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

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

v.

JIM WALTER RESOURCES, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. SE 85-48  
A.C. No. 01-01247-03637

No. 4 Mine

DECISION

Appearances: George D. Palmer, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Birmingham, Alabama, for the Petitioner;  
Harold D. Rice and Robert Stanley Morrow,  
Esqs., Jim Walter Resources, Inc., Birmingham,  
Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with an alleged violation of mandatory safety standard 30 C.F.R. 75.316, and 30 C.F.R. 75.1712-3(a). The respondent filed a timely answer and a hearing was convened in Birmingham, Alabama. The parties waived the filing of written posthearing proposed findings and conclusions, but were afforded an opportunity to make oral arguments on the record during the course of the hearing. Their respective arguments have been considered by me in the course of this decision.

Issue

The issue presented in this case is whether the respondent violated the cited mandatory safety standards in question, and if so, the appropriate civil penalties that should

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be assessed based upon 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, Pub.L. 96-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 20 C.F.R. 2700.1 et seq.

#### Stipulations

The parties stipulated that the respondent and the subject mine are subject to the jurisdiction of the Act, that the respondent is a medium-size operator, and that the imposition of civil penalties will not affect the respondent's ability to continue in business. They also stipulated that the respondent's history of prior violations is average and that the violations were abated in good faith.

#### Discussion

Section 104(a) "S & S" Citation No. 2482846, issued by MSHA Inspector Terry Gaither on December 11, 1984, cites a violation of mandatory safety standard 30 C.F.R. 75.316, and the condition or practice cited is described as follows:

The approved ventilation methane and dust control plan was not being complied with in the overcast over the intake air entry (1) crosscut inby the No. 11 section switch in that the overcast wall separating the belt entry and tracks (intake) had a hole approximately 12 feet by 4 feet.

Section 104(a) "S & S" Citation No. 2482924, issued by MSHA Inspector Thurman E. Worth on December 4, 1984, cites a violation of mandatory safety standard 30 C.F.R. 75.1712-(3)(a), and the condition or practice is described as follows:

The bathing facilities and change rooms were not being maintained in a sanitary condition in that the drains for the showers were

backing up and not carrying the bathing water out of the showers. The floor drains in the changing rooms were backing up with the bathing water out into the changing room floors.

#### Petitioner's Testimony and Evidence

Kenneth W. Ely, MSHA Health Inspector Specialist, confirmed that he is involved in the approval of mine ventilation plans, and that once an operator submits a plan for approval, he studies it and makes recommendations to the district manager. He confirmed that mandatory safety standard section 75.326 prohibits the use of belt air to ventilate an active working place. He also confirmed that exhibits G-1 are documents in connection with a petition for modification of section 75.326 for the respondent's No. 4 Mine. He confirmed that an August 27, 1979, decision by the Secretary's Administrator for Coal Mine Health and Safety granting the modification was subject to certain conditions as stated at pages 7 and 8 of the decision. The particular conditions are those found in paragraph 6, page 7, which requires that permanent stoppings separating the belt haulage and intake escapeway entries shall be continuous, and the stipulation found on page 8 with respect to the construction of the stoppings (Tr. 11-14).

Mr. Ely stated that the construction of the stopping in question is a substantial project, and he likened it to the building of a virtually airtight brick or block wall for the physical separation between the intake escapeway and the beltline (Tr. 14). He defined the term "continuous" in the context of the stopping to mean "from the bottom of the intake air shafts or the intake where your beltlines actually begin, continuous to your section, and this is defined as wherever your loading point is, in the working section" (Tr. 13).

Mr. Ely identified exhibit G-3, as a March 3, 1983, supplement to the No. 4 Mine ventilation plan, whereby the respondent requested permission to "point feed," at necessary locations, the belt entry from the "smoke free" intake system. That request was approved by MSHA's district manager by letter dated March 25, 1983. Mr. Ely explained the basis for the approval of the supplement to the ventilation plan (Tr. 15-16). He confirmed that this approved proposal by the respondent was lawful and permissible under the 1979 modification petition approval (Tr. 16). However, he qualified his answer by stating as follows (Tr. 16-17):

A. Going back now, I really think we exceeded the bounds that were set up in the 1979 decision. Because in the decision of '79 it said that the construction of that stopping line would be, you know, with permanent type stopping material and built in a workmanlike manner and would be continuous.

And by permitting an open hole in order to gain access for the air to get in there, we actually changed the wording for the "continuous" and changed the method of construction for the stopping.

Mr. Ely identified exhibit G-2, dated May 14, 1985, as a further modification approved after the issuance of the citation in this case for the original modification granted on August 27, 1979. He explained that when the ventilation problems developed in 1983, "we got into point feeds with Jim Walters at all their mines, and we discovered then as we were getting more and more into point feeds that the original petition did not make reference to point feed or did not make reference to a way to admit this air from your intake into your beltline" (Tr. 17). At that point in time, contact was made with the respondent's ventilation department, and they were informed that an additional modification to the original petition had to be filed "in order to gain some language that would give some leeway in order for the different things that had come about," particularly with respect to new technological advances in the methods for construction of stoppings. It was MSHA's view that the respondent should avail itself of the ventilation plan approval process to allow it to adopt these new construction advances, instead of resorting to petitions for modification each time something new was developed (Tr. 18).

Mr. Ely quoted paragraph 2 of page 2 of the May 14, 1985, approval (exhibit G-2), particularly the words "other ventilation controls" and stated "that's where point feed came into being" (Tr. 18). He pointed out, however, that in its original "point feed" letter of March 3, 1983, the respondent assured MSHA that the control device used for point feeding would be constructed according to the method approved for a standard regulator with sufficient material readily available to completely close the openings, if necessary, and that all "point feed" locations will be posted on a map at the minesite and will be shown on the current ventilation map to be submitted in the next regularly scheduled 6-month update of the Ventilation System and Methane and Dust Control Plan.

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The plan update would then include a drawing depicting the method of construction for the "point feed" device (Tr. 19-20).

