CCASE:
SOL (MSHA) v. PYRO MINING
DDATE:
19850925
TTEXT:

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. KENT 84-184 A.C. No. 15-13881-03528
v.	Docket No. KENT 84-196 A.C. No. 15-13881-03530
PYRO MINING COMPANY, RESPONDENT	Docket No. KENT 84-238 A.C. No. 15-13881-03532 Pyro No. 9 Slope Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
William Craft, Manager of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Steffey

Completion of the Record

A hearing in the above-entitled proceeding was held on February 12, 1985, in Evansville, Indiana, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977, pursuant to a notice of hearing issued January 15, 1985. An unusually heavy snowstorm occurred during the afternoon and night preceding the hearing so that respondent's witnesses were unable to be present at the hearing and it was very doubtful if the roads would be clear enough for them to be present to testify on the day following the hearing. Therefore, I agreed that the parties could subsequently obtain a deposition of any witness who was unable to appear at the hearing and it was agreed that the deposition would be used as a supplement to the record for the purpose of making findings of fact and deciding the issues in this proceeding (Tr. 190).

The deposition referred to in the preceding paragraph was taken on May 23, 1985, and the typed deposition was received by me on July 25, 1985. The parties submitted only one exhibit in conjunction with the deposition and it was marked as Exhibit C. The parties inadvertently overlooked the fact that I had received in evidence at the hearing Respondent's Exhibits A through F. Consequently, there is

already in evidence as Exhibit C a one-page document consisting of page No. 254 from MSHA's inspection manual. There are frequent references to the duplicate Exhibit C in the parties' deposition. If I were to redesignate Exhibit C accompanying the deposition as Exhibit G so as to eliminate the duplicate marking of two different exhibits with the letter "C", the many references in the deposition to Exhibit C would also have to be changed. On the other hand, page 254 of the inspector's manual, which was designated as Exhibit C at the hearing, is referred to in the transcript of the hearing only in the index of exhibits and on page 80 of the transcript. Therefore, the simplest way to eliminate the repetitious use of the letter "C" for identifying two exhibits is to redesignate page 254 from the inspection manual as Exhibit G and correct the index and page 80 of the transcript to show that page 254 of the inspector's manual is Exhibit G and to receive in evidence as Exhibit C the drawing which was submitted with the parties' deposition.

For the reasons given above, the excerpt from MSHA's inspection manual having at the bottom of that excerpt a Roman numeral "II" and the number "254" is redesignated as Exhibit G and is received in evidence as Exhibit G. The necessary changes will physically be made on the exhibit and on the index to the transcript of the hearing. Page 80 of the transcript will also be corrected to show the marking and receipt in evidence of Exhibit G on that page instead of Exhibit C.

The drawing of the No. 4 Unit of Pyro's No. 9 Slope Mine, prepared by Pyro's witness Tom Hughes, is received in evidence as Exhibit C and the parties' deposition of May 23, 1985, will be considered as additional transcript of the witnesses who testified in this proceeding.

References to the transcript of the hearing will be shown as "Tr. _____" in this decision and references to the deposition will be shown as "Dep. _____".

Issues

The issues in a civil penalty proceeding are whether violations of the mandatory health and safety standards occurred and, if so, what civil penalties should be assessed based on the six criteria listed in section 110(i) of the Act. Counsel for the Secretary filed his posthearing brief on August 26, 1985, and Pyro's representative filed his posthearing brief on August 28, 1985. The arguments made by the parties are hereinafter considered.

CONSIDERATION OF PARTIES' ARGUMENTS

DOCKET NO. KENT 84-184

The proposal for assesment of civil penalty filed in Docket No. KENT 84-184 seeks to have penalties assessed for alleged violations of section 75.400 and section 75.503. Both violations were alleged in citations written under section 104(a) (FOOTNOTE.1) of the Act in conjunction with an order of withdrawal issued under section 107(a) (FOOTNOTE.2) of the Act.

Findings of Fact

1. Imminent-danger Order No. 2338837 was written after the inspector had obtained a reading on his methane detector indicating the presence of 2.3 percent methane at the working face of the No. 2 entry (Tr. 34; Exh. 2). The inspector issued Citation No. 2338839 alleging a violation of section 75.503 (FOOTNOTE.3) because a cable had been ripped out of a splice

box on a loading machine which was sitting close to the face where the high reading of methane had been obtained. The loading machine also had an opening in excess of .004 of an inch between the cover and the frame of the forward/reverse electrical compartment (Tr. 38; Exh. 4). The inspector issued Citation No. 2338840 alleging a violation of section 75.400 (FOOTNOTE.4) because loose coal had been allowed to accumulate along the ribs of the Nos. 5, 6, and 7 entries up to 1 foot in depth and in several room necks (Tr. 19; 104; Exh. 5). The inspector prepared Exhibit 6 to show where the coal existed. The coal is depicted by small dots which appear on Exhibit 6 in two room necks on the right side of No. 7 entry and in one room neck on the left side of No. 1 entry (Tr. 17). The room necks were from 8 to 10 feet deep and 20 feet wide and were filled with loose coal. Loose coal had also been allowed to accumulate in large quantities in the crosscut between Nos. 6 and 7 entries and in the No. 7 entry just inby Spad No. 1523 as shown on Exhibit 6 (Tr. 18; 22).

2. The inspector wrote the words "stored coal" on the right side of Exhibit 6. He stated that he made that entry on the exhibit because Pyro's safety manager, Tom Hughes, who accompanied him on his inspection, stated that Pyro had permission to store the coal along the ribs and in room necks during the first two shifts and then the stored coal was taken out of the mine on the third shift. The reason given by Hughes for storing the coal was that Pyro had a raw-coal contract at that time which required Pyro to deliver the purest coal which could be picked up by the loader. After the loader had picked up all the coal it could while trying to avoid getting into draw rock or fire clay, a scoop followed and scraped up coal containing draw rock and fire clay and stored it along the ribs and in room necks (Tr. 16; 24; 52; 56; 89). The conveyor belt was removed from the regular stock pile when the stored material containing rocks and fire clay was being transported out of the mine (Dep. 28).

3. Although Hughes told the inspector that the stored coal cited by the inspector as coal accumulations was 90 percent rock, the inspector stated that it appeared to be 90 percent coal to him (Tr. 21; 56-57). The inspector collected two samples of the stored coal and the laboratory analyses of those samples indicated that they were 22 and 20 percent incombustible, respectively, whereas section 75.403 requires

intake entries like those in which the samples were taken, to be rockdusted so as to have an incombustible content of 65 percent (Tr. 64; 96; Exh. 9). The inspector, however, made no attempt to take a sample which would contain rocks and the inspector agreed that he took the dust sample in the usual manner which involved passing the coal dust through a sieve which would not have permitted rocks to pass through the sieve into the coal collected for the purpose of making a laboratory analysis (Tr. 91; 104-105). The inspector insisted that the stored material contained entirely too much coal to be treated as rocks (Tr. 92). Hughes testified that the stored material was processed in Pyro's preparation plant and that the resulting coal was sold (Dep. 29-30).

4. As indicated above, the loose coal accumulations were among the hazards which the inspector took into consideration when he issued imminent-danger Order No. 2338837 at the time he obtained a methane reading of 2.3 percent at the face of the No. 2 entry. The other hazard which the inspector took into consideration was the aforementioned violation of section 75.503 alleged in Citation No. 2338839 because the missing cable and light on the right side of the loading machine and the opening of more than .004 of an inch in the control panel supplied an ignition source for the methane accumulation which the inspector believed was approaching the explosive range of 5 percent (Tr. 39; 47; 60; 100-101).

Citation No. 2338839 3/23/84 75.503 (Exhibit 4)

The violation of section 75.503 alleged in Citation No. 2338839 was that the loading machine had an opening in excess of .004 of an inch between the cover and the frame of the forward/reverse electrical compartment and there was no conduit and cable to one light and a splice box (Finding No. 1 above). Pyro's brief does not deny that those openings existed and the loading machine operator testified that he was aware that the light was not burning but that he did not know why it failed to work (Tr. 126). Pyro's brief (pp. 6 and 7) mixes its discussion of Citation No. 2338838, alleging a violation of section 75.503, with its discussion of Citation No. 2338839, alleging a violation of section 75.308. Most of that discussion pertains to the violation of section 75.308 which is hereinafter evaluated under Docket No. KENT 84-196. A portion of Pyro's defense to the violation of section 75.503 is intertwined with its argument that the loading machine involved was not situated in a "working place" which is defined in section 75.2(g)(2) as "the area of a coal mine inby the last open crosscut." Section 75.503 is quoted in full in footnote 3 on page 3 above and that section requires equipment to be permissible "which is taken into or used inby the last open crosscut".

The Commission long ago considered and rejected the argument that a violation of section 75.503 may not be cited unless the equipment involved is located inby the last open crosscut. In Solar Fuel Co., 3 FMSHRC 1384 (1981), the Commission held that all MSHA has to prove with respect to showing that a violation of section 75.503 occurred is that there is an intent to take equipment inby the last open crosscut. The Commission stated 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 pointed out that the purpose of the permissibility standard is to assure that equipment will not cause a mine explosion or fire. Therefore, the Commission stated that section 75.503 applies not only to equipment which has been taken inby the last open crosscut at the time it is 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 when the cited equipment is outby the last open crosscut.

In this instance, the loading-machine operator testified that he had just loaded at least one shuttle car of coal at a point which was 15 feet from the working face and had backed up in position to load another shuttle car when the inspector found the permissibility violation of section 75.503 (Tr. 128-129). There can be no doubt but that the loading machine cited by the inspector was intended to be used inby the last open crosscut and that it was properly cited by the inspector for a violation of section 75.503. Therefore, I find that a violation of section 75.503 occurred. Pyro's brief (p. 2) also makes some arguments about the nonserious nature of the violation. Those arguments will subsequently be considered when I discuss the criterion of gravity in assessing a civil penalty.

