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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 PROCEEDING Docket No. WEST 85-55-M A.C. No. 04-04700-05502
v.	Digmor Placer Mine
C.D. LIVINGSTON, RESPONDENT	

DECISION

Appearances: Carol A. Fickenscher, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. C.D. Livingston, Iowa Hill, California, pro se, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) on April 1, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (1977) (herein the Act). A hearing on the merits was held in Sacramento, California on April 9, 1986, at which the Secretary was represented by counsel and the Respondent, Mr. C.D. Livingston, represented himself.

The Secretary seeks assessment of a penalty against Respondent for violation of 30 C.F.R. 57.4Ä52(FOOTNOTE 1) which was described in combination Citation (Section 104(a)) Order (Section 107(a)) No. 2363585 issued May 17, 1984, as follows:

> "A 4Ächylinder gasoline powered front-end loader is being used underground to muck out the sand and gravel and hawl [sic] the material to the surface.
>
> CO Drager gas detector measurements at the face 50 ppm one stoke."

The Citation/Order also charged that the violation was "significant and substantial" (herein "S & S") 2 and that an imminent danger existed.

The preponderant reliable and probative evidence of record established the following sequence of events and factual conformation.

The subject gold mine, owned and operated by Respondent and referred to in this matter as the Digmor Placer Mine, is not a gassy mine (Tr. 51Ä53). However, it has but one horizontal or inclined roadway from the surface large enough to accommodate vehicular traffic, in this case, a tunnel (Tr. 28).

On May 17, 1984, MSHA Inspector Nicholas Esteban, having been assigned to inspect another mine, a surface mine, located on the same Digmor Placer property, observed the subject underground gold mine and undertook to inspect the same (Tr. 14Ä15, 39Ä41, 46Ä49, 71). Respondent Livingston owns the 80Äacre Digmor Placer property, and leases the surface mine to others (Tr. 71, 72, 77).

Inspector Esteban came upon the Respondent (Tr. 15) who at first refused to allow his mine to be inspected on the basis that his was a "one-man" operation (Tr. 15) but subsequently acceded to the Inspector's request and signed a CAV (compliance assistance visit) request after the Inspector indicated to him that the inspection was to be a "courtesy" inspection and after the Inspector told him that no penalties would derive from the issuance of any notices of violation(FOOTNOTE 3) (Tr. 15, 16, 18, 21, 22, 42, 43, 60). The Inspector and Mr. Livingston then walked into the mine (Tr. 23).

The Inspector took a Drager gas detector measurement which indicated the air inside the mine was contaminated with carbon monoxide (50 parts per million) (Tr. 23). The Inspector informed Mr. Livingston of this result and advised him a Citation/Order rather than a CAV "notice" would be issued for this violation (Tr. 24). Mr. Livingston became upset at this point, but
ad

mitted he had been using the gasoline-powered front-end loader in question that morning and also the previous day to muck around a fan (Tr. 23Ä24, 30, 70). Mr. Livingston also admitted he had been using the loader underground 2 or 3 days a week for a period of approximately 2 months (Tr. 72) and that at times other miners were present (Tr. 73).

The gasoline-powered engine emitted carbon monoxide and it did not have a water scrubber or a catalytic converter "to help burn off the carbon monoxide." (Tr. 26).

Inspector Esteban advised Mr. Livingston that he could not leave the property without issuing the imminent danger order (Tr. 24, 31) because someone could be killed using a gasoline-powered engine underground. The mine did not meet the regulation's criteria for using gasoline powered equipment (Tr. 27, 28) since it did not have multiple roadways from the surface, but only a single tunnel (Tr. 28, 52, 54). There existed a serious hazard from carbon monoxide poisoning (Tr. 26, 30, 32, 34, 72Ä73, 75), which could result in a fatality (Tr. 30, 34). As many as 4 persons had worked in the mine in the past (Tr. 28, 44Ä46, 66, 67, 76), and Mr. Livingston and his "partner" were currently working in the mine (Tr. 28, 72Ä73).

The lethal nature of carbon monoxide poisoning was described by the Inspector as follows:

> "Because if he gets a high concentration of carbon monoxide, you can't smell the gas, you can't detect it. All of a sudden you're down, and you're dead." (Tr. 34).

Mr. Livingston had been using the gasoline-powered loader two or three times a week for 4 or 5 years (Tr. 66). He intended to dispose of the loader at the time of the inspection and so advised the inspector (Tr. 61Ä62). Mr. Livingston thereafter sold the loader to one Douglas Mead, who he first characterized as a "junk dealer" (Tr. 64), but subsequently in his testimony, it also turned out that Douglas Mead was one of those who worked in the mine (Tr. 67) and the same person Mr. Livingston said was his "partner" (Tr. 73). Mr. Livingston closed the mine 2 or 3 weeks after the CAV inspection (Tr. 62, 76).

Following the inspection, Inspector Esteban issued 4 CAV-type notices of violation (Tr. 22) in addition to the Citation/Order which is the subject of this proceeding.

At the hearing, Mr. Livingston who, it should again be mentioned, was not represented by counsel, offered an undated letter (Ex. RÄ1) which he had sent to the Secretary's counsel subsequent to the issuance of the Citation/Order. In the first paragraph of this letter he sets forth what appears to be his primary contention (Tr. 75) in this matter, i.e., that a "one-man" operation is not subject to the Act:

> "Please be advised that I do indeed protest the proposal for assessment of a civil penalty against me for an alleged violation of the Mine Safety and Health Act of 1969. Since I am a private citizen, work alone and hire no employees, I declare myself to be exempt from any rules and regulations of the Dept. of Labor. You, nor anyone else has shown proof that it was the intent of Congress to subject the one-man mine operator to the burden of these rules and regulations. Neither you, nor anyone in your office has ever quoted a court case that pertained to a one-man operation. Every case you cite has had paid employees or several people working."

However, at the hearing, Mr. Livingston testified under oath as to a somewhat contrary picture of the employment situation at his mine.

> Q. Do you have friends or acquaintances or relatives that have worked at the Digmor Placer with you, and when I use the term "Digmor Placer", I'm referring to the specific mine that Mr. Esteban inspected?
>
> The Witness: Do I ever have someone with me?
>
> Q. During the time that you were working it?
>
> A. Okay. Occasionally I have had people help me.
>
> Q. Who were those people that helped you?
>
> A. My son.
>
> Q. Anyone else?
>
> A. Yeah. There was a Ron Stockman. He helped me for just a few days is all, but that didn't last long.
>
> Q. Anyone else?
>
> A. Yeah, Douglas Mead. He helped me for a while.
>
> Q. So, you really weren't working that by yourself?
>
> A. I was working it alone by myself most of the time.
>
> Q. But you had other people there?
>
> A. I had, occasionally, some people there, yes.
> (Tr. 66, 67).

Based on his sworn testimony, Mr. Livingston's contention that his was a "one-man" operation is rejected. Regardless, his Digmor Placer mine is covered by the 1977 Mine Safety Act. Secretary of Labor v. C.D. Livingston, 7 FMSHRC 1485 (1985).

Mr. Livingston also complains of the Inspector's action in first telling him there would be no penalties assessed and then finding a violation and issuing the Citation/Order in question for which a penalty is sought herein:

> "The point I'm trying to make is that he told me there would be no finable, assessable violations per se; and you won't have to pay a fine and this and that, and then he writes me up one for a loader which I already told him I was getting rid of."
> (Tr. 63)

It is first noted that the "compliance assistance visit" process is not provided for in the Act. The Secretary, although requested (Tr. 81), has not furnished the source of MSHA's CAV policies. On the other hand, the gold mine in question is subject to the Act and inspections thereof are mandated by the Act. Section 103(a), 30 U.S.C. 815. Regardless of the Inspector's promises, the Act requires that a penalty be assessed when a violation occurs. Old Ben Coal Co., 7 MSHRC 205, 208 (1985); Section 110(a), 30 U.S.C. 820. The record is not absolutely clear that the Inspector utilized the CAV policy to overcome Respondent's refusal of entry, but it strongly appears such was the case (Tr. 10, 15, 16, 42, 43, 60) and I do so infer and find.

A preliminary question is thus posed: whether Respondent, had any right to deny entry to begin with. In the circumstances established in this record, I find that Respondent had no right to deny the Inspector entry to the mine to conduct an inspection. In Secretary of Labor v. Calvin Black Enterprises, 7 MSHRC, 1151 (1985), the Commission succinctly enunciated the principles relating to such denial of entry:

> "The law on denial of entry under the mandatory inspection provisions of section 103(a) of the Act is clear. Section 103(a) expressly requires that no advance notice be given an operator prior to an inspection and gives authorized representatives of the Secretary an explicit right of entry to all mines for the purpose of performing inspections authorized by the Act. The Supreme Court has upheld the constitutionality of thses provisions. Donovan v. Dewey, 452 U.S. 594, 598Ä608 (1981). Consistent with that decision, we have held that an operator's failure to permit such inspections constitutes a violation of section 103(a). Waukesha Lime & Stone Co., Inc., 3 FMSHRC 1702, 1703Ä04 (July 1981); United States Steel Corp., 6 FMSHRC 1423, 1430Ä31 (June 1984)." (emphasis supplied).

It is clear that regardless of Respondent's stand to the contrary, his mine was subject to inspection as required by the Act and that likewise a penalty is required to be assessed for a violation. In view thereof, there is no support from a purely equitable standpoint for Respondent's argument that the Inspector's "no penalty" promise should bind the Secretary and excuse Respondent from the requirements of the Act. Certainly the Inspector's promise does not in these circumstances-where Mr. Livingston's refusal to permit an inspection is itself a violation-work a serious injustice to Mr. Livingston, See U.S. v. Lazy F.C. Ranch, 481 F.2d 985 (9th Cir, 1973). Similarly, since several miners were endangered by Respondent's intransigence, the public interest as reflected in the purposes behind the safety standard infracted would not be served by estopping the enforcement agency from disavowing the misstatement of its agent.

In any event, in Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Commission has rejected the doctrine of equitable estoppel. It also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty, stating:

> "The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp v. Merrill, 332 U.S. 380, 383Ä386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408Ä411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. GeorgiaÄPacific Co., 421 F.2d 92, 95Ä103 (9th Cir.1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38Ä39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.
>
> Furthermore, under the 1977 Mine Act. an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncments, can be appropriately weighed in determining the appropriate penalty (as the judge did here)."

But here, in contrast to the situation in King Knob, the Inspector's inpropriety did not induce or otherwise result in the commission of the violation itself (the Respondent was solely to blame for this violation), and there being no legal or equitable

justification for Respondent's opposition to the inspection, no basis exists for reduction of the penalty amount otherwise warranted.

The Respondent does not challenge the occurrence of the violation. Although Respondent did not challenge that it was a significant and substantial (S & S) violation or that it resulted in an imminent danger, it should be mentioned with regard to the S & S charge in the Citation that the Commission has held that a violation is properly designated S & S "if, based on the particular facts surrounding that 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 FSMHRC 822, 825 (April 1981. In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained:

> "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."

The Commission has 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). The Commission has 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 S & S. See 6 FMSHRC at 1836.

On this record, and in view of the findings heretofore made, there is no question but that a violation of 30 C.F.R. 57.4Ä52 occurred and that a "measure" of danger to safety was contributed to by such.

Based on the prior findings as to the absence of multiple roadways into the mine, the lethal nature of carbon monoxide poisoning, the results of Inspector Esteban's gas detector measurements, (Tr. 23, 28Ä32), the lack of a water scrubber and catalytic converter on the engine, and the number of miners (including Mr. Livingston when he was working alone) who were exposed to the danger (Tr. 71Ä73), it is clear that there was a reasonable likelihood that the hazard (carbon monoxide poisoning) contributed to by the violation would result in an injury of a reasonably serious nature, including a fatal injury. The Secretary is thus found to have impressively established his burden of proof that the violation was S & S.

Turning now to the question of whether the imminent danger aspect of the Citation/Order is supported in the record, it is first noted that there is some similarity in the factual foundation required for the special "S & S" finding and that sufficient to support a reasonable belief on the part of an inspector that an imminent danger exists. It would seem that in all cases a violation which results in an imminent danger would also be S & S while the reverse would not necessarily be true. Determining whether the factors constituting the instant violation, taken in combination with evidence relating to S & S (similar to imminent danger except in degree and immediacy) as well as other evidence-which is not necessarily relevant to the violation or the S & S determination - meets the level of proof required to justify the "imminent danger" order is aided by a brief consideration of the evolution of this term.

The term "imminent danger" is found in both the Federal Coal Mine Health and Safety Act of 1969 and the Amendments thereto which comprise the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., and the definition thereof currently found in section 3(j) of the 1977 Act is for all intents and purposes identical in both Acts, to wit:

> "the existence of any condition or practice in a coal or other mine(FOOTNOTE 4) which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Historically, the first tests for determining whether an imminent danger exists or not were set forth in Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), and Eastern Associated Coal Corp., 2 IBMA 128, 80 I.D. 400 (1973), aff'd Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals et al., 491 F.2d 277 (4th Cir., 1974). In Eastern, supra, the Board of Mine Operations Appeals, formerly a division of the Interior Department's Office of Hearings and Appeals, herein "BMOA", held that:

> * * * an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition

> cannot be divorced from the normal work activity. The question must be asked - could normal operations proceed prior to or during abatement without risk of death or serious physical injury? If the answer to this question is "no,' then an imminently dangerous situation exists and the issuance of a 104(a) withdrawal order is not only proper but mandatory under the Act.

In Freeman, supra, the BMOA elaborated on its decision in Eastern and held that the word "reasonably" as used in the definition of imminent danger necessarily means that the test of imminence is objective and that the inspector's subjective opinion is not necessarily to be taken at face value. The Board also gave this 2Äsentence test of "imminent danger:"

> * * * would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must of of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. (Emphasis added)

The United States Court of Appeals for the 7th Circuit in Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (1974), while quoting with surface approval the BMOA's definition of "imminent danger," went on to add its own:

> > An imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make the impending threat virtually an immediate one. (Emphasis supplied)

In Canterbury Coal Corporation v. Mining Enforcement and Safety Administration (MESA), Docket No. PITT 74Ä57 (January 24, 1975, ALJ Decision; unreported), the extreme but plain meaning of the second sentence of the BMOA's imminent danger test was questioned:

> "I conclude, after reviewing the Board's decisions in Freeman and Eastern, the decisions from the 4th and 7th Circuits on appeal therefrom, and subsequent Board decisions, that the Board, by its use of the phrase "at least just as probable as not" in the Freeman case, did not set up a pure mathematical equation for determining whether it is reason

> able for an inspector to find imminent danger. More directly, I do not believe the Board intended to require that the odds be even that if normal operations continued the danger would come to fruition, or to hold that there must appear to be a 50/50 chance . . . that the tragedy or disaster would occur, to justify the issuance of a closure order. It most certainly is clear from factual analysis of the Board's numerous "imminent danger" decisions that the lives and well-being of miners are not to ride on the same law of statistical probabilities found in the toss of a coin. Accordingly, I reject any such interpretation of the Freeman test."

Thereafter, during the process of the enactment of the 1977 Act, the Senate Committee on Human Resources, made this statement:

> "The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the commission." (Leg.Hist. of the Federal Mine Safety & Health Act of 1977, 95th Cong., 1st Sess. (hereinafter Leg.Hist.1977 Act) at 38.)

The Commission, in Pittsburg & Midway Coal Mining Company v. Secretary of Labor, (2 MSHRC 787, 788; 1980) also set a different course for approaching imminent danger questions:

> " . . . we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., we will examine anew the question of what conditions or practices constitute an imminent danger."
>
> (emphasis added)

Research of this question leads one to believe that the literal meaning of the "at least just as probable as not" (emphasis supplied) language, has for the most part been expressly discarded or otherwise ignored. In studying the past difficulties of various tribunals to describe what constitutes an imminent danger, one is reminded of the recent answer of a Supreme Court Justice when asked what pornography was: "While I can't put it into words, I know it when I see it." But also, it is well established that the Mine Act and the standards

promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co., v. FMSHRC, 606 F.2d 417, 419Ä420 (4th Cir.1979); Old Ben Coal Co., 1 FMSHRC 1954, 1957Ä58 (1979); Secretary of Labor v. Pittsburg & Midway Coal Mining Company, 8 FMSHRC 4 (1986). Accordingly, the "at least just as probable as not" formula contained in the BMOA's Freeman decision, supra, will not be used here as the sounding board for determining the existence of imminent danger.

Since the Commission's Pittsburg & Midway decision, there have been relatively few imminent danger matters in litigation before the Commission. Under the 1977 Act, decisional emphasis seems to be on the individual factual configurations involved rather than on discrete tests and formulas for determining imminent danger. See, for example, Secretary of Labor v. U.S. Steel Corporation, 4 FMSHRC 163 (1982). At this time, the Act's section 3(j) definition appears to be the primary legal touchstone. Evaluating the dangerous condition or practice - whether or not a violation-in the perspective of continued mining operations also appears to be a prerequisite in determining the validity of an imminent danger order. There also is a case for treating these as prerequisites: (1) that the hazard (risk) foreseen must be one reasonably likely to induce fatalities or injuries of a reasonably serious nature, and (2) that such hazard or risk have an immediacy to it, that is, it could come to realization "at any time."

In adopting the above concepts, a review of the factual underpinnings for the Inspector's conclusions is required. It is found therefrom that the Inspector properly issued an imminent danger order based on (a) those findings previously made in connection with the S & S issue and (b) these additional probative evidentiary factors:

1. Carbon monoxide is undetectable, as the Inspector testified:

> " . . . if he gets a high concentration of carbon monoxide, you can't smell the gas, you can't detect it. All of a sudden you're down, and you're dead." (Tr. 34)

2. Respondent's admission that he used the front-end loader "two or three days a week" over a period of four or five years (Tr. 66, 72), and underground for a period of 2 months (Tr. 70Ä72) on occasions when other miners were present (Tr. 73).

3. Respondent's admission that he knew that operating the gasoline-powered loader was dangerous (Tr. 75) coupled with the extent of his prior use of the same compels the inference of the probability that the loader would have continued to be used under improper and dangerous conditions.

4. A fan in the mine which Respondent thought would clear the air when the loader was running was actually insufficient for this purpose (Tr. 31, 32).

Based on the foregoing substantial evidence it is concluded that the Inspector exercised correct and reasonable judgment in determining that an imminent danger existed on May 17, 1984, since there existed both (1) a practice and (2) conditions in the subject mine which reasonably could be expected to cause death or serious physical harm at any time had normal mining operations been permitted to continue and before such condition and practice could have been abated. The imminent danger withdrawal order is thus affirmed.

RULING ON SECRETARY'S MOTION

The Secretary, at the end of his post-hearing brief received May 23, 1986, and in the 11th hour of the Judge's jurisdiction in this matter, states that in keeping with the Secretary's "policy of conducting Compliance Assistance visits, a penalty should not have been assessed", going on to add:

> "Since the inception of the CAV program in 1979, MSHA policy has been to not propose penalties for violations observed during the course of a CAV reopening inspection (Metal Ä Nonmetal Assistance Program) or 303(x) reopening inspection (Coal Mine Assistance Program). This violation was not identified as observed during a CAV inspection, hence, trial counsel is now advised that it inadvertently received a proposed penalty."
> (emphasis added)

The last sentence of the Secretary's brief more clearly indicates what the Secretary intended:

> "Plaintiff therefore withdraws the penalty assessment and respectfully requests that the citation/order be upheld."

The requests therein for both (a) withdrawal, and (b) review of the Citation/Order are contradictory. Thereafter, in response to my Order to Show Cause, the Secretary clarified this motion to show that he was moving to withdraw the petition and that indeed such should result in dismissal of the entire proceeding and preclude review of the Citation/Order.

Commission Rule 11 provides that a party may withdraw a pleading at any stage of a proceeding with the approval of the Commission or the Judge". (emphasis supplied). Both the form and timing of the attempted withdrawal here are of some concern since the unsupported motion comes after the matter has proceeded through an adversary hearing. Nevertheless, since it is clear that the Secretary does not wish that a penalty be assessed in this de novo proceeding before the Commission for the violation

found and since the Commission's Rule 11 requires the judge's approval before such can be accomplished, an exercise of discretion and a ruling thereon is required. Here, at the Secretary's instigation, this matter was fully litigated on the record in an adversary proceeding provided for in the Act, and of more importance, the Secretary clearly established that a violation occurred (admitted by Respondent). The Secretary has not shown-or alleged-any basis why or how Section 110(a) of the Act can be ignored. The impropriety of the Inspector's CAV promises not to issue citations was litigated. As above noted, Section 110(a) requires that a penalty be assessed when a violation occurs and this also is a principle of mine safety law. See U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (1984); Tazco, Inc., 3 FMSHRC 1895 (1981). Whatever the Secretary's CAV procedures are - again the Secretary, although requested (Tr. 81), has not submitted any written documentation reflecting what his CAV procedures or policies are - the Secretary has not shown how a mandatory provision of the Mine Act can be waived in this matter or why it should be. I am unaware of any basis upon which such can be waived. Even the Secretary's "policy" as articulated in his brief - applicable only where a mine is being reopened - isn't clearly relevant. Also, and as previously found, the Secretary should not be estopped from enforcing the Act and the public's interest in this matter.

Some situations where the Secretary, after Commission jurisdiction attaches, might be permitted to drop its prosecution are usefully compared:

1. where the parties, before entry of a final agency decision, reach an appropriate settlement;

2. where the Secretary, after further investigation on or off the record of a formal adversary hearing, concludes that a violation was not committed;

3. where some late-discovered jurisdictional defect is discovered;

As best I divine it, if it is not self-application of the estoppel defense, the Secretary's purpose here is simply to protect the credibility of its CAV process. But this is both an unusual and isolated case where such is not significantly threatened. As previously discussed, there certainly is no inequity or unfairness which would result from not dismissing this matter. Mine safety clearly is best served by not aborting the proceeding at this juncture; where the public interest rests is well demonstrated on this record. Dismissal of this de novo proceeding where the Commission's jurisdiction has been locked in and a record developed would more likely bring in to question the proper discharge of the administrative-judicial responsibility than the enforcement process. Accordingly, in the exercise of my

discretion under Rule 11, the motion of the Secretary to withdraw the petition for penalty assessment herein is denied.(FOOTNOTE 5)

ASSESSMENT OF PENALTY

It has previously been shown that the violation occurred as charged in Citation/Order No. 2363585 and that both the Inspector's special S & S findings and finding that an imminent danger existed are supported in the record. There remains the determination of an appropriate penalty. The mine in question is a very small one which is now out of business (Tr. 62). Since there were no previous inspections (Tr. 63) Respondent has no history of previous violations. Respondent makes no claim that payment of a penalty to use the words of the Act, will jeopardize "his ability to continue in business", or, more appropriately here, that he is unable to pay a penalty.6 Since Respondent never used the front-end loader in question after the Citation/Order was issued, it is concluded that Respondent, after notification of the violation, proceeded in good faith to promptly achieve compliance with the safety standard violated. The record is clear that this was a serious violation which created an imminent danger and that Respondent was highly negligent in its commission (Tr. 34, 75). The Inspector's indecorous preliminaries, as previously noted, do not call for a downward penalty adjustment. After weighing these various penalty assessment criteria mandated by the Act, a penalty of $150.00 is found appropriate.

ORDER

1. Citation/Order No. 2363585 is affirmed in all respects.

2. Respondent, if he has not previously done so, shall pay the Secretary of Labor within 30 days from the date hereof the sum of $150.00 as and for a civil penalty.

Michael A. Lasher, Jr.
Administrative Law Judge

FOOTNOTES START HERE-

1 "Gasoline shall not be stored underground, but may be used only to power internal combustion engines in nongassy mines that have multiple horizontal or inclined roadways from the surface large enough to accommodate vehicular traffic. Roadways and other openings shall not be supported or lined with combustible material. All roadways and other openings shall be conected with another opening every 100 feet by a passage large enough to accommodate any vehicle in the mine."

2 In Secretary v. Consolidation Coal Company, 6 FMSHRC 189 (1984), the Commission held that S & S findings may be made in connection with a citation issued under Section 104(a) of the Act. Considering this ruling in conjunction with U.S. Steel

Mining Company, 6 FMSHRC 1834 (1984), where the mine operator was allowed to contest S & S findings entered on Section 104(d)(1) citations in a penalty case, it is concluded that S & S findings contained in a Section 104(a) Citation similarly are properly reviewable in this penalty proceeding.

3 Notices of violation, which are issued on CAVs instead of Citations, are on a form approximately 1/3 the size of a regular Citation form (Tr. 20).

4 By virture of Section 102(b)(4) of the 1977 Mine Act the phrase "or other" was added after the word "coal" to expand the Act's coverage to all mines.

5 It may be that as a matter of supporting enforcement policy the Secretary should have the absolute right to withdraw his initial pleading at any time before final decision by (a) the trial level judge or (b) the Commission. I am, however, unable to draw such a line absent clarifying Commission policy or distinguishing precedent. The Secretary has not cited, nor do I know of, any basis for such proposition. The facts of this particular matter do not provide an illustration for removing Commission review of withdrawal requests.

6 In the absence of proof that the imposition of otherwise appropriate penalties would adversely affect a mine operator's ability to continue in business, there is a presumption that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (1983), aff'd 736 F.2d 1147 (7th Cir., 1984).