Mr. Ely identified exhibits G-7 as the respondent's projected 1-year ventilation map dated December 15, 1984, which was received in his office on January 13, 1984. He confirmed that the location identified by Mr. Gaither on this map is not designated as a point feed location. He also confirmed that the map contains no regulator construction locations, and the only thing depicted is a track entry (Tr. 28).

Mr. Ely explained the method which should be used for development of point feed locations in the mine pursuant to the existing ventilation plan. He stated that point feeds are methods of controlling the air flow from an intake into a belt, and that they are to be constructed according to "regulator specifications." Such locations are constructed with intent, and the installation of a point feed is a planned installation "and not something that you would just go down and quickly knock a hole in for a problem that might develop on a moment's notice." The point feed should be constructed according to a submitted plan, with enough material available to close the regulator in the event a problem were to develop or found. The term "as necessary" as used in his review of the 1983 ventilation plan amendment, as well as the 1984 plan, conveys a meaning that such point feeds are to be placed at planned locations for a specific purpose to regulate the air flow. Since ventilation changes are involved, and since there are guidelines for installing ventilation controls, the term "as necessary" should not be interpreted to permit haphazard construction of point feeders, or to permit their installation at every crosscut or at every two crosscuts (Tr. 29).

Mr. Ely pointed out that in his review of the mine maps, there are only eight point feed locations designated as such on the current map submitted for approval, and that on the 1983 map only one location is designated as a point feed. In his view, such point feeds are constructed with intent and purpose, and are not something that is done frivolously or at a moment's notice (Tr. 29-30).

Mr. Ely described a "point feed" as follows (Tr. 32):

Q. Would you explain to us what a point feed is?

A. Okay, my concept of a point feed is a point between the intake and the belt where you build a ventilation control similar to or akin to the construction listed in the ventilation plan as a regulator, and it is used --the purpose of it serves to admit intake air into the beltline, and into the belt air course, the same thing.

Mr. Ely identified exhibit G-4, as a July 14, 1984, MSHA approval of the respondent's ventilation plan which had been submitted by the respondent on November 16, 1983. He pointed out that item 12 on page 3 of the approved plan requires that any point feed location be posted on the mine map at the mine site and is also shown on the current ventilation map of the ventilation plan. He also pointed out that in the original point feed approval submitted by the respondent on March 3, 1983, exhibit G-3, all point feed locations were required to be posted on a map at the minesite and they were required to be shown on the current ventilation map to be submitted in the next regularly scheduled 6-month update of the ventilation plan (Tr. 20-22).

Mr. Ely testified that the effect of the change in the language as shown on the current ventilation plan map is that the respondent must submit any point feed location with its approved map as well as with the 6-month review of its ventilation plan. The respondent must also submit a projection map which projects for a year in advance any projected ventilation devices for the mine areas to be developed. These requirements would require any point feed locations to be put on the maps submitted to MSHA prior to their opening (Tr. 22).

Mr. Ely alluded to three mine maps which are applicable to this case, and he confirmed that he has discussed them with Inspector Gaither, and that Mr. Gaither has pointed out to him what he will testify to with respect to the location of the point feed in issue in this case (Tr. 22-23).

Mr. Ely identified the current mine map as exhibit G-5, and he confirmed that it is dated January 27, 1985, and that it was received in his office on April 11, 1985. He marked the map to show the location of the alleged point feed in question in this case as pointed out to him by Mr. Gaither (Tr. 25-26).

Mr. Ely identified exhibit G-6 as the respondent's mine map dated December 12, 1983, and received in his office on

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February 6, 1984. He confirmed that this map is the only official map preceding the January 27, 1985, map. He also confirmed that it was submitted as part of the respondent's ventilation plan approval, which MSHA considered as an accurate depiction of the mine conditions. Neither map has any markings or designations to suggest that any of the locations pointed out by Mr. Gaither are point feed locations. The only markings at these locations are overcast depictions (Tr. 27). Although point feeder locations are shown on the map, the nearest one from the location pointed out to him as the alleged point feed in this case is 1,200 to 1,600 feet away (Tr. 28).

Mr. Ely confirmed that the standard construction method for a regulator is shown on the diagram following page 3 of the approved ventilation plan, exhibit G-4). Both "wooden plank" and "sliding door" methods of construction are shown (Tr. 34).

On cross-examination, Mr. Ely confirmed that at the time of the issuance of the citation in December, 1984, the respondent had MSHA approval to point feed under the conditions of the respondent's exhibit G-3 letter of March 3, 1983, and the subsequent MSHA approval of that method. He also confirmed that the ventilation plan in effect at the time the citation was issued was the one approved by MSHA on July 14, 1985, exhibit G-4 (Tr. 35).

Mr. Ely stated that in the event a point feed was deemed necessary and constructed after submission of the mine map to MSHA, it would not appear on the map. In the event the point feed were then closed because it was no longer needed, it would not appear on the next map submitted to MSHA (Tr. 37). Any changes made with regard to point feeders should be posted on a current basis on the map kept at the mine and any projected point feeds are required to be shown on the maps submitted to MSHA (Tr. 38). The ventilation plan provides that anticipated major changes in mine ventilation be submitted to MSHA for approval before the changes are adopted, and that any deficiencies in ventilation detected during an inspection could result in the revocation of the plan (Tr. 41). Mr. Ely stated that he did not know the basis for the citation which was issued in this case, and he was not involved in the decision to issue the citation (Tr. 50).

MSHA Inspector Terry Gaither testified as to his background and experience, and he confirmed that he issued the citation after observing that the wall of the overcast between the belt entry and the intake entry had a hole in it

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measuring approximately 12 feet by 4 feet, with a piece of line brattice over it. He asked for an explanation from company safety inspector Eddie Nicholson, and someone in the inspection party stated that the hole was taken out of the overcast wall in order to take a belt header out of the belt entry (Tr. 52-53).

Mr. Gaither stated that after he informed Mr. Nicholson that he was in violation, Mr. Nicholson replied "We'll call this a point feed." Mr. Gaither then informed Mr. Nicholson that he could not randomly remove a stopping and call it a point feeder when in reality the wall was taken out to facilitate the removal of a piece of equipment (Tr. 53).

Mr. Gaither described the edges of the stopping as "rough" and he stated that the cinder or slag blocks had been knocked out and scattered around. Mr. Gaither observed no other materials in the area, and he confirmed that 14-foot long boards would have been required to cover up the hole which was knocked out of the wall (Tr. 54-55).

Mr. Gaither stated that he discussed the matter further with Mr. Nicholson, and Mr. Nicholson was under the impression that the purpose of the hole was to facilitate the removal of the belt header and that the hole was to be sealed after this equipment was removed. Mr. Gaither confirmed that the citation was orally issued underground and that he reduced it to writing on the surface and fixed the abatement time as the next day after discussing it with Mr. Nicholson (Tr. 55).

Mr. Gaither confirmed that he was familiar with the mine maps, exhibits G-5 through G-7, and that the location of the cited hole was not shown as a point feed on the working map kept at the mine office (Tr. 56).

Mr. Gaither stated that he discussed the violation further with Mr. Nicholson and assistant mine manager Eddie Ball during a close-out conference held later in the week. Mr. Ball stated that the cited location was a point feed, and he was under the impression that the brattice could be removed when necessary to remove equipment and that the location could be designated as a point feed. Mr. Gaither could not recall telling Mr. Ball that the location was not shown as a point feed on the mine map, and he could not recall Mr. Ball mentioning that it was (Tr. 57-58).

Mr. Gaither stated that he had never seen a point feed located at an overcast, and in his opinion the location was

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not an intended or bona fide point feed. He believed that the hole was used to remove the belt head equipment and that it was to be sealed up after the removal of the equipment (Tr. 59). Mr. Gaither confirmed that he reviewed the mine map kept in the mine office on the day he issued the citation and the cited location was not designated as a point feed (Tr. 60).

On cross-examination, Mr. Gaither stated that he did not issue the citation because the asserted point feed location was not on the mine map. He conceded that he considered the fact that the stopping wall was not constructed as a planned point feed, but insisted that the citation was issued because the belt entry and intake entry were not separated at that point. There was a hazard presented by this condition, and the regulator was initially installed to separate the two entries (Tr. 61-62).

Mr. Gaither confirmed that while he personally disagreed with point feeding because in the event of a fire on the belt line the smoke will get into the intake and into the sections, he conceded that the approved mine ventilation plan did not prohibit point feeds. He then stated that "the basis for the citation was them not complying with the ventilation plan on the installation of point feeds" and because "a violation existed" (Tr. 62).

Mr. Gaither confirmed that while the ventilation plan did not prohibit the moving of a belt header through a point feed, Part B, page 1 of the plan specifically covered the movement of equipment in or out of a belt entry (Tr. 63).

In response to further questions, Mr. Gaither stated that the normal size of a point feed opening is 4 to 6 feet wide by the height of the entry. He had never seen an opening the size of the hole in question which measured 4 feet high by 12 feet wide (Tr. 63-64).

Mr. Gaither stated that the permanent stopping in question is defined at page 1 of the ventilation plan, exhibit G-4, and it was the wall of the overcast. The purpose of the device is to maintain air separation, and it is required to be maintained intact. The existence of the 12 x 4 foot hole led him to conclude that the stopping was not constructed or maintained to maintain permanent separation of the air, and that this condition violated the ventilation plan (Tr. 66).

Mr. Gaither confirmed that at the time the citation was issued, he was aware of the fact that the respondent had

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filed a petition for modification which approved the use of point feeds as part of the mine ventilation plan (Tr. 68). He also confirmed that a properly constructed and maintained overcast separation is one which is completely constructed as a cement block wall similar to the sketch shown in the approved ventilation plan (Tr. 71).

Mr. Gaither stated that: abatement was achieved by replacing the blocks in the hole and completely cementing it to make a permanent separation between the belt and the intake. He described a point feed as "a standard-sized hole framed in with boards," and stated that boards are taken off or added to regulate the amount of air passing through the opening (Tr. 72). A totally cemented wall is not, by definition, a point feed (Tr. 72).

Mr. Gaither confirmed that point feeds per se are not violations, but that "if it wasn't on the mine map and hadn't been approved, depending on the circumstances, it could be a violation" (Tr. 74). Once a point feed is approved by MSHA, it must be properly maintained (Tr. 75).

Mr. Gaither confirmed that he was in the mine a day or so prior to his inspection, and that his notes reflect that there was a hole in the stopping in question, but that he did not issue a citation (Tr 76). He also confirmed that he is aware of no regulatory definitions of "point feeds," and he stated that "its an intake regulator \* \* \* no matter what you call it" (Tr. 77).

#### Respondent's Testimony and Evidence

Deputy Mine Manager Eddie G. Ball testified that at the time the citation was issued the existing mine map reflected the existence of a point feed at the location cited by Inspector Gaither, and that it had been so designated on the map for "only a day or two" (Tr. 82). He stated that the point feed had not been projected, planned, or shown on the map previously submitted to MSHA because they cannot be planned. He explained his answer further as follows (Tr. 82-83):

Q. And is there any particular reason why that point feed would not have been projected or planned or shown on the map that had been submitted to MSHA several months before that?

A. Yes, sir. On point feeds you can't plan them, say, two or three or six months ahead.

You might think you can, but you don't know what geology is going to do to you or what kind of gas bleeders you're going to run into.

You really don't know what your ventilation is going to do to you, because you can have good ventilation today, but as your sections keep advancing out and you keep advancing brattice lines, all of a sudden you lose pressure.

So then you have to make some kind of moves to either parallel more air out to it or parallel more air away from it. And, of course, with a belt line, sometimes you have to parallel more air to it, particularly if there is something back on your belt line somewhere creating a restriction behind you.

Q. Okay, now, this particular point feed was shown on the mine map previous to being constructed?

A. Yes, sir.

Q. What about after the citation and the abatement? Was it still shown on the map?

A. Yes, sir, it was.

Q. On the mine map there at the mine?

A. Yes, sir, it was.

Q. Would it have been shown on any future subsequent maps that were submitted to MSHA after it was closed off?

A. No, sir, there's no reason to; we closed it back off. But, even so, we still wouldn't have. Because immediately upon pulling that belt drive out of there we would have built a stop and a permanent stopping in by it so that we could tear the entire overcast out.

Q. So that, really, in this particular situation it would have been impossible for it, or impossible for it, to be shown on a prior map or subsequent map in that six-month projection that is sent to MSHA, is that correct?

A. It would be highly improbable that you would, because you would only be there for the length of time that you need it. It's kind of like regulators you build in return; they're only there as long as you need them.

Mr. Ball stated that he visited the location in question immediately upon being informed that the citation had been issued, and he confirmed that the point feed was constructed under his direction. He also confirmed that he was familiar with the ventilation plan specifications for constructing point feeds, and stated that the point feed in question was constructed in accordance with the plan (Tr. 84).

Mr. Ball denied that a brattice curtain was simply over the hole, and he stated that edges of the hole in the wall were "rough knocked-out." He stated that the wall was "knocked straight down, as near straight as the masons could get it." Two seven-by-nines were on each side of the hole, and it was completely boarded up and a piece of curtain was over the top of the hole. He stated that the stopping was boarded up because "we intended to pull the belt drive out of there and immediately build a stopping behind it." However, "our belt foreman got tied up in other emergency work that had to be done, so we just boarded it up and left the project until he came back to it in a week or so" (Tr. 86).

Mr. Ball stated that he was aware of the fact that Mr. Gaither had previously been in the mine because Mr. Nicholson pointed out to him (Ball) that a hole had been knocked out of the stopping and he did not know whether materials were there. In response to Mr. Nicholson's inquiry as to whether he intended to make the hole a point feed, Mr. Ball informed him that he did, and Mr. Ball stated that he informed the general mine foreman that he wanted the stopping built as a point feed that night exactly in compliance "to the letter of the law" (Tr. 86). Mr. Ball stated that he went to the cited location within an hour or two after Mr. Gaither issued the citation, and that the point feed was boarded up (Tr. 87). He described the stopping as 50 1/2 inches high and 10 feet wide on the opening (Tr. 87).

Mr. Ball stated that approximately 6 months or a year prior to the issuance of the citation, a stopping was completely taken out in order to remove a belt drive. Another MSHA inspector (Zimmerman) who was inspecting the mine advised him that he would issue a citation because of the opening between the belt and track. Mr. Zimmerman advised him that a

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ventilation control was required and suggested that a point feed similar to one used in the respondent's No. 3 Mine be considered. Mr. Ball stated that this suggestion prompted him to install point feeds in the No. 4 Mine in order to move equipment in and out and to use them for ventilation control (Tr. 87).

Mr. Ball stated that prior to the issuance of the citation in this case, MSHA has never indicated that point feeds could not be used for ventilation and for moving out a piece of equipment. He stated that the use of point feeds for both purposes are accepted methods since the air may be controlled "in the event something happens." He confirmed that point feeds have been constructed and closed the same day because of certain ventilation problems, and he stated that they are constructed "as needed" (Tr. 88-89).

Mr. Ball stated that the cited stopping was closed off and completely blocked because Inspector Gaither fixed the abatement time as the next morning and did not agree with the point feed at that location. Mr. Ball stated that Mr. Gaither took the position that the point feed could not be constructed and used to remove equipment and that it served no ventilation purpose (Tr. 90). Since Mr. Gaither fixed the abatement as the following morning, Mr. Ball believed "the simplest way out of it is to build it right back now" (Tr. 90). Mr. Ball stated that Mr. Gaither never mentioned that the point feeder was not shown on the map or that the hole was not constructed as a point feed. He insisted that the entire context of his conversation with Mr. Gaither was "that is not what a point feed is for and you cannot use it for that" (Tr. 90).

Mr. Ball stated that in a citation conference with MSHA Inspector Jerry Early in Birmingham, Mr. Early informed him that a point feed cannot be used for moving equipment, and Mr. Early said nothing about improper construction or the fact that the point feed was not shown on the map (Tr. 91).

On cross-examination, Mr. Ball stated that the decision to move the belt header was made 2 weeks prior to the inspection, and the opening in the wall was started the day before the citation was issued. Instructions were given to build the point feed in the side of the overcast in order to move the belt drive. Once this was done, the stopping would be put back in place and the overcast would be removed because it was no longer needed (Tr. 93).

Mr. Ball stated that even though the hole was boarded up, since it was like a regulator, it was still constructed

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as a point feed, even though it was inactive at the time. He confirmed that while the whole purpose of the point feed was to remove the belt drive, the air had to be controlled while they were in the process of removing the drive, and the control device built for this was the point feed (Tr. 98). He further explained as follows at (Tr. 98-100):

JUDGE: Well, that's a little different. I get the impression that that was the only way that you could physically remove that belt-header was through this permanent stopping, so you knocked it down and converted it into a point feed to facilitate the removing of the belt-head? Is that correct?

THE WITNESS: Yes, sir. This belt--this section had mined out. All of the belt structure the ropes, the structure and everything had been carried out through manddoors. But you can't get the belt drive out; it's too big. We don't even want the overcast there anymore. But economically and what you say is best economically for us, and to still control the air between the belt and the track, then build a point feed. If something happened you could quickly board it up, and you've got this control that they want.

JUDGE: But you didn't actually build the point feed. You converted a permanent stopping into a point feed didn't you?

THE WITNESS: Yes. We kick out the sides of the walls and build a point feed.

JUDGE: And his question was, you did it with the specific purpose of moving the belt-header, correct?

THE WITNESS: Yes, but--

JUDGE: Hear me out, now. Your initial thought was: "How are we going to get the belt-header out?"

THE WITNESS: Yes.

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JUDGE: So you converted a permanent stopping into a point feed?

THE WITNESS: Yes.

JUDGE: And your testimony is the reason you did that was to take the belt-header out?

THE WITNESS: Yes sir.

JUDGE: But you had to do something to control the air?

THE WITNESS: Yes, sir. So we built the point feed.

JUDGE: Well, which came first, the chicken or the egg?

THE WITNESS: Well, you can't get the drive out until you build the point feed, so the sequence of events is--this is an overcast; it's not just a normal stopping.

We had to go down there and build two cribs on each side. Then we put three steel rails over the top there to support the roof of this overcast.

JUDGE: All right?

THE WITNESS: And then at that point we just knocked these walls out through the block to the side, set the two seven by nines in there, take the boards, and just board it up like you do an overcast.

JUDGE: All right.

THE WITNESS: The first time Mr. Gaither was there they hadn't boarded it all up. They were in the process of building it.

JUDGE: Well, the first time he was there did that get his attention?

THE WITNESS: That got his attention. Mr. Nicholson is the one that told me. "Eddie,

you've got this hole in the brattice down here, it's not finished, and he was questioning it."

That's when I told Mr. Oliver, our general mine foreman: "You see that that is constructed proper as the law requires."

JUDGE: Do you know whether anybody specifically told Mr. Gaither when he initially saw that opening what your intent was?

THE WITNESS: Yes. Mr. Nicholson informed us that he told him what we were doing.

JUDGE: But did you tell Mr. Gaither?

THE WITNESS: No, sir; he did not ask me. Until after this citation I had no contact with him.

Mr. Ball stated that when he viewed the "hole" in question shortly after the citation was issued, it was a well constructed regulator which was in compliance with the ventilation plan. He confirmed that it was constructed in accordance with item No. 12 of the plan, and in accordance with the plan sketches for a wood-board type regulator (Tr. 109).

Inspector Gaither was called in rebuttal, and he testified that the condition of the hole when he observed it at the time he issued the citation was not as described by Mr. Ball. Mr. Gaither surmized that someone started to work on the hole by putting up headers and boards before Mr. Ball arrived on the scene (Tr. 114). Mr. Gaither stated that the belt header equipment could have been removed by constructing a door and pulling it through the door, or the stopping could have been removed and an air lock curtain installed during an idle shift so that the resulting ventilation changes could not affect the men who normally work the section. Once the equipment was removed, the stopping could be replaced (Tr. 115).

Mr. Gaither stated that the permanent overcast has never been removed, and that the respondent is free to remove it at any time. He recommended that any equipment be removed during an idle shift when no miners are inby, and that this could be done by putting up check curtains, taking down the wall, and then putting it back up after the equipment is removed (Tr. 117).

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Mr. Gaither stated that when he observed the hole it was covered with a brattice cloth and he observed no boards installed across it. The hole did not look like any of the other point feeders in the mine, and he saw nothing to indicate to him such a point feeder was being constructed (Tr. 118). When asked about his previous observation of the hole, Mr. Gaither responded as follows (Tr. 118-119):

Q. Had you seen point feeders in this mine before?

A. Yes, sir.

Q. Did this look like a point feeder?

A. No, sir, it didn't.

Q. Did it look like a point feeder in being? One that was being constructed?

A. I didn't see anything there to indicate that it was being constructed.

Q. Well, now, when you saw it the day before, the opening, what conjured up in your mind then? Why didn't you issue a citation?

A. I don't really know, unless I went back and checked the plans. I didn't have the ventilation plan with me or the petition for modification. I probably went back and checked the plans.

Q. Well, now, on Monday, when you were there before, you saw this opening, was your curiosity aroused as to what that opening was doing?

A. Yes.

Q. And did you have a conversation with Nicholson?

A. Yes, sir.

Q. And what was that? What were you led to believe from him?

A. I was led to believe that it was in there to take equipment out.

Q. To take equipment out?

A. They had a header there to take out.

Q. Did you have any conversation with anyone else that day?

A. No, I don't recall; I don't think so. I don't think we talked about it. I probably told them then that it needed to be blocked up.

Q. But you issued no citation?

A. No, sir.

Q. And then the next day when you went back there you decided to issue the citation?

A. I don't know if it was the next day, but after that I did. If they were going to take the equipment out, they should have had it out and the hole blocked back up.

Mr. Gaither stated that a point feeder may not be constructed simply to facilitate the removal of equipment. He confirmed that he issued the citation because the stopping was not constructed in accordance with the ventilation plan, and the hole in the stopping did not maintain air separation between the belt and the intake. A point feed with a door which is used solely for ventilation control would not be a violation. As long as the ventilation is not interrupted, it would not be a violation to take equipment through the stopping door (Tr. 121).

Mr. Gaither stated that he did not determine whether the ventilation was interrupted with the brattice over the hole in the stopping, and he took no air readings (Tr. 128). The ventilation plan required that the separation of air be maintained with a permanent stopping, and since the stopping had a hole in it which was covered by a brattice it was no longer a permanent stopping. Although air separation may have been maintained with the brattice cloth, it was not maintained by a permanent stopping as required by the plan (Tr. 129).

Mr. Ely was recalled and he stated that the purpose of the introduction of the point feed in 1983 was to allow air to be admitted from the normal air intake into the belt entry

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in order to supplement the air in the belt entry and to preclude the accumulation of noxious and flammable gases. The integrity of the stopping line must be maintained in order to maintain the air flow in the designated direction and to maintain the intake escapeway "smoke free" in the event of an emergency. A physical separation must be maintained, and if a hole is knocked out of the stopping, a pressure change would result, and in the event of a fire it could spread from one entry to another (Tr. 130-132).

Mr. Ely stated that under section 75.322, any ventilation changes must be done on idle work shifts. Once a hole is knocked out of a stopping, a determination must be made as to the effect of the hole on the ventilation currents in the mine, and one "cannot go down there and knock a hole whenever you feel like it" (Tr. 133). As long as the ventilation is not changed to the point where it materially affects the air supply on the mine splits, the use of point feeds is not prohibited (Tr. 133-134). Mr. Ely explained further at (Tr. 134-138):

Q. Earlier this morning when Mr. Palmer asked you if you had any idea or any notion as to why the inspector issued this citation you said you didn't. Now after hearing the inspector's testimony do you have any idea why he issued it?

A. Yes. From what I have heard this morning, I would have believed that the point feed was put there for the purpose of gaining access to this piece of equipment, not for the purpose of a ventilation control.

Q. Let's assume that was done. What does that violate?

A. What does--

Q. What's wrong with the operator constructing his point feed for the purpose of facilitating moving of the equipment?

A. Well, let's take it down the road a little bit.

Q. Let me just back up just a second. The operator in this case did not initially construct the point feed as such. He had a permanent stopping in there. And I used the term "converted." Isn't that--

A. I have no problem.

Q. That's what he did, right?

A. Converted it. You know, he had a purpose in mind. He had a job to do and he constructed this device to help him facilitate his job.

Q. But his first purpose when he put the permanent stopping in there was to have it as a permanent stopping, correct?

A. That is correct.

Q. We have to assume that if he had always wanted a point feed there he would have put a point feed there in the first place.

A. That's right.

Q. It seems much simpler than going to all the trouble of putting up a wall then knocking it out. In any event, he converted a permanent stopping into a point feed.

A. Right.

Q. And he did that for the specific purpose of getting out the belt-header and removing it.

A. That's correct.

Q. Now, what's illegal about that?

A. You are destroying the integrity of a stopping line between an intake escapeway and a belt entry. And that is in violation of another regulation in the law.

Q. Well, why weren't these other regulations cited?

A. Because this stopping line serves the purpose for these other regulations, too. They have a dual purpose. You must maintain the integrity of that intake escapeway.

Q. And the inspector's contention here that by making this opening it failed to maintain the integrity of the stopping line, that's what the violation is all about?

A. That's right.

Q. Is that your notion as to why he issued that?

A. That's right. They failed to maintain the integrity of the stopping line. And if an operator were to carry it to the point that--to give you an example that was given this morning--a one-foot hole.

If I wanted a one-foot hole to facilitate the putting of rock dust in an area and so I knocked a one-foot hole, and my hose doesn't reach and I go on down here and I knock another hole, and pretty soon you've got a mine full of holes, and you have destroyed the integrity of that stopping line.

Q. And you think that this is the same principle that is involved here?

A. Well, it comes back to the intent again. Was the need there primarily to facilitate air flow, or was the need there primarily to facilitate the transference of this piece of equipment?

Q. Now, what if the mine operator in this case decided to put up a point feed to not only regulate the air but also to facilitate movement of equipment at some point in time? He knows he's going to mine so far and he's got to come back and take all of that equipment out of there, and he decides that's what he wants to do. Could he do that?

A. If the primary objective of that point feed is to facilitate the flow of air, we would have no problem.

Q. What's the primary purpose of a regulator under this mine control plan?

A. To regulate the flow of air to the different areas of the mine. If he has a regulator in his return, and a fire boss examiner on his weekly examination were traveling down that return and he wanted to step through it, I would have no objection to him stepping through that regulator.

Q. So in this case, even though there is no evidence or no showing that ventilation was in any way interrupted, or there was no impact on the ventilation by the punching of this hole through there and constructing the point feed, your theory would be that the integrity of that wall has still been changed?

A. That's right. And if we were to--if we had such a system that you could go down and destroy at will whatever holes you wanted to put holes in there, then you're destroying a separation of your intake escapeway from that belt entry. And if there was an emergency, or for whatever reason, you have less control the more you have.

Mr. Ely reiterated that the intent of constructing point feeders is to regulate air flow, and not to facilitate the movement of equipment (Tr. 139). He confirmed that point feeders were first introduced in the respondent's mines in 1982, and stated that they are peculiar to the area where those mines are located. He also confirmed that the respondent has received MSHA approval of its petitions for modification to use belt air in the faces, and that it is in the process of installing sealed monitor systems and other safeguards to achieve this and to remain in compliance with section 75.326 (Tr. 139-142).

MSHA Inspector Milton Zimmerman was called as the Court's witness to testify to the circumstances surrounding his issuance of four section 75.316 violations in February and August, 1984 (exhibits ALJ-1 through ALJ-4). Mr. Zimmerman confirmed that he issued the citations, and he commented that anytime he

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finds a stopping knocked out or a hole in the stopping, the respondent attempts to justify the conditions by commenting "Oh, it's a point feed." Mr. Zimmerman stated that in these instances, he knew the cited locations were not designated point feeds and in his view "it's just a hole in a stopping, and it shouldn't exist" (Tr. 157-158).

Mr. Zimmerman stated that he was not with Inspector Gaither during his inspection in this case and had no prior knowledge that he had issued a violation. However, had he observed the same condition as testified to by Mr. Gaither he would have issued a section 104(d)(2) order "Because it was definitely a violation of the ventilation plan, and management cannot go around knocking holes in overcasts and stoppings and putting a piece of line curtain over it" (Tr. 159-160).

Mr. Zimmerman stated that if the stopping cited by Inspector Gaither was in fact a point feeder the stopping boards would have been in place and stopping materials would have been readily accessible at the stopping location. Had the boards been in place with a line curtain, and if the stopping was in fact a point feeder, he would not have issued a citation. However, if the point feeder was not so designated on the mine map kept on the surface he would have issued a citation for failure to record the point feeder on the map as required by the ventilation plan (Tr. 160). He testified further as follows at (Tr. 160-161):

Q. But the fact that--the question of whether or not it's a point feeder is a question of fact, what it looks like and what it is, not whether it's on a map.

A. If it look like what Mr. Ball say it was, it was a point feed. If it look like what the inspector saw when he was there, it was definitely a hole in an overcast.

Q. Has this problem between the point feeds and permanent stoppings been a problem or a controversy at this mine between MSHA and the mine operator?

A. No controversy, just the fact that you see a hole in a stopping, and I guess Eddie Nicholson's name is on most of those, and you say, "Eddie, you got a hole in the stopping," and he say, "Oh, it's a point feed," you know.

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Q. What's he mean by that?

A. Just somebody knocked a hole in a stopping and they shouldn't have.

Q. But that never got him off the hook, did it?

A. No, sir.

#### Findings and Conclusions

Fact of Violation--Citation No. 2482846

The respondent in this case is charged with a violation of mandatory safety standard 30 C.F.R. 75.316, because of its failure to follow its approved ventilation methane and dust-control plan. The inspector who issued the citation found a hole in an overcast permanent stopping wall, and because of the hole, he concluded that complete air separation between the belt and intake was not maintained as required by the plan, and that the stopping was not constructed and maintained as required by the plan.

Respondent's counsel conceded that the applicable ventilation plan requires that all permanent stoppings be maintained as shown in the diagram for continuous mortar and brick construction, and that a hole in such stopping would constitute a violation of the plan (Tr. 149).

Respondent's position is that the cited overcast stopping location was in fact a properly designated point feeder under the approved ventilation plan. Respondent's counsel agreed that if I make a finding that the location was not a point feeder and simply a permanent stopping that was out of compliance with the plan, the citation would be affirmed. He also agreed that in the event I ruled that the location was a properly designated point feeder location, I could also find that it was not properly constructed and maintained in accordance with the plan, and still affirm the citation. Counsel also agreed that Inspector Gaither issued the citation because the integrity of the stopping was not maintained (Tr. 149-152).

Respondent's counsel asserted that the pivotal problem with this case is the fact that MSHA's prior approval for point feeding in the mine conflicts with the views of Mr. Ely,

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Inspector Gaither, and possibly other individuals in the district office with respect to the concept of point feeding. Counsel takes the position that since point feeding has been approved for its mine, and since it has the discretion under that approval to determine where a point feed should be located and how it is to be used, it should not be penalized simply because it relied on that plan approval. Counsel also asserted that questions concerning the respondent's intended use of point feeds, and whether or not they appear on the mine map are not germane to the citation issued in this case. Counsel maintains that the issue here is whether or not it was proper to move a piece of equipment through a stopping wall which the respondent had decided was a point feed under its approved plan (Tr. 167-168).

Respondent's counsel confirmed that the respondent did not contest the four ventilation plan violations previously issued by Inspector Zimmerman, and he conceded that the violations were issued for failure to maintain complete air separation (Tr. 162). I take note of the fact that two of the violations were issued by Mr. Zimmerman after he found missing blocks in one stopping and another stopping which had been knocked out (exhibits ALJ-1, ALJ-2). Another violation, exhibit ALJ-3, is a section 104(d)(2) order which Mr. Zimmerman issued after finding that a missing stopping resulted in the failure to maintain air separation between the belt line and intake escapeway. Inspector Zimmerman noted that such air separation must be maintained except where point feeders are listed on the mine map. The order was terminated after a permanent stopping was constructed to separate the belt from the intake.

Petitioner's counsel asserted that the size of the hole in the stopping cited by Inspector Gaither supports a conclusion that the stopping was never intended to be used as a point feeder in the first place (Tr. 68). Coupled with the fact that the inspector observed no stopping materials readily available at the location, and the fact that mine map did not show the location as a pre-planned point feeder, counsel suggested that the respondent has made a feeble attempt to establish that the overcast stopping was a bona fide point feeder which was used to facilitate the movement of belt equipment (Tr. 68-70).

Although the respondent has the discretion under its approved plan to establish point feeders at necessary locations, the conditions under which this may be done are spelled out at page 3, paragraph 12 of the plan. Those conditions require that a point feeder location be so designated

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on the current mine map and also be shown on the current ventilation map. A second condition is that the point feeder control device be constructed according to the approved method for constructing a standard ventilation regulator, with sufficient materials readily available to completely close the opening if necessary.

Assistant Mine Manager Ball contended that the cited permanent overcast stopping was in fact an "inactive" point feeder which was constructed as such for the specific purpose of facilitating the removal of the belt drive. He also contended that this was done to control the air during the week that the belt drive was planned to be removed (Tr. 97). However, he then admitted that the permanent stopping was actually "converted" into a point feeder by knocking down the sides of the walls and installing boards. I find Mr. Ball's position to be rather contradictory. It seems strange to me that the respondent would go to the expense of constructing a solid masonry block wall stopping, only to knock it down to remove a piece of equipment that it knew had to be removed in the first place.

Mr. Ball testified that the purported point feeder was so designated on the mine map at the time the citation issued. However, the mine map was not produced at the hearing, and Inspector Gaither testified that the location of the permanent stopping which he cited was not shown as a point feed on the working mine map maintained at the mine office.

Inspector Gaither testified that even if the hole had been 1-foot by 1-foot, he would have issued the citation because air separation was not being maintained as required by the plan (Tr. 68). Mr. Gaither stated that in order to maintain air separation, the cited overcast permanent stopping was required to be constructed and maintained as a solidly cement block and mortared wall as depicted in the sketch which is a part of the plan. He confirmed that the blocks were replaced and the wall was recemented in order to achieve abatement. Since it was not reconstructed in the manner in which point feeders are normally constructed in the mine, the respondent's contention that it was a point feeder is contradictory (Tr. 72). He testified that point feeders are constructed with a normal sized hole 4 to 6 feet wide which is framed by boards which may be removed and replaced to regulate the amount of air passing through the opening. Since the cited stopping was not constructed in that manner, he believed that the respondent never intended to use it as a point feeder. Respondent's counsel conceded that a stopping

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was quickly constructed once the citation issued, but contended that simply because this done cannot serve to establish that the respondent did not intend it as point feeder (Tr. 79). Although counsel alluded to an "obvious valid reason" for constructing the stopping to achieve abatement, since none were forthcoming, I can only conclude that abatement was achieved to insure compliance and to preclude the issuance of a closure order.

Mr. Ball asserted that Mr. Gaither had previously observed the hole in the stopping before he issued the citation and that he discussed the matter with respondent's safety inspector Eddie Nicholson. Mr. Ball stated that prior to the issuance of the citation, Mr. Nicholson informed him about "the hole out stopping" and asked him whether he (Ball) intended "to make that a point feed." At that point in time, Mr. Ball advised his general foreman that he wanted the stopping built as a point feed that night (Tr. 86). Mr. Ball stated that he knew it was built that way prior to the issuance of the citation because he went to the location an hour or two after the citation was issued and found it boarded up (Tr. 87). Mr. Ball admitted that he did not discuss the matter with Inspector Gaither until after the citation was issued.

Inspector Gaither testified that when he observed the stopping hole during his inspection, there were no boards installed across it, a piece of curtain was hanging over the hole, and he saw no evidence of any construction taking place. He confirmed that Mr. Nicholson was with him and that when he asked Mr. Nicholson for an explanation, someone in the inspection party offered an explanation that the hole was knocked in the overcast wall in order to remove the belt header. At that point in time, Mr. Gaither stated that he informed Mr. Nicholson that this could not be done, and that Mr. Nicholson simply replied "We'll call this a point feeder."

During a subsequent conversation, Mr. Gaither stated that Mr. Nicholson advised him that it was his impression that the hole was knocked out to facilitate the removal of the belt header and that the hole was to be sealed up after the equipment was taken out. Since Mr. Nicholson was not called to testify in this case, and since I find Mr. Gaither to be a credible witness, I accept his version of the events. Further, Mr. Gaither's version, contrary to that of Mr. Ball, supports a conclusion that the permanent overcast stopping was initially constructed for that purpose, and that it was not constructed as a point feeder. Further, I reject any notion that the respondent was in the process of constructing

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a point feeder at the time of the inspection. I conclude that it simply knocked a hole in the permanent stopping to facilitate the removal of the belt header, and that Mr. Ball's testimony is simply a less than credible attempt to justify what was done.

After careful consideration of all of the credible testimony and evidence adduced in this case, I cannot conclude that the respondent has rebutted the petitioner's contention that the cited overcast stopping was not in fact a bona fide point feeder. I conclude and find that the overcast stopping was not a point feeder. I accept Inspector Gaither's testimony with respect to the condition of the stopping as credible evidence of the fact that it was not intact and was not constructed and maintained as required by the plan, and that the large hole in the stopping precluded the required maintenance of air separation between the belt entry and intake entry. The fact that the purported point feeder was not so designated on the map, and the fact that stopping materials were not present or readily available at the stopping location lend additional support to the inspector's contention that the overcast stopping was not in fact a designated point feeder.

I conclude and find that the cited overcast stopping in question was in fact a permanent stopping within the meaning of the approved plan. The applicable plan provisions found at page one, including the construction sketches referred to by the inspector which are part of the plan, required that such stoppings be constructed of stacked or mortared conventional or solid masonry blocks. Since the overcast stopping in question was not so constructed or maintained as required by the plan when the inspector found it, I conclude and find that a violation of the plan has been established. Since it is clear that a violation of the approved plan constitutes a violation of section 75.316, the citation IS AFFIRMED.

Citation No. 2482924, issued on December 4, 1984, charges a violation of mandatory standard 30 C.F.R. 75.1712-3(a), in that the bathing facility change rooms were not maintained in a sanitary condition because of backed-up shower floor drains. The respondent admitted that the violation occurred as stated by the inspector who issued the citation, and the parties settled the matter at the hearing. The parties subsequently filed a joint motion for approval of the proposed settlement pursuant to 29 C.F.R. 2700.30. The citation was modified to delete the inspector's "significant and substantial" finding,

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and the respondent agreed to pay the full amount of the proposed civil penalty of \$178. After consideration of the arguments presented in support of the proposed settlement, the joint motion IS GRANTED, and the settlement IS APPROVED.

#### History of Prior Violations

The parties have stipulated that the respondent has an "average history of prior violations." However, since the petitioner did not submit a computer print-out of the mine history, I have no way of knowing what an "average" history is or whether or not the respondent's compliance record warrants any additional increases or decreases in the civil penalty which I have assessed for the violation in question. However, I have considered the four prior citations issued by Inspector Zimmerman at the mine as part of the respondent's compliance record and this is reflected in the penalty assessed for the violation in question.

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

The parties have stipulated that the respondent is a medium-sized operator and that the imposition of a civil penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

#### Negligence

I conclude that the violation resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of its ventilation plan. The evidence adduced in this case established that mine management had knowledge of the existence of the hole in the overcast stopping, and I conclude that its failure to insure against such a condition constitutes ordinary negligence.

#### Gravity

There is no evidence in this case that the respondent was experiencing any ventilation problems in the mine at the time the citation was issued, and the parties agreed that this was the case (Tr. 140). Although Inspector Gaither confirmed that he took no air readings and did not determine whether the air ventilation was interrupted during the time the hole in the stopping existed with a brattice cloth over it, (Tr. 127), the fact is that the integrity of the stopping was not maintained and complete air separation as required by

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the plan was not maintained. Further, the overcast stopping was an intergral and important part of the underground ventilation system and methane and dust-control plan. Under the circumstances, I conclude and find that the violation was serious.

#### Good Faith Compliance

The parties stipulated that the violation was timely abated in good faith, and I adopt this as my finding on this issue.

#### Significant and Substantial Violation

The petitioner advanced no arguments as to why it believes that the violation is significant and substantial, and the inspector's testimony does not address this question. As pointed out earlier, the inspector made no air readings and did not determine whether or not the ventilation was interrupted. As a matter of fact, he conceded that even with the brattice cloth over the hole in the stopping, any leakage would be minimal and "so small you couldn't measure it." He also stated that while air separation was not maintained because the permanent stopping was destroyed, he conceded the possibility that separation was maintained even with the brattice cloth over the hole (Tr. 129). Under the circumstances, I cannot conclude that the petitioner has presented any evidence to support a conclusion that the violation presented a reasonable likelihood of an accident or injury of a reasonably serious nature. Accordingly, the inspector's "S & S" finding IS VACATED.

#### Penalty Assessment

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 a civil penalty assessment in the amount of \$200 is appropriate and reasonable for the section 104(a) Citation No. 2482846, issued on December 11, 1984.

#### ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$200 for the violation in question. Respondent is also ORDERED TO PAY a civil penalty in the amount of \$178 for Citation No. 2482924, which has been settled by the parties. The civil penalty assessment payments are to be made to MSHA

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within thirty (30) days of the date of this decision and order.  
Upon receipt of payment, this case is dismissed.

George A. Koutras  
Administrative Law Judge