Citation No. 2338840 3/23/84 75.400 (Exhibit 5)

Citation No. 2338840 alleged a violation of section 75.400 because loose coal had been allowed to accumulate along the ribs of Nos. 5, 6, and 7 entries up to 1 foot in depth and in several room necks in piles 20 feet wide and 3 feet in depth (Finding No. 1 above). Pyro's brief (pp. 5 and 7) objects to the alleged violation of section 75.400 for three reasons. First, Pyro claims that the samples of the loose coal taken by the inspector were not representative. Second, Pyro argues that the inspector failed to take a band sample. Third, Pyro contends that the No. 4 Unit, where the accumulations were found, was in the Second Main North area of the mine rather than in the Main West area of the mine where the inspector understood the No. 4 Unit to be located.

In considering Pyro's objections to the violation of section 75.400 based on the claim that the inspector's dust sample was not representative of the type of materials he found, it should be noted that the former Board of Mine Operations Appeals held in Kaiser Steel Corp., 3 IBMA 489 (1974), that an inspector does not need to take a dust sample in order to prove a violation of section 75.400. I am aware of no Commission decision which has reversed the former Board's holding. Since Pyro does not deny that the accumulations existed, I could find that the violation occurred on that basis alone and consider Pyro's arguments solely from the standpoint of gravity in assessing a civil penalty. I shall, however, consider Pyro's arguments about the validity of the representative samples because section 75.400 refers to coal dust, float coal dust, loose coal and "other combustible materials" so that an operator can hardly be said to have violated section 75.400 if the accumulations of loose coal described in an inspector's citation are so predominately made up of draw rock and fire clay as to render those materials incombustible as claimed on pages 7 and 8 of Pyro's brief.

The inspector agreed that the two samples he took of the cited materials were almost entirely pure coal because the rocks in the accumulations would not pass through the sieve he used to collect the samples which he sent to the laboratory for analysis. The inspector also agreed that if he had been able to include rock in the samples, the rock would have resulted in a greater incombustible content than the results of the analysis showed, which was in a range of from 20 to 22 percent incombustible (Tr. 105), but the inspector insisted that the materials he had cited as loose coal accumulations consisted of too much coal to be treated as if they were almost entirely made up of rocks (Tr. 92). Since both samples were obtained in intake entries, the incombustible content would have had to be at least 65 percent incombustible in order to be exempt from being cited as combustible accumulations (Tr. 96). While the inspector did not take a sample from the No. 1 entry, he observed loose coal in a room neck in the No. 1 entry which is a return entry where the incombustible content is required to be 80 percent (Tr. 96; Exh. 6; Dep. 24).

Pyro's claim that the accumulated materials described in the inspector's citation were composed of too much rock and fire clay to be considered combustible is not supported by the testimony of either of Pyro's witnesses. It is undisputed that the material which was piled along the ribs of the Nos. 5, 6, and 7 entries and in the room necks shown on Exhibit 6 were the materials which were scraped up by the scoop after the loading machine had removed the choice coal from the mine for sale without having to be passed

through Pyro's processing plant. The inaccuracy of Pyro's contention that the accumulations stored along the entries and in room necks were incombustible is demonstrated beyond any doubt by the following testimony of the loading-machine operator (Tr. 150-151):

> A Well, Pyro was wanting us to load ash-free coal, the best we can. In order to do that, is to keep my loader head from getting down in that soft fireclay and, you know, scooping it up.
>
> And that's what they mean by trying to keep my head up--try to stay, you know, just above it and not get as much--get as least amount of fireclay as you can get by with.
>
> Q So, really, what you're telling me is that you don't go back and drop it any lower than that.
>
> A I--well, I try to keep it to grade, more or less, is what I always try to do.
>
> Q But that coal is taken on out and sold.
>
> A Right.
>
> Q And so no product that's picked up by the loading machine is stockpiled?
>
> A No.
>
> Q The stockpiling is done solely with the scoop.
>
> A Right.
>
> Q Which deliberately picks up the fireclay and coal.
>
> A Well, even the scoop--they don't want the scoops to get the fireclay either, if they can prevent it, but it's just hard not to.

The testimony of Pyro's safety manager also shows that the coal cited by the inspector as combustible accumulations were not primarily composed of rocks and fire clay (Dep. 29):

> Q But the material that you stored in the room neck that Mr. Dupree [the inspector] found, you did have to put through a process to separate the coal out from the incombustible material, is that correct?

A Yes, sir.

Q And were you then able to use that same coal in your raw coal contract or did you do something else with that coal?

A No. That coal could then be marketed.

The above testimony of Pyro's witnesses support a finding that, while the inspector's samples may not have been representative of all of the materials which he found along the ribs and in the room necks, those materials were also composed primarily of coal because they had been gathered by a scoop operator who had been instructed to gather up as little fire clay and rocks as possible. If the coal had been as incombustible and full of rocks as Pyro argues it was in its brief, it would not have been economical to run the coal through the processing plant.

The Commission's very recent decision in Black Diamond Coal Mining Co., 7 FMSHRC ----, August 5, 1985, rejected an argument almost identical to the one made by Pyro in this proceeding. In the Black Diamond case, the operator's foreman testified that coal accumulations cited by the inspector were 80 percent rock and the remaining 20 percent was coal. The foreman also testified that the accumulations were so wet that when he grabbed a handful of it and squeezed it, the material ran through his fingers. The Commission rejected Black Diamond's argument that the accumulations were not combustible by stating, among other things, as follows (p. 5):

> Even if, as Black Diamond asserts, the accumulation was damp or wet, it was still combustible. For example, in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire. Furthermore, even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite. Also, coal mixed with rock and fire clay can nevertheless burn. A construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist. [Emphasis supplied.]

Since the record in this proceeding shows that the accumulations cited by the inspector were primarily coal which had been collected by a scoop operator who had been instructed to pick up as little fire clay as possible, and since the

Commission has already rejected a claim that accumulations composed of large amounts of rock and fire clay should not be cited under section 75.400 as combustible materials, I find that the violation of section 75.400 alleged in Citation No. 2338840 occurred.

Pyro's claim that the inspector's sample should have been made up of materials taken from the mine floor, ribs, and roof is also rejected because a band sample is required to be taken only when the inspector is citing a violation of section 75.403 because of an operator's failure to apply rock dust "upon the top, floor, and sides of all underground areas of a coal mine". As I observed at the commencement of this discussion of the violation of section 75.400 here involved, the former Board held long ago in the Kaiser Steel case that an inspector is not obligated to take a sample to prove a violation of section 75.400. Therefore, Pyro's objection to the sample as not having been a band sample is rejected as being an irrelevant consideration in the proving of a violation of section 75.400.

The final objection made in Pyro's brief (p. 5) to the inspector's having cited it for a violation of section 75.400 is that the laboratory report showing the results of analysis of the dust samples indicates that the inspector obtained the samples in the No. 4 Unit in the Main West area of the mine, whereas the No. 4 Unit is located in "Second Main North" (Tr. 66; Exh. F). Pyro states that the inspector claims that Pyro's safety manager told him that the No. 4 Unit was located in Main West and that the safety manager denies that allegation (Dep. 20). On cross-examination, however, the safety manager testified that he took the inspector to the No. 4 Unit and that the inspector found the conditions described in his citations at the place where the safety manager took him (Dep. 34).

The operator of the loading machine testified that he works in the No. 4 Unit where the accumulations were found and that the No. 4 Unit is 2 miles from the bottom so that it takes 45 minutes for him to go to the No. 4 Unit and 45 minutes for him to get back from the No. 4 Unit (Tr. 155-156). I conclude that the No. 4 Unit was located in Second Main North, but it is immaterial, in proving that a violation of section 75.400 occurred, whether the No. 4 Unit is in Main West or Second Main North because the accumulations existed in a place where Pyro was producing coal and at a place which was 2 miles from the bottom where the miners entered the mine to go to work. An explosion or fire occurring in a place that far underground would present problems in containment and rescue and make it especially important that the inspector take prompt action in preventing accumulation of combustible materials.

For the above reasons, I find no merit to Pyro's objections to the violation of section 75.400 on the ground that the No. 4 Unit was in Second Main North instead of Main West as indicated by the inspector when he submitted his dust samples for analysis.

Assessment of Penalties

Payment of Penalties Will Not Cause Pyro To Discontinue in Business

Pyro stipulated in its answer to the prehearing orders issued in this proceeding that it is subject to the Act. It also dealt with one of the assessment criteria by stipulating that the payment of civil penalties will not cause it to discontinue in business.

The Size of Pyro's Business

The proposed assessment sheets in the official files in Docket Nos. KENT 84-184 and KENT 84-196 show that Pyro produces over 1,655,000 tons of coal at its No. 9 Slope William Station and over 3,000,000 tons of coal on a company-wide basis. Those production figures support a finding that Pyro is a large operator so that penalties in an upper range of magnitude are warranted under the criterion of the size of the operator's business.

Good-Faith Effort To Achieve Rapid Compliance

The inspector testified that Pyro assigned all of its miners to abating the various violations he had cited so that Pyro corrected all of the hazardous conditions, including cleaning up all the loose coal, within a very short time so that he was able to terminate the citations and order of withdrawal in about 2 hours after they were written (Tr. 45; Exhs. 4 and 5). It is my practice to increase a civil penalty otherwise assessable under the other criteria if I find that an operator has failed to make a good-faith effort to achieve rapid compliance and to decrease the penalty otherwise assignable under the other criteria only if the operator shows an unusual effort to achieve rapid compliance. In view of the extensive amount of loose coal which had to be cleaned up, along with correcting the permissibility violations on the loading machine and other hazards which are not a part of the contested aspects of this case, I find that Pyro made a greater than normal effort to achieve rapid compliance in this instance and that the civil penalties assessed for the violations which occurred on March 23, 1984, should be reduced by 20 percent.

