CCASE:
SOL (MSHA) v. IKE COAL COMPANY
DDATE:
19910114
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 90-128 A.C. No. 15-07253-03568
v.	
IKE COAL COMPANY, INC., RESPONDENT	No. 10 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Arnold D. Coleman, Secretary-Treasurer, Ike Coal Company, Inc., Elkhorn City, Kentucky, 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 in the amount of $1,200, for an alleged violation of mandatory safety standard 30 C.F.R. 75.507. The respondent filed an answer denying the violation, and a hearing was held in Pikeville, Kentucky. The parties waived the filing of posthearing briefs, but I have considered their arguments made on the hearing record in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standard as alleged in the proposal for assessment of civil penalty, (2) whether the violation was "significant and substantial," and (3) the appropriate civil penalty that should be assessed based on the civil penalty

criteria found in section 110(i). Additional issues raised in this proceeding are identified and disposed of in the course of my decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

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

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

Discussion

Section 104(a) "S&S" Citation No. 3368426, issued by MSHA Inspector Thomas M. Charles on September 21, 1989, cites a violation of mandatory safety standard 30 C.F.R. 75.507, and the cited condition or practice is described as follows:

> Evidence indicates that a nonpermissible power connection point in the form of a bulldozer is being used in the main return air course of this mine. There are numerous sets of bulldozer tracks extending underground through the No. 1 entry return portal. There is a diesel power Case 450 dozer parked next to the No. 1 return portal. The electrical system of this dozer is not permissible.
>
> A 107-A Order #3368425 has been issued in conjunction with this citation. No termination due date is set.

The aforementioned Imminent Danger Order No. 3368425, issued simultaneously by Inspector Charles on September 21, 1989, states as follows:

> Evidence indicates that a work practice which constitutes an imminent danger is being performed at this mine. There are bulldozer tracks (numerous) in the number one return portal. These tracks extend underground for an unknown distance. (Mine is idle no fan running). A diesel powered Case 450 bulldozer is parked next to the No. 1 return portal. Evidence indicates that the dozer has been used underground to pull equipment out of this mine. This dozer has an open nonpermissible electrical system. Given the equipment height and finished mining height of this area of the mine there can not be much clearance for the dozer operator. Also the internal combustion

engine of the bulldozer puts off harmful gasses which in the confined underground area of a mine could be fatal.

> A citation number 3368426 is being issued in conjunction with this 107-A order. A special assessment will be asked for on this order, also a special investigation will be asked for.

Inspector Charles subsequently filed a report, which is included with the pleadings filed by the petitioner, requesting a special assessment for the cited violation, and the report states as follows:

> Special assessments are requested. There is no way that the operator could not of been aware of this. This mine is nonproducing, the owners are in the process of pulling the equipment out, possibly doing this work their self. By using the bulldozer underground in a close clearance confined area in the main return air course a reckless disregard for health and safety has been demonstrated.

Petitioner's Testimony and Evidence

MSHA Inspector Thomas M. Charles testified that he has served as an inspector since 1978, and that he has 22 years of mining experience, including work as a mine foreman. He confirmed that he conducted a spot inspection of the mine on September 21, 1989, and that the mine was in a "non-producing, men working" status at that time. He stated that the mine gate was locked and that he walked onto the mine property and went past the mine fan to the mine opening at the number one return portal. He observed evidence of some "work activity" at the mine and observed a Case 450 bulldozer parked "around the hill from the portal" entry and observed dozer tracks in and around the area. He observed that the dozer had "greyish and blue" mud on it up and over the bulldozer "cat pads" for some 34 inches. Since he did not have his usual equipment with him, he only went 25 feet underground and used a stick or a reed to measure the width and length of the dozer cat pad tracks on the ground, and when he compared the measurements with those of the cat pads on the dozer, he found a "direct match."

Mr. Charles stated that he also observed a rubber tired battery tractor, a flatbed truck, and some scoops at the site, and he identified a sketch of the site which he prepared (exhibit P-4). There was no one working at the mine, but he saw a pickup truck parked at the mine office and a private security guard hired by the mineral owner was sitting in the truck. He did not observe any joy loader on the mine surface. He stated that the mine entry was approximately 6 feet high at the entry

portal, and he walked into the entry for a distance of 25 feet and observed the same dozer tracks which he had observed in and around the portal entry. He also observed that the dozer exhaust stack and roll-over protection had been removed and were lying on the flat bed truck. He assumed that this equipment had been removed from the dozer in order to allow it to clear the portal entry into the underground mine, and based on his observations and measurements of the tracks, he concluded that someone had taken the dozer inside the mine opening and used it underground. He then left the mine to call his supervisor, and returned to the mine to do his "paperwork." He placed a red closure tag at the mine and left a copy of the citation and order at the mine office.

Mr. Charles stated that the "blueish and greyish" mud and tracks which he observed outside the mine entry is the same kind of mud found underground and that it was not the usual kind of mud found on the surface. He confirmed that there was a mud hole with tracks around it outside of the portal entry, but that this surface mud was not the same kind which was underground. If the dozer exhaust stack and rollover protection had not been removed from the dozer, the machine could not have been taken underground because of the lack of clearance at the entry, and his assumption was that this equipment had been removed so that the dozer could go underground to help bring out some of the equipment which the respondent was removing from the mine.

Mr. Charles stated that after the citation and order were "conferenced" by the district manager in Pikeville, he was instructed to return to the mine to conduct a special investigation and he next returned to the mine with two other inspectors on September 26, 1989, to inspect the mine again, and that Ike and Rodney Coleman were there at that time. Mr. Charles stated that the inspection party went underground for a distance of approximately 800 feet, and he observed that a scoop had been used to "back-blade" or wipe out some of the dozer tracks, and that a scoop was stuck in the mud. He stated that the mine was wet and had "standing water and mud," and that he observed the same type of dozer tracks underground as he had previously observed on September 21, when he issued the citation and order.

Mr. Charles confirmed that on September 26, the dozer was still parked outside of the mine, and he measured the cat pads with a tape measure and found that they were 16 inches wide and 6 inches between the track blades. He compared these measurements with the tracks which he observed underground, and he again found the same match as he had found during his prior inspection of September 21. He also measured the finished mining height at the portal entry at 6 feet, and he indicated that the mining heights were higher inside the underground mine and were sufficient to allow the dozer to operate underground.

Mr. Charles stated that the respondent informed him that a Joy 1410 front-end loader was used underground to help retrieve some of the equipment and claimed that the tracks were made by the loader. Mr. Charles did not believe that the tracks were made by a loader because from his experience, any track prints on the ground made by the loader would be different from those made by the dozer. He explained that the Joy loader in question was a common piece of equipment, and that he had previously inspected the loader during two complete inspections of the mine which he had conducted prior to September 21, and that he was familiar with the loader tracks. He did not observe any loader at the surface or underground in the area where he traveled, and he confirmed that he did not travel to the mine face.

Mr. Charles identified exhibit P-5, as a picture of a Cat dozer which is representative of the type of "cleat" or gripping pattern of the dozer which he believes was used underground. He also identified a standard cat pad from a Joy 1410 loader which was produced in court for demonstration purposes by the petitioner's counsel. Mr. Charles explained that the loader pad gripping pattern and configuration was different from the dozer tracks which he observed underground, that the loader pad is 12 inches wide, and that any tracks left by the loader in the mud would be different from those made by the dozer.

Mr. Charles stated that he returned to the mine on September 27, to meet with the respondent in order to terminate the citation and order, and that he "looked over" the surface area of the mine, while one of his fellow inspectors, Billy Ramey, went underground to continue his inspection and investigation. Mr. Charles stated that the dozer was still parked on the surface, and the exhaust stack had been replaced. However, the rollover protection was still removed from the dozer at this time. Mr. Charles stated that there was no question in his mind that the bulldozer had been used underground at various times in the main return air course.

Mr. Charles stated that the bulldozer in question was a nonpermissible piece of equipment, and that its electrical components which constitute power connection points, are nonpermissible. He confirmed that the cited mandatory section 75.507, prohibits the use of such a piece of equipment underground in a return air course. He further confirmed that the use of such equipment underground in return air presents a dangerous and hazardous situation because the nonpermissible dozer, including its electrical system and components, are a potential ignition sources. In the event of any accumulation of methane underground, and given the fact that the dozer would be operating in a

confined area, an ignition was possible. If this had occurred, anyone working underground would be exposed to a serious ignition hazard and would likely suffer burns or fatal injuries (Tr. 8-63).

Mr. Charles stated that the mud which he observed on the bulldozer was "way up on the framework." He confirmed that he had not previously observed the dozer at the mine site, and in his opinion, it was brought to the site to pull the equipment out. Referring to his sketch, exhibit P-4, he confirmed that the measurement shown as 5.3, represents the measured height of the dozer which was five and three-tenths of a foot high, and that the measured height of the entry was 6 feet. He further confirmed the entry heights increased inby to heights of 8 and 9 feet and that it "rolled out in places," and that the next lowest height he found was in the low top area approximately 800 feet underground, and that this area was 6 feet high. He also confirmed that when he visited the mine on September 21 and 26, 1989, the power was on, but he observed no one working there (Tr. 64-68). He stated that the respondent would not have been given permission to use the dozer underground because it was nonpermissible and was not equipped with a scrubber to keep the diesel ignitions clean (Tr. 69).

MSHA Inspector Billy Ramey testified that he has served as an inspector since September, 1982, and he confirmed that he went to the mine on September 27, 1989, with Inspector Charles to conduct a spot inspection. Mr. Ramey stated that he was aware of the citation and order issued by Mr. Charles on September 21, 1989, and that he (Ramey) went underground for a distance of approximately 180 feet, or "three breaks," to check the conditions (Tr. 70-72).

Mr. Ramey stated that he observed equipment tracks underground along the left rib and that the "bottom rock" was clean. He also observed a pump cable lying in the roadway and determined that a piece of equipment had traveled over it and cut a piece of the cable. Although most of the underground mud on the bottom had been cleaned up or "drug over" by scoops, and he observed no tracks in the remaining mud, he did observe equipment track indentations on the mine rock bottom and over the pump cable. He measured the tracks which were in plain view, and found that they were 16 inches wide and 6 inches long. The bulldozer which had been cited by Inspector Charles was still parked on the surface, and after measuring the cat pads, Mr. Ramey found that his measurements conformed with the tracks measurements which he made underground, and he concluded that the tracks were made by the same bulldozer (Tr. 72-73).

Mr. Ramey stated that he observed some mud on the frame of the bulldozer but he could not find any muddy areas on the

surface where the bulldozer could have operated in mud deep enough to cause it to come up and over the frame of the machine.

Mr. Ramey confirmed that he was familiar with a 1410 Joy loader but that he did not observe one at the mine site when he was there. After examining a Joy loader cat pad used for demonstration purposes by the petitioner's counsel, Mr. Ramey was of the opinion that the tracks which he observed underground were not made by such a loader. He confirmed that the bulldozer exhaust stack was on the machine which was parked on the surface, and that Mr. Charles lifted it off and then replaced it. Mr. Ramey did not believe that the rollover protection was on the machine (Tr. 74-76).

On cross-examination, Mr. Ramey stated that he has never observed a piece of steel welded across a 1410 Joy loader cat pad. He confirmed that no one was at the mine when he was there on September 27, except for a security guard. He also confirmed that he helped Inspector Charles measure the height of the bulldozer, but he could not recall the measurements. He did recall that Mr. Charles measured the height of the portal entry, but he could not recall the measured height. Mr. Ramey confirmed that the mine was still closed and "red-tagged" when he was there (Tr. 77-79).

Mr. Ramey stated that he observed 10 or 12 "good pad marks" underground which he believed were made by the bulldozer. He confirmed that he observed a gob pile outside the portal entry with mud which appeared to be from inside the mine, but he did not see any evidence of any bulldozer tracks in the job pile area (Tr. 79-81).

Mr. Ramey stated that he has never observed a loader being used to pull any equipment out of a mine and he did not believe that a loader would be used for this purpose. He confirmed that he detected no methane with his methane spotter while he was underground and he did not observe any loader at the mine site when he was there on September 27. He did observe the bulldozer, a battery tractor motor, 30 to 40 feet of cable inside the mine, and more cable on the outside, but he did not see any scoops (Tr. 70-86).

Inspector Charles was recalled, and he confirmed that while he believed that someone had gone underground between September 21 and 26, and wiped out some of the dozer tracks, he did not issue any citation or further order for a violation of his closure order because he did not observe this happen and did not know who may have gone underground, and since this would have been a "willful" offense, he did not believe that he had enough evidence to establish such a violation (Tr. 89).

Mr. Charles confirmed that he discussed the use of the dozer underground with the respondent, but that the respondent denied using it underground and claimed that a loader was used and that the tracks were caused by the loader. Mr. Charles confirmed that he had previously observed a loader at the mine prior to his inspection of September 21, but he did not see it on the surface after he issued his closure order, nor did he know where it was at (Tr. 90). He did not find the absence of the loader unusual because he and the respondent "had a pretty rough relationship going right at that time" and that the conversations about the dozer being used underground "were confined to a few questions and gruff replies and yes and no, you know, try to take care of business and get out" (Tr. 91). Mr. Charles confirmed that during the 7-month period when he conducted inspections at the mine he had never observed any dozer at the mine and he believed it was rented or leased (Tr. 93). Given the conditions he observed on September 21, he believed that a loader would have had difficulty tramming on the soft mine bottom because it does not have much bottom clearance and he did not believe it would have been capable of pulling any other equipment out of the mine in the mud (Tr. 94).

Respondent's Testimony and Evidence

Rodney Coleman testified that he is employed by the respondent as a maintenance person, and after viewing the "cat pad" produced in court by the petitioner, he stated that "it looks like a loader track, but not like we use," and he explained the differences (Tr. 95-96). Mr. Coleman stated that the 450 Case dozer in question was not used underground and that it was used in front of the surface drift mouth in the area of a "big mud hole." He denied that any 5/8 inch steel cable hooked to the winch of the dozer was used in the mine to pull out the equipment, and he stated that the respondent had two 1410 loaders (Tr. 96). He stated that when it was necessary to clean the drift mouth, the materials removed from the mine bottom were pushed to the mud hole. He could not recall the height of the portal entry but stated that he could probably touch his head to the beams across the portal (Tr. 97).

Mr. Coleman stated that no men were employed at the mine from September 8 to 21, 1989, and he confirmed that when Inspector Charles closed the mine on September 21, no one was there and the "paperwork" was left at the office and he found it 2 days later (Tr. 97). Mr. Coleman confirmed that "several times" he has hooked a chain to a 1410 loader and pulled a piece of equipment around with the loader, and in his opinion, this can be done. He indicated that the loader has a ground clearance of 7 inches "between the tracks," and that this was approximately the same clearance as a scoop (Tr. 98).

In response to further questions, Mr. Coleman stated that prior to September 21, the equipment which was underground consisted of two small scoops, a flat bottom feeder, a 11-RU cutter and a 16 cutter. He believed that they were trying to remove the flat bottom feeder by pushing it on one end with a scoop and pulling on one end with a loader, and he confirmed that it was removed from underground (Tr. 99). He again denied that the dozer was used underground to remove any of the equipment, and he confirmed that he did not go underground with any of the inspectors in September 26 (Tr. 101).

When asked about the respondent's relationship with Inspector Charles, Mr. Coleman stated that "he kept the men tore up. Kept all the men in an upset mood. With his arrogant way of going about his job. Instead of doing the job, he would always have to criticize them and made them feel bad" during his prior mine inspections (Tr. 101). Mr. Coleman confirmed that he did not get along with Mr. Charles, and that he was the only inspector that he ever had a problem with (Tr. 102).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.507, which provides as follows: "Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air."

In its answer filed on July 23, 1990, the respondent denied that the cited bulldozer was used underground. The respondent asserted that it was closing the mine because the company was insolvent and that it used a Joy loader to bring the underground equipment to the mine surface. The respondent further asserted that Inspector Charles never observed any nonpermissible equipment underground, and that his opinion that the nonpermissible bulldozer was used underground was not fair. Rodney Coleman testified that "we all" drafted the answer and that Branson Coleman signed it in his capacity as president of the company (Tr. 103).

Inspector Charles' credible and unrebutted testimony establishes that the cited diesel powered bulldozer was a nonpermissible piece of equipment, and that its electrical components constituted nonpermissible power connection points. His credible and unrebutted testimony further establishes that the use of this equipment in an underground return air course is prohibited by section 75.507.

Neither Inspector Charles or Inspector Ramey actually ever observed the cited bulldozer operating underground. Inspector Charles' belief that the dozer was used underground to help remove some mine equipment was based on his personal observations of certain equipment tracks which he observed in the soft and muddy roadway underground. He went underground for a distance of 25 feet on September 21, 1989, and 800 feet on September 26, 1989. On each occasion, he observed the tracks, and confirmed that they extended some 300 feet inby the portal entry on September 26. Inspector Ramey, who went to the mine with Inspector Charles on September 27, 1989, confirmed that he went underground that day for a distance of approximately 180 feet, and also observed the tracks in the soft mine roadway.

Inspector Charles' conclusion that the tracks which he observed were made by the dozer was based on certain measurements which he made of the tracks in the roadway and the dozer which he found parked outside of the portal entry. He made these measurements on two separate occasions on September 21, and 26, and in each instance he found that his measurements of the tracks, when compared to his measurements of the dozer cat-pads, were an "exact match." Inspector Ramey also measured the tracks which he observed in the roadway while he was underground on September 27, 1989, and he testified that they conformed with the measurements which he made of the dozer cat pads that same day. He testified that he observed approximately 10 to 15 "good marks" in the roadway, and based on these measurements and observations, he too concluded that the dozer was used underground.

In addition to his measurements and comparisons of the tracks with the configuration and measurements of the dozer cat-pads, Mr. Charles measured the height of the dozer and the portal entry and concluded that the mining heights at the entry, as well as inby, were sufficient to allow the dozer to operate underground. This conclusion was further supported by his observation that the dozer exhaust stack and rollover protection had been removed from the dozer in order to allow the dozer to be taken through the portal entry and be operated underground with sufficient roof clearance. Inspector Ramey believed that the rollover protection was not on the dozer when he observed it, and although the exhaust stack had been replaced when he observed it, he stated that Inspector Charles easily removed it with his hand and then replaced it.

The respondent denied that the cited dozer was taken and used underground to help remove its underground equipment, and it asserted that the tracks observed by the inspectors were made a Joy 1410 loader. Inspector Charles and Ramey testified that they observed no loader at the mine during their September inspections, and they both confirmed that they were familiar with the type of loader in question, had previously observed it, and they described it as a common piece of equipment used in mining. They

were also familiar with the loader cat-pads and testified unequivocally that the tracks which they observed and measured were not made a loader. They also were in agreement that given the poor roadway conditions and the operational parameters of a loader, it was not likely that a loader was used to help remove the equipment from the underground mine.

During closing arguments on the record, Mr. Arnold Coleman stated that during the period in question when the dozer was cited, approximately $10,000 worth of tools and supplies were stolen from the mine. Mr. Coleman denied that the cited dozer was used by the respondent underground and he indicated that "anything was possible," and suggested that someone else could have gone to the mine and taken the dozer underground (Tr. 112). When reminded of the inspector's testimony that he had not previously observed any dozer at the mine prior to his September 21, inspection, and believed that it was a leased piece of equipment, Mr. Coleman responded "I say it's roughly that time when they went in and stole all that stuff" (Tr. 112).

I take note of the fact that when Inspector Charles went to the mine on September 21, 1989, he found a security guard there and the mine entrance had been secured. Mr. Coleman indicated that supplies and tools had been stolen from the mine, but he did not indicate that any underground equipment had been stolen. Under these circumstances, I find it highly unlikely that any thieves would have taken a dozer to a secured mine and used it underground in an attempt to steal equipment.

The respondent suggested that the dozer remained outside of the portal entry while a length of cable was attached to the dozer winch and was used to remove the equipment which was underground. Inspector Ramey confirmed that he observed 30 to 40 feet of rusty cable on the dozer winch outside of the mine (Tr. 84). Inspector Charles confirmed that on September 26, the respondent mentioned something about winching the equipment out of the mine with a cable, but that when he observed the cable on September 27, he estimated that it was 60 to 80 feet long. Since the roadway where the equipment was located was approximately 400 feet underground, and the respondent was experiencing some difficulty in moving the equipment through the roadway, Inspector Charles believed "there was no way that the rope would be long enough to reach" the equipment (Tr. 31).

Rodney Coleman testified that the equipment which the respondent was attempting to remove from the mine was located in "a real rough area" 500 feet inside the mine in an uphill area which was "real muddy" (Tr. 99). Although he alluded to a 5/8 inch steel cable hooked to the dozer winch, Mr. Coleman denied that the dozer was used underground to do this (Tr. 96). However, I find no testimony from Mr. Coleman that the equipment was removed by using the cable. Indeed, Mr. Coleman testified

that he was attempting to remove a flat bottom feeder by pushing one end with a scoop and pulling on one end with a loader (Tr. 99).

Mr. Coleman's testimony concerning the roadway conditions where the equipment which was being removed was located corroborates Inspector Charles' testimony that the worst roadway conditions were 400 to 600 feet inside the mine where the roadway could not be maintained and where "you couldn't hardly get a piece of equipment in and out of the mine" (Tr. 39). In view of these conditions, Mr. Charles believed that the dozer was probably being used to move the equipment through this area (Tr. 40).

Rodney Coleman further testified that he had used a Joy 1410 loader on prior occasions to pull a piece of equipment around, and in his opinion, the loader could be used for such a purpose. Inspector Charles confirmed that during his mining experience he has observed mine operators use a Joy 1410 loader to pull shuttle cars around under good tramming conditions (Tr. 46). However, the fact that such a loader may have been used on prior occasions to pull equipment around, and is capable of doing such a job, does not per se establish that it was used underground for that purpose, or that the tracks observed by the inspector were loader tracks rather than dozer tracks. Given the roadway conditions testified to credibly by Inspector Charles, conditions which were not rebutted by the respondent, I find the inspector's belief that it was not likely that a loader would be used in the muddy soft bottom roadway in an attempt to remove the equipment to be credible.

Although the respondent maintained that the loader was used underground, there is no evidence that at any time during the inspections of the mine on September 26, or 27, 1989, did the respondent offer to show the loader to the inspectors, and Inspector Charles' credible testimony that he saw no loader and could not determine its whereabouts when he was at the mine during his inspections remains unrebutted. The absence of the loader, and the respondent's failure to bring it to the attention of the inspectors, or to account for it, particularly when it was claiming that it was used, raises a strong inference that the loader was not at the mine during the inspections.

After careful review of all of the testimony and evidence in this case, and having viewed the inspectors in the course of the hearing, I find them to be credible witnesses. Notwithstanding the fact that the inspectors never observed the dozer operating underground, I conclude and find that the evidence they developed during their inspections to support their conclusions that the dozer was used underground to help remove some of the equipment, albeit circumstantial, supports their conclusions in this regard. I further conclude and find that the respondent has presented no credible or probative evidence to support its assertion that the

equipment tracks were made by a loader, rather than the cited dozer, and that it has not rebutted the conclusions made by the inspectors to the contrary.

Although there is no direct evidence as to who may have used the dozer underground, the fact remains that the respondent was the operator of the mine and that it was under its control. Further, the respondent admits that it had decided to cease mining operations and was at the mine conducting work to recover its equipment which was underground. Under the circumstances, I believe one can reasonably conclude that the dozer was taken underground by the respondent and used to recover some of the equipment. As the responsible mine operator, the respondent is accountable and liable for any violations which may occur at the mine.

On the basis of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of the standard by a preponderance of the credible and probative evidence adduced in this case, and the contested citation issued by the inspector IS AFFIRMED.

Significant and Substantial Violations

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

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (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, (August 1985), 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, 1574-75 (July 1984).

Although the evidence establishes that the mine was not actively producing coal when the inspectors conducted their inspections, the power was on and inspector Charles confirmed that methane liberations were possible at any time in an underground mine (Tr. 39, 67). Although Inspector Ramey confirmed that he did not detect any methane with his methane spotter during prior mine inspections, he believed that methane was present in certain bottle air samples which he had taken at the mine (Tr. 82). Further, in its answer filed in this proceeding, the respondent conceded that the operation of a nonpermissible bulldozer in its underground mine would be hazardous.

Inspector Charles' credible and unrebutted testimony establishes that the nonpermissible dozer and its electrical components were potential ignition sources, and that the operation of the dozer underground where there was a possible build up of dangerous pockets of gas presented an ignition hazard which exposed anyone underground to burns or fatal injury. He indicated that the mine was idle for certain periods of time, and anyone going underground to attempt to remove the equipment would be exposed to pockets of gas which could have been present (Tr. 31-32). The inspector also confirmed that the nonpermissible diesel powered dozer was not equipped with a scrubber to keep the diesel ignitions clean (Tr. 69).

The respondent presented no evidence to rebut the inspector's credible testimony with respect to the hazards associated with the operation of a nonpermissible dozer in the underground mine. Under the circumstances, I conclude and find that the evidence presented by the petitioner supports the inspector's significant and substantial (S&S) finding, and IT IS AFFIRMED.

History of Prior Violations

Exhibit P-1 is an MSHA computer print-out reflecting the respondent's history of prior violations for the period September 21, 1987, through September 20, 1989. The information presented establishes that the respondent was served with 186 assessed violations, 145 of which were designated as "significant

and substantial" (S&S) violations. Six violations received "special assessments" totalling $2,750, and 30 violations were designated as "single penalty assessments." Twenty-five citations attributable to the No. 10 Mine reflect that they were issued in conjunction with section 104(b) withdrawal orders for noncompliance or failure to take timely action to abate the cited conditions.

The computer print-out further reflects proposed civil penalty assessments totalling $18,591, for all of the aforementioned violations, and that the respondent has paid only $1,025.46, of this amount. MSHA has apparently served the respondent with "delinquency letters" for the assessments which remain unpaid. Petitioner's counsel had no additional information with respect to the status of these unpaid assessments or whether or not they have been referred to the Department of Justice for collection action.

I conclude and find that for an operation of its size, the respondent has an extremely poor compliance record, and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

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

The information contained in MSHA's pleadings, Proposed Assessment Form 1000-179, reflects that the respondent's overall coal production in 1989 was 85,110 tons, and that the No. 10 Mine had an annual coal production of 24,290. Mr. Arnold (Ike) Coleman agreed that the No. 10 Mine had an annual coal production of approximately 24,000 tons when it was producing in 1989, and that it employed 10 miners. In the absence of any evidence to the contrary, I conclude and find that the respondent is a small mine operator and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

Mr. Arnold (Ike) Coleman, stated that he is the secretary-treasurer of Ike Coal Company, and that his father, Branson Coleman, served as the company president. Although Branson Coleman was present in the court room, he was not called to testify in this proceeding. Arnold Coleman confirmed that his family is no longer mining coal and that the company is out of business. He stated that he was unable "to work the mine" because of the "attitude" of the MSHA inspectors. He maintained that most of the citations reflected in MSHA's computer print-out were issued at the No. 10 Mine by Inspector Charles and contributed to his decision to close the mine (Tr. 104).

Mr. Coleman confirmed that the respondent also operated the C-22 and C-23 mines, and he asserted that the prior violations issued at those mines resulted from conditions which had existed

when they were operated by the previous owner. However, he conceded that the violations were issued to his company, that his company owned the equipment and was responsible for maintaining the permissibility of that equipment (Tr. 105-106).

The respondent's history of prior violations, as corroborated by copies of the citations and orders produced by the petitioner, reflect that violations were issued at several mining locations operated by the respondent under MSHA mine identification numbers associated with mines operated by the respondent and which are identified as the No. 3, No. 7, B.C. Energy C-22, and B.C. Energy C-23. Citation No. 3360514, issued on January 5, 1989, at the No. 3 Mine (Exhibit P-52), reflects that the mine "has been abandoned for more than 90 days." No information was forthcoming with respect to the current status of the other mines, but it would appear that as of the dates the violations were issued, the mines were actively producing coal.

Twenty (20) of the prior citations and orders issued at the No. 10 Mine were issued by three different inspectors, and 15 were issued by Inspector Charles, four of which were non-S&S violations. The citations were issued to the respondent under its mine identification number, and with the exception of one citation served on an individual identified as Bill Wetsel, the remaining citations and orders were served on Arnold "Ike" Coleman and Rodney Coleman, and another individual (Ralph Coleman), who I assume is a member of the coleman family that operated the mine. Under the circumstances, and contrary to Arnold Coleman's assertions, I cannot conclude that these violations involved preexisting conditions resulting from the operations of the mine by an operator other than the respondent. The violations include electrical and permissibility violations, roof control and ventilation violations, conveyor belts and fire warning devices, sump pumps, underground cables, a roof-bolting machine, and a loading machine. Under the circumstances, and in the absence of any probative evidence to the contrary, I conclude and find that all of this equipment belonged to the respondent and was used by the respondent while it was operating the mine, and that the conditions cited were within its control and resulted from its operation of the mine.

I find no credible evidence in this case to support any conclusion that any of the inspectors who issued the aforementioned citations at the No. 10 Mine, including Inspector Charles, harassed the respondent, and the cited conditions and practices, on their face, reflect conditions which prompted the inspectors to issue the citations and orders in question. Accordingly, the respondent's suggestion that he was forced to close the mine because of the "attitude" of the inspectors is rejected. To the contrary, I can only conclude that any effect the citations and orders had on the respondent's decision to close the mine and

cease mining coal came about as a result of its failure to stay in compliance with the required mandatory safety standards.

No probative information or documentation was forthcoming from the respondent with respect to its current financial condition, and the respondent has produced no tax, financial, or networth statements conclusively establishing that it is insolvent or has filed for bankruptcy. Although the petitioner's counsel alluded to a $200,000 debt owed to the respondent for contract work which it performed for an unknown company or individual, Arnold Coleman indicated that he has not collected this debt and has sued the individual for the money, but that this individual has declared bankruptcy (Tr. 109).

No information was forthcoming with respect to the status of the mining equipment which was removed from the No. 10 Mine, as well as the equipment used by the respondent at its other mining operations, and I have no basis for determining whether or not this equipment is owned or mortgaged, or whether it is still in the possession of the respondent as part of its corporate assets. Under all of these circumstances, and in the absence of any evidence to the contrary, I cannot conclude that the respondent has established that it cannot pay the civil penalty assessment which I have made for the violation which has been affirmed in this case.

Negligence

In his inspection report filed in connection with the order and citation which he issued, Inspector Charles took the position that by using the cited nonpermissible dozer underground, the respondent exhibited a "reckless disregard" for safety. He made the same finding of "reckless disregard" on the face of the citation which he issued. In support of this negligence finding, the petitioner argued that assuming that the fact of violation is established, it would be obvious that the respondent knew about this violation, and it pointed out that in its answer filed in this case, the respondent conceded that using a nonpermissible dozer underground would be hazardous (Tr. 111). I agree with the inspector's negligence finding of "reckless disregard," and IT IS AFFIRMED.

Gravity

In view of my "significant and substantial" (S&S) findings, I conclude and find that the violation was serious. Indeed, in its answer filed in this proceeding, the respondent conceded that operating the nonpermissible bulldozer underground would be hazardous.

Good Faith Compliance

The evidence in this case reflects that in conjunction with the citation which he issued, the inspector also issued a section 107(a) imminent danger order "red-tagging" or closing down the entire underground area of the mine. Since there is no evidence that the respondent timely contested the issuance of the order, it is not in issue in this case. I take note of the fact that in issuing the citation, the inspector did not establish an abatement time and it seems obvious that the inspectors never observed the dozer being operated underground. On the facts here presented, although I conclude and find that the violation was abated, it was effectively abated by the inspector when he closed the underground mine area, and not by the respondent who denied that the dozer was used underground. Under the circumstances, I have no basis for finding that the respondent abated the violation in good faith.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $950, is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $950 for the section 104(a) "S&S" Citation No. 3368426, September 21, 1989, 30 C.F.R. 75.507. Payment is to be made to MSHA within thirty (30) days of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge