignment at that time such that the bolt holes in the bin did not line up with the bolt holes in the main support column so that they were not used, that they were simply a weld put in but no bolt?

A. I looked at the support column in all six. Unless that column was cut where it had originally been cut, in other words, the cut was in an identical place, there was no other cut welds on either piece, the stub column or the main support column. So, if that had happened, then they had cut the stub column off in the exact place that it had been cut before.

Q. I am not sure I follow your answer. It may have been a good answer, but it was not clear to me. Is there any reason to think that one or more of those pairs of bolt holes were not used, that they were just simply holes in the side of the bin?

A. No, we didn't find any evidence whatsoever to support that.

Q. I am not asking if you found evidence to support that, I am asking you if it could have been. Was it possible? Do you have evidence that every bolt hole lined up with a main support column, physical evidence?

A. The last time the bin was painted there was a support column lining up those holes because right below those holes they needed paint. Sir, that is about as much evidence as I have.

Mr. Cavanaugh also indicated that contrary to the blueprints, which indicated continuous support columns from the bottom of the structure to the top, the investigation revealed that the support columns were cut and that plates were inserted to form the stub column (Tr. 192-197). He confirmed that transit checks were made on the footings, and that there was no way to determine how many cross braces may have been

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present prior to the accident. He conceded that to some extent, the removal of lateral and cross supports would affect the structural stability and strength of the bin structure, and that it was possible that there could have been a failure of a leg (Tr. 201).

In response to further questions, Mr. Cavanaugh stated that the load capacity of the bin was 300 tons, and he estimated that at the time of the collapse there was approximately 250 tons of material in the bin (Tr. 205). He confirmed that his mathematical calculations took into account the two support beams misaligned by inches, and a load by 300 tons. He confirmed that while welds were made on the two support columns in question, the top support columns were not directly over the bottom ones (Tr. 206). He concluded that the structure did not collapse earlier than it did because it was strong enough to support 250 tons, and the work which was done on the welds was "good work." However, he believed that the material breaking loose inside the cone initiated the collapse (Tr. 207, 209). In his opinion, the bin was close to collapse when one of the victims began banging on the cone with a sledge-hammer to free the clogged materials, and that the falling material "probably" initiated the collapse (Tr. 210).

Mr. Cavanaugh stated that in his opinion, even if the bin structure had not collapsed, it was still not maintained in good repair in compliance with mandatory safety standard section 77.200 (Tr. 216-217).

Respondent's Testimony and Evidence

Joseph B. Necessary, testified that he is 61 years of age, and he confirmed that he has been in mine construction work, including work as a welder, for approximately 45 years. He testified as to his experience and background, including the operation of his own mine construction business (Tr. 241-245).

Mr. Necessary stated that since August 1982, he has been employed for approximately four weeks, and that since that time he has done odd jobs such as "carpenter work, pouring concrete" (Tr. 245). He described his present financial condition as "Low. From one day to the next," and he indicated that his financial obligations include mortgage and car payments, and utility costs. He also indicated that he has had to rely on his son for financial assistance (Tr. 246).

Mr. Necessary confirmed that he was in charge of the dismantling of the top of the bin in question, as well as

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the repairs that were made to that structure. He described how the work was performed and how the old bin was cut off and removed, and how it was replaced after the welding work was completed (Tr. 247-253). He also described the procedures used to cut the old bin portion away from the structure, including the cutting of the stub columns in question (Tr. 254-258).

Mr. Necessary described that the loading of refuse into the bin began after the interior welds were completed, but before the outside work had been completed (Tr. 261). He confirmed that Mr. Young and Mr. Stewart did the work connected with the welding of the stub columns, and he confirmed that he was called up to look at the work, and that he was informed of the fact that one of the columns was "out of line" for a distance of two inches, and that he confirmed this by measuring it with a tape (Tr. 262-263). He denied that any of the stub columns were misaligned by eight inches or more (Tr. 265).

Mr. Necessary testified that he observed water around the bin structure footers at the No. 5 and 6 columns next to the catwalk (Tr. 269). He conceded that the newly repaired bin may have been "out of round" when it was reinstalled, and that it was "drawn in" to correct this problem, and he indicated that the new bin was of the correct size (Tr. 271).

Mr. Necessary expressed an opinion that the collapse of the structure in question was caused by the "bridging of material," which entailed the filling of the bottom of the bin cone with "filter cake" material, and he explained his theory as to what may have caused the collapse of the structure (Tr. 271-275).

On cross-examination, Mr. Necessary confirmed that upon examination of the repair work, he observed only one column which had been welded on two inches off center (Tr. 278). When asked about the bolt holes which are present under the columns depicted in MSHA's report at location C-4,

Mr. Necessary stated that he could not recall observing any bolt holes at the time the work was performed (Tr. 282). He confirmed that at no time did he ever view the bin after it collapsed, and that he has never spoken with anyone who worked around the bin when it collapsed (Tr. 284).

Mr. Necessary stated that at the time the repair work was performed, he looked at the bin and found that five of the stub columns were aligned properly, but that one was misaligned by two inches (Tr. 288-289). He could not recall

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discussing the matter with Mr. Young or Mr. Stewart, and he indicated that he did not consider it "that much of a hazard" (Tr. 293). He also did not dispute Mr. Cavanaugh's testimony that the holes in the columns were used to align them, but he indicated that he had no knowledge of any such holes and has never heard of them being used for that purpose (Tr. 295-296).

Inspector Cavanaugh was recalled for additional testimony, and he indicated that "impact loads" caused by a "pyramiding" and sudden falling offilter cake materials in a bin cone are common occurrences. He pointed out that the bins are specifically designed to withstand such loads, and he concluded that there has to be something wrong with a structure of this kind to allow it to collapse (Tr. 315). He reiterated that it was his opinion that the collapse of the bin in question was caused by the misaligned stub columns, and that his opinion that the columns were misaligned by as much as eight inches was based on his examination of the physical evidence which remained after the collapse, and the fact that two placement holes were off center (Tr. 315-316).

Procedural Motion

At the conclusion of the petitioner's case, respondent's counsel made a motion to dismiss the proposal for assessment of civil penalty filed against Mr. Necessary on the ground that petitioner presented no evidence to support its assertion that he had any knowledge that two bin columns were misaligned by eight inches. Conceding that the evidence presented by petitioner may establish that Mr. Necessary was aware of the fact that one column was misaligned by two inches, and conceding further that petitioner's evidence and testimony may support a conclusion that the bin was not in good repair, and therefore in violation of section 77.200, respondent's counsel asserted that there is no evidence to support a "knowing" violation against Mr. Necessary (Tr. 227-228).

Petitioner's counsel argued in opposition to the motion to dismiss, and in support of his case asserted that the evidence presented by the testimony of the two welders and Mr. Cavanaugh show without a doubt that two of the columns were misaligned, that this caused the structure to collapse, and that as the on-site foreman, Mr. Necessary should have known that the structure was unsound (Tr. 227-239).

After further consideration of the oral arguments in support of and in opposition to the motion to dismiss, it was denied (Tr. 240).

Findings and Conclusions

The interpretation and application of the term "knowingly" as used in the Act has been the subject of litigation before this Commission. *MSHA v. Everett Propst and Robert Stemple*, 3 FMSHRC 304 (1981). In *MSHA v. Kenny Richardson*, 1 FMSHRC 874 (July 1979; ALJ Michels), 3 FMSHRC 8 (January 1981), the Commission held that the term "knowingly" means "knowing or having reason to know," and it rejected the assertion that the term requires a showing of actual knowledge and willfulness to violate a mandatory standard. In this regard, the Commission adopted the following test as set forth in *U.S. v. Sweet Briar, Inc.*, 92 F.Supp. 777 (D.S.C.1950):

"[K]nowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

In *Richardson*, the Commission held that its interpretation of the term "knowingly" was consistent with both the statutory language and the remedial intent of the Act, and it expressly stated that "if a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." On appeal to the Sixth Circuit, the Court affirmed the Commission's decision, *Richardson v. Secretary of Labor*, FMSHRC, 689 F.2d 623 (6th Cir.1982), cert denied, 77 L.Ed.2d (1983).

In *MSHA v. Roy Glenn*, 6 FMSHRC 1583 (July 1984), the Commission applied its holding in the *Richardson* case to a factual situation where the violation of a mandatory standard did not exist at the time of the alleged failure of the corporate agent to act. The Commission stated as follows at 6 FMSHRC 1586:

* * * we hold that a corporate agent in a position to protect employee safety and health has acted "knowingly" in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that

a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the structures of the Mine Act.

Given the parameters of the Commission's application of the term "knowingly" in the Richardson case, and the refinement of that term in the Glenn case, the question presented is whether, given the facts presented in this case, Mr. Necessary "knew or had reason to know" of the violative conditions, but failed to act. In this regard, the commission observed as follows in its Glenn decision, at 6 FMSHRC 1587:

* * * the Commission held in Kenny Richardson that a supervisor's blind acquiescence in unsafe working conditions would not be tolerated. Onsite supervisors were put on notice by our decision that they could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance. Our decision here today is buttressed by the same concerns and principles.

Although the respondent in this case conceded that MSHA's evidence establishes that the existence of one or more misaligned support columns may support a conclusion that the bin structure was not in good repair as required by the cited mandatory section 77.200, it nonetheless attempted to establish that other circumstances may have caused the collapse of the structure. Respondent's testimony is that the existence of standing water at the base of the structure at the footings, and the possible lack of enough cross-braces at the base of the structure may have precipitated the collapse. However, upon review of the testimony, I conclude that respondent's assertions in this regard fail to rise above unsupported opinions and speculations. On the other hand, Mr. Cavanaugh testified that he considered these factors in his analysis and determination of what caused the collapse, and discounted them. I accept Mr. Cavanaugh's explanations as credible, and I conclude and find that respondent has not established that the standing water or any missing braces caused the structure to collapse, or otherwise contributed to that incident.

During the hearing, the respondent raised the inference that the structure may have been damaged when it was struck by a crane while lifting the bin from the top of the structure. However, the testimony establishes that it was the respondent's crane, and that examination of the bin structure at the time of that event did not detect any damage. Accordingly, respondent's assertion is totally unsupported, and it is rejected.

Although Mr. Necessary was of the opinion that the collapse of the structure was caused by material "bridging" in the cone portion of the bin, and then suddenly being loosened, Mr. Cavanaugh discounted this theory and testified that such "bridging" is not an unusual occurrence and that a properly constructed bin should withstand such sudden releases of materials.

Finally, the respondent argued that because of the complete collapse and massive accumulation of bits and pieces of the structure after it collapsed, it is impossible to reconstruct the incident with any degree of certainty. In this regard, I take note of the fact that the respondent failed to call any engineering or construction experts to support its conclusions in this regard. On the other hand, MSHA presented the testimony of Mr. Cavanaugh, a mechanical engineer who participated in the post-accident investigation, and who was in large measure responsible for authoring the August 24, 1982, report which is part of the record in this case (exhibit P-1). Further, the record establishes that after the collapse of the structure, all of the remaining parts were secured, inventoried, and labeled by the mine operator, and MSHA's reconstruction of the event, including its conclusions as to what caused the collapse of the structure, was made after careful analysis and evaluation of all of this material. Accordingly, after careful review of Mr. Cavanaugh's testimony, I conclude and find that the petitioner has established by a preponderance of all of the credible evidence adduced in this case that the proximate cause of the collapse of the structure was the fact that two of the stub support columns were not aligned with the main support columns, and that this misalignment affected the structural integrity of the bin structure in that it reduced its load supporting capability.

The thrust of petitioner's case is that MSHA's investigation of the accident established that two of the bin support stub columns which were replaced after the welding work completed by the welders under Mr. Necessary's direct supervision were misaligned and were not welded in place directly over the structure's main support columns. Petitioner asserts that MSHA's post-accident investigation established that the two stub columns in question were out of line by as much as eight inches, and because of this, the bin structure was structurally unsound, and the misalignment ultimately caused the structure to collapse.

During the hearing, petitioner's counsel pointed out that Mr. Necessary was in a position where he should have known that at least two of the stub columns were misaligned,

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that one of the welders gave him an opportunity to observe it closely, and that Mr. Necessary clearly remembered that at least one of the support columns was misaligned by at least two inches, and that he personally made the measurement that confirmed this fact (Tr. 322).

Mr. Necessary admitted that after the construction work was completed on the bin, it may have been "out of round" when it was rewelded to the bin structure, and that this necessitated that it be "drawn in" by the welders. It seems obvious to me that at this point in time, Mr. Necessary should have been aware of the fact that the newly constructed and installed bin did not exactly fit in place when the welders commenced their work of reattaching it. Further, Mr. Necessary admitted that when he examined the work done by the welders, he recognized the fact that at least one of the stub columns had been welded in place two inches off center, and he conceded that the stub support column which he observed was misaligned by at least two inches. Although he testified that he did not consider this misalignment to pose "that much of a hazard," this candid admission on his part supports a conclusion that he at least recognized that the misalignment did in fact pose a hazard.

While there is a dispute in the testimony on the question of whether or not two stub columns were misaligned by as much as eight inches, I cannot conclude that this detracts from the fact that the testimony of at least four witnesses who were either directly involved in the construction of the bin, or participated in the post accident investigation, establishes that one or more support stub columns were misaligned.

I conclude and find that the petitioner has established through the credible testimony of Mr. Cavanaugh, that any misalignment in the support columns affected the structural integrity of the bin structure, thereby causing, or significantly contributing to, its collapse. Under the circumstances, I conclude and find that the petitioner has established by a preponderance of the evidence adduced in this case, that the bin structure in question was not maintained in good repair to prevent accidents and injuries, and that this constitutes a violation of section 77.200.

