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SOL (MSHA) v. HELVETIA COAL

HELVETIA COAL v. SOL (MSHA)

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

HELVETIA COAL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. PENN 84-210-R  
Order No. 2409293; 8/3/84

Docket No. PENN 84-211-R  
Order No. 2409294; 8/3/84

Docket No. PENN 84-212-R  
Order No. 2409295; 8/3/84

Lucerne No. 9 Mine

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

v.

HELVETIA COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 85-54  
A.C. No. 36-05374-03554

Lucerne No. 9 Mine

DECISION

Appearances: William M. Darr, Esq., Helvetia Coal Company,  
Indiana, Pennsylvania, for  
Contestant/Respondent;  
Linda M. Henry and Covette Rooney, Esqs.,  
Office of the Solicitor, U.S. Department of  
Labor, Philadelphia, Pennsylvania, for  
Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for  
assessment of civil penalties filed by MSHA against the Helvetia  
Coal Mining Company pursuant to section 110(a) of the Federal  
Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking  
civil penalty assessments for three alleged

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violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The alleged violations were stated in three section 104(d)(2) orders issued by MSHA Inspector Lloyd Smith on August 3, 1984, during his inspection of the mine.

Helvetia Coal Company contested the civil penalty proposals, and also filed separate notices of contest pursuant to section 105(d) of the Act challenging the validity of the orders. The cases were consolidated for trial in Indiana, Pennsylvania, and the parties filed posthearing proposed findings and conclusions which B have considered in the course of these decisions.

#### Issues

The issues presented in these proceedings include the validity of the orders and whether or not the alleged violations resulted from an unwarrantable failure by Helvetia Coal Company to comply with the cited mandatory standards.

Assuming the fact of violation is established by a preponderance of the evidence, the question next presented is the appropriate civil penalties to be assessed for the violations, taking into account the criteria found in section 110(i) of the Act.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq
2. Sections 110(a), 110(i), 104(d), and 105(d), of the Act.
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

#### Stipulations

The parties stipulated to the following:

1. The Lucerne No. 9 Mine is owned and operated by the Helvetia Coal Company.
2. The mine is subject to the 1977 Federal Mine Safety and Health Act.
3. The presiding judge has jurisdiction to hear and decide these proceedings.

4. The citations were properly served on the contestant-respondent Helvetia Coal Company.
5. The proposed civil penalty assessments will not adversely affect Helvetia Coal Company's ability to continue in business.
6. The overall 1984 mine production for the Rochester and Pittsburgh Coal Company, the parent company, was 7,233,311 tons, and the production for the Lucerne No. 9 Mine was 788,952 tons.
7. All of the violations were timely abated, and Helvetia Coal Company exhibited ordinary good faith compliance.
8. Helvetia's history of prior violations is shown in MSHA exhibit G-5, a computer print-out of Helvetia's compliance record for the period August 3, 1982 to August 2, 1984.
9. The hearing exhibits offered by the parties are authentic and may be admitted as part of the record in these proceedings.
10. There were no intervening "clean" inspections of the mine during the "104(d) chain" of violations issued by the MSHA inspectors in these proceedings.
11. There was no damage to the cable ground monitoring system, and no visual damage to the internal cable conductors. Order No. 2409293).
12. The underlying section 104(d)(1) citations supporting the section 104(d)(2) "chain" orders issued in these proceedings were properly issued and served on the respondent-contestant Helvetia Coal Company.
13. Helvetia's proposed exhibit R-1, is a portion of the 17 foot cable cited by Inspector Lloyd Smith, and counsel for Helvetia Coal Company agreed to maintain custody of the cable, and because of its size and bulk, agreed that it need not be made part of the actual record exhibits in these proceedings.

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Section 104(d)(2) Order No. 2409293, 10:15 a.m., August 3, 1984, citing a violation of 30 C.F.R. 75.517, states the following condition or practice:

The 600 volt power cable supplying power to the 5 South 015 working section was not being fully protected in that there was evidence (scuff marks) that the cable was being struck by either mobile equipment or the supplies being hauled by mobile equipment. This cable is installed in the No. 4 entry about 43 feet outby Survey No. 1349 and the cable was hanging down from the mine roof ranging from 18 inches to 27 inches for a distance of about 17 feet and there was minor damage to the outer cable jacket in three locations. This entry is used as an off track supply roadway for the 5 South working section and the preshift mine examiner had placed his date, time and initials in the area within 50 feet as dated--8/3/84 G.C. 6:49 AM.

Section 104(d)(2) Order No. 2409294, 11:05 a.m., August 3, 1984, citing a violation of 30 C.F.R. 75.400, states the following condition or practice:

There was an accumulation of loose coal being stored in the 2nd crosscut outby survey No. 1349 between the Nos. 4 and 5 entries of the 5 South 015 Section that measured 10 feet in width, 5 feet in length and ranged from 3 inches to 39 inches in depth. This area is outby the working section.

Section 104(d)(2) Order No. 2409295, 1:15 p.m., August 3, 1984, citing a violation of 30 C.F.R. 75.303(a), states the following condition or practice:

The preshift examination of the No. 4 entry of the 5 South 015 section from Survey Station No. 1349 outby for 2 crosscuts used as an off track supply haulage roadway was not adequate in that 2 violations of the mandatory standards were observed in the area and the area had been examined by a certified person on 8/3/84. The dates, times, and initials were--8/3/84 G.S. 6:49 AM.

MSHA's Testimony and Evidence

Lloyd Smith, MSHA Inspector, testified as to his background and experience, and he confirmed that he inspected the mine on August 3, 1984, and issued the three orders which are the subject of these proceedings (Exhibits G-1, G-3, and G-4).

With regard to Order No. 2409293, Mr. Smith stated that he issued it after observing a power cable hanging down from the roof along the off-track supply road used to bring supplies to the section. The cable was hanging down for a distance of 18 to 27 inches for a distance of 17 feet along the rib. The remaining portion of the cable which extended along the entire length of the entry in question was hung up on insulated "J" hooks fastened to the roof bolts.

Mr. Smith stated that he observed several knicks, "minor damage," and scuff marks on the cable which was hanging down, and in view of some "white powdery" marks and scratches which he observed on the cable, he assumed that it may have been struck by a scoop loaded with supplies and cinder blocks. He observed several tire tracks under the cable, and he assumed that a scoop passed under the cable and struck it while bringing supplies into the section face area. The tire tread marks were "off to the side" of the roadway.

Mr. Smith stated that the cable may have been hung to the roof at one time, but he had no way of knowing whether it had been installed in the manner which he found it. He drew a sketch depicting how the cable was hung (exhibit G-6), and he confirmed that he cited a violation of section 75.517, because the cable portion which was hanging down was not installed on insulated "J" hooks and was therefore not fully protected since he believed it had been struck by a scoop carrying supplies to the section.

Mr. Smith believed that a hazard existed but that the extent of possible further danger to the cable would depend on the type of supplies being transported to the section, and whether or not they would cut or scrape the cable. Although the cable conductors and internal wires were not damaged, Mr. Smith believed that in time, striking the cable with equipment as it passed by presented the possibility of further damage to the cable, and in the event the internal wires were damaged a shock or electrocution hazard would result.

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In view of the fact that the area in question was preshifted at 6:49 a.m., Mr. Smith believed that the mine operator was negligent. Mr. Smith stated that the cable condition was obvious and he could not understand how the preshift examiner could have missed it. He stated that the examiner is charged with the responsibility of looking for such conditions, and since he had not recorded the condition in his preshift report, Mr. Smith was of the opinion that the examiner was indifferent to the condition. Further, since the examiner's initials were placed on the rib approximately 50 feet from the cable condition, and since the hanging cable was readily observable, Mr. Smith was of the opinion that the violation was an unwarrantable failure.

Mr. Smith stated that the roof area was approximately 5 to 6 feet high, and that abatement was achieved by a mechanic taping the "small knicks" in the cable, and the cable being rehung on "J" hooks.

Mr. Smith confirmed that he subsequently modified the order to delete his "S and S" finding, and that he modified his negligence finding from "high" to "moderate," and his gravity finding from "reasonably likely" to "unlikely," the "number of persons affected" from one to none, with "no lost workdays." He explained that he made these modifications at the instruction of his supervisor during a conference held in MSHA's district office on August 30, 1984. The mine operator presented "new information" which reflected that the cable in question was scheduled to be moved on August 4, the day following the issuance of the violation, and his supervisor believed that it was unlikely that any further severe damage to the cable would occur within the following two working shifts. Mr. Smith confirmed that certain records produced by the company at the conference confirmed that the cable was scheduled to be moved, and that it was in fact moved. He also confirmed that the information provided by the company reflected that the preshift examiner may not have seen the cable condition, and that this prompted his supervisor to instruct him to modify his negligence finding.

Mr. Smith stated that after citing the cable condition, he proceeded to the intake air course where he looked between the No. 4 and No. 5 crosscuts and observed a pile of loose coal which appeared to have been dumped in the area. The entire area around the dumped coal was well rock dusted and in otherwise good condition, but the black undusted coal "stuck out like a sore thumb" and was readily observable. Mr. Smith stated that the loose coal was dumped in an area

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10 feet wide, 5 feet long, and ranged in depth from 3 to 39 inches, and he confirmed that he made measurements to substantiate these findings. He also confirmed that he did not take samples of the coal, or otherwise test it because it was not rock dusted, was black in color, and it was obvious to him that it was combustible.

Mr. Smith stated that it appeared that the loose coal was loaded on a scoop and simply dumped in the area where he found it. Since he had cited the only scoop used in the section earlier during his inspection, and since that scoop was under repair and in the battery charging station, he concluded that the loose coal was dumped earlier in the day and prior to the preshift examination of 6:49 a.m. Further, since the section foreman Mark Thomas could not explain how the cable and coal conditions occurred and advised him that his crew had not been in the area prior to his inspection, Mr. Smith concluded that both conditions existed earlier than the day shift and that the preshift examiner should have reported them on his preshift report.

Mr. Smith believed that the preshift examiner should have noticed the loose coal earlier, and since "there was no way he could not have seen them if he looked," and since the condition was obvious, Mr. Smith believed that there was a high degree of negligence and that the violation was an unwarrantable failure. He conceded that his negligence finding was later modified to reflect a "moderate" degree of negligence, and that this was done at the August 30, district manager's conference.

With respect his gravity findings, Mr. Smith confirmed that he did not believe the violation was "S and S," and he saw no hazard present because the area was well rock-dusted, the closest power cable was 20 to 30 feet away, and he did not believe that the presence of the loose coal presented any injury hazard. Abatement was achieved by removing the one-scoop full of loose coal and re-rock dusting the area. He could not determine who dumped the coal in question, or how it got to the area where he found it, and no one ever admitted dumping it.

With regard to the order concerning the inadequate preshift examination, Mr. Smith stated that he issued it after checking the preshift examination books of August 3, 1984, and finding that the cable and loose coal conditions were not reported or recorded. Since he believed that both conditions were readily observable and should have been discovered by the examiner, he concluded that there was indifference on

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the part of the examiner. Under these circumstances, he concluded that the inadequate preshift examination constituted an unwarrantable failure.

Mr. Smith believed that the inadequately conducted preshift examination constituted a hazardous condition because the examiner had not reported the conditions to the oncoming day shift, and because it was reasonably likely that the cable could have suffered severe damage if cut or damaged by supplies being transported in the scoop. He considered that a hazardous condition resulted from the failure by the examiner to note the conditions. Abatement was achieved by the examiner being "re-instructed" by the operator to include and report future violations in his preshift reports.

Mr. Smith confirmed that his negligence findings were subsequently modified at the August 30th conference from "high" to "moderate," and that his gravity findings were modified from "reasonably likely" to "unlikely," and that the "number of persons affected" was changed from one to none, and "no lost workdays." His previous "S & S" finding was also deleted.

