

CCASE:

SOL (MSHA) V. HENRY B. SALYERS (MIDDLE CREEK ENERGY)

DDATE:

19930827

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 92-83
Petitioner	:	A.C. No. 44-05772-03557-A
	:	
v.	:	Docket No. VA 92-84
	:	A.C. No. 44-05772-03558-A
HENRY B. SALYERS	:	
DARRYL KEENE	:	Docket No. VA 92-89
STEVE VINSON	:	A.C. No. 44-05772-03559-A
JIMMY D. WYATT Employed by	:	
MIDDLE CREEK ENERGY	:	Docket No. VA 92-93
INCORPORATED,	:	A.C. No. 44-05772-03555-A
Respondents	:	No. 1 Mine

DECISION

Appearances: Stephen Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;  
Henry B. Salyers, Pounding Mill, Virginia, for himself;  
Darryl Keene, Cedar Bluff, Virginia, for himself;  
Steve Vinson, Richlands, Virginia, for himself;  
Jimmy D. Wyatt, Cedar Bluff, Virginia, for himself.

Before: Judge Barbour

STATEMENT OF THE PROCEEDINGS

These are civil penalty proceedings initiated by Petitioner, the Secretary of Labor ("Secretary"), against the Respondents, Henry B. Salyers, Darryl Keene, Steve Vinson and Jimmy D. Wyatt, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 801 et seq.(Footnote 1) The

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Section 110(c) of the Act states in pertinent part:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act] except an order

incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered or

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Secretary asserts that Wyatt, as superintendent of the No. 1 Mine, a mine owned and operated by Middle Creek Energy, Inc. ("Middle Creek"), knowingly authorized ordered or carried out violations of mandatory safety standards 30 C.F.R. 75.400 and 30 C.F.R. 75.517. He further asserts that Salyers, Keene and Vinson, as section foremen at the No. 1 Mine, each knowingly ordered, authorized or carried out the same violation of section 75.400 as Wyatt. The Secretary seeks the assessment of civil penalties against the individual Respondents for the alleged violations.

An evidentiary hearing was conducted in Tazewell, Virginia, at which the Secretary was represented by Steven Turow and the individual Respondents represented themselves.(Footnote 2)

#### STIPULATIONS

The parties stipulated as follows:

1. On February 14, 1991, Steven May, an inspector of the Secretary's Mine Safety and Health Administration ("MSHA") conducted an inspection of the No. 1 Mine, a mine owned and operated by Middle Creek.

2. As a result of the inspection May issued three citations: Citation No. 3507924, a citation issued pursuant to section 104(a) of the Act and alleging a violation of section 75.517; Citation No. 3507925, a citation issued pursuant to section 104(a) of the Act and alleging a violation of section 75.400; and Citation No. 3507926.(Footnote 3)

3. On February 13 and 14, 1991, Wyatt was the mine superintendent at the No. 1 Mine and Salyers, Keene and Vinson were section foremen.

4. Middle Creek is a corporation.

Tr. 8.

1...(continued)

carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. 820(c).

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At the commencement of the second day of the proceeding, counsel for the Secretary moved to withdraw the petitions against Keene and Vinson and to dismiss the cases in which they were named as parties. Tr. 315. I granted the motion. Id. However, since the allegations against the two remaining Respondents are intertwined with those previously pending against Keene and Vinson, I will reference all of the allegations in discussing and ruling on the remaining cases.

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Citation No. 3507926 is not at issue in these proceedings.

CONTENTIONS OF THE PARTIES

Counsel for the Secretary stated the evidence would show that on February 14, 1991, May found conditions at the mine that cumulatively resulted in an imminent danger and in the issuance of an order of withdrawal pursuant to section 107(a) of the Act. In addition, and pertinent to these proceedings, the conditions individually constituted violations of the alleged mandatory safety standards. The violation of section 75.400 concerned accumulations of loose coal and coal dust and the violation of section 75.517 concerned tears in the jacket of a trailing cable for a continuous mining machine ("continuous miner"). As a result, in conjunction with the imminent danger order of withdrawal, citations alleging the violations were issued by May.

According to counsel, all of the Respondents were aware of the existence of the coal and coal dust, all were in a position to correct the violation and all failed to do so. Tr. 8-9. Moreover, Wyatt was aware of the condition of the trailing cable and was in a position to have the cable repaired and/or replaced and failed to do so. Tr. 9.

Wyatt, responding on behalf of the Respondents, maintained the government could not substantiate that an imminent danger had existed and that the order and alleged violations did not convey "the true picture of the conditions." Tr. 10. In Wyatt's view, none of the Respondents "willfully violate[d] any standards of the Act." Id.

THE SECRETARY'S WITNESSES

STEVEN MAY

May was the Secretary's first witness. Prior to being employed by MSHA, May had a total of eight years experience as a mine electrician. In addition, May was certified as an electrical repairman, a maintenance foreman and a chief electrician. Tr. 15.

May described Middle Creek's No. 1 Mine as an underground mine where coal was mined by continuous miners, hauled to underground transfer points by ram cars and transferred to the surface by conveyor belts. Tr. 16. May stated that the mine produced approximately 3,000 tons of coal per day and that there were two production shifts.(Footnote 4) Tr. 17, 170. With a labor force of

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It was stipulated during the course of May's testimony, that there were three shifts at the mine: 11:00 p.m. to 7:00 a.m., a maintenance shift of which Vinson was the foreman; 7:00 a.m. to 2:30 p.m., a production shift of which Salyers was the foreman; and 2:30 p.m. to 10:30 p.m., a production shift

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approximately 35 miners, May described the mine as of a medium size. Tr. 170-171.

May identified a drawing of part of the section of the mine where the violations were alleged to have occurred (the 001 section) and stated that the drawing represented the area as it had existed on February 14. P. Exh. 3; Tr. 18. The drawing depicts five advancing faces. (They are numbered 1 through 5 from left to right.) Directly outby the No. 5 face is a crosscut and May stated that a continuous miner was located in the crosscut, to the right of the face when looking inby. The No. 4 face was further advanced than the No. 5 face and a roof bolting machine was parked outby the face.

A trailing cable ran from the continuous miner to the power center located in the third crosscut outby the No. 4 face. The transfer point was in the No. 4 entry between the third and fourth crosscut outby the No. 4 face. Tr. 20.

May stated that he arrived at the mine at approximately 2:00 p.m. on February 14. It was the first day of a regular quarterly inspection of the entire mine. May and Wyatt proceeded to the 001 section. Tr. 24. May and Wyatt passed the power center, the electrical installation where a transformer lowered incoming electrical current to 480 volts. Tr. 26. May and Wyatt walked past the power center and up the No. 5 entry. Tr. 54.

The trailing cable for the continuous miner was lying on the floor of the entry. Id. May believed he could hear machines running on the section and he assumed that mining was in progress. Tr. 50, 94-95. May began to examine the cable and the noise stopped. Tr. 50. May believed the cable was energized. Tr. 51. May stated he could see the light on the continuous miner. Tr. 150.

May described the cable. It was approximately 2 inches thick. Inside there were three power conductors and a ground monitor and ground wire. Electricity ran through the conductors. The monitor and ground wire were safety devices and if either were broken or came in contact with a conductor, the continuous miner was supposed to de-energize. Tr. 29.

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of which Keene was the foreman. Tr. 179-180.

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The entire trailing cable for the continuous miner measured approximately 500 feet in length. The continuous miner was located about 150 feet from the power center. The excess cable was lying in loops in the No. 5 entry, one side of each loop being approximately 30 feet long. Tr. 30. The loops were lying along the rib. Tr. 54. The loops extended in by the No. 5 entry to the corner of the entry in which the continuous miner was located (crosscut B on P. Exh 3).

May inspected the looped cable and initially observed 17 places where it was torn and ripped. May stated that after the cable was totally unlooped, he counted 18 such places. Tr. 31. May did not recall if the tears were at places in the cable that had been taped previously, but he described the cable as being "as bad as I've seen." Tr. 37. In each of the 18 places May maintained that he could see through the tears to the interior of the cable. Tr. 55.

The longest tear was approximately 25 inches long. (May measured the tear with a folding ruler. Tr. 31-32.) At another tear where the cable's outer insulation was missing for approximately 8 to 10 inches, May found that the three conductors had been rolled together and the ground monitor had been rolled around the conductors. Tr. 32. In addition, one of the conductors was bare and a wooden wedge was driven between the bare conductor and the ground wire. Tr. 33. May believed the conductor and the ground wire had burned together and had been separated subsequently by the wedge. Tr. 79-80. May speculated the wedge had been driven between the conductor and the ground wire so the wires would not touch and de-energize the continuous miner. Tr. 34. (On cross-examination May stated that he could not recall pointing out the bare wires and wedge to Wyatt, and he confirmed that he did not mention the condition in his notes. Tr. 81-82.)

May explained that a ground wire does not have to be insulated but that a conductor requires insulation. Tr. 60-61, 76. The insulation keeps the current from traveling from one conductor to another. According to May, when he first saw the cable he could not believe it was being used. Rather, he thought it was "some old cable that was discarded." Tr. 161.

May concluded the condition of the cable constituted a violation of section 75.517. The violation was based upon the torn and exposed areas in the cable. Tr. 148-149. May stated that in his opinion any unrepaired break or tear in the cable cover was a violation of the standard and it did not matter how many of the interior wires were exposed. Tr. 149. May described what he regarded as the essence of the violation: the cable "had 18 places that were not properly insulated that were open, and even one with a bare phase wire." Tr. 89.

May was especially concerned about the tear that exposed the bare conductor. He believed it posed a dual hazard in that miners who touched the conductor could be shocked and if the conductor touched the ground wire, the resulting arc could ignite a fire. Tr. 33. Although the average miner wore rubber boots, some miners wore leather boots and if they stepped on the bare conductor they could be shocked. Tr. 35. They also could be shocked if they crawled and put their hands on the bare conductor. Tr. 35. However, crawling by the miners was not likely since the entry was approximately 48 inches high. Tr. 83. Because the cable carried 480 volts of electricity any miner contacting it could be critically injured or killed. Id.

May also believed the tears exposing insulated conductors created a shock hazard because without the protection of the cable's out jacket a miner who touched an insulated conductor could be shocked. In short, the potential for injury was increased by the fact that the outer jacket of the cable was not providing the protection it was designed to ensure. Tr. 63, 73.

Moreover, if the conductor and ground wire contacted one another and arced, coal dust or loose coal in the vicinity of the arc could ignite, and May stated that he had observed coal and coal dust and loose coal measuring about 2 inches deep lying on and around the cable. Tr. 36, 38, 42. May believed it was "highly likely" such an ignition could happen. Tr. 50.

