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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. LAKE 84-99 A.C. No. 11-01845-03552
v.	Zeigler No. 5 Mine
ZEIGLER COAL COMPANY, RESPONDENT	

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
J. Halbert Woods, Esq., Des Plaines, Illinois, for Respondent.

DECISION

Before: Judge Steffey

Pursuant to a notice of hearing dated November 28, 1984, a hearing in the above-entitled proceeding was held on January 15 and 16, 1985, in Champaign, Illinois, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977.

The proposal for assessment of civil penalty filed by the Secretary of Labor sought to have civil penalties assessed for a total of six alleged violations of the mandatory health and safety standards. The parties presented evidence with respect to four of the alleged violations and entered into a settlement agreement with respect to two of the alleged violations. After the parties had completed their presentations of evidence with respect to each of the contested violations, I rendered a bench decision, the substance of which is hereinafter given along with the citations to the record where each bench decision appears in the transcript. The parties' settlement agreement is discussed under a separate heading at the end of the decision.

CONTESTED ISSUES

Citation No. 2323513 7/25/84 75.503 (Exhibit 1) (Tr. 89-102)

The first alleged violation in this proceeding was contained in Citation No. 2323513 which alleges a violation of 30 C.F.R. 75.503 in that a 14 BU loading machine, Serial No. 9208, Approval No. 2F1532A-8, contained four openings in

excess of .007 inch between the box and the light switch involving a step flange. There was also one opening in excess of .004 inch between the cover and the main controller panel. Additionally, there was an opening in excess of .004 inch between the cover and the main controller panel.

I shall make some findings of fact pertaining to this violation.

1. The loading machine cited was situated about five crosscuts from the working face at the time the inspector checked its permissibility. The loading machine was parked and was not being used actively at the time the inspector made his examination. The inspector nevertheless cited the excessive openings in the various compartments as being in violation of the permissibility standard because it was his belief from talking to the miners on this section that the loading machine is from time to time taken inby the last open crosscut to be used for cleanup purposes, even though he agreed that Zeigler had converted from conventional mining to continuous mining for the entire No. 5 Mine and that the loading machine was therefore not used in the normal mining process.

2. The Secretary of Labor's counsel presented as a witness, in addition to the inspector, the UMWA safety committeeman who traveled with the inspector in this instance, and he also testified that he is aware of having seen loaders used inby the last open crosscut for cleanup purposes even though he also testified that Zeigler has converted to a continuous mining machine operation. The safety committeeman testified that he had not personally seen the loader cited in this particular instance being at the face of the No. 4 Unit which is here involved, but he was of the opinion, based on statements made by other miners, that the loading machines on all units were taken to the face from time to time and used for cleanup purposes.

3. Respondent presented as a witness the company's safety inspector who traveled with the MSHA inspector in this instance, and Zeigler's witness testified that the No. 2 Unit, and the No. 3 Unit to a certain extent, were wet and frequently have a fireclay bottom which makes the surface of the mine floor very unstable so that the loading machines on those units have to be taken to the face and used for the purpose of cleaning up mud so that the mine floor can be made stable enough for the continuous mining machine to be taken from one place to another. Zeigler's witness, however, was not absolutely sure that the loader on the No. 4 Unit here involved is never taken to the face. It was his opinion as a section foreman, which position he holds at the present time, that it would be unwise to bring the loading machine to the face simply for

ordinary cleanup purposes for the simple reason that it creates hazards in the form of trailing cables and general confusion and additional personnel at the face, so that in his opinion, if the unitrak (or scoop), which is normally used to clean up at the face, should be unavailable or inoperative on a given occasion, he would propose bringing in another unitrak rather than bringing up the loading machine for cleanup purposes.

I believe that those findings cover the essential points made by the two parties. The section which is alleged to have been violated, namely, section 75.503, provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

Counsel for Zeigler concentrated his argument on the last portion of that section which provides that equipment has to be kept permissible "which is taken into or used inby the last open crosscut of any such mine." The operator's counsel states that inasmuch as Zeigler had converted from conventional mining equipment to continuous mining equipment, that the loading machines on each section or unit were there simply because they were left over from the conventional type of mining, and that while they were kept in compliance with section 75.1725, which only requires that equipment be kept in a mechanically safe operating condition, that they were not kept for the purpose of being used in the production of coal. He therefore claimed that since the loaders were not going to be used inby the last open crosscut, they did not have to be maintained in a permissible condition in compliance with section 75.503. He also stressed the fact that the testimony of no witness really shows that he personally had seen the loading machine involved in this instance being used inby the last open crosscut on the No. 4 Unit.

The Secretary's counsel has emphasized, on the other hand, that there is testimony by all three witnesses to the effect that loading machines are used in some instances inby the last open crosscut in the No. 5 Mine and that there is no certainty that the loading machine on the No. 4 Unit would never be used inby the last open crosscut. It follows, of course, that if the loading machine is used inby the last open crosscut, it would have to comply with section 75.503 by being permissible.

I have noted that respondent's witness endeavored to sustain Zeigler's position with respect to the fact that these loading machines were kept in a safe operating condition in the sense that they were inspected and made safe from the standpoint of having good brakes and not having some defective mechanical piece that might create a hazard, but he tried

to distinguish that kind of safety from the electrical type of safety which is associated with the possibility of creating a spark in the mine atmosphere at a time when there is methane present in an explosive concentration. It is possible to make that distinction; that is, that a piece of mining equipment not taken inby the last open crosscut merely has to be in safe operating condition mechanically, but does not have to be maintained in a fine state of repair with respect to joints and openings where electrical sparks may cause an explosion in the presence of methane.

The Commission has decided a case very similar to this one. In Solar Fuel Co., 3 FMSHRC 1384 (1981), the Commission reversed an administrative law judge's decision because he had vacated two citations alleging violations of section 75.503 based on findings that a continuous mining machine and a roof-bolting machine were outby the last open crosscut. The facts showed that the equipment was outby the last open crosscut when the citations were written, but mining had been done on the day the citations were written. The administrative law judge had interpreted section 75.503 to require that equipment actually be taken inby or used inby the last open crosscut. The Commission said that the judge had used the past tense, whereas the regulations are couched in terms of the present tense. The Commission said that all that needs to be shown is the intention of taking equipment inby the last open crosscut. The Commission said that the emphasis is not on where the equipment is located at the time of the inspection, but whether the equipment will be taken inby the last open crosscut. The Commission further noted that the purpose of permissibility standards is to assure that equipment will not cause a mine explosion or a fire. The Commission said that section 75.503 applies not only to equipment taken inby the last open crosscut when inspected but also to equipment which is intended to be or is habitually taken or used inby the last open crosscut even if the inspection actually occurs outby the last open crosscut.

The Commission also held in U.S. Steel Mining Co., Inc., 6 FMSHRC 1866 (1984), that four bolts missing in attachment of a lens in a headlight assembly was a significant and substantial violation even though at the time the violation was cited, there was an indication that there was adequate ventilation and no methane was present in explosive quantities. Also the Commission in that case noted that U.S. Steel had failed to present any evidence in support of its argument that methane in a headlight had never caused an explosion.

I believe that the Solar case decided by the Commission could be used in support of Zeigler's argument in this case because in that instance it appears that the evidence supported the argument that those pieces of equipment were from

time to time, and certainly were intended to be, used inby the last open crosscut, whereas in this instance, the testimony fairly well supports the conclusion that this particular loading machine would not be taken inby the last open crosscut.

Other portions of the Commission's decision in the Solar Fuel case, however, emphasize that the purpose of the standard is to assure that equipment will not cause a fire or explosion, and I believe that one could also conclude from the testimony that there is at least a possibility that a section foreman, in his desire to clean up coal, even on the No. 4 Unit, might take the loading machine inby the last open crosscut and use it.

If Zeigler's personnel are only inspecting that loading machine for the purpose of making sure that it is mechanically safe, and if the section foreman should not be aware of that fact, there is a possibility that he might have that piece of equipment taken to the face and used without having his electrician check the permissibility just prior to taking it inby the last open crosscut. Therefore, I think that the intention of the regulation is that if there is a piece of equipment on the section, which on some units is taken inby the last open crosscut, and which in some possible situation prevailing in the No. 4 Unit, could be taken inby the last open crosscut and used, I think that it ought to be maintained in permissible condition under section 75.503. Consequently, I find that a violation of section 75.503 occurred.

Having found that a violation occurred, I am required to assess a civil penalty under the six criteria. The parties have stipulated to some facts which enable me to deal with some criteria.

First of all, as to the size of the operator's business, it has been stipulated that the No. 5 Mine produces about 303,000 tons of coal per year and that Zeigler produces at all of its mines approximately 1,625,000 tons of coal per year. Those production figures support a finding that Zeigler is a large operator and that penalties should be in an upper range of magnitude to the extent that they are determined under the criterion of the size of respondent's business.

As to the criterion of whether the payment of penalties would cause the company to discontinue in business, the parties have stipulated that payment of penalties would not cause Zeigler to discontinue in business. Therefore, no penalty determined under the other criteria needs to be reduced under the criterion that payment of penalties would cause the operator to experience adverse economic hardship.

The next criterion is whether the operator demonstrated a good-faith effort to achieve rapid compliance once the violation had been cited. The facts show that the inspector issued the citation at 10:00 a.m. and he provided that the violation should be corrected by 10:00 p.m. He wrote an action to terminate at 8:00 p.m. finding that the permissibility standard had been complied with. Consequently, Zeigler showed a good-faith effort to demonstrate rapid compliance because it corrected the violation before the time given by the inspector had expired. Therefore, no portion of the penalty should be assessed under that criterion.

The Secretary's attorney presented as Exhibit 9 a list of previous violations which have occurred during the last 24 months at No. 5 Mine, and that exhibit shows that there have been 31 previous violations of section 75.503. Unfortunately, many of them were just immediately prior to the occurrence of the violation here involved. There were two violations on July 24, 1984, which was the day before the one cited in this instance, that is, July 25, 1984. There was another one on July 17, another on July 16, another on July 11, three on July 10, and two on July 9. There were 10 violations in July prior to July 25. The legislative history of the Act, S.REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comments about history of previous violations:

> 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.1)

According to Exhibit 9, which lists the previous violations, many of the violations of section 75.503 were classified as nonserious and were given single penalty assessments of $20 each as provided for in 30 C.F.R. 100.4. The ones, however, that I referred to above as immediately preceding the one here involved, were considered to be "significant and

substantial."(Footnote.2) One of those was assessed at $147 and another one for $98. The first significant and substantial penalty shown on Exhibit 9 in July was $147, so if the intent of Congress is taken into consideration, I should increase the penalty in this instance by roughly $300 under the criterion of history of previous violations.

The fifth criterion is whether the operator was negligent in bringing about the violation. The inspector was of the opinion that moderate negligence was associated with the violation, but that is a little more severe evaluation than the evidence, taken as a whole, supports. The Commission held in Penn Allegh Coal Co., 4 FMSHRC 1224 (1982), that a judge is not bound by the inspector's or the witnesses' opinions as to negligence, but that it is his responsibility to draw legal conclusions from the evidence considered as a whole. Consequently, if I consider all the facts showing that Zeigler had converted to a continuous mining machine operation and did have the feeling that it could use a loading machine on a section outby the last open crosscut without maintaining it in a permissible condition, and apparently it did intend to use this particular piece of equipment outby the last open crosscut, I think that we could consider negligence to be zero in this instance because Zeigler did have an intent to avoid a serious situation and did think that it was in compliance with the permissibility section. For that reason, I find that no portion of the penalty should be assessed under the criterion of negligence.

The final criterion to be considered is gravity. While the Commission has indicated that a judge may take into consideration what might have happened if a condition is not corrected so that a piece of equipment is continued to be used until a violation does result in injury, I believe in this instance that that would be somewhat unfair to the operator because there was no intent on the No. 4 Unit to take this loading machine inby the last open crosscut, and if the company's intention had been carried out so that this machine was never taken inby the last open crosscut, no one would have been exposed to a serious hazard. On the other hand, if this violation had resulted in equipment being used inby the last open crosscut in a nonpermissible condition, there would, of course, have been the possibility that methane might exist in a sufficient concentration to cause an explosion. The

possibility of occurrence of mine disasters is always something that each section foreman and each miner has to work in light of at all times.

For the aforesaid reasons, I find that there was at least a moderate amount of gravity associated with having a piece of equipment on the section which was not permissible. Consequently, under the criterion of gravity, a penalty of $100 is reasonable. As I indicated above, a penalty of $300 should be attributed to the criterion of history of previous violations. When that amount is added to the penalty of $100 assessed under gravity, a total penalty of $400 should be assessed for the violation of section 75.503 alleged in Citation No. 2323513 dated July 25, 1984.

Citation No. 2323515 7/25/84 75.503 (Exhibit 3) (Tr. 164-170)

The next citation which was contested by the operator in this proceeding is No. 2323515 alleging a violation of section 75.503 because the shuttle car on the No. 4 Unit was not maintained in a permissible condition. The specific alleged violation pertained to the headlight on a shuttle car. The lens was not secured to prevent it from coming off the light, the screw retainer was broken, and the locking device was not in proper condition. A lens retainer cover was improperly assembled and lead seals were not pressed to make the lens cover permissible. The pertinent factual circumstances will be set forth in the following findings:

1. The inspector testified that at the time he came on the section to check the permissibility of the shuttle car, it had been tagged and locked out and was in the process of being repaired by the mechanic on the section. The inspector discussed the mechanic's instructions received from his section foreman and was advised that the mechanic had been asked to repair a panel on the shuttle car and also a different headlight from the one cited by the inspector. The inspector indicated to the mechanic that he would examine the remaining portions of the machine to see if it was otherwise within the provisions of section 75.503 as to permissibility. The mechanic consented to that arrangement. The inspector continued with his inspection and cited the violation which has been described above.

2. The UMWA safety committeeman testified that he heard the same conversation between the mechanic and the inspector which has been discussed in finding No. 1 above. He and the inspector both agreed that the shuttle car and its trailing cable were warm. That warmth indicated to them that the shuttle car had been used shortly before the repairs had been instituted.

3. Zeigler's safety director, who also accompanied the inspector, testified that he had been told by the section foreman that the mechanic was working on the shuttle car to repair some permissibility violations or problems which had been discovered on the midnight to eight shift. The information that those repairs needed to be done had been referred to the section foreman on the day shift. The day shift foreman had instructed the mechanic to make the repairs which had been discovered on the midnight shift, and the mechanic was told to check the entire shuttle car for permissibility before it was put back into service.

4. The inspector was recalled for examination, and he further explained that he had had a conversation with the section foreman after he came out of the mine. That conversation occurred on the surface of the mine, and at that time the section foreman indicated to the inspector that he did not think the inspector should have cited the permissibility violation pertaining to the other headlight because the section foreman said, "We were going to correct all those things before the equipment was put back into service." The inspector said that he had not been so advised by the mechanic. Therefore, he felt that he was justified in having cited the violation. The inspector indicated, however, that if the mechanic had told him that he intended to inspect the entire shuttle car for permissibility before it was put back in service, he would have asked the mechanic to advise him when he had finished working on the machine and had finished checking it for permissibility, and that the inspector would then have made his examination for permissibility.

5. One other point that the inspector made during his initial testimony was that he had examined the shuttle car for permissibility while it was being worked on by the mechanic so that his inspection would not cause the machine to be out of operation for an additional period of time over and above the time that it was out for the repairs and examination by the mechanic. The inspector thought that his inspection performed while the shuttle car was out of service was to Zeigler's benefit because it enabled the shuttle car to be placed into productive operation for a greater period of time than it could otherwise have been used.

I think those are the pertinent facts that were developed. Zeigler's attorney has moved that the citation be vacated because the company was doing all it could to see that its equipment was permissible at the time the inspector made his examination of the shuttle car, that the equipment was tagged and locked out and was not being used, and that he does not think that the inspector should be permitted to examine a piece of equipment and cite violations at the same time the company is in the process of

correcting existing violations of which the company had knowledge.

The Secretary's attorney has argued, on the other hand, that Zeigler's representative did not make clear to the inspector that the mechanic had been given instructions to check other aspects of permissibility before the machine was put back into operation, and that Zeigler's failure to bring those matters to the inspector's attention was the cause of the inspector's going ahead with the examination at the time he performed it.

Counsel for Zeigler cited a case decided by the former Board of Mine Operations Appeals in Zeigler Coal Co., 3 IBMA 366 (1974), in which the Board held that inspection of equipment should not be performed when equipment is being repaired and is out of service. The Board made a similar ruling in Plateau Mining Co., 2 IBMA 303 (1973), and, so far as I know, the Commission has not overruled either of those Board decisions.

It seems to me in this instance that there is enough equivocation in the testimony to support Zeigler's argument. The company's witness seems to be certain of the fact that the section foreman had instructed the mechanic to complete not only the repairs that he was performing but to perform a complete permissibility check before the equipment was put back into service. It is also a fact that the inspector agreed that the section foreman had talked to him after the shift had ended and had expressed a belief that the inspector should not have written this particular citation because it was the section foreman's intention to have all the permissibility matters corrected on the machine before it was put back into service.

The inspector thought he had a basis for having gone ahead with the inspection in this instance, but this type of confusion and doubt could, of course, as the inspector indicated, have been eliminated simply by the inspector's telling the mechanic and the section foreman to let him know when they had stopped working on the equipment and not to use it until he could have a chance to check it because he had come there on that day to make a permissibility examination.

I think in this instance that there was ample indication that the shuttle car would not be used until all of the permissibility aspects of it had been examined. The facts support Zeigler's argument that this particular inspection should not have been made until the company had been afforded an opportunity to finish its work on the equipment. Therefore, the order accompanying my decision will vacate Citation No. 2323515.

Citation No. 2323517 7/25/84 75.316 (Exhibit 5) (Tr. 238-249)

The next contested violation in this proceeding is a violation of section 75.316 alleged in Citation No. 2323517. The citation states that Zeigler had not complied with its approved ventilation and dust control plan because on July 27, 1984, only 23 of the water sprays on the continuous mining machine were operational when the inspector made his examination of that machine. Paragraph 1 on page three of the Ventilation Plan, which is Exhibit 7 in this proceeding, provides that 25 of the 34 sprays on the machine are to be operational. The facts pertaining to the alleged violation will be set forth as follows:

1. The inspector testified that the failure to have the required 25 sprays operational indicated a high degree of negligence because the company provided in its own ventilation plan that it would have 25 of them operational, but he found only 23 to be operational. He pointed out that there are 34 sprays on the machine and that the difference between the 23 that were operating and the 34 that were on the machine indicates a disparity of 11 that were not operating. He also was of the opinion that failure to have the 25 operational was a significant and substantial violation because, over a long period of time, persons who were exposed to excessive respirable dust may contract pneumoconiosis.

2. The UMWA committeeman, who was with the inspector, supported the inspector's belief that the violation was significant because the sprays should have been operational in his opinion. He also emphasized the fact that one of the hoses to the water sprays was broken, and that that would have a tendency to lower the pressure to all of the sprays if the hose supplying pressure to any one of them was broken.

3. Respondent's safety director, who was accompanying the inspector, did not see the continuous mining machine in operation, and, therefore, could not state whether he agreed with the inspector's belief that there was an excessive amount of dust in the atmosphere at the time the machine was being used. He did, however, present as exhibits some analyses of respirable dust samples, and those all indicated that Zeigler had been successful at keeping respirable dust on the No. 4 Unit down to about 1 milligram instead of the 2 milligrams that are permitted, and for that reason, he did not think that the failure to have 25 sprays operable, as opposed to 23, was a serious violation. There is no testimony to show that there was any less dust in the atmosphere after the violation was corrected than there was before the violation was corrected.

4. Zeigler presented as a witness its Director of Safety and Health, and his background shows that he had been involved in some of the early research in trying to develop methods that would alleviate the concentration of respirable dust at the working face of coal mines. His experience in that endeavor was obtained while he worked for MSHA or its predecessor, and he had found through his experimentations that the main way to alleviate respirable dust at the working face was the installation of a scrubbing system. That system was described by both of respondent's witnesses as a sort of vacuum sweeper attachment which pulls air from the front of the continuous mining machine, and, in doing so, brings the dust associated with the cutting of the coal into contact with large amounts of water so that the dust is converted, along with the coal, into a slurry and thereby reduces dust to such an extent that the original scrubbers had an efficiency of about 73 percent even when there were as few as 13 or 14 water sprays in operation.

5. Zeigler's Director of Safety and Health testified further that the system being used in the No. 5 Mine is referred to in the Ventilation and Control Plan as a Joy flooded bed type which is much more advanced and effective than the prototype which he had used in the early research days of alleviating respirable dust. The Joy flooded bed type of scrubber has an efficiency of 95 percent or greater. He stated that he had written the respirable dust plan which is in the record as Exhibit 7, and that he had used a very conservative number of having 25 of the 34 sprays on the continuous mining machine in an operable condition to allow for the fact that some of the sprays might not be operational on a given day, and that in his opinion, unless the sprays were reduced to 14 or less, would there be any likelihood that the respirable dust on the No. 4 Unit would be in excess of the 2 milligrams required by the mandatory health and safety standards.

I believe that those are the primary facts that were developed in support and against the alleged violation in this instance. The respondent's attorney has not denied that there were only 23 of the required 25 sprays operable on the continuous mining machine at the time the citation was written, and since the plan does provide for 25 sprays to be operational, I naturally must conclude that a violation of section 75.316 occurred.

Zeigler's counsel does not contest the occurrence of the violation, but directs his argument to the fact that the inspector considered the violation to be "significant and substantial," and he argues that the citation should be modified to show deletion of the designation of "significant and substantial." As noted in footnote 2 above, the Commission held

in the Consolidation case 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, specifically, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The Commission, as Zeigler's counsel pointed out in his argument, defined the term "significant and substantial" in its National Gypsum case, 3 FMSHRC 822 (1981).

The Commission has enlarged upon its definition of "significant and substantial" in the Mathies Coal Co. case, 6 FMSHRC 1 (1984), and also in the Consolidation case which I just cited at 6 FMSHRC 189. In those two cases, the Commission evaluated the definition in four steps. One is whether a violation occurred. Two is whether the violation contributed a measure of danger to a discrete safety hazard. Three is whether there is a reasonable likelihood that the hazard contributed to will result in injury. Four is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Counsel for Zeigler has argued that his testimony shows that there had not been a citation of the No. 4 Unit for a violation of the respirable dust standards for an extensive period of time prior to the citing of this violation as to the number of sprays in operation on the machine, and that the testimony of the safety director at Zeigler's mine shows that there was no likelihood that anyone would have been exposed to excessive respirable dust as a result of the violation here involved.

The Secretary's counsel has argued that there is no contradiction of the inspector's testimony or of the safety committeeman's testimony that the required 25 water sprays were inoperative, but he stressed primarily the negligence of the operator in failing to have the water sprays operational.

I have already indicated that a violation occurred, and that, of course, takes care of the first step required to consider the designation of "significant and substantial" in the citation. The second step is whether the violation contributed a measure of danger to a discrete safety hazard. There is no doubt that the testimony shows that there may be an increase in respirable dust when water sprays are not working properly on a continuous mining machine, and there is also a possibility that an explosion may occur if all of the factors required for an explosion are in existence. The testimony emphasized the possibility of igniting methane. Consequently, there is evidence to support a finding that a discrete safety hazard is involved which is either excessive respirable dust or the possibility of an explosion of methane.

The third requirement in the significant and substantial evaluation is whether there is a reasonable likelihood that the hazard contributed to will result in injury. On that particular requirement, it appears to me that Zeigler introduced evidence to support a finding that there was not a reasonable likelihood that the hazard in this instance would have resulted in injury. Zeigler presented as Exhibit C information showing that there had been no citation for a violation for a dust standard for about a year prior to this citation.

Zeigler's safety director also testified at length that the primary method for controlling respirable dust, as well as dust in any form at the working face, was through the scrubber which had been installed on the continuous mining machine. The dust-control plan itself shows that the primary means of dust control will be the scrubbing device attached to the continuous mining machine, and the manager of safety also stressed that in the basic research done to develop these scrubbers, even 14 water sprays were sufficient to keep the respirable dust below a concentration of 2 milligrams. The inspector did not address the efficiency of the scrubber versus the water sprays. Therefore, I find that the fact that the company had operational only 23 sprays out of the 25 that were required was not such a violation that it could reasonably be expected that the inoperable condition of two water sprays would have been likely to have caused an injury.

Finally, the fourth consideration is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Here again, the evidence presented, when it is examined in its entirety, will show that there was not likely to be a reasonably serious injury in this instance. There was certainly enough water from 23 operable sprays, taken in conjunction with the scrubbers, to keep respirable dust down and also to counteract the likelihood of ignition as a result of methane being present at the face.

Consequently, I believe that Zeigler's counsel has successfully argued that the citation should be modified to eliminate the designation of "significant and substantial." A violation of section 75.316 has been shown to exist, however, and a civil penalty must be assessed (Tazco, Inc., 3 FMSHRC 1895 (1981)). The Secretary's counsel has indicated that MSHA proposed a penalty of $206 in this instance, and that he believes that there is enough negligence and enough gravity associated with the violation to merit a penalty of no less than $206, whereas Zeigler's counsel has indicated that if the designation of "significant and substantial" is eliminated from the citation, that a penalty of $20 would be appropriate.

In the previous discussion of assessing the penalty for the violation of section 75.503 in Citation No. 2323513, I noted that respondent is a large operator, that payment of penalties would not cause it to discontinue in business, and those findings are, of course, applicable to the existing assessment. There was a good-faith effort shown again in this instance to achieve rapid compliance because the inspector gave respondent until 4:00 p.m. to abate the violation, and he wrote an action to terminate at that same time, 4:00 p.m., showing that the water sprays had been cleaned and were operative and the broken hose had been replaced. Therefore no portion of the penalty should be assessed under the criterion of good faith.

Insofar as the history of previous violations is concerned, Exhibit 9 shows that the company has only been cited for four previous violations of section 75.316, and all of those occurred almost a year prior to the violation involved in this instance. As the matter of fact, the company shows a very marked improvement in its resolve to avoid a violation of section 75.316. Therefore, I shall assess no penalty under the criterion of history of previous violations because of the company's obvious effort made to eliminate violations of the respirable dust standards and of its ventilation and dust control plan.

The fifth criterion to be considered is negligence, and on that, the Secretary has made his primary argument in this instance by pointing out that Zeigler had already given itself a leeway from the 34 sprays that are on the machine down to the 25 that are required to be operational under its plan, and the Secretary's counsel has argued that it shows a high degree of negligence for the company to fail to keep at least those 25 in operation at all times. When it is considered that Zeigler's own witnesses indicated that an examination of the machine occurs during the actual working cycle and that the water sprays are inspected during each shift, it does seem to me that it is a high degree of negligence to fail to find that these sprays are operational, and the section foreman and the continuous mining machine operator know that they have this leeway between 34 and 25, and it seems that that is a pretty liberal provision that they can have that few operative out of the 34. Consequently, I agree with the Secretary's attorney that this was a violation involving a considerable amount of negligence. Therefore, under the criterion of negligence, I believe that a penalty of $200 would be appropriate.

The final criterion to be considered is gravity. Under that criterion, I have indicated that most of the testimony was directed to either showing that the violation was serious or to showing that it was not serious. I have already found

that it was not a serious violation, and I have given the reasons for finding it to be nonserious. I believe that a penalty of $10 would be appropriate under the criterion of gravity. Consequently, when I issue the decision in this case, Zeigler will be directed to pay a penalty of $210 for the violation of section 75.316 alleged in Citation No. 2323517.

Citation No. 2323518 7/26/84 75.1105 (Exhibit 6) (Tr. 391-406)

The final contested violation in this proceeding is Citation No. 2323518 issued July 26, 1984, alleging a violation of section 75.1105 because the battery barn or charging station in the No. 5 Mine was not vented to the return air course when tested by the inspector with a smoke tube. A considerable amount of testimony was introduced by both parties, and the evidence will be summarized in the following paragraphs.

1. The inspector who wrote the citation traveled to the battery barn shown in Exhibit D, and he was accompanied by the UMWA safety committeeman. The inspector proceeded into the battery station and noted that there were battery-charging receptacles throughout the battery station which extended about 160 feet from east to west. He noted that on the extreme east end of the station, there was a blowing fan and an exhaust fan, the blowing fan being on the south side and the exhaust fan on the north, and he felt that the ventilation was adequate in that area. He proceeded to the west side of the station and noted that there was a 2-inch tube allowing air to leave the battery station at approximately the center of the station. He then proceeded into the west end of the station and was impressed by the fact that he could detect no movement of air in that area. The inspector then released some smoke and found that the smoke was suspended in the atmosphere without showing any visible movement in any direction. Using the aspirator with a smoke tube, he checked the area of the west end in several locations and could detect no air movement at all. He was accompanied also by Zeigler's electrician who made no comment as to the adequacy of the use of the smoke tube. The inspector thereafter issued the citation described above alleging the violation of section 75.1105.

2. The inspector considered the violation to be the result of a high degree of negligence because in his opinion the company was aware of the requirements that the battery station be ventilated because fans had been placed in the east end and some aperture had been made about the center of the station. He believed that the entire battery station should have been ventilated as well as the east end appeared to be. He also considered the violation to be sufficient to cause an injury because he believed that hydrogen could accumulate in the battery-charging station. He stated that hydrogen is released

when batteries are charged and he feared that there might be an explosion from accumulation of hydrogen from the possibility of sparks from electrical equipment which existed in the battery-charging station.

3. The inspector wrote approximately 10 other citations of various violations of the mandatory safety standards in the station, including the fact that some bare wires were exposed and the fact that the hoist for raising batteries from equipment was resting on an electrical connector box. Therefore, he felt there were electrical hazards in the station which might ignite hydrogen if it should happen to exist in sufficient quantity.

4. The company presented as its witness its Manager of Safety who has had 3 years of experience working for Zeigler, and approximately 11 years of experience working for MSHA, and who had inspected the No. 5 Mine many times prior to becoming Zeigler's Manager of Safety. He presented extensive testimony to the effect that this battery-charging station is supplied with intake air from a downcast which provides 350,000 cubic feet of air per minute which is split at the bottom of the mine where the battery-charging station exists. A volume of 90,000 cubic feet per minute is directed into the vicinity of the battery-charging station while the remaining quantity of 250,000 cubic feet per minute is directed to the only working sections in the mine which are located to the east and north of the area where the battery-charging station exists.

5. The Manager of Safety pointed out that while Exhibit D shows a white area surrounding the battery-charging station, which normally would indicate neutral air accompanied by a low velocity, that, for all practical purposes, the area around the entire battery-charging station could be shown in blue, as the rest of the area around the station is shown, because he says there was a considerable amount of air passing along the entry which is used as a travelway to the battery-charging station. Therefore, he said that there was an adequate amount of intake air going into the battery-charging station at all times. He also testified that the area around the battery-charging station is sealed so that air does not go into inactive areas around the station and that all the intake air is directed to an upcast or return away from the battery-charging station and, for that reason, there is a large amount of air passing through the battery-charging station.

6. The Manager of Safety stressed the fact that the battery-charging station had been in existence for about 10 years, that it had been inspected at least 75 times during its existence, and that no inspector had ever found it to be

in violation of section 75.1105 because, apparently early in its existence, it had been required by an inspector to have the two fans previously described installed in the east end. As far as he was concerned, that ventilation was all that was required in addition to the 2-inch aperture which, he thought, might be slightly larger than 2 inches, and which had been installed about the center of the station at the very initiation of the station. In his opinion, there was no possibility that the failure to have a vent in the west end of the station, as required by the inspector in this case, could have been a hazard because he noted that the battery-charging station is a large area, which is approximately 10 feet high in the east end and 7 to 8 feet high in the west end. Because of the station's spaciousness, he believed that the hydrogen that might accumulate would tend to go to the high side of the station in the first place. In the second place, he stated that hydrogen will not explode unless it is from 4 to 75 percent of the total volume of the atmosphere, and he felt that there was no possible likelihood that hydrogen would escape from the charging of batteries to such an extent that it could reach a concentration of explosive quantity in the large area comprising the battery-charging station. Additionally, he believed that since the entire area around the station is intake air being moved at very high velocity, that if any fire should occur, the fumes and toxic fumes, carbon monoxide, and other hazards from a fire would necessarily be directed to the return because all the air around the entire battery-charging station is going to the return and cannot go to any working sections because there are no working sections in that area of the mine.

7. The Manager of Safety also was critical of the inspector's smoke-tube test because he said that the inspector should have gone very close to the stoppings in the west end to determine whether there was a movement of air because the stoppings are subjected to so much air pressure from the large amount of air circulating in the vicinity of the battery-charging station that the stoppings do not keep air from passing through them. In other words, they are not impervious to air movement. Therefore, he believed that the fact that the smoke did not move in the west end when tested by the inspector could not be taken as proof that the west end was not ventilated sufficiently to comply with section 75.1105.

8. The Secretary's counsel presented as his rebuttal witness the safety committeeman who had accompanied the inspector when he made his smoke-tube test and inspected the other portions of the battery-charging station. He stated that the inspector took his smoke-tube test as previously described, and that he could detect no movement of air whatsoever when the smoke was released. He testified additionally that after the inspector required an 8- by 16-inch cement

block to be knocked out of the stopping on the north side of the west end of the battery station, smoke was again released, and it did not go anywhere. It remained motionless as before, until the inspector allowed his light to shine into the opening made by removal of the cement block. It was then realized that the wall was constructed of double layers of cement blocks and that the outer layer of blocks was still intact and would not allow smoke to pass through the 8- by 16-inch hole made on the inside of the first layer of blocks. Therefore, a block was also knocked out of the second layer of blocks which had been constructed against the first one. A smoke-tube test was again made, and this time the smoke went through the 8- by 16-inch hole made by the knocking out of a block in each of the two layers constituting the wall of the battery-charging station. The safety committeeman said that no one had complained about noxious fumes or hydrogen or hazards in the battery-charging station since it was initially constructed. He said that early in the station's existence, there had been a detection of hydrogen sulfide or noxious fumes in sufficient amount to cause the miners to request that something be done. That problem resulted in the installation of the fans in the east end of the station which have been described above.

I believe that the above findings constitute the main points made by the witnesses. Counsel for Zeigler has moved that the citation be vacated on the grounds that the battery-charging station was already in compliance with section 75.1105 at the time the inspector made his examination and required the additional block to be knocked out for ventilation on the west end, and that the regulation does not refer to any amount of air that has to be provided in a battery-charging station, and also does not provide that more than one ventilation point has to be supplied for a battery-charging station. He also stressed the fact that the station does get a lot of air, but that it has to be restricted because the Manager of Safety had indicated that the air entering the station can be below freezing and can result in freezing the batteries and causing problems if an excess amount of air is allowed into the station. Therefore, he believed that the battery-charging station was in compliance with the regulation and that the inspector unnecessarily required an additional ventilation point.

The Secretary's counsel has stressed the facts which I have given in finding Nos. 1 through 3 above. He believes that the inspector properly wrote a citation, that the additional ventilation which the inspector required was within the purview of section 75.1105, and that there was a hazard in the form of a possible explosion from the hydrogen released in the area or from the electrical equipment in the area.

Section 75.1105 reads as follows:

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

Of course, the main thrust of the inspector's citation relates to the second sentence in the quotation given above, namely, that "air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return." Counsel for both parties agree that while Exhibit D shows only intake air surrounding the battery-charging station, the intake air from the station is headed for the return, and, therefore, can be considered to be return air for the purpose of applying section 75.1105.

The thrust of Zeigler's argument as to no violation relates primarily to the fact that there were admittedly an exhaust fan and a blowing fan in the east end of the station, and those fans and the 2-inch aperture at the center of the station had been there for perhaps 10 years and no additional requirements for ventilation have been required. Zeigler argues that there is nothing in section 75.1105 to spell out how much air current is required or how many openings have to be in a battery-charging station and that there is simply nothing in section 75.1105 that would support the inspector's requirement that an additional ventilation opening be made in the west end.

There is a lot of merit in Zeigler's argument, and I am hardpressed to disagree with Zeigler, but the Commission in practically all of its decisions, except possibly the one in Mathies Coal Co., 5 FMSHRC 300 (1983), has stressed the fact that the Act and the regulations should be liberally construed because they have as their purpose the preservation of life and health of the miners. In the Mathies case, the Commission said that the judge had erred because he had held that an elevator was a moving machine part within the meaning of section 75.1722(a) and that that was going a little too far afield, but in its decisions interpreting the standards, the Commission has stressed that safety should be given the primary emphasis in interpreting the regulations. Consequently, I believe that the inspector was within the purview of this section in his belief that the west end of the battery-charging station was not sufficiently ventilated into the return.

The question of whether the inspector's test-tube examination was adequate is sufficiently supported by the testimony of the inspector and the UMWA safety committeeman to make me believe that there was not an adequate amount of ventilation in the west end because the smoke did not move when the first block was knocked out of the stopping but the smoke did readily go out the hole made in the stopping when the second block was removed. I believe that the fact that the smoke went out after the hole was made is a good indication that the additional ventilation was needed.

Another aspect of the validity of the inspector's requirement of the additional ventilation relates to the statement of Zeigler's Manager of Safety to the effect that air entering the center of the battery-charging station would not necessarily be pulled by those fans in the east end all the way into that area because he felt that there was so much leakage in the stoppings and so much air pressure on the entire station that air would be pulled out of the station through the stoppings regardless of whether any additional openings were made. I believe that on balance, however, that his belief is rebutted by the fact that smoke did not go out until the additional opening was made in the west end. That fact appears to show that a double layer in a permanent stopping is more resistant to the passage of air through it than the Manager of Safety realized.

Having found that a violation existed, it is necessary that I assess a civil penalty. In this decision I have already made findings concerning the criteria of the size of the company and the fact that penalties would not cause the company to discontinue in business. I have made reference before to Exhibit 9 which lists history of previous violations for the No. 5 Mine, and that shows only four previous violations of section 75.1105 and only one of those violations occurred in July of 1984, and the rest occurred in 1983. Consequently, I don't think that there is such an unfavorable history of previous violations that a very large portion of the penalty should be assessed under that criterion. Consequently, a penalty of $10 will be assessed under history of previous violations.

The inspector gave the company until 10:00 a.m. on the day the citation was written to abate the violation, and he wrote an action to terminate on the same day at 10:00 a.m. stating that the west end had been ventilated to the return air course by removing two concrete blocks. Consequently, the company demonstrated a good-faith effort to achieve rapid compliance and no portion of the penalty should be assessed under that criterion.

The fifth criterion is negligence. The inspector felt that the company was highly negligent in failing to install ventilation in the west end because it had done so in the east end. He believed that management should have realized that there was not sufficient movement of air in the west end, and therefore concluded that there was a high degree of negligence. The findings that I have made above indicate that Zeigler certainly had reasons for believing that the battery-charging station was adequately ventilated because it had put in the two fans I described and another aperture about the center of the station. The Manager of Safety who inspected this mine many times as an MSHA inspector believed that there was a sufficient velocity of air going through the stoppings to ventilate the west end, and while it appeared to me that that may not be true, the facts are that he had a logical basis for his belief, and I have barely been able to find a violation at all. Consequently, I believe that the violation was the result of no negligence on the part of the company, and no portion of the penalty should be assessed under that criterion.

The seriousness of the violation is the final criterion to be considered. The inspector's testimony about the seriousness of the violation is offset in large part by the Manager of Safety's beliefs that there was no seriousness whatsoever and those opposing views have been spelled out in the findings above, and it is likely that the violation was not serious. The only case that I know of in which the Commission has touched upon the possibility of seriousness as to hydrogen is in the case of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 1529 (1983), in which the Commission held that a miner was sufficiently worried about his safety to be supported in his refusal to put out or try to put out a fire on a scoop's battery because he feared that hydrogen might explode in the battery and throw acid and shrapnel on him.

Since the inspector did cite some electrical violations, and there was, as the Manager of Safety agreed, always a possibility that where there are electrical installations, there can be a short circuit which could conceivably cause a fire, and since batteries were present in this station, I suppose that you could have a problem of an exploding battery, but I think for the most part, the violation, as described by the inspector under the conditions that he found, was only very slightly serious. I am inclined on the facts of this case to hold that there was not a reasonably strong likelihood that an injury would occur or that it would have been a serious one if anything had occurred because of the conditions that existed--the type of ventilation that existed all around the station and the few people who were required to stay in the station for any length of time, and the other factors pertaining to the nonserious nature of the violation described in finding No. 6 above. I believe that

all of the aforementioned factors tend to require a finding that a very low portion of the penalty be assessed under gravity. Therefore, I find that a penalty of $25 should be assessed under the criterion of gravity for a total of $35 for this violation of section 75.1105.

SETTLEMENT

The parties entered into a settlement agreement with respect to two alleged violations (Tr. 103-106). Under the settlement agreement, Zeigler would pay in full the penalties proposed by MSHA which amounted to $91 for each violation.

One of the violations was alleged in Citation No. 2323514 which stated that Zeigler had violated section 75.517 because the trailing cable for the loading machine was not adequately insulated and fully protected at one location. The outer jacket of the cable had been damaged and repaired, but the inner insulated power conductors were exposed at that location. The other violation was alleged in Citation No. 2323516 which stated that Zeigler had violated section 75.503 by failing to maintain the continuous mining machine in a permissible condition because there were several openings in the electrical components which were in excess of .004 inch.

MSHA proposed a penalty of $91 for each violation based primarily on the inspector's evaluation of negligence and gravity. In each instance, the inspector considered the violation to have been associated with moderate negligence and to have been moderately serious. In each instance, MSHA reduced the penalty by 30 percent under section 100.3(f) of the assessment formula because Zeigler demonstrated a good-faith effort to achieve rapid compliance after the violations had been cited. Under the criterion of history of previous violations, MSHA assigned two penalty points based on the calculation described in section 100.3(c) of the assessment formula, using the statistics that Zeigler had been assessed for 90 violations during 255 inspection days. MSHA assigned nine penalty points under the criterion of the size of respondent's business, utilizing coal-production figures in the same range of magnitude which I have previously discussed in this proceeding.

My examination of the procedures used by MSHA to arrive at a proposed penalty of $91 for each alleged violation shows that the penalties were properly determined under MSHA's assessment formula described in section 100.3. Therefore, I find that the parties' settlement agreement, under which Zeigler agreed to pay each of the proposed penalties in full, should be approved.

I should note that Exhibit 9 in this proceeding indicates that Zeigler has an unfavorable history of previous violations

with respect to prior violations of both section 75.503 and section 75.517. If the parties had introduced evidence with respect to each of the alleged violations and if the Secretary's counsel had succeeded in proving that violations occurred, I would have assessed civil penalties based on the evidence in this proceeding without giving any consideration to MSHA's proposed penalties because, as the Commission has held in two recent decisions in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir.1984), and U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (1984), the Commission and its judges are not bound by MSHA's assessment procedures described in Part 100 of Title 30 of the Code of Federal Regulations when assessing penalties on the basis of evidence presented at a hearing.

When I am evaluating settlement proposals, however, the parties have not introduced any evidence with respect to the issues involved in the settlements. In such circumstances, I am required only to determine if appropriate penalties have been proposed by MSHA on the basis of the information MSHA had when determining its proposed penalties. It would be improper for me to interpose evidence received in a contested proceeding with respect to a single criterion for the purpose of showing that a proposed penalty might be unduly low unless I also have evidence before me with respect to other criteria such as negligence and gravity. Also, when citations are contested, there is the additional possibility that MSHA will be unable to prove that violations occurred. Moreover, when parties settle cases, they are engaging in appraisals of the strengths and weaknesses of their respective cases and are making trade-offs in accordance with those evaluations. Consequently, the process of evaluating settlements is entirely different from the process of deciding cases on the basis of evidence presented at a hearing. For the aforesaid reasons, my approval of the parties' settlement agreements should not be considered as being inconsistent with the procedures which I have utilized to assess penalties in the decisions which I have rendered with respect to the issues raised in the contested aspects of this proceeding.

WHEREFORE, it is ordered:

(A) Citation No. 2323517 is modified to remove therefrom the designation of "significant and substantial" in Item No. 11a of that citation.

(B) Citation No. 2323515 dated July 25, 1984, alleging a violation of section 75.503, is vacated for the reasons hereinbefore given.

(C) Zeigler Coal Company shall, within 30 days from the date of this decision, pay civil penalties totaling $827.00,

of which an amount of $645.00 is allocated to the respective violations as shown in paragraph D below, and an amount of $182.00 is allocated to the respective violations as shown in paragraph E below.

(D) Penalties totaling $645.00 have been assessed with respect to the contested issues in this proceeding as shown below:

Citation No. 2323513	7/25/84	75.503	$400.00
Citation No. 2323517	7/25/84	75.316	210.00
Citation No. 2323518	7/26/84	75.1105	35.00

Total Penalties Assessed in Contested Proceeding $645.00

(E) The parties' settlement agreement resulted in the payment of penalties totaling $182.00 which are allocated as follows:

Citation No. 2323514	7/25/84	75.517	$ 91.00
Citation No. 2323516	7/25/84	75.503	91.00

$ Total Penalties Agreed upon in Settlement Proceeding..... $ 182.00

Richard C. Steffey
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

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

~Footnote_two

2 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.