History of Previous Violations

Exhibit 1 is a computer printout listing the violations of the mandatory health and safety standards for which Pyro has been cited between the dates of December 1, 1982, and March 22, 1984. Exhibit 1 shows that Pyro has been cited for 38 previous violations of section 75.400 from February 8, 1983, to and including February 22, 1984. All of the violations were cited under section 104(a) of the Act and the inspectors did not consider 22 of them to be significant and substantial.(FOOTNOTE.5) Five of the previous violations occurred in February, which was the month preceding the violation here involved, and all five of those violations were considered to be significant and substantial. S.REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comment about using the criterion of history of previous violations in assessing penalties:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation.(FOOTNOTE.6)

Exhibit 1 further shows that Pyro paid penalties for nine previous violations of section 75.400 in January and February of 1984 which were the 2 months preceding the month in which the violation of section 75.400 alleged in Citation No. 2338840 occurred. Consequently, Pyro's history of previous violations of section 75.400 is worse than the seven or eight referred to in the legislative history. Exhibit 1 indicates that MSHA proposed penalties ranging from $20 to $178 for the nine previous violations. Of course, the penalties proposed by MSHA are total penalties based on an evaluation of all of the six criteria. I believe that Congress

intended for the criterion of history of previous violations to result in a penalty "several times greater" than the amount assessed under that criterion for the first violation. MSHA's proposed penalties for violations cited under section 104(a) are generally proposed under the penalty formula described in 30 C.F.R. 100.3 and that rarely results in assessment of more than $50 under the criterion of history of previous violations. When one considers that Pyro was assessed penalties for 38 violations of section 75.400 at just one mine over a period of 16 months and that nine of those violations occurred just 2 months before the violation of section 75.400 here involved, I believe that a substantial penalty should be assessed under the criterion of history of previous violations.

Pyro's brief (p. 8) tries to minimize its excessive violations of section 75.400 by arguing that the penalties were cited during 500 inspection days so that the "violation density for this mine during this period was well below the National average". MSHA's penalty formula for history of previous violations in section 100.3(c) relies upon a ratio of total violations to the number of inspection days, but the Commission has ruled in many decisions that when cases are heard on a record before one of the judges, that the judge should assess penalties by application of the six criteria to the evidence before him, irrespective of the amount of the penalties proposed by the Secretary. Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir.1984), and U.S. Steel Mining Co., 6 FMSHRC 1148 (1984). I believe that MSHA's formula for proposing a penalty under the criterion of history of previous violations fails to take into consideration an operator's repeated violations of the same safety standard, especially if that standard, by its very nature, exposes the miners to possible fires and explosions, as is the case when an operator violates section 75.400. Civil penalties were placed in the Act as a means to deter operators from departing from safe practices. The criterion of history of previous violations is a criterion which especially takes into consideration the question of an operator's efforts to avoid repeated violations of the same standard. In view of Pyro's very unfavorable history of previous violations, I find that a penalty of $200 should be assessed under the criterion of history of previous violations for the violation of section 75.400.

Exhibit 1 shows occurrence of 12 previous violations of section 75.503 from August 9, 1983, to and including March 22, 1984. Four of the 12 violations occurred during the months of January, February, and March 1984. Consequently, Pyro's history of previous violations of section 75.503 is considerably more favorable than its history of

previous violations of section 75.400. There is, however, still an excessive number of previous violations of section 75.503 and I find that that history warrants assessment of a penalty of $75 under the criterion of history of previous violations for the violation of section 75.503 alleged in Citation No. 2338839.

Gravity

As I noted at the commencement of my discussion of the violations involved in Docket No. KENT 84-184, both violations were issued by the inspector as part of imminent-danger Order No. 2338837 which was primarily based on the fact that the inspector had detected 2.3 percent of methane near the working face in the No. 2 entry where the loading machine had just finished loading a shuttle car with coal before the inspector made his methane reading (Finding Nos. 1 and 4 above). The primary reason for the inspector's issuance of the imminent-danger order was that the inspector feared that an explosion could have occurred at any time if the methane concentration should continue to increase. The inspector testified that he considered the violation of section 75.503 to be very hazardous because the lack of a cable on the loading machine left an opening "right straight into the compartment, plus the openings in the panels, this forward/reverse compartment is just always arcing and sparking, and it was--you know, it wasn't in permissible condition" (Tr. 47).

Pyro's brief (p. 2) seeks to minimize the hazardous nature of the violation of section 75.503 by including as a part of its brief some Bureau of Mine statistics for the years 1971 through 1976. From those statistics, Pyro points out that only 17 out of 298 methane ignitions, or 5.7 percent, were caused by electrical arcs of all kinds, including trolley wires, trolley feeder wires, trailing cables, etc. Pyro also claims that the specific gravity of methane emanating from the coal seam in its mine has a specific gravity which would cause the methane to be 30 inches above the loading machine so long as it was found in a concentration of 3 percent or less. Moreover, the writer of Pyro's brief states on page 2 that he has never known a loading machine to cause a methane ignition.(FOOTNOTE.7)

Even if Pyro is correct in alleging that only 17 out of 298 methane ignitions between 1971 and 1976 were caused by electrical arcs, Pyro's statistics show that those 17 ignitions caused five injuries and 22 deaths. Moreover, even if no loading machine has ever caused a methane ignition up to the present time, that is no reason to assume that the ignition hazards observed by the inspector on the loading machine involved in this case could not have become the first ignition caused by a loading machine if the inspector had not ordered all power to be cut off and had not required action to be taken to reduce the methane concentration to a legal and safe amount.

As for Pyro's claim that the methane here involved would have remained above the location of the ignition hazards observed by the inspector on the loading machine, the loading machine's operator testified that he thought the methane concentration was caused by "these digging arms on the loader" stirring the coal around and they "pushed gas out of the coal" (Tr. 137). If, as the loading-machine operator speculated, the methane came out of the coal on the mine floor which the machine was loading, the methane, being lighter than air, would necessarily have had to come in close proximity to the ignition hazards cited by the inspector on its way to the roof of the mine where Pyro claims it would harmlessly have remained.

The above discussion shows that the violation of section 75.503 was extremely serious because it constituted a potential ignition hazard which could, as the inspector testified (Tr. 47), have caused a mine explosion or fire. Therefore, I find that a penalty of $2,000 should be assessed under the criterion of gravity.

The gravity of the violation of section 75.400 was also considered to be very serious by the inspector. While it is true, as Pyro argues in its brief (p. 5), that the coal accumulations were 300 feet from the loading machine where the methane and ignition source were observed, the inspector stated that the loose coal and coal dust accumulations contributed to the seriousness of having an excessive quantity of methane in the mine. The inspector testified that there was coal dust with the loose coal and that if there is an ignition which picks up the coal dust and places it in suspension, there is a likelihood of a propagation which "can just rip the mine open" (Tr. 48-49). Also the loose coal in the room neck in the No. 1 entry was much closer to the source of the ignition hazard in the No. 2 entry than the loose coal accumulations cited in the Nos. 5, 6, and 7 entries (Exh. 6).

The preponderance of the evidence supports a finding that the loose coal accumulations constituted a serious hazard in the circumstances described by the inspector. The danger associated with the loose coal, however, was not as great as the ignition hazard caused by the violation of section 75.503 discussed above. Therefore, I find that a penalty of $750 should be assessed under the criterion of gravity for the violation of section 75.400 alleged in Citation No. 2338839.

Negligence

The final assessment criterion to be considered is negligence. The operator of the loading machine testified that he knew the light on the loading machine was not working before the inspector found that the cable which supplies power to the light had been cut off (Tr. 126). While it is true, as noted in Pyro's brief (p. 6), that the Commission held in Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), that negligence of a rank and file miner should not be imputed to the operator, the failure of a light on a loading machine to work is a malfunction which is clearly visible to the section foreman who is supposed to make frequent checks of the face area. Since the loading machine had already been used to load coal out of one face area before proceeding to the No. 2 entry where it was cited by the inspector for the violation of section 75.503 here involved, the section foreman had plenty of time within which to have observed the lack of a light on the loading machine. Therefore, the section foreman was negligent in this instance and his negligence may be imputed to the operator.

In such circumstances, I find that the violation of section 75.503 was associated with a high degree of negligence because the failure of a light to work on a loading

machine being used at the face is a deficiency which is easily visible to a section foreman and he should have discovered the permissibility violation and should have had it corrected before allowing the loading machine to continue working in the face area where methane is most likely to be released in explosive quantities. Therefore, a penalty of $1,000 will be assessed under the criterion of negligence.

Pyro introduced Exhibits D and E at the hearing for the purpose of supporting its argument that it had MSHA's permission to store coal and rock along the ribs and room necks (Tr. 81-84). Exhibit D is a copy of Pyro's cleanup plan submitted to MSHA. Exhibit E is a copy of MSHA's response to the filing of the plan. MSHA's response states that the plan has been received, but that MSHA does not approve cleanup plans. The first paragraph of the cleanup plan provides as follows (Exh. D):

> At the close of each production shift, coal and rock along each rib will be loaded by a scoop, deposited against a concrete stopping in a well rock-dusted location. It will be wet down. At the close of the last production shift in each 24 hour period, the coal and rock shall be loaded on the belt and removed from the mine.

Even if one assumes for the sake of argument that Pyro was entitled by its cleanup plan to store coal and rock along the ribs and in room necks during two consecutive production shifts and then clean it up and remove it on the third shift, the facts in this case show that the coal had not been removed in accordance with Pyro's cleanup plan because the inspector wrote his citation at 9:45 a.m. and the loose coal had not been removed during the last shift in the 24-hour period as required by Pyro's cleanup plan. The inspector did not agree at the hearing that Pyro has permission to store the coal and rock just because it has filed a cleanup plan containing the language quoted above, but he said that his response to Pyro's claim that it had permission to store the coal he had cited as combustible accumulations was why had they not removed the coal and rock during the third shift in accordance with their cleanup plan (Tr. 90).