After examining the cable, May walked to the continuous miner. Wyatt did not accompany him. While walking from the power center to the coiled cable and from the cable to the miner May had observed coal and coal dust on the mine floor. Later, when May had an opportunity to inspect the entries and face areas, he also noted the presence of coal and coal dust in all 5 entries from the transfer point inby, although the accumulations were located mainly in entries No. 3 and No. 4. Tr. 43, 46. The coal and coal dust had accumulated in even greater amounts in the face areas than it had between the power center and the miner. Tr. 41. As May explained, loose coal and coal dust will occur naturally where mining has taken place. Therefore, May did not believe that the coal and coal dust that was present in each entry from the face to 40 feet outby the face was in violation of section 75.400. Tr.43-44. Nonetheless, the accumulations that existed from 40 feet outby the faces to the transfer point did violate the standard, and May estimated that the distance the violative accumulations existed in each entry was 200 feet or more. Tr. 44.

In describing the accumulations in the crosscuts, May stated that the accumulation in the crosscut furthest outby (crosscut E on Exh. P. 3) gradually built up to a depth of 51 inches at the feeder. Tr. 136. Crosscut D was not "too awful bad" although there was some accumulation. Id. In crosscuts E, D and C there



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was some rock dust, but in crosscuts A and B there was none. May also stated that where the coal in the entries had been run over by mining equipment, coal dust in depths of approximately 2 inches existed. Id., 51. The coal and coal dust in the entries was dry and black and May described the section in general as being "very dry". Tr. 46, 83. May did not see any evidence that a clean up was in progress on the section. Tr. 96.

May admitted, however, that rock dusting would have been done after the section had been cleaned and that the accumulations he observed could have been from the production shifts that followed Vinson's maintenance shift. He stated he had "no idea" how much cleaning Vinson had done on the 11:00 p.m. to 7:00 a.m. shift. Tr. 132, 134, 138. He agreed it was possible Vinson might have made certain that everything was cleaned, but May added, "Wyatt told me the reason the section was dirty was that . . . [Vinson's crew had] worked maintenance on the . . . [other production section] and had not got down . . . [to the section where the accumulations existed] to clean it up." Tr. 132. May further agreed that before he reached the section where the accumulations existed, Keene, foreman of the 2:30 p.m. to 10:30 p.m. shift, could have been in the process of getting ready to clean the entries. Tr. 145.

In addition to the entries and crosscuts, May found that at the feeder coal dust had accumulated from the floor to the roof, a distance of 51 inches. Tr. 47, 119. The hazard from coal dust adjacent to the feeder was that there were potential ignition sources present at the feeder -- bearings, electric motors, gears and pulleys, all of which created heat through friction. Tr. 48. May agreed, however, that he had not tested the dust to determine its combustible content, and he further agreed that it could have contained incombustible material. However, he did not believe the incombustible content could have been as much as 50 percent because "[the dust] would not have been black if it had been 50 percent incombustible." Tr. 102.

May stated that after viewing the condition of the cable he had intended to issue an imminent danger order of withdrawal. However, by the time he next saw Wyatt, May had an opportunity also to view the accumulations. Therefore, he based the imminent danger order on both the cable and the accumulations. May stated, "[w]ith the bare phase lead and with the coal . . . as it was I felt that if they continued to run [coal] then you would have had a disaster on the section." Tr. 157. In conjunction with the withdrawal order May issued citations for violations of sections 75.517 and 75.400. The citations were abated by 9:30 a.m., the following morning. Tr. 126-127.

With regard to the allegations that Wyatt, Vinson, Keene and Salyers knowingly violated the cited standards, May testified he

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recommend that MSHA conduct an investigation to determine if they had acted contrary to section 110(c). He made the recommendation because of the seriousness of the cited conditions. Tr. 176.

RICKEY LAWSON

Lawson, who on February 14, 1991, was a mechanic/electrician for Middle Creek at the No. 1 Mine, was the Secretary's next witness. (At the time he testified he no longer worked for Middle Creek.) Lawson worked on the 11:00 p.m. to 7:00 a.m. shift and he was supervised by Vinson. He described the nature of his job as servicing equipment and repairing anything that broke down during the day shifts. Tr. 183.

On February 14, 1991, Lawson had worked for approximately three to five months at the mine, and Lawson stated that the trailing cable May cited as being in violation of section 75.517 was in use when he started work. Tr. 184-185. Lawson's job included repairing the cable, which usually involved applying rubber tape to the outer jacket and covering the rubber tape with wide, plastic masking tape. Tr. 185. He testified that prior to February 14, he had repaired the cable "quite a few times." Tr. 191. However, he had worked with many cables that were in worse condition than the cited cable. Tr. 186. He acknowledged that the cited cable had to be taped daily because as the continuous miner moved, the cable rubbed against the ribs and the tape from previous repairs wore off. Tr. 187.

Lawson stated that Wyatt told him and all other electricians "to seek an eye on the cable." Tr. 187. At one point Wyatt had also directed the cable be turned around -- that is, reversed -- so that worn parts would get less wear. Tr. 188-189. (Lawson described the turning of cables as a common mining practice. Tr. 194.) He further stated that he had told Wyatt the cable had a lot of "busted" places in it and he suggested it be replaced. Wyatt's response was to tell Lawson to continue taping it and to "keep an eye on it." Tr. 189.

Lawson described a "game plan" for the cable -- to keep watching it, to keep it taped and to retape it every night if necessary. Tr. 191-192. The continuing problem necessitating the "game plan" was the cable's outer jacket burst as it was pulled around corners. Tr. 192. Lawson recalled Middle Creek contacting the manufacturer of the cable and requesting that the company send a representative to determine why Middle Creek was having so much difficulty with the cable. Tr. 195.

BERNARD SALYERS

Bernard Salyers, cousin of the Respondent, Henry Salyers, had worked at the mine as an electrician since 1987.

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In February 1991, he was the chief electrician and he worked part time above ground and part time underground. Tr. 202.

