

CCASE:  
SOL (MSHA) V. CONSOLIDATION COAL  
DDATE:  
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TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

v.

CONSOLIDATION COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 87-19  
A.C. No. 46-01453-03730

Humphrey No. 7 Mine

DECISION

Appearances: Therese I. Salus, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for the Petitioner;  
Michael R. Peelish, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$350 for an alleged violation of mandatory safety standard 30 C.F.R. 75.1105, as stated in a section 104(a) "S & S" Citation No. 2704343, issued to the respondent on September 5, 1986. The alleged violative condition or practice as stated on the face of the citation is as follows: "The Thromore pump at 433 block on main haulage is not housed in fire proof enclosure and vented to the return. According to weekly examination book, pump has been in service since May 20, 1986."

The respondent filed a timely answer and contest denying the violation. The respondent took the position that the cited pump in question was not a permanent pump, but rather, a temporary pump, and thus was not required to be housed in a fireproof structure. The petitioner took the position that

the pump was in fact a permanent pump subject to the requirement that it be housed in a fireproof enclosure or area with the air current coursed directly into the return as required by section 75.1105. Petitioner asserted that the respondent had obtained a variance of section 75.1105 for the permanent pumps along its mainline track haulage because of special circumstances that existed, and that pursuant to that variance, the pump had to be enclosed in a fireproof structure and provided with an automatic fire suppression system. Since the pump was not housed at all, nor provided with an automatic fire suppression system, petitioner concluded that the pump did not meet the requirements of the variance, and was therefore in violation of section 75.1105.

A hearing was conducted in this matter in Morgantown, West Virginia. The parties filed posthearing briefs. In addition, the prehearing arguments and submissions made by the parties have been incorporated by reference as part of the record in this case, and I have considered all of these arguments in the course of my adjudication of this matter.

#### Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty to be assessed for the violation based on the criteria found in section 110(i) of the Act.
2. Whether the cited pump in question was a permanent or temporary pump.
3. Whether the inspector's "significant and substantial" (S & S) finding concerning the violation is supportable.
4. Additional issues raised by the parties in this proceeding are identified and disposed of in the course of this decision.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Å164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

MSHA's Testimony and Evidence

Spencer A. Shriver, MSHA Electrical Engineer, testified as to his background and experience, and he confirmed that he holds B.S. and M.S. degrees in electrical engineering from West Virginia University, and is a certified electrician, and a licensed professional engineer. His duties include the inspection of mines and conducting investigations concerning petitions for modification of safety standards.

Mr. Shriver confirmed that he conducted a spot electrical inspection of the mine on September 5, 1986, on four different days over a 2-week period, and that he issued the citation after observing an operating energized pump at the track haulage which was completely exposed and not enclosed in a fireproof structure, and the air used to ventilate the pump was not being vented to the return. The pump was resting on four concrete stopping blocks at each corner, approximately 8 to 10 feet from the tracks, and Mr. Shriver described it as a 7 1/2 horsepower ThroMor pump. An overhead trolley wire was located at an angle approximately 3 to 4 feet above the pump, and a wooden crib used for roof support was located about 4 feet from the pump.

Mr. Shriver stated that he observed no walls or ventilation tubing of any kind, and the air would either remain at the pump or find its way back into the intake. He confirmed that he walked around the pump and that it was visible for 40 or 50 feet in behind and around it.

Mr. Shriver stated that he made a determination as to whether the pump was "permanent" by referring to MSHA's policy statement found in the inspector's manual (exhibit GÄ3). A "temporary" pump is defined by the policy as one that would be advanced with the working section, and it would be self-propelled or portable. Such portable pumps that are regularly moved from one mine location to another would not be considered to be "permanent."

Mr. Shriver stated that since the pump was several thousand feet from a working section, it would not be advanced with the working section. Since the pump was not self-propelled, had no drive mechanism or gear box, and was located on a bank beside the track approximately 2 feet high behind the trolley wire, he did not consider it to be portable. He also observed a large motor and starter box on a heavy

metal sled which weighed "a few hundred pounds." Based on all of these factors, he considered the pump to be permanent.

Mr. Shriver stated that he reviewed the weekly mine pump examination books and determined that the pump had been at the location where he found it since May 30, 1986. He observed that entries had been made in the books for the pump for each week from May 30 to September 5, 1986. The records did not reflect that the pump had been moved during this time period.

Mr. Shriver stated that pumps along the haulage are usually placed there to gather up problem water and pump it to a discharge point for removal from the mine, but he did not know whether the pump in question was used regularly. The weekly electrical examination records indicated that the pump had been examined once a week, and the fact that it was not in a fireproof enclosure was obvious to any capable observer.

Mr. Shriver believed that the violation was significant and substantial because it was reasonably likely that a reasonably serious accident would occur if the pump motor would short circuit, or if the bearings were to freeze and a fire were to start. The resulting smoke and fire could affect the ventilation in other areas where people would be working. Further, if the cribs or coal were to catch fire, the entry could fill with smoke and miners could have trouble finding their way out of the area. He believed it was reasonably likely for these problems to occur, and he was aware of other pumps catching fire.

Mr. Shriver stated that he observed that a clamp holding the power conductor wire going into the pump motor starter box was loose, but he observed no other condition that would have increased the likelihood of a hazard. He did not issue a violation for the loose clamp because it was taken care of immediately. Had a fire occurred, injuries such as smoke inhalation or burns would likely occur; and compliance by providing a fireproof enclosure would contain any fire. Five or six people on a track crew and a few motormen would be affected by any fire.

Mr. Shriver believed that the negligence was moderate in that the pump examiner should have been aware of the cited condition. He confirmed that the violation was timely abated when the pump was deenergized by removing the power conductors from the starter box. However, the pump was not removed from its location, and when he later observed it on May 11, 1987, what appeared to be the same pump was in a fireproof enclosure and an automatic fire suppression device was provided. An

examination of the pump inspection books confirmed that the pump had been continuously inspected from September 19, 1986 through May 11, 1987.

Mr. Shriver identified exhibit GÄ4 as a request for a variance from the requirements of section 75.1105 filed by the respondent on January 24, 1986, for several water pumps located along the main haulage. In view of roof falls in the returns, it was virtually impossible to vent the 11 pumps to the returns, and the variance was granted with some stipulations.

Mr. Shriver stated that the 11 identical pumps subject to the variance were located between survey stations 180 + 00 and 448 + 00, and that the pump he cited was within this area. Mr. Shriver confirmed that the variance only applied to the pump ventilation, and the pumps were required to be enclosed in fireproof enclosures. They were in fact so enclosed, along with fire suppression equipment and fire doors.

Mr. Shriver confirmed that in the past 9 1/2 years while inspecting mines, he has had occasion to cite a violation of section 75.1105 only one other time on the same type of pump and under circumstances identical to those in this case. He reiterated that his understanding of a "permanent" pump is one which is not on a working section and is not portable or self-propelled. He believed that the length of time a pump is at any location is not relevant as to whether it is permanent (Tr. 7Ä42).

On cross-examination, Mr. Shriver confirmed that he was aware of the time reference in MSHA's policy statement regarding section 75.1105, but that he preferred to rely on whether or not the pump is advanced with the section or is self-propelled or portable (Tr. 43).

Mr. Shriver confirmed that within the past few days he has heard of an MSHA policy indicating that 6 months was the yardstick used to determine the permanency of a pump, and while it has been discussed in his office, he has been unable to find anything in writing in this regard. He further confirmed that while he is not aware of any MSHA inspectors using any such 6Ämonth time frame to determine whether a pump is temporary or permanent, he has heard of it as an argument advanced to the inspectors. When asked for the source of this information, Mr. Shriver stated that the consensus in his office is that the 6Ämonth policy has something to do with hanging cables on J-hooks for 6 months, and at the end of that time, the cables had to be permanently supported. To his

knowledge, this 6-month period has not been applied to pumps (Tr. 48-51).

Mr. Shriver stated that he had no reason to believe that the cited pump was put in service prior to May 30, 1986, and if it was, it was not for more than a week earlier than that date (Tr. 52). He estimated the main line haulage where the pump was located to be 8 to 10 miles long up to the pit mouth, and that the track crew and a couple of motormen would be in that area at any given time. He believed the haulageway was the main artery for transporting coal out of the mine, and he did not know where the air that passed over the cited pump entered the return. He indicated that the air goes up to the fan, and he did not believe that it travelled to an active section (Tr. 54). He estimated that it might take three or four shifts to construct a structure to house a pump (Tr. 54). The fact that he noted a pump entry in the examination book after the citation was issued does not necessarily mean that the pump was put back in operational service (Tr. 56).

Mr. Shriver could not recall whether there was any fire suppression equipment at the cited pump, and confirmed that if none was there, he probably would have cited it (Tr. 57). Aside from the lack of a fireproof structure, the pump was otherwise properly located and installed (Tr. 58). He confirmed that the size of the pump is not the sole determining factor as to its permanence (Tr. 58). He also confirmed that he discussed the citation with maintenance foreman David Painter, and that Mr. Painter suggested to him that since the pump was not at the cited location for 6 months, it was not permanent (Tr. 59).

In response to further questions, Mr. Shriver stated that he saw no wheels on the pump assembly, and that the pump was not located on an advancing section (Tr. 67). He confirmed that the variance was never used as the basis for the citation, and that he was unaware of it at the time he cited the violation (Tr. 67). Mr. Shriver did not know whether or not the respondent still had a water problem after the violation was abated, and he confirmed that when he next viewed the pump during a subsequent inspection on another matter, he observed that it was in service, and Mr. Painter told him that it was put back in service because they could not get along without it. The pump was enclosed as required, and it had a fire suppression system. He did not know whether the other pumps which were subject to the variance were still in service (Tr. 70-71). He confirmed that the respondent advised him that the cited pump was there because of a water problem, and that water was being pumped to the Bacon Run Shaft (Tr. 75).

MSHA's Posthearing Depositions

In view of the unavailability of one of MSHA's witnesses at the hearing, and at my direction, MSHA was permitted to depose three witnesses with respect to the question of any MSHA 6-month policy interpretation of section 75.11105.

Paul M. Hall, Chief Electrical Engineer and Inspector, MSHA Morgantown District Office, testified that he has worked in that office since 1970, and that his duties include the supervision of inspectors who conduct electrical mine inspections. Mr. Hall stated that although he has served on a committee to re-write MSHA's nationally applied electrical standards periodically since 1983, he does not make policy. He described what he believed to be the requirements of section 75.1105, and agreed that the standard does not define the term "permanent pump." He confirmed that he and his inspectors rely on the 1978 Inspector's Manual reference under section 75.1100-2(e), for guidance, and that "the main thing is that it is going to be used in one place for awhile, for a long or indefinite period of time." He agreed that the policy statement does not elaborate on the meaning of that phrase (Tr. 9).

Mr. Hall explained the exceptions for "portable pumps" found in the section 75.1100-2(e) Manual policy statement, and indicated that a portable pump is one that is used and moved relatively often, such as on a working section. Such pumps are used intermittently, are regularly attended, are light weight, have no automatic controls, and once the area is de-watered, the pumps are stopped and moved elsewhere. Permanent pumps would have automatic controls which would stop the pump when it runs out of water, and it would not be attended at all times. They would require lubricating oils and grease, and would create more of a fire hazard because they remain in one location and are not regularly attended. All of these factors were taken into consideration when the policy was developed, and he confirmed that it would be impractical to house portable pumps in a fire proofed enclosure (Tr. 11).

Mr. Hall stated that he did not participate in the formulation of the 1978 Manual policy in question, and he confirmed that the policy is one that is applied Nationally, and that his inspectors are expected to follow it. He explained the application of the phrase "relatively long or indefinite period of time" as follows (Tr. 12):



As far as relatively long, it is something that the inspector has to use his judgment in. He is to go and look at the installation itself and make a judgment decision on whether he feels that that pump is going to remain in that location. He has to take into consideration where the water is coming from, how often the pump is going to be used, the method of installation, and whether it is installed in a permanent manner. An inspector has to use his best judgment to make that decision. You cannot give a time period. A mine may install a pump knowing full well it is going to be there for the life of the mine -- at the time of installation it has to be -- it is a permanent pump, so there is no time limit on how long a pump has to be there before it is considered permanent, but once it meets that requirement the inspectors have to make a judgment on whether it is a permanent pump.

Mr. Hall confirmed that over the years, his district has used various interpretations in determining what may constitute a permanent pump installation. He identified a copy of a reference document which he used at a district #3 staff meeting held on May 6, 1983, to discuss the policies concerning permanent pumps (Deposition exhibit A1). He confirmed that he prepared the document by relying on information obtained from MSHA's headquarters in Arlington, Virginia, and he explained the different policies as reflected in the document (Tr. 15A19).

Mr. Hall confirmed that the staff meeting was called to clear up some questions concerning the permanent pump policy, and to his knowledge the prior 6-month policy alluded to in paragraph 3 of the document in question has not been used in his district after the date of the meeting. He stated that during the meeting, everyone present confirmed that they were using the 1978 manual policy, and that District Manager Ron Keaton informed everyone to continue to use that policy, "and as far as an indefinite period of time, he was leaving that up to the judgment of the inspectors to make that determination on a case-by-case basis" (Tr. 20). With regard to any further elaboration by Mr. Keaton, Mr. Hall stated that "he just said that the inspector had to make sure--that he had to make a judgment on whether he thought it was a permanent pump or not. You have to take into account such things as method of installation and what was the intent and use" (Tr. 21).

Mr. Hall stated that although MSHA's National policies supersede any local district policies, the district does make policy through Mr. Keaton, and in those instances concerning electrical policy matters, Mr. Keaton relies on him.

Mr. Hall confirmed that he was familiar with the facts of this case, and that he reviewed the citation issued by Inspector Shriver, including his notes, but did not discuss any questions with the inspector because he was in agreement that the citation was properly issued, and saw nothing which would lead him to conclude that the cited pump was not a permanent installation (Tr. 22).

Mr. Hall confirmed that the issue of permanent pumps has previously been raised in his district at the Mettiki No. 1 Mine operated by the Southern Ohio Coal Company. When it came to his attention that the operator was following a policy other than the district and national policy, he instructed his inspector to advise the operator of the correct policy and to give it sufficient time to conform. After a short period of time, the inspector issued a violation to the operator and the matter was contested (Tr. 23).

In response to a question as to whether or not he was aware of any district policy that would support Consolidation Coal's assertion that it somehow has a 6-month period of time within which to evaluate a water problem and to determine whether or not a pump should be installed permanently, Mr. Hall responded "there has never been an official policy like that -- not since 1978 anyway" (Tr. 24). However, he indicated that any such policy probably would have been consistent with MSHA's 1974 Manual policy, but that this was superseded by the present policy as reflected in the 1978 Manual. Mr. Hall stated that mine operators should be aware of the fact that after 1978, there no longer existed any 6-month policy because they should have a copy of the Manual. When asked whether he had specifically advised the inspectors that this was the case, Mr. Hall replied "No. Everybody was given a copy of the Manual. As a matter of fact, I think they even had training classes" (Tr. 26). When asked whether he would have been aware of any 6-month policy in use after 1978, he replied "If there was a problem, I would have, yes." However, he could not recall anyone commenting about this policy, nor could he recall any phone calls from operators questioning the policy (Tr. 26).

Mr. Hall stated that the reason for the May, 1983, district meeting was to discuss some "questions that were brought up on the various things and one of the things was

that we decided that we wanted to discuss the permanent pumps" (Tr. 27). He stated that the background document discussed at the meeting, (Deposition exhibit 1), was not introduced to alleviate confusion, but to review the policy history and to consider whether the development of a new policy was needed. He explained that "the intent was to see if we could develop a new policy for permanent pumps. The district manager at that time said to continue using the existing policy" (Tr. 28). Mr. Hall conceded that the 1978 policy may not be perfect, "but it was the best that we had and it was one that was supposed to be consistent with everyone in the nation" (Tr. 29).

Mr. Hall stated that the fact that the cited pump looked like the other permanent pumps which were installed and housed, would be something for the inspector to consider when he makes his judgmental decision on a case-by-case basis. Mr. Hall could not recall whether a sump was located at the cited pump location in question, and he confirmed that a sump or the lack of a sump would not necessarily make the cited pump permanent.

Mr. Hall confirmed that he is aware of no inspectors who may have informally advised operators after 1978, that they were still to abide by the prior 6-month policy, and that he has never made statements to that effect (Tr. 35). He confirmed that the Southern Ohio case was decided a month before the citation in this case was issued, and that the 6-month policy question was not an issue in that case (Tr. 40).

MSHA Supervisory Inspector Cecil Branham, MSHA District Three, Morgantown, West Virginia, stated that he first became aware of the facts in this case when he was briefed by MSHA's counsel "a couple of days ago" prior to the taking of his deposition. He stated that section 75.1105 does not define the term "permanent pumps," and that he and other inspectors rely on the definition of a "permanent" electrical installation found in section 75.1100-2(e), and MSHA's policy guideline for that section as it is stated in the March 9, 1978, Inspector's Manual (exhibit G3).

Mr. Branham was of the opinion that a "permanent pump" is "something that has been there for a long period of time," and include "basically any pumps other than the ones that are moved with the section." Mr. Branham was not aware of anything that defines or explains what "a long period of time" might be, and he confirmed that the 1978 Manual has not been updated, and that it is available to mine operators. He

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believed that the requirement that permanent pumps be ventilated and housed in fireproof enclosures is to protect against a fire hazard. He explained that such pumps are electrical installations which are placed in areas where people are not present at all times, and since they are unattended, there is a possibility that they could catch fire, and if they do, a means of carrying the smoke away from miners must be provided.

Mr. Branham confirmed that he probably has reviewed all citations or orders issued by inspectors under his supervision, but he could not recall how the inspectors may have determined that any pump was out of compliance with section 75.1105. With regard to any 6-month policy which has been relied on by the respondent in this case, Mr. Branham stated that while such a policy was used prior to 1978, it is not in use at the present time, and he is not aware that any of his inspectors have used that policy since 1978.

Mr. Branham stated that he was not aware of any written memorandums or other "suggestions" for the MSHA districts to follow with regard to how the 6-month policy was to be used. However, he was sure that this policy was discussed at regular staff meetings when he was an inspector. He identified the three page document containing various interpretations of permanent pumps which was alluded to during the taking of Mr. Hall's deposition (Deposition Exhibit GÄ1), and confirmed that he saw the document during a staff meeting of supervisors on May 6, 1983.

Mr. Branham stated that all of the interpretations stated in Deposition Exhibit GÄ1 are not used in his district. He confirmed that the horsepower guideline was used at different times prior to 1983, and that 10 or 15 horsepower pumps were not considered to be permanent. He also confirmed that the 6-month period referred to in the 1974 Manual, as discussed in paragraph 3 of the document, and the reference to District 2 referred to in paragraph 5, were never used in his district. However, the reference in paragraph 4 to "Kline, Lucky, etc." referring to pump design and method of installation, and the reference to the 1978 Manual made in paragraph 6, are currently in use in his district, and have been used since the publication of the Manual in 1978.

Mr. Branham stated that the May 6, 1983, staff meeting was called to clear up confusion and that mine operators were not present. He confirmed that at no time after that meeting was he authorized by the district manager to use any 6-month policy. He was aware of citations for violations of section 75.1105 which were issued since 1983 for pumps installed for

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fewer than 6 months, but he could supply no specifics. He was not aware of any permanent pump issues raised in his district since the meeting in question.

Mr. Branham confirmed that the 1978 Manual policy guideline regarding section 75.1100Ä2(e), does not mention vacating or voiding any prior 6Ämonth policy, and simply refers to a "relatively or indefinitely long period of time." Although he was sure that he may have had conversations with Consolidation Coal officials during his mine visits with respect to the question of permanent pumps, he could not recall any specific conversations. Mr. Branham confirmed that it was possible that such an issue may have been raised by an operator.

Mr. Branham confirmed that apart from the 1978 Manual, he was unaware of any other MSHA policy statements regarding any 6Ämonth policy, and that the Manual was the "last word" on the subject. He also confirmed that the 6Ämonth standard is no longer used by his district, and that it was discontinued sometime after the 1978 Manual became effective. Apart from the Manual, he was not aware that MSHA has disseminated the decision not to use the 6Ämonth policy to all coal mine operators.

Mr. Branham stated that MSHA's present practice in determining whether a pump is permanent or not is to basically consider all of the circumstances with respect to the installation of the pump, rather than a consideration of any definitive time period. He agreed that evaluating the source of water in the mine may sometimes takes several months, and that the re-appearance of water after it has been pumped can occur because of geological factors and water seepage through the mine bottom.

Mr. Branham was sure that the prior 6Ämonth policy in question came from the 1974 Inspector's Manual. He conceded that this policy could have been communicated to mine operators through the Manual reference, or by inspector's who have day-to-day contact with operators. He also confirmed that the most recent Manual policy guidelines superseded all prior Manuals, and that this is stated on the second page (exhibit GÄ3). He was unaware of the dissemination of any further policy memorandums or directives regarding pumps since the publication of the 1978 Manual, and he had no knowledge that the results of the 1983 staff meeting were communicated to operators in writing.

Mr. Branham confirmed that since 1983, his office has enforced section 75.1105 by relying on the Manual policy guideline, and that "Basically, what we have been saying is that

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all pumps need ventilated housing except for ones that are moved on a regular basis or small pumps" (Tr. 27). He further testified as follows (Tr. 27-30):

BY MR. PEELISH:

Q. The statement under 75.1100 states that permanent electrical installation is electrical equipment that is expected to remain in place for a relatively long or indefinite period of time. It does not state, and I am not going to read the remainder of it, but it does not state anything about the inspector will look at the design or the setup, or the method of how a pump is set up, of horsepower limits or whether pumps can be hand carried, it does state portable, but it does not state any of those other elements that you have delineated that committee report. That Kline, Lucky Committee, number four report. Does it? Those were never -- in other words, those factors were never inserted in that 1978 policy manual?

A. No.

Q. So an operator would not know, other than what you said was verbal communication, about any of the meetings that the inspectors had had in regards to this standard or this policy?

A. This policy is what was in the 1978 manual. That is what is in there.

Q. But I am saying, the factors that are in number four from the Kline, Lucky Committee meeting were never included in that manual, were they?

A. No.

\* \* \* \* \*

Q. Now, can you understand that an operator who has lived under a standard for several years has stated a statement that there is a six-month standard out there? Could you understand where he could have a problem in a new policy statement that has been issued that has an ambiguous time period indicated in it?

A. It is really hard for me to realize that we would have confusion on six months. I might understand confusion today on maybe some horsepower or size, but as far as I am concerned six months was done away with a long time ago.

Q. It was never relayed to any of the operators though? Was it?

A. No, but during this time frame I am sure inspectors and operators have discussed all kinds of stuff like this.

Q. Can you tell me for certain that Blane Meyers or any other operator at Humphrey No. 7 Mine were told that the six-month standard existed no longer?

A. Not for certain. No.

Q. Can you state specifically that you had any discussions with any coal mine operators with Consolidation Coal Company where you told them specifically that the six-month standard no longer was in use?

A. I do not recall.

MSHA Supervisory Inspector Paul Mitchell, Clarksburg, West Virginia Field Office, testified that he has been assigned to that office for 3 years, supervises seven inspectors, and that prior to his present assignment he served as an inspector in Morgantown. Mr. Mitchell confirmed that he was not familiar with the citation issued by Inspector Shriver in this case. He agreed that section 75.1105 does not provide a definition for a "permanent pump," and he confirmed that he has never issued a citation for a violation of that section, and has never reviewed any such citations issued by any of his inspectors.

Mr. Mitchell stated that he would refer to the 1978 Inspector's Manual policy statement as stated in section 75.1100Ä2(e), for guidelines regarding the definition of a "permanent pump" (Exhibit GÄ3). He agreed that the policy statement does not define the terms "a relatively long period of time or indefinite period of time," and in response to a question as to how his inspectors determine the meaning of "a

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relatively long period of time," he responded as follows (Tr. 10, 13-14):

They look at the conditions. They look at the intent of the operator. If it is going to be positioned there indefinitely, they can tell by the location. They can tell by the way it is constructed and by the material that is surrounding it.

\* \* \* \* \*

They look at the situation. If they drill a hole and put a sump there, or if they made a dam and stuck a pump there or if they got a steady running water stream they put a pump there and put permanent fixtures on it and then we assume that they are going to have that pump there over a period of time and we make a determination.

Mr. Mitchell stated that since the receipt of the 1978 Manual, he has received no further policy information except for a memorandum concerning a decision in the Southern Ohio Coal Company case, and he confirmed that no other policy guidelines have been distributed to his inspectors. Mr. Mitchell was unaware of any 6-month policy ever being used in his district, and while he could not specifically recall speaking with Mr. Blane Myers about any such policy, he indicated that he could have spoken with him (Tr. 20). Mr. Mitchell confirmed that a 1973 policy memorandum, which is no longer in effect, indicated that pumps which are skid-mounted or are used intermittently, were not considered to be permanent (Tr. 17). He agreed that the phrase "relatively long or indefinite periods" is ambiguous, but he indicated that an inspector would make a judgment, on a case-by-case basis, as to what constitutes a permanent pump installation (Tr. 22-23).

Mr. Mitchell stated that before making a decision as to whether a pump is permanent or not, the inspector will speak to the operator to ascertain the extent of any water problem. He agreed that certain pumps cannot be used because of their pumping capacity, and horsepower, and the fact that a pump may be skid mounted is just one of many factors considered in determining whether it is a permanent installation (Tr. 26).



Respondent's Testimony and Evidence

David Painter, respondent's shift maintenance foreman, testified that he oversees the mechanical and electrical maintenance of the mine, including all of the pumps along the main haulage line, and he described the location of the cited pump, the distance of the haulway, and the air ventilation (Tr. 75-79). Mr. Painter identified exhibit R-2 as a two-page description of a "ThroMor" Pump, and he confirmed that it is very similar to the one cited in this case (Tr. 80).

Mr. Painter confirmed that he was with Inspector Shriver when he issued the citation, and that he discussed with him his reasons why he did not believe that a citation should be issued. Mr. Painter stated that he informed Mr. Shriver that he was not sure whether the pump was going to be permanent, and that it was his belief that it was a temporary pump until such time as the water problem along the haulage could be evaluated. Mr. Painter explained the water problem in question, and he confirmed that Mr. Shriver told him that he did not have a 6-month period within which to evaluate the water problem, and that if the pump was to be installed permanently, it needed to be enclosed immediately (Tr. 82).

Mr. Painter confirmed that he initiated the 6-month evaluation period discussion with Mr. Shriver, and that this "rule" was used by the respondent in the past, with MSHA's cooperation, and that no prior citations had ever been issued for having a temporary pump for less than 6 months. Mr. Painter could not name any MSHA inspectors who were with him on prior inspections, nor could he state any specific time periods to support his contentions concerning the lack of prior citations (Tr. 83-84).

Mr. Painter confirmed that the pump in question was examined on a preshift basis, and that prior to the issuance of the citation, it had been examined. He was not personally involved in the original installation of the pump, but it was quite possible that someone under his supervision was. He confirmed that May 30, 1986, was the first date recorded in the pump permissibility book, that such records are initiated after the equipment is put in service, and he believed that the pump was put in service within a day or two prior to the entry made in the book, or at least not greater than a week before (Tr. 90-91).

Mr. Painter confirmed that at the time of the inspection, fire suppression equipment consisting of a fire extinguisher, six bags of rock dust, and a second self-contained automatic

fire suppression fire extinguisher triggered by heat, were present at the pump location (Tr. 92). The violation was abated by immediately taking the pump out of service, and it remained out of service until late January, 1987. He was called to place the pump back into service, and he instructed his people to do this. To his knowledge, the pump was not in service from the time of the abatement in September, to the time it was put back in service in January, and it was in the same condition, with no electrical work performed on it, as it was when it was taken out of service, and it was not running (Tr. 92-93). Mr. Painter could think of no reason why anyone would continue to examine the pump during this period of time. He confirmed that he was not involved in the granting of the variance, but he believed that the variance covered 11 permanent pumps that had been installed for "quite some time." The cited pump in question was not put into service until after the variance was requested (Tr. 94).

On cross-examination, Mr. Painter confirmed that permanent pumps are required to be enclosed, and that this is done at all mine shaft bottoms. He stated that a hole at the mine shaft bottom allows water to come in, and in order to determine whether a pump will be permanently installed, there is a need to evaluate the situation, but that such evaluation need not be done first (Tr. 96). Mr. Painter confirmed that he was familiar with MSHA's policy as stated in the Inspector's Manual, exhibit GÄ3, and his understanding of the policy is that if the pump "is going to be there for an indefinite period of time, then it is permanent" (Tr. 97). He conceded that the policy does not define "indefinite period of time," but does state that self-tramming equipment, portable pumps, and portable rock dusters are not considered to be permanently installed electrical equipment. He confirmed that the respondent has not stated that the cited pump was portable, and that it was not self-propelled, nor was it located on, or advanced with, the section (Tr. 98).

Mr. Painter stated that water problems differ, and that some evaluations take longer than others. Prior to the issuance of the violation, he believed that he had 6 months to evaluate a water problem, and that at the expiration of that time period, if the evaluation was not completed, then he would have to accept the pump as a permanent installation (Tr. 99). He confirmed that he has never taken more than 6 months to determine whether to install pumps permanently, but has taken more than that time to evaluate a water problem (Tr. 101). Any determination as to whether a pump would be considered to be permanent before the expiration of 6 months would

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depend on whether he had a steady continuous water problem (Tr. 101).

Mr. Painter could not specifically establish the source of the "six-month" pump policy rule, and he confirmed that MSHA never objected to it or issued any citations in connection with this rule. He assumed that it was an MSHA standard, and confirmed that Consol has never been cited for using a pump which had been installed for less than 6 months while a water problem was being evaluated. To his knowledge, this issue had never been previously raised, and he never discussed it with any MSHA inspectors prior to the time the citation in this case was issued (Tr. 103-105).

Mr. Painter explained that a running pump will assist in evaluating the water problem, and that if the water stays away, the problem is temporary. He had no idea how much water was in the area where the cited pump was located, was not sure whether the pumps operate continuously, and that when the pump was taken out of service, little water remained (Tr. 108). He confirmed that since the pump has been permanently enclosed, a water problem still exists (Tr. 109). He confirmed that the area is travelled at least once every 8 hours (Tr. 110). He confirmed that the pumps covered by the variance are used to pump water, but he was not sure where the water was coming from, and did not know whether some of it came from the same source as the pump that was cited. He did not know how long the other pumps had been in place, and confirmed that most of them are still in service and housed in fireproof structures (Tr. 112).

Mr. Painter confirmed that none of the ThroMor pumps used in the mine have wheels, and that the wheels shown in the exhibit may be part of the cart. He also agreed that the sketch of the pump drawn by Mr. Shriver is "pretty close" to what the cited pump looked like, and that it was resting on concrete blocks mounted on a metal skid, as are all of the other similar pumps (Tr. 117-119, 125). He confirmed that he was not aware of all citations issued at the mine, and that a water problem still exists at the 433 track location where the pump was cited, and that it occasionally has to be pumped away (Tr. 120). Mr. Painter stated that he last reviewed the examination books "three days ago," and did not believe that any pump entries were made until the pump was put back in service in January, 1987 (Tr. 121). Mr. Painter was not sure whether any of the pumps along the 180 to 448 main haulage area have been relocated (Tr. 123).

Blane K. Myers, mine superintendent, testified as to his background and experience, and he stated that over the years he has discussed the "six-month policy" with his people as well as with different MSHA inspectors. He stated that "simply because it is not in writing, everyone has always accepted six months as determining the amount of time you have to evaluate an area." He indicated that after the expiration of 6 months, regardless of whether the evaluation process is finished, if it concerns a pump, it has to be enclosed in a fireproof structure (Tr. 128). He believed that this policy came from the previously referred to Inspector's Manual, (exhibit GÄ3), and he explained the circumstances concerning the water problems that were present, and how they were addressed (Tr. 129Ä132).

Mr. Myers confirmed that a water problem developed at the 433 block where the pump in question was cited, and since there was no explanation for the water, the pump was installed at that location to pump out the water, and it was subsequently monitored to determine how much water appears (Tr. 132). He confirmed that the pump was shut down after it was cited, and it did not operate again until January 1987, because the water appeared for a second time and there was an indication that the pump would be required at that location, and he did not want to take a chance that it would be cited again. He confirmed that it would take 8 to 10 man shifts to construct and install the required fireproof pump enclosure, including two shifts to install a sump pump while the enclosure is under construction (Tr. 134). Mr. Myers explained where the water was pumped and the ventilation in place, and he stated that as a general rule, there are no more than two people in the pump area at one time (Tr. 135).

Mr. Myers explained the variance in question, and he confirmed that it was an extension of a previously granted variance, that all of the pumps subject to the variances have always been enclosed in fireproof structures, and that the variance was sought and granted so that the pumps were not necessarily required to be vented to the return (Tr. 135Ä136).

Mr. Myers confirmed that the ThroMor pumps are frequently used in the mine to gather water from great distances and pump it great distances away, that they are used on advancing sections, and that there is no difficulty with the mobility of the pumps on an advancing section. He confirmed that they are used frequently in temporary situations and installations (Tr. 137).

On cross-examination, Mr. Myers confirmed that he was not present during the inspection, and that he probably saw the cited pump within the next few days after the citation was issued. He confirmed that he had previously discussed the 6-month policy in question with MSHA Inspectors Paul Mitchell, Jim Underwood, and others "somewhere in the mid-seventies, '74, '75, '76, somewhere in that area, and I am sure that I have talked with many other inspectors about it between the periods of '71 and '85." He could not recall the specific dates, and had no reason to document his conversations (Tr. 138). He confirmed that he was aware of the 1978 Manual definition of "permanent electrical installations," and was familiar with it prior to the time the citation was issued (Tr. 139).

Mr. Myers conceded that the cited pump was not located on a working section, nor was it advanced with the working section (Tr. 151). He did not know whether the particular pump in question had ever been used on an advancing working section, but that it was moved prior to its installation at the 433 block on May 30, 1986 (Tr. 152). He estimated that the water problem had been present at that location for a week or two prior to the installation of the pump, and that the water problem along the haulage from the 180 to the 488 area has existed from the late 1950's to the present. The purpose of the cited pump was to gather the water which had accumulated at that location, and at the time of the citation there were no plans to leave it there or remove it because "we were trying to evaluate the situation" (Tr. 153). Mr. Myers believed the pump was in operation when it was cited, and that it is still in operation from time-to-time (Tr. 153). The pumps which were the subject of the variance have been in place for many years, and they are still in place (Tr. 154).

Mr. Myers confirmed that he was not concerned that he had 6 months to enclose the pump in question, and that "we have always considered that we had 6 months to make a determination whether or not we needed to construct a pump station, a fireproof house and everything needed" (Tr. 155-156). Regarding his statement on exhibit R-3, indicating that the cited pump had "been in service for three months and will be moved in the near future," Mr. Myers confirmed that he had no specific location in mind where it would be moved, and that prior to the issuance of the citation he was still evaluating the situation. In the event a determination had been made that there was no water problem at that location, he would have shut the pump down and left it there until it was needed somewhere else (Tr. 156). He conceded that his intent to move the pump elsewhere

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"in the near future" came about after the citation was issued (Tr. 157).

In further explanation of the purported "six-month rule," Mr. Myers stated as follows (Tr. 157):

BY JUDGE KOUTRAS:

Q. No one specifically from MSHA ever told you about the six month policy. Is that correct? You said you discussed it with a couple of inspectors.

A. Resident inspectors.

Q. Who planted the seed originally in your mind there was a six month rule that would allow you to evaluate water or any other problem? Where did that idea come from?

A. Through my discussions with the powers that be. The State inspectors, Federal inspectors.

Mr. Myers could not identify the specific source of the "six-month" rule, and he stated that he was led to believe that after 6 months, a pump had to be enclosed in a fire-proofed structure. He confirmed that he discussed the instant matter with the inspector after the citation was issued, and he informed him that the "six-month" rule does not apply and that he did not know where the rule came from. Mr. Myers confirmed that he never sought a written or oral opinion from MSHA's district manager, and that "it has just always been an accepted standard and understood throughout the industry in this area that six months was the cutoff. It was the yardstick" (Tr. 158-159).

#### Findings and Conclusions

The essential facts in this case are not in dispute. Inspector Shriver issued the citation after observing that an energized and operating 7.5 horsepower ThroMor pump, which was pumping water from the 433 Block of the Mainline haulage, was not housed in a fireproof enclosure, and that the air current used to ventilate the pump was not coursed directly into the return. Mr. Shriver cited a violation of mandatory safety standard 30 C.F.R.

75.1105, which is a restatement of the statutory provision found in section 311(e) of the Mine Act, and it provides as follows:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction (emphasis added).

The critical issue in this case is whether or not the cited pump was a "permanent pump" within the meaning of section 75.1105. MSHA maintains that the pump was a permanent installation, and since it was not housed in a fireproof structure or vented directly to the return, a violation has been established. MSHA also suggested that the pump was subject to the terms and conditions of a prior variance granted by MSHA for 11 other pumps located in the main haulage area in question, and that the respondent is in violation of the variance by not housing the pump in a fireproof structure or venting it directly into the return.

In response to the alleged violation, respondent maintains that MSHA has not established that the cited pump was a "permanent pump" within the meaning of section 75.1105. Respondent asserts that the pump was a portable pump that is regularly moved from one place in the mine to another, and that it was not in service greater than 6 months. Respondent maintains further that the pump, which was placed in service on or about May 30, 1986, was there to evaluate a water problem which had developed at the 433 Block, and that it was a temporary installation to facilitate the respondent's evaluation and resolution of the source of the water problem. In this regard, the respondent argues that following what it believed to be an MSHA acceptable 6-month "grace period" during which it could evaluate the water problem, it would have made a decision as to whether to install the pump permanently by enclosing it in a fireproof structure and venting it to the return as required by the standard, or removing it from "temporary service."

With regard to the alleged violation of a prior variance, respondent maintains that the cited pump was installed after the variance was granted and that the purported violation of the variance was not the basis for the inspector's citation. With regard to MSHA's policy guidelines concerning "permanently installed" electrical equipment such as the cited pump in question, respondent takes the position that the policy is

merely a general statement and does not establish a binding norm.

Black's Law Dictionary, Revised Fourth Edition, defines the term "permanent" as "fixed, enduring, abiding, not subject to change. Generally opposed in law to temporary, but not always meaning perpetual." The term "indefinite" is defined as "without fixed boundaries or distinguishing characteristics; not definite, determinative, or precise."

Webster's 3rd New International Dictionary, Unabridged, defines "permanent" as "continuing or enduring without fundamental or marked change, not subject to fluctuation or alteration; fixed or intended to be fixed."

"Permanent pumps" is defined by A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, 1968 Edition, as follows:

Permanent main pumps are those on which the mine depends for the final disposal of its drainage. As they usually are not moved during the life of the mine, their location, installation, and design require careful consideration. A permanent main pump may discharge on the surface, into an underground sump, or into some other part of a mine. \* \* \*

The term "permanent pump" is not specifically defined in the Mine Act or section 75.1105. Although section 311(e) of the Act and regulatory section 75.1105 were contained in the Coal Act of 1969, the term was not specifically defined there either, and neither the legislative history nor relevant case law is helpful on the issue of what constitutes a permanent pump. However, the parties are in agreement that the cited pump installation in question is governed by MSHA's enforcement policy for permanent electrical installations pursuant to 30 C.F.R. 75.1100-2(e), which provides as follows:

Electrical installations. (1) Two portable fire extinguishers or one extinguisher having at least twice the minimum capacity specified for a portable fire extinguisher in section 75.1100-1(e) shall be provided at each permanent electrical installation.  
(2) One portable fire extinguisher and 240 pounds of rock dust shall be provided at each



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temporary electrical installation (emphasis added).

MSHA's "permanent electrical installation" policy, which is contained at page IIÄ471 of its March 9, 1978, Underground Inspection Manual, (exhibit GÄ3), provides as follows:

#### POLICY

A permanent electrical installation is electric equipment that is expected to remain in place for a relatively long or indefinite period of time.

Consequently, the following electric equipment should be considered permanently installed:

All rectifiers, transformers, high-voltage switchgear and battery chargers which are not located on and advanced with the working section; rotary converters; motor-generator sets; belt drivers; compressors; pumps (except those excluded below) and other similar units of electrical equipment.

The following electric equipment should not be considered permanently installed:

Electric equipment which is located on and advanced with the working section, self-propelled electric equipment, portable pumps and portable rock dusters which are regularly moved from one location in the mine to another, and similar electric equipment. (Emphasis supplied.)

MSHA's Purported "six-month policy" for Compliance with the Requirements of 30 C.F.R. 75.1105

Respondent suggests that whether on the grounds of a reasonable interpretation of the regulatory language, or an informal 6Ämonth policy created by representations of MSHA inspectors, the citation should be vacated and dismissed. Respondent asserts that the testimony of Mr. Myers and

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Mr. Painter, who have 25 years of collective mining experience, reflects that an evaluation period is necessary when a water problem arises in the mine. Since water may appear and re-appear at different locations, even after it is initially pumped, respondent suggests that logic dictates that mine management must first investigate the source of the water and then wait to see if the water continuously shows up at a particular location, and that not until management makes a final determination that the water will continue to be a problem will they decide to install a pump as a permanent installation.

The respondent asserts that it has shown that its ThroMor pumps have had various uses on advancing sections, along mainline haulage for temporary use in dewatering the haulage, and for permanent use, in which case the pump is installed in compliance with section 75.1105. The respondent contends that the word "permanent" means lasting or intended to last indefinitely or for a relatively long time. Although it concludes that MSHA's enforcement policy under section 75.1100Ä2(e), is not an enforceable norm, the respondent believes that MSHA has failed to show that the cited pump was a permanent pump by any reasonable definition of the word.

The respondent submits that the distinction in the enforcement policy under section 75.1100Ä2(e), between an electrical installation which should be and should not be considered permanently installed, is premised on the introductory language relatively long or indefinite period of time. The respondent concludes that this is a question of law, and that the construction and interpretation of sections 75.1105 and 75.1100Ä2(e), and the related policy is a function of the presiding judge. The respondent invites and welcomes a judicial determination that 6 months be accorded the respondent before a decision to permanently install a pump is made, and that this would at least allow the respondent to know what policy is going to be enforced from week to week.

The respondent maintains that the policy language found in section 75.1100Ä2(e) has been historically enforced by MSHA and perceived by the respondent to mean 6 months. The respondent asserts that "perhaps" MSHA believes that a 6 month standard exists since it enforced a 1Äyear policy under the 1969 Coal Act, and a 6Ämonth policy under its 1974 Underground Inspection Manual. The respondent contends that these definitions of permanency, which were in place for many years, have created a yardstick by which to gauge the phrase "relatively long on indefinite period of time."

MSHA does not dispute the fact that a 6-month policy may have at one time been used within District 3, and it points out that Inspector Shriver, who began working with MSHA in 1978, testified that prior to his inspection, he was not aware of any 6-month policy adopted by MSHA. Furthermore, MSHA asserts that since the distribution of its 1978 Manual, any earlier interpretations or policies have not been used for several years, and that the testimony reflected in its post-hearing depositions of knowledgeable MSHA supervisory inspectors reflects that the prior 6-month policy was specifically abrogated by the 1978 Manual, and has not been used in the District since the Manual became available. MSHA points out that the respondent has conceded that it had available, and even consulted, the 1974 and 1978 Manuals, and should have been aware of the fact that MSHA no longer used any 6-month policy. MSHA emphasizes that although the section 75.1100-2(e) part of the 1974 Manual described a 6-month policy, no such policy is mentioned under the same section of the 1978 Manual, which specifically states that "the guidelines contained in this chapter supersede all previous instructions . . . relating to the same subject category." Although Mr. Painter indicated that the respondent may have used a 6-month rule in the past, MSHA maintains that it had no basis for doing so after 1978.

In response to the respondent's testimony that it believed that a 6-month policy was still in effect, MSHA points out that while Mr. Painter testified that he had not seen anything that indicated that MSHA was following such a policy, he assumed that such a policy existed. Similarly, although Mr. Myers remembered discussing such a policy with MSHA inspectors in the mid-seventies, and claimed that he discussed it with inspectors after 1978, he could not recall any specific individuals or dates.

MSHA's prior Manual policy interpretations of "permanent pumps" included the following:

1971, 1972, 1973, and 1974 Underground Inspection Manuals.  
75.1100-2(e).

Electrical installations.

(1) A permanent electrical installation includes any electrical apparatus \* \* \* which will remain in the same location for a period of six months or more.  
\* \* \* pumps, \* \* \* etc., shall be considered electrical installations.

(2) A temporary electrical installation includes any electrical apparatus \* \* \* which will remain in the same location for a period less than six months. Fire extinguishers and rock dust provided on a working section, under Section 75.1100-2(a) shall be considered adequate protection for temporary electrical installations located in by the section loading point. (Emphasis added.)

1968 and 1969 Underground Inspection Manuals  
(Deposition of Cecil Branham, Exhibit D-1):

A pump installation shall be considered in permanent status if it will remain in the same location for a period of one year or more. (emphasis added.)

Foreman Painter acknowledged that he had read the latest 1978 MSHA Inspector's Manual, and that he was familiar with MSHA's policy statement regarding pumps that appears at page II-471, and he explained his understanding of the policy regarding the permanency of a pump by stating "It seems to me if it is going to be there for an indefinite period of time, then it is permanent" (Tr. 96-97).

Although Mr. Painter stated that he did not know the source of the so-called 6-month rule, he acknowledged that his own management people initially advised him of this, and he conceded that he had never discussed the installation of permanent pumps with any MSHA inspectors, and that the question never arose prior to the time the citation was issued by Mr. Shriver. He confirmed that he assumed the 6-month period was valid since he had never been cited before, and when asked to explain why this is so since he acknowledged that he was aware of MSHA's policy, Mr. Painter responded "I never thought anything of it" (Tr. 105-106).

Superintendent Myers testified that he has discussed MSHA's 6-month policy "over the years" with many inspectors, and that everyone has always accepted 6-months as the amount of time an operator has within which to evaluate a water problem and to decide whether to install a pump permanently. He believed this 6-month "yardstick" period came from MSHA's March 9, 1978, Inspector's Manual, and that "you have got 6-months before it becomes an indefinite period or relatively long period" (Tr. 128). Although he could recall the name of one inspector with whom he discussed this matter "in the mid seventies," Mr. Myers could not identify the names of any

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inspectors with whom he may have discussed it after 1978 (Tr. 138). Mr. Myers acknowledged that he was familiar with the latest 1978 Inspector's Manual, including MSHA's policy interpretation concerning permanent pumps as stated in the Manual, and that he was aware of this policy prior to the issuance of the citation (Tr. 139). Respondent's counsel does not dispute the fact that it has always had a copy of the manual.

I find no credible or probative evidence to support the respondent's assertion that MSHA inspectors used any 6-month rule after March 9, 1978. Even if they did, I agree with MSHA that the respondent may not avail itself of any estoppel defense with respect to the particular violation at issue in this case. See: Secretary v. Southern Ohio Coal Company, 8 FMSHRC 1231 (August 1986); Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1981); Secretary v. Emery Mining Corporation, 5 FMSHRC 1400 (August 1983). However, any credible reliance by the respondent on MSHA's past policies or enforcement actions may be considered by me in mitigating the respondent's negligence, and in the assessment of any civil penalty.

After careful review of all of the testimony in this case, including the arguments advanced by the parties, I conclude and find that the respondent has not rebutted MSHA's credible showing that any prior 6-month policy which may have been in effect prior to the publication of the current policy, as reflected in the 1978 Manual, was no longer applicable after the publication of that Manual, and that it did not apply at the time the citation was issued. I further conclude and find that the respondent knew, or should have reasonably known, that MSHA's prior time-related interpretations of "permanent pump" were no longer in effect at the time of the inspection by Inspector Shriver. In addition to the clear statement which appears in the Manual that all prior guidelines were superseded as of February 1, 1987, the new policy guidelines, which became effective on that date, with respect to section 75.1100-2(e), contain no mention of any time periods for compliance. Further, neither the past or current policy guidelines make reference to any "evaluation" periods. Under all of these circumstances, I conclude and find that the respondent had no reasonable basis for relying on any prior Manual statements or inspector's assurances to support its belief that the phrase "relatively long or indefinite period of time" meant an evaluation period of 6 months or less.

MSHA's Manual Policy Interpretation of "Permanent"

In *Secretary v. Southern Ohio Coal Company*, 8 FMSHRC 1231 (August 1986), a case involving the same MSHA Manual policy interpretation of "permanent," Judge Fauver rejected the operator's contention that the manual definition violated the Administrative Procedure Act (A.P.A.) requirement that all rules concerning mandatory safety standards must go through any formal rulemaking process. Judge Fauver concluded that the Manual definition was simply a general policy statement of MSHA's interpretation of "permanent," and was not subject to the A.P.A.'s notice and comment requirements.

Regarding the Manual's general legal status, the Commission has ruled that the Manual's instructions are not officially promulgated and do not prescribe binding rules of law, *Old Ben Coal Company*, 2 FMSHRC 2806, 2809 (October 1980). The Commission reaffirmed this ruling in *King Knob Coal Company, Inc.*, 3 FMSHRC 1417 (June 1981), when it refused to recognize the validity of a Manual interpretation of mandatory safety standard 30 C.F.R. 77.410, and rejected the operator's reliance on the Manual interpretation as an estoppel defense to the violation. On the facts of that case, the Commission found that the Manual interpretation in question was an attempted modification of the standard's requirements, rather than a genuine interpretation or general policy statement. However, in that case, the Commission made the following observation at 3 FMSHRC 1420:

This does not mean that the Manual's specific contents can never be accorded significance in appropriate situations. Cases may arise where the Manual or a similar MSHA document reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect. This case, however, does not present that situation.

In reply to the respondent's suggestion that it's enforcement policy is not enforceable as an acceptable norm, MSHA asserts that the obvious purpose of section 75.1105 is to protect miners against fire and smoke inhalation, and that it is a part of a larger section dealing with fire protection in coal mines. MSHA maintains that these hazards, coupled with the facially broad language of the standard, supports a conclusion that the standard is meant to have a broad reach to effectuate the purposes of the standard and the Act.

Although the respondent has not raised the issue in response to any suggestion that section 75.1105 may be vague, ambiguous or overly broad, MSHA cites Judge Fauver's decision in the Southern Ohio case, supra, rejecting the same argument made by the operator in that case. Relying on the case law cited by Judge Fauver in his decision, MSHA maintains that a standard is not unenforceably vague when a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would recognize the hazardous conditions which the standard seeks to prevent. MSHA concludes that the pertinent question under section 75.1105 in deciding whether a pump is required to be housed in a fireproof enclosure or area and vented to the return is whether a reasonably prudent person, familiar with the mining industry would recognize the existence of a hazard. Given the record evidence of the presence of fire and smoke hazards in this case, as testified to by its witnesses, MSHA further concludes that a reasonably prudent person familiar with the mining industry would recognize that a pump expected to remain in place for a long period of time should be housed and vented into the return.

Relying on the Manual definition of "permanent," as well as the deposition testimony of Inspectors Hall, Branham, and Mitchell, MSHA maintains that its interpretation of "permanent pump" as one that is "expected to remain in place for a relatively long or indefinite period of time" is consistent with the broad language and intent of section 75.1105. Since this policy is consistent with the plain meaning of the word "permanent," and absent any other available guidance on the definition of a "permanent pump," MSHA concluded that its policy can be seriously considered and accorded legal effect.

I agree with MSHA's positions with respect to the "vagueness" issue, as well as the issue concerning the weight to be accorded its policy interpretation of "permanent," and I adopt these positions as my findings and conclusions on these issues.

The cited pump was not enclosed in a fireproof structure and the ventilating air current was not coursed directly into the return.

It seems clear to me from the evidence in this case that the cited pump was not enclosed in a fireproof structure or vented directly to the return. Inspector Shriver's testimony, which I find credible, reflects that the pump was energized and pumping at the time he observed it and that it was not enclosed and "just sitting up on the bank there, open" (Tr. 13). Mr. Shriver stated that the pump was completely exposed,

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and he observed no ventilation tubing or other means of coursing the air used to ventilate the pump installation directly into the return. The lack of ventilation tubing or walls around the pump would cause the air to remain in the area or to course back into the intake.

Maintenance Foreman David Painter confirmed that the nearest location of the next available return split was some 5,000 feet from the cited pump, and that the air used to ventilate the pump would have to travel that distance before entering the return (Tr. 79Å80). In a prior unrebutted statement made by Mine Superintendent Blane Myers at the time the citation was issued, Mr. Myers admits that the cited pump was not enclosed in a fireproof structure or vented to the return (exhibit RÅ3; Tr. 154Å155).

In view of the foregoing, I conclude and find that MSHA has established that the cited pump was not enclosed in a fireproof structure or vented directly into the return as required by section 75.1105.

#### The Variance

MSHA's suggestion that the cited pump did not comply with the terms of a variance previously granted to the respondent by its district manager on February 12, 1986, is not relevant to the question of whether the pump cited by Inspector Shriver in this case was in violation of the requirements of section 75.1105. The variance in question concerned 11 other pumps which were previously cited by an MSHA inspector, and it was granted prior to the inspection conducted by Mr. Shriver (exhibit GÅ4). As a matter of fact, at the time of his inspection, Mr. Shriver was unaware of the variance, he confirmed that it played no role in the issuance of his citation, and there is no evidence that the pump cited by Mr. Shriver was included among those for which the variance was granted. Further, since petitions for modifications or variances are no longer within the jurisdiction of the Commission or its judges under the Mine Act, MSHA must look elsewhere for relief if it believes that the respondent has violated the terms of the variance in question.

The cited pump was not located on and advanced with a working section; was not self-propelled or portable; and was not regularly moved from one location in the mine to another.

The respondent concedes that the cited pump was an "electrical installation" within the meaning of MSHA's regulatory standards (Tr. 72Å73). Its contention is that the pump was



not a "permanent" installation within the meaning of the applicable MSHA standards and policy, including the exclusions (Tr. 73). The respondent argues that its ThroMor pumps are considered to be portable and versatile pumps in the industry, and that under the prevailing circumstances at the time the citation was issued, it was the only type of pump suitable for the job of pumping the water from the 433 Block. The respondent submits that the pump was mounted on skids similar to equipment that is advanced on a working section, and that its versatility is established by the fact that it is frequently used in temporary situations. While this may be true, the question presented with respect to the portability of the particular cited pump is not whether it is versatile or has been used in the past on advancing sections, or to cure temporary water problems. The question presented is whether or not the facts presented in this case can lead one to reasonably conclude that the pump, which is constructed of cast iron, and includes a large motor, an electrical starter box, and interconnecting electrical connections, (exhibits RÅ2 and GÅ2), all mounted and installed on a heavy metal sled, was in fact "portable."

Although it may be true that some of the ThroMor pumps used by the respondent in the mine are installed as a "temporary" measure to take care of water problems as they occur, others, such as the 11 pumps which were the subject of the variance, are permanently installed by enclosing them in fireproof structures in order to take care of long-standing water problems, and to insure the continuous pumping and removal of water from the affected main haulage areas of the mine. As a matter of fact, Inspector Shriver passed by several of these permanently installed pumping locations, which may or may not have been the ones subject to the variance, during his inspection and on his way to the area where he observed the cited pump in question.

The respondent's assertion that Inspector Shriver was unable to state with certainty that the cited pump was not portable nor regularly moved from one location in the mine to another, is not well taken and it is rejected. Mr. Shriver testified that since the pump was several thousand feet from a working section, it would not be advanced with the working section. He also testified that his examination of the weekly pump examination book reflected that the pump had been in place since May 30, 1986, and notations for that pump were entered for each week up to and through the week of September 5, 1986, with no indications that the pump had been moved. Mr. Shriver confirmed that the pump was located on four concrete stopping blocks approximately 8 to 10 feet from

the track, and that his determination that the pump was not portable was based on the fact that the pump was not self-propelled, had no drive mechanism or gear box, and that the pump installation included a large motor and starter box on the heavy metal frame sled which he estimated weighed "a few hundred pounds." Mr. Shriver believed that it would take some effort by several people to remove the pump from its location and to load it out of the area. He also considered the location of the pump installation on a bank 2 feet high and in behind the overhead trolley wire, and the fact that he observed no wheels on the pump assembly (Tr. 16, 21-23, 66-67). Mr. Shriver's observations are confirmed by a sketch of the pump installation which is included as part of his inspector's notes (exhibit G-2).

Maintenance Foreman David Painter testified that while the pump in question could be considered portable, he conceded that "I do not believe we said it was portable." He also conceded that the pump was not self-propelled, was not located on or advanced with the working section, and that none of the ThroMor pumps used in the mine have wheels (Tr. 98, 117). Mine Superintendent Blane Myers conceded that the cited pump was not located on a working section and was not advanced with the working section, and he had no knowledge that it was ever used on an advancing section. He also conceded that once the pump was installed at the 433 Block on May 30, 1986, it was not moved from that location (Tr. 151-152). Although Mr. Myers, who did not observe the cited pump at the time the citation was issued, but viewed it several days later, testified that the ThroMor pumps are versatile and easily moved and set up, are frequently used in temporary situations, and pose no mobility difficulties on advancing section, I find his testimony to be general in nature and of little weight with respect to the particular pump which was cited in this case.

In view of the foregoing, and on the basis of a preponderance of all of the evidence and testimony adduced in this case, including a lack of any credible evidence to establish that the cited pump was regularly moved from one mine location to another, that it was self-propelled or otherwise portable, or that it was located on or advanced with a working section, I conclude and find that the respondent may not avail itself of the exclusions found in MSHA's applicable policy interpretation. To the contrary, on the facts of this case, I conclude and find that MSHA has established that the cited pump was not located on or advanced with a working section, was not self-propelled or portable, and was not regularly moved from one mine location to another.

The "permanency" Issue

I have concluded that none of the facts which would justify an exception to the general policy interpretation of "permanent pump" are present in this case. In my view, while the exceptions noted in MSHA's Manual policy are clear and readily understandable, the same may not be said for the introductory language "expected to remain in place for a relatively long or indefinite period of time," which is found in the first sentence of the policy. That language establishes no definitive or authoritative standard for determining or measuring the phrase "relatively long or indefinite period of time." Given the hazards intended to be prevented by section 75.1105, I am not convinced that any fixed time-frame can be established as a measure for defining this policy language, and I decline the respondent's invitation to make such a finding, or to establish such a norm. Absent any established guidance, I believe that the question of permanence must necessarily be addressed on a case-by-case basis, taking into account any reasonably observable or known indications of permanency, including the question of an operator's intent.

Although Inspector Shriver stated that the length of time that a pump is at any location is not relevant to the question of whether it is permanent, in one respect he used a time-frame when he determined that his examination of the fire-boss books reflected that the pump had not been moved since it was installed. In any event, his determination that the pump was permanently installed was based on the absence of any factors which would justify application of the exceptions noted in the policy, and the fact that the pump was located among other permanently installed pumps along the mainline haulage area which was known to have a severe water problem, and the fact that the pump was identical to other ThroMor pumps covered by a variance granted to the respondent.

Electrical Inspector Hall believed that any judgment call by an inspector regarding any indicia of permanence should be done on a case-by-case basis, taking into account the operator's intended use of the pump, the method of installation of the pump, and the similarity of the pump to other permanently installed pumps.

Supervisory Inspector Branham believed that a permanent pump is one that has been in place for a long period of time, including a pump that is not moved with the working section. Although he agreed that evaluating the source of water in a mine may take several months, and that water may again appear after it has been pumped out of the mine, he reiterated that

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MSHA's present practice in determining whether a pump is permanent entails consideration of the circumstances under which the pump was installed, rather than any definitive time period. He confirmed that these considerations, as reflected in paragraph 4, of the Memorandum used during the staff meeting of May 6, 1983, (Deposition Exhibit DÄ1), are still followed in his district (Tr. 15). The Memorandum states in part as follows: "A permanent pump is a stationary pump installed in a permanent manner. The word 'permanent' refers to the design and method of installation, rather than the length of time a pump is expected to remain in one location. \* \* \*"

Supervisory Inspector Mitchell testified that what constitutes a permanent pump installation is a matter best left to an inspector's judgment on a case-by-case basis. In making these determinations, his inspectors will speak to the operator to ascertain the extent of any water problem. In determining whether a pump has been in place for "a relatively long period of time," his inspectors will consider the intent of the operator, as well as their own observations of the pump, its location, the surrounding material, and the method of construction, all of which should enable the inspector to determine whether the pump is going to be at the location indefinitely. The inspectors will also look for signs of any drill holes or sumps, and any other permanent fixtures.

Although I believe that it is not unreasonable for an operator to expect to be allowed some reasonable time to evaluate a water problem before expending time and money to permanently install a pump, these considerations must be balanced against the fire and smoke exposure hazards associated with an unattended electrical installations located in relatively remote mine areas which are only required to be examined on a weekly basis.

The evidence establishes that the cited pump, which was energized and in operation at the time of the inspection on September 5, 1986, was installed and placed in service at least a week or few days before May 30, 1986, a period in excess of 3 months, and it remained at that location until the inspection. Although the pump was disconnected after the citation was issued, the credible testimony of the inspector supports a reasonable un rebutted conclusion that the pump remained at the same location until it was again reconnected and rendered serviceable in late January, 1987.

Inspector Shriver assumed that the pump was again placed in service after the citation was issued, and was in service from September 19, 1986 through May 11, 1987. His assumption

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was based on a review of the respondent's electrical equipment examination records when he next returned to the mine on May 11, 1987. Mr. Shriver found an entry for September 19, 1986, indicating that the pump had been examined, and he surmised that the respondent would not examine the pump unless it was in service. He also relied on a statement by Mr. Painter that the pump was the same pump previously cited, and that the respondent placed it back in service when it found that it could not do without it (Tr. 70).

MSHA did not produce the examination records referred to by Mr. Shriver, nor did it call any of the pump examiners to testify. However, the respondent submitted copies of the examination record for the period September 19, 1986 through January 23, 1987, and an affidavit from Mr. Myers which confirms his hearing testimony, as well that of Mr. Painter, that the pump was not placed in service again after the citation was terminated on September 10, 1986, until late January, 1987, when there was a need for it (Tr. 93; 132-133). The records confirm that no inspections of the pump were made from September 26, 1986 to January 23, 1987. While there is an inference that the pump may have been in service on September 19, 1986, I find no basis for concluding that it was in service during the intervening period through late January, 1987.

The record establishes that the pump was located within a haulage area where a severe water problem has existed since that area was first mined in the 1950's (Myers, Tr. 153); Variance letter of January 24, 1986, Exhibit G4). Eleven other ThroMor pumps in this area have been permanently installed for many years to address the continuing water problems, and Foreman Painter confirmed that those pumps are installed on metal skids and concrete blocks identical to the manner in which the cited pump was installed (Tr. 125, 154). Mr. Painter also confirmed that his understanding of MSHA's policy is that if such a pump is at a location for an indefinite period of time, it is considered to be a permanent pump (Tr. 97).

The evidence established that the respondent was aware of the fact that it had a water problem at the cited pump location as early as a week or two before the installation of the pump, and Mr. Myers confirmed that the pump was installed there to pump the water from that location (Tr. 152). Mr. Myers also confirmed that after a pump is installed and in operation, it is left running "for days on end," or at least three or four shifts, to determine the amount of water which may again appear in the area (Tr. 132). Mr. Painter confirmed

that the fact that a pump may be energized and pumping does not necessarily indicate an immediate water problem, and that quite frequently, the pumps stay on and pump nothing but air, and not always water (Tr. 109-110; 116).

I take note of the fact that in connection with the issuance of the citation, Mr. Myers had previously claimed that the pump would be "moved in the near future" (Tr. 156; Exhibit R3). When asked to explain this statement, Mr. Myers confirmed that he had no specific location in mind for any future movement of the pump, and he conceded that any intentions on his part to move the pump "in the near future" came only after the citation was issued.

With regard to the respondent's "evaluation" of the water problem, Mr. Myers confirmed that the problem was caused by an inoperable sump pump in another area of the mine, and that the sump had always been a problem and had overflowed many times in the past (Tr. 131-133). Mr. Painter confirmed that there was very little water at the cited pump location at the time of the inspection (Tr. 108). Given the fact that the respondent knew the source of the problem, and that there was very little water at the cited pump location at the time of the inspection, I find it difficult to believe that the respondent required any extended period of time within which to conduct and complete its evaluation. Mr. Myers conceded that such evaluations do not take very long (Tr. 130), and the respondent has presented no evidence to suggest that the evaluation process presented any unusual difficulties. At most, such evaluations had in the past taken no more than four or five shifts. In this case, the pump was operational for more than 3 months after it was installed, and after the source of the water was discovered. The evidence suggests that the respondent had no difficulty in timely discovering the source of the water, and I reject any notion that there was a need for any extended "evaluation" period, particularly where the facts show that the problem was caused by a sump which had a long history of acting up and causing water overflow problems. Further, given the fact that the respondent has claimed that the cited pump posed no mobility problems, and was easily moved, it seems to me that after the immediate water problem was taken care of, the pump could have been removed and reinstalled again after the water again reappeared in late January, 1987. In this case, the pump has remained at the same location from the day of its initial installation in May, 1986, to the present, and it was in service at least from May, to September, 1986, and again from January, 1987, to the present.

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that the respondent intended to leave the cited pump in service for an undetermined or indefinite period of time as "insurance" against another future possible water overflow problem from the inoperative sump which had caused the problem in the first place, and that but for the inspection, the respondent would have left the cited pump in the same operable and unprotected condition as it was when the inspector observed it on the day of his inspection. I further conclude and find that given the hazards presented in not housing and ventilating the pump as required by section 75.1105, the respondent should have recognized that the pump which it intended to leave in place for an undetermined or indefinite period of time, should have been housed and vented in the same manner as the other similarly situated pumps located within the same physical area of the cited pump. In failing to do so, I conclude that the respondent's actions were less than what should be expected of a reasonably prudent operator.

I further conclude and find that in making his decision that the cited pump was a permanent electrical installation, Inspector Shriver acted reasonably, and had a sound basis for arriving at such a conclusion. Although Mr. Shriver may have discounted any time-related factor in arriving at his conclusion, I find that his application of the other MSHA policy factors alluded to by the other inspectors who testified in this case, which I find reasonable, were correctly and reasonably applied in evaluating the circumstances then presented at the time of his inspection.

In view of the foregoing, and coupled with my findings and conclusions that the respondent may not avail itself of the exceptions found in MSHA's policy interpretation of a permanently installed pump, I conclude and find the preponderance of the probative and credible evidence in this case establishes that the cited pump in question was a permanent pump within the meaning of the cited standard, and that the respondent's failure to house and vent it establishes a violation of the cited standard. Accordingly, the citation IS AFFIRMED.

#### Significant and Substantial Violation

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

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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, 3 (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, 1574 (July 1984).

For the reasons stated in my gravity finding, which follows, I agree with MSHA's position that the prevailing conditions as described by the inspector at the time of his inspection posed a discrete fire and smoke hazard within the meaning of the Commission's interpretation of "significant and substantial." Although rock dust and a fire extinguishing device may have been present at the pump location, the unhooded and unvented pump would likely contribute to, and



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expose miners to the hazards associated with a mine fire. Accordingly, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

#### History of Prior Violations

A computer print-out submitted by MSHA in response to a prehearing order issued by Chief Judge Merlin prior to the assignment of this case to me was for the respondent's Loveridge Mine, and not the Humphrey No. 7 Mine. Although MSHA asserts at page three of its posthearing brief that it filed the relevant print-out with me on September 24, 1987, a review of the record and the official docket record for this case does not reflect that such a submission was filed with me or my office. Under the circumstances, I have no basis for making any findings on this question.

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

The parties have stipulated to the relevant facts concerning the size of the respondent and the size of its mining operation at the Humphrey No. 7 Mine. Based on the stipulated facts submitted, I conclude and find that while the respondent, as a corporate entity is a large operator, the subject mine is a medium-to-large operation. The parties have also stipulated that the payment of a civil penalty assessment for the violation will not adversely affect the respondent's ability to continue in business, and I adopt this stipulation as my finding on this issue.

#### Good Faith Compliance

MSHA agrees that the violation was promptly abated by the respondent when it took the pump out of service by disconnecting it immediately after the citation was issued, and I have taken this into consideration in this case.

#### Gravity

Inspector Shriver's un rebutted testimony is that the pump was energized and operating at the time of his inspection, and that an electrical connecting into the pump assembly starter box was loose, posing a potential fire hazard, short circuiting, or frozen bearings. The pump was not housed in a fireproof enclosure, nor vented to the return. In the event of a fire, miners would be exposed to a fire and smoke hazard, and the ventilation would be affected in the

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intake airways, not only in the immediate area of the pump which was required to be inspected by an examiner when it was in place and operation, but in other mine areas where miners would likely be exposed to the smoke and fire hazards. Under the circumstances, I conclude and find that the violation was serious.

#### Negligence

Although I have rejected the respondent's reliance on MSHA's prior time-related enforcement policies as grounds for vacating the citation in this case, I conclude and find that there is evidence of confusion and uncertainty in the record on the part of both parties sufficient enough to mitigate the respondent's negligence, and the civil penalty assessment for the violation. Further, while I have ruled that the respondent had actual or constructive knowledge that the prior interpretative policy of MSHA was revoked by the publication of the 1978 Manual, and was no longer in use at the time the citation was issued, the deposition testimony of MSHA's supervisory inspectors raises a convincing inference to support a conclusion that MSHA has relied on, and continues to rely on, factors not specifically stated in its 1978 Manual, or otherwise communicated clearly in writing to the respondent, in determining the meaning of a "permanent" pump electrical installation.

Although the first sentence of MSHA's "permanent electrical installation" policy is expressed in terms of an expectation that a pump will be in place during a time-related period, the testimony of the inspectors reflects that some inspectors in the field use this as part of their judgment call, while others, such as Inspector Shriver, do not. Although Inspector Hall initially stated that the prior 6-month policy was not "officially" in use after the publication of the 1978 Manual, he later testified that the policy was not used after the May 6, 1983, staff meeting, thereby raising an inference that some inspectors were still using the out-dated policy prior to that meeting. This conclusion is further supported by the testimony of Inspector Branham that the staff meeting was called to "clear up confusion" concerning the policy, and that after that meeting, his inspectors were not authorized to rely on the outdated policy.

Inspector Branham confirmed that although the present policy being followed in his district includes the "design and installation" factors which were the subject of a prior

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committee meeting, those guidelines have not been communicated to the respondent. I believe it is incumbent on MSHA to communicate its enforcement ground-rules to the respondent, and to seriously consider amending its enforcement Manual to include these factors, so that there is some semblance of consistency among its inspectors when they conduct their inspections.

Under all of the aforementioned circumstances, I conclude and find that the respondent exhibited a low degree of negligence with respect to the violation in question, and I have taken this into consideration.

#### Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of \$250 is reasonable and appropriate for Citation No. 2704343, September 5, 1986, 30 C.F.R. 75.1105. The respondent IS ORDERED to pay this amount to MSHA within thirty (30) days of the date of this decision and order.

George A. Koutras  
Administrative Law Judge