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SOL (MSHA) V. BROKEN HILL MINING
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 92-290 A.C. No. 15-15637-03537
v.	:	
	:	Mine No. 1
BROKEN HILL MINING CO., INC., Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Hobart W. Anderson, President, Broken Hill Mining Company, Inc., Ashland, Kentucky, pro se, 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 civil penalty assessments for six (6) allege violations of certain mandatory safety and health standards found in Parts 70 and 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and a hearing was held in Pikeville, Kentucky. The parties were afforded an opportunity to file posthearing briefs. The petitioner filed a brief, but the respondent did not. I have considered the oral arguments made by the parties in the course of the hearing, as well as the brief filed by the petitioner, in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether several of the alleged violations were "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act, particularly the respondent's ability to continue in

business. Additional issues raised by the parties are 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. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Section 104(a) non-"S&S" Citation No. 9876024, July 16, 1991, cites an alleged violation of mandatory health standard 30 C.F.R. 70.207(a), and the cited condition or practice states as follows (Exhibit P-1):

> The mine operator did not take five valid respirable dust samples during the bimonthly sampling cycle of May through June on MMV 001-0 for the designated occupation of 036, continuous miner operator, shown in the attached advisory number 0001. No valid respirable dust samples were received and credited to this bimonthly sampling period.

Section 104(a) non-"S&S" Citation No. 9876034, July 30, 1991, cites an alleged violation of mandatory health standard 70.508, and the cited condition or practice states as follows (Exhibit P-2):

> The operator of this mine failed to report and certify to MSHA the results of the periodic noise exposure survey to which each miner is exposed. This survey was due no later than 6-6-91. The last reported survey was conducted 12-6-90, which exceeds the intervals of at least every six months.

Section 104(a) "S&S" Citation No. 3807424, August 29, 1991, cites an alleged violation of mandatory health standard 30 C.F.R. 70.101, and the cited condition or practice states as follows

> Based on a valid respirable dust sample collected by an MSHA inspector on August 28, 1991, the respirable dust concentration in the working environment of the designated area 901-0 in mechanized mining unit 001-0 was 3.5 mg/m3 which exceeded the 1.3 mg/m3 standard. Management shall make available approved respiratory equipment to affected miners, take corrective action to lower the respirable dust, and sample each production

> shift until five valid respirable dust samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory.

Section 104(a) "S&S" Citation No. 3807425, August 29, 1991, cites an alleged violation of mandatory health standard 30 C.F.R. 70.101, and the cited condition or practice states as follow (Exhibit P-6):

> Based on 5 valid respirable dust samples collected by an MSHA inspector on 8/28/91, the respirable dust concentration in the working environment of the occupations was (1)036, 3.8 mg m3, (2) 035, 3.3 mgm3, (3) 073, 14.2 mgm3, (5) 050, 2.8 mgm3. The average concentration amounted to 5.2 mgm3 on the 001-0 mmu which exceeded the 1.2 mgm3 standard. Management shall take corrective action to lower the respirable dust and sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory on the (036) designated occupation (mmu 001-0).

Section 104(a) "S&S" Citation No. 3809256, November 15, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.400, and the cited condition or practice states as follows (Exhibit P-8):

> Combustible materials in the form of a unmeasurable coat of float coal dust has accumulated over the previously rock dusted area of the No. 1 belt entry starting at the No. 2 portal and extending inby to the No. 2 head drive a distance of approximately 1,800 ft. The float coal dust is from gray to dark in color.

Section 104(a) "S&S" Citation No. 3809258, November 15, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.400, and the cited condition or practice states as follows (Exhibit P-9):

> Combustible material in the form of a thin unmeasurable coat of float coal dust has accumulated at numerous locations in the No. 2 belt entry, starting at the No. 2 head drive and extending inby to the No. 2 tail piece a distance of approximately 1,800 ft. The combustible material is from gray to dark in color.

Petitioner's Testimony and Evidence

Citation No. 9876024

MSHA Inspector John C. Smallwood testified that he issued the citation after receiving an "Advisory" (Attachment to Exhibit P-1), stating that the respondent had not submitted valid respirable dust samples for the bi-monthly period May-June 1991. He confirmed that he made a finding of non-"S&S" because he believed an injury was unlikely, and he terminated the citation after the violation was abated by the submission of five valid samples (Tr. 28-30).

Citation No. 9876034

MSHA Inspector James H. Osborn testified that he issued the citation concerning the periodic noise survey because MSHA had not received the results of a survey from the respondent. He had no knowledge as to whether a survey was actually taken and stated that "it was a matter of paper, administrative". He confirmed his low negligence and non-"S&S" findings and stated that an injury was unlikely because of a lack of a prolonged period of noise exposure (Tr. 33-38).

On cross-examination, Mr. Osborn confirmed that the citation was served on the respondent by certified mail, but he did not know who may have received it and he did not see the return postal receipt (Tr. 39, 42-43).

MSHA Inspector Buster Stewart testified that he issued section 104(b) Order No. 3809822 (Exhibit P-3), on November 19, 1991, because MSHA had not received the results of the noise survey which prompted Inspector Osborn to issue citation No. 9876034. Mr. Stewart stated that he did not know when the abatement of the citation was due, and he served the order on mine superintendent R.B. Hughes who confirmed that the survey had not been taken. Mr. Stewart stated that continuous violative noise exposure can lead to hearing loss, and that six months elapsed after the first six-months when the survey was due. He believed that the respondent had ample time to take the survey, and he modified the order to allow mine production to continue so that the survey could be taken. The survey was submitted on December 3, 1991, and the citation was not terminated until October 30, 1992, because the mine was shut down and he had no earlier opportunity to abate the violation (Tr. 46-50).

On cross-examination, Mr. Stewart could not recall whether Mr. Hughes was aware of the citation nor whether he (Hughes) had called MSHA's office about the matter (Tr. 50). Mr. Stewart confirmed that the results of the noise survey submitted by the respondent were acceptable, and at no time during 1991 was there any excessive noise exposure (Tr. 51). He confirmed that the

survey of valid samples reflected compliance with MSHA's noise standards (Tr. 52).

Citation No. 3807424

MSHA Inspector Foster I. Justice testified that he issued the citation after the respirable dust sample for the designated roof bolter operator reflected noncompliance with the acceptable standard. He confirmed that the mine had a quartz problem and he explained the methodology for computing the acceptable dust exposure levels when there is such a problem (Tr. 55-57). He stated that the acceptable level of exposure is lower because quartz dust exposure causes silicosis. He confirmed that he took the sample on which the citation is based, and he indicated that the exposure exceeded the 1.3 milligrams per cubic meter of air established for the roof bolter. The test results indicated an exposure of 3.5 milligrams per cubic meter of air (Tr. 59).

Mr. Justice confirmed his moderate negligence finding, and he stated that he based his "reasonably likely" gravity finding on the fact that the dust exposure for the one person exposed was twice the amount allowed by the standard. He stated that he based his "S&S" finding on the fact that "it has been proven that with that high of dust concentration on a sample, that they're going to end up permanently disabled in the long run" (Tr. 61).

Citation No. 3807425

Inspector Justice stated that he issued the citation after the dust sampling which he conducted for the continuous miner operator, the offside shuttle car operator, the scoop operator, and the standard side shuttle car operator reflected noncompliance with the established 1.2 milligrams per cubic meter of air standard which is based on the amount of quartz present in the samples. He explained that the sampling was done during the regular mining cycle, and he indicated that the standards for the tested occupations were different from those established for the roof bolter because they are working in different mine strata and the standard for compliance for everyone except the roof bolter is established at the level allowable for the high risk continuous miner occupation (Tr. 62-65).

Mr. Justice confirmed his moderate negligence finding, and he based his "highly likely" gravity finding on the test results which showed high levels of dust exposure and because "It's been proven that silicosis, black lung, and so forth, can be caused with an excessive amount of dust" (Tr. 66). He believed the violation was "S&S" because "if it would have kept on , the dust level had kept on at what it is--and it has been proven that, definitely, they would have ended up with black lung, silicosis" (Tr. 67).

Mr. Justice confirmed that he fixed the abatement time for both of the dust citations he issued after considering the fact that ventilation adjustments had to be made to lower the dust exposure, further sampling had to be done, and the samples had to be submitted to MSHA's Pittsburgh laboratory for analysis to allow for abatement and termination of the citations (Tr. 61, 67). Mr. Justice explained why he issued separate citations for the roof bolter and the other occupations on the designated mining unit in question (Tr. 67-68). Petitioner's counsel stated that pursuant to the cited standard, the inspector could have issued separate citations for each of the designated occupations that were out of compliance, but that MSHA's policy is to issue separate citations for the roof bolter and the rest of the individuals on a working shift (Tr. 70).

On cross-examination, Mr. Justice agreed that cutting rock in low coal will result in the generation of more dust and quartz, and that there is no likelihood of someone contracting black lung in one day rather than over a longer period of time (Tr. 72). Mr. Justice believed that the respondent's most recent test samples in February still reflected noncompliance with the quartz dust standard, and he agreed that the respondent changed its ventilation each time in an attempt to come into compliance and that it is attempting to comply but is experiencing problems with quartz. He further agreed that each time the respondent is in compliance, the standard is lowered to that compliance level, and that it is difficult for the respondent to continually stay in compliance as the standard is adjusted and lowered after each sampling cycle and after ventilation changes are made (Tr. 75-78).

Mr. Justice further explained the differences for sampling and establishing the acceptable dust exposure levels for the roof bolter and the remaining crew members (Tr. 79-81). He confirmed that the respondent made respirators available to the miners at the mine and the respirators could have been used by the miners working in dusty areas. He also confirmed that he would consider the wearing of respirators when weighing the gravity of a violation if it could be shown that the respirators were "fit tested". He confirmed that the respirators met MSHA's standards, and stated that "I've never seen no fit tested ones over there" (Tr. 82).

Mr. Justice confirmed that during his two visits to the mine it has been out of compliance with the dust requirements, and the mine bi-monthly sampling has reflected noncompliance. However, he disagreed that it was impossible for the mine to stay in compliance because of low coal and rock problems, and he believed that the installation of scrubbers and wetting agents would help bring the mine in compliance even though it would be costly (Tr. 86-87).

MSHA Inspector Buster Stewart testified that he issued section 104(b) Order No. 3809821, on November 19, 1991, because of the respondent's failure to timely abate Citation No. 3807424 issued by Inspector Justice on August 29, 1991. Mr. Stewart stated that he visited MSHA's laboratory and determined that MSHA had not received any roof bolter samples from the respondent to abate the citation. Mr. Stewart stated that he spoke with mine superintendent Hughes about the matter and that Mr. Hughes was "in limbo" about taking any samples because "we were having some problems with all white centers, and he was, I guess, a little bit scared about that" (Tr. 90).

Mr. Stewart believed that the respondent had ample time to take and submit samples to abate the citation, and that it did not request any extension of the abatement time. He confirmed that the citation was terminated on September 17, 1992, and he explained that the mine was down for three or four months and that another inspector took over from him. He also indicated that the mine was in retreat mining pillars and roof bolters were not being used at that time (Tr. 91-92).

Mr. Stewart confirmed that he also issued section 104(b) Order No. 3809260, on November 19, 1991, (Exhibit P-7), because of the respondent's failure to timely abate Citation No. 3807425, issued by Inspector Justice. He believed that there was a continuing quartz exposure hazard, but he did not consider extending the abatement time because he believed the respondent had ample time to take and submit samples and to make ventilation adjustments. He confirmed that he modified the order to allow mining to continue so that sampling could be done, and that he terminated the violation on August 31, 1992, after the mine had been out of production for sometime and after the respondent submitted five valid samples (Tr. 93-95).

On cross-examination, Mr. Stewart confirmed that in his prior dealings with the respondent it has always abated citations in a timely manner. He acknowledged that superintendent Hughes informed him that he was worried about an ongoing respirable dust tampering investigation involving other mine operators. Mr. Stewart stated that he informed Mr. Hughes that he was still required to take samples and suggested that he maintain a log detailing each step taken in the sampling process (Tr. 96). Mr. Stewart agreed that Mr. Hughes was under some apprehension about the "adverse white centers" publicity and investigation (Tr. 98).

Citation Nos. 3809256 and 3809258.

The respondent stipulated and admitted that the cited coal accumulations existed as charged in the two citations and that violations of section 75.400 occurred as noted on the face of the

citations issued by Inspector Buster Stewart on November 15, 1991 (Tr. 101-102).

Inspector Stewart confirmed his negligence and gravity findings, and he stated that the accumulations presented a fire hazard and that ignition sources such as belt drives, belt boxes, and numerous electrical sources were present in the cited areas, and that a piece of draw rock falling from the roof or a cable short were potential ignition sources. He based his "S&S" findings on his belief that an accident could reasonably be expected to happen if the accumulations were allowed to continue. He described the extent of the accumulations and indicated that "it was just a thin coat of float dust over the area" which he could not measure and that it was "from grey to dark in color". He terminated the citations on November 19, 1991, after the accumulations were cleaned up and the areas were re-rock dusted. Mr. Stewart stated that the affected areas were travelways and he concluded that the foreman and superintendent traveled the belt areas and should have been aware of the conditions, but waited for a later time, or possibly an "off shift" to clean the accumulations (Tr. 102-106).

On cross-examination, Mr. Stewart stated that cleanup should be done "as needed", and he agreed that the area had previously been rockdusted. He did not check the belt head drive units and did not know if water was provided to control the dust (Tr. 106-108). He also indicated that re-rock dusting can be done to render the coal dust incombustible (Tr. 112). Mr. Stewart did not check all of the electrical components present in the cited areas and did not know whether they were out of compliance (Tr. 119). He did not believe that the accumulations had existed for more than two days, and the preshift reports which he reviewed did not reflect any of the accumulations that he cited (Tr. 120).

Respondent's Testimony and Evidence

Hobart W. Anderson, respondent's president, testified that the Broken Hill Mining Company is a wholly owned subsidiary of Hobart Energy Corporation. He stated that although Hobart Energy has owned several other operating coal mines in the past, Broken Hill is the only operating mine at the present time. Mr. Anderson asserted that Hobart Energy and Broken Hill are in "severe financial positions", and he produced copies of Federal and state income tax returns filed by Hobart Energy Corporation and Broken Hill Mining Company, financial income statements for Broken Hill, an affidavit concerning the financial condition of Broken Hill and two other mining companies controlled by Hobart Energy, a Federal IRS Notice of Levy filed against Broken Hill, and a Broken Hill financial balance sheet, and he explained the information contained in these documents (Exhibits R-1 through R-7, Tr. 131-138).

Mr. Anderson stated that Broken Hill was at one time a contract mining company for Island Creek Coal Company, but that Island Creek sold the property to A.T. Massey on January 31, 1992. Broken Hill lost its contract rights to mine the property, and the mine was shut down for brief periods in 1991 because of the Island Creek negotiations. However, Broken Hill was able to reopen in early July, 1992, but was having problems since 1990 because of the decreasing mining heights and rock problems. These problems resulted in a production decrease of saleable coal and an increase in the rejection rate of the mined coal because of the rock which had to be removed. At the present time, for each 100 tons of raw material mined, Broken Hill is paid for approximately 45 tons. Mr. Anderson confirmed that in 1992, A.T. Massey contracted with Broken Hill to mine the No. 3 Mine, and he stated that this mine "seems to be, so far, and appears to be, a good operation". He also indicated that A.T. Massey has also subsidized the mine and has contributed $10,000, since February, 1993, to compensate Broken Hill for its losses due to the high coal rejection rate, and that Broken Hill had to finish mining the marginal old mine before contracting to mine the new No. 3 Mine (Tr. 133-136).

Mr. Anderson alluded to several outstanding liens on Broken Hill's mine equipment, including a $250,000 lien held by the First National Bank of Louisville. He also indicated that Broken Hill has agreed to pay the IRS $5,000 a month for a tax lien, and that Hobart Energy also has liens in excess of $250,000, and cannot borrow any more money. He stated that Hobart Energy, Inc., "is in a substantially worse state and shape than Broken Hill" (Tr. 138). He also confirmed that Broken Hill owes MSHA for previous penalty assessments in excess of $10,000, and has agreed to pay MSHA $250 a month over three years as part of a consent judgment to satisfy that debt. Mr. Anderson stated that because of the financial condition of Broken Hill, he would have liked to pay "fifty cents on the dollar" for the penalty assessments in this case and could not understand why MSHA has rejected any settlement offer, particularly in light of a past settlement in July, 1992, concerning Broken Hill which was accepted by MSHA and approved by another Commission Judge (Tr. 139-140; Exhibit R-8).

Mr. Anderson stated that in the recent proceedings concerning the Spurlock Mining Company and the Sarah Ashley Mining Company which were heard in September or October, 1992, MSHA submitted a brief taking his testimony out of context and contending that all of Hobart Energy mining companies should be considered and combined as one whole operation. Mr. Anderson stated that each mine had its own operation, with separate superintendents, and that he did not intermingle purchases, and loans between companies were covered by notes (Tr. 140). He stated that "if the court rules it is an aggregate unit, we're saying Hobart Energy is in worse financial shape and consolidated

than Broken Hill, because Broken Hill was our only operating company" (Tr. 141). He further indicated that Hobart Energy has more liabilities and less assets, has no other mining operations, and no sources of income (Tr. 141). He was of the opinion that the petitioner would not agree to settle the instant case "because I wouldn't agree to settle Ashley and Spurlock and I took them to hearing. . . . So now, I guess, they've taken the position that we're going to go to court on every one, which is fine" (Tr. 142).

Mr. Anderson stated that the IRS has given him until May 15, 1993, to file Broken Hill's 1991 tax return "knowing that there will be a loss" (Tr. 142). He also indicated that Broken Hill owes the accounting firm over $50,000, and that Hobart Energy, in the aggregate, owes over $300,000, to the accounting firm. In view of his personal relationship with the CPA firm where he was a former partner, the firm has agreed to do his work at reduced rates (Tr. 142).

On cross-examination, Mr. Anderson confirmed that he is president of Broken Hill Mining Company, and that one-hundred percent of the stock in that company is owned by Hobart Energy Inc. He stated that he owns twenty-five percent of the stock in Hobart Energy, and he identified three individuals who each own twenty-five percent of that company. He further confirmed that he serves as president of the board of directors of Broken Hill, and that seven other individuals serve as officers. He stated that he receives no salary from Broken Hill but is paid $75,000 annually by Hobart Energy which he currently receives regularly (Tr. 152-153).

Mr. Anderson stated that Broken Hill started operations with a capitalization of $5,000, and a $250,000 bank loan personally guaranteed by the four owners of Hobart Energy. Current bank loans amount to $250,000 to $300,000, guaranteed by personal notes of the owners of Hobart Energy. Broken Hill owns the mining equipment that it uses, and it was purchased from equipment venders. Broken Hill does not use any equipment owned by any other corporation (Tr. 154-155).

Mr. Anderson explained several payments and assets reflected in the financial records he produced (Tr. 156-157). With regard to the 1990 Income Tax return for Hobart Energy, which includes an Affiliations Schedule and Schedule of Subsidiary Income and Loss, Mr. Anderson confirmed that Hobart Energy owned all of the mining companies listed at that time, but that at the present time, the only company that is in operation is Broken Hill (Tr. 158). He stated that although some of the companies listed have mining permits, he considers the permits to be a liability rather than an asset, and he confirmed that none of these companies own any coal leases or other property (Tr. 159).

Mr. Anderson stated that Summit Processing, Inc., one of the companies listed on Hobart Energy's tax return, is in bankruptcy and is no longer owned by Hobart, and that Hobart only received $5,000 of the $75,000 due from Summit. He confirmed that Broken Hill does not own the property that it mines, and that when it is mining, it does so as a contract mining company for Island Creek and A.T. Massey Mining Companies, the owners of the property. Mr. Anderson stated that White Cloud has a judgment in its favor for two million dollars as the result of a lawsuit. However, the judgment is on appeal, and the matter will go through the bankruptcy court, and White Cloud's debts and lawyer's fees would have to be paid. Mr. Anderson anticipates that it will take two or three years for this litigation to conclude. If the matter is settled, he does not anticipate that White Cloud will receive all of the two-million dollars (Tr. 161-162).

Mr. Anderson confirmed that Hobart Energy had income of over $4,000,000 million in 1990, but had expenses of $4,650,000, and in 1991 its income was less because Broken Hill was the only company in operation that year. He explained that Hobart Energy contracted with Island Creek to mine under the name of Spurlock Mining and Sarah Ashley Mining, and although those ventures were profitable at one time, they shut down in 1990, and were not in operation in 1991 (Tr. 161). Mr. Anderson confirmed that Hobart Energy engages in no activities other than managing the mining companies that it owns, but that the only one currently in operation is Broken Hill Mining Company (Tr. 161).

Findings and Conclusions

Fact of Violation

Citation No. 9876024

Mr. Anderson did not dispute the fact that the required valid respirable dust samples were not submitted as required by the cited mandatory health standard (Tr. 30-31). In defense of the citation, Mr. Anderson asserted that because of an ongoing industry-wide investigation concerning "adverse white centers" and industry-wide respirable dust sampling programs the individual certified to submit the samples for his mine "was afraid he was going to get in trouble even though he had tried to do it right" (Tr. 31).

The respondent's asserted defense is rejected. The respondent was obliged to comply with the law and to submit the required samples in question. Its failure to do so constitutes a violation of the cited standard, and the citation IS AFFIRMED.

Citation No. 9876034

The citation was issued and served on the respondent by certified mail because MSHA did not receive the results of the periodic noise survey required to be submitted by the cited standard. The respondent has not rebutted the presumption that the survey was not taken and submitted as required.

In its answer, and in the course of the hearing, Mr. Anderson took issue with the amount of the civil penalty assessment of $195 for the violation. Mr. Anderson asserted that the assessment "is too high and overstated", and he pointed out that the violation was cited as a non-"S&S" violation, with a low degree of gravity and negligence.

In defense of the respondent's untimely abatement of the violation, Mr. Anderson asserted that "we probably didn't terminate this on time because my mine operation was not aware of it" (Tr. 43). He explained that the noncompliance notice was probably mailed to his CPA office rather than to the mine, and that it did not come to his attention right away (Tr. 43-44).

Mr. Anderson did not dispute the fact that the valid samples were not submitted or received by MSHA. Under the circumstances, I conclude and find that the cited violation has been established by a preponderance of the evidence. I have considered the mitigating circumstances advanced by Mr. Anderson, but I cannot conclude that they may serve as a defense to the violation. Under the circumstances, the citation IS AFFIRMED.

Citation Nos. 3807424 and 38007425

With regard to the respirable dust violations concerning the working environment of the cited designated mechanized mining unit and the cited individual occupations, the credible unrebutted testimony and evidence adduced by the petitioner establishes that the results of the samples indicated that the unit in question, as well as the individual occupations, were out of compliance. Accordingly, I conclude and find that the violations have been established, and the citations ARE AFFIRMED.

In the course of the hearing, and in his answer filed in this case, Mr. Anderson took the position that the cited violations "are only one violation and should not have been written twice". Mr. Anderson's argument is rejected. It seems clear to me from the credible testimony of the inspector that pursuant to the requirements of the cited standards, the cited area and occupations were separate and distinct violations. The issue raised by Mr. Anderson has been raised and rejected by the Commission. See: El Paso Rock Quarries, Inc., 3 FMSHRC 35 40 (January 1981), and Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 378 (March 1993), where the Commission stated in relevant part

that "although Cyprus' violations may have emanated from the same event, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator".

Citation Nos. 3809256 and 3809258

The credible testimony of the inspector establishes the existence of the cited accumulations of combustible float dust over two rather extensive areas in the No. 1 and No. 2 belt entries. Indeed, Mr. Anderson did not deny that the cited accumulations existed, and he stipulated and admitted that the accumulations existed as described by the inspector in his citations (Tr. 101-102). Mr. Anderson's dispute lies with "the effort or the confusion on dust control" in connection with the respondent's abatement efforts (Tr. 21-23). However, these matters may not serve as a defense to the existence of the violations, and the citations ARE 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, 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).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Company, 7 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citation Nos. 3807424, 3807425.

Inspector Justice presented credible testimony in support of his "S&S" findings with respect to the two respirable dust citations that he issued (Citation Nos. 3807424 and 3807425). He stated that exposure to excessive levels of respirable dust in the presence of quartz rock which is being cut is particularly hazardous to miners and exposes them to silicosis (Tr. 58). The allowable exposure levels are reduced because of the presence of quartz which is more hazardous than coal dust. He believed it was reasonably likely that unabated exposure to the levels of respirable dust as determined by the samples "would more than likely if it kept on at this rate, that at some time or other, this man is going to have a problem" (Tr. 60). He pointed out that the sampled designated roof bolter was exposed to over twice the allowable standard, and he believed that such a high exposure level in any period of time would be permanently disabling (Tr. 60-61).

Inspector Justice reiterated that the excessive levels of dust exposure affecting the five miners on the designated MMU, as reflected by the samples, exposed the designated miner occupations to a silicosis hazard. He stated that the "silicon like" quartz dust "cuts your lungs and so forth more than what the coal dust does", and that if the conditions are allowed to exist, it was highly likely that the individuals exposed to the dust would end up with silicosis "somewhere down the road," particularly if mining were allowed to continue with the conditions unabated (Tr. 71-74).

The respondent presented no credible evidence to rebut the inspector's "S&S" findings. Indeed, Mr. Anderson conceded that even during a "short term", exposure to excessive levels of respirable dust, in the presence of quartz rock, made it reasonably likely that the affected miners would be exposed to a silicosis hazard (Tr. 74). Further, Mr. Anderson conceded that the mine has a quartz problem that consistently keeps the mine out of compliance even though ventilation changes are made periodically (Tr. 77-78). Although respirators were available, there is no evidence that they were being used, and Mr. Anderson was not aware that a wetting agent was being used to control the dust (Tr. 87).

In Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987), the Commission held that all respirable dust violations exceeding the allowable regulatory limits are presumptively "S&S" violations. See also: Consolidation Coal Company, 13 FMSHRC 1076 (July 1991), decided by Chief Judge Paul Merlin affirming a respirable dust "S&S" violation on the basis of the Commission's June 1986 decision, and the recent Commission decision of June 22, 1993, in Twenty mile Coal Company, Docket No. WEST 91-449, reaffirming its Consolidation Coal Co., holding. Under the circumstances, and based on the unrebutted and credible testimony of the inspector, I conclude and find that the petitioner has established that the two violations in question were significant and substantial (S&S), and the findings of the inspector ARE AFFIRMED.

Citation Nos. 3809256 and 3809258

With regard to the two float coal dust accumulation violations, Inspector Stewart testified that the cited areas served as travelways and considering the ignition sources which were present, and with the belt running, it was reasonably likely that a fire would occur through the creation of an arc or a grounded out power wire caused by a rock fall along the belt line or the belt rubbing against the stand (Tr. 103). Inspector Stewart identified the potential ignition sources as the 220 volt control lines, electrical belt drives and boxes, and "numerous electrical sources" that could be shorted out by draw rock falling from the roof (Tr. 104). Mr. Stewart also believed that if the float coal dust which was present over previously rock dusted areas were placed in suspension, it could result in a coal dust explosion that "is probably the most violent explosion there are, and if you should have one, then it would affect everybody in that mine" (Tr. 110). He also believed that the cited accumulations had existed for at least two days (Tr. 120). Mr. Anderson conceded that the cited coal and float coal dust accumulations were present over a rather extensive distance of 1,800 feet (Tr. 112).

Inspector Stewart testified that the thin unmeasurable float coal dust that he observed was deposited over previously rock dusted surfaces and that it was "grey to dark" in color. There is no evidence or testimony that any of the dust was deposited on any of the potential ignition sources identified by the inspector, and his citation simply reflect that the deposits were at "numerous locations". The inspector conceded that if the cited areas were wet, a violation would still exist, but that an accident would have been unlikely (Tr. 117). Although he confirmed that the respondent's ventilation plan required that water be maintained on the belt drive units to control excessive dust, he admitted that he did not inspect the belt drives and did not know whether there was any water on the belts (Tr. 108). The citations do not reflect whether or not the cited areas were wet or dry, and there is no testimony by the inspector in this regard, or any evidence that he cited the respondent for a violation of its ventilation plan for the lack of water.

Although Inspector Stewart confirmed the presence of potential ignition sources in the cited areas, he admitted that he did not inspect any of the electrical components to determine whether they were defective or out of compliance (Tr. 119), and there is no evidence of any defective belt parts or belt conditions that would have sparked a fire had normal mining operations continued. Further, although the inspector alluded to a piece of falling draw rock sparking a fire, there is no evidence that he inspected the roof areas, nor is there any evidence of any roof conditions that would have made it likely that a piece of rock would fall and spark a fire had normal mining operations continued.

The respondent has admitted that the cited accumulations constituted violations of the cited section 75.400, and I conclude and find that the accumulations presented a discrete fire hazard. I also conclude and find that it was reasonably likely that a mine fire, if one had occurred, would reasonably likely result in injuries of a reasonably serious nature. However, in order for a fire to occur, with resulting injuries, there must first be an ignition resulting from the cited accumulations in question. On the facts of this case, and on the basis of the aforementioned testimony of the inspector, I cannot conclude that the petitioner has established that the conditions at the cited locations presented a reasonable likelihood of an ignition that would spark or result in a fire had normal mining operations continued. See: Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988); Eastern Associated Coal Corporation, 13 FMSHRC 178, 184 (February 1991). Under the circumstances, I conclude and find that the cited conditions did not constitute significant and substantial (S&S) violations and the inspector's "S&S" findings ARE VACATED. The citations ARE MODIFIED to reflect non-"S&S" violations, and I have taken this into account in the civil penalty assessments that I have made for the violations.

Size of Business

Inspector Justice testified that the respondent's mine superintendent, R.B. Hughes, informed him during a dust survey on February 24, 1993, that the mine produces 350 tons of coal a shift during two working shifts (Tr. 68-69). Mr. Anderson testified that the mine had an annual production rate of 80,000 tons of "clean coal", and that 14 to 15 miners, including a superintendent, work at the mine site (Tr. 128). The petitioner's counsel stated that MSHA's inspectors consider the mine to be a small mining operation (Tr. 127-218). Under all of these circumstances, I conclude and find for purposes of civil penalty assessments the respondent is a small mine operator, and I have taken this into consideration in this case.

History of Prior Violations

An MSHA computer print-out reflects that for a two-year period beginning August 28, 1989, and ending August 27, 1991, the respondent was assessed civil penalties totalling $5,024, for thirty (30) violations, and that it paid $1,045.11, for eight of the violations and was issued delinquency letters for non-payment of the remaining violations. The print-out reflects no prior violations of mandatory standards 30 C.F.R. 70.207(a), 70.508, or 70.101, but does show ten (10) prior violations of section 75.400. Although I cannot conclude that the respondent has a particularly bad history of prior violations, it would appear to have a problem with controlling and cleaning up coal and coal dust accumulations. I also note the number of delinquency letter reflecting non-payment of prior penalty assessments. However,I consider this a "debt collection" matter and I assume that the petitioner is taking the necessary steps to seek payment from the respondent.

Good Faith Compliance

With regard t the two respirable dust citations issued by Inspector Justice (Nos. 3807424 and 3807425), and the noise citation issued by Inspector Osborn (No. 9876034), the record reflects that during a subsequent inspection on November 19, 1991, Inspector Stewart issued three section 104(b) orders because of the respondent's failure to timely abate the previously issued citations. Although the validity of the orders are not in issue in this civil penalty proceeding, I agree with the petitioner's assertion that the respondent failed to timely abate the citations and has not advanced any reasonable evidence to rebut Inspector Stewart's credible testimony as to why the orders were issued. Further, I find no justifiable mitigating circumstances excusing the respondent's failure to timely abate the citations. Under the circumstances, I conclude and find that the respondent failed to demonstrate good faith in timely abating the conditions cited by Inspectors Justice and Osborn. With

regard to the remaining citations (Nos. 9876024, 3809256, 3809258), I conclude and find the cited conditions were timely abated in good faith by the respondent.

Negligence

The inspectors found a low degree of negligence associated with Citation Nos. 9876024 and 9876034, and a moderate degree of negligence with respect to the remaining citations (3807424, 3807425, 3809256, 3809258). I agree with these negligence findings by the inspectors and adopt them as my findings and conclusions on this issue.

Gravity

Based on the inspector's Non-"S&S" findings with respect to Citation Nos. 9876024 and 9876034, I conclude and find that these violations were nonserious. Based on my findings and conclusions concerning Citation Nos. 3809256 and 3809258), I conclude and find they were nonserious. Based on the "S&S" findings made by the inspectors regarding Citation Nos. 3807424 and 3807425, I conclude and find that these citations were serious.

The Effect of the Proposed Civil Penalty Assessments on the Respondent's Ability to Continue in Business

In a contested civil penalty case the presiding judge is not bound by the penalty assessment regulations and practices followed by MSHA's Office of Assessments in arriving at initial proposed penalty assessments. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. 820(i), and the information relevant thereto developed in the course of the adjudicative hearing. Shamrock Coal Co., 1 FMSHRC 469 (June 1979); aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersburg Stone Company; 5 FMSHRC 287, 292 (March 1983).

As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). Conversely, the size and documented financial condition of a mine operator is required to be considered in any determination as to whether or not the payment of civil penalties will adversely impact on a mine operator's ability to continue in business.

In several early decisions pursuant to the 1969 Coal Act, the former Interior Board of Mine Operations Appeals held that Congress intended a balancing process in arriving at an

appropriate civil penalty assessment in any given case, including consideration of the size of the mine and the ability of a mine operator to stay in business. See: Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (May 1972), 1 MSHC 1024; Newsome Brothers, Inc., 1 IBMA 190 (September 1972), 1 MSHC 1041 1041; Hall Coal Company, 1 IBMA 175 (August 1972), 1 MSHC 1037.

In several cases adjudicated by me pursuant to the 1977 Mine Act, I followed and applied the Robert G. Lawson Coal Company, line of decisions, supra, and concluded that the reduction of the initial penalty assessments were justified because the mine operators were small and in serious financial difficulties, and that the initial assessments in the aggregate would effectively put the operators out of business. See: Fire Creek Coal Company of Tennessee, 1 FMSHRC 149 (April 1979), I MSHC 2078; Fire Creek Coal Company of Tennessee, 2 FMSHRC 3333 (November 1980); Davis Coal Company, 4 FMSHRC 1168, 1192-1196 (June 1982); G & M Coal Company, 2 FMSHRC 3327 (November 1980) and 3 FMSHRC 889 (April 1981); Faith Coal Company, 14 FMSHRC 1907 (November 1992). See also: Davis Coal Company, 2 FMSHRC 619 (March 1980), where he Commission reviewed and affirmed several settlement decisions approving proposed civil penalty reductions based on the detrimental effect that assessment of the originally proposed penalties would have had on the mine operators ability to remain in business.

In the course of the hearing in this matter, petitioner's counsel took the position that the respondent's ability to pay the proposed civil penalty assessments should be based on the total assets available to Mr. Anderson, and not simply the assets of the respondent Broken Hill Mining Company. Counsel asserted that Mr. Anderson's ownership interests in other mining companies, including the degree of any interrelationships among those companies, including the intermingling of funds and equipment, should be considered in any determination as to whether or not the payment of the proposed civil penalties in the instant case will adversely affect the respondent's ability to continue in business (Tr. 17-19).

Petitioner's counsel cited several prior consolidated civil penalty cases heard by Judge Gary Melick on September 4, 1992, concerning two other coal companies controlled by Hobard Energies Inc., (Spurlock Mining Company, Inc., and Sarah Ashley Mining Company, Inc.) and counsel requested that I take judicial notice of the testimony by Mr. Anderson in those proceedings, as well as the brief filed by the solicitor representing MSHA in those cases (Tr. 17; 146).

The petitioner's counsel offered a copy of the brief filed in the prior cases, (Exhibit ALJ-1), and it was accepted "not as evidence, but as information and background" (Tr. 143-144). Counsel's request that I take notice of the transcript of the

prior cases was taken under advisement, and counsel was advised to file a motion or further request that I consider the transcript, as well as the brief, when he filed his posthearing brief in the instant case (Tr. 147-148).

Mr. Anderson took the position that his testimony in the Spurlock and Sarah Ashley cases are not relevant to this case involving the Broken Hill Mining Company. He testified that only four of the purported 12 or 13 coal companies that MSHA's prior counsel argued were under his control were actually operating coal companies during the time the prior cases were adjudicated, and that the remaining companies "were dormant or very inactive companies" (Tr. 147).

Mr. Anderson stated that he would file a copy of his reply brief in the Spurlock and Ashley Mining cases, but he has not done so (Tr. 149). Petitioner's counsel stated that he "would advise the court if I felt the need to do any further discovery regarding the financial situation" (Tr. 166). However, counsel has not done so, and his posthearing arguments with respect to the respondent's financial ability to pay the proposed civil penalty assessments in this case simply repeat his requests made during the hearing that I take notice of the transcript of the prior proceedings. Counsel also states that he is incorporating by reference the arguments advanced in the brief filed in those prior cases.

In the Spurlock and Sarah Ashley cases, the respondents conceded that the violations occurred as charged, but contended that payment of the proposed civil penalty assessments would affect their ability to remain in business. It was established that the respondents were subsidiaries of Hobart Energy, Inc., and Mr. Anderson was the only witness testifying on behalf of the respondents. None of the inspectors who issued the citations testified. Judge Melick issued his decisions on April 2, 1993, 15 FMSHRC 629 (April 1993), and rejected Mr. Anderson's arguments concerning the adverse affect of the penalties on the ability of Spurlock and Sarah Ashley to remain in business. Judge Melick held that since those companies were no longer in business, "the proffered excuse is no longer relevant" and that their financial condition was "only an issue of collection and while the Secretary may have to stand in line with other creditors this is no longer an issue under Section 110(i) of the "Act", 15 FMSHRC 630-631.

Judge Melick questioned the reliability of the financial evidence presented by Mr. Anderson in support to his claim (state and Federal corporate tax returns, unaudited balance sheets, notices of tax and other liens, and court pleadings apparently involving litigation by creditors against the respondent companies and Mr. Anderson personally), and found that this evidence was too limited in scope. Judge Melick held that "the

equities of this case support piercing the corporate veil" under an "alter ego" theory because there was a complete merger of ownership and control of the Spurlock an Sarah Ashley companies with Mr. Anderson personally. On May 12, 1993, the Commission granted Spurlock and Sarah Ashley's petitions for review of Judge Melick's decision, and the matters are still pending before the Commission for adjudication.

The petitioner's request that I take notice of the transcript of the hearing held in the prior proceedings before Judge Melick on September 2, 1992, and the posthearing brief filed by the petitioner IS GRANTED, and I have reviewed the transcript and the brief in the course of my adjudication of the instant case. Mr. Anderson's unrebutted testimony in the prior matters reflected that his only compensation was a $75,000, salary that the received from Hobart Energies, Inc., the controller company in which he has a 25% stock ownership stake (Tr 60. 69). Hobart Energies owned all of the equipment used at the Sarah Ashley operation, some of the equipment used at the Spurlock operation, and equipment was interchanged between the two operations as needed (Tr. 64-65). Mr. Anderson confirmed that both of these operations mined coal on a contract basis, but that they were inactive and no longer in business. However, he stated that the equipment was still at the mine sites, and he hoped to go back into business at those operations (Tr. 74-75). He also indicated that Hobart Energies may lease the equipment to other mine operators, but that any lease proceeds will go to the IRS to satisfy personal liens against him and Hobart Energies for nonpayment of payroll and unemployment taxes (Tr. 78-79).

In the prior proceeding, Mr. Anderson testified that the Broken Hill Mine was opened in late July, 1992, and coal was mined on a contract basis for A.T. Massey Coal Company. That company purchased some belt equipment from Broken Hill who in turn used the proceeds to make payments to the bank that held a lien on the equipment (Tr. 84-85). Mr. Anderson confirmed that he served as president and chief operating officer of Broken Hill Mining Company, as well as several other companies held by Hobart Energies, the controller company owning 100% of the stock of these companies (Tr. 87-91). Mr. Anderson further testified that Broken Hill "had been shut down for six months and just got back on its feet. And hopefully it can turn around but to date has been losing money" (Tr. 106). He also stated that none of his coal mine companies were dong well and that "anything that we have to pay is a struggle" (Tr. 106).

In the posthearing brief filed in the prior proceedings (Exhibit ALJ-1), MSHA's counsel took the position that Mr. Anderson's "general, unsupported, and self-serving" testimony about the financial condition of Sarah Ashley and Spurlock was insufficiently probative of those respondents inability to pay the assessed penalties without adversely impacting on their

ability to remain in business. I take note of the fact that during the course of the hearing in the prior proceedings, MSHA's counsel offered in evidence the financial data supplied by Mr. Anderson with respect to Sarah Ashley and Spurlock, and counsel expressed agreement with the information presented, and she did not challenge the balance sheets prepared by Mr. Anderson or his accountants, the authenticity or the accuracy of the information, or the supporting affidavits reflecting the opinions of the CPA's who prepared Mr. Anderson's tax returns, and Mr. Anderson, who is also a CPA. All of this documentary financial evidence was received without objection (Tr. 21-24).

In the prior proceedings, MSHA's counsel noted that Mr. Anderson chose not to submit financial data for ten other companies under his management, and since these corporations were not dissolved and their assets liquidated, counsel argued that it was reasonable to conclude that they were still producing coal and that money was coming from somewhere to pay the costs of the corporations controlled by Mr. Anderson and to maintain a continuing banking relationship with his business lenders. Under the circumstances, counsel concluded that Sarah Ashley and Spurlock did not establish that payment of the assessed penalties would have an adverse affect on the ability of all of the Hobart Energies subsidiaries to remain in business, and that Mr. Anderson and the corporate entities that he managed should be held jointly and severally liable for these penalties.

After careful review and consideration of the aforementioned record in the prior Sarah Ashley and Spurlock cases, I decline to adopt the "alter ego" findings and conclusions made by Judge Melick, as well as the arguments advanced by MSHA. I conclude and find that there is sufficient evidence of a more current nature in the instant proceeding to enable me to make a decision on the issue of whether or not the payment of the penalties proposed by the petitioner, or the payment of the penalties which I have assessed for the violations which have been affirmed, will adversely affect the respondent Broken Hill Mining Company's ability to continue in business.

Mr. Anderson's unrebutted testimony in this case reflects that with the exception of the Broken Hill Mining Company, the other corporate mining ventures controlled by Hobart Energy Inc., are no longer viable and productive mining operations. Insofar as Broken Hill is concerned, Mr. Anderson testified that the company was resurrected in July, 1992, and that although one of its mines was experiencing problems with rock, which impacted adversely on production, the mine was nonetheless producing coal. This is consistent with Mr. Anderson's testimony in the prior proceedings that Broken Hill "was back on its feet" and was again producing coal, although Mr. Anderson claimed the company was losing money and that it "was a struggle" to pay bills.

In the instant case, Mr. Anderson further testified that due to the high rate of coal rejection at the Broken Hill No. 1 Mine, A.T. Massey has paid subsidies to Broken Hill as compensation. He also testified that Broken Hill's new No. 3 mine, which started coal production in November, 1992, is still producing coal and that it is "a good operation" (Tr. 135-136). There is no evidence that this operations is troubled, and although the mine equipment is secured by a bank lien, which I do not find to be particularly unusual, the equipment is owned by Broken Hill Mining Company. Further, the evidence in the instant proceeding reflects that Mr. Anderson receives a salary of $75,000, a year, on a regular basis, from Hobart Energy Inc., Broken Hill's parent company, and that Broken Hill has consented to pay MSHA $250 a month for past civil penalty assessments, and is paying $5,000 a month to the IRS for past tax liens.

In view of the foregoing, and notwithstanding the testimony and evidence presented by Mr. Anderson with respect to the financial state of the respondent Broken Hill Mining Company, which reflects several liens and other outstanding debts, which I have taken into consideration, I am not convinced that the payments of the penalties assessed in this proceeding against Broken Hill Mining Company will adversely affect its ability to continue in business. I conclude and find that if the respondent Broken Hill Mining Company can pay $250 a month to MSHA, $5,000 a month to the IRS, and at the same time continue to mine coal at its newly opened No. 3 mine, producing revenue for Broken Hill, and I assume Hobart Energy Inc. as well, which in turn pays Mr. Anderson a $75,000 annual salary, it can afford to pay the civil penalties assessed in this case. Further, given Mr. Anderson's financial acumen, and his CPA background, I am confident that the respondent will find the funds to pay the penalty assessments. Accordingly, the arguments advanced by the respondent that it cannot pay any civil penalties ARE REJECTED, and I conclude and find that the respondent has failed to establish that payment of the penalties that I have assessed will adversely affect its ability to continue in business.

Civil Penalty Assessments

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 the following civil penalty assessments are reasonable and appropriate for the violations that I have affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
9876024	7/16/91	70.207(a)	$20
9876034	7/30/91	70.508	$150
3807424	8/29/91	70.101	$200

3807425	8/29/91	70.101	$350
3809256	11/15/91	75.400	$65
3809258	11/15/91	75.400	$65

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above for the six (6) violations which have been affirmed in this case. Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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