In his opinion the trailing cable had a manufacturing defect in that "for no apparent reason its outer jacket would just burst open." Tr. 201. The jacket would separate along a straight line and the insulated inner wires would be revealed. Tr. 203-204. The splits were so straight that initially he suspected the cable had been cut. Tr. 207. Upon observing the cable closely, he found that at first a small groove would appear on the cable jacket and the cable would start to separate along the groove. Tr. 209. He believed the problem with the cable began two or three months before it was cited. Tr. 205.

According to Bernard Salyers, Middle Creek contacted the company from whom it had purchased the cable (not, as Lawson testified, the manufacturer) and the company advised Middle Creek to cut a piece from the cable and the company would send it to the manufacturer for analysis. Tr. 204. This was done, a few days before May's inspection. Tr. 205. Thus, on February 14, Middle Creek was waiting for advice from the company whether to purchase a new cable. Tr. 208. Middle Creek purchased a new cable from a different manufacturer a month or two after the citation was issued. Tr. 214.

#### STEVE VINSON

Vinson began working for Middle Creek in July 1989. On February 14, 1991, he was a shift foreman at the mine. Vinson explained that the purpose of his shift, the 11:00 p.m. to 7:00 a.m. shift, was to make it possible for the day shifts to function as production shifts. Tr. 221. The only type of maintenance the production shifts would do was to clean up and to rock dust. Tr. 222. In Vinson's opinion, there was no way a production shift could clean up all of the coal that had accumulated during a shift and the maintenance shift therefore cleaned up what was left. Tr. 222-223, 243.

Wyatt, as superintendent, always listed for Vinson the jobs to be done on the maintenance shift. At the end of the list, cleaning and rock dusting were invariably included and this was true for the 11:00 p.m. to 7:00 a.m. shift of February 13-14. Tr. 243, 253.

On that shift Vinson was told to move the belt on the 002 section (the section that was "down") and to clean and rock dust both sections. Tr. 225. The belt move took about 4 hours and involved all of the crew. Tr. 226. After the move was completed, Vinson directed a miner to go to the 001 section (the production section) to clean, rock dust and work on ventilation. Cleaning was done with a scoop. Tr. 227. Vinson and three members of the crew remained at work on the 002 section. Id.

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Ron Joyce was the miner Vinson sent to the 001 section. Vinson stated that he went to the 001 section around 6:40 a.m. on February 14. As best Vinson could recall, he met Joyce at the feeder. Joyce was cleaning and because the shift was ending, Vinson stopped Joyce, and Joyce and Vinson left the mine.  
Tr. 230, 231.

Although Vinson believed the area in front of the feeder had been cleaned, he did not think procedures that were required to move the feeder had been instituted, and it was necessary to move the feeder to clean immediately adjacent to it. Tr. 230-231. In any event, the sides of the feeder were not cleaned because the only way that could have been done was to pull the feeder out of position, which would have taken 3 hours. Therefore, accumulations directly in front of the feeder were cleaned but those at its sides were not. Tr. 246-247. Vinson agreed that the area around the feeder including the sides of the feeder could have been cleaned by shovel, but he estimated it would have taken one man four or five hours. Tr. 252.

At about 3:30 a.m., prior to sending Joyce to clean in 001 section, Vinson had inspected the section (including the area involved in the citations) and he again inspected it at 6:30 a.m., shortly before meeting Joyce. Tr. 232-234. Vinson stated that although the section was a little dirty in the face of No. 4 and No. 5 entries, it was "nothing that wouldn't pass inspection that morning," and, indeed, Vinson believed that Joyce's clean up efforts had been adequate. Tr. 234-235, 256.

Vinson stated that he disagreed with May regarding the existence of the alleged accumulations. In Vinson's opinion a lot of the areas that May regarded as containing float coal dust and as being black in color (the entries and cross cuts outby the continuous miner) really were old rock dusted areas and were "whitish" in color, not black. Tr. 238, 246, 249. In Vinson's opinion "the only places that were really dirty was in the face" and he added "I done my best to get them cleaned up that night." Tr. 238.

Vinson added that the fact that May testified he saw rock dust showed that some cleaning had been done because rock dust is applied after cleaning. Tr. 240. Vinson believed that the Nos. 1, 2 and 3 entries had been rock dusted -- although he had not seen Joyce rock dusting and he could not recall if he asked Joyce if he had done any rock dusting. Tr. 241. He also believed that rock dusting had been done by hand because, as he stated, "We just didn't have the manpower there that night with all the work we had to do." Tr. 251. Vinson explained that one man was sent to clean up because in his experience one man, working for three hours, could accomplish all the clean up that was usually needed. Tr. 252. Vinson stated that Wyatt would

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have had no prior knowledge of the condition of the section before Vinson had his crew begin cleaning it. Tr. 248.

With regard to the cited trailing cable, Vinson testified that two days before the inspection he had helped Lawson tape 2 tears in the cable. Tr. 239.

DARRYL KEENE

Darryl Keene testified next. At the time of the hearing he was working as a ram car operator for another coal company. However, on February 14, 1991, he was shift foreman for Middle Creek on the 2:30 p.m. to 10:30 p.m. production shift. Tr. 251. He had been the foreman for only two or three days and he had worked for Middle Creek for only three or four months.

Keene stated that as shift foreman he was responsible for making sure the face areas were cleaned and that cleaning was usually done with a scoop. Tr. 261. Keene was also responsible for seeing to it that the face areas were rock dusted. In fact, Keene, himself did the cleaning and rock dusting. Areas that he was not able to clean before the shift ended would be reported to the oncoming shift foreman, Vinson. Tr. 262.

On February 14, Keene entered the mine at 2:10 p.m. Contrary to his usual practice, he did not get an oral preshift report from Henry Salyers, the foreman on the 7:00 a.m. to 2:30 p.m. shift. (Footnote 5) Rather, the preshift report was brought out of the mine in written form and Keene did not see it before going on the section and thus had no prior knowledge of whether or not accumulations were present on the section. Tr. 264-265.

Once on the section, Keene inspected all of the headings. He believed that he walked from the power center up the No. 4 entry toward the face. Keene did not believe the No. 4 entry had an excessive amount of accumulated coal dust, although he stated that probably there was some present. Tr. 266. Keene described the entire section as being in need of "some cleaning," except

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Keene explained:

The preshift is called out to me. The way we done that is . . . Salyers . . . would call his preshift report out to me and I would write in a book what he called out to me what was [done] and what was left. And then I would come on and do my shift, do my production. Then two or three hours before Steve [Vinson] came on I would do the same thing for him.

Tr. 264.

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for crosscuts A and B between entries Nos. 1 and 2, areas which had just been cut and had not yet been roof bolted. Tr. 269, 290. Regarding the feeder, Keene recalled an area of perhaps 12 feet where coal had accumulated. Tr. 267.

Keene testified that during his shift there was very little, if any, production because the continuous miner had been rendered inoperative by a problem with its methane monitor. Tr. 270, 279, 283. Keene did not check the continuous miner's cable and he was unaware if it was in need of taping, but he agreed it was general knowledge at the mine that the cable had a problem that caused it to split. Tr. 271, 259-260. He also did not know if the cable was energized but it could have been. Tr. 284.

#### JIMMY WYATT

Jimmy Wyatt last worked for Middle Creek at the No. 1 Mine in August or September 1991. At that time he had been working at the mine for approximately two years as the superintendent. He described his job as being in charge of day-to-day operations at the mine. Tr. 293. Wyatt stated that prior to February 14, 1991, no orders of withdrawal of any kind had been issued at the mine while he was the superintendent. Tr. 294. He estimated that as the superintendent he was required to spend between 25 percent and 35 percent of his time underground. Tr. 296.

On February 14, Wyatt arrived at the mine at approximately 6:15 a.m. By the time May arrived at 2:00 p.m., Wyatt estimated that he had spent at least two hours underground. Tr. 298. Wyatt first went to the 001 section because the continuous miner was not operable. A ripper jack had broken and needed to be repaired. Tr. 298. The jack was fixed around 11:00 a.m., and Wyatt believed that some mining had been done after it was repaired. Tr. 299.

Wyatt stated that he could not recall when first he had become aware of the condition of the cable. He described its propensity to split as a slowly progressive condition, and he speculated that the first few times it split miners were not overly concerned about it. Tr. 299. Wyatt also did not recall when the piece was cut from the cable and sent to the manufacturer's representative. He believed that Bernard Salyers had been responsible primarily for doing it. Tr. 300. Wyatt did recall, however, that the cable was not a constant source of discussion during the daily morning safety discussions at the mine. While it was true that it was at times discussed, a week to ten days might pass between such discussions. Id.. Middle Creek purchased the cable in approximately September 1990, and it was put into use upon purchase. Because it required continual taping the cable was replaced approximately a month or two after February 14, 1991. In Wyatt's opinion the cable had a manufacturing defect. Tr. 303.

DEWEY RIFE

Dewey Rife, a MSHA special investigator, was the Secretary's last witness. He was apparently called to refute Wyatt's contention that while he was superintendent no order of withdrawal had been issued prior to the imminent danger withdrawal order of February 14, 1991. Rife stated that MSHA's records indicated a section 107(a) imminent danger order of withdrawal had been issued at the mine on September 29, 1990. Rife, whose knowledge of the existence of the order was limited to a MSHA computer printout of violations issued at the mine, did not know upon whom the order had been served. Tr. 308.

RESPONDENTS' EVIDENCE

At the close of the Secretary's case the hearing recessed until the following morning. When it resumed the Respondents indicated they felt they had been able to present adequately their cases through their testimony as the Secretary's witnesses and through cross examination. The Respondents stated that they had no testimony or documentary evidence to present but would rely on what had already been stated and on any closing arguments they might choose to make.

DISMISSAL OF PROCEEDINGS AGAINST VINSON AND KEENE

Prior to closing arguments, the Secretary's counsel moved to dismiss the Secretary's petitions alleging knowing violations by Vinson and Keene. Counsel stated: "The purpose of the [Mine Act], particularly section 110(c) [of the Act], would not be further served by continuing a prosecution against either."  
Tr. 315. I agreed and granted the motion. Id. I will affirm the dismissals at the close of this decision.

CLOSING ARGUMENTS

THE SECRETARY

Counsel began by noting the official positions of the two remaining Respondents -- that Wyatt was the superintendent of the mine and that Salyers was the foreman of the shift immediately preceding the inspection. Counsel maintained the testimony established the presence of significant accumulations of coal and coal dust in the 001 section in violation of section 75.400. The Secretary had proven coal dust was present at the feeder to a depth of 51 inches and that coal and coal dust existed in several places along the entries for a distance of 200 feet. He also asserted the evidence established the presence of coal dust on the ribs. According to counsel, the testimony of the Respondents established that at the No. 1 Mine, production and equipment maintenance came before the cleaning up of

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accumulations, and that Wyatt and Salyers knew of the accumulations and failed to take steps to eliminate them.

In view of the fact that the mine was fairly small, it was reasonable to expect the superintendent to know of the conditions at the mine. Wyatt was in the mine prior to May's inspection and he should have observed the accumulations. Equally important, Wyatt managed the mine in such a way that violative accumulations were almost inevitable in that clean up duties had a low priority, for example, one person had been given three hours to clean up the 001 section.

Turning to Salyers, counsel argued that while his shift may have "inherited" some coal dust from Vinson's shift, the testimony made clear Salyers was responsible for leaving major accumulations of combustible materials at the end of his shift. That the cited accumulations had been left by Salyer's shift was established by the fact that Salyers' shift ended shortly before May's inspection.

Counsel further argued May's testimony that the cable contained 18 tears, some of which revealed the cables interior wires and at least one of which revealed a fully exposed conductor, established a violation of section 75.517. The testimony confirmed the condition of the cable had been an ongoing problem given the regularity with which it had split. In addition, Lawson's testimony indicated that Lawson had raised with Wyatt the problem created by the defective cable 2 or 3 times prior to February 14. Bernard Salyers also testified that he had raised the problem of the defective cable with Wyatt prior to February 14. Counsel stated that given the condition of the cable, the cable should have been removed from the mine and replaced rather than have been kept in use.

In counsel's opinion, the coal and coal dust was dry and the exposed cable wires and potential friction from the feeder provided possible ignition sources in the vicinity of the accumulations. Thus, the accumulations posed a serious fire hazard. In addition, the condition of the cable subjected miners on the 001 section to a serious and possibly fatal shock hazard.

THE RESPONDENTS

JIMMY WYATT

Wyatt argued the company had a clean up plan and that it was trying to do the best it could to keep the mine clean. He cited to Vinson's testimony that one man had been sent to clean the section and had been given three hours to do so and argued that within this time frame the section could have been cleaned. Referring to Keene's testimony that he did the clean up duties on his shift, Wyatt stated it was not unusual at times for a section



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foreman to clean. Wyatt also argued that May's description of the alleged accumulations was suspect and he stated that May had not measured the accumulations at any particular point.

Wyatt maintained that May's testimony that the cable had 18 places where the inner leads were visible also was inaccurate. In fact, Wyatt believed that May had probably found only one place that needed taping. The 18 places to which May referred were places that Wyatt and May retaped, and they were counted after the cable had been retaped. According to Wyatt, every tear in the cable had been retaped as discovered. Wyatt also argued that May's notes and the citation form contained no reference to a stick being used to separate the exposed conductor and ground wire in the cable. The bottom line for Wyatt was that the cable was not in poor condition, as shown by the fact that it was used during the remainder of May's inspection and, Wyatt asserted, for a month or two thereafter, until it was replaced.

Moreover, the cable did not pose the hazard May contended. For one thing, the continuous miner was shut down due to a malfunctioning methane monitor which de-energized power to the machine. Further, even if the ground wire had been energized the circuit breaker would have tripped and power would have been cut off.

The cable itself was lying in an entry that had been the immediate return and as a result all dust in the entry had to be maintained at 80 percent incombustible content. The reason May conveniently failed to take any samples was because he knew the dust consisted mostly of rock dust.

#### HENRY SALYERS

Salyers maintained that he was no more to blame than anyone else for the existence of the accumulations on the 001 section. His responsibility was to run coal and to clean when he could. His shift always cleaned in the face, but if there were any accumulations in the back areas, they were cleaned up by the 11:00 p.m. to 7:00 a.m. shift.

Salyers was candid:

That day I cleaned what I could clean in the face. By the time the boss man makes a section all the time, watches about all the other men, keeps his centers up, keeps his curtains up and everything, there ain't no way -- with what people you've got there ain't no way you can go back three or four breaks back down the hallways and clean the hallways and keep them scraped up and ke[ep] the dust scraped up back there.

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Tr. 357. In addition, Salyers claimed that May had seen the feeder before with similar amounts of coal around it and had never previously written a citation for a violation of section 75.400.

THE VIOLATIONS

30 C.F.R. 75.400

Citation No. 3507925 states in part:

Beginning at the 001-0 section transfer point and extending inby in all entries and crosscuts to within 40 feet of the face areas of the 001-0 section loose[,] dry coal up to 48 (inches) at the transfer point and from 0 to 12 (inches) elsewhere with up to 2" (inches) of float dust present in the haulways was present. The entire section was very dry with up to 0.3 % methane in the No. 2 entry.

P. Exh. 2. The cited standard, section 75.400, provides that "[c]oal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Wyatt, as superintendent of the No. 1 Mine, and Salyers, as foreman at the mine, do not deny they were agents of the cited corporate operator, Middle Creek. Rather, they maintain there was no violation of section 75.400 and even if there was that they did not knowingly authorize order or carry out such violation.

With regard to the existence of the alleged violation, I find it existed as charged. May was specific, and to my mind credible, in his testimony describing the accumulations, and if he was less specific in articulating their parameters in the body of the citation than in his testimony it is understandable, for it is clear that the accumulations were extensive in size and varied in consistency. Nor was May the only witness who noted the presence of the accumulations. Keene, who was the foreman on the shift during which the accumulations were cited, agreed the section was in need of "some cleaning." Tr. 269.

May's testimony that the accumulations existed from the face areas outby to the transfer points for approximately 200 feet was persuasive. It is true that May for the most part judged the existence and consistency of the accumulations by "eyeballing" them. But, there was at least one instance (in the vicinity of

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the coiled cable) where he sat in the accumulated coal dust and found it to be about 2 inches thick and dry.

The credibility of May's testimony is further enhanced by the fact that he recalled the accumulations as varying in their characteristics -- testimony that is generally reflective of actual mining conditions. For example, May noticed that in some places in the entries the coal had been pushed up against the ribs while in other places machines had run through it, helping to reduce it to dust and leveling it out.

In addition, May's description of the coal dust that had accumulated at the feeder also was persuasive. He knew the height of the entry at the feeder was approximately 51 inches and he observed that coal dust had accumulated to the roof. I am persuaded that he accurately described the accumulations at the feeder not only by his specific testimony of their extent, but also by Vinson's statement that when he viewed the feeder around 6:40 a.m. on February 14, he did not believe procedures had been undertaken to move the feeder so that areas adjacent to it could be cleaned. I am further persuaded by Vinson's acknowledgement that the sides of the feeder could have been cleaned by shovel but that it would have taken a miner up to five hours to do it, and by the fact that the testimony does not indicate such a clean up, or indeed any other kind of clean up, was undertaken at the feeder between the time Vinson observed the feeder and the time May arrived on the section. Further, Keene too noted accumulations at the feeder.

May believed that there had been some attempt to rock dust and to clean up the entries and crosscuts before he observed the section, and the evidence establishes that May was correct in this regard. However, the clean up effort was inadequate. Vinson stated that in general the clean up program at the mine required the 11:00 p.m. to 7:00 a.m. shift to clean up what was left from the two production shifts and I believe this to have been true.

Because there was no testimony to the contrary, I also credit Vinson's testimony that Wyatt listed the jobs Vinson was to assign his crew to do, that the cleaning up of accumulations and rock dusting were always on the list, and that this was so for the 11:00 p.m. to 7:00 a.m. shift on February 13 and 14. According to Vinson, the program followed by the 11:00 p.m. to 7:00 a.m. shift generally was to send only one person to work for approximately three hours to clean up the section. Vinson stated that usually this was adequate. However, it seems certain that the usual program was not adequate on February 14, especially with regard to the accumulations at the feeder, which existed when Vinson left the section and which I believe were essentially the same accumulations found by May.

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I conclude, therefore, that May properly found a violation of section 75.400. The testimony of May, who eyeballed the accumulations, and who was able to describe their consistency and extent was persuasive and, in my opinion, the Respondents did not present any testimony to overcome it. Moreover, and as I have stated, the fact that May was unable to describe with precise specificity the depths of the accumulations in each entry and crosscut does not, in my opinion, detract from his overall credibility, for it is clear to me that the accumulations were extensive.

#### KNOWING VIOLATION

The violation having been established the question is whether Wyatt and Salyers "knowingly authorized, ordered or carried [it] out?" The Commission has defined the term "knowingly," as used in section 110(c) as having the meaning:

that [is] used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . [T]his interpretation is consistent with both the statutory language and the remedial intent of the . . . Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (January 1981), aff'd, 669 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

May testified that Wyatt told him that Vinson's crew had not gotten the section cleaned. Tr. 176. May believed that a conscious decision was made by Wyatt to produce coal in any event and to put production ahead of safety. Tr. 176-177. However, even if Wyatt stated to May that Vinson's crew had not cleaned the section, it does not follow that Wyatt necessarily knew this before the conditions were pointed out to Wyatt by May. Rather, it could be that Wyatt assumed after he and May observed the accumulations that they were the result of inadequate clean up by Vinson's crew. Thus, the Secretary's case for a "knowing violation" must be established, if it is established at all, on another, less ambiguous basis.

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In my view, the chronology of events provides such a rationale. May arrived at the mine at approximately 2:00 p.m. At that point Wyatt had been underground for approximately two hours and by Wyatt's own testimony he had been on the 001 section where he had inspected the continuous miner. Salyers, who was the foreman of the shift during which Wyatt was underground, did not testify. But Keene, the foreman immediately after Salyers' shift, stated that when he arrived on the section, the entire section was in need of some cleaning, and there was no testimony that Keene had the section cleaned prior to May's arrival. Indeed, common sense dictates that there was not time to have had this done.

May testified, and I have accepted, that accumulations existed in each entry for a distance of approximately 200 feet or more. These accumulations were visually obvious. I believe it permissible to infer from the presence of accumulations at the beginning of Keene's shift that during Salyer's shift the same or substantially similar accumulations existed and that they existed when Wyatt was underground before May arrived. It is not clear where the continuous miner was positioned when Wyatt was underground and it may be that it was not where May observed it because the Secretary and Wyatt agree that at least some mining may have been done after Wyatt viewed the machine. Nonetheless, if the presence in the entries of the same or substantially similar accumulations can be inferred while Wyatt was underground, it can also be inferred that to reach the continuous miner Wyatt would have had to pass through areas containing the accumulations. Since the accumulations were obvious, I find that Wyatt knew of the existence of the accumulations prior to May observing them.

It having been established that Wyatt knew of the violation, the question becomes whether Wyatt acted to try to eliminate the condition? There is no evidence that he did, and the lack of any such evidence leads me to conclude that Wyatt knowingly violated section 75.400 and accordingly is liable for a civil penalty pursuant to section 110(c) of the Act.

I also conclude that Salyers knowingly violated the standard. As I have found, the violative accumulations found by May on the 001 section were extensive, and I have concluded that the same or essentially similar accumulations existed during Salyers shift. As foreman, Salyers was responsible for the conditions on the section. The accumulations were visually obvious and I conclude Salyers knew of their existence.

As with Wyatt, the question becomes whether Salyers acted to try to eliminate the condition? I have noted that Salyers did not testify on his own behalf. I note as well that there is nothing in the record from which to infer that he tried to clean up the accumulations before Keene's shift took over. Indeed,

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because Keene did not get the usual oral preshift report from Salyers and thus was not alerted to the presence of the accumulations prior to coming on the section, the implication is that Salyers did not give elimination of the accumulations the priority it deserved.

Salyers' argument that his job was to run coal and clean what he could and that he could not keep the section clean with the number of people he had on hand, is no excuse for failing to take steps to try to remove the accumulations. The law may not in all instances require the agent of a corporation, such as a foreman, totally to correct an existing violation but it does require him or her to try. A foreman cannot simply neglect the problem because there is "no way" to correct it.

I conclude therefore that Salyers also knowingly violated section 75.400 and accordingly is liable for a civil penalty pursuant to section 110(c) of the Act.

30 C.F.R. 75.517

Citation No. 3507924 states in part:

The 480 three phase continuous mining machine's trailing cable in use on the 001-0 section has 18 damaged places where the outer jacket was removed with inner leads visible. 1 place was 25" (inches) long [.] Another place had outer and inner insulation removed with bare phase and ground wires present. This was located on dry, float coal dust down the No. 5 entry to the section transformer.

P. Exh. 1. The cited standard, section 75.517, provides, "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

As previously mentioned, Wyatt does not deny that he is an agent of Middle Creek. Wyatt's attack on the violation essentially consists of challenging the credibility of May's testimony regarding the number of places where the outer jacket of the cable was torn and presence of a piece of wood being used as a wedge to separate the exposed conductor and the ground wire.

I am persuaded, however, that May's testimony regarding the condition of the cable is accurate to the extent that there were 18 places requiring taping or retaping due to tears in the cable's jacket. May counted the places. May helped to tape the cable. In addition, Lawson, Bernard Salyers, Keene and Wyatt agreed the cable was defective and subject to repeated splitting,

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and I accept that this was true. The propensity of the cable to split lends further credence to May's version of what he found.

I also conclude that at one of the tears the bare wire of one of the conductors inside the cable was exposed through the tear. While I agree with Wyatt that May's failure contemporaneously to record the existence of the alleged piece of wood that supposedly separated the conductor and the ground wire casts doubt upon its existence, I conclude that the question of whether or not the wood was present is beside the point when considering the existence of the violation. Section 75.517 requires the cable to be insulated adequately and fully protected. When the outer jacket is torn, as it was in 18 instances, the cable is not adequately insulated and the standard has been violated. Artificial separation of a naked conductor from a ground wire would simply augment the overall gravity of the violation.

#### KNOWING VIOLATION

The violation having been established, the question is whether Wyatt knowingly violated it. There is no doubt that the generally defective nature of the cable was known to Wyatt. However, this does not establish a knowing violation, unless in some fashion Wyatt did nothing to protect against the cable splitting and his failure to act lead directly to the 18 tears in the cable. It must be recognized that use of the cable was acceptable to MSHA, provided it was adequately taped. Afterall, and as Wyatt points out, once the violation was abated by taping the tears the cable was left in use for one or two months more.

In my view, the Secretary has not established that Wyatt failed to act to prevent the cited tears. Rather, the testimony leads me to conclude that Wyatt took some pains to make certain the cable was properly taped. Lawson's testimony that prior to the violation being cited Wyatt directed Lawson and all other electricians to "keep an eye on the cable" was not refuted. Similarly, his testimony that Wyatt ordered the cable turned to reduce the tears was not contradicted. While Lawson also testified he suggested to Wyatt that the cable be replaced, I do not draw an inference adverse to Wyatt from the fact that it was not taken out of service. As I have noted, use of the cable apparently was acceptable to MSHA provided it was adequately repaired. I further recognize that when the violation was cited, Middle Creek was awaiting an opinion from the company from whom it had purchased the cable regarding why the cable was prone to split and what could be done about it. The advice was sought while Wyatt was superintendent and is additional evidence that action was being taken in response to the problem.

Given the fact the cable could be used provided it was properly taped, I do not find persuasive counsel's argument that

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Wyatt knew the cable was defective and should have had it replaced prior to being cited for the violation of section 75.517. Nor do I find that the Secretary has established that on February 14, Wyatt knew or should have known of the existence of the tears in the cable.

I have found that on February 14, Wyatt was on the 001 section prior to May's arrival and it is true that Wyatt directed his attention to the condition of the continuous miner. However, it is not certain where the continuous miner was located and thus it is not certain Wyatt had to walk past the area of the cable where the tears existed in order to reach the miner. Moreover, even if he did pass the defective area of the cable while he was on the 001 section, there is no basis from which to infer the tears (unlike the accumulations) were so visually obvious he would or should have observed them while passing by. May found them because he was specifically inspecting the cable and the evidence does not suggest to me that Wyatt should have made a special point of examining the cable. While the splitting of the cable was admittedly an ongoing problem, from Wyatt's viewpoint it seems reasonable to have believed that his directives to "keep and eye on the cable" and to keep it taped were being followed. He had instructed all of the electricians in this regard, and his testimony that the cable was not a frequent topic of discussion at daily safety meetings was not contradicted or challenged.

Therefore, I conclude that Wyatt did not knowingly authorize or order the violation of section 75.517, and I will dismiss this portion of the Secretary's penalty petition at the close of this decision.

GRAVITY OF VIOLATION  
AND OTHER  
APPLICABLE CIVIL PENALTY CRITERIA

Having found that Wyatt and Salyers knowingly violated section 75.400, I now turn to the gravity of the violation and to the other applicable civil penalty criteria. The accumulations of loose coal and coal dust were extensive, they were dry and they existed in the immediate vicinity of potential ignition sources. I credit May's testimony that the feeder mechanism contained many such sources -- bearings, electric motors, gears and pulleys -- the malfunction of any one of which could have ignited the accumulated coal and coal dust. I also note that the defective cable was lying in coal dust and that had the conductors contacted one another the circuit breaker, which was supