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

JIM WALTER RESOURCES, INC., CONTESTANT	CONTEST PROCEEDING
	Docket No. SE 85-36-R
v.	Order No. 2482922; 12/4/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	No. 4 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. SE 85-62 A.C. No. 01-01247-03641
v.	Docket No. SE 85-123 A.C. No. 01-01247-03664
JIM WALTER RESOURCES, INC., RESPONDENT	No. 4 Mine
	Docket No. SE 85-109 A.C. No. 01-01401-03597
	Docket No. SE 85-124 A.C. No. 01-01401-03607
	No. 7 Mine

DECISIONS

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

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals 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), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. Docket No. SE 85Ä36ÄR is a contest filed by Jim Walter Resources, Inc., challenging the legality of section 104(d)(2) Order No. 2482922, which is the subject of civil penalty Docket No. SE 85Ä62.

The respondent filed timely answers contesting the proposed civil penalties and hearings were held in Birmingham, Alabama. The parties waived the filing of posthearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearings have been considered by me in the adjudication of these cases.

Issues

The critical issue presented in these proceedings is whether or not the respondent is obliged to maintain its ventilation line curtains within 10 feet of all faces, or only the working faces from which coal is being extracted or was most recently extracted.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. 30 C.F.R. 75.316.

4. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the subject mine.

2. The respondent and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in these cases.

4. The MSHA Inspectors who issued the subject orders or citations were authorized representatives of the Secretary.

5. A true and correct copy of the subject orders or citations were properly served upon the respondent.

6. Copies of the subject orders or citations and determinations of violations at issue are authentic and may be admitted into evidence for purpose of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. The imposition of civil penalties in these cases will not affect the respondent's ability to continue in business.

8. The alleged violations were abated in good faith.

9. The respondent's history of prior violations is average.

10. The respondent is a medium-size mine operator.

The violations in issue in these proceedings are as follows:

Docket Nos. SE 85Ä62 and SE 85Ä36ÄR

Section 104(d)(2) "S & S" Order No. 2482922, was issued at 2:10 p.m., on December 4, 1984, and it cites a violation of mandatory safety standard 30 C.F.R. 75.316. The condition or practice is described as follows:

> The companies (sic) approved ventilation plan was not being complied with in that the curtain line in No. 2 entry on the No. 13 section measured 24 feet from the face. They had turned a crosscut from the No. 2 entry toward the No. 1 entry on the curtain line side leaving the No. 2 entry 24 feet from the deepest penetration. The companies (sic) approved ventilation plan states that the line brattice shall be maintained within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times, except while roof bolting and servicing as stated in the plan.

Docket No. SE 85Ä109

Section 104(d)(2) "S & S" Order No. 2481092, was issued at 11:02 a.m., on April 8, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. 75.316. The cited condition or practice is described as follows:

> The current approved ventilation methane and dust control plan was not being complied with on the No. 11 section (011Ä0) in that the line curtain was 19 feet from the point of deepest penetration of the face of the No. 2 entry. The plan requires line curtain be maintained within 10 feet of all working places inby the last open crosscut at all times.

Docket No. SE 85Ä124

Section 104(a) "S & S" Citation No. 2347351, was issued at 2:20 p.m., on April 13, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. 75.503. The condition or practice is described as follows:

> The Joy model 12, S/N 3524 and approval No. 2GÄ33344AÄ00 being operated in the faces of the No. 6 active section to cut and load coal from these faces was not being maintained

in permissible condition in that an opening in excess of .004 inches was observed in the lid of the control box.

Section 104(d)(2) "S & S" Order No. 2482911, was issued at 6:00 a.m., April 13, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. 75.316. The condition or practice is described as follows:

> The current approved ventilation and methane and dust control plan was not being complied with in the No. 3 entry on the No. 6 section. The line brattice was measured to be 34 feet from the face of the No. 3 entry. The plan states that line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting. Roof bolting was not being performed in the entry and a distance greater than 10 feet has not been granted by the MSHA District Manager.

Docket No. SE 85Ä123

Section 104(d)(2) "S & S" Order No. 2346556, was issued at 9:40 a.m., on April 15, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. 75.316. The cited condition or practice is described as follows: "The approved ventilation methane and dust-control plan was not being complied with in the No. 5 entry crosscut right in that the line brattice was 17 feet from the face. The approved plan requires that line brattice be maintained to within 10 feet of all working places."

The parties stipulated that the issue concerning the alleged violations of mandatory safety standard 30 C.F.R. 75.316, and the contestant/respondent's approved ventilation and methane and dust-control plan are identical to the issue presented in the case of MSHA v. Jim Walter Resources, Inc., Docket No. SE 85Ä42, decided by Judge Broderick on September 27, 1985, 7 FMSHRC 1471. The parties agreed that the issue presented is that stated by Judge Broderick at 7 FMSHRC 1474, as follows: "Whether respondent is obliged to maintain line curtain within 10 feet of all faces, or only the face from which coal is being extracted or was most recently extracted?"

The parties also stipulated and agreed that the "face" issues with respect to the ventilation plans in all of these cases are identical and that my dispositive determination of this issue in Docket No. SE 85Ä109, is dispositive of all of the subject cases. The parties also agreed and stipulated that the alleged violations are accurately described and evaluated in the appropriate sections of the respective orders and that the preconditions of the respective orders (unwarrantable failure, no "clean" inspection, etc.) are met if the "face" issue determination is made in favor of MSHA's position.

In the prior decision by Judge Broderick, he concluded that the respondent was in violation of its approved ventilation plan by failing to maintain line curtain within 10 feet of the face in the No. 3 entry on the No. 4 section in the No. 4 Mine. His dispositive ruling (conclusion of law) is stated as follows at 7 FMSHRC 1474Ä1475:

> 3. The approved ventilation, methane and dust control plan in effect at the subject mine on November 13, 1984 required that line curtains be maintained within 10 feet of all faces in all working places. A "coal face" is defined in A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968) as
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> > a. The mining face from which coal is extracted by longwall, room, or narrow stall system. Nelson. b. A working place in a colliery where coal is hewn, won, got, gotten from the exposed face of a seam by face workers. Pryor, 3.
>
> This definition obviously is not limited to the time during which coal is actually being extracted. It includes working faces as well as faces from which coal has been or will be extracted. The language of the approved plan is all inclusive and clearly includes entry No. 3 cited in this case. The obvious purpose of the changes made in 1972 was to go beyond the requirement of 30 C.F.R. 75.302Ä1(a) that line brattice be installed no more than 10 feet from active working faces. All faces, including idle faces, are covered by the plan. The reason for their inclusions is the unusually

high methane liberation in the mine. Respondent argues that the requirement is onerous and that it has not been enforced by MSHA prior to 1984. Neither of these arguments can affect the interpretation of the wording of the plan, and I reject them.

MSHA's Testimony and Evidence

With regard to Order No. 2482922, issued in civil penalty Docket No. SE 85Ä62 and contest Docket No. SE 85Ä36ÄR, Order No. 2482911 issued in civil penalty Docket No. SE 85Ä124, and Order No. 2346556, issued in SE 85Ä123, the parties agreed that MSHA need not present testimony from the inspectors who issued those orders since their testimony would be the same as the inspector who issued Order No. 2481092 in civil penalty Docket No. SE 85Ä109. The parties agreed that all of these orders present common issues of the application and enforcement of mandatory standard section 75.316, and the respondent's ventilation plan (Tr. 90Ä92; 256Ä258).

MSHA Inspector Judy McCormick confirmed that she inspected the No. 7 Mine on April 8, 1985, and issued Order No. 2481092, (Docket No. SE 85Ä109). She identified exhibit GÄ3 as a sketch of the underground scene and confirmed that it accurately portrays the condition she cited. She stated that coal was being mined at the point shown by an "X" on the sketch and that the violation occurred at point "Y" where the face had been penetrated. The line curtain depicted by the dotted line was located 19 feet outby that "Y" face, and since the ventilation plan required that the curtain be maintained to within 10 feet of all faces, she issued the violation (Tr. 96).

Ms. McCormick stated that the hazard presented in not having the curtain to within 10 feet of a face is the possibility of methane accumulations at the "Y" face, and she noted the direction of the air ventilating the entry by the arrows shown on the sketch (Tr. 98). She confirmed that the ventilation plan, exhibit GÄ1, at page 10, requires that a minimum of 17,000 cubic feet of air reach the end of the line brattice where coal is being cut. Since coal was not being cut at the "Y" face, only 7,000 cubic feet of air was required at that location (Tr. 98Ä99).

On cross-examination, Ms. McCormick stated that she made a methane test and found less than one percent of methane at the "Y" face, and she confirmed that her interpretation of the plan was made to prevent a potential buildup of methane,

and that was the reason why she believed the line curtain should have been installed to within 10 feet of the face in question (Tr. 101). She confirmed that all of the area shown on the sketch was idle at the time of her inspection, and that the most recently mined area was at the point marked "X". She estimated that the respondent had turned away from the point marked "Y" and began mining toward the point marked "X" several days earlier than the day of her inspection (Tr. 101Ä102).

Ms. McCormick defined a "working face" as an area from which coal is extracted on the mining cycle. She stated that the law does not provide a legal definition of the term "face," and she would "guess" that it means an area from which coal is to be extracted or is being extracted (Tr. 102). She stated that since the area shown as "Y" had been penetrated, she would consider it a "face" requiring line brattice to within 10 feet. Had the area not been penetrated, and although respondent defines it as a "rib," she would still "theoretically" consider it to be a "face" because coal will in the future be extracted from that location. She confirmed that anywhere that coal is planned to be extracted would be a "face" subject to the ventilation plan requirement for line brattice (Tr. 104Ä106).

Ms. McCormick confirmed that she made no smoke tube test in the "Y" face area to determine the amount of ventilation or air circulation in that area (Tr. 110). She explained that the violation was issued for failure to maintain the line brattice to within the required distance of that face, and not for a failure to maintain proper air velocity (Tr. 112Ä113).

Ms. McCormick stated that the areas marked "X" and "Y" on the sketch are both working places. She indicated that the area marked "X" is penetrated for approximately 50 feet, and that area "Y" is penetrated for some 8 feet. In both instances, "X" and "Y" would both be the deepest penetration working faces of working places (Tr. 117).

Ms. McCormick stated that while "X" and "Y" are both working places, mining could not take place simultaneously at those locations because two miners would be operating on one split of air, and that is not permissible. She considers both "X" and "Y" to be "working places," but not "working faces," and since the ventilation plan addresses "faces of working places," she considers both locations to be "faces of working places" (Tr. 120).

Ms. McCormick confirmed that at the time of the inspection, a brattice curtain was within the required 10 feet of the "X" working face where coal had last been cut (Tr. 121). Although she could test for air movement at location "Y," and the total air intake into the No. 2 entry, she would have no way of determining the amount of air flowing into area "Y" (Tr. 122). She confirmed that abatement was achieved by advancing the curtain at an angle as shown on the sketch, (Tr. 126), and she conceded that this presented a possible hazard because there would be a visibility problem between the mining machine and shuttle car, and to some extent the respondent would be forced to operate through the curtain. However, she explained that this problem was created by turning the crosscut as depicted on the sketch, and that had it been turned from the side to the left of the "Y" area the problem would not exist (Tr. 124).

William H. Meadows, MSHA supervisory mining engineer, testified that he is a graduate professional mining engineer, and that he has engaged in the review and approval of mine ventilation plans since 1969. He stated that the ventilation plan changes concerning the respondent's No. 4 and No. 7 Mines occurred in 1972 after a frictional methane ignition occurred in the No. 3 Mine. The ignition occurred when a continuous-mining machine was scraping the bottom after a line curtain was taken down after the working face was mined. A citation was issued for a violation of section 75.316, but after a determination was made that coal was not being mined and that the line brattice was within 10 feet of the working face, the violation was voided and the case was dismissed. He confirmed that he was called upon to furnish his expert opinion in that case, and on the basis of the facts of that case, he concurred in the decision that a violation could not be supported.

Mr. Meadows stated that as a result of the prior litigation, the language of the ventilation plan for the No. 3 Mine was changed, and the words "working faces" were changed to reflect a requirement that "all faces" would in the future be required to have line curtains installed to within 10 feet. The requirement that line curtains "be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut except while roof bolting and servicing as stated in the plan" was also included in all subsequent plans approved by MSHA for the No. 4 and No. 7 Mines.

Mr. Meadows confirmed that the term "faces" is not defined by MSHA's regulations. In his opinion, one has to assume from the history and literature on the subject of mine

ventilation that the requirement for maintaining line brattices to within 10 feet of the face implies that they be so maintained at all mine faces, including idle faces.

Mr. Meadows pointed out that the respondent's old ventilation plan simply paraphrased the requirements of section 75.302Ä1(a), which required that line brattices be maintained to within 10 feet of the area of deepest penetration of the working face. The purpose in adding the new language was to distinguish between "working faces" as it existed in the law and plan at that time and "all faces in all working places" (Tr. 140).

Mr. Meadows also pointed out that section 75.308 makes reference to methane accumulations in face areas of working places, and line brattices are not specifically mentioned. While there are regulatory definitions for the terms "working places" and "working faces," there is no definition of a face. However, he believes that one must assume a definition from past experience, enforcement, and research. "Faces" would result after one has "worked a face." Once a "working face" has been cut, mined, and loaded, the dropping of the word "working" means "it's no longer being worked, it now becomes a face" (Tr. 141).

Mr. Meadows referred to a February 1969 Bureau of Mines pamphlet, Exhibit ALJÄ1, and pointed out that the term "working face" is not used. He described the ventilation tests covered by the publication, and he indicated that when a continuous miner penetrates a coalbed, it extracts coal from a working face. When the miner ceases operation, that working face becomes a face, and if he were to conduct a study similar to the one covered in the publication, he would refer to the "working face" simply as a "face" similar to the reference made in the publication (Tr. 142Ä143).

Mr. Meadows stated that the respondent's mines freely liberate methane at all faces, including idle faces, and that the mines are among the top 10 percent of all mines nationally with respect to methane liberation (Tr. 144Ä145).

Referring to the sketch of the No. 2 entry of the No. 7 Mine, exhibit GÄ3, Mr. Meadows stated that he would consider the areas marked "X" and "Y" as faces. If coal were being cut at "X" and not at "Y," he would consider the former a working face, and the latter an idle face. He explained that the reason the language "all faces" was included in the MSHA approval letters accompanying the respondent's ventilation

plan is to take into account the fact that in a working place there may be more than one face (Tr. 146).

On cross-examination, Mr. Meadows stated that at the time an initial cut of coal is taken, that area becomes a working face. If no coal cuts are made, the area remains a rib until such time as a coal cut is taken. He further explained that if he observed coal being cut, he would consider it a working face, and if work stopped after the initial cut, he would consider it simply as a face (Tr. 151). When asked whether such a cut would remain a working face between shifts when no production is taking place, he replied "To me, a working face is only when you cut it, mine it, or load it, or the district manager specifies some other operation such as roof bolting, blasting, clean-up" (Tr. 52).

Mr. Meadows confirmed that the respondent's ventilation plan is one of the most stringent plans in the country. He agreed that while theoretically possible, due to the manner in which the crosscuts in question were turned, the respondent would have difficulty in maintaining a line curtain to within 10 feet of "Y" while cutting coal at face "X" (Tr. 154Ä155).

Mr. Meadows stated that the terms "working face" and "face" have different meanings to him, but he conceded that during his testimony in a prior case before Judge Broderick with respect to the term "face" he testified that "Our intention was that the line curtain would be maintained to all faces. You can pick the word "working faces' or "face'; it's all faces" (Tr. 159). He conceded that he did not differentiate the terms in his prior testimony, but pointed out that the word "working" brings a new meaning to the term "faces" because of the use of that term in the regulation. He further conceded that the regulation does not use the term "faces" by itself (Tr. 160).

Mr. Meadows conceded that the requirement for line brattice to be maintained to within 10 feet of all faces is not specifically stated in the respondent's plan in clear language, and he alluded to the plan provisions at pages 10 through 13 where the term face is used, and indicated that "A face, if you want to call it a working face or a face. They're one in the same" (Tr. 165Ä167).

Mr. Meadows confirmed that were it not for the plan provision in this case, an inspector could not cite a violation of section 75.302Ä1, at locations "X" and "Y" because there was no mining activity taking place at those locations and

they would not be considered "working faces" at the time of the inspection. If mining was taking place, then an inspector could cite section 75.302Ä1, but at location "Y" no citation could be issued unless the district manager had designated it as another "working face" used for bolting, servicing, or it was designated as an idle face. Rather than doing this, the district manager elected to drop the word "working" from the plan, and used the phrase "all faces" (Tr. 178).

Mr. Meadows stated that the area "Y" was mined and developed in the No. 2 entry, and while it was being mined it was a "working face." When mining ceased, it became a "face" which was required under the plan to have line brattice to within 10 feet. There is no plan provision to remove that brattice from the "Y" area. Had "Y" not been cut for a distance of 8 feet it would still technically be considered a "face" because it was developed as the face of the No. 2 entry. In the event the respondent does not consider it a face, he suggested that it file a supplemental ventilation plan requesting approval not to maintain the line curtain at that location (Tr. 180).

Mr. Meadows stated that a face in any mine in any place where future mining is planned is a potential face, but that he would not require a brattice at the area to the right of the sketch off entry No. 2 which has not actually been mined or cut unless it had actually been developed as a face up to that point (Tr. 182). He conceded that his prior testimony in the earlier litigation indicated that even if the respondent intended to turn right, he would still consider it a "face" (Tr. 183).

With regard to the method of abatement in the instant case, Mr. Meadows confirmed that a potential hazard is created by installing the line curtain to within 10 feet of the "Y" area as was done in this case. The hazards concern a possible short circuiting of the air and a visibility problem in that equipment will run through the curtain. Some mines use clear curtains so that miners can see through it (Tr. 184). However, he believed that such problems would not occur if the respondent had cut through from the "non-curtain side," or if the crosscuts had been mined from left to right (Tr. 185). In the instant case, the violation was issued because the inspector found that the line curtain was not maintained to within 10 feet of "Y," which was the point of deepest penetration in the No. 2 entry (Tr. 189).

Daryl Dewberry testified that he is the president of the local union, a member of the mine safety committee, and is

employed by the respondent as a continuous miner operator at the No. 7 Mine. He is familiar with the violation issued by Inspector McCormick, and in his opinion, because of the equipment operating in the area, it would be impossible to maintain a line curtain to within 10 feet of face "Y" without taking it down. He stated that the respondent's No. 7 Mine ranks number two nationwide in incidents of methane ignition, and that the No. 3 Mine ranks number one (Tr. 191Ä196).

On cross-examination, Mr. Dewberry stated that he believed the 8Äfoot cut into the "Y" face was a mistake and that the spads were simply overcut. Normally, the rib would come straight across at that point. He also believed that it would have been more practical to turn right off the No. 2 entry and cut from the off-curtain side because the ventilation curtain could then be maintained to within 10 feet of the face in all penetration areas (Tr. 202Ä204).

Respondent's Testimony and Evidence

Thomas E. McNider testified that he is the respondent's deputy manager for ventilation, and he confirmed that his duties include the development of mine ventilation plans. He stated that the applicable mine ventilation plans for the respondent's No. 3 and No. 7 Mines all make reference to working faces where actual work is being performed. He believed that the mine faces referred to in the plans must necessarily be interpreted as working faces, and that the use of the language all faces as referred to in MSHA's covering letters approving the plans must be construed to mean working faces in order to be consistent with the actual plans submitted by the respondent.

Referring to the sketch of the No. 2 entry in question, exhibit GÄ3, Mr. McNider was of the opinion that the area marked "X" on the sketch is a working face, but that the cited area marked "Y" is a rib. He also believed that the area to the right of the developed crosscut as shown on the sketch, even though a potential crosscut, is in fact a rib. He believes there is but one working face in a working place.

Mr. McNider stated that advancing the ventilation brattice to within 10 feet of the purported face designated "Y" on the sketch to achieve abatement in this case constituted a hazard in that the brattice curtain would short circuit the air moving along that location. The brattice would also cut down on the visibility and would subject the brattice to being torn down by equipment moving through the area (Tr. 216).

Mr. McNider stated that as faces are advanced, there are four working places and four working faces. Working faces are turned to establish new crosscuts. As a crosscut is established to the left and then advances to the right, at that point in time the right "rib" becomes a face and the previously mined "face" becomes a rib (Tr. 216). Holing through the crosscut as was done in this case is proper because the "X" area becomes the working face and the line curtain would be maintained to within 10 feet of that face, or the point of deepest penetration, and machines would not be running through the curtain (Tr. 218).

On cross-examination, Mr. McNider confirmed that the respondent's No. 3 and No. 7 Mines were opened in the 1970's. He believed that the crux of the issue presented in these proceedings turns on the definition of the term "face." It is his position that the positioning of the ventilation brattice devices as referred to in the mine ventilation plans refer to working faces where coal is actually being cut and mined, and that MSHA's position is that the requirements apply to all faces, including those which are idle and not being actively or currently mined.

Mr. McNider stated that any methane present at point "Y" on the sketch would be under 1 percent, and if any is detected it would be cleared up. He also indicated that the majority of the methane at the respondent's mines is generated while coal is actually mined at the cutting face, and that any methane generated at the ribs is of a lesser degree and magnitude. He also pointed out that the majority of methane ignitions occur at the working face when a continuous miner is scraping bottom, and he could think of none which have occurred at an idle face. Although an ignition could occur at an idle face, some work activity has to be taking place, and if this were the case, the face would no longer be an idle face (Tr. 227).

Mr. Meadows was called in rebuttal, and he stated that there is a potential for methane build-up at an idle face area, and that potential ignition hazards are presented when work is performed in the area, or equipment and cables are present. He confirmed that a ventilation survey he supervised indicated that there were 15 methane ignitions in the No. 7 Mine in fiscal year 1985. Assuming that the mine did not liberate methane freely, he was of the view that the term "all faces" would probably not be part of the mine ventilation plan (Tr. 242). He believed that the respondent is the only mine operator that has the "all faces" provision as part of its plan, with the possible exception of U.S. Steel (Tr. 243).

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On cross-examination, Mr. Meadows stated that methane tests are required to be made in all working places inby the last open crosscut before any equipment is brought in. He stated that if methane is detected and not taken care of it presents a potential ignition source. He stated that in the State of Alabama the average methane liberation in the active working faces while coal is being cut is 25 cubic feet per minute, but at the respondent's mines, the methane liberation at an active working face ranges from 300 to 500 cubic feet a minute, and under 300 cubic feet a minute at an idle face (Tr. 248). He conceded that he did not know how many of the 15 ignitions that he referred to occurred at the longwall or whether they occurred in situations similar to the facts presented in this case. He also conceded that the 15 ignitions in question are not relevant to the instant case (Tr. 250).

Discussion

30 C.F.R. 75.316 provides as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

30 C.F.R. 75.2(g) provides as follows:

> (g)(1) "working face" means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle,
>
> (2) "Working place" means the area of a coal mine inby the last open crosscut,

(3) "Working section" means all areas of the coal mine from the loading point of the section to and including the working faces,

(4) "Active workings" means any place in a coal mine where miners are normally required to work or travel;

30 C.F.R. 75.302, provides in part as follows:

(a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and other noxious gases, dust, and explosive fumes, * * * .
(Emphasis added.)

30 C.F.R. 75.302Ä1(a) provides as follows:

(a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the coal Mine Safety Manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located. (Emphasis added.)

In Docket No. SE 85Ä109, Inspector McCormick issued Order No. 2481092 after finding that a ventilation brattice curtain installed 19 feet from the point of deepest penetration in the No. 2 entry (location "Y" as shown on sketch exhibit GÄ3). The inspector considered that location to be a face in the working place which requires the curtain to be installed within 10 feet as stated in the respondent's ventilation plan. The facts show that a curtain was installed within 10 feet of the working face (location "X" on exhibit GÄ2), where the crosscut had been mined in the direction of that face. The parties agreed that any dispositive decision based on these facts would be controlling in the remaining dockets, and I assume that the violations in the remaining dockets were issued after the inspectors found line curtains

installed at faces in the working places in excess of the 10 feet provided for the plan.

The parties are in agreement that prior to 1984, no citations were issued at the subject mines for violations similar to the ones involved here; that is, for failure to maintain line brattices to within 10 feet of an entry face, after a crosscut was turned.

The requirements for installing section and face ventilation line brattice are found at page 10, paragraph 1, of the respondent's ventilation plan (exhibit GÄ1). The pertinent plan provision in question provides as follows: "See page 11 for typical section and face ventilation systems for three, four, five and six entry sections. Line brattice shall be installed at a distance no greater than ten (10) feet from the deepest point of penetration."

The requirement for maintaining line brattice to within 10 feet of all faces was not included as part of the ventilation plan submitted by the respondent to MSHA for approval. This provision was included in a June 7, 1984, letter from MSHA's acting district manager at the time the plan was approved, and it provides as follows: "Line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting as shown in Sketches 11, 12 and 13."

During the course of the hearing, the respondent asserted that MSHA's intent in requiring line brattice to within 10 feet of all faces, including idle faces, is based on MSHA's belief that turning a crosscut from the line brattice side of the entry is not a good mining practice because the line curtain can never be maintained to within 10 feet of the working face of the crosscut while it is being mined during the curtain-side turn.

Respondent also pointed out that its ventilation plans do not require that brattices be maintained to within 10 feet of all faces, and that this requirement has been imposed on the respondent by means of the ventilation plan approval letters containing the language "all faces."

Respondent's counsel confirmed that the respondent is at present regularly contesting all violations which are based on MSHA's definition of a "face," and the application of the 10Äfoot line curtain requirements to that definition. Counsel also confirmed that the respondent has met with MSHA

to discuss its enforcement position, but no resolution has been reached short of issuing violations (Tr. 118).

MSHA's counsel stated that the "all faces" language has been inserted by MSHA's district office consistently since 1972 (Tr. 170Ä173). Respondent's counsel stated that the respondent has no choice in the matter when the plan is approved with the "all faces" proviso in it (Tr. 174). However, he also indicated that while the respondent has not in fact accepted this definition of a "face," it does not wish to risk a mine closure for non-compliance. He also indicated that the issue has never been raised until these cases were litigated, and it is now contesting all cases in which this issue is presented (Tr. 173Ä174).

Respondent's counsel took the position that there is no intended distinction between the terms "face" and "working face" and that they mean the same thing. He pointed out that for approximately 13 years no one thought that there was a distinction in the terms or that the terms had different meanings, and that the distinctions have been made by MSHA when it began issuing citations and orders at its mines. Counsel stated that "MSHA is determined that we should not turn into the curtain on making crosscuts," and he insisted that continued compliance with the requirement that curtains be located within 10 feet of all faces would result in unsafe mining practices (Tr. 208Ä211).

MSHA's counsel conceded that while the point of deepest penetration where the alleged violation took place was not a working face because no coal extraction was taking place, the other face where the curtain was installed was a working face, and that both locations were working places because they were inby the last open crosscut (Tr. 125Ä126). Counsel also conceded that in the absence of the phrase "all faces," the failure by the respondent to maintain line brattice to within 10 feet of a working face would constitute a violation of section 75.302Ä1(a), and any inspector who found such a condition would have to cite that specific standard as a violation rather than the plan.

MSHA's counsel confirmed that the "all faces" requirement was placed in the respondent's ventilation plan because of the high liberation of methane. Counsel confirmed that the respondent's mines operate under the most stringent ventilation plans, and that the respondent is the only mine operator with such a plan provision. He conceded that the plan provision is there because MSHA put it there by the "cover sheet" or approval letter accompanying the plan (Tr. 227Ä228).

MSHA's counsel asserted that the "all faces" requirements of the plan in question would apply in these cases regardless of the amount of penetration made at the No. 2 entry face identified as "Y". He pointed out that the facts before Judge Broderick in the prior case indicated that there had been no penetration at a similar "Y" location, and very little at a similar "X" location, but that Judge Broderick nonetheless ruled that both locations were faces which required brattice curtains within 10 feet. Counsel also pointed out that Judge Broderick rejected any notion that the face which had not been penetrated was simply a rib (Tr. 130). In support of his position in all of these cases, counsel relies on the dictionary definition of the term "face" relied on by Judge Broderick (Tr. 130Ä131). Counsel conceded that if the plan had used the words "all working faces in all working places" instead of "all faces in all working places," the violations would not have issued in these cases (Tr. 128).

Respondent's counsel agreed that at the point in time when the location "Y" was penetrated, it was in fact the face of the No. 2 entry. However, aside from the fact that he believed the cutting machine had simply "overcut" by 2 feet and that the penetration was a "mistake," he took the position that once the machine turned away from that location and starting driving and cutting the crosscut, location "Y" was not a working face because it was not being mined and had not been mined for at least several days before inspector McCormick arrived on the scene. In counsel's view, at the time the inspector was there, location "Y" was simply a rib, but that eventually the crosscut would have been turned to the right off the entry, and the "rib" at location "Y" would have been mined through at some future time (Tr. 206Ä208).

In the prior decision by Judge Broderick, he relied on the definition of a "coal face" as found in A Dictionary of Mining, Mineral and Related Terms, to support his conclusion that the term is not limited to the time during which coal is actually extracted, and that the term includes working faces as well as faces from which coal has been or will be extracted. If one were to use the definition of the term "face" as found in the same dictionary, one could come to the opposite conclusion. The term "face" is there defined in part as follows:

> * * * A point at which coal is being worked away, in a breast or heading; also working face. * * * The exposed surface of coal or other mineral deposit in the working place

> where mining, winning, or getting is proceeding. * * * The principal frontal surface presenting the greatest area such as the face of a pile of material, the point at which material is being mined. * * *

In the case of United States Steel Corporation v. Secretary of Labor, 1 FMSHRC 1024, decided August 10, 1979 by former Commission Judge Forrest E. Stewart, he vacated two alleged violations of 30 C.F.R. 75.316, which charged that the operator had violated a provision of its ventilation plan which required line brattice to be maintained to within 10 feet of the deepest penetration of all working faces. In that case, the evidence established that no coal was actually being cut, mined or loaded when the inspector observed the alleged violative conditions. Judge Stewart ruled that line brattice was required to be maintained to within 10 feet of the area of deepest penetration of all working faces only when coal was actually being cut, mined or loaded.

Judge Stewart took note of the fact that mandatory standard section 75.302Ä1(a), specifically requires line brattice at the 10Äfoot distance only when coal is being cut, mined or loaded. Since this provision clearly designated the working face as that place at which brattice is to be maintained, Judge Stewart ruled that the modifying phrase "from which coal is being cut, mined or loaded" specified the time at which brattice is to be maintained, and he concluded that all working faces must be provided with line brattice meeting the 10Äfoot criteria during that time period.

Judge Stewart held that the language "all working faces" as contained in the operator's ventilation plan clearly did not mean that brattice be maintained at all times in all working faces. Although the ventilation plan was silent as to the time when the 10Äfoot line brattice was required during advance mining, he observed that this silence could not be construed as adding additional requirements to those found in section 75.302Ä1(a). He ruled that in order for the operator to be penalized for failure to maintain 10Äfoot line brattice at times other than those specified in the regulation, the approved plan should clearly have stated the additional requirements in such a way that clearly informed the operator of its obligations.

Judge Stewart also observed that it was obvious that the operator did not intend that brattice must be maintained within 10 feet of the working face at all times when it submitted its plan to MSHA for approval. He also observed that

to construe the plan in a manner which would require 10Äfoot line brattice at all times, even when coal was not being cut, mined or loaded, would create a conflict with the roof-control plan which contained a specific exemption. He noted that the inspector testified that there were times when the line brattice did not have to be maintained to within 10 feet of the face since the roof-control plan allowed the removal of line brattice during roof bolting operations. This provision was included in the roof plan because the line brattice presented a hazardous obstruction during bolting. The inspector mentioned one occasion on which this obstruction resulted in the severe injury to a miner's arm.

Findings and Conclusions

MSHA's position for insisting that line brattices be installed within 10 feet of all faces is premised on the theory that methane can accumulate at idle faces, as well as working faces, and the fact that the respondent's mines have a history of liberating high amounts of methane. However, MSHA presented no credible testimony or evidence to establish that hazardous methane accumulations had occurred at the face areas cited by the inspectors in these cases. As a matter of fact, although MSHA introduced evidence of a number of prior methane igntions at the respondent's mines, ventilation specialist Meadows did not know how many of these involved idle face ignitions, nor could he supply the facts and circumstances under which these purported ignitions occurred.

Mr. Meadows conceded that the law requires that all faces in all working places be tested for methane, and that if the tests were not made, a potentially hazardous condition would be present (Tr. 246Ä247). If a test were made and no methane were detected, there would be no hazard. Further, if methane were detected within 5 to 15 minutes after a test indicated none present, the respondent would have to be given an opportunity to dispel the methane (Tr. 248). Mr. Meadows had no knowledge as to how many of the 15 methane ignitions occurred at the longwall, and assuming they all occurred at the longwall, he conceded that the fact that they occurred would not be relevant to the facts presented in these cases (Tr. 250).

Respondent's ventilation manager McNider testified that the majority of methane ignitions which have occurred in the respondent's mines have occurred at the working face where a continuous miner was operating and scraping the mine bottom. He pointed out that such ignitions would not occur at an idle face unless some work was going on at that location, and

since no work is taking place at an idle face, an ignition is not likely to take place there. In his opinion, an "idle face" is by definition one which has been abandoned and no work is taking place there (Tr. 225Ä227).

Mr. Meadows confirmed that the ventilation plan change which occurred in 1972 was the result of litigation arising from a methane ignition which occurred while a mining machine was scraping bottom after a line curtain was taken down from a working face which had been mined. The respondent was charged with a violation of section 75.316, but the case was dismissed after it was determined that coal was not being mined at the face and that the line curtain was within 10 feet of the face. Mr. Meadows confirmed that he testified in that case and agreed that the violation could not be supported.

I believe it is reasonable to conclude that MSHA's "all faces" requirement, which applies only to the respondent's mines, and no other mine operators nationwide, was added to the plan to cover a situation where a potential methane accumulation is presented at an idle face which had been mined and which no longer fits the definition of "working face" as defined by MSHA's regulations. If it is true that methane accumulates at idle faces as well as working faces, MSHA's adoption of this plan provision only for the respondent's mines, and not for other mines, appears to be discriminatory. While it is true that the respondent's mines have a history of high methane liberation, I cannot conclude that in those mines which liberate less methane, accumulations of methane at idle or non-working faces do not present the same potential for methane ignitions. All mines liberate methane, and it seems to me that if MSHA wishes to impose an "all faces" interpretation of the ventilation requirements of sections 75.316 and 75.302Ä1(a), it should do so through proper rule making rather than imposing them on a mine operator through the ventilation plan review process, or by adding such a requirement in a transmittal letter.

I also believe it is reasonable to conclude that MSHA is not too enchanted with the mining methods utilized by the respondent while driving and turning its crosscuts, and that its insistence on maintaining line brattices to within 10Äfeet of all faces in the working places is a subtle attempt to force the respondent to change its mining methods. During the course of the hearing, MSHA's counsel denied that this was the case, and he simply took the position that since the all-faces requirement was a part of the respondent's approved plan, it must be followed, and he implied that the respondent "was stuck with the plan provision."

I take note of the fact that the 10 foot "all faces" line brattice requirement contains an exception for roof bolting accomplished in accordance with plan sketches 11, 12, 13. Although this exception may cure an otherwise contradictory conflict with the "all faces" requirement, the same cannot be said for other parts of the plan which I find to be in conflict with MSHA's asserted "all faces" requirements. These plan provisions specifically use the term "working faces." Since that term is specifically defined by regulation, requiring the respondent to maintain its brattice to within 10 feet of "all faces," a term not defined by the regulation, creates a confusing conflict in the application of the plan as a whole.

The plan provision for installing section and face ventilation line brattice does not specifically state that a line brattice must be within 10 feet of a face or working face, and Mr. Meadows conceded that the plan itself "is not written specifically in the King's English that way" (Tr. 163). When asked for an explanation, Mr. Meadows cited paragraph 2 at page 10, which states in pertinent part that "A minimum of 17,000 cubic of air shall reach the end of the line brattice where coal is cut, mined or loaded," and that by definition this means the working face (Tr. 164). He stated that the sketches found on page 11 depict the line curtain installation methods in all working places, and that the optional face ventilation system plan provisions found on page 12 depict "blowing curtains" requirements when roof and rib bolting and servicing take place, and that the reference to a 10 feet maximum distance from a face as shown on sketch 11, page 13, is from a face "no matter if you want to define it as a working face or a face," (Tr. 165). He stated that the face curtain requirements for use when bolting takes place depicts "10 feet of a face, a face, if you want to call it a working face or a face. They're one and the same" (Tr. 165).

In further explanation of Mr. Meadows' testimony, MSHA's counsel stated that "I think the witness would construe it to mean at least to be consistent with his approach that what they really meant to say "all faces in all working places," and the District Manager simply set that out clearly in the approval" (Tr. 169).

It seems clear to me that in that portion of the ventilation plan dealing with the installation of blowing brattice curtains while bolting or servicing the roof and rib, the use of the term "face" is clearly intended to mean working face. In fixing the maximum distances that a brattice curtain may

be installed, numbered paragraphs 2, 9, and 10 of the plan specifically use the term working face, and paragraph 10 states that "the entire blowing curtain may be taken down after the permanent exhaust line curtain has been extended to within 10 feet of the working face." Under the circumstances, I conclude that all "face" references in the plan provisions for roof/rib bolting and servicing found at page 12, including the sketches found at page 13, are intended to apply only to the working faces.

The respondent's ventilation and methane and dust-control plan contains several additional requirements for maintaining proper air ventilation in the mines, and in each instance, the plan refers to working faces. The plan requirements for dust control at the respondent's longwall, page 18, paragraph F, provides that a minimum of 18,000 C.F.M.'s of air shall reach the working face where coal is being mined. The plan requirements for mine maps found at page 19 requires a mine map reference notation for average height and air velocity, as required, at each working face. Page 4, paragraph 11, makes reference to a November 21, 1980, approved section 101(c) modification petition permitting the respondent to use belt air entries for coursing intake air to active working faces.

Inspector McCormick defined a "working face" as "an area from which coal is being extracted on the mining cycle." She stated that there is no legal definition of the term "face," but she guessed that it would be "the area from which coal is to be extracted or is being extracted." When asked whether a "planned" cut would be considered a "face," she answered in the affirmative. When asked whether a line curtain would be required within 10 feet of that "planned" cut, she replied "no." When asked to explain her answer, she replied "theoretically, this is a rib." She explained that the fact that a "rib" had been penetrated, yet not "squared off" would make it "a face" (Tr. 102Ä103). She confirmed that her understanding of MSHA's position is that a "face" is any location where an operator plans to extract coal (Tr. 104). If this is true, then the inspector's belief that a planned cut does not require line brattice to within 10 feet, and MSHA's position that it does are at odds with each other and are contradictory.

Mr. Meadows believed that the terms "faces" and "working faces" mean the same thing, and he believed that the requirement for maintaining line brattices to within 10 feet of the face implies that they be so maintained to all faces, including idle faces. In support of this conclusion, Mr. Meadows relied on "the history and literature on the subject of mine ventilation." The only cited literature is a February 1969

Bureau of Mines Report of Investigations 7223 entitled Face Ventilation in Underground Bituminous Coal Mines (exhibit ALJÄ1). Mr. Meadows pointed out that the term "working face" is not used in this publication, and he indicated that once a continuous miner penetrates and extracts coal from a seam, it does so from a working face. Once the miner ceases operation, the working face becomes simply a face, and he would refer to both as a "face."

MSHA's reliance on the publication cited by Mr. Meadows to support a conclusion that the phrase "all faces" includes idle faces as well working faces as defined in its regulations is rejected. I take note of the fact that the publication in question was published prior to the enactment of the 1969 Coal Act and the 1977 Mine Act. While it is true that the article does not use the term "working face," it does state that the basic objective of mine ventilation is to provide an adequate supply of uncontaminated air to the working areas, and that the volume of methane released from an active face varies throughout the bituminous coal fields and cannot be predicted with certainty (pgs. 1, 15). Although the term "active face" is not further explained, there is a strong inference that when used in conjunction with "working areas," it means" active working faces.

The practice of supplementing ventilation plans by correspondence appears to be a routine matter between MSHA and this respondent. In a case recently decided by me involving these same parties, Docket No. SE 85Ä48, the identical ventilation plan for the respondent's No. 4 Mine was in issue. In that case, in response to a July 14, 1984, approval letter from MSHA's acting district manager, respondent's mine manager, Ken Price, wrote a letter to the district manager requesting approval to "point feed" its underground air ventilation at necessary locations. That request was approved by a letter from the district manager, and the approved methods and procedures for "point feeding" were specifically incorporated as a supplement to the previously approved plan, and were in fact subsequently incorported as part of the plan itself when it was next reviewed. However, in the instant proceedings, the requirement for maintaining line brattices to within 10 feet of the area of deepest penetration of all faces has never been specifically made a part of the respondent's plan. It has apparently been included in the district manager's approval letters as a "proviso" to the plan. I find this method of plan review and approval to be rather strange, and it supports the respondent's contention that it never intended the all faces interpretation or application as imposed by MSHA. It seems to me that had it intended to be

covered by the "all fces" provision, respondent would have included it in the plan submitted to MSHA.

The respondent's contention that compliance with the requirement that line brattice be maintained to within 10Äfeet of all faces presents certain potential hazards is supported by the record. Inspector McCormick conceded that requiring a brattice curtain to be installed within 10Äfeet of the face which had been penetrated presented a possible hazard in that a visibility problem would be created between the shuttle cars and continuous miners, and they would have to operate through the curtain (Tr. 123).

MSHA's ventilation specialist Meadows agreed that the respondent would have difficulty maintaining line brattice to within 10 feet of the cited face while cutting coal at the working face where a brattice had been installed to within 10 feet (Tr. 154Ä155). Mr. Meadows also agreed that requiring the brattice within 10 feet of the cited face in question would present a hazard in that visibility would be curtailed and the air ventilation could possibly be short-circuited (Tr. 184Ä185). Safety committeeman Dewberry stated that because of the equipment operating in the crosscut area, it would be impossible to maintain the brattice within 10 feet of the cited face, and some of the curtain would have to be taken down (Tr 195).

I conclude and find that on the facts of these cases, requiring the respondent to adhere to the all faces requirement imposed on it by MSHA by means of ventilation plan approval letters would result in exposing the miners to hazards and accidents stemming from their inability to clearly observe men and equipment moving behind the line curtains located in places where MSHA insists they be placed in order for the respondent to avoid citations. MSHA's witnesses agree that the potential hazards are real, and I believe that the recognition of these potential hazards and the safety concerns expressed by the respondent override any subtle attempts by MSHA to "nudge" the respondent into changing its mining methods. If MSHA believes that the respondent's present mining methods are hazardous, it has an obligation to directly address such situations rather than imposing unworkable plan requirements which in the final analysis result in additional potential hazards.

I further conclude and find that MSHA's application and interpretation of the all faces requirement it imposed on the respondent is inconsistent with the overall plan, as well as

mandatory standards 75.302 and 75.302Ä1(a). Although I realize that the respondent is not charged with a violation of these standards, the regulatory intent for imposing these requirements for the ventilation of working faces as encompassed in those standards as well as the overall plan, is to insure a methane free working face atmosphere where active mining is taking place with miners and equipment present.

Mandatory safety standard section 75.316 requires a mine operator to adopt a suitable mine ventilation and methane and dust-control plan for its mine. Once approved by MSHA, that plan becomes the applicable plan required to be followed until such time as it is revised, revoked, or otherwise changed. A violation of the plan constitutes a violation of the requirements of section 75.316. I conclude and find that at the time the respondent submitted its plan to MSHA for approval it never intended that line brattice be required to be maintained within 10 feet of all faces. I assume that in the absence of this MSHA imposed requirement, the plan as submitted was suitable for the mines in question.

MSHA's attempt to impose further requirements for line brattices at idle "faces" or "ribs" where coal is not being mined or cut only at the respondent's mines would in my view lead to conflicting and confusing applications of the respondent's overall plan, and it would impose additional requirements on the respondent which other mine operators are not required to follow. I recognize the fact that section 75.316, provides flexibility in authorizing MSHA to require a ventilation system and methane and dust-control plan suitable to the prevailing conditions in a mine on a case-by-case basis. However, in these proceedings I am not convinced that MSHA has established that the respondent failed to follow a plan suitable to the mine conditions in question. Since the record here establishes that requiring the respondent to follow the all faces requirement for maintaining brattice curtains would result in additional hazards to miners, quite the contary is true. In my view, the resulting hazards render the plan requirements unsuitable for the mines in question. Since they are, I find no basis for concluding that the respondent is required to follow them, and I further conclude and find that MSHA has failed to establish any violations of the cited plan provision in question.

In view of the foregoing findings and conclusions, Order Nos. 2482922, 2481092, 2482911, and 2346556 ARE VACATED, and MSHA's civil penalty proposals in connection with these orders ARE DISMISSED. The contestant's contest in Docket No. SE 85Ä36ÄR (Order No. 248922) IS GRANTED.

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Fact of Violation

Docket No. SE 85Ä124, Citation No. 2347351

In this case, the respondent is charged with the failure to maintain a continuous-mining machine in a permissible condition. The inspector found an opening in excess of .004 inches in the lid of the control box, and the machine was being used to cut and load coal from the faces.

The parties stipulated and agreed that the citation as issued accurately describes and evaluates the permissiblity violation of 30 C.F.R. 75.503. The inspector who issued the citation was not available for testimony and the petitioner's counsel stated that he was out of state of other MSHA business.

Respondent does not dispute the fact that the conditons described on the face of the citation constitute a violation of section 75.503. Respondent presented no testimony or evidence with respect to this citation, and its counsel did not dispute the inspector's "S & S" finding. Counsel stated that he was only disputing the amount of the proposed civil penalty assessment proposed by MSHA ($850). The parties requested that I assess an appropriate civil penalty on the basis of the citation, the pleadings filed by the parties, and the statutory criteria found in section 110(i) of the case (Tr. 8).

The burden of proof in a civil penalty case with respect to the fact of violation and the proposed civil penalty assessment lies with the petitioner. In this case, the respondent has conceded that a violation occurred and that it was significant and substantial. Accordingly, the citation IS AFFIRMED.

The proposed civil penalty in this case was "specially assessed" pursuant to MSHA's civil penalty criteria and procedures found in Part 100, Title 30, Code of Federal Regulations. However, it is clear that I am not bound by these assessment regulations and have jurisdiction to assess a civil penalty for the violation de novo.

With respect to the six statutory criteria found in section 110(i) of the Act, the parties have stipulated to the following:

1. The respondent is a medium sized mine operator and the imposition of a civil penalty will not affect the respondent's ability to continue in business.

2. The violation was abated in good faith.

3. The respondent's history of prior violations is average.

I take note of the fact that abatement in this case was achieved within an hour and 10 minutes of the issuance of the violation. I also note that the inspector found that the violation was the result of moderate negligence on the part of the respondent, and that the likelihood of the occurrence of the event against which the standard is directed was "reasonably likely" and that two persons were exposed to a hazard.

In this case, the inspector found an opening between the cover plate and control box of the continuous-mining machine in excess of .004 of an inch. The machine was being operated at the face cutting and loading coal. Testimony in connection with the other violations issued at this mine in this case reflects that the mine liberally releases methane and that methane ignitions have occurred in the mine. Under the circumstances, I conclude that the violation presented a possible ignition hazard and was serious.

With regard to the respondent's history of prior violations, although the parties stipulated that the respondent has an "average" history of prior violations, I have no idea what this means. MSHA has filed no information concerning the respondent's history of prior violations, and I have no basis for determining whether an increase or decrease in the initial assessment is warranted.

Civil Penalty Assessment

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I cannot conclude that MSHA's initial assessment of $850 for the violation in question is unreasonable. Accordingly, IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $850 for section 104(a) "S & S" Citation No. 2347351,

April 13, 1985, 30 C.F.R. 75.503. Payment is to be made to MSHA within thirty (30) days of the date of this order, and upon receipt of payment, the case is dismissed.

George A. Koutras
Administrative Law Judge