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SOL (MSHA) v. U.S. STEEL MINING  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
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5203 Leesburg Pike  
Falls Church, Virginia 22041

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

v.

U.S. STEEL MINING COMPANY,  
INC.,  
RESPONDENT  
AND

UNITED MINE WORKERS OF  
AMERICA (UMWA),  
INTERVENOR

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 90-224  
A.C. No. 46-01816-03744

Gary No. 50 Mine

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Petitioner;  
Billy M. Tennant, Esq., U.S. Steel Mining Company,  
Inc., Pittsburgh, Pennsylvania, for the  
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$91 for an alleged violation of mandatory safety standard 30 C.F.R. 75.1105. The respondent filed an answer contesting the alleged violation and a hearing was held in Beckley, West Virginia. The UMWA failed to appear. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

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

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criteria found in section 110(i) of the Act. Additional issues raised by the parties 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. 95.164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. 30 C.F.R. 75.1105.
4. Commission Rules, 20 C.F.R. 2700.1 et seq.

#### Stipulations

The parties stipulated in relevant part as follows (Exhibit ALJ-1):

1. The presiding judge has jurisdiction to hear and decide this matter.
2. The inspector who issued the contested citation was acting in his official capacity as a Federal coal mine inspector.
3. The citation was properly issued to the respondent's agents.
4. The cited conditions were timely abated.
5. Payment of the proposed civil penalty assessment of \$91 will not adversely affect the respondent's ability to continue in business.

#### Discussion

The contested section 104(a) non-"S&S" Citation No. 3237370, issued by MSHA Inspector Randall C. Wooten on May 2, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.1105, and the cited condition or practice is described as follows:

The battery charging station located in the No. 4 entry, 6 B section, where batteries are being serviced from the equipment to be charged, is not housed adequately in a fireproof structure or area.

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Petitioner's Testimony and Evidence

MSHA Inspector Randall C. Wooten testified that he issued the citation in the course of a regular mine inspection after finding what he believed to be an inadequate fireproof structure or area used to house a battery-charging station. The inspector estimated that the area was approximately 16 feet by 40 feet, and he stated that it was located between two pillar blocks of an entry 20 feet wide. A fireproof stopping constructed of masonry blocks was located in front of the area in question, and the interior area consisted of corrugated metal walls attached to and supported by 4 x 4 inch wooden timbers. The inspector confirmed that the corrugated metal walls and stopping were constructed of fireproof materials and he found no problems with this.

Mr. Wooten stated that the roof of the enclosure consisted of incombustible rock, and that the coal ribs were approximately 6 to 8 inches behind the metal corrugated walls of the enclosure. The timbers supporting the metal walls were located between the ribs and the back of the walls. The corrugated metal did not extend fully to the roof, and the faces of four or five of the wooden support timbers were not fully covered by the metal. The exposed timber areas ranged from one to 12 inches. However, the areas between the support timbers consisted of incombustible draw rock which extended 10 to 12 inches down from the roof and around the perimeter of the metal enclosure. The roof was approximately 5 1/2 feet high.

Mr. Wooten stated that the enclosure area was well rockdusted and properly ventilated, and he found no problems in this regard. His belief that the enclosure was inadequate was based on the fact that the interior metal walls did not extend all the way to the roof, thereby leaving some of the tops of the combustible wooden timbers exposed. He confirmed that if the metal material were extended all the way to the roof fully covering the timbers, he would not have issued a citation. He also confirmed that abatement was achieved by extending the metal material to the top of the timbers around the enclosure (Tr. 13-22).

Mr. Wooten stated that the battery charger was approximately 30 inches high, 34 inches long, and 30 inches wide, and that it was located "off to the left as you walk into the station" and approximately two to three feet from the corrugated metal in from the rib (Tr. 23). If one were in the station area he would see corrugated metal to the right and left, a stopping with a block removed "dead ahead", and an incombustible rock roof overhead (Tr. 20). He was not sure whether or not the battery charger was in use at the time of the inspection (Tr. 23).

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Mr. Wooten stated that if a fire were to occur in the charging station, the timbers could be ignited and burn and the structure would then collapse and expose the coal ribs behind the walls (Tr. 17). If a fire were to occur, he believed the flames would reach the roof (Tr. 22). He later testified that the charging station was completely open to the intersection and if there were a fire at the station, it was unlikely that it would spread out into the intersection because the fresh air which was directed through the station was going through the stopping return. He confirmed that the violation was "non-S&S", and he indicated that any smoke from a fire would probably burn in the direction of the return. He had no reason to believe that the air current would cause the flames to go in an upward direction and ignite the exposed portions of the timbers in question (Tr. 25).

#### Respondent's Testimony and Evidence

William L. Jones, mine safety inspector, testified that when he became aware of the citation he went to the area and found that the floor was well rock-dusted with six to eight inches of rock dust, and fifty bags of rockdust were stacked on the right side of the station. Referring to his notes taken at the time in question, he testified as to the construction of the battery charging station, and in his opinion it was housed in a fireproof structure. He was also of the opinion that in the event of a fire at the charging station the exposed timber tops supporting the tin enclosure would not have been exposed to any flame because the battery charger was located toward the back of the station on the left side looking in, and any fire would have traveled in by towards the stopping and into the return (Tr. 35-38). He confirmed that the timbers near the area where the battery charger was located were least exposed and the corrugated metal covered more of those timbers than the others (Tr. 39).

On cross-examination, Mr. Jones stated that taking into account the rock dust in the area, the ribs, roof, floor, and any exposed combustible materials, it was his opinion that the cited station was fireproof and that the exposed timbers could not have caught fire in the event a fire occurred at the battery charging station (Tr. 40).

In response to further questions, Mr. Jones stated that the cited station was constructed approximately a week prior to the inspection, and that two additional stations were constructed in the area in the same fashion. He did not know whether the inspector ever saw the additional stations, but he confirmed that they were not cited and were not reconstructed after the issuance of the citation in question (Tr. 42).

Findings and Conclusions

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. 75.1105, which provides in relevant part as follows:

Underground \* \* \* battery-charging stations, \* \* \* 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. \* \* \*.

MSHA's Program Policy Manual, July 1, 1988, states in relevant part as follows with respect to the application of section 75.1105:

\* \* \* \* \*  
Compressor stations, shops, and permanent pumps are required to be enclosed in structures with the sides, roof, and floor composed of incombustible material. Where such structures are built, the naturally incombustible surface of the roof, rib, or floor may be utilized.

\* \* \* \* \*  
Battery-charging units enclosed in substantial metal housings which are used to charge batteries that are also enclosed in substantial metal housings and remain on the machine during the charging operation may be considered to be in a fireproof structure and require no further fireproofing.

\* \* \* \* \*  
The battery(ies), battery charger(s), and the battery-charging station should be kept free of extraneous combustible materials, such as paper, liquids, grease, oil, wood, loose coal, or coal dust.

The term "fireproof" is not defined in MSHA's regulations. Although section 75.1105, states that battery charging stations shall be housed in fireproof structures or areas, such stations are not included in the policy application requiring compressor stations, shops, and permanent pumps to be enclosed in structures with the sides, roof, and floor composed of incombustible material. The policy does not explain any distinctions, if any, between a "structure" and an "area", and it only requires that extraneous combustible wood materials be kept free of the station.

The evidence establishes that the battery-charging station, an area approximately 16 feet wide and forty feet long, was adequately ventilated and that the air was being coursed into the return as required by the standard. The evidence also establishes that the corrugated metal walls and concrete stopping

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used as part of the station were constructed of fireproof materials and that the station was well rock-dusted. It has also been established that the roof of the station, which was approximately 5 1/2 feet high, consisted of incombustible rock, that the coal ribs were 6 to 8 inches behind the metal walls, and that the areas between the tops of the 4 x 4 wooden timbers which supported the metal walls enclosing the station consisted of incombustible draw rock that extended 10 to 12 inches down from the roof and around the area (Tr. 17, 18, 28).

The parties do not dispute the fact that the corrugated metal material which formed the two walls in the area housing the battery charging station was incombustible. Nor do they dispute the fact that the concrete block stopping, the roof composed of draw rock, and draw rock which extended down from the roof and along the top of the ribs, and the well rock-dusted floor, were all incombustible. Indeed, the inspector himself conceded that all of these materials used as part of the construction of the area housing the station did not cause any problems and he considered them to be fireproof.

The inspector believed that the term "housed" as used in the standard means that the battery charging station should be inside a fireproof structure or area (Tr. 24). In his opinion, a "fireproof" structure or area is one that has no combustible exposed material as part of its construction (Tr. 30). His conclusion that the cited station was inadequately housed in a fireproof structure or area was based on the fact that the tops of four or five timbers which served to support the metal walls were not completely covered by the corrugated metal material for distances ranging from 2 to 10 inches. The inspector believed that these exposed wooden combustible areas rendered the station less than fireproof and unacceptable and inadequate as a fireproof area or structure (Tr. 27-28).

In Clinchfield Coal Company 4 FMSHRC 465 (March 1982), Commission Judge Gary Melick affirmed a violation of section 75.1105, after finding that a battery charger located seven feet from combustible coal ribs, with no fireproof separation between the charger and the ribs, was not housed within a fireproof structure or area. Judge Melick rejected the operator's contention that the absence of fireproof housing around portions of the station was necessary to allow for the ventilation required by the second part of the standard, and he took note of the operator's admission that the station was not completely housed in a fireproof structure or area. However, he tacitly approved of the following interpretation of the standard as advanced by the mine operator (4 FMSHRC 467):

The proper interpretation of this mandatory standard insofar as it states the charging station be housed in a fireproof area must be that the battery-charging

station must be so housed as to prevent the spread of fire to combustible materials while, at the same time, allowing proper and necessary ventilation to carry away any and all gases and fumes which could contribute to an ignition and fire and all fumes and smoke that would result from an ignition or a fire.

During the course of the hearing, respondent's counsel complained that he only learned "the past week or so" prior to the hearing that the inspector had a problem with exposed timbers in the battery charging station. Counsel pointed out that the citation makes no mention of any exposed timbers and simply states that the station was not adequately housed in a fireproof structure. Counsel believed that it was inconceivable and incredible that any fire or flame in the direction of the air being forced through the return "is going to allow those flames to leap six feet in the air and catch a four-inch timber that is exposed perhaps as little as one-half inch" (Tr. 45).

Although I agree that the citation simply states a conclusion that the charging station was inadequately housed, and provides no description of the actual hazardous conditions (exposed combustible wooden timbers), I cannot conclude that the respondent has been prejudiced. I take note of the fact that the parties engaged in pre-trial discovery, and although the petitioner advised the respondent that the inspector would testify "about the conditions which gave rise" to the issuance of the citation, and furnished the respondent a copy of the inspector's notes, no further follow-up was apparently taken by the respondent. Further, the respondent had an opportunity to provide a management representative to accompany the inspector at the time of the inspection, but apparently opted not to do so (Tr. 46-27). Finally, the citation was timely abated, and the inspector testified and was cross-examined rather thoroughly by the respondent's counsel. Under all of these circumstances, I cannot conclude that the respondent has been prejudiced by the unartfully written citation. To the contrary, I conclude and find that the respondent has had a full and fair opportunity to defend itself.

In response to a pre-trial interrogatory as to why it believed that it did not violate 30 C.F.R. 75.1105, the respondent stated as follows:

The cited battery-charging station was housed in a fireproof area consisting of metal and incombustible rock. The roof, mine floor, and the upper portion (21" -22" ) of both ribs consisted of incombustible rock. The sheet metal protecting the ribs extended above the coal seam. Along one rib the metal extended to within 1-1/2" -10-1/2" of the roof. The metal extended to



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1/2" -6-3/4 of the roof along the other rib. The metal is 30-gauge corrugated galvanized tin sheet. The MSHA Program Policy Manual recognizes that the naturally incombustible surface of the roof, rib, and floor may be utilized as part of the fireproof structure.

In its posthearing brief, respondent relies on the following definitions of "fireproof" and "fireproofing":

Fireproof is defined as:

Proof against fire; relatively incombustible. The general meaning of fireproof, as applied to a residence, a modern office building, an ordinary safe, and a bank vault, includes varying degrees of immunity from fire. Since even buildings and commodities constructed of incombustible material will be damaged by a fire of sufficient intensity, fire-prevention engineers prefer the term "fire resisting" to "fireproof" as being more accurately descriptive. In technical usage, "fireproof" designates buildings in which all parts that carry weights or resist stresses, and all exterior and interior walls, stairways, etc., are made of incombustible materials, and in which structural members of materials such as steel or iron, which are injuriously affected by heat, are protected effectively by other materials not so affected. Degrees of fire resistance, in decreasing order, are designated by "fire-resistive", "fire retardant", and "flameproof".

Webster's New International Dictionary, 2d Edition Unabridged, 1946.

4. Fireproofing means:  
Method of making normally combustible materials as nearly non-combustible as possible. In most cases, it is possible only to treat them with a solution or coating of some substance that will tend to retard their ignition. . . Wood construction can resist fire for a long time if the timbers are much heavier than necessary for structural strength. Fire will burn very slowly inward from the surface, leaving enough sound timber in the center to prevent collapse.  
The New Columbia Encyclopedia, 1975.

The respondent takes the position that "fireproof" does not denote absolute protection against fire, but rather, indicates a resistance to burning. Respondent maintains that the cited

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charging station provided a high degree of resistance to fire and that in view of the size and location of the charger, the surrounding structure, and the air coursing into the return, it was extremely unlikely that a fire could reach and ignite the timbers at the roofline. Respondent further argues that it is illogical to claim that the exposed timbers destroyed the fireproof nature of the structure when a fire could spread into the intersection or through the regulator in the stopping and into the return.

In support of the citation, the petitioner cites Clinchfield Coal Company, supra, and argues that just as in that case, there was no fireproof separation between the battery charging station cited by the inspector in the instant case and the exposed combustible timbers and coal ribs. Under the circumstances, petitioner concludes that the cited station was not housed within a fireproof structure or area.

Contrary to the respondent's assertion that the four-inch timber was "exposed perhaps a little as one-half inch", (Tr. 45), the unrebutted and credible testimony of the inspector reflects that on either side of the two walls there were approximately four or five timbers with exposed and unprotected face areas ranging from one to 12 inches which were not covered by the metal material which was otherwise fastened to the timbers (Tr. 17, 31). While it is true that the areas between the timbers consisted of incombustible draw rock which extended 10 to 12 inches down from the roof, the fact remains that the wooden timbers which provided the framework for the two corrugated metal walls were combustible, and the inspector was concerned that if a fire were to occur the unprotected timbers could be ignited and burn, resulting in a collapse of the walls and the exposure of the coal ribs which were located approximately 6 to 8 inches behind the wooden framed walls.

While it is true that except for the exposed and unprotected wooden combustible timber areas in question, the rest of the station area was well rock dusted, adequately ventilated, and constructed of incombustible materials, given the dynamics of mining on a day-to-day basis, there is no assurance that a fire will never occur or that the air ventilating a battery charging station will never be interrupted and will always be adequate and coursed through the return. In the event of such adverse occurrences, one cannot predict the results of any fire which may occur within the confines of the station, particularly in the presence of exposed and unprotected combustible wooden timbers.

I cannot conclude that the inspector's belief that a fireproof battery charging station area or structure pursuant to section 75.1105, is one that has no exposed combustible exposed material as part of its construction is unreasonable, and I agree with the inspector. Further, although the language found in

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section 75.1105, does not include the words "adequate" or "inadequate", I cannot conclude that the inspector's finding that the exposed combustible wooden timber areas rendered the station inadequate for purposes of the application of the regulation was unreasonable or erroneous.

The regulatory requirement found in section 75.1105, is straight forward--it requires that battery charging stations be housed in fireproof structures or areas. I conclude and find that all materials used in the construction of a structure or area to house (locate) a battery charging station must be incombustible or fireproof, and that once constructed, the station must be completely maintained in fireproof condition. On the facts of this case, the station in question was rendered less than fireproof when the metal material used in the construction of the walls was not extended fully to the top of several of the wooden combustible support timbers, leaving the upper portions of the timbers exposed and unprotected. In these circumstances, I conclude and find that a violation of section 75.1105, has been established, and the contested citation IS AFFIRMED.

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

I conclude and find that the respondent is a large mine operator, and it has stipulated that the proposed civil penalty assessment will not adversely affect its ability to continue in business.

#### History

A summary of the respondent's violation history for the period of May 2, 1988 through May 1, 1990, reflects that the respondent paid \$63,795, in penalty assessments for 488 violations issued at the subject mine (Exhibit P-1). A computer print-out itemizing the violations reflects that 161 of them were "single-penalty" (non-"S&S") violations. Twenty (20) of the prior violations are for violations of section 75.1105, five (5) of which were issued as "non-S&S" section 104(a) citations. Taking into account the size of the respondent's mining operations, and absent any additional evidence to the contrary, I cannot conclude that the respondent's history of prior violations warrants any additional increase in the civil penalty assessment which I have made for the violation.

#### Good Faith Compliance

The parties stipulated that the respondent timely abated the violation, and I have taken this into consideration.

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Gravity

Based on the inspector's testimony and his finding that the violative conditions were not significant and substantial, I conclude and find that the violation was non-serious.

Negligence

I agree with the inspector's "low negligence" finding, and I have taken this into consideration.

#### Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the proposed civil penalty of \$91 is reasonable and appropriate, and it is affirmed.

#### ORDER

The respondent IS ORDERED to pay a civil penalty assessment of \$91 for the violation which has been affirmed within thirty (30) days of the date of this decision and order. Payment is to be made to MSHA, and upon receipt of payment, this matter is dismissed.

George A. Koutras  
Administrative Law Judge