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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. VA 84-37 A.C. No. 44-05141-03503
v.	No. 1 Tipple
J.A.D. COAL COMPANY, INC., RESPONDENT	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Hugh P. Cline, Esq., Cline, McAfee & Adkins, Norton, Virginia, for Respondent.

Before: Judge Steffey

Pursuant to orders issued on October 5, 1984, and January 22, 1985, hearings in the above-entitled proceeding were held on November 8, 1984, and February 26, 1985, respectively, in Norton, Virginia, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. I rendered a bench decision during the second hearing, but before the bench decision is reproduced as my final action in this proceeding, it is necessary that I deal with a procedural matter which was raised at the second hearing.

Denial of Request for Continuance

The second hearing in this proceeding was scheduled to commence at 9:00 a.m. on February 26, 1985, but at 9:00 a.m. on that day, I did not convene the hearing because no one had appeared in the hearing room to represent respondent. After we had waited for about 10 minutes for respondent's counsel to arrive, one of MSHA's secretaries in the building where the hearing was being held handed me a telephone message which had been received from the Norton, Virginia, law office of respondent's counsel. The note read as follows: "He [Mr. Carl E. McAfee] was to be here for meeting but he is out of town. His associate Mr. Kline cannot be here either so they are requesting a continuance. Pls. call Sandy Osborne if you have any questions."

Several factors enter into my conclusion that the request for continuance should be denied. When the first hearing was convened on November 8, 1984, Mr. Carl McAfee, who had signed all the pleadings and letters from respondent in the official file with respect to this proceeding, failed to appear at the hearing, but an associate, Mr. Hugh P. Cline, in Mr. McAfee's law firm, did appear at the hearing on respondent's behalf. His first request was that I delay the convening of the hearing until Mr. Woodard, respondent's vice president, could be present because he had had trouble with his car or truck and could not be present at 9:00 a.m. I agreed to delay the hearing until Mr. Woodard arrived with the result that the hearing did not commence until 10:10 a.m.

After the hearing was convened, Mr. Cline moved for a continuance on the ground that the petition for assessment of civil penalty sought to obtain assessment of penalties for only nine alleged violations, whereas MSHA's inspectors had cited a total of about 20 violations at the same time the nine here involved were written. Mr. Cline claimed that it would be tantamount to a denial of due process for respondent to be required to hire a lawyer to defend it in two cases when one would have been sufficient if MSHA had waited until all the citations had been processed through MSHA's assessment procedures before filing a petition for assessment of civil penalty for only nine of the citations.

In response to Mr. Cline's request for a continuance on the ground that this case did not include all violations which had been cited on or about May 9, 1984, I read from a letter to me from Mr. McAfee dated October 1, 1984, in which he had stated:

> I am prepared to stipulate and agree that a violation occurred at the Tipple of J.A.D. Coal Company of St. Charles, Virginia, and there was a violation of 104a of the regulations and assessment of appropriate fine and penalty; however, I am not prepared to admit or stipulate that there were approximately fifteen or twenty 104a violations.

I then pointed out to Mr. Cline that in my order setting the case for hearing I had stated as follows:

> The petition for assessment of civil penalty filed in this proceeding seeks to have penalties assessed for nine alleged violations of the mandatory health and safety standards. For that reason, I am somewhat perplexed by the statement in the last paragraph of respondent's reply to the prehearing order because reference is there made to 15 or 20 alleged violations.

Mr. Cline agreed with my observation that the least Mr. McAfee should have done in response to my hearing order would have been to file a motion requesting consolidation of the other alleged violations with the present case or a request that the hearing be continued until such time as the status of the other alleged violations could be determined.

As an alternative to continuing the hearing which was then in progress, I stated that the two inspectors who wrote the nine citations involved in this proceeding were present in the hearing room and I could see no reason why their direct testimony could not be introduced at this hearing and that I would return to Norton and hold a second hearing to consider the remaining alleged violations after respondent had received from MSHA a proposal for assessment of penalties with respect to the remaining citations.

Mr. Cline said he could not waive his objection to proceeding with the other alleged violations still pending, but that I had suggested "an excellent alternative" (Tr. 11). Therefore, the Secretary's counsel presented two inspectors who testified in support of the nine violations alleged in this proceeding and Mr. Cline cross-examined them (Tr. 19-83). Mr. Cline at first stated that he would prefer to wait until MSHA had filed a petition for assessment as to the remaining alleged violations before presenting any evidence (Tr. 84). When I pointed out that Mr. Cline might find that his client did not protest the remaining alleged violations which would have the result of preventing them from ever coming before the Commission, he said that he would present Mr. Woodard "briefly" as a witness (Tr. 84).

The time was then about 12:45 p.m. and I suggested that we have a luncheon recess before receiving respondent's evidence. An off-the-record discussion was then held during which Mr. Cline again expressed a preference for not putting on any evidence because he apparently had other commitments after lunch although my order providing for hearing had specifically stated on page one that "each attorney should arrange his schedule so that he has a full day to devote to the completion of the hearing." It was then agreed that respondent would waive the presentation of any evidence if it should be found that respondent had not contested the penalties proposed by MSHA with respect to the remaining citations which had been written during the same inspection which resulted in issuance of the nine citations involved in this proceeding. The following colloquy then occurred (Tr. 85):

> JUDGE STEFFEY: During an off the record discussion Mr. Cline indicated that his client would not put on additional testimony as to any of the

> nine violations that we have discussed today, and if the subsequent ones which were written at the same time as these go to a hearing before me he will put on a witness or witnesses pertaining to these nine violations. However if the other violations are settled by J.A.D. Coal Company's paying the proposed penalty so that no additional hearing is required as to the additional citations, Mr. Cline has indicated that I may issue a decision based on the testimony which has now been given by the government.
>
> MR. CLINE: Judge, I believe you told me that's what you would do.
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> JUDGE STEFFEY: But I want your agreement that that's all right.
>
> MR. CLINE: Yes.
>
> JUDGE STEFFEY: Then this proceeding is concluded unless we have to have an additional one when the other matters come before Mr. Woodard and he decides whether he wants a hearing on them.

Despite the arrangement agreed upon by Mr. Cline for presentation of evidence only if respondent requested that a hearing be held with respect to violations in addition to the nine involved in this proceeding, Mr. McAfee subsequently sent to me a letter in which he revised his reply to the prehearing order issued in this proceeding to state that he wished to present two witnesses instead of three as originally anticipated and that the time required for presenting their testimony would be 2 hours instead of the 45 minutes previously indicated. The letter was postmarked on November 15, 1984, which was 7 days after the first hearing had been held on November 8, 1984.

Thereafter counsel for the Secretary filed on December 7, 1984, a letter in which he stated as follows:

> In the above-captioned matter nine 104(a) citations were contested at hearing in Norton, Virginia, on November 8, 1984. Discussions indicated that some twelve other citations were written by the inspectors at a time contemporaneous with the nine subject to hearing. Counsel for Respondent indicated that he wished to present a defense common to all twenty-one citations and your Honor agreed to reconvene the hearing once the other citations were before your office.

> Please be advised that upon my inquiry it was found that Mine Safety and Health Administration never received a Notice of Contest from the respondent in regard to the other twelve citations. It presently appears, then, that the Office of Administrative Law Judges does not and will not have jurisdiction over the other twelve citations. Accordingly, the hearing should be reconvened only to hear the defense to the nine pending citations.

Although I was of the opinion that Mr. Cline had waived the presentation of evidence with respect to the nine violations involved in this case unless it turned out that respondent had requested a hearing on the other 12 alleged violations, I concluded, for two reasons, that the hearing should be reconvened so that respondent could present evidence as to the nine violations involved in this proceeding. First, the letter quoted above from counsel for the Secretary indicated that he had no objections to my reconvening the hearing for the purpose of allowing respondent to present evidence as to the nine violations involved in this proceeding. Second, it appeared that respondent's counsel had reevaluated his case and had mailed the letter on November 15, 1984, to advise me that he was expecting me to reconvene the hearing so that he could introduce evidence pertaining to the nine alleged violations involved in this proceeding.

For the foregoing reasons, I issued on January 22, 1985, an order providing for the hearing to be reconvened on February 26, 1985, in Norton, Virginia. The order explained that respondent had failed to contest MSHA's proposal for a penalty with respect to the other 12 violations and that the hearing was being reconvened on February 26 "for the sole purpose of permitting respondent to present evidence with respect to the nine violations as to which counsel for the Secretary introduced evidence on November 8, 1984". A return receipt in the official file shows that Mr. McAfee's office received a copy of the order on January 26, 1985. Therefore, respondent's counsel had 30 days' notice that the hearing would be reconvened on February 26, 1985, for the sole purpose of allowing respondent to present evidence. Moreover, the hearing was scheduled to be held in the same town in which Mr. McAfee and Mr. Cline have their law office. It is difficult to imagine how a respondent could be given more adequate notice of a hearing or be afforded a more convenient hearing site than was provided by my order issued January 22, 1985.

Exhibit 10 in this proceeding indicates that Mr. McAfee is respondent's president. Mr. Cline stated at the first hearing that he had had a conference with Mr. McAfee prior to appearing before me on November 8, 1984, to represent respondent (Tr. 8). It is difficult for me to understand why

Mr. McAfee would have led Mr. Cline to believe that the remaining 12 violations cited by the inspectors in early May of 1984 would ever be the subject of a proceeding before the Commission. According to MSHA's Civil Penalty Processing Unit, those 12 alleged violations were the subject of Assessment Control Nos. 3502, 3504, 3505, and 3506. All of those proposed assessments were sent to respondent in June or July of 1984. Respondent did not protest any of those proposed assessments and all of them became final orders under section 105(a) of the Act in July or August of 1984. Therefore, when Mr. Cline appeared at the hearing before me on November 8, 1984, and moved for a continuance because there were allegedly 12 other violations which might subsequently come before me or some other judge for hearing and argued that it was a denial of due process for me to hold repetitious hearings for violations which were issued at the same time, he should have been advised by Mr. McAfee, respondent's president, or Mr. Woodard, respondent's vice president, that the remaining 12 violations could never come before me or any other judge because of respondent's failure to file a notice of contest regarding the penalties proposed by MSHA with respect to the other 12 violations.

By asking his law partner to represent respondent at the first hearing, Mr. McAfee was able to raise frivolous issues about the Secretary's failure to include all violations in a single proceeding which could not have been raised by Mr. McAfee if he had personally represented his company because he would have been unable to profess ignorance, as his partner in good faith did, with respect to the remaining 12 violations which are not a part of this proceeding. In any event, Mr. McAfee undoubedly knew prior to the morning of February 26, 1985, that he would be unable to appear at the hearing to represent his company. The least he should have done, therefore, would have been to request a continuance before the Secretary's counsel and a judge had traveled to Norton, Virginia, to convene a hearing for respondent's sole benefit.

As I have indicated above on page four of this decision, Mr. Cline had already waived the presentation of evidence with respect to the nine violations in the event it developed that respondent had not filed a notice of contest with respect to the remaining 12 alleged violations. Mr. Cline's realization that he had waived presentation of evidence as to the nine violations here involved may have caused him to believe that it would be inappropriate for him to represent respondent at the reconvened hearing. Mr. Cline had also stipulated at the first hearing that all of the factual statements made in the inspectors' citations were correct (Tr. 12). That stipulation also probably contributed to Mr. Cline's lack of willingness to appear at the reconvened hearing because there is little that a respondent can present in its own defense in a civil penalty proceeding after it has stipulated that the facts stated by the inspectors in their citations are correct.

The facts which I have given above show that Mr. McAfee was afforded two opportunities for presenting evidence in this proceeding and failed to take advantage of either one of them. I do not believe that Mr. McAfee has shown good cause for being given a third opportunity to present evidence and there is no reason to believe that he would appear at a third hearing even if one were to be scheduled. Therefore, the order accompanying this decision will deny respondent's request for continuance made in a note delivered to me on February 26, 1985, by one of MSHA's secretaries.

The Commission issued its decision in Little Sandy Coal Sales, Inc., 7 FMSHRC 313 (1985), after I had finished drafting this decision, but I do not think that denial of respondent's request for a continuance in this case is in conflict with the Commission's holding in the Little Sandy case. In that case, the Commission reversed a judge's ruling to the effect that Little Sandy's representative was not entitled to cross-examine MSHA's witness because of the representative's failure to appear at the hearing. Little Sandy's representative, however, had called the judge's secretary the day before the hearing was held to state that he was too ill to attend the hearing. Therefore, in the Little Sandy case, the judge at least knew before convening the hearing that respondent's representative did not plan to attend the hearing.

In this case, respondent's counsel had already cross-examined both of MSHA's witnesses at the first hearing. The second hearing was held solely to permit respondent to introduce a direct case with respect to the same citations which were the subject of the testimony introduced by the Secretary's counsel at the first hearing. Moreover, in this case, respondent's counsel did not call me or my secretary prior to the hearing to advise me that he could not be present at the hearing and waited until after the time had passed for the hearing to commence before sending me a note by one of MSHA's secretaries asking for a continuance. While the note indicated that Mr. McAfee "is out of town" the note, as to Mr. Cline, who had represented respondent at the first hearing, simply stated that he "cannot be here either".

Additionally, in the Little Sandy case, the owner was proceeding without assistance of counsel, whereas in this case, Mr. McAfee, respondent's president, is an attorney who has a professional obligation to ask for continuances in a timely manner so as to avoid the inconvenience and expense which resulted from the untimely request for continuance made in this proceeding.

Respondent's Claims of Discriminatory Treatment by MSHA

At the commencement of the first hearing, counsel for respondent made a motion for dismissal of the Secretary's petition for assessment of civil penalty for the reason given below (Tr. 4):

> Furthermore we move that all charges be dismissed by reason of the violation of equal protection under the constitution; that this is a discriminatory inspection, we can show by evidence, that Your Honor probably well knows, if not I have no objection to telling you that these inspectors were not permitted to inspect this tipple for some two years by reason that there was a court action that ruled in our Western District of Virginia that the Mine Safety and Health Act did not apply to tipples, and a court order in federal court was entered to that effect, and being law abiding citizens they abided by that, and then the court reversed its decision and said tipples were under the jurisdiction of MSHA, and of course we abided by that. And as soon as that was lifted we had a discriminatory inspection, and we move that it be dismissed for that reason. * * *

It was not clear from the above argument just what was discriminatory about the inspection of respondent's tipple until respondent's counsel cross-examined the two inspectors who testified in support of the citations which they had written (Tr. 31-33; 80-81). That cross-examination shows that respondent was under the belief that MSHA would conduct a preliminary "walk-through" of the tipple and informally advise respondent as to the requirements of the regulations before conducting an inspection which would result in the writing of actual citations alleging violations of the mandatory health and safety standards (Tr. 33). Both of the inspectors stated that when a new facility has been constructed and the prospective operator of that facility requests MSHA to make a "walk-through" before any coal is processed, that MSHA will make that kind of examination, but both inspectors stated that respondent's tipple had been processing coal before the inspection here involved was made and that MSHA does not perform "walk-through" inspections in such circumstances (Tr. 31; 80).

The above references in the transcript show that respondent is claiming that the inspection in this instance was discriminatory because respondent's tipple was not made the subject of a friendly walk-through inspection, whereas other operators

have received such advisory inspections (Tr. 33). Respondent's counsel at no time mentioned or asked about any other specific operator who has received a friendly advisory inspection. Consequently, there are no facts in the record to support a finding that MSHA treated respondent any differently than it has any other tipple operator who has been actively processing coal prior to being inspected by MSHA.

Moreover, it should be noted that section 103(a) of the Act specifically states that "[i]n carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections". The legislative history clearly shows that Congress did not intend for the Secretary of Labor, or any representative of the Secretary of Labor, to give advance notice of an inspection. The Joint Explanatory Statement of the Committee of Conference explained the provisions of section 103(a) as follows: (Footnote.1)

> The Senate bill prohibited advance notice of any inspection conducted by the Secretary of Labor irrespective of the purpose. The Senate bill did permit the HEW Secretary to give advance notice of inspections or investigations conducted for the purpose of obtaining or disseminating information or for the development of standards. [Emphasis supplied.]
>
> . . . .
>
> The conference substitute conforms to the Senate bill, with an amendment to clarify the fact that while the Secretary of Health, Education, and Welfare has authority to enter the mines, he has no enforcement responsibilities.

Section 110(e) of the Act provides as follows: "Unless otherwise authorized by this Act, any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both."

In view of the prohibition of advance notice set forth in section 103(a), it appears inappropriate for respondent to argue that it ought to have been given advance notice before an inspection was made at its tipple, especially since respondent's president had signed a stipulation agreeing that MSHA could commence making inspections at its tipple (Exh. 10). The former Board of Mine Operations Appeals long ago held that operators are conclusively presumed to know what the mandatory health and safety standards are. Freeman Coal Mining Co., 3 IBMA 434, 422 (1974); North American Coal Corp., 3 IBMA 515 (1974). The Board's holding is especially pertinent in the case of a respondent whose president is a lawyer. There is nothing in the record to show that respondent's tipple was subjected to a discriminatory investigation in the first instance and there is doubt that respondent has any right to claim that it would be entitled to a "friendly" advisory inspection in the second instance, even if its tipple had been new, which does not appear to be the case (Tr. 80-81).

In the circumstances described above, I find that there is no merit to respondent's claim that the citations here involved were issued during a discriminatory inspection. The order accompanying this decision will deny respondent's request that the petition for assessment of civil penalty be dismissed because of MSHA's alleged discriminatory conduct in making the inspection.

Decision on the Merits

The order providing for the first hearing in this proceeding specified that I would render a decision at the hearing with respect to each of the respective alleged violations as soon as the parties had completed their presentations of evidence. I was unable to render a bench decision at the first hearing because I ruled that I would postpone deciding the issues on the merits until it could be determined whether a further hearing would be required with respect to the other 12 violations which have already been discussed at length in the first part of this decision (Tr. 10).

At the second hearing, after I had determined that respondent's motion for a continuance should be denied, I rendered a bench decision with respect to the nine violations which are the subject of the petition for assessment of civil penalty filed in this proceeding. As my order providing for hearing stated, the issues to be considered in a civil penalty

proceeding are whether any violations of the mandatory health and safety standards occurred and, if so, what penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. The substance of my bench decision follows (Tr. 94-109):

Counsel for respondent stipulated that the factual statements in all of the citations were correct, but that he would not stipulate as to some of the six criteria, such as negligence and gravity (Tr. 12). Subsequently, counsel for the parties stipulated to four of the six criteria, specifically that respondent abated all of the violations within the time provided by the inspectors, that respondent is a small operator which processes an average of about 750 tons of coal per day, that respondent has not been cited for any violations during the 24-month period preceding the writing of the citations involved in this proceeding (Tr. 28), and that payment of penalties will not cause respondent to discontinue in business (Tr. 30). Consequently, the evidence presented by counsel for the Secretary was limited to testimony pertaining to the remaining two criteria of negligence and gravity.

The two inspectors who wrote the citations involved went to respondent's tipple on the same day. One of the inspectors had received specialized training in electrical installations and equipment, whereas the other inspector did not have such specialized training. The inspector without specialized electrical training wrote all of the citations pertaining to safety in general, while the electrical inspector wrote the citations pertaining to failure to maintain electrical equipment in a safe operating condition. Both inspectors, however, had examined the entire plant. Therefore, the electrical inspector testified about the negligence and gravity associated with the electrical violations which he personally cited as well as to the negligence and gravity of the violations which were cited by the other inspector. My findings as to negligence and gravity are based on the testimony presented by both inspectors. My transcript reference to both inspectors' testimony will make it a simple matter for anyone reading my decision to check the testimony and to determine whether my findings are supported by the record.

A violation of 30 C.F.R. 77.1713(c) was alleged in Citation No. 2155278, or Exhibit 1. Section 77.1713(c) requires the results of daily inspections for hazardous conditions to be entered in a book kept for that purpose. Respondent did not have a book available for that purpose and was not recording the results of the inspections, assuming that they were being made. The types of hazards which might be noticed during an inspection for hazardous conditions would include such things as impediments to safe walking, such as

coal accumulations on walkways, the lack of guards along elevated walkways or failure to guard moving machine parts where employees are required to work. Failure of the person performing the inspection to record the hazards in a book would mean that no place would exist where another person could determine whether hazardous conditions existed in the plant. Failure to make such entries could also result in a failure to eliminate the hazards because if the person who makes the examinations for hazardous conditions is not also responsible for their correction, he might forget to inform a supervisor that the hazards exist, so that the supervisor could have the hazards eliminated (Tr. 24-26; 59).

As I have noted above, stipulations have already been made with respect to the four criteria of the size of respondent's business, history of previous violations, respondent's good-faith effort to achieve rapid compliance, and the fact that payment of penalties will not cause respondent to discontinue in business. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir.1984) and in U.S. Steel Mining Co., 6 FMSHRC 1148 (1984), that its judges are not bound by the Secretary's assessment procedures described in Part 100 of Title 30 of the Code of Federal Regulations in assessing penalties. Therefore, the penalties which I shall hereinafter assess in this proceeding will be based on the six criteria listed in section 110(i) of the Act, in light of the evidence presented by the parties in this proceeding.

The first criterion which should be examined is the size of respondent's business. Respondent has only two employees working at its preparation plant and processes only 750 tons of coal on an average daily basis. In such circumstances, penalties in a very low range of magnitude should be assessed to the extent that they are based on the size of respondent's business.

Another important consideration is the criterion of history of previous violations. Respondent had not been cited for any violations during the 24-month period preceding the writing of the citations which are involved in this proceeding. Counsel for respondent has indicated that a court proceeding initiated by respondent resulted in no inspections being made of respondent's plant for about 2 years. Consequently, it may be that violations existed at respondent's plant during the 24 months preceding the writing of the instant citations, but regardless of why no violations were cited, it is a fact that there is no history of previous violations to be considered. For that reason, no portion of the penalties will be attributed to the criterion of respondent's history of previous violations.

Respondent's cross-examination elicited from both inspectors many statements to the effect that respondent was cooperative in trying to correct all of the violations immediately after they were cited. The inspectors have agreed that respondent began working on abatement of the violations as soon as they were cited, but not all of them were corrected by the second day of the inspection and it was necessary for the inspectors to extend the time for abatement with respect to some of the violations (Tr. 50; 54).

It has always been my practice to increase a penalty by some amount if an operator fails to show a good-faith effort to abate the violation and to reduce the penalty if an operator demonstrates an unusual effort to achieve compliance, such as shutting down other operations so as to bring additional employees into a cited area to correct conditions which have not been the result of a withdrawal order which would have closed down a mine or portion of a mine in any event. In this case, the two employees who normally worked at the plant apparently began to correct the violations instead of processing coal, and that is what normally happens. Therefore, I believe that respondent made a good-faith normal effort to achieve compliance. When that occurs, I neither increase nor reduce any of the penalties under the criterion of good-faith abatement.

The fourth criterion as to which the parties stipulated is that the payment of penalties will not cause respondent to discontinue in business. Therefore, it is not necessary to reduce any of the penalties upon a finding that respondent is in dire financial condition.

The discussion above shows that the penalties in this case will primarily be based on the three criteria of the size of respondent's business, negligence, and gravity. As to the violation of section 77.1713(c) discussed above, there is no doubt but that the failure to have a book for recording the results of inspections for hazardous conditions was associated with a high degree of negligence. As previously indicated above, the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that an operator is conclusively presumed to know what the mandatory health and safety standards are. Consequently, a penalty of $30 should be assessed under the criterion of negligence. I would assess a much larger penalty except for the fact that I am bearing in mind throughout this decision that a small operator is involved.

The inspectors found coal accumulations on one elevated walkway. They considered those accumulations to be a stumbling

hazard. If the person making the daily examinations for hazardous conditions had written in a book every day that he had observed that hazardous condition on the walkway, it would have impressed him with the importance of correcting that hazard if he also had the responsibility of correcting any hazards that he observed during his inspections. If a supervisor or other person was responsible for correcting the dangerous condition, that person would have been more likely to take action to clean up the coal by seeing the hazard noted in a book which he read each day. Consequently, the violation was moderately serious and a penalty of $20 should be assessed under the criterion of gravity, making a total penalty of $50 appropriate for the violation of section 77.1713(c).

A violation very similar to the one discussed above was alleged in Exhibit 2 which is Citation No. 2278321 alleging a violation of section 77.502. The pertinent portion of section 77.502 here involved requires the results of examinations of electrical equipment to be recorded in a book kept for that purpose. The citation alleges that respondent was failing to record the results of electrical inspections because no book was available for making such entries. The types of deficiencies which should be recorded would include accumulations of coal dust on electrical components and broken electrical conduits which might result in a fire. Failure to record the existence of such deficiencies might result in their continuance without being remedied (Tr. 60-61).

I have already discussed the six criteria in connection with the previous violation of section 77.1713(c) which also pertained to the failure to record hazards in a book kept for that purpose. The evidence supports similar findings as to negligence and gravity with respect to the instant violation of section 77.502, namely, that the violation was associated with a high degree of negligence and was moderately serious. Therefore, a penalty of $50 should be assessed for the violation of section 77.502.

Two violations of section 77.1710(e) were alleged in Exhibits 3 and 4 which are Citation Nos. 2155279 and 2155280. Section 77.1710(e) requires employees in surface work areas to wear suitable protective footwear. Each of the citations alleged that an employee was not wearing protective footwear in the form of hardtoed shoes. Each employee was exposed to the possibility of having heavy tools or pieces of coal up to 6 inches in size drop on his foot (Tr. 37-38; 62-64). Failure to wear hardtoed shoes could result in injuries ranging from a bruise to a broken toe.

The evidence supports a finding that the violations were associated with a high degree of negligence because respondent should have made certain that its employees were wearing proper protective shoes. Consequently, a penalty of $30 will be assessed for each violation under the criterion of negligence. The violations were relatively nonserious because the employees were not likely to suffer greater injuries than bruised or broken toes. While such injuries are painful, they are not life threatening. Consequently a penalty of $10 will be assessed under the criterion of gravity, making a total penalty of $40 for each violation appropriate.

A violation of section 77.410 was alleged in Exhibit 5 which is Citation No. 2282283. That section requires trucks and other mobile equipment to be equipped with an adequate automatic warning device which will give an audible alarm when the equipment is put in reverse. The citation stated that a truck being used to haul coal from a stockpile to the tipple was not equipped with the required back-up alarm. Coal was dumped into the truck with an endloader which was operated by the same person who drove the truck. Therefore, the truck was not normally used in a manner which would place a second person behind the truck when it was being backed up. As one of the inspectors pointed out, however, there are two employees working at the plant and one of them is working at the tipple when the other employee backs a truck to the tipple for the purpose of unloading coal. Consequently, it would be possible for the driver of the truck to run over and injure another person because of the lack of an adequate back-up alarm (Tr. 41-43; 65-66).

Here again the violation was associated with a high degree of negligence because respondent either knew or should have known that back-up alarms are required on all such mobile equipment. The violation, however, was relatively nonserious in the circumstances because it would have been very unusual for anyone to be on the ground behind the truck when it was backing up. Of course, it is that rare occasion when someone might be behind the truck when it is being used in reverse gear that makes the back-up alarm a vital consideration if that rare instance does occur. Therefore, I think that a penalty of $30 is appropriate under the criterion of negligence and that a penalty of $10 should be assessed under the criterion of gravity, making a total penalty of $40 for this violation of section 77.410.

Citation No. 2282284, which is Exhibit 6, alleged that the same truck discussed in the previous citation was violating section 77.1109(c)(1) which requires mobile equipment such as trucks to be equipped with at least one portable fire extinguisher. The truck used to haul coal from the stockpiles to the tipple was not provided with a fire extinguisher. Fires may start in a truck because of a short circuit in the wiring or as a result of a person dropping a cigarette on flammable materials. The inspector stated that the driver of the truck could have obtained a fire extinguisher in a building located about 100 feet from the one stockpile, but that the truck might be farther away from that fire extinguisher if it were being used at another stockpile farther from the place it was being used when the citation was written (Tr. 44-46).

The Commission held in Puerto Rican Cement Co., Inc., 4 FMSHRC 997 (1982), that having a fire extinguisher on a wall 100 feet away from a piece of mobile equipment is not a satisfactory alternative for being required to have the fire extinguisher available on the mobile equipment because additional time is required to obtain an extinguisher from a nearby place. An electrical fire expands rapidly once it starts and ability to put out the fire depends upon having the fire extinguisher close at hand and ready for use. Therefore, I find that there was a high degree of negligence associated with failure to have a fire extinguisher on the truck. The evidence does not show that a fire was likely to occur and it is improbable that a fire would have exposed the driver of the truck to serious injury because, in most instances, he would be able to jump out of the truck if he should find himself unable to extinguish any fire that might occur (Tr. 44-45).

The discussion above supports a finding that there was a high degree of negligence associated with the violation and that it was relatively nonserious in the circumstances which prevailed when the citation was written. Therefore, a penalty of $30 will be assessed under the criterion of negligence and $10 under the criterion of gravity for a total penalty of $40 for the violation of section 77.1109(c)(1).

Citation No. 2282285, which is Exhibit 7, alleged a violation of section 77.205(b). That section requires that travelways and platforms where persons are required to travel or work are to be kept clear of all extraneous materials and other stumbling or slipping hazards. The citation states that the travelway leading to the head roller of the No. 5 belt was completely covered with loose coal. The walkway was constructed of steel and had toeboards about 4 inches in

height and a single hand railing about 42 inches above the walkway. The coal accumulations were deep enough to be even with the toeboard and the inspector had to walk on the accumulations in order to check the motor size and related components on the electrical system. The walkway was constructed at an angle so that its lower end was about 8 feet above ground level and its upper end was about 12 feet from ground level. If a person should stumble in the coal and fall through or over the hand railing, he could suffer minor injuries or death, depending on how he landed on the concrete surface below the walkway. The inspector believed that the coal had been in existence for a considerable period of time because coal is wet when it first comes from the mine, but the coal accumulations were dry. An examiner would have to use the walkway at least once a day (Tr. 46-48; 66-70).

There was a high degree of negligence associated with this violation because the coal accumulations appeared to have been in existence for several days, but had not been cleaned up. The violation was serious because it exposed an employee to the possibility of a fall which might have resulted in serious injury or death. Consequently a penalty of $40 will be assessed under the criterion of negligence and a penalty of $50 will be assessed under the criterion of gravity, for a total penalty of $90 for this violation of section 77.205(b).

Citation No. 2278322, which is Exhibit 8, alleged a violation of section 77.202 which prohibits allowing coal dust to accumulate in dangerous amounts on structures or enclosures. The citation stated that dangerous accumulations of float coal dust ranging in depths of from 1/8 to 1/2 inch were present inside the enclosures of the motor control center, the combination AC-DC magnet controllers and other related electrical units located inside the motor control room. The motor control center and other units were energized with 480-volt, three-phase power, and contained relays and other arcing components.

The inspector who wrote the citation estimated that the float coal dust had been accumulating for 6 months or longer than that. The dust had accumulated not only in the compartment, but was also lying on the circuit breaker, the wiring, and all of the components. A person has to enter the motor control center to push a button to start and to stop the equipment. Even when the equipment is operating under normal conditions, there is an arcing

effect when machinery is energized and deenergized. If equipment is deenergized under a full load, which occurs when a belt is overloading, the extent of the arcing is increased. Such arcing can cause an ignition to occur which in turn may be propagated throughout all the electrical compartments. Such an ignition could result in anything from a minor burn to serious burns or death (Tr. 70-74).

The evidence discussed above supports a finding that respondent was extremely negligent in allowing float coal dust to accumulate to the extent described by the inspector. The violation was very serious because an ignition hazard existed which could have caused a fire at any time. Such a fire could have resulted in serious burns or death of the person who operated the controls. In such circumstances, a penalty of $75 should be assessed under the criterion of negligence and a penalty of $75 should be assessed under the criterion of gravity for a total penalty of $150 for the violation of section 77.202.

Citation No. 2278323, which is Exhibit 9, alleges a violation of section 77.506-1 which requires operators to use devices for protection of short circuit or overload conforming to the National Electric Code. The citation stated that a 480-volt control circuit for the No. 8 belt controller was not provided with a device conforming with the minimum standards of the National Electric Code because the fuse had blown and had been wrapped in aluminum foil. The inspector stated that putting foil around the fuse destroyed the design of the fuse and allowed an unknown amount of amperage to pass through the circuit with relatively no control as to what the safe limits are. When an overload occurs, in such circumstances, the insulation on the conductors begins to melt and that causes damage to other conductors in the general vicinity so that a possible fire may occur. If a fire should occur, its results could be anything from a minor burn to death because the float coal dust referred to in connection with the previous violation was present (Tr. 75-77).

There was an extremely high degree of negligence associated with the violation of section 77.506-1 because respondent had deliberately wrapped foil around the fuse with the result that its short circuit and overload protection had been destroyed. The violation was not quite as serious as the previous violation because the belt in question was not being used at the time the citation was written and the belt is used only on an intermittent basis.

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Therefore, the likelihood of a fire or explosion was reduced as compared with the previous violation. In such circumstances, a penalty of $75 should be assessed under the criterion of negligence and a penalty of $25 should be assessed under the criterion of gravity for a total penalty of $100 for the violation of section 77.506-1.

WHEREFORE, it is ordered:

(A) The request for continuance contained in a note handed to me at the hearing reconvened on February 26, 1985, by one of MSHA's secretaries is denied.

(B) Respondent's motion for dismissal of the petition for assessment of civil penalty on the ground that the inspection resulting in the alleged violations here involved was discriminatory is denied.

(C) J.A.D. Coal Company, Inc., within 30 days from the date of this decision, shall pay civil penalties totaling $600.00 which are allocated to the respective violations as follows:

Citation No. 2155278	5/9/84	77.1713(c)	$ 50.00
Citation No. 2155279	5/9/84	77.1710(e)	40.00
Citation No. 2155280	5/9/84	77.1710(e)	40.00
Citation No. 2278321	5/9/84	77.502	50.00
Citation No. 2278322	5/9/84	77.202	150.00
Citation No. 2278323	5/9/84	77.506-1	100.00
Citation No. 2282283	5/9/84	77.410	40.00
Citation No. 2282284	5/9/84	77.1109(c)(1)	40.00
Citation No. 2282285	5/9/84	77.205(b)	90.00

Total Civil Penalties Assessed in This Proceeding $ 600.00

Richard C. Steffey
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 CONFERENCE REP. NO. 95-41, 95th Cong., 1st Sess. 44 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 1322 (1978).