With regard to the evidence establishing Mr. Necessary's accountability for the violation, Mr. Young, one of the welders who helped do the work, admitted that while he was welding the outside of the bin at a time when material was being dumped into it, he observed one column which was misaligned by at

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least two inches, and that it was not lined up with the support column. Mr. Young confirmed the accuracy of a prior statement he made to an MSHA investigator where he confirmed that the misaligned stub column was discussed with Mr. Necessary, and that Mr. Necessary inspected the work.

Mr. Stewart, the second welder who was working with Mr. Young, also confirmed that two or three days after the bin was in place on the structure, and while material was "being run" into the bin, he observed one stub column misaligned by two inches, and he indicated that it was not directly over the companion support column. Further, when asked about the number four and five columns which petitioner claims were misaligned by 8 inches, Mr. Stewart responded that while "they didn't line up," he disputed the fact that they were misaligned by 8 inches, and his recollection was that only one column was misaligned. He also stated that he was sure that Mr. Necessary saw the one misaligned column while he was on an outside scaffold instructing him and Mr. Young as to how to weld some plates to fill gaps under the column.

The evidence adduced in this case establishes that Mr. Necessary was an experienced welder and construction man. He alluded to 45 years of experience in the business, including the operation of his own construction company. Given this background, I believe one can reasonably conclude that he knew or should have known that the misaligned stub support column in question posed a serious potential safety problem which he should have addressed immediately by ordering his welding crew to make the necessary corrections.

I conclude that the facts presented in this case establish that Mr. Necessary was aware of the fact that one, and possibly two, support stub columns had been welded in place in a misaligned position, and not directly above the remaining support column or columns. Further, in view of the fact that Mr. Necessary was supervising the work, the fact that the condition was called to his attention by at least one of the welders, and the fact that he readily admitted he knew that at least one of the columns was misaligned, I conclude that he knew, or with the exercise of reasonable diligence, should have known of the hazardous condition presented by the misalignment of the stub columns in question. Given these facts, I further conclude and find that Mr. Necessary should have taken the necessary corrective action to insure that the stub columns were properly aligned, and that his failure to do so constituted a knowing violation of the cited mandatory safety standard in issue in this case.

Civil Penalty Assessment

Although given ample time to file post-hearing briefs, or proposed findings and conclusions, the parties declined to do so. However, I have considered the oral arguments made by counsel during the course of the hearing in this matter. With regard to the six statutory civil penalty criteria found in section 110(i) of the Act, petitioner's counsel agreed that the factors of gravity, negligence, and the respondent's financial ability to pay a civil penalty for the violation in question are relevant, but that the factors concerning any history of prior violations, size of operation, and good faith abatement do not lend themselves for application in this case (Tr. 320-321).

Negligence

I find no circumstances presented in this case which may mitigate Mr. Necessary's negligence with respect to the violation. The evidence establishes that he knew or should have known of the conditions constituting a violation of section 77.200, and that this constitutes a high degree of negligence on his part.

Gravity

The collapse of the bin structure resulted in the death of three miners, and I conclude that the violation was extremely serious.

Respondent's Ability to Pay a Civil Penalty

As previously noted, respondent's employer paid a civil penalty in the amount of \$9,000, for a violation of section 77.200, and the mine operator paid a civil penalty assessment in the amount of \$240.

Mr. Necessary's un rebutted testimony is that since August 1982, he has been employed for about four weeks, and he alluded to certain financial obligations which he has, including mortgage and utility payments. He also indicated that he has had to rely on his son for financial assistance.

Petitioner has asked for a civil penalty assessment in the amount of \$1,000, and its counsel suggested that if this amount were assessed by me for the violation, the respondent could possibly work out a payment schedule with MSHA for the payment of the penalty (Tr. 321).

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Although on the facts of this case, a substantial civil penalty assessment would otherwise be in order, I take note of the fact that Mr. Necessary is 61 years of age, has no steady employment, and has financial obligations which he must meet. Further, given the passage of time since the violation occurred, the fact that Mr. Necessary and others may have been the subject of possible criminal proceedings, and the fact that he has obviously incurred legal expenses in connection with these matters, I am not convinced that a substantial civil penalty is warranted. Accordingly, I conclude that a civil. penalty in the amount of \$500 is appropriate in this case.

ORDER

Respondent Joseph B. Necessary IS ORDERED to pay a civil penalty in the amount of \$500, for the violation which has been affirmed in this case, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge