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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 85-105 A.C. No. 15-13920-03539
v.	Docket No. KENT 85-141 A.C. No. 15-13920-03548
PYRO MINING COMPANY, RESPONDENT	Docket No. KENT 85-142 A.C. No. 15-13920-03549 Docket No. KENT 85-159 A.C. No. 15-13920-03550 Docket No. KENT 85-167 A.C. No. 15-13920-03551 Docket No. KENT 85-180 A.C. No. 15-13920-03554 Pyro No. 9 Wheatcroft

DECISIONS

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These civil penalty proceedings concern proposals 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). The petitioner seeks civil penalty assessments against the respondent

for 15 alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests, and hearings were held in Evansville, Indiana. The parties filed no posthearing briefs or proposed findings and conclusions, but I have considered the oral arguments made by the parties on the record during the hearing in the adjudication of these matters.

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

Issues

The primary issues presented are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory standard, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of these decisions.

Stipulations

The parties stipulated that the respondent is subject to the Act, and that at all times relevant to these proceedings, the overall coal production for the respondent's operating company was 5,200,080 tons, and that the production for the Pyro No. 9 Wheatcroft Mine was 1,662,825 tons. They also stipulated that the payment of the assessed proposed civil penalties will not adversely affect the respondent's ability to continue in business, and that the violations were abated in good faith.

Discussion

KENT 85Ä105

Section 104(a) "S & S" Citation No. 2507205, January 29, 1985, 30 C.F.R. 75.1722: "The north conveyor belt was not guarded on the bottom side where the No. 4 unit supply road passed under the belt. There are exposed moving parts that could be contacted by employees travel (sic) under the conveyor."

Section 104(a) "S & S" Citation No. 2507206, January 30, 1985, 30 C.F.R. 75.400: "Loose coal and coal dust had accumulated in the Nos. 5, 6, and 7 return entrys (sic) and connecting crosscuts for 100 feet outby spad No. 9+536 on the No. 2 unit."

Section 104(a) "S & S" Citation No. 2507208, January 31, 1985, 30 C.F.R. 75.503: "The loader used to load coal on the No. 3 unit (# L23) was not maintained in a permissible condition in that the packing glan (sic) to the right head motor was loose. The service wire to the left light was cut and not insulated."

Section 104(a) "S & S" Citation No. 2507209, January 31, 1985, 30 C.F.R. 75.313: "The methane monitor installed on the L23 loader used on the No. 3 unit was not maintained in that the sensor head was stopped up with oil and dirt to the point it would not operate."

MSHA Inspector George Newlin confirmed that he issued the guarding citation (2507205), on the north conveyor coal carrying belt after observing that the bottom side of the belt had not been guarded to preclude someone from reaching up and into the idler pinch points. The belt was 42 inches wide and was approximately 4 to 5 feet above the roadway which passed under it. Supplies were stored under and near the belt, and it was an area where men and equipment regularly passed under it. He was concerned that some one such as a mechanic or supply person, or someone walking or riding under it could stand up and reach into the unguarded pinch point.

Mr. Newlin considered the belt idlers to be unguarded pinch points, and he was also concerned that in the event the belt broke, the whipping action could result in someone being struck by the belt and injured. He considered the idlers and the belt itself to be moving machine or equipment parts which required to be guarded. The belt had been previously guarded by metal mesh material, but it had become deteriorated and removed. The guard was replaced by welding steel bars to the frame of the belt at the point where the roadway passed under it.

On cross-examination, Mr. Newlin confirmed that he was not aware of anyone being injured at the unguarded belt location, and he also confirmed that inspectors regularly passed under the belt location in the past but did not cite it for any inadequate guarding. He considered the violation to be "S & S" because the unguarded belt exposed miners to a hazard,

and he believed that the condition could reasonably likely result in serious injuries. He did not know how long the belt had been installed at the cited location. He confirmed that belt idlers located at the underside of the belt were not required to be guarded along the entire belt line, unless the belt crossed over a roadway or travelway where men and equipment would be present. He identified photographic exhibit RÄ1 as a photograph of the belt location in question, and confirmed that the photograph shows the guarding which was installed to achieve abatement. He believed that miners congregated at the location in question, and he stated that there was a mine phone nearby, but that it was not in the area of the unguarded belt.

David Furgerson, mine safety manager, testified that the belt was initially installed approximately 13 to 14 months prior to the citation and that many MSHA inspectors had passed under it without citing it. Mr. Furgerson did not believe that anyone passing under the belt could contact the idlers, but conceded that if they stood up while in a piece of equipment they could contact it. He saw no evidence of any prior guards, and did not believe that anyone would be injured if the belt broke.

Section foreman James M. Hibbs testified that he is familiar with the unguarded belt in question, and he stated that for the 3 years he has been employed at the mine he has never known the belt to be guarded.

Inspector Newlin confirmed that he issued a citation for coal accumulations (2507206) on the Number 5, 6, and 7 return entries. He described the accumulations as "grey and black in color," ranging in depths from 0 to 8 inches, 20 feet wide, along the crosscuts and entries. He believed that the accumulations resulted because of a failure to properly clean up while the mining cycle advanced, and he indicated that the accumulations were the result of mining as the faces were advanced. The entries in question were in neutral belt return entries where no active mining activities were taking place.

Mr. Newlin stated that the accumulations presented a hazard in that they could have contributed to the enhancement of an explosion. In the event of any ignition of explosion at the face, the accumulations would have contributed to the severity of the explosion. He saw no evidence of any equipment passing through the areas in question, and confirmed that no immediate ignition sources were present. He confirmed that the closest mining taking place was approximately two

crosscuts, or 100 feet inby the location of the accumulations, and that the face area was approximately 180 feet away.

On cross-examination, Mr. Newlin stated that he had intended to take a dust survey, but after observing the accumulations and issuing the citation, he did not take such a survey. He detected a negligible amount of methane present in the cited locations, and while the area was not adequately rock-dusted, he confirmed that he issued no citation for lack of rock dust. He stated that the coal accumulations were behind the section brattice line, and that no ignition sources were present behind the brattice line. He believed that equipment could have traveled the area, and confirmed that the brattices had been previously constructed.

Safety manager David Furgerson, confirmed that he traveled with Mr. Newlin during his inspection and he confirmed the existence of the cited coal accumulations. He produced a copy of the preshift examiner's report for January 30, 1985, and noted that no violations or hazardous conditions were noted (exhibit RÄ3).

Inspector Newlin confirmed that he issued the permissibility violation (2507208), for the loader used to load coal in the number 3 unit after finding a loose packing gland and loose wire which had been cut on the machine. The wire was for one of the headlights, and while it was disconnected, the end was not insulated where it had been cut. The loader was in operation loading coal, and he detected .2 methane present, but this caused him no particular concern. Mr. Newlin stated that the loader operator told him that "there was power to the wire." Mr. Newlin stated that the loose energized wire could come in contact with the frame of the loader and cause a spark. The loader operator advised him that the light had come off the machine, but that the face boss was not aware of the condition.

Mr. Newlin stated that he cited two separate conditions; the loose uninsulated wire, and a loose packing gland. He identified a similar packing gland produced by the respondent for demonstration purposes, and he confirmed that it was loose by turning it with his fingers and finding that it was not "finger tight." The purpose of the packing gland is to keep the wires inside the machine protected from arcs or sparks. Mr. Newlin confirmed that he issued a second citation on that same loader (No. 2507209) that same day because the methane monitor sensor head was clogged with dirt and oil.

On cross-examination, Mr. Newlin could not state where the loader was precisely operating when he cited it. He confirmed that he made no independent determination that the wire was energized or that it had power. He simply relied on what the loader operator told him, but admitted that his notes did not reflect any statement by the operator that the wire was energized. Mr. Newlin confirmed that he did not check the loader light fuses to determine if they had blown out, and he stated that he would not have issued the citation if there was no power to the light wire in question. The wire appeared to have been cut, and the exposed end had not been insulated. Mr. Newlin also confirmed that he did not check the loader electrical junction box and did not check the wire with an OHM meter.

Safety manager David Furgerson testified that the wire could have been cut when it came into contact with a rib. He stated that the machine operator would not know whether there was power to the wire after it was cut. He recalled no conversations with Mr. Newlin or anyone else about the cited condition, and he did not know the identity of the loader operator.

James Crowell, respondent's maintenance director, testified that the loader has two sets of lights, and that they operate under two separate electrical circuits. He stated that the loader can operate with one light, and that in the event a wire or cable is cut, the fuse would blow and interrupt the power to the light. He confirmed that he did not examine the loader in question, and conceded that a fuse may not always blow if the light wire or cable is cut.

Inspector Newlin confirmed that he cited the loader used on the number 3 unit after finding that the methane monitor sensor head was gobbed with oil and dirt (2507209). He explained that the purpose of the sensor head is to detect the presence of methane. If methane is detected, the sensor sends a signal to the methane monitor which registers the amount on a signal device in the operator's cab. In his opinion, the gobbed sensor head would prevent the proper signal, but he conceded that he did not test the sensor head with a predetermined mixture of methane to be absolutely sure that it was not functioning properly because there was not enough methane present to make comparisons, and he had no predetermined mixtures with him at the time he observed the condition. However, based on his visual observation of the gobbing condition, he did not believe that the sensor head was functional.

On cross-examination, Mr. Newlin confirmed that the methane monitor test button was functional and operating properly. He confirmed his prior observations of the gobbed condition of the sensor head, and confirmed that the accumulated oil and dirt was cleaned out with a screwdriver after the sensor cap was removed. He also confirmed that the gobbed condition was readily observable, that there was sufficient air ventilation on the unit, and that it was adequately rock dusted. He also confirmed that there were no dangerous methane accumulations present.

Safety manager David Furgerson testified that it was his belief that the methane monitor sensor head was working properly even though it was gobbed with dirt and oil. He stated that the specific gravity of methane is .5545, and that it will permeate oil and dirt because it is porous material. He confirmed that the maintenance department cleaned out the sensor head, but that it was not tested with a known mixture of methane. It was his view that simply because the sensor head was dirty did not indicate that it was inoperable. He simply did not believed that the oil and dirt was "packed in enough" to prevent the sensor head from sending a signal to the methane monitor.

KENT 85Ä141

Section 104(a) "S & S" Citation No. 2508624, April 11, 1985, 30 C.F.R. 75.807:

> The high voltage cable installed along the north west track entry was not placed so as to afford protection against damage from mobile equipment in several places. Also the cable was not guarded in at least fifteen places where miners were required to be under it. Supplies and tool boxes were stored under the cable.

Section 104(a) "S & S" Citation No. 2508625, April 11, 1985, 30 C.F.R. 75.1306: "The explosives magazine on the No. 4 unit, I.D. No. 004 was not maintained in good condition because the doors would not close, the magazine had been struck by a piece of machinery."

Section 104(a) "S & S" Citation No. 2508627, April 11, 1985, 30 C.F.R. 75.400: "Accumulations of loose coal and coal dust, 2 to 6 inches deep and averaging 8 foot wide was present along the ribs of the No. 4 unit belt beginning at the tailpiece and extending outby 150 feet."

Section 104(a) "S & S" Citation No. 2507611, April 12, 1985, 30 C.F.R. 75.400: "Accumulation of float coal dust and coal dust was observed over previous rock dusted surfaces in the 3ÄA belt conveyor entry starting at the header and extending 5 crosscuts inby (approximately 250 feet) ranging in depth from 0 to 5 inches."

Section 104(a) "S & S" Citation No. 2507618, April 23, 1985, 30 C.F.R. 75.807: "The 7200 (volts) high voltage cable strung across the No. 3 entry used as the haulage road did not have a guard on it. The entry was approximately 4 feet high. Miners were required to travel under this cable."

MSHA Inspector James E. Franks testified as to his background and experience. He confirmed that he inspected the mine on April 11, 1985, and issued Citation No. 2508624, after observing several locations, and at least 15 additional locations along the track entry in question, where a high voltage cable had not been hung or guarded to prevent damage from equipment or from miners coming in contact with it. He stated that supplies were stored under the cable at the locations in question, and in several places the cable was hung so low that he believed it could be damaged by equipment which was required to pass under it while storing and retrieving the supplies. Mr. Franks stated that section 75.807, requires cable protection to protect the cable from equipment damage, and to also protect miners from coming in contact with it. He confirmed that he issued the citation to prevent cable damage from mobile equipment at several places, and to prevent miners from contacting the cable when they passed under it at the locations where the supplies were stored. He explained that any cable located at points where men do not regularly pass under it is required to be guarded by hanging it out of the way of equipment or behind timbers, and that at places across roadway and travelways, it is required to be guarded or covered to preclude miner contact as well as equipment damage.

Mr. Franks identified a piece of PCV hard plastic pipe produced for demonstration purposes at the hearing as the type of guarding which is acceptable to MSHA. The pipe material is cut along one side so as to facilitate it being taped or otherwise secured around the cable for protection. He stated that the PCV pipe is similar to the guarding used by the respondent.

Mr. Franks testified that in at least five or six locations the cable was lying along the side of the track on the

mine floor and he was concerned that scoops and battery motors using the track entry would get into the cable and cause damage. Some of these locations were in areas where the track was narrow, and the operators would be on the "off-side," thereby increasing the possibility that a piece of equipment would damage the cable. Most of the other 15 locations were at the end of the track where the respondent stored blocks, boards, steel ties, and roof bolts, and he believed that men were required to pass under the cable to move the supplies in and out, and the chances were great that someone would come in contact with the unprotected cable.

Mr. Franks conceded that the cable in question is inherently shielded and that it was provided with a ground check monitoring system. A properly functioning system will deenergize the cable if it is cut or shorted out, but he believed that such a system may not always be in proper working order. He also believed that it was possible that someone merely touching the cable would not suffer any harm, but on the other hand, if the conditions were right, it could cause fatal injuries. He confirmed that the cable at the equipment supply locations was hung but not protected, and at the other locations it was simply lying on the mine floor.

On cross-examination, Mr. Franks stated that the section in question was operating on a 20Ähour a day production schedule, and that the supplies which were stored under the cited cable locations were needed and used during these production periods. He confirmed that as the mining cycle advances, the supplies would be moved up. However, he pointed out that the track entry had been driven approximately 1,200 feet and that the track had been in place for about a year. He believed the supplies in question had been stored at the cited locations for approximately 3 weeks, and that men were regularly required to pass under the unprotected cable to retrieve and move the supplies. He observed miners under the cable, and also observed a motor unloading supplies under the cable. He confirmed that he did not know the type of cable used by the respondent and that he detected no damage to the cable at any of the cited locations.

Mr. Franks dicussed the supply and storage system used at the mine, and he explained MSHA's guidelines for guarding high voltage cables. He confirmed that the type of plastic PCV pipe used by the respondent to guard its cables is acceptable as adequate guarding material for high voltage cables.

James Crowell, respondent's maintenance director, testified that he has 15 years of experience in electronics and

electricity and has taught and conducted training courses in these areas. He produced sections of cables for demonstration purposes, and he explained that one of the cables is a standard black permissible 8,000 volt power feeder cable which is acceptable by MSHA for use by the respondent in its mines. However, he explained that the respondent does not use this type of cable, but instead uses a "hypalon" cable approximately two times the diameter of the standard cable, and that it has an insulated jacket and three electrical conductors which are independently braided and protected by insulation. The cable has two insulated ground wires and one insulated ground check wire, and he described it as "the best available cable on the market." He stated that in the unlikely event that the cable were run over and a massive break or cut occurred to the insulated high voltage conductor, the cable would deenergize and the power would cut off. He is unaware of any incidents in which the cable has failed to function properly.

On cross-examination, Mr. Crowell confirmed that he did not inspect the cable which was cited by Inspector Franks, and he stated that the cable ground monitoring system is required to be tested and checked monthly. He believed that under normal mine operating conditions the cable in question is inherently safe, and that it was not reasonably likely that someone would be injured by contacting such a cable.

Inspector Franks confirmed that he issued Citation No. 2508625 on April 11, 1985, after observing that the doors of a mobile explosives magazine would not shut tight to afford protection to the explosives stored inside. The doors appeared to have been struck by another piece of equipment and he observed an indention in the doors. The doors were warped and they could not be shut tight to the latches provided to secure the doors. He believed that the magazine had to be moved and advanced as the mining cycle advanced, and he was concerned that another piece of equipment could run into it while it was being moved. With the doors opened and unsecured, he believed that such a collision would detonate the explosives stored inside the magazine.

Mr. Franks stated that the magazine, in its parked position at the time of the inspection, was not in the line of fire of any shots that may have been fired. However, he believed that it was possible for a piece of shot coal or rock to fly into the area where the doors were not secured if the magazine were moved to an area where shots were being fired, and that the explosives could possibly be detonated. If this occurred, 14 people on the section would be exposed

to the resulting explosion hazard. Mr. Franks discussed prior reported nationwide incidents of powder magazine accidents, but confirmed that none have occurred at the respondent's mines.

Mr. Franks could not state how long the condition of the doors had existed. Apart from the warped doors, he confirmed that the magazine was otherwise properly constructed of metal with adequate insulation inside. He did not know the type of powder stored inside the magazine, and made no determination whether or not any detonator caps were also stored in the magazine with the powder. If they were, he speculated that they would be stored and isolated from the powder by a metal compartment.

On cross-examination, Mr. Franks identified two photographs of a mobile explosives magazine taken by the respondent, and he confirmed that it was similar to the one he cited. The magazine is mounted on rubber tired wheels and he explained that when it is moved it moves along a track with the wheels lowered. When it is parked, the wheels are raised to the position shown in the photographs. He identified the doors on the side of the magazine depicted in the photographs as similar to the ones he cited, and he confirmed that the overall metal construction and configuration of the magazine was similar to the one cited.

Mr. Franks stated that under normal operating conditions, the powder and detonators are stored separately inside the magazine and they are separated by a 4 inch metal or steel plate, and that apart from the doors, the cited magazine was of substantial construction and was otherwise in compliance with the requirements of section 75.1306.

In response to a suggestion by the respondent's representative that the respondent complied with the requirements of section 75.1304, because it always kept its explosives or detonators in properly constructed closed containers, Mr. Franks stated that section 75.1304 does not apply to the facts on which he based his citation. He explained that section 75.1304, is intended to apply where explosives and detonators are "hand carried" by the shooter to the shot location after he has taken them out of the magazine. He explained further that the cited mobile magazine is not "carried" by miners, but is moved or pulled about the mine on a track by means of another piece of equipment and a cable or other coupling device. He emphasized the fact that he cited the violation because the damaged and warped doors rendered the magazine less than "of substantial construction" as required

by cited section 75.1306. Further, the warped doors exposed the metal interior of the magazine and did not afford protection from roof falls as required by the standard.

Mr. Franks stated that he considered the violation to be significant and substantial because the magazine would be moved about the mine and there was a reasonable likelihood that it would be struck by other equipment travelling about the unit, with resulting injuries of a serious nature.

James Hibbs, respondent's safety manager, confirmed that the doors of the explosives magazined cited by Mr. Franks were damaged. He stated that one of the doors was "badly damaged" and that the other one was "not quite as bad." He confirmed that it was impossible to securely close or latch the doors. He confirmed that when the magazine is moved, the wheels are down, and that in this position, it is impossible to move the magazine with the doors opened because they would strike the wheels.

On cross-examination, Mr. Hibbs stated that he had no knowledge as to how the cited magazine was moved out of the mine to achieve abatement. He confirmed that the respondent uses a water based gel explosive powder manufactured by Dupont, and it is known as "Tovex." He confirmed that all explosives used in the mine are permissible, and that in order to have an explosion, a detonator device must be used in conjunction with the powder. He did not believe that powder, by itself, will explode by being struck by equipment or rocks.

Inspector Franks confirmed that he issued Citation No. 2508627, on April 11, 1985, after observing accumulations of loose coal and coal dust along the ribs of the No. 4 unit belt line for a distance of approximately 150 feet. He described the conditions he observed, and he stated that active mining on the unit was taking place two to three crosscuts inby the areas where he observed the accumulations.

Mr. Franks speculated that the accumulations had existed for 4 to 6 days, and he surmized that they either rolled off shuttle cars which had traveled the area or had been left there as the unit advanced. He observed some of the coal accumulations along two of the bottom belt rollers which were turning in the coal, and a power cable was on the coal. He confirmed that waterlines and fire warning devices were installed along the belt line. Although his visual observations led him to conclude that the area in question was not

adequately rock-dusted, he conceded that he issued no citation for lack of adequate rock dusting.

Mr. Franks stated that he considered the violation to be "significant and substantial" because coal accumulations turning in belt rollers could cause a fire, and the presence of the cable which he observed constituted a possible ignition source.

On cross-examination, Mr. Franks confirmed that the normal mining procedure in the mine is to advance one break a day during production, and that the respondent's normal practice is to "scoop the entry" before installing the belt line. He conceded that the accumulations could have existed for less than 4 to 6 days.

MSHA Inspector Dennis Dati confirmed that he issued Citation No. 2507611 on April 12, 1985, after observing accumulations of float coal and coal dust across the No. 3ÄA belt conveyor entry for approximately five crosscuts, or a distance of 250 feet. He stated that the accumulations varied in depth, and that in some areas he could see the rock dust under the accumulations. He confirmed that the belt was moving, but observed none of the accumulations turning in the belt rollers. An electrical power box which provided power for the belt, as well as timbers and the belt itself, were in the area of the accumulations. He could not determine how long the accumulations had existed prior to his inspection, and he discussed the conditions with respondent's safety manager David Furgerson, but he made no comments.

On cross-examination, Mr. Dati stated that float coal dust and coal dust is explosive, and "if it goes off" it is "extremely hazardous." He did not return to the mine until April 15, because he had other business to attend to, but when he returned he found the conditions abated and the area had been cleaned up and rock-dusted. He confirmed that he did not sample the accumulations for incombustible content, but based on his observations, he believed that any sample would have indicated 65 percent incombustility. He stated that the float coal dust was scattered throughout the cited area and was present on the belt and box. He could not recall whether the areas were wet, but he conceded that under normal operating conditions the belt heads would be wet. He also conceded that the cited area was adequately rock-dusted.

Respondent's safety manager David Furgerson testified that he was with Inspector Dati during his inspection, and he confirmed the existence of the cited accumulations. He

stated that the float coal dust had accumulated on the rock dusted surfaces. He stated that the entire area in question was damp and that the top was leaking. He explained that most of the area is cribbed because of a bad top condition and that it was difficult to travel through the crosscuts with equipment. Under the circumstances, rock dust must be taken in on the belt and the area had to be hand dusted. The cited areas looked white to him, and he believed the cited accumulations had existed for possibly one prior shift or at most 2 days.

Inspector Dati confirmed that he issued Citation No. 2507618, on April 23, 1985, after observing an unprotected high voltage cable hung across the No. 3 entry haulage road. He stated that he was with respondent's safety manager James Hibbs in a golf cart driving towards the face area, and that they passed under the cable. The cable was not guarded in the area where it crossed the roadway, and he believed that 8 to 10 men would regularly be required to travel under the cable.

On cross-examination, Mr. Dati stated that the haulage road in question was the main haulage road used by scoops, jeeps, and men on foot. The cable was hung on J-hooks but was not guarded by the pcv plastic pipe material normally used by the respondent for this purpose. He observed haulage equipment travelling the roadway, and he confirmed that it was possible that the guarding had been knocked off. He observed no damage to the cable, and confirmed that he saw the guard lying by the side of the crosscut. The condition was abated within an hour or so.

Safety manager James Hibbs confirmed that he was with Inspector Dati when he issued the citation. He stated that he could see the cable from a distance as they approached it in the golf cart, and since a curtain was hung across the road, he could not see that the cable guard was off. He believed the guard had recently been knocked off, and he observed that the tape used for installing the guard to the cable was still present on the cable. He stated that the unit was driving to the left off the main entry, and that the day in question was the first production morning on the unit. He had no reason to believe that it was necessary for anyone to go under the cable before the unit was advanced.

On cross-examination, Mr. Hibbs conceded that men and equipment regularly used the haul road in question, and would pass under the cable. He believed that the cable had not been unguarded for more than 8 hours, and he did not know how many men were on the unit.

The parties agreed to incorporate by reference the prior testimony of maintenance director James Crowell with respect to the type of cable used by the respondent in the mine, and the fact that it is provided with a ground check monitoring system.

KENT 85Ä142

Section 104(a) "S & S" Citation No. 2507619, April 26, 1985, 30 C.F.R. 75.807: "The 7200 high voltage cable strung across the crosscut at spad No. 12+80 between No. 3 and No. 2 entrys' (sic) were (sic) there was evidence of miners travelling under it did not have a guard on it."

MSHA Inspector Dennis Dati testified as to his background and experience and he confirmed that he issued the citation in question. He confirmed that Mr. James Hibbs, respondent's safety representative, accompanied him during his inspection. Mr. Dati stated that he and Mr. Hibbs were travelling the entry roadway in a golf cart and when they reached the crosscut at spad 12+80, Mr. Dati observed that the high voltage cable which was hung across the crosscut was not provided with a guard. Cables hung at such locations are normally guarded by a plastic "water-pipe" type shielding which is taped over the cable portion which crosses the crosscut.

Mr. Dati stated that he observed no one walking or driving under the cable, but he did observe "all kinds" of tire tracks under the cable and this led him to believe that equipment had passed under it. However, he observed no foot prints, and the tire tracks were over the rockdusted crosscut roadway. Mr. Dati estimated that the cable was hung up approximately 4 1/2 to 5 off the floor, and he stated that he is 5 feet 8 inches tall and could not stand up in the area.

Mr. Dati stated that the hazard presented was the possibility of equipment running into the cable and damaging it. He could not identify the types of equipment which may have made the tracks, but he assumed they were made by scoops, track buggies, jeeps, or golf carts. The cable had an outer protective insulated jacket, but it was not otherwise protected against damage. He did not believe that a person contacting the cable could be injured, and his only concern was over possible damage to the cable through equipment contact.

On cross-examination, Mr. Dati reiterated that the only evidence he had to support his conclusion that men or equipment regularly passed under the cable were the tracks he

observed on the rockdusted roadway. He did not check the tracks to determine the types of equipment that may have made them, nor could he determine when the cable was hung across the crosscut or whether the tracks were there before the cable was advanced and hung across the crosscut. He confirmed that there were other means of access to the places where mining was taking place. Referring to exhibit RÄ6, a sketch of the area, Mr. Dati placed the cable location in question as approximately five crosscuts outby the face, and he agreed that the power center was advanced approximately three crosscuts as the mining cycle advanced. The cable was hung along the right side of the roadway for four additional crosscuts outby the location where it was not guarded. These additional locations were timbered, and since the cable was behind the timbers it was not required to be guarded at those locations.

Mr. Dati confirmed that the unguarded cable was equipped with a ground check monitoring system which is intended to cut off the power in the event the cable is damaged.

In response to further questions, Mr. Dati stated that he observed no damage to the cable, and observed no knicks, abrasions, or other evidence of cable damage. He also confirmed that he did not interview any of the equipment operators who may have passed under the cable, did not ascertain the types of equipment operating on the section, and he did not know the heights or other working parameters of the equipment. He believed that the only person exposed to any hazard would be the individual who passed under the cable. In the event of cable damage, that person would be exposed to a possible hazard from any cable damage.

Mr. Dati stated that Mr. Hibbs offered no explanation for the condition in question and simply agreed that the cable needed to be guarded. A guard was installed within 20 minutes, and Mr. Dati terminated the citation.

Mr. Dati identified a copy of an MSHA report of investigation concerning a fatality which occurred at another mine because of a defective low voltage cable monitoring device and he conceded that the citation in issue in this case deals with a high voltage cable which was not damaged.

Section foreman James Hibbs confirmed that he accompanied Inspector Dati during his inspection, agreed that the cable was not guarded with any additional guarding other than its own protective insulated cable jacket, and agreed that it was hung across the crosscut at the spad 12+80 location. He saw no equipment or miners passing under the cable and he agreed

that there were equipment tracks under the cable. He believed that it was possible that the cable was hung at the location after the tracks were made in the roadway, and he was not aware of any injuries sustained by any employees because of damage to any of the high voltage cables.

Mr. Hibbs stated that all of the mine high voltage cables are hung on insulated hooks and that in areas where men or equipment regularly pass under the cables they are protected and guarded by a hard plastic type guarding device which is taped over the cable at those locations.

On cross-examination, Mr. Hibbs testified that the unit was engaged in retreat mining and that mining was taking place in the rooms to the right of the haulageway where the cable was hung. He marked exhibit RÄ6 to show where the rooms were located and he explained what was taking place and how the cable in question was routed to the power center. He placed the location of the power center in an area to the right of the roadway as shown on exhibit RÄ6, and he confirmed that a guard was installed within 20 minutes in order to abate the violation.

KENT 85Ä167

Section 104(d)(1) Order No. 2507503, March 21, 1985, 30 C.F.R. 75.313: "The methane monitor on the No. 2 unit loader had been bridged out in the power box. Coal was being loaded in the No. 2 heading."

MSHA Inspector George Newlin confirmed that he conducted an inspection at the mine on March 21, 1985, and issued the citation after finding that the loading machine methane monitor was inoperative. He tested the monitor by activating the test button, and when it did not deenergize the machine an electrical mechanic was called to the scene. He discovered that the monitor had been "bridged out" and that a wire was disconnected. He reconnected the wire and this rendered the monitor operable.

Mr. Newlin stated that during an inspection the day before the citation was issued he observed the same loader with the same inoperative methane monitor. The machine was idle, but the power was on. The maintenance foreman did some troubleshooting and after removing some cover bolts, found that the monitor had been "bridged out." He repaired it and rendered it operable. Mr. Newlin stated that he did not issue a citation that day because the machine was idle and he was told that the monitor was scheduled for maintenance that

day. When he returned on March 21, and found the same condition, he was told by the machine operator that the monitor had been bridged out for 3 days. Under these circumstances, he decided to issue a section 104(d)(1) order, and so informed Douglas Whitledge, the mine foreman who was with him on his inspection.

Mr. Newlin stated that at the time he cited the loader on March 21, it was loading coal and the regular production crew was working. He believed that a methane explosion can occur at any time underground and that a serviceable monitor is critical in order to deenergize the loader when explosive levels of methane are detected.

On cross-examination, Mr. Newlin confirmed that the violation was abated within 22 minutes after the monitor bridge was removed. At that time, the monitor was "partially working," and he was told that a new one was on its way underground to replace the questionable one. Although the old one was not completely operable, he permitted the loader to be used, but only after instructing the operator to use a methane spotter for periodic methane checks. He confirmed that methane monitors which have mechanical problems "may be repaired one minute and then go out the next."

Mr. Newlin confirmed that he found no unusual amount of methane present during his inspections and issued no additional citations for any hazardous ignition sources. He corrected his prior testimony and stated that he did issue a 104(a) citation on March 20, because of the inoperable methane monitor in question. He stated that he did not know who bridged the monitor or why it was done. He explained that such monitors often experience mechanical problems and speculated that it may have been bridged out to prevent the machine from deenergizing while it was in operation and loading coal. He reiterated that he permitted the machine to be used with a partially repaired monitor because he knew a new replacement was on its way and would be installed, and that a spotter would be used. However, he did not remain on the scene until the new monitor was actually installed.

Douglas Whitledge, mine foreman, confirmed that he was with Inspector Newlin when he cited the methane monitor in question, and confirmed that it had been bridged out and was inoperative. He also confirmed that he made his methane checks and that Mr. Newlin permitted the partially repaired monitor to be used on March 21, until the new one was installed. He confirmed that Mr. Newlin did not state that it could be used while it was bridged out, and he had no

knowledge as to when Mr. Newlin was first made aware of the fact that it had been bridged out.

David Furgerson, mine safety manager, stated that he was with Inspector Newlin on March 20, when the methane monitor condition was first discovered. He stated that the third shift was performing routine maintenance and discovered that the monitor in question had been bridged out. The monitor was repaired at that time, but he had no personal knowledge as to the extent of the repairs or what was done to render it serviceable.

James Crowell, maintenance director, testified that methane monitors regularly break down for various mechanical reasons and he produced a maintenance and order form indicating that a new monitor was ordered for the one which was defective (exhibit RÄ3).

KENT 85Ä180

Section 104(a) "S & S" Citation No. 2507175, March 11, 1985, 30 C.F.R. 75.1300: "Care was not taken to be sure that all personal (sic) was (sic) clear of a shot that was fired in the crosscut between No. 3 and No. 4 entry on No. 1 unit."

The citation was modified on March 28, 1985, as follows:

> Citation No. 2507175 is hereby modified to change the Part/Section from 75.1300 to 75.1303 and to include in the body of the citation that permissible explosives were not being used in a permissible manor (sic) in that care was not taken to ascertain that all persons were in the clear, and the loader operator was not removed from the adjoining working place (No. 3 entry) where there was a danger of shot blowing through.

Section 104(a) "S & S" Citation No. 2507176, March 11, 1985, 30 C.F.R. 75.1300: "An unintentional unconfined shot was fired in the crosscut between No. 3 and No. 4 entry on No. 1 unit ID 001."

MSHA Inspector Ronald Oglesby testified as to his background and experience, and he confirmed that he and another inspector conducted an investigation of an explosion which occurred at the mine at approximately 1:00 a.m., on March 11,

1985. He identified exhibit PÄ6 as the report of investigation, and he confirmed that the two citations in question were issued as a result of his investigation of the incident. He identified exhibit PÄ7 as a sketch of the area where the incident occurred and he explained the cutting, drilling, and shot procedures which were taking place. He also identified exhibit PÄ8 as a diagram of the mine section given to him by someone in the respondent's safety department. Mr. Oglesby described the "explosion" as a "large blow out" from the side of a crosscut at a location where a drill hole had been shot through. As a result of his investigation, including the examination of the drill hole, he concluded that an unconfined shot had taken place.

Mr. Oglesby confirmed that he issued Citation No. 2507175, because the shooter failed to take care and insure that all miners in the blast area were clear of the shot and removed from the area. He stated that he placed the location of loader operator Marvin Ferguson, who was injured by the blast, by speaking with the shooter and other witnesses during his investigation. He also spoke with Mr. Ferguson on March 27, while he was in the hospital recuperating from burns he received by the blast, and Mr. Ferguson told him that he was temporarily operating a loader in the number 3 entry while awaiting the arrival of the regular loader operator. Mr. Ferguson confirmed that the shooter, James Bealmear, told him that he was preparing to fire a shot and asked if he was clear. Mr. Ferguson stated that he told Mr. Bealmear that he was in the clear, and then proceeded to squat down with his hands over his ears when the shot went off. After the shot, Mr. Ferguson shouted to Mr. Bealmear, but Mr. Bealmear could not get to him, and the face boss came to Mr. Ferguson's rescue.

Mr. Oglesby referred to the sketch and testified that after Mr. Bealmear loaded the shot hole, he returned to the location shown on the sketch and fired off the shot.

Mr. Oglesby confirmed that he issued Citation No. 2507176 after determining that the shot in question was an unconfined shot. He defined an "unconfined shot" as one which is fired without at least 18 inches of overburden material around it. He did not know the type of explosive used by the shooter, nor could he determine whether any stemming was used. The appearance of the blown-out area indicated to him that the shot was not confined, and he stated that had it been properly confined it would not have blown out. He identified exhibit PÄ10 as the results of a state investigation of the incident.

On cross-examination, Mr. Oglesby stated that the area being mined was a continuous mining unit, and that coal is not normally mined by using blasting agents of shooting and drilling. He confirmed that it is not uncommon for coal to be shot down between the crosscuts in order to even them up, and that the existence of such uneven crosscuts is not uncommon. He also confirmed that it is not illegal to make "pop shots" by shooting one drill hole at a time.

Mr. Oglesby testified as to the distinctions between a confined and unconfined shot, and he stated that he could not recall seeing through to the number 4 entry from the number 3 entry. He identified exhibit PÄ10 as a statement made by Mr. Ferguson on June 3, 1985, and confirmed that his accident investigation report stated that Mr. Ferguson was not in the direct line of fire of the shot. He also confirmed that he issued no citations for the lack of proper shot stemming or for the use of non-permissible shot powder.

In response to further questions, Mr. Oglesby stated that he observed that the coal behind the shot had been fractured, and he further explained why he believed the shot was unconfined and how the fractured coal indicated to him that the shot could not be contained. He confirmed that Mr. Ferguson's injuries were not the direct result of being struck by the shot material, but that he suffered burns as the result of dust or methane being ignited by the shot. He also confirmed that had Mr. Ferguson been removed completely out of the entry and area where he was working at the time of the shot, the citations would not have been issued.

James S. Bealmear testified that he worked for over 11 years for the Island Creek Coal Company, and has worked for the respondent for the past 2 years. He stated that he is a certified mine foreman by the State of Kentucky, and that this certification qualifies him as a shot firer. He confirmed that he fired the shot in question between the number 3 and 4 entries, and he stated that he loaded the drill hole properly with two stemming devices and powder. After loading the powder he pulled the charge back with a wire device to insure that it had not fallen through the drill hole on the other side. He then stemmed the hole and had he had any doubts that the charge had dropped or fallen through the hole, he would have checked it. He confirmed that all of the other drill holes were shot through except for the one which blew out.

Mr. Bealmear stated that after loading the shot he ordered a cutter man who was working the number 5 entry to

come out of the entry, and he then proceeded to the number 3 entry where he observed Mr. Ferguson. He flagged Mr. Ferguson and warned him that he was going to fire a shot. Mr. Ferguson responded that "he was o.k.", and after again giving the required verbal signals, Mr. Bealmear fired off the shot from his position shown on the sketch.

On cross-examination, Mr. Bealmear reiterated that after warning Mr. Ferguson about the impending shot, Mr. Ferguson told him to "go ahead, I'm o.k.". Mr. Bealmear explained that the area marked "C" on the sketch was solid coal, and that the "A" area had been shot. Since the drill holes in the area which had been shot were collapsed, he could not load the shot from that side. He confirmed that he was familiar with the permissibility shot firing regulatory requirements and procedures, and indicated that the shot itself blew out and not the coal. He confirmed that he did not know the depth of the coal at the point where the hole was loaded, and that he had no reason to believe that the shot would blow out. Although the face boss was aware that he was shooting, he did not speak to the face boss before firing off the shot because the boss is not expected to be in the area at all times.

Mr. Bealmear stated that he averages approximately 40 shots a day, and based on his experience as a shooter he did not believe that there was a danger of the shot in question blowing out at the time he set it off. He stated that the drill hole had been shot half-way through on one side, and that he loaded it from the other side to complete the shot.

Marvin H. Ferguson testified that he has 11 years of mining experience and that he is currently employed by the Island Creek Coal Company. He confirmed that he was previously employed by the respondent as a mechanic, and that on the morning of the accident he was temporarily asked to operate a loader in the absence of the regular loader operator. He stated that he had loaded out two or three cars of coal, but stopped loading because additional cars had stopped coming to the area. He confirmed that he had parked his loader and was not loading at the time of the ignition in question.

Mr. Ferguson stated that he was aware of the fact that Mr. Bealmear was going to fire a shot because he observed him at the No. 3 entry and Mr. Bealmear warned him that he was going to fire a shot. Mr. Ferguson stated that he told Mr. Bealmear that he "was o.k.," and that after the initial warning he proceeded to walk out of the entry and stopped by the right side of the rib where he stooped down to await the shot. He marked the spot where he was located when the shot

went off by an "X" on the sketch used at the hearing, and he confirmed that Mr. Bealmear called out to him three times with a warning prior to firing the shot.

On cross-examination, Mr. Ferguson stated that he does not know Inspector Oglesby and could not remember speaking with him in the hospital. He recalled speaking with someone about the incident, and he explained that he was being treated for burns, had undergone skin grafts, and was medicated during the 3 weeks that he spent in the hospital and could not remember who the individual was. Mr. Ferguson stated further that Mr. Bealmear had previously fired shots in the mine and that on every occasion that he could recall Mr. Bealmear always called out three warnings before firing a shot. Mr. Ferguson also confirmed that during his employment with the respondent he was always retrained annually in his job tasks.

Docket No. KENT 85Ä159

Section 104(a) "S & S" Citation No. 2507418, issued on March 18, 1985, cites a violation of 30 C.F.R. 75.1403Ä5(g), and the cited condition or practice states as follows: "A clear travelway was not provided on the 3A belt for 50 feet starting 6 crosscuts inby the 3A header."

The citation was modified on March 20, 1985, as follows:

> Citation No. 2507418 issued for a clear travelway on the 3A belt for a distance of 50 feet, starting 6 crosscuts inby the 3A header is modified to not require a travelway in this area. This is due to adverse roof conditions. This area has had a rock fall, cribs have been installed and the top is too bad to remove the cribs. However, the following stipulations will be followed: Stop and start switches shall be installed both inby and outby the area; signs both inby and outby the area; the belt will be stopped before being examined; if any violations of Part 30 C.F.R. are observed, the belt will remain down until corrections are made.

Section 104(a) "S & S" Citation No. 2507612, issued on April 16, 1985, cites a violation of 30 C.F.R. 400, and the cited condition or practice is stated as follows: "Accumulations of float coal dust and coal dust was observed over previous rockdusted surfaces in the No. 4 unit belt conveyor

entry (I.D. 004Ä0) starting at the header and extending 6 crosscuts inby (approximately 300 feet) ranging in depth from 0 to 6 inches."

Inspector George Newlin confirmed that he issued Citation No. 2507418 pursuant to section 75.1403Ä5(g) after observing that a clear travelway was not provided on the 3ÄA belt for 150 feet starting six crosscuts inby the 3ÄA header. The area had been "cribbed out," and there was no way for the belt walker to examine the belt or to do any cleaning or maintenance work on the belt because there was no 24Äinch clearance on either side of the belt. Once a citation is issued for such a condition, his supervisor has to go to the mine to examine the area and inform the operator as to what is required for compliance (Tr. 742Ä743).

Mr. Newlin stated that in issuing the citation, he relied on a previously issued safeguard notice of February 26, 1985 (exhibit PÄ22). The previous safeguard was issued for another location where there was no 24Äinch clearance on the beltline.

Inspector Newlin explained the effect of a previously issued safeguard notice as follows (Tr. 779Ä781):

> A. Under these conditions in that area. But what I was wanting to say is, if I find another condition at this same mine, without a travelway, even if they have gone by these rules, in another area, I would still issue a citation.
>
> JUDGE KOUTRAS: Why would you do that?
>
> A. Because these areas are something that was set out; I mean, these stipulations was set out for this location. And the next location, whoever the man was that was making this judgment might make a different judgment for that location. This doesn't give them a - My original Safeguard tells them they've got to have 24 inches throughout the mine.
>
> JUDGE KOUTRAS: You mean to tell me that when the initial Safeguard Notice is issued because a mine operator didn't maintain 24 inches because of rib clearances, you give them 24, and you give them the alternative means of complying, the start and stop switches -
>
> A. At that one time.

JUDGE KOUTRAS: - at that one time, from that point on the next time the mine operator comes upon a condition where he has to build cribs, that would reduce his travelway along the belt line, do you mean to tell me that he's not authorized to go ahead and put stop and start switches in?

A. No, sir.

JUDGE KOUTRAS: To comply with the previous Safeguard Notice?

A. No, sir.

JUDGE KOUTRAS: But he has to have authorization from MSHA to do that before he does it?

A. As far as a Safeguard Notice.

Inspector Franks was called by MSHA to further clarify the safeguard procedure, and he explained it as follows (Tr. 782Ä784):

A. If you go to a mine, and you find the conveyor belt where they don't have the 24Äinch clearance, you issue a Safeguard, providing there's never been a Safeguard issued. We issue a Safeguard requiring them to provide the clearance.

The company will submit a letter or something to the district manager. The district manager, he's doing it, so I assume he has this authority to delegate it to somebody lower down, like a supervisor.

Then this supervisor will go to this mine, and he'll look at it. And the operator says, "Boy, I've got bad top. Here, I've got water comin' in here. I just can't provide the travelway."

Somebody has to make a decision, either an inspector or supervisor looking at, too, if nobody is pulling his leg, in other words. And he'll decide, okay, you can not provide the clear travelway. But I'm going to make

> some requirements that you are going to have to do in addition to. So he'll modify the original Safeguard to this area only.
>
> Now, I'll go back out there after everyone's left, and I go on another conveyor. They's already been a Safeguard issued in this mine, and I find another condition, they don't provide the 24 inches of clearance. I issue a citation because there can't be but one Safeguard on that particular belt. I refer back to that Safeguard.
>
> JUDGE KOUTRAS: Why would you issue the citation?
>
> THE WITNESS: Because that's the instructions.
>
> JUDGE KOUTRAS: Because there wasn't any clearance on either side?
>
> A. Yes. I refer back to that Safeguard, and I write this citation. I don't have the authority to tell him, "You can go ahead and violate the law." So I issue a citation. The operator screams bloody murder. "I can not provide the clearance." So we'll go through the same procedure again. He'll write a letter to him. Somebody in higher authority will come out and look at it to make the determination.

On cross-examination, Mr. Newlin confirmed that he issued the citation for lack of a 24Äinch clearance on the cited belt line caused by the installation of roof cribs which were put in because of the roof conditions. He confirmed that the belt in question was not a primary or secondary escapeway, and that prior to the installation of the cribs there was no problem with the belt. He confirmed that he had previously inspected the belt a week before on either March 14, or 15, but denied that he required the respondent to crib out the belt for a distance of 60 feet on both sides from rib to rib. He stated that "maybe I asked them to timber up the belt," and confirmed that when he came back on March 18, he issued the citation, and also issued another one for loose coal accumulations from the end of the fall to the header (Tr. 795Ä799).

Safety manager David Furgerson confirmed that the citation was issued because the timber and cribs on the beltline

eliminated the required 24Äinch belt clearance. He confirmed that the cited condition was not present prior to the installation of the cribs. He explained that once the respondent determines that an entry is not "run on site like they should," the cribs are taken down, and the belt is put back in. Once this is done, if the roof conditions are adverse, additional cribbing and timbers are installed, and the respondent must then apply for a waiver (Tr. 800).

Mr. Furgerson stated that the area in question had already been cribbed, and that when Mr. Newlin first observed it he suggested that additional timbers be installed because the area where the belt walkers were expected to travel "was busted up." The additional timbering was done on either March 16 or 17, and when Mr. Newlin returned on March 18, he issued the citation for lack of clearance on the belt. Mr. Furgerson explained further as follows (Tr. 801Ä802):

> * * * And I asked him about the citation, which I really didn't have any trouble with him writing because if he hadn't a wrote the citation, then we would apply for a waiver and another MSHA representative would have come down and written the citation. We was going to get the citation one way or the other. Once we set the additional timbers in there, whether a regular inspector finds it or whether we find it and ask for a waiver, which we have to do by law, we're going to get the citation one way or the other. So I didn't have no big problem with him that day with him writin' it.

Mr. Furgerson explained that in situations where the respondent cannot maintain 24Äinch clearances on its belt lines because of the installation of cribs due to adverse roof conditions, it submits a letter to MSHA's district office for a "waiver," and the request is normally accompanied with a mine map designating the affected area. The district office will send one of its representatives to the mine to examine the area in question. The representative will issue a citation and will then advise the respondent as to what is required in lieu of the 24Äinch required belt clearances. MSHA may take a day or two, or possibly a week to act on the request, and in the meantime the belt is continually used to run coal (Tr. 804).

In the instant case, Mr. Furgerson stated that no violation existed until the respondent installed the additional

timbering. The timbers reduced the belt travelway, and this prompted the issuance of the citation by Mr. Newlin (Tr. 806). Mr. Furgerson later stated that he was not sure that Mr. Newlin's request to install additional roof support timbers was for the location that he cited in this case (Tr. 818). MSHA's counsel made a proffer that if Mr. Newlin were recalled, he would confirm that his prior request for roof support was not for the same location he cited, and respondent's representative accepted this fact and stated "I have no problem with that" (Tr. 819).

Inspector Dati testified that he conducted an inspection on April 16, 1985, and issued Citation No. 2507612, after finding accumulations of float coal dust and coal dust over previously rock dusted surfaces along the No. 4 unit belt conveyor entry along 6 crosscuts for approximately 300 feet. He confirmed that the accumulations ranged in depth from 0 to 6 inches. He saw no belt rollers turning in coal accumulations, and he considered the belt headers to be possible ignition sources.

On cross-examination, Mr. Dati stated that in certain places he observed rock dust under the accumulations, and he believed that the incombustible content of the rock dusted accumulations was in compliance with the applicable standard. He did not make any methane tests, and he saw no problems with the belt headers which were wet. He did not know how long the accumulations had existed prior to his inspection, saw no one working to clean up the accumulations, and had no indication as to when the area was to be cleaned. He believed the violation was significant and substantial because he saw no evidence of any attempts to clean up the accumulations, and if the conditions were left unattended he believed that it was reasonably likely that an ignition would occur. He confirmed that he had no knowledge of any prior injuries or accidents in the mine which may have resulted from similar coal accumulations.

Findings and Conclusions

Docket No. KENT 85Ä105 - Fact of Violation

Citation No. 2507205

I conclude and find that the petitioner has established by a preponderance of the credible evidence that the north conveyor belt was not guarded on the bottom side where a supply road passed under it. Section 75.1722 requires that all exposed moving machine parts and belt conveyor drives,

heads, and tail pulleys which may be contacted by persons be guarded to prevent persons from contacting the unguarded parts or reaching behind the guard and becoming caught between the belt and pulley.

In this case, the inspector was concerned that someone could contact the belt idler pinch points by reachng in or contacting the unguarded belt where men and equipment regularly passed under it. He was also concerned that someone could be injured in the event the belt broke and "whipped out" and struck someone. The evidence established that supplies were stored near the unguarded belt location where men and equipment regularly passed under it, and the location had been previously guarded by a metal mesh guard which had deteriorated. Respondent's safety manager conceded that someone standing up in a piece of equipment while passing under the unguarded belt could contact the exposed pinch points. Under the circumstances, I find that a violation has been established and the citation IS AFFIRMED.

Citation No. 2507206

The testimony of the inspector establishes the existence of loose coal and coal dust in the three cited entries and crosscuts, and the respondent's safety manager, who was with the inspector when the violation was noted and the citation issued, confirmed the existence of the accumulations in question. I conclude and find that a violation of section 75.400, has been established, and the citation IS AFFIRMED.

Citation No. 2507208

The testimony of the inspector establishes that the packing gland for the cited loader motor was loose and that a service wire for one of the headlights was cut and not insulated. Section 75.503, requires that all electrical face equipment be maintained in permissible condition. The loose packing gland and uninsulated cut wire rendered the loader nonpermissible, and not in compliance with the requirements of the cited standard. Respondent's safety manager did not dispute the cited conditions, and while its maintenance director testified as to matters concerning the gravity of the violation, he did not examine the loader and had no personal knowledge as to the actual condition of the cited loader in question. I find that the petitioner has established a violation of section 75.503, and the citation IS AFFIRMED.

Citation No. 2507209

The evidence established that the methane monitor on the cited loader was gobbed with oil and dirt. The citation charges that because of this condition the monitor would not work. The only evidence adduced by the petitioner to establish as a fact that the monitor would not work is the visual observation of the inspector. The inspector did not test the monitor and he testified that the methane monitor test button located in the cab of the machine was functioning and operating properly.

Section 75.313 requires that the monitor be kept operative and properly maintained and frequently tested. I cannot conclude that simply because the cited monitor was gobbed with dirt and oil that it was ipso facto inoperative. The petitioner has the burden of establishing that the cited monitor was inoperative and the inspector conceded that a properly administered test would have established this fact. However, he failed to conduct such a test, and I conclude and find that the inspector's visual observations are insufficient to establish a violation in this case. Further, the respondent is not charged with a failure to frequently test the monitor to determine whether it was operative and no evidence was presented to establish that the inspector reviewed any records to determine when the device was last tested or whether or not such tests indicated that the monitor was inoperative. The citation IS VACATED.

Docket No. KENT 85Ä141 - Fact of Violation
Citation No. 2508624

The testimony of the inspector establishes that the cited high voltage cable was not guarded at the locations in question. The evidence also establishes that supplies were stored under the cable at the cited locations and that in several locations the cable was hung so low as to place it in a position of being damaged by equipment which was required to pass under it. Further, the unrebutted testimony of the inspector establishes that men and equipment regularly passed under the cable while storing and retrieving the supplies and that the unguarded cable could readily be contacted by these individuals. The inspector also indicated that the cable was lying on the mine floor at several locations.

Section 75.807 requires that all underground high voltage cables be guarded where men regularly work or pass under them.

In this case, the evidence establishes that the cable in question was not guarded with the type of guarding material normally used by the respondent for this purpose. Under the circumstances, the citation IS AFFIRMED.

Citation No. 2508625

In his defense of Citation No. 2508625, for failure to maintain the explosives magazine in good condition, respondent's representative suggested that Inspector Franks should have cited mandatory section 75.1304, which requires that explosives or detonators which are carried by persons anywhere in the mine be in containers which are maintained in good condition and kept closed. Respondent asserted that since the citation charges that the doors of the cited explosives magazine were not closed due to the warped condition of the doors, and since the magazine was not kept in "good condition" because of the damage to the doors, Mr. Franks should have cited section 75.1304, rather than 75.1306. Respondent also argued that a miner could "carry" the magazine in question by pulling it with a scoop (Tr. 658Ä661).

The respondent's assertion that Inspector Franks should have cited section 75.1304, is rejected. I conclude that this section is intended to apply in cases where explosives or detonators are hand carried in bags or containers suitable for this purpose by the shooter to the location where he is to fire a shot. The cited section 75.1306, requires that explosive magazines be of substantial construction with no metal exposed on the inside. The evidence in this case clearly establishes that the cited magazine was damaged and that the doors were warped and could not close. Respondent's safety manager Hibbs confirmed that this was the case. Because of this condition, the doors could not close, and the interior metal construction of the magazine was exposed. Under the circumstances, I conclude and find that the magazine was not of substantial construction and that the cited conditions constitute a violation of section 75.1306. Accordingly, the citation IS AFFIRMED.

Citation No. 2508627

The testimony of the inspector establishes the existence of accumulations of loose coal and coal dust along the ribs of the number four unit belt as stated in the citation and the respondent offered no testimony or evidence to rebut this fact. Accordingly, I conclude and find that the petitioner has established a violation of section 75.400 by a preponderance of the credible evidence, and the citation IS AFFIRMED.

Citation No. 2507611

The testimony of the inspector establishes the existence of accumulations of coal dust and float dust along the number 3ÄA belt conveyor entry as described by the inspector in his citation, and the respondent's safety manager confirmed the existence of these accumulations. Accordingly, I conclude and find that the petitioner has established a violation of section 75.400 by a preponderance of the credible evidence, and the citation IS AFFIRMED.

Citation No. 2507618

The testimony of the inspector establishes that the high voltage cable hung across the number three entry haulage road was not protected as required by section 75.807. The respondent's safety manager Hibbs conceded that the cable was not guarded, but believed that no one had any reason to travel under the cable. However, in this case, the evidence establishes that the inspector and Mr. Hibbs passed under the cable while in a golf cart, and the inspector observed equipment traveling the haulage road and he believed that since it was the main haulageway men and equipment would regularly pass under the cable. In addition, the evidence also establishes that the cable guard was apparently knocked off by a piece of equipment and the inspector observed it on the mine floor nearby the location in question. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Docket No. KENT 85Ä142 - Fact of Violation

Citation No. 2507619

In this case the respondent is charged with a violation of section 75.807, for an alleged failure to guard a high voltage cable hung across a crosscut between the number 2 and 3 entries. The cited standard requires that such a cable be guarded where men regularly pass under it.

Respondent's argument is that there is no evidence as to when the cable was hung at the location where the inspector found it, and that Inspector Dati had no knowledge as to where mining was taking place or where the power center was located. Respondent's representative asserted that the testimony of Mr. Hibbs supports a strong reference that the equipment tire tracks observed by Inspector Dati were made prior

to the time the cable was advanced to spad 12Ä80, and that it is not unusual for tire tracks to be present at crosscuts throughout the mine at any given time.

The only evidence to support the citation is the testimony of Inspector Dati that he saw tire tracks under the cable. Mr. Dati conceded that there were other means of access and travelways to the area where mining was being conducted on the unit, and he candidly admitted that he had no way of determining whether or not the tire tracks were made prior to or after the installation of the cable in question (Tr. 354).

Mr. Dati referred to his notes made at the time of the inspection, but they contained no information as to the location of the power center, and he candidly conceded that he could not remember in which entry the power unit was located, nor could he remember where the brattice line was installed or where the unit was operating (Tr. 356). He also could not remember how long it took to develop the crosscuts, and he conceded that if the unit were operating "straight ahead," the equipment would not have to pass under the cable (Tr. 356). Mr. Dati did not know how much time had passed prior to the advancing of the cable to the location where he observed it, and he confirmed that it was probably more than one shift. He also confirmed that equipment could have passed through other crosscuts, that the cited location was just one of many ways for the unit to advance (Tr. 359), and that he spoke with none of the equipment operators to determine whether they may have passed under the cable (Tr. 365).

Mr. Dati confirmed that he observed no cable damage, abrasions, or scuff marks indicating that the cable had ever been struck by equipment passing under it, and he confirmed that the cable was equippped with an operative ground check monitoring device (Tr. 371, 386).

Section 75.807, requires that high voltage cables be covered, buried, or placed so as to afford protection against damage, and guarded where men regularly work or pass under them. In support of the citation, MSHA's counsel argued that Mr. Dati's observations of the tire tracks passing under the cable is sufficient to establish that men regularly passed or worked under the cable. Counsel also asserted that the evidence establishes that the cable was not guarded against damage, and that the essence of the citation issued by Inspector Dati was the prevention of both physical damage to the cable and injury to miners who may have come in contact with it.

In the case of Secretary of Labor v. Keystone Coal Mining Corporation, decided by Chief Merlin on December 28, 1979, 1 FMSHRC 2154, 1 MSHC 2301 (1979), Judge Merlin vacated a citation for an alleged violation of section 75.807, based on his finding that the evidence established that a storage area to which miners were going had been moved 200 feet inby an unguarded cable before the issuance of the citation. Judge Merlin rejected the inspector's assertion that he cited the travelway areas where the cable was hung because he believed men regularly worked on passed under the cable while traveling the crosscuts to get supplies from the storage area. Judge Merlin accepted the testimony of the operator's safety inspector that the crosscuts were no longer supply areas because mining had advanced 200 feet beyond the cited areas, and he concluded that the evidence did not establish that men regularly worked or passed under the cable in question.

In the instant case, it seems clear to me that Inspector Dati issued the citation because he believed that miners were travelling under the unguarded cable. However, I conclude and find that there is no credible testimony or evidence to establish that men regularly worked or passed under the cable. Apart from his observations of the tire tracks, after viewing Inspector Dati on the stand, and upon careful examination of his testimony, I am convinced that he had no idea where mining was taking place, where the power center was located, or in which direction the unit was being driven. In short, I cannot conclude that there is any credible evidence to support an inference that men or equipment passed under the cable after it was advanced and installed at the location where it was found by the inspector.

The evidence establishes that there were other means of travel to the area where men and equipment would go to reach the area where mining was being conducted, and the testimony of Mr. Hibbs, although somewhat confusing, convinces me that the direction of mining and the location of the power center were such as to support a conclusion that the tire tracks observed by Mr. Dati were made before the cable in question was advanced and installed. Under the circumstances, I conclude and find that MSHA has failed to establish by any credible evidence that men regularly worked or passed under the cable in question, and that it was required to be guarded.

MSHA's contention that the cable was not otherwise protected against damage is rejected. The standard requires guarding only in instances where men regularly work or pass under it. If they do not, the cable must be covered, buried,

or placed so as to afford protection against damage. On the facts of this case, there is no evidence that the cable was damaged or even scuffed or marked, and there is no evidence that it was in any area where it would likely be damaged. The evidence establishes that the cable was hung up approximately 4 1/2 to 5 feet off the floor, and was properly insulated. Under the circumstances, I conclude and find that the cable was placed so as to afford it protection against damage, and that it was in compliance with the requirements of section 75.807. In view of the foregoing findings and conclusions, the citation IS VACATED.

Docket No. KENT 85Ä167 - Fact of Violation

Citation No. 2507619

The testimony of the inspector establishes that the methane monitor for the cited loader in question was bridged out and had a disconnected wire which rendered it inoperative, and the respondent's mine foreman Whitledge and safety manager Furgerson confirmed this fact. Further, the inspector confirmed that when he activated the methane monitor test button on the machine, it would not deenergize the machine.

Mandatory safety standard 75.313 requires that methane monitors which are installed on loading machines are to be kept in an operative condition and properly maintained. They are also required to be tested as prescribed by MSHA. On the facts of this case, it is clear to me that the cited methane monitor was not maintained on an operative condition as required by section 75.313. I conclude and find that the petitioner has established a violation by a preponderance of the credible testimony, and the citation IS AFFIRMED.

MSHA's request to reopen the record in Docket No. KENT 85Ä167, for additional testimony by the inspector was denied (Tr. 820).

Docket No. KENT 85Ä180

Citation No. 2507175

The respondent is charged with a violation of section 75.1303 for failure to insure that loader operator Marvin Ferguson was not in the clear when the shot was fired by shooter Bealmear. Section 75.1303 requires that all explosives and blasting devices be used in a permissible manner. In issuing the citation, Inspector Oglesby made reference to the explosives permissibility requirements of 30 C.F.R.

15.24, Section 5(b)(16), which states as follows: "Ampl warning shall be given before shots are fired, and care shall be taken to ascertain that all persons are in the clear. Men shall be removed from adjoining working places when there is a danger of a shot blowing through."

The evidence establishes that at the time the shot was fired, Mr. Ferguson was still in the adjacent working place but was not in the direct path of the shot which blew out. The evidence also establishes that Mr. Ferguson received ample verbal warnings from Mr. Bealmear, was aware that a shot was to be fired, and was doing no work at the time the shot was detonated. However, it is clear that Mr. Bealmear did not remove Mr. Ferguson from his working place before firing the shot.

Mr. Bealmear apparently believed that Mr. Ferguson was safe, and he obviously relied on Mr. Ferguson's judgment rather than his own since Mr. Ferguson indicated that he was out of danger. Mr. Bealmear stated that after warning Mr. Ferguson he proceeded to the number 5 entry and "got the cutter man out." He then proceeded to the number 3 entry and again warned Mr. Ferguson before firing the shot (Tr. 134). He later stated that he simply warned the cutter man and that he came out of the entry voluntarily and that he saw him come out of the entry. Mr. Bealmear stated that he did not know whether he would have refused to shoot if the cutter man had not come out of the entry, and he confirmed that he did not believe the shot would come through (Tr. 150Ä151).

I fail to understand why Mr. Bealmear did not order Mr. Ferguson out of the entry or wait to see that he was completely out before firing the shot. Mr. Ferguson indicated that when he was initially warned he proceeded on his way out of the entry, but stopped short at the rib after the second warning and stooped against the rib. Under the circumstances, I conclude and find that Mr. Bealmear failed to exercise care in ascertaining that Mr. Ferguson was completely out of the entry where he had been working before he fired the shot. I find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2507176

Inspector Oglesby issued the citation charging a violation of section 75.1300, because he believed that the shot fired by Mr. Bealmear was an "unconfined" shot. Section 75.1300 prohibits the firing of such shots underground. Mr. Oglesby defined an "unconfined shot" as one which is fired

without at least 18 inches of overburden material around it. Blasting permissibility standard section 15.24, Section 5(b)(6) provides that "all blasting charges in coal shall have a burden of at least 18 inches in all directions if the height of the coal permits." Mr. Oglesby concluded that the shot was unconfined by the appearance of the shot hole after it had been fired and the fact that the shot blew out (Tr. 79). He testified that he did not know the type of explosive used by Mr. Bealmear and could not determine whether the shot had been stemmed. However, he confirmed that no citations were issued for lack of proper stemming or nonpermissible explosives.

Inspector Oglesby further explained that an unconfined shot is one which has no material around the shot placed in the borehole to confine it. He indicated that stemming is placed around the loaded powder charge to keep it from blowing back out of the hole, and if the charge is not stemmed the borehole "would be just like a muzzle of a gun and the flame would shoot out the hole" (Tr. 60).

MSHA's counsel took the position that if a blowout occurs, one can conclude that the shot was not confined, and if a blowout does not occur, one may conclude that the shot was confined (Tr. 61). In this regard I take note of the definition of a "blown-out shot" found in the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, at pg. 1004. Such a shot is defined as "a shot which merely throws out the stemming without loosening much of the coal." In this case, the evidence establishes that the shot itself blew out and apparently ignited coal dust or methane which caused the explosion resulting injuries to Mr. Ferguson, and that none of the coal surrounding the shot hole was disturbed or blown out.

Inspector Oblesby's conclusion that there was insufficient overburden less than 18 inches around the shot hole was based on his assumption that sufficient overburden would have prevented the blow-out (Tr. 68). He also considered the fact that the top coal appeared to be cracked and loose and that the surrounding coal immediately behind the shot on the number 3 entry side was broken and fractured (Tr. 68, 74). Mr. Oglesby further explained his perception of an unconfined shot as follows (Tr. 82Ä84):

> Q. What is the difference between a blowout and an unconfined shot?
>
> A. An unconfined shot, to me, is the one that doesn't have any burden around it, 18 inches.

A blowed-out shot is one that makes a hole that they didn't put stemming in where it blows out.

Q. When MSHA talks about shooting unconfined shots and adobe shots, what is the primary purpose of their meaning of that law?

A. What is the reason for the law?

Q. No. What is their meaning behind what an unconfined shot is or an adobe shot is?

A. It's to keep people from shooting unconfined shots with concussion of the shot itself.

Q. Is there any difference between shooting a lump of coal that has a drill hole in it and laying a piece of powder on top of a rockfall and shooting that?

A. Sure.

Q. What's the difference?

A. You have an unconfined shot where you are putting the powder on top of the rock. If you drilled the piece of coal, put your powder in it, put a stemming device in it, that's confined.

When asked about his interview with Mr. Bealmear during the course of his investigation, Mr. Oglesby responded as follows (Tr. 94):

JUDGE KOUTRAS: Did he explain to you how he loaded the shot?

A. No.

JUDGE KOUTRAS: He didn't?

A. No, just saying there was one stick of powder in it.
JUDGE KOUTRAS: You didn't ask him about how he loaded it?

A. He told us how he loaded it, how he put the one stick in.

JUDGE KOUTRAS: Did he use stemming? Did he go 18 inches?

A. I don't remember. I don't remember that part of it.

JUDGE KOUTRAS: Was it confined?

A. I don't remember that, no, sir.

Mr. Bealmear testified that he loaded the shot hole in question with one stick of powder, tamped the hole, and pulled back on the wire to insure that the powder did not drop through the hole. He confirmed that he stemmed the hole by inserting "water dummies" behind the powder (Tr. 132Ä133). He confirmed that he had spoken with certain state inspectors when the Kentucky State Department of Mines investigated the incident. When asked about a statement attributed to him in the state report that he "felt the powder push through but that he pulled in back in place" (exhibit PÄ10, pg. 5), Mr. Bealmear explained that the powder did not fall through the hole and that he simply pulled back on the wire to make sure the powder was still sliding in the hole (Tr. 172Ä173, 176).

Mr. Bealmear stated that the drill hole which he loaded had been previously drilled and shot from the other side but did not go all the way through. He did not know the depth of the hole and he conceded that after pulling the wire to insure that the powder was sliding in the hole, he did not push the powder all the way back to the end of the loose hole (Tr. 176Ä178). He also conceded that he knew the coal would shoot through but did not know that it would ignite (Tr. 178).

Referring to a sketch of the scene of the detonation, (exhibit RÄ1), Mr. Bealmear conceded that his prior shot from the number 3 entry could possibly have weakened or fractured the coal in that area. He confirmed that the back of the hole which he loaded from the number 4 entry side would be the area which he had previously shot (Tr. 166). Given these circumstances, he expected that the coal would blow through but never expected an ignition to occur because he did not believe that coal blowing through the hole could ignite methane or coal dust (Tr. 167).

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that it supports a conclusion that the shot or blow out in question was an unconfined shot in violation of section 75.1300. The evidence establishes that the coal strata behind the shot and at the end of the hole which had been loaded had been fractured and loosened by a prior shot, and had failed to confine the shot in question. The evidence also leads me to conclude that by failing to push the powder charge all the way to the end of the previously drilled and shot hole, and then stemming it completely, Mr. Bealmear had no way of knowing the distance between the charge and the end of the weakened or loosened hole, and that this contributed to the apparent lack of total confinement of the charge which was detonated. The citation IS AFFIRMED.

Docket No. KENT 85Ä159 - Fact of Violation

Citation No. 2507418

The respondent in this case is charged with a violation of the safeguard provisions of section 75.1403Ä5(g), for failure to provide a clear travelway along a conveyor belt for a distance of 50 feet. In issuing the citation, Inspector Newlin relied upon a previously issued safeguard notice (2507409) on February 26, 1985, in conjunction with MSHA supervisory inspector George Siria (exhibit PÄ22). The previous notice was issued because "A clear travelway was not maintained on the 3ÄC belt for 150 feet starting 450 feet inby the 3ÄC header," in violation of section 75.1403Ä5(g), which provides as follows:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

After Mr. Newlin issued his section 104(a) citation of March 18, 1985, on the number 3ÄA belt, Mr. Siria modified it on March 20, 1985, and imposed the same "stipulations" for that belt as he had done for the number 3ÄC belt. Inspector Dati terminated the citation on April 12, 1985, after noting that "The operator installed start and stop switches on both inby and outby of the area and also posted signs."

Mr. Newlin explained that after he issued the safeguard notice on February 26, 1985, Mr. Siria visited the mine for the purpose of determining what was required to achieve compliance. After Mr. Siria issued his safeguard requirements for the 3ÄC belt, they became applicable to any future belt conditions of the same type found in the mine. Since he found similar conditions on the 3ÄA belt on March 18, 1985, Mr. Newlin issued section 104(a) Citation No. 2507418, because the belt was not provided with the required travelway clearances.

Mr. Newlin's citation was terminated by MSHA Inspector Dennis Dati on April 12, 1985, and his termination notice reflects that it was terminated after "The operator installed start and stop switches both inby and outby of the area and also posted signs."

MSHA's position is that a safeguard notice applies to any underground location in the mine. However, any modification made to the safeguard notice would only apply to the particular location for which it was issued and not to other mine areas (Tr. 767Ä768). In the instant case, MSHA's counsel asserted that although the previously modified safeguard notice of February 26, 1985, eliminated the requirement for a clear travelway at the location for which that safeguard was issued, it did not authorize the respondent to unilaterally not provide clear travelways at other belt locations which were required to be examined, traveled or maintained (Tr. 747Ä750).

MSHA's counsel asserted that the citation issued by Inspector Newlin in this case was issued because of the failure by the respondent to provide clear travelways of at least 24 inches along the cited beltline as required by section 75.1403Ä5(g). Once the citation issued, supervisory inspector Siria modified the citation for that particular location by imposing stipulations requiring stop and start switches, signs, and a requirement that the belt be stopped before being examined. Once these stipulations were in place, the safeguard, as modified by Mr. Siria, became a requirement for that location, but the respondent was still required to maintain clear travelways at other locations in compliance with section 75.1403Ä5(g) (Tr. 747Ä753).

Inspector Newlin explained that by requiring the respondent to adhere to the stipulations for providing a means of access to the beltline at locations which have been cribbed out because of adverse roof conditions, MSHA is in effect providing the belt examiner with a "walkway," i.e., the belt

itself, as a means of examining the belt. Once this is done, compliance with section 75.1403Ä5(g) is achieved (Tr. 756).

MSHA's counsel conceded the fact that by cribbing out the beltline where an adverse roof condition exists, the respondent solved one problem, but created another, by exposing itself to a citation for not having clear travelways as required by section 75.1403Ä5(g) (Tr. 757). Counsel asserted that the safeguard provisions present unique situations in that once MSHA is made aware of a problem, it may impose a safeguard to address that problem. In the instant case, counsel pointed out that rather than requiring the respondent to tear out the beltline and move it to another entry where the roof conditions were better and did not require cribbing, it imposed certain safeguard stipulations for that particular location. However, the requirements for clear travelways at other locations still remained in effect (Tr. 757Ä760).

MSHA's counsel asserted that each incident of roof cribbing which results in the effective elimination of the travelway must be individually addressed, and the mine operator may not simply go ahead and install stop and start switches and claim that it is in compliance. MSHA must first examine the conditions before authorizing the implementation of alternative means of compliance, and the operator may not unilaterally take these additional steps (Tr. 760Ä761). Even if the respondent in this case had installed the stop and start switches at the place which was cited, it would still be in violation of the clear travelway requirement of section 75.1403Ä5(g), because it would not have had MSHA's approval to modify the clear travelway safeguard requirements for that location (Tr. 762Ä764; 766Ä767).

MSHA's counsel further explained the safeguard procedures as follows (Tr. 790Ä791):

> MR. GROOMS: The only analogy I can think of is a form of abatement, your Honor. It's a form of abatement that's peculiar to the issuance of Safeguards. Issuance of Safeguards is a peculiar thing in itself. It's the Secretary making a judgment about what the law is going to be in a particular mine.
>
> * * * * * * * * * *
>
> MR. GROOMS: It seems to me the analogy to abatement may be right in the sense that in a

statutory standard they may have some alternatives to abatement. You may danger off the area rather than repair the roof. You may seal off the mine. In this case you may do a different thing by the procedures that have been established that you don't provide a clear way for that one spot in the mine.

Respondent's representative confirmed the procedures for notifyng MSHA with respect to obtaining a waiver of the requirements for maintaining belt walkway clearances as required by section 75.1403Ä5(g), and he explained that as a practical matter if the roof conditions are bad the respondent installs the cribs immediately in order to support the roof and MSHA is later notified. He agreed that even if the inspector in this case advised the respondent to install cribs for roof support, such a request was not unreasonable (Tr. 818).

The evidence adduced in this case establishes that the cited belt conveyor travelway in question was not provided with the clearances required by the cited safeguard standard. The evidence also establishes that the respondent had adequate notice as to the requirements of the previously issued safeguard and that it was aware of the procedures followed by MSHA for issuing such safeguards at the mine. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Citation No. 2507612

The testimony of the inspector establishes the existence of float coal dust and coal dust along the belt conveyor on the number 4 unit. The accumulations were extensive and the inspector saw no evidence of any clean-up efforts by the respondent. The respondent offered no testimony in defense of the violation. I conclude and find that the evidence adduced by the petitioner supports a violation of section 75.400, and the citation IS AFFIRMED.

History of Prior Violations

Exhibit PÄ2 is an MSHA computer print-out summarizing the respondent's compliance record for the period April 26, 1983 through April 25, 1985. That record reflects that the respondent paid civil penalty assessments totaling $92,243 for 893 violations. Three-hundred and thirty-one of the citations are paid $20 "single penalty-non S & S" citations.

Thirty-eight are paid assessments for violations of the guarding requirements of section 75.1722(a), (b) or (c); 173 for violations of 75.400 (coal accumulations); 72 for violations of 75.503 (permissibility); 14 for violations of 75.807 (cable guards); 6 for violations of 75.1306 (explosive storage); 14 for violations of 75.313 (methane monitors); and one violation for the safeguard requirements of 75.1403Ä5(g). No prior paid violations of the blasting requirements of 75.1300 or 75.1303 are noted.

Exhibit PÄ1 is a computer print-out covering the respondent's history of prior violations for the period January 29, 1983 through January 28, 1985. Some of the information is included in exhibit PÄ2. I have considered all of the information pertaining to the respondent's history of prior violations, and this is reflected in the penalty assessments made by me for the violations which have been affirmed.

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

The parties have stipulated as to the scope of the respondent's mining operations and agreed that the payment of civil penalties will not adversely affect the respondent's ability to continue in business. I conclude that the respondent is a large mine operator and that the payment of the assessed penalties in these proceedings will not affect its ability to continue in business.

Good Faith Abatement

The parties stipulated that all of the conditions and practices cited as violations in these proceedings were abated in good faith by the respondent. I agree, and I conclude that the respondent exercised good faith in abating the cited violations.

Negligence

I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of the cited mandatory standards. I further conclude and find that the respondent knew or should have known about the cited conditions and that its failure to insure against such conditions constitutes ordinary negligence. With regard to Citation No. 2507176, (Docket No. KENT 85Ä180), concerning the unconfined shot, the inspector indicated that in view of the fact that the shot

was unintentional, the degree of negligence was considered as low (Tr. 94Ä95). I agree, and adopt this as my conclusion with respect to this violation.

Gravity

I conclude and find that all of the citations which have been affirmed in these proceedings were serious. The unguarded belt was in an area where miners congregated and where a roadway passed under the belt and it presented a hazard in that someone could have inadvertently come in contact with the unguarded belt pinch points.

The loose coal and float coal dust accumulations violations presented a fire and explosion hazard. None of the cited accumulations had been cleaned up and the inspectors observed no indication as to any cleanup efforts by the respondent. Although one citation (2507206) concerned accumulations in a neutral return where active mining was not taking place, the remaining three citations (2508627, 2507611, 2507612) concerned rather extensive accumulations of loose coal and coal dust, some of which was in contact and turning in belt rollers, and ignition sources such as a cable and belt headers were present. Although the evidence indicated that one location was wet and that other locations were properly rockdusted, the fact remains that all of the cited accumulations presented a fire hazard. In the event of a fire or ignition, the accumulations presented a real potential for fueling a fire or contributing to its severity.

The unguarded high voltage cable violations were at locations where men or equipment passed under them, and presented a hazard in that miners could contact the cables and equipment could have damaged the cable. In one instance, the evidence indicated that one of the cable guards had apparently been knocked off by a piece of equipment. In another, the cable was lying on the floor at several locations. Although the respondent established that its high voltage cables are protected by short circuit monitoring devices and are of a high quality, the fact remains that the failure to guard the cable exposed it to potential damage or contact by miners. The purpose of the guard is to prevent these occurrences, and in the event of cable failure or an inoperative monitoring device, miners would be exposed to a hazard.

The permissibility violation concerning the L23 loader presented a potential shock hazard to anyone contacting the uninsulated and cut headlight wire, and the loose packing gland presented a hazard in that it did not serve the purpose

of securing the cable which passed through it. Although the inspector did not determine whether the wire was "hot," it may have been, and the operator had no way of knowing it when the machine was in operation. The permissibility violation concerning the methane monitor which had been bridged out rendered the monitor inoperative, and when tested, it would not deenergize the machine. In the event methane were encountered while the machine was in operation, the failure to deenergize it would present a possible explosion or ignition hazard.

The explosive magazine violation presented a hazard in that the failure of the doors to close tight rendered the magazine less than a secure storage area and exposed the explosives to possible damage.

The unconfined shot violations resulted in an explosion when the shot apparently ignited coal dust or methane and injured two miners. Both miners suffered burns, and one of them was hospitalized with serious burn injuries. The failure to remove that miner from his working place resulted in injury to that miner, as well as the shooter.

The safeguard violation concerning an inadequate clearance along a beltway presented a hazard in that the belt walker was precluded from making his normal inspection of the belt. The obstruction caused by the installation of roof cribs prevented the examination of the belt for a distance of 50 feet, and any hazardous conditions which may have been present would go undetected.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

Incorporating by reference my gravity findings, and applying the principles of a "significant and substantial" violation as articulated by the Commission in the aforementioned decisions, I conclude and find that with two exceptions, (Citation No. 2507206 - coal accumulations and Citation No. 2508625 - improperly maintained explosive magazine), the remaining violations were all significant and substantial, and the findings by the inspectors in this regard ARE AFFIRMED.

I conclude and find that in terms of continued normal mining operations, the evidence presented supports a conclusion that there was a reasonable likelihood that the cited conditions could contribute to the hazards resulting from the violative conditions in question. These hazards are noted in my gravity findings, i.e., contact with unguarded pinch points, possible fire or explosion resulting from accumulations of loose coal and coal dust, high voltage cable contact

by miners or damage to cables by equipment because of lack of proper guards, shock hazard through contact with uninsulated loader wire, inoperative methane miner on loader, injuries resulting from the unconfined shot and failure to remove a miner from his working place resulting in his injuries, and the failure to provide adequate belt clearance for examination of the belt for possible hazardous conditions. In each of these instances, had the events noted occurred, I believe it is reasonable to conclude that the injuries produced could be of a reasonably serious nature.

With regard to Citation No. 2507206, the cited coal accumulations were found in a neutral belt entry where no active mining was taking place. The active faces had advanced beyond the area where the accumulations were located, and the inspector saw no evidence of any equipment passing through the area, and he confirmed that no immediate ignition sources were present. The inspector found negligible amounts of methane, and issued no citations for lack of adequate rock dusting. He also confirmed that the closest mining taking place was two crosscuts (100 feet) away, and that the face area was approximately 180 feet from the area where the accumulations were present. Given these circumstances, I cannot conclude that MSHA has presented any credible evidence to support a conclusion that there was a reasonable likelihood that an accident or injury would occur. While I have concluded that the accumulations violation was serious, I cannot conclude that it was significant and substantial, and the inspector's finding IS VACATED.

With regard to Citation No. 2508625, the inspector believed that the improperly maintained explosives magazine violation was significant and substantial in that it was reasonably likely that it would be struck by a piece of equipment if it were to be moved about the unit. On the facts of this case, I find this hardly unlikely. The magazine was positioned on a track, and the photograph exhibits of a comparable magazine reflect that it is of steel construction and mounted on wheels and protected by a steel superstructure which surrounds the vehicle. The respondent's unrebutted testimony is that when the magazine is moved, the wheels are in a down position, and that in this position, it is impossible to move the magazine with the doors opened because they would strike the wheels.

The inspector agreed that in its parked position, the magazine posed no hazard. Although he alluded to a possibility of a piece of coal finding its way into the opened doors and detonating the explosives which were stored inside, there

is absolutely no evidence of any actual or planned blasting taking place in the area where the vehicle was parked, nor is there any evidence that the magazine was parked in a location which may have posed a hazard from a roof fall or other similar incident. Under the circumstances, although I have concluded that the violation was serious, I cannot conclude that the petitioner has established that it was significant and substantial. The inspector's finding in this regard IS VACATED.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the violations which have been affirmed.

Docket No. KENT 85Ä105

Citation No.	Date	30 C.F.R.Section	Assessment
2507205	1/29/85	75.1722	$ 125
2507206	1/30/85	75.400	$ 150
2507208	1/31/85	75.503	$ 135

Docket No. KENT 85Ä141

Citation No.	Date	30 C.F.R.Section	Assessment
2508624	4/11/85	75.807	$ 125
2508625	4/11/85	75.1306	$ 150
2508627	4/11/85	75.400	$ 200
2507611	4/12/85	75.400	$ 200
2507618	4/13/85	75.807	$ 150

Docket No. KENT 85Ä167

Citation No.	Date	30 C.F.R.Section	Assessment
2507503	3/21/85	75.313	$ 750

Docket No. KENT 85Ä180

Citation No.	Date	30 C.F.R.Section	Assessment
2507175	3/11/85	75.1303	$1,000
2507176	3/11/85	75.1300	$ 600

Docket No. KENT 85Ä159

Citation No.	Date	30 C.F.R.Section	Assessment
2507418	3/18/85	75.1403Ä5(g)	$ 100
2507612	4/16/85	75.400	$ 200

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

Citation No. 2507209 (Docket No. KENT 85Ä105), and Citation No. 2507619 (Docket No. KENT 85Ä142), ARE VACATED.

George A. Koutras
Administrative Law Judge