Mr. Smith confirmed that he did not contact or interview the preshift examiner in question, and that he did not review the preshift examiner's records for the days or shifts prior to those of August 3, 1984 (Tr. 14-51).

On cross-examination, Mr. Smith stated that the cable in question was connected from the power center to the distribution center and he agreed that the electrical hook-up depicted by the operator's exhibit R-3 was accurate. Although he did not know the exact cable voltage, Mr. Smith was sure that it was supplying voltage to the section. He stated that the cable is advanced as the section mining cycle is advanced, and he confirmed that the excess cable which is not in use may be stored on the floor as long as it is out of the way and protected. He also conceded that the cable could be subjected to scrapes as it is pulled or dragged while being moved and advanced.

Mr. Smith confirmed that he detected no damage to the cable interior conductors, and he conceded that if the operator considered the cable to be a trailing cable it could be permitted to lie on the mine floor against the rib or be suspended, at the operator's option.

Mr. Smith examined a portion of the cable in question, exhibit R-1, and he identified two "inundations" or "knicks"

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which had been taped and repaired, but he could not see the "scrapes" or "scuff marks" that he previously testified to. He conceded that it was possible that the inundations or knicks which he observed could have been caused by dragging or moving the cable along the mine floor, and that they could also be "manufacturer's defects." He also conceded that a number of "possibilities" propounded by the operator's counsel could have caused the cable to come loose from the "J" hooks.

Mr. Smith stated that the width of the entry where the cable was located was 18 to 20 feet. He confirmed that four "J" hooks were obtained to reinstall the cable, and that he observed no hooks on the mine floor near the cable. He also confirmed that he did not see the cable struck by a scoop, and he conceded that the tire tracks which he observed could have been there before the cable was struck.

Mr. Smith confirmed that when he issued the cable violation, he did not perceive it as a serious situation and that he did not require that the power be shut off before permitting the cable knicks to be taped.

With regard to the loose coal violation, Mr. Smith confirmed that the area was well rockdusted, and he indicated that the loose coal was located in a permanent cement-block stopping area, and that it "stuck out like a sore thumb." He conceded that it was possible that the coal was dumped after the preshift examination was conducted.

Mr. Smith stated that he did not know for a fact that the examiner was in the entry where the loose coal was found, and he denied that he was "angry" when he issued the order.

With regard to the preshift examination violation, Mr. Smith stated that it was obvious that the cited conditions existed, and that it should have been obvious to anyone passing through the areas.

In response to further questions, Mr. Smith stated that he believed the operator was treating the cable in question as a power cable subject to the requirements of section 75.517, but that the cable did meet all of the requirements of MSHA's Subpart G trailing cable standards. He confirmed that he has observed trailing cables in other working sections which were on the mine floor or suspended (Tr. 52-132).

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Donald P. Jones, continuous-miner operator, Lucerne No. 9 Mine, testified as to his mining background and experience, and confirmed that he is a member of the mine safety committee and that he accompanied Inspector Smith during his inspection of August 3, in his capacity as the union walkaround representative. He confirmed that he observed the cable conditions cited by Mr. Smith, and he estimated that the cable was hanging down for an approximate distance of 18 to 27 inches for a distance of some 17 feet. He observed tire tracks under the cable, and also saw some scuff marks on the bottom of the suspended cable. The entry in question is used when supplies are transported to and from the section by a scoop at least once during the day. The entry was not straight at the location of the cable, and he believed that the cable could be struck by the scoop as it travelled the uneven entry.

Mr. Jones stated that the hanging cable was readily visible, and he indicated that the rest of the cable in question was securely hung by "J" hooks from the roof. He observed a telephone wire hanging from a roof bolt in the area where the cable was hanging down, and he speculated that it may have been used to secure the cable. After the condition was cited, the cable was re-hung, but he could not recall whether it was re-hung on a "J" hook or on the telephone wire. After the cable scrapes were taped by a mechanic, he helped him re-hang the cable. With regard to the coal accumulations citations, Mr. Jones stated that he observed "pure black coal" which appeared to have been dumped in the area noted by Mr. Smith, and he confirmed that it was readily noticeable since the surrounding area was well rock-dusted. He also confirmed that the scoop which was normally used in the section was not in operation the morning of the inspection because it had been parked at the charging station and had not been moved. He observed the preshift examiner's initials and date indicating that he had conducted a preshift at 6:49 a.m. that morning, but Mr. Jones had no idea how the coal got to the area where he observed it (Tr. 143-152).

On cross-examination, Mr. Jones stated that the coal which he observed appeared to be "fresh coal," and it was not rock dusted. The remaining area was rock-dusted, and in his opinion it had been rock-dusted before the coal was dumped. He confirmed that no coal samples were taken, and the area "was not damp, nor was it perfectly dry."

Mr. Jones stated that when the cable condition was first observed, he and Inspector Smith discussed the possibility of simply hanging it up. However, when Mr. Smith saw the scuff

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on August 3, because Mr. Claassen called out that the section was safe for Mr. Thomas' crew to enter. At the time, Mr. Thomas was a union employee filling in for the regular shift boss.

Mr. Thomas identified exhibits R-6 and R-7 as the mine examination records for August 3, 1984, and he confirmed that they reflect that Mr. Claassen conducted his required examinations on that day. Mr. Thomas identified his signature, as well as Mr. Claassen's, and stated that he would not have counter-signed the reports if he had any doubts that Mr. Claassen had preshifted the section, or had not completed his examination (Tr. 245-258).

On cross-examination, Mr. Thomas stated that he relied on Mr. Claassen's assuring him that he had preshifted the section, and he believed that Mr. Claassen's crew on the preceding shift would probably have used the No. 4 entry because it is a shorter route out of the section and the mine height is better for travel. However, he could not state whether his own crew would have used that entry because he had only supervised the crew for 2 days prior to August 3. Mr. Thomas confirmed that the supply scoop has been known to carry more than three tiers of cinder blocks, and that it sometimes transported four tiers (Tr. 259-270).

Gregory Claassen, assistant mine foreman, testified as to his mining experience and background, and stated that he has worked at the mine for over 3 years as a mechanic and electrician. He has served as an assistant mine foreman for over a year, and he has a B.S. degree from Penn State, and holds mine foreman and electrician papers. He testified as to the training he received in conducting preshift and onshift examinations, and he stated that he is thorough in conducting such examinations. He confirmed that he is married and has two children, and he stated that since he is subject to fines and discharge if he does not conduct proper preshifts, he is particularly sensitive as to how to go about his preshift examinations.

Mr. Claassen testified that he did in fact conduct a preshift examination on August 3, 1984, and he testified as to his movements throughout the section on that morning. He stated that he began his preshift at approximately 5:00 a.m., and first inspected the belts and track entry. He then proceeded to the face area and down the No. 5 entry. After examining the faces, he proceeded down the No. 4 entry and walked out through the return rather than the supply doors where he had previously placed his initials, time and date.

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Mr. Claassen stated that a scoop would have been used in the section on his shift in the area where Inspector Smith found the dumped coal because a pallet of rock dust was stored nearby. He stated that he observed the cable cited by Smith, but insisted that it was hung up on "J" hooks, and he did not see any portion of the cable hanging down. He indicated that the cable is hung at 8-foot intervals, and that it normally sags about 12 inches from where it is hung simply because of its weight. In his opinion, had the cable been hanging as described by Mr. Smith, he would have noticed it, and it would have taken him no more than 15 seconds to re-hang it on a "J" hook. Mr. Claassen denied that he observed the cable suspended for a distance greater than its normal height, and he stated that no one ever reported to him that the cable was hanging down or was being struck or scraped by equipment.

Mr. Claassen explained the preshift examination procedures, and he stated that he checks both sides of the crosscuts. He indicated that he pays particular attention to the crosscuts because the prior shifts place supplies in the crosscuts. With regard to the coal which was dumped in one of the crosscuts, Mr. Claassen stated that he looked into the crosscut in question during the preshift, and observed that it had a stopping and man door in it and that it was well rock-dusted. Other than gob, he observed no coal dumped in the area.

Mr. Claassen stated that normal operational procedures call for the scoop to be parked at the charging station between shifts while it is being charged. He believed that someone from his crew dumped the coal in the crosscut in question after he had conducted his preshift examination. He surmized that someone had used the scoop to clean the faces, and that when rock dust was required to be brought to the face area, the responsible individual probably dumped the coal in the crosscut where the gob was located so that he could use the scoop to transport the rock dust to the face area. He confirmed that he had assigned some of his crew to perform rock dusting and clean up at the faces, and since the crosscut where the coal was found was a "gobbing crosscut," he believed it was a logical place for anyone to dump coal that they wanted to get rid of. He also believed that a scoop operator would not want to leave a scoop charging with a bucket load of loose coal. Although he advised his crew that nothing would happen to them if the guilty party identified himself, no one came forward to admit to the violation.

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With regard to any "re-instructions" given him to abate the citation issued by Mr. Smith for his purported failure to conduct a proper preshift examination, Mr. Claassen stated that a representative of the mine safety department, Mr. Petro, simply asked him if he had observed the coal and cable conditions cited Mr. Smith, and they generally discussed the violations. Mr. Claassen stated that at no time has Inspector Smith ever discussed the violations with him.

Mr. Claassen examined copies of the August 3, 1984, preshift reports, exhibits R-6 and R-7, and confirmed that the notations and signature were his. He stated that he never skips a preshift examination and that he has always conducted proper preshift examinations and reports the results in accordance with the law. He reiterated that he conducted a proper and thorough preshift examination on the morning of August 3, 1984, and denied that he observed the conditions cited Mr. Smith, or that he simply overlooked them and neglected to note them in his reports (Tr. 271-303).

On cross-examination, Mr. Claassen confirmed that the citations in question have been a topic of discussion at the mine. He stated that except for the time spent with the safety department on retraining, no one from mine management has discussed this case with him for the past year, and that it never occurred to him that anyone would want to discuss the matter with him (Tr. 305, 308).

Mr. Claassen stated that in order to take the scoop to the battery charging station, it would not be necessary to pass the area in which the coal in question was dumped. He confirmed that he started his preshift at 5:00 a.m., and that sometime between 6:30 and 6:40 a.m., he instructed his crew to scoop up the face areas, clean up the feeder, and rock dust (Tr. 311-314). He testified as to his movements about the section and explained the work that is normally done by his crew on the section (Tr. 314-318).

In response to further questions Mr. Claassen confirmed that Inspector Smith never discussed the inadequate preshift violation with him, and in his opinion, had he been asked to explain the circumstances, the citation would possibly not have been issued (Tr. 320).

Inspector Smith was called in rebuttal, and he stated that at no time prior to the hearing has anyone told him that the operator considered the cable in question to be a

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trailing cable rather than a power cable. He also stated that during discussions with the operator's representatives at the close-out conference he conducted after completion of his inspection, the matter was not discussed, but at the district manager's conference, there was "a discussion" about the operator's contention that the cable could be treated as either a trailing cable or power cable, and that the method used for protecting the cable was at the "option" or "discretion" of the operator.

Mr. Smith stated that at the time he issued the cable violation he believed the operator was treating the cable as a power cable, and that this conclusion is based on the fact that the entire length of the cable was hung on insulated "J" hooks suspended from the roof. He conceded that had it been treated as a trailing cable, it could have remained on the mine floor and need not be suspended as long as it was otherwise protected from damage by mobile equipment.

Mr. Smith stated that he was not aware of the "experiment" testified to by Mr. Flack prior to the hearing, and that no one ever informed him that such a test had been conducted.

Mr. Smith confirmed that during a conversation with Mr. Petro of the company's safety department, he did advise Mr. Petro that if the company could produce or identify the person who dumped the loose coal or knocked down the cable, "it would be a different ball game" and he would reconsider the violations (Tr. 324-336).

Mr. Smith conceded that he made no attempts to contact Mr. Claassen to discuss the cited conditions with him, and when asked why, he replied "because the system, at most mines, you deal with the safety department" (Tr. 341).

#### Findings and Conclusions

##### Fact of Violations

Section 104(d)(2) Order No. 2409293

This order charges Helvetia Coal with a failure to fully protect a power cable installed along the rib in that it was hanging down and not secured for a distance of some 17 feet. The inspector noted scuff marks and minor damage to the outer cable jacket, and this led him to support his conclusion that it had not been adequately protected. The cited mandatory standard, 30 C.F.R. 75.517, provides as

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marks on the cable, he informed Mr. Jones that he would issue a citation, but Mr. Jones could not recall when Mr. Smith specifically informed him that he would issue an unwarrantable failure order. Mr. Jones believed that someone from mine management took pictures of the cable in question and he confirmed that he participated in the post-inspection conference concerning the violation. He denied any knowledge of any "amnesty" offers made by the company to any employees who would admit to dumping the coal in question (Tr. 153-157).

#### Helvetia Coal's Testimony and Evidence

Richard J. Flack, testified as to his mining background and experience, and he confirmed that he is employed by the Rochester and Pittsburgh Coal Company as a senior safety inspector and is assigned to Helvetia Coal's safety department. He stated that he is aware of the violations issued by Inspector Smith, and he confirmed that he participated in a company investigation concerning the cable and coal accumulations violations. He stated that the company's investigation focused on an effort to determine who was responsible for knocking the cable down and who may have dumped the coal in question. However, these efforts were fruitless, and no one came forward to admit that they were responsible, even though the company assured all employees that no action would be taken against them.

Mr. Flack identified a portion of the cable which was cited, and he confirmed that the piece of cable marked as exhibit R-1, was in fact a portion of the cable which was cited by Mr. Smith, and that he was present when the cable was taken down. He stated that the cable had one "abrasion area" and one permanent splice in it. He also stated that several days after the violation was issued, he participated in a company conducted experiment or "simulation" in which wires and flags were strung along the area where Mr. Smith found the cable hanging down. A scoop was loaded with supplies, including two or three courses of concrete blocks, and when it was driven under the wire which had been strung 17 feet from the roof, the scoop passed under the flags which had been attached to the wire without striking them. This led him to conclude that the scoop would not have caused the "scuff marks" testified to by Mr. Smith.

Mr. Flack described the mine bottom in the area where the coal was dumped as "damp," and he indicated that the mine roof heights in the area where the cable was observed were approximately 6 feet. Although Mr. Flack did not observe the conditions on the day the violations were

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issued, he believed that the cable "was hanging as it was installed."

Mr. Flack testified that the cited cable was not required to be hung on "J" hooks, or otherwise suspended, because the company treated it as a trailing cable, rather than a power cable. He stated that any cable located between the power center and power distribution box may be considered a trailing cable, and that the company often uses its cable in this fashion. He has observed such cable being used both as a trailing cable and as a power cable, and he indicated that this was a common practice in the mine. As long as the trailing cable is protected from damage, the company has the option of hanging it up or simply leaving it on the mine floor against the rib.

Mr. Flack stated that the outer jacket of the cable which was cited was in good condition and well insulated. He conceded that knicks and abrasions will occur when the cable is being moved as the section mining cycle advances. He believed that the cable in question was moved frequently, and that since this was the case, the company treated it as a trailing cable and did not believe that it was required to be hung up on "J" hooks.

Mr. Flack stated that he participated in the conference held in MSHA's district office with respect to the violations in question. Although the company advised Inspector Smith's supervisor that the company treated the cable as a trailing cable, the supervisor apparently did not accept this defense since he did not order that the violation be vacated. With regard to the coal accumulation violation, Mr. Flack stated that Mr. Smith advised him that he would reconsider the matter if the company could produce the person who was responsible for dumping the coal. Mr. Flack stated further that Mr. Smith informed him that had the responsible person been produced by the company, Mr. Smith would not have issued the unwarrantable failure order for this violation. Mr. Flack confirmed that all of the personnel on the three working shifts in question were questioned, but no one would admit to the violations.

Mr. Flack was of the opinion that the preshift examiner, Gregory Claassen, is a responsible individual, and that he is careful in the manner in which he conducts his preshift examinations. Mr. Flack also believed that Mr. Claassen would have observed the cable and coal conditions during his preshift if the conditions had in fact existed at that time (Tr. 178-198).

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On cross-examination, Mr. Flack testified further as to the simulated experiment which was conducted with the scoop and flagged wires. He stated that a "comparable" load of materials similar to "pallet materials" normally transported by the scoop were used in the experiment. He conceded that the demonstration was conducted solely by the company, and that no MSHA representatives were invited to attend. (Tr. 199).

Victor Pividori, testified that he is employed by the Rochester and Pittsburgh Coal Company as an electrical safety inspector, and that in this capacity he inspects 10 company mines, including the Lucerne No. 9 Mine. He testified as to his mining background and experience, and stated that he was formerly employed as a Federal mine inspector conducting electrical inspections of mine electrical systems. He identified exhibit R-3 as a schematic drawing of a typical underground mine electrical hook-up, and confirmed that the power systems in use in the mine in question are similar to those shown on the exhibit. He confirmed that a continuous-mining machine trailing cable could be connected directly to the A.C. power center shown on the diagram, and in his opinion the cable which was cited by Mr. Smith could either be hung up or laid on the mine floor at the company's discretion.

Mr. Pividori stated that under the provisions of section 75.606, a trailing cable may either be suspended or allowed to remain on the mine floor as long as it protected from damage. In his opinion, based on the testimony he has heard in this case, the cable was fully protected in the manner in which it was suspended from the mine roof at the time the inspector observed the condition on August 3. He stated that the scoop is 9 feet wide, and given the width of the entry, the cable would be visible. In further support of his opinion that the cable was adequately protected, he stated that "Mr. Flack's test convinced him" that this was the case.

Mr. Pividori described the cited cable as a three conductor 4/0 g. GC-cable, with a 2 KV rating, and while it is rated at 2,000 volts, only 575 volts were on it at the time the citation was issued (Tr. 228-237).

On cross-examination, Mr. Pividori conceded that he did not observe the cited conditions and had never been to the areas in question prior to the time the violations were issued. He also conceded that he was not present at the

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time the cable demonstration was conducted by Mr. Flack (Tr. 238-239).

Mark D. Thomas, testified that he is employed as a section foreman at the Lucerne No. 9 Mine, and he confirmed his background and mining experience. He stated that he was aware of the violations issued by Inspector Smith on August 3, 1984, and he confirmed that the violations were served on him. He did not accompany Mr. Smith during his inspection rounds, but did discuss the conditions with him after being informed that the closure orders were issued. The cable violation was abated after several places in the cable were taped, and the cable was re-hung on one "J" hook, which Mr. Thomas indicated was found lying on the mine floor in the area. He conceded that it was possible that more than one hook was used to re-hang the cable, and he described the area as damp and well rock-dusted.

Mr. Thomas stated that during his discussion with Mr. Smith, Mr. Smith advised him that the hanging cable was "plainly obvious" and that he could not understand "how a guy could walk by and not see it." Mr. Thomas confirmed that Mr. Gregory Claassen, the previous shift foreman, conducted the preshift examination and placed his initials and the time 6:49 a.m., on a nearby rib to indicate that he had preshifted the area. Mr. Thomas agreed with the cable measurements made by Mr. Smith, and he conceded that had he conducted the preshifts examination, he would have seen the cable and coal conditions. However, he indicated that different shift crews used different entries when walking through the section, and he could not state how the violations occurred.

Mr. Thomas stated that Mr. Smith told him that he would issue a closure order because of the coal accumulations, but did not indicate that the cable violation would also be in the form of a closure order. Mr. Thomas stated that Mr. Smith "was hot" or disturbed when he saw the coal condition, but that he was not when he cited the earlier cable condition. The area where the coal was dumped had some gob against the wall, and except for the loose coal, the rest of the area was well rock-dusted.

Mr. Thomas stated that on the prior 2 days, Mr. Claassen had initialed and dated the rib near the supply doors when he conducted those preshifted examinations, but that on August 3, he had initialed at a different area, and Mr. Smith could not understand why this had happened. Mr. Thomas believed that Mr. Claassen did in fact conduct his preshift

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follows: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be adequately and fully protected."

In defense of this violation, Helvetia Coal maintains that the cable in question can be used as either a power cable or trailing cable at its option, and that at the time of the citation it was being used as a trailing cable between the power center and distribution box. Helvetia Coal also contends that it had the further option of placing the cable on the mine floor along the rib or providing additional protection by hanging it from the mine roof, thereby providing an extra indicia of protection. MSHA's proposed findings and conclusions do not address the issue.

I take note of the fact that in its Notice of Contest and answer to the civil penalty proposal filed by MSHA, Helvetia Coal never contended that the cable in question was a trailing cable. As a matter of fact, it specifically refers to the cable as a power cable, and stated that it is "commonly referred to as 600 volt cable." This defense was raised for the first time during the hearing. Helvetia's senior safety inspector Flack who viewed the cable after it was taken down, testified that any cable used between the power center and power distribution box may be used as a trailing cable, and as long as it is protected from damage, the operator has the option of hanging it up or leaving it on the mine floor. Since the cited cable had to be moved frequently, he believed that it was used as a trailing cable. Company electrical inspector Prividori, who was not present when the citation was issued, and who had never been in the area prior to the issuance of the citation, testified that under section 75.606, the company had the option of either hanging up a trailing cable or leaving it on the mine floor.

Inspector Smith believed the cable was being used as a power cable because it was hung on insulated "J" hooks for its entire length. Continuous-miner operator and safety committeeman Jones made no mention of the cable being used as a trailing cable. Section foreman Thomas, who discussed the matter with Inspector Smith shortly after the order was issued, did not contend that the cable was a trailing cable which did not have to be suspended for protection. Assistant section foreman and preshift examiner Claassen testified that when he viewed the cable, it was hung up on "J" hooks at uniform lengths. In explaining why the cable was hung at uniform lengths, he characterized it as a high voltage cable (Tr. 283). While explaining a past incident concerning a nail in a cable, he characterized the cable as

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a power cable, and in fact identified it as identical to the power cable cited by Inspector Smith (Tr. 308). Mr. Claassen does not mention anything about a trailing cable.

The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, 1968 Edition, defines the term "trailing cable" as follows at page 1156:

a. A flexible cable designed to be movable while in use. B.S. 3618, 1965, Sec. 7. b. A flexible electric cable for connecting portable face machines and equipment to the source of supply located some distance outby. The cable is heavily insulated and protected with either galvanized steel wire armoring, extra stout braiding hosepipe, or other material. See also collectively screen trailing cable; individually screened trailing cable. Nelson. c. A cable for carrying electricity from a permanent line or trolley wire to a movable machine such as in mining or quarrying. It is usually paid out from a reel as the machine advances. Grove. d. A flexible, rubber-insulated conductor, or set of conductors, which carries electric power to a crane or other moving machine. Ham. e. A flexible insulated cable used for transmitting power from the main power source, such as a trolley wire, nipping station, or junction box, to a mobile machine. It includes cables between the nipping station and distribution center.

Whether or not the operator had an option to treat the cited cable as a trailing cable covered by section 75.606, or a power cable covered by section 75.517, and whether or not the cable met the requirements of the trailing cable regulations set forth in Subpart G, Title 30, Code of Federal Regulations, is not the issue here. The issue is whether the cited cable was in fact a power cable within the meaning of section 75.517, at the time the citation was issued, and whether it was fully protected. Even if one were to conclude that the cited cable was a trailing cable, a violation would still occur if it was not adequately protected.

The testimony in this case reflects that the cable in question was connected from the power center to the distribution center, and that its purpose was to supply power and

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voltage to the working section. Mr. Pividori confirmed this during his explanation of the mine power distribution system as depicted in Helvetia Coal's Exhibit-3, and he identified the cable in question as the cable between the A.C. power center and distribution center (circled at the bottom of the diagram).

After careful consideration of the testimony and evidence adduced in this case, I conclude and find that at the time the citation was issued the cable in question was being used as a power cable. Helvetia's contentions to the contrary are rejected. I further find that the cited cable was not suspended or otherwise adequately protected for a distance of approximately 17 feet, and that the credible testimony of Inspector Smith that he observed some damage and scuff marks on the cable, and tire marks under it where it was hanging down for a distance of 18 to 27 inches, as well as the credible testimony of Mr. Jones that the cable could be struck by a scoop as it travelled the uneven entry, supports a conclusion that the cable was not fully protected and could have been struck by supply vehicles passing through the area which was used as a supply road for the section. With regard to Mr. Flack's experiment in an attempt to reconstruct the possibility of a scoop striking the cable, I note that it was conducted several days after the condition was abated and that MSHA representatives were not invited to be present. I find this experiment to be unreliable and reject it to support a conclusion that the cable was fully protected. I conclude and find that MSHA has established a violation of section 75.517, by a preponderance of the evidence, and IT IS AFFIRMED.

Section 104(d)(2) Order No. 2409294

This order charges Helvetia Coal with failing to clean up an accumulation of loose coal which the inspector asserts was "stored" in an area outby the working section. The cited mandatory standard, 30 C.F.R. 75.400, provides as follows: "Coal 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 electrical equipment therein."

Although Helvetia Coal asserts that the coal accumulations cited by Inspector Smith were not present at the time of the preshift examination conducted by Mr. Claassen, it does not deny the existence of the cited coal accumulations at the time of Mr. Smith's inspection. Mr. Smith described the accumulations in detail, and confirmed his measurements

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with respect to the extent of the accumulations. He confirmed that the accumulations consisted of a pile or "scoop full" of black undusted combustible coal which was readily observable in an otherwise well rock dusted crosscut. Accordingly, I conclude and find that MSHA has established a violation of section 75.400, and the violation IS AFFIRMED.

Section 104(d)(2) Order No. 2409295

This order charges Helvetia Coal with failing to conduct an adequate preshift examination in those areas where the prior cable and accumulations orders were issued. The cited mandatory standard, 30 C.F.R. 75.303(a), provides in pertinent part as follows:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative.

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If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine.

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Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary

kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Inspector Smith testified that he issued the order after reviewing the preshift examination books for August 3, 1984, and finding that the coal accumulations condition was not reported or recorded in the book. He contended that section foreman Thomas advised him that his crew had not been in the area where the accumulations were discovered prior to the time of his inspection. Since the accumulations were readily observable and were not recorded in the preshift book, Mr. Smith concluded that preshift examiner Claassen was less than attentive to his duties and conducted an inadequate examination. However, he conceded that it was possible that the coal could have been dumped after the preshift examination was conducted, and he admitted that he did not contact or speak with Mr. Claassen about the violation, and did not check the preshift record for the shifts prior to the one in question. Mr. Claassen testified that Mr. Smith never discussed the cable or accumulations violations with him prior to the date of the hearing.

With regard to the cable violation, Inspector Smith testified that the hanging cable was obvious and he could not understand how it could have been missed during the preshift examination. Since Mr. Claassen had placed his initials, date, and time of the preshift at a location some 50 feet from the hanging cable, and since no entry was made in the preshift book, Mr. Smith concluded that Mr. Claassen was indifferent to the condition and that his examination was inadequate. However, he confirmed that he modified his negligence finding after being advised by his supervisor that Helvetia Coal provided information during a conference on the violation which reflected that Mr. Claassen may not have seen the cable condition.

MSHA asserts that no miner from the day shift entered the areas where the violations were observed subsequent to 6:49 a.m., when Mr. Claassen made his preshift notations on the section, and before the orders were issued, and that no miner from the previous 12:00 midnight to 8:00 a.m., shift would have any reason to be in the areas after 6:49 a.m. Although MSHA fails to discuss its rationale for these conclusions in its posthearing submissions, I assume it relies on the testimony of Inspector Smith that Mr. Thomas told him that his crew had not been in the area, and the testimony of

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Mr. Thomas that had he conducted the preshift examination, he would have observed the cited conditions. However, these conclusions are based on assumptions that the conditions in fact existed at the time Mr. Claassen made his preshift examination.

Mr. Thomas, a union employee, testified that he had no doubt that Mr. Claassen conducted a preshift since Mr. Claassen called out and advised him that the section was safe for Mr. Thomas' crew to enter. Mr. Thomas also confirmed that he would not have counter-signed the preshift book if he had any doubt that Mr. Claassen preshifted the section. Inspector Smith issued the cable and accumulations violations at 10:15 a.m., and 11:05 a.m., well after Mr. Claassen had called out that the section was safe for Mr. Thomas' crew to enter the section. Mr. Thomas testified that Mr. Claassen's crew on the previous shift could have been in the areas in question and that different crews used different entries, and that he had no knowledge as to how the violations occurred. This casts some doubt on Inspector Smith's assertion that Mr. Thomas told him that his crew had not been in the area, and Mr. Thomas was not asked whether he actually made that statement to Mr. Smith.

Mr. Flack considered Mr. Claassen to be a responsible and careful preshift examiner. Mr. Claassen, the preshift examiner on the 12:00 midnight to 8:00 a.m., shift, gave a detailed account of his movements throughout the section during his preshift examination. He denied the existence of the violations at the time of his examination, and denied that he simply overlooked the conditions or failed to report them. I find him to be a credible witness, and I accept his account as to how the coal accumulations may have been dumped in the crosscut to facilitate the transfer of rock dust from a nearby storage area to the faces after he had conducted his examination. I believe that the cited conditions occurred after Mr. Claassen's preshift examination and that he had no knowledge of their existence, and MSHA has produced no credible testimony or evidence to the contrary. In short, I conclude and find that MSHA has failed to prove that the violative conditions existed at the time of the preshift examination conducted by Mr. Claassen or that he was aware, or should have been aware of the conditions. Under the circumstances, I conclude that Inspector Smith had no credible basis for assuming that Mr. Claassen failed to conduct an adequate preshift examination. Accordingly, the order IS VACATED.

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#### The Unwarrantable Failure Issue

MSHA's posthearing proposed findings and conclusions simply conclude that the cable and accumulations violations were the result of Helvetia's unwarrantable failure to correct the violations. There is absolutely no supporting arguments for this conclusion, and I can only assume that MSHA believes the violations were unwarrantable simply because Helvetia Coal was negligent, or that Mr. Claassen failed to detect the violations during his preshift examination. At the same time, MSHA's proposed findings state that "the operator's negligence was accurately assessed as moderate" as to all three violations. Further, Inspector Smith conceded during the hearing that he subsequently modified his negligence findings, and copies of the modifications are of record (exhibit G-1, G-3, and G-4).

On the facts of this case, I believe one can reasonably conclude that Inspector Smith issued the orders in question because of his unsupported conclusions and assumptions that preshift examiner Claassen was indifferent or lackadaisical in going about his duties. Since I have vacated the order on this issue, there is no need to address the unwarrantable failure question with respect to that violation. As to the cable and coal accumulations violations, the question of whether they were unwarrantable failure violations necessarily must focus on those particular conditions. On the facts of this case, there is no evidence that the cited conditions were the result of Mr. Claassen's purported indifference or lack of diligence. Nor is there any evidence that Helvetia Coal was indifferent or acted less than diligent in allowing the conditions to exist.

In view of the foregoing, I conclude and find that MSHA has failed to establish that the cable and coal accumulations resulted from Helvetia Coal's unwarrantable failure to comply with the requirements of sections 75.517 and 75.400. Accordingly, the inspector's findings in this regard ARE VACATED, and the section 104(d)(2) orders in question ARE MODIFIED to section 104(a) citations, and ARE AFFIRMED as modified.

#### The "significant and substantial" Issue

In its posthearing proposed findings and conclusions with respect to the power cable citation, No. 2909293, MSHA asserts that the gravity of an injury resulting from the violation "was appropriately assessed as fatal, as the miners were exposed to a potential electrical shock hazard." MSHA also asserts that the area "is used as a supply haulage

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roadway, so the likelihood of an injury is reasonably likely." However, Inspector Smith confirmed that he subsequently modified his gravity findings on the face of his citation to reflect "no lost work days," "unlikely," "no individuals exposed to any hazards," and he modified and deleted his "S & S" finding. Under the circumstances, I fail to comprehend how anyone can reasonably conclude that a fatality would have resulted from the violation.

Mr. Smith conceded that the cable is advanced as the mining cycle is advanced, and he confirmed that during a conference held after the citation was issued Helvetia produced records to confirm that at the time the violation was issued, the cable was scheduled to move, and in fact was moved. Under the circumstances, I believe it is reasonable to conclude that the violative condition would not have gone undetected, and that it would have been corrected before any further damage to the cable would have occurred. However, since the inspector deleted his "S & S" finding, that issue is moot.

#### History of Prior Violations

Exhibit P-5, is a computer-printout summarizing the mine compliance record for the period August 3, 1982 through August 2, 1984. That record reflects that Helvetia Coal has paid civil penalty assessments totaling \$19,798, for 398 violations issued at the mine during the 2-year period. Thirteen prior violations of section 75.517, and 45 prior violations of section 75.400, are noted on the printout. I do not consider this to be a good record of compliance, and that fact is reflected in the civil penalties which I have assessed for the violations which have been affirmed.

#### Good Faith Abatement

The parties have stipulated that the violations were timely abated, and that Helvetia Coal exhibited ordinary good faith compliance in this regard. I adopt this as my finding in this case and have taken it into account in assessing the civil penalties.

#### Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The information of record as noted in the stipulations reflects that Helvetia Coal is a large mine operator, and

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the parties have stipulated that the proposed civil penalties will not adversely affect Helvetia's ability to continue in business.

#### Negligence

I conclude and find that the cited coal accumulations and cable violations resulted from the operator's failure to exercise reasonable care, and that its failure to correct the conditions before they were discovered by the inspector constitutes ordinary negligence.

#### Gravity

With regard to the cable citation, the parties have stipulated that there was no damage to the cable ground monitoring system, and no visual damage to the internal cable conductors. However, Inspector Smith's testimony reflects that the cable had been subjected to some abuse, and when he observed it appeared to have been "knicked" and had scuff marks on it. While it is possible that this occurred while advancing or dragging the cable on the mine floor, the fact remains that it was hanging down and not secured high enough to prevent it from being struck by passing machines. Continued damage of this kind, although somewhat minor at the time, could have led to more serious problems. Under the circumstances, I find that this violation was serious.

With regard to the coal accumulations violation, while it is true that the coal had been rock dusted and the surrounding area was in condition, the coal accumulations were not rock dusted and were black. These accumulations were present over an area 10 feet wide and 5 feet long, and they ranged from 3 to 39 inches in depth. Although it appears that the coal was "dumped" in the crosscut, its existence in the working section presented a possible or potential fire hazard. Accordingly, I find that this violation was serious.

#### Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

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		30 C.F.R.	
Citation No.	Date	Section	Assessment
2409293	8/3/84	75.517	\$ 150
2409294	8/3/84	75.400	\$ 250

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above in the amounts shown within thirty (30) days of these decisions and order, and upon receipt of payment by MSHA, these proceedings are dismissed.

George A. Koutras  
Administrative Law Judge