Pyro's safety manager did not claim to have the right to allow the coal to accumulate in the quantity and at the time it was found by the inspector. In fact, he conceded on cross-examination that the "right side of the run did need cleaning" (Dep. 30). When he was asked why the coal had been allowed to accumulate, he stated (Dep. 30):

> Well, it's any number of things. We could've had scoop problems, mechanical problems with our scoop, or our machine that cleans this coal up, poor management, just any number of things.

Pyro's safety manager was also asked on cross-examination whether Pyro has taken the position that it could accumulate coal over two shifts and not be in violation of section 75.400. He replied (Dep. 31):

> I don't know they actually made a stand on that, but we did get into this kind of problem with this practice, yes. We were in a situation where we could be cited, I suppose, depending on the Inspector's outlook.

The safety manager stated that Pyro does not now have a raw-coal contract which allegedly requires it to use the practice of accumulating coal for two shifts followed by a cleanup on the third shift. When the safety manager was asked if he would oppose use of that procedure if another raw-coal contract were to be obtained, he said that he was not in a position to make that decision. He said (Dep. 32):

> Oh, I would have my problems with it and talk to management about it, but I don't have in my power to stop management from doing it.

The Secretary's brief (p. 10) in this case shows that Pyro has, indeed, taken the stand that it has the right to accumulate coal for two shifts and then remove it on the third shift. The Secretary cites Judge Koutras' decision in Pyro Mining Co., 7 FMSHRC 13 (1985). In that case, Judge Koutras rejected Pyro's defense claiming that it had a cleanup plan which allowed it to accumulate coal up to the end of the 24-hour production shift for removal during the last part of the 24-hour period. In Judge Koutras' case, Pyro had a slightly better defense than it does in this case, because there was apparently no testimony in Judge Koutras' case showing that Pyro had failed to remove the accumulations during the third shift, as there is in this proceeding. While Judge Koutras was critical of MSHA's regulations which require an operator to submit a cleanup plan but provide for no MSHA oversight or review or approval of the plan, he stated that he was "constrained to follow the regulations [75.400-2] as promulgated". 7 FMSHRC at 38. Since the accumulations had been allowed to exist during two mining cuts for a period of 4 or 5 hours, Judge Koutras found that a violation of section 75.400 had occurred. 7 FMSHRC at 38.

The citation involved in Judge Koutras' Pyro decision was dated March 6, 1984, and the one here involved is dated March 23, 1984. It is obvious that Pyro's management not only ignored the fact that an MSHA inspector had already cited it for violating section 75.400 under its plan of deliberately accumulating coal during two shifts for removal on the third shift, but that management had allowed the condition to become increasingly serious by failing to remove the accumulations on the third shift in accordance with its cleanup plan which had been filed with MSHA for the purpose of supporting its contention that it had permission to accumulate coal for two shifts and clean the coal up on the third shift. Judge Koutras found it to be a violation for Pyro to accumulate coal for 4 or 5 hours during a single shift. In this case, Pyro had deliberately accumulated coal for more than 24 hours before it was cited by the inspector as part of an imminent-danger order.

In such circumstances, I find that the violation of section 75.400 was associated with a very high degree of negligence and that a penalty of $2,000 is warranted under the criterion of negligence.

Conclusions

I have found above that Pyro is a large operator and that payment of penalties will not cause it to discontinue in business. As to the violation of section 75.503, I have assessed $75 under history of previous violations, $2,000 under gravity, and $1,000 under negligence, for a total amount of $3,075 which should be reduced by 20 percent to $2,460 under the criterion of Pyro's having shown more than an average effort to achieve rapid compliance. As to the violation of section 75.400, I have assessed $200 under history of previous violations, $750 under gravity, and $2,000 under negligence, for a total amount of $2,950 which should be reduced by 20 percent to $2,360 under the criterion of Pyro's having shown more than an average effort to achieve rapid compliance.

DOCKET NO. KENT 84-196

The proposal for assessment of civil penalty filed in Docket No. KENT 84-196 seeks assessment of penalties for

an alleged violation of section 75.308 (FOOTNOTE.8) and for another violation of section 75.400. The inspector issued Citation No. 2338838 in conjunction with imminent-danger Order No. 2338837 which has been discussed above in Docket No. KENT 84-184. MSHA, however, included Citation No. 2338838 among the violations alleged in Docket No. KENT 84-196. Therefore, the violation of section 75.308 alleged in Citation No. 2338838 is being considered in Docket No. KENT 84-196 despite its total interrelationship with the facts heretofore discussed in Docket No. KENT 84-184.

Additional Findings of Fact

5. The inspector testified that he found it necessary to cite a violation of section 75.308 after he had entered the No. 2 entry where the loading machine was sitting. The operator of the loader was standing near the controls on the right side of the machine which had been loading coal near the face of the No. 2 entry. The inspector walked to the left side of the machine and made a test for methane at a point about 2 feet from the roof and 4 feet from the rib. The reading indicated the presence of 1.3 percent methane (Tr. 32).(FOOTNOTE.9) The inspector had just had his methane detector

tested and charged before he left his office to make the inspection of Pyro's mine and was confident that his reading was correct (Tr. 29-31). The inspector then moved backward from the front of the loading machine and took another reading with his methane detector at a point 10 feet from the rib, 16 inches from the roof, and about 6 feet from the loader. The second reading indicated the presence of 2.3 percent methane (Tr. 33). The inspector made a drawing of the loading machine at its location in the No. 2 entry and entered the figures "1" and "2" on that drawing to show where he obtained the methane readings (Exh. 7).

6. Because of the loose coal accumulations and permissibility violations described above, the inspector considered the presence of 2.3 percent methane to be a very dangerous condition and advised Hughes, Pyro's safety manager, that he was issuing an imminent-danger order (Tr. 33). Hughes stated that the methane readings were caused by exploding ammonia nitrate to produce the coal which the loading machine had been loading just before the inspector entered the No. 2 entry (Tr. 34). The inspector doubted that his reading was for any gas other than methane, but took a bottle sample for laboratory analysis and used a red pencil to make an "S" on the card accompanying the sample. The red letter "S" was a signal for the laboratory to take into consideration that the sample required special attention because the inspector requested that the laboratory provide a complete analysis of the sample which would show the presence of anything unusual in the sample (Tr. 41; 43). Exhibit 3 shows the results of the laboratory analysis of the inspector's bottle sample and indicates that the mine atmosphere contained .23 percent carbon dioxide, 20.48 percent oxygen, 1.5 percent methane, .058 percent ethane, and 77.939 percent nitrogen (Tr. 44).

7. Although the loading machine was not being operated, power was flowing to the machine through its trailing cable and turning off the power at the point where the cable entered the machine could create an arc and cause an explosion if the methane content in the air continued to rise (Tr. 59). The inspector asked Hughes to have the power turned off at the power center outby the face, but Hughes took a methane reading himself and obtained a reading a few tenths less than the inspector's reading of 2.3 percent, but Hughes does not recall for certain the exact percentage registered on his methane detector (Dep. 17). Hughes then discussed his theory about the presence of ammonia nitrate during a period lasting about 5 minutes. It was necessary for the inspector to ask a second time for the power to be turned off at its source before Hughes directed that the power be disconnected (Tr. 36; 58). The operator of the loading machine then left the face area and had the power disconnected by a mechanic (Tr. 145).

8. The violation of section 75.400 involved in Docket No. KENT 84-196 was alleged in Citation No. 2505051 as a part of imminent-danger Order No. 2505050 which was issued on April 18, 1984, nearly 1 month after issuance of the imminent-danger order discussed above (Exh. 12). The imminent-danger order in this instance was issued because the inspector encountered coal dust and float coal dust extending for a distance of 2,100 feet along the 2 west conveyor belt. Nine bottom rollers were turning in coal dust and float coal dust and the dust had to be 8 inches deep on the mine floor in order to come in contact with the rollers (Tr. 168; 172; Exh. 13). The accumulations were associated with an unusual occurrence in that the conveyor belt had been rockdusted where it passed through the crosscuts, but the conveyor belt had not been rockdusted along the intervals of about 50 feet between crosscuts, so that when the inspector examined the entry in which the conveyor belt was situated, he saw a checkerboard effect of alternating black and white areas extending down the length of the belt as far as he could see (Tr. 166). The inspector considered the accumulations to be very dangerous because the rollers turning in coal dust might become hot enough from friction to cause a mine fire or an explosion (Tr. 172; 177).

Citation No. 2338838 3/23/84 75.308 (Exhibit 10)

The violation alleged in Citation No. 2338838 is based upon the inspector's having obtained a methane reading of 1.3 percent on the left side of the loading machine at a point about 2 feet from the mine's roof and 4 feet from the rib. The inspector moved backward from the front of the loading machine and obtained a second methane reading of 2.3 percent at a point 10 feet from the rib, 16 inches from the roof, and about 6 feet from the loading machine. The inspector's methane detector had just been checked for accuracy before he left his office and he was confident that his readings were correct (Finding No. 5 above). Because of the loose coal accumulations and permissibility violations discussed at great length above, the inspector considered a methane concentration of 2.3 percent to constitute an imminent danger and he issued the citation of section 75.308 as part of imminent-danger Order No. 2338837 also previously discussed under Docket No. KENT 84-184 above.

Pyro's brief (pp. 5-7) raises quite a few arguments in support of its contention that a violation of section 75.308 was not proven. Pyro's brief (p. 5) first notes that the citation refers to the taking of a bottle sample of air and contends that the analysis of that air sample revealed only 1.5 percent methane, instead of the volume of

2.3 percent methane mentioned in the citation. The inspector's testimony shows quite clearly that his reading of 2.3 percent methane was revealed by his methane detector. His citation was written just a short time after he obtained the reading of 2.3 percent methane, whereas the results of the analysis of the bottle sample were not known until after the bottle sample had been analyzed by MSHA's laboratory located in Mount Hope, West Virginia (Tr. 43-44; Exh. 3).

Section 75.308 is quoted in full in footnote 8 on page 20 above. That section refers to testing for methane and section 75.308-2 provides for such tests to be made with a methane detector. There is no requirement in the Regulations that a violation of section 75.308 be proven only by an inspector's obtaining a bottle sample of the mine atmosphere and waiting until a laboratory has analyzed the methane content in that air sample before determining whether or not there has been a violation of section 75.308. The inspector explained in great detail all of the procedures which had been utilized to establish the accuracy of his methane detector before he left the MSHA office on March 23, 1984, the day he wrote the citation for the violation of section 75.308 here involved (Tr. 29-30). Consequently, there is no merit to Pyro's contention that the reading of 2.3 percent methane obtained by the inspector with his methane detector was incorrect just because a laboratory analysis of a bottle sample of air indicated a methane content of only 1.5 percent. Moreover, a violation of section 75.308 may be found to have occurred if there is a concentration of only 1.5 percent methane. Therefore, even if one assumes that the inspector's methane reading of 2.3 percent was in error, the violation would still exist if Pyro failed to take immediately the steps required by section 75.308 to reduce the methane concentration to less than 1 percent.

Pyro's brief (p. 5) relies on several decisions, such as a Commission judge's decision in CF & I Steel Corp., 3 FMSHRC 2819 (1981), in which the judge held that no violation of section 75.308 was proven because the operator immediately took the steps required by section 75.308 to reduce the methane concentration as soon as the high concentration was found to exist. Pyro argues that its safety manager in this case took immediate steps of having the power turned off on all face equipment as soon as it was determined that a dangerous quantity of methane was found by the inspector. Consequently, Pyro argues that the inspector improperly issued Citation No. 2338838 alleging that Pyro had violated section 75.308.

The inspector testified with respect to his citing Pyro for a violation of section 75.308, that after he obtained a reading of 2.3 percent methane, he requested the safety manager to have the power to the loading machine cut off immediately, but that the safety manager claimed that the inspector's reading of what appeared to be methane was caused by the ammonia nitrate used by Pyro to blast coal from the face. The inspector replied that it was peculiar that Pyro's mine would produce an erroneous methane reading because that had not occurred at other mines. The inspector said that he then took a bottle sample of the mine atmosphere and that he marked a red letter "S" on the card accompanying the sample to alert the laboratory personnel that the sample was one which required special attention. The inspector requested the laboratory to make an analysis of every element in the bottle, while giving particular attention to detecting the presence of any gas associated with use of ammonia nitrate as an explosive. The inspector said that the discussion with the safety manager took about 5 minutes and that it was then necessary for him to ask the safety manager a second time to have all power turned off so that there would not continue to be a danger of an explosion from the lack of permissibility of the loading machine which was situated only 6 feet from the place where the inspector obtained a methane reading of 2.3 percent (Finding No. 5 above).

The inspector's testimony supports a finding of a violation of section 75.308 because Pyro's safety manager did not immediately have the power to the loading machine turned off as soon as he was asked to do so by the inspector. Instead of performing the steps required by section 75.308 to turn off power and make adjustments to lower the methane concentration, the safety manager engaged in a 5-minute argument with the inspector about whether the inspector's methane detector was reading methane or some residue of ammonia nitrate.

It is true, as Pyro argues in its brief (p. 5), that the safety manager testified in his deposition that he took immediate steps to have the power turned off and that all that was necessary to reduce the methane concentration in the mine atmosphere was to have the face area in the No. 2 entry sprayed with a water hose (Dep. 16; 24). While it is true that the safety manager claims to have taken immediate steps to reduce the methane concentration, his detailed testimony pertaining to the events described by the inspector do not support his claims.

In the first place, the safety manager, during his direct examination, voluntarily made the very damaging admission that after he was advised by the inspector that a dangerous quantity of methane had been detected, the safety manager asked where the inspector had obtained the high reading, and proceeded to take some methane readings himself and he said that he found some readings which were a few tenths less than the reading obtained by the inspector, but that he could not recall the exact reading (Dep. 17). The safety manager's action of taking additional readings after he had been advised of the high readings by the inspector was a violation of section 75.308 under the Commission's decision in Mid-Continent Coal and Coke Co., 3 FMSHRC 2502 (1981). In that case, the Commission affirmed a judge's finding of a violation of section 75.308 in the following discussion:

> The facts are undisputed. Approaching the face of a crosscut, both the inspector and respondent's superintendent observed a continuous miner backing away from the face with the amber light on its methane monitor glowing. The glowing light indicated the presence of over 1 percent methane. The superintendent proceeded to the face and took two methane readings before ordering the continuous miner deenergized.
>
> We interpret 30 CFR 75.308 and its statutory authority, section 303(h)(2) of the Act, to require electric face equipment in a working place be deenergized immediately when 1 percent or more of methane is detected in such working place. After such methane accumulation had been detected by the methane monitor here, to continue an ignition source while rechecking the monitor's reading was a violation of the regulation alleged. The judge is affirmed.

3 FMSHRC at 2504.

Additionally, the safety manager's denial of having debated the inspector's finding of a high concentration of methane by asserting a claim that the inspector's methane detector had been rendered erroneous by Pyro's use of ammonia nitrate as an explosive is not convincing as his answer to that question shows:

> A. You know, I really, I don't remember. I remember. I remember on a[n] occasion, I don't know if it was on this section, I do remember talking to him about ammonium nitrate. We were

> using this Topex Water Gel, and these spotters had been acting up quite a bit, after, you know, go to a place right after it shot. And they had been going crazy, acting up, and I was trying to find out what this was, what was causing this. I remember talking to Tom [the inspector] on occasion about the ammonium nitrate. I don't remember, I don't think it was right here. I wasn't stalling for time as far as shutting the equipment down. I didn't carry on any long conversation with him about anything. I don't remember the ammonium nitrate conversation at this point on this section.

Deposition, p. 19. The safety manager also agreed on cross-examination that he took no notes pertaining to the location of equipment or incomplete mining of crosscuts on the day the citation was issued and took no notes concerning his conversation with the inspector (Dep. 26; 34). The inspector would have had no reason to take a bottle sample on March 23, 1984, mark the sample with a special red letter "S", and request the laboratory personnel to give special attention to detecting the presence of ammonia nitrate if the safety manager had not brought up the subject of ammonia nitrate at the time the inspector asked the safety manager to turn off the power and make the required adjustments to reduce the concentration of methane (Tr. 41-44). In such circumstances, I find that the inspector's testimony is more credible than that of the safety manager and I find that a violation of section 75.308 occurred because of the safety manager's having engaged in a 5-minute debate with the inspector about the accuracy of the methane reading despite the fact that his own methane detector had shown at least 1.5 percent methane (Tr. 58; Dep. 17).

Pyro's brief (p. 6) also claims that the inspector improperly cited a violation of section 75.308 because that section refers to "the air at any working place" and that section 75.2(e)(2) defines "working place" as "the area of a coal mine inby the last open crosscut." I have already shown that a violation of section 75.503 is not defeated by an argument that the loading machine was not inby the last open crosscut at the time it is cited for a violation of section 75.503. It is somewhat difficult to determine whether Pyro is claiming that the loading machine was not inby the last open crosscut because it was sitting in the crosscut, or whether Pyro is arguing that no violation of section 75.308 was proven because the inspector did not personally see the loading machine being used inby the last open crosscut. Regardless of which argument Pyro is making, it is not a valid argument because no witness denied that

the loading machine had just loaded at least one shuttle car with coal before it was cited for the permissibility violation. The loading machine had just backed up in preparation for loading another shuttle car with coal when the inspector made his methane readings. A loading machine cannot load coal blasted from the working face without being in a working place. If that working place is in the crosscut itself, then the last open crosscut is either the crosscut in which the loading machine is sitting or it is the next crosscut outby the place where the loading machine is sitting (Exhs. 6 and 7).

In this instance, Pyro is confusing the last open crosscut with the crosscut in which the loading machine was sitting. Pyro's safety manager testified that the inspector had correctly depicted on Exh. 6 the state of completion of the working section on March 23, 1984 (Dep. 22). Exhibit 6 clearly shows by use of the letter "L" that the loading machine was sitting in a crosscut which had not been completed because there was an incomplete (unblasted) cut of coal remaining in the crosscut between the Nos. 1 and 2 entries, between the Nos. 3 and 4 entries, between the Nos. 5 and 6 entries, and between the Nos. 6 and 7 entries. A crosscut which still has that much virgin coal in it cannot possibly be designated as the "last open crosscut". Therefore, the last open crosscut on March 23, 1984, was the one outby the place where the loading machine was sitting when the inspector cited it for a violation of section 75.308.

Since the Commission has already held in Solar Fuel Co., 3 FMSHRC 1384 (1981), that a piece of equipment may be cited for a violation of section 75.503 so long as it is intended to be used inby the last open crosscut, and inasmuch as a violation of section 75.308 does not depend upon the location of equipment so long as the methane is detected in a working place, I find that the evidence clearly shows that the necessary prerequisites for citing violations of both sections 75.503 and 75.308 existed on March 23, 1984, because a reading of 2.3 percent methane was obtained by the inspector within 6 feet of the loading machine which was situated within 15 feet of the face of the No. 2 entry for the purpose of continuing the loading of a pile of coal which had recently been blasted from the face of the No. 2 entry (Tr. 33; 129).

Pyro's brief (p. 7) makes two additional arguments in trying to show that no violation of section 75.308 was proven. Both arguments are related to Pyro's contention that it was providing adequate ventilation to the working place where the violation of section 75.308 was cited.

Pyro first claims that it had to do nothing to reduce the methane concentration below 1 percent other than spray water in the area in which the high reading had been obtained. The inspector, on the other hand, claims that it was necessary to erect a curtain between the Nos. 2 and 3 entries in the crosscut outby the loading machine in order to direct enough air to the working face of the No. 2 entry to drive the excess methane from the left side of the loading machine. The inspector testified that Pyro's failure to erect a curtain at that point caused most of the air to pass from the No. 4 entry directly to the No. 1 entry which is a return entry (Tr. 46).

Pyro's brief (p. 7) also contends that the Secretary's counsel incorrectly argues that the testimony of the operator of the loading machine shows that no curtain had been erected between the Nos. 2 and 3 entries. Pyro claims, on the contrary, that the operator of the loading machine testified that the line curtain was already up and that all he had to do to dilute the methane concentration was to spray water in the vicinity of the left side of the loading machine. If Pyro's representative will read the loader operator's testimony again at pages 156 and 157 of the transcript, he will find that the loader operator's statement to the effect that the curtain was already up refers to the line brattice which is required by section 75.302-1 to be within 10 feet of the working face when the loading machine is loading coal. The loader operator clearly states on page 157 that he was referring to the face curtain as being up, whereas the inspector was "talking about a curtain back" and the loader operator did not know whether that curtain was up or not before the inspector found the high methane reading.

Pyro's entire argument about the fact that it had already erected a curtain between the Nos. 2 and 3 entries is based on either a deliberate obfuscation of the facts or upon an inadvertent misunderstanding of the facts. Even the safety manager's Exhibit C, which he drew to support his claim that there was a curtain directing air to the face of the No. 2 entry, is based on a showing that there was a face curtain beside the loading machine as required by section 75.302-1. The inspector's Exhibits 6 and 7, on the other hand, show that a curtain was needed in the crosscut outby the face curtain to direct air to the face of the No. 2 entry. The inspector's exhibits and testimony explain that having a curtain beside the loading machine did not succeed in keeping the methane concentration below 1 percent because there was not enough air being directed into the No. 2 entry at the outby crosscut in order for the line curtain beside the loading machine to have the desired effect of

directing a proper amount of air to the working face so as to sweep the methane out of the face area.

Pyro's safety manager conceded on cross-examination that the inspector had correctly shown on Exhibit 6 the existence of cuts of coal still standing in the crosscut which the safety manager's Exhibit C shows to be a completely open crosscut (Dep. 27). The safety manager drew a diagram of the working section which was in error because of his failure to take notes as the inspector had done. Therefore, Pyro is simply arguing unproven facts in claiming that it had already erected a curtain between the Nos. 2 and 3 entries before the inspector found the reading of 2.3 percent methane. Therefore, I reject all of Pyro's arguments to the effect that it was fully ventilating the face of the No. 2 entry where the reading of 2.3 percent methane was found by the inspector.

Assuming, arguendo, that all Pyro had to do to reduce the methane concentration to less than 1 percent was to spray water near the face of the No. 2 entry, the Commission held in Mid-Continent Coal and Coke Co., 3 FMSHRC 2502, 2503 (1981), that a ventilation procedure which has to be performed repeatedly to keep the methane content below 1 percent is not effective and that it constitutes a violation of section 75.308 to allow methane repeatedly to exceed 1 percent throughout the working shift because the intent of section 75.308 is that the operator will provide enough ventilation to keep the methane level continuously below 1 percent.

I have already shown in the discussion above that the safety manager's testimony does not support Pyro's claim that it immediately took action to reduce the methane concentration as soon as it was brought to the safety manager's attention by the inspector. Pyro also relies upon the testimony of the loading-machine operator in support of its claim that it immediately reduced the methane concentration when it was made aware of it by the inspector. Pyro relies upon a single statement by the loading-machine operator at transcript page 120. All the loading-machine operator said there was that when Pyro's safety manager told him to "knock the power on the machine", he "went and found a mechanic and told him" that the safety manager wanted the power knocked. The loading-machine operator's testimony in no way disputes the inspector's testimony to the effect that a 5-minute debate with the safety manager occurred before the safety manager finally asked the loading-machine operator to have the power turned off.

The lengthy discussion above shows that all of Pyro's arguments claiming that no violation of section 75.308 occurred must be rejected as not being supported by the

preponderance of the evidence. I find that the Secretary proved that a violation of section 75.308 occurred as alleged by the inspector in Citation No. 2338838.

Assessment of Penalty

Size and Ability to Pay Penalties

The findings heretofore made with respect to the size of Pyro's business and Pyro's ability to pay penalties are equally applicable for assessment of all penalties and need not be repeated here.

Good-Faith Effort To Achieve Rapid Compliance

The Secretary's brief (p. 14) asserts that Pyro failed to make a good-faith effort to achieve rapid compliance with respect to the violation of section 75.308, but the Secretary does not state how Pyro failed to do so. It is possible that the Secretary's counsel is mixing Pyro's failure to begin reducing the methane concentration immediately with the question of whether Pyro made a good-faith effort to achieve rapid compliance after the violation was cited. If Pyro, immediately upon being advised of the high methane reading, had taken the steps of cutting off the power and working on ventilation, there would not have been a violation of section 75.308 and therefore nothing to abate. After Pyro's safety manager discontinued his debate with the inspector as to whether a high concentration of methane had been detected, Pyro did begin with commendable speed to abate all of the violations cited by the inspector, including erecting the curtain between the Nos. 2 and 3 entries so as to sweep out the methane concentration. Therefore, I believe that Pyro's unusually rapid effort to reduce the methane concentration applies as to the violation of section 75.308, just as it did with the previous violations discussed above, and that any penalty assessed under the other criteria should be reduced by 20 percent under the criterion of Pyro's good-faith effort to achieve rapid compliance.

History of Previous Violations

Exhibit 1 shows that Pyro has not previously been cited for a violation of section 75.308. Therefore, no part of the penalty to be assessed for the violation of section 75.308 should be assigned under the criterion of history of previous violations.

Negligence

A violation of section 75.308 can hardly occur without a finding that an operator is negligent. It was very negligent for Pyro's safety manager to enter into a debate with the inspector when the inspector advised him that he was issuing an imminent-danger order because he had just found a high reading of methane, along with hazardous permissibility violations on the loading machine which was situated within 6 feet of the place where 2.3 percent methane had been detected. The loading-machine operator was waiting for another shuttle car to appear before continuing to load coal. Therefore, no great loss of coal production would have occurred if the safety manager had immediately directed the power to be turned off to all face equipment so that efforts could be made to reduce the high reading found by the inspector (Finding No. 7 above).

Additionally, the preponderance of the evidence shows that Pyro had failed to erect a curtain between the Nos. 2 and 3 entries so that an adequate amount of air could be directed to the face of the No. 2 entry to sweep out the high concentration of methane found by the inspector on the left side of the loading machine (Tr. 45-46).

There are some facts to be considered in Pyro's favor. The loading-machine operator testified that he took a reading for methane before he started loading and that he did not detect any methane (Tr. 119). He said that only 2 minutes elapsed between the time he made his check for methane and found none and the time the inspector made his reading and found a significant amount of methane (Tr. 124). The inspector agreed on cross-examination that it would have been possible for the loading-machine operator to check for methane and not find any and thereafter use the loading machine to load a shuttle car of coal and make another check for methane and find a significant amount (Tr. 61).

The loading-machine operator testified that Pyro makes a lot of time studies to determine how long it takes to load a shuttle car with coal and that it takes only 16 seconds (Tr. 126). There is, of course, a methane monitor on the loading machine which is supposed to show an amber light when the machine encounters as much as 1 percent of methane. The monitor did not show any methane in this instance. While the loading-machine operator did not push the methane monitor's check button on the loader just prior to loading coal in the No. 2 entry, he believed that the monitor was operative because it has a white light which indicates that it is receiving power. It is possible for the monitor to be energized and still fail to detect methane, but the loading-machine operator did not think it was out of operation on

March 23, 1984, when the violation was cited, because he did push the button to determine if the monitor was operating after the inspector had left and it did work, so the monitor should have detected the presence of methane before the inspector found it (Tr. 154; Dep. 20).

The above review of the pertinent evidence pertaining to Pyro's negligence with respect to the violation of section 75.308 shows that the violation was associated with a relatively low degree of negligence because Pyro's safety manager had previously become aware of some erratic readings by methane detectors when Topex Water Gel had been used as an explosive (Dep. 19). While that difficulty does not justify his reluctance to accept the inspector's statement that a 2.3 percent methane reading had been found, it does show that the safety manager had a reason for entering into a discussion with the inspector. In such circumstances, I find that a penalty of $200 should be assessed under the criterion of negligence.

Gravity

The seriousness of the violation of section 75.308 is equal to the hazards which I previously discussed in assessing a penalty for the violation of section 75.503 because it was the inspector's finding of a concentration of 2.3 percent methane within 6 feet of a loading machine having permissibility violations which caused the inspector to issue imminent-danger Order No. 2338837 which has already been discussed under the heading of Docket No. KENT 84-184. I found above that the violation of section 75.503 was extremely hazardous and assessed a penalty of $2,000 under the criterion of gravity. Since the methane concentration contributed to the hazards of an explosion or fire and since the violation of section 75.308 was issued as a part of the imminent-danger order, I believe that an identical finding of extreme danger is warranted for the violation of section 75.308 and that a penalty of $2,000 should be assessed under the criterion of gravity.

Conclusions

Taking into consideration that Pyro is a large operator with ability to pay penalties, that no amount should be assessed under Pyro's history of previous violations, that $200 should be assessed under the criterion of negligence, and that $2,000 should be assessed under the criterion of gravity, for a total penalty of $2,200, and that the penalty should be reduced by 20 percent under the criterion of Pyro's

good-faith effort to achieve rapid compliance, I find that a penalty of $1,760 should be assessed for the violation of section 75.308 alleged in Citation No. 2338838.

Citation No. 2505051 4/18/84 75.400 (Exhibit 13)

Citation No. 2505051, alleging a violation of section 75.400, was issued as a part of imminent-danger Order No. 2505050, but the factual situation was entirely unrelated to the violations heretofore discussed in this proceeding. In this instance, the hazard which caused the inspector to issue the imminent-danger order was the possibility of a fire or explosion because of the inspector's having found loose coal, coal dust, and float coal dust along the entire 2,100-foot length of a conveyor belt, except at places where the conveyor belt passed through crosscuts where the belt entry had been rockdusted. The inspector found that nine bottom belt rollers along the belt were turning in coal dust and he stated that the coal dust had to be 8 inches deep on the mine floor in order for the dust to come into contact with the rollers (Finding No. 8 above).

Pyro did not present any evidence to controvert the inspector's testimony, but in its brief (pp. 6 and 8), Pyro first alleges that the inspector testified that he could not say that the operator should have known about the condition and failed to do anything about it (Tr. 182). Then Pyro refers to the Secretary's brief (p. 9) and claims that counsel for the Secretary there stated that the inspector's testimony does not seem credible. Pyro's brief (p. 8) then states that the Secretary's counsel is apparently "doubting the credibility of his own witness".

The above allegations in Pyro's brief are based on a question asked during Pyro's cross-examination of the inspector. Before one can understand the significance of Pyro's question and the inspector's answer to the question, it is necessary to provide some explanatory information. Inspectors write citations and orders on MSHA Form 7000-3. That form has a "Section III" at the bottom and in that portion of the form, inspectors check "blocks" to indicate their evaluation of the six assessment criteria for the purpose of assisting MSHA in proposing civil penalties. The portion of the Act providing for issuance of imminent-danger orders is section 107(a) and that section also provides that an inspector may issue a citation under section 104(a) for a violation of a mandatory safety standard if he believes that a violation is associated with the imminent danger which he is describing in his order. Since the order is not, by itself, alleging a violation, the inspector is not required to fill in the blocks in Section III of a Form

7000-3 used for issuing an imminent-danger order because no civil penalty has to be proposed for the issuance of an imminent-danger order by itself, but a civil penalty does have to be proposed for any violation alleged in a citation which is issued in conjunction with the imminent-danger order.

In this instance, the inspector had started to fill in the blocks in Section III of his imminent-danger order and had checked the first item under Section III which pertains to negligence. In doing so, he checked the "D" block to indicate that he thought "high" negligence was involved, but then the inspector recalled that he did not need to fill out Section III on a Form 7000-3 which is being used to issue an imminent-danger order and the inspector did not check any more of the blocks under Section III on the imminent-danger order, but he filled out all pertinent blocks under Section III on the citation issued in conjunction with the order because he knew that a civil penalty would have to be proposed with respect to the violation of section 75.400 alleged in the citation. When the inspector filled out Section III of the citation, however, he checked the "C" block under negligence to indicate "moderate" negligence, as opposed to the "high" negligence which he had checked under Section III of the order.

When Pyro's representative asked the inspector on cross-examination why he had rated Pyro's negligence on the citation as being less than he had rated negligence on the order, the following colloquy occurred (Tr. 182):

> A Well, I've got to follow directions, or instructions, and when you mark "high", then it can't be a 104(a), it's got to be a 104(d). That means you knew, or should have known, and didn't care nothing about it.
>
> Q Well, in the coal mines--
>
> A And I couldn't say that.
>
> Q Sir?
>
> A I couldn't say that.

I believe that Pyro has misinterpreted the inspector's statement that he "couldn't say that". The inspector did not mean that the evidence would not support the findings which are required to be made before an inspector can issue an unwarrantable-failure citation under section 104(d) of the Act, but that he could not designate the violation as unwarrantable failure and still issue it in conjunction with an imminent-danger order because an inspector cannot issue an

unwarrantable-failure citation under section 104(d) of the Act unless he first finds that the violation did not cause an imminent danger. Since the inspector had already concluded that the nine bottom rollers turning in loose coal dust accumulations constituted an imminent danger, he was required to issue a citation under section 104(a) to allege a violation of section 75.400 and he had been instructed by MSHA that if he checked "high" negligence in Section III of a citation, he would be required to issue the citation under the unwarrantable-failure provisions of section 104(d), and that could not be done at the same time he was issuing an imminent-danger order.

Pyro is also misinterpreting the Secretary's brief in claiming that the brief indicates that the Secretary's counsel is "doubting the credibility of his own witness". The Secretary's brief (p. 9) referred to the answer filed by Pyro to the Secretary's proposal for assessment of civil penalty. In that answer filed in Docket No. KENT 84-196, Pyro stated that the belt examiner did not report any accumulations of loose coal and coal dust on the day the citation was issued. Therefore, when counsel for the Secretary stated in his brief (p. 9) that Pyro's answer (denying the existence of accumulations because its belt examiner did not report those accumulations) "does not seem credible", he was doubting the credibility of Pyro's belt examiner, rather than the credibility of the inspector. Pyro did not present its belt examiner as a witness in this proceeding. Consequently, I have no way to evaluate the credibility of his failure to report the accumulations cited by the inspector on April 18, 1984.

The inspector's testimony, as summarized in Finding No. 8 above, supports a finding, and I so find, that a violation of section 75.400 occurred.

Assessment of a Penalty

Good-Faith Effort To Achieve Rapid Compliance

The inspector testified that after he issued the imminent-danger order and citation for the violation of section 75.400 here involved, that the superintendent of Pyro's mine personally ordered everyone on the section to work on cleaning up the belt entry and that there was so much coal dust and loose coal along the belt that the belt had to be advanced periodically to make room on the belt for depositing the coal resulting from shoveling along the belt. The inspector had planned to leave the mine after he wrote the order and return the next day to terminate the order after the coal had been cleaned up, but the miners cleaned up the coal very rapidly and then began applying rock dust in the conveyor-belt entry

by using two rock dusters, beginning simultaneously from each end of the belt, so as to apply rock dust as fast as possible. The inspector said that they did such a good job, that he stayed at the mine so that he could terminate the order as soon as they had finished cleaning up and rockdusting (Tr. 171; 176-177).

In view of the outstanding effort made by Pyro to achieve rapid compliance, I find that a reduction of 30 percent of the penalty assessed under the other criteria should be made for the violation of section 75.400.

History of Previous Violations

Exhibit 11 shows that Pyro has a history of 40 previous violations of section 75.400 from February 8, 1983, to and including March 27, 1984. Eleven of those 40 violations occurred during the 3 months preceding the month in which the violation of section 75.400 here under consideration occurred. In view of that very adverse history of previous violations of section 75.400, I find that an amount of $400 should be assigned under the criterion of history of previous violations for the violation of section 75.400 alleged in Citation No. 2505051.

Negligence

I have already rejected the claim in Pyro's brief (p. 8) to the effect that the inspector could not say that the operator was aware of the loose coal and coal dust accumulations in the belt entry. Section 75.303 requires that belt conveyors on which coal is carried be examined after each coal-producing shift has begun. Therefore, Pyro's section foreman should have been aware of the loose coal and coal dust accumulations which extended for the entire length of the conveyor belt for a distance of 2,100 feet. The section foreman's negligence in failing to do anything about the accumulations until they were found by the inspector may be imputed to the operator. Assuming, arguendo, as Pyro alleges, that its belt examiner failed to report the existence of coal accumulations on the day Citation No. 2505051 was issued, the former Board of Mine Operations Appeals held in The Valley Camp Coal Co., 3 IBMA 463 (1974), that a coal company may not rely upon a preshift examiner's report to exculpate itself from the high degree of care imposed upon it by the Act.

The section foreman should have been able to see that the conveyor-belt entry had not been rock dusted or cleaned, except at crosscuts, just as the inspector did when he looked down the belt entry. I find that the violation of section 75.400 was associated with a high degree of negligence and that a penalty of $500 should be assessed under the criterion of negligence.

Gravity

The inspector considered the loose coal, coal dust, and float coal dust along the entire length of the belt conveyor to be hazardous enough to warrant issuance of an imminent-danger order because he believed that the friction of nine bottom rollers turning in float coal dust might cause a mine fire (Tr. 173). He said that there was "just black float dust all the way down the belt" except at the crosscuts where rock dust had been applied (Tr. 172; 177).

I assessed a penalty of $750 under the criterion of gravity for the violation of section 75.400 previously considered under Docket No. KENT 84-184 above. In that instance, most of the loose coal and coal dust accumulations were located about 300 feet from the ignition hazard. In this instance, the rollers turning in float coal dust were located at intervals along the conveyor belt and therefore constituted a more immediate threat to causing a fire than the violation previously considered. Therefore, I believe that the instant violation of section 75.400 constituted a greater hazard than the previous violation of section 75.400. Consequently, I find that a penalty of $1,500 should be assessed under the criterion of gravity.

Conclusions

In view of the fact that Pyro is a large operator with ability to pay penalties, that a penalty of $400 should be assessed under the criterion of history of previous violations, that $500 should be assessed under the criterion of negligence, that $1,500 should be assessed under the criterion of gravity, for a total penalty of $2,400, and that the penalty should be reduced by 30 percent under the criterion of Pyro's outstanding effort to achieve rapid compliance, I find that a penalty of $1,680 should be assessed for the violation of section 75.400 alleged in Citation No. 2505051.

SETTLEMENT PROPOSED IN DOCKET NO. KENT 84-238

The proposal for assessment of civil penalty in Docket No. KENT 84-238 seeks to have penalties assessed for violations of sections 75.523-1, 75.400, and 75.807. All of the citations involved were written in June 1984 under section 104(a) of the Act and do not involve hazardous circumstances such as those heretofore considered in the other two contested cases involved in this consolidated proceeding. After the parties had presented evidence with respect to the issues raised in Docket Nos. KENT 84-184 and KENT 84-196, they requested that I approve a settlement agreement under which respondent would pay reduced penalties totaling $295 instead of penalties totaling $344 proposed by MSHA.

It has been made clear in the preceding portion of this decision that civil penalties have to be assessed pursuant to the six criteria listed in section 110(i) of the Act. The parties' settlement agreement shows that they agree with MSHA's evaluation of three of the assessment criteria, namely, that payment of civil penalties will not cause Pyro to discontinue in business, that Pyro is a large operator, and that Pyro demonstrated a good-faith effort to achieve rapid compliance after the violations were cited. A brief discussion of the remaining three criteria of negligence, gravity, and history of previous violations is required in order to determine whether the parties' settlement proposal should be approved.

The aforementioned violation of section 75.523-1 was alleged in Citation No. 2505113 which states that the deenergization bar on a roof-bolting machine would not operate when tested by striking the lever. Section 75.523-1 requires that self-propelled electric face equipment be provided with a device that will quickly deenergize the tramming motor of the equipment in the event of an emergency. MSHA generally proposes civil penalties pursuant to the assessment formula described in 30 C.F.R. 100.3. The usual procedures were followed in Docket No. KENT 84-238 and all of the civil penalties proposed by MSHA were derived by utilizing the civil penalty formula described in section 100.3. An appropriate amount was allocated under the criteria of the size of Pyro's business and Pyro's having made a good-faith effort to achieve compliance after the violations were cited. There was no need to reduce the penalties under the criterion of whether payment of penalties would cause Pyro to discontinue in business because Pyro has stipulated that payment of penalties will not adversely affect its ability to continue in business.

MSHA did not assess any portion of the penalties proposed in this docket under the criterion of history of previous violations because application of the principles described in section 100.3(c) of MSHA's assessment formula did not require assignment of any penalty points under that criterion. Normally, when a judge is considering a settlement proposal, he does not have the computer printout listing previous violations which is available in this consolidated proceeding. Consequently, the judge is generally limited to an examination of MSHA's penalty formula to determine whether it has been accurately applied in a given case. In this proceeding, counsel for MSHA has provided me with Exhibits 1 and 11 which list previous violations and show that Pyro has been assessed a penalty for a single previous violation of section 75.523-1. That violation occurred over a year prior to the violation alleged in Citation No. 2505113. Consequently, I I find that application of section 100.3(c) of MSHA's formula

appropriately resulted in assignment of zero penalty points for the violation of section 75.523-1 under the criterion of history of previous violations.

MSHA considered that the violation of section 75.523-1 was associated with a low degree of negligence and that the gravity of the violation was moderate because any injury resulting from the failure of the panic bar to operate would probably have resulted in lost workdays for a single person. Under the parties' settlement agreement, Pyro has agreed to pay the full penalty of $68 proposed by MSHA. I find that the penalty was reasonably determined under MSHA's assessment formula and that Pyro's agreement to pay the penalty in full should be approved.

The aforementioned violation of section 75.400 was alleged in Citation No. 2505114 and stated that loose coal and coal dust and float coal dust had been permitted to accumulate around the power center and in all cuts across the unit and in some room necks, but the citation does not state how deep the coal accumulations were or attempt to give an estimate in feet as to the extent of the accumulations. While absence of those measurements does not defeat a finding that the violation occurred (Old Ben Coal Co., 2 FMSHRC 2806 (1980)), measurements do assist in evaluating both negligence and gravity. MSHA considered the violation to be associated with moderate negligence and to be somewhat serious because any injury resulting from the violation would be likely to cause lost workdays for up to 12 miners. MSHA proposed a penalty of $178 for the violation which Pyro has agreed to pay in full.

As was noted above in discussing the violation of section 75.523-1, application of section 100.3(c) of MSHA's penalty formula in this proceeding results in assignment of zero penalty points for the violation of section 75.400 under the criterion of history of previous violations. The penalties which I have previously assessed under the criterion of history of previous violations for the contested violations involved in this consolidated proceeding resulted in assignment of up to $400 because of Pyro's unfavorable history of previous violations of section 75.400. I have noted in approving other settlement proposals that section 100.3(c) of MSHA's penalty formula does not, in some cases, give adequate consideration of the criterion of history of previous violations because it is based on a formula which merely provides for calculating a factor of seriousness based on the total number of violations which are cited by inspectors depending upon the number of days they have made inspections at a given operator's mine.

If this had not been a consolidated proceeding, I would not have had in the record a computer printout, like Exhibit 1 in this proceeding, to provide the facts showing that Pyro has a history of an excessive number of violations of section 75.400. Since I have emphasized Pyro's unfavorable history of previous violations in this proceeding by having assessed some substantial amounts under the criterion of history of previous violations, I believe that it is possible to approve the parties' settlement under which Pyro has agreed to pay the full penalty of $178 proposed by MSHA for this violation of section 75.400 because the other two penalties assessed for violations of section 75.400 should have the deterrent effect of impressing upon Pyro's management the importance of increasing its efforts to avoid further repetitious violations of section 75.400.

The last violation to be considered is the aforementioned violation of section 75.807 alleged in Citation No. 2338419 which states that a high-voltage cable was not guarded at a substation where miners are required to travel under the cable to get to the breakers on the substation. MSHA considered the violation to have been associated with moderate negligence and gravity because any injury which might have occurred would have been likely to cause lost workdays for one person and proposed a penalty of $98. Pyro has agreed to pay a reduced penalty in this instance of $49.

Exhibit 11 shows that Pyro has been assessed penalties for four previous violations of section 75.807, but three of those, including the most recent one, were not considered to be serious enough to be designated as significant and substantial by the inspector who wrote the citations. I would be inclined to assess at least $20 under the criterion of history of previous violations in this instance if it were not for the fact that the parties' settlement agreement is based on some extenuating circumstances which indicate that some doubt exists as to whether the violation actually occurred.

Section 75.807 provides, in pertinent part, that underground high-voltage cables shall be "guarded where men regularly work or pass under them." The parties agreed to the reduction because the citation is based on a miner's statement to an inspector, rather than on an observation made by the inspector himself. Pyro contends that the violation was cited at a place where miners do not regularly travel or pass. Counsel for MSHA stated that there appears to be merit to Pyro's contention and that a reduction in the proposed penalty is warranted in such mitigating circumstances (Tr. 189). I find that the parties have given a satisfactory reason for reducing the proposed penalty in this instance to $49.

For the aforesaid reasons, the parties' request for approval of their settlement agreement should be granted as hereinafter ordered.

WHEREFORE, it is ordered:

(A) The motion filed on September 3, 1985, by counsel for the Secretary of Labor to strike portions of Pyro Mining Company's brief is denied for the reasons hereinbefore given.

(B) The parties' motion for approval of settlement with respect to the penalties proposed by MSHA in Docket No. KENT 84-238 is granted and the settlement agreement is approved.

(C) Pursuant to the parties' settlement agreement, Pyro Mining Company shall, within 30 days from the date of this decision, pay civil penalties totaling $295.00 which are allocated to the respective alleged violations as follows:

Citation No. 2505113	6/1/84	75.523-1	$ 68.00
Citation No. 2505114	6/1/84	75.400	178.00
Citation No. 2338419	6/26/84	75.807	49.00
Total Settlement Penalties in Docket No. KENT 84-238			$295.00

(D) Pyro Mining Company shall, within 30 days from the date of this decision, pay civil penalties totaling $8,260.00 for the violations cited by the inspector in Docket Nos. KENT 84-184 and KENT 84-196 which are allocated to the respective violations as follows:

Docket No. KENT 84-184

Citation No. 2338839	3/23/84	75.503	$2,460.00
Citation No. 2338840	3/23/84	75.400	2,360.00
Total Penalties in Docket No. KENT 84-184			$4,820.00

Docket No. KENT 84-196

Citation No. 2338838	3/23/84	75.308	$1,760.00
Citation No. 2505051	4/18/84	75.400	1,680.00
Total Penalties in Docket No. KENT 84-196			$3,440.00
Total Penalties in Contested Dockets in This Proceeding			$8,260.00

Richard C. Steffey
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
FOOTNOTES START HERE:-

~Footnote_one

1 Section 104(a) provides in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. * * *

~Footnote_two

2 Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

~Footnote_three

3 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."

~Footnote_four

4 Section 75.400 provides "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

~Footnote_five

5 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 or health hazard.

~Footnote_six

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

~Footnote_seven

7 Pyro's representative in this proceeding is not a lawyer, but he has participated in numerous hearings before the Commission's judges. He should be reminded that the purpose of a hearing is to allow the parties to present evidence which can be the subject of cross-examination or presentation of rebuttal evidence by the opposing party. It is especially objectionable for him to testify in his brief as to facts which the Secretary's counsel is precluded from the right of cross-examination and concerning which the judge has no way to seek clarification. I could, of course, strike the portions of Pyro's brief which are based on facts and exhibits which were not introduced or even discussed at the hearing. I am not doing so because they are not sufficiently meritorious, when considered, to affect the outcome of this case. After I had drafted this portion of the decision, the Secretary's counsel filed on September 3, 1985, a motion to strike the materials discussed above. The motion to strike is hereinafter denied for the reason stated above.

~Footnote_eight

8 Section 75.308 provides:

If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

~Footnote_nine

9 Section 75.308 provides for methane tests to be made no closer to the roof than 1 foot. Pyro's brief (p. 2) incorrectly alleges that the inspector violated section 75.308 by taking the methane reading "as close to the roof as he could." The inspector was asked if he took the reading as close to the roof as he could, but his answer was that he "got as close" to the "last row of bolts" as he could. The inspector had already stated that he took the reading 2 feet from the roof (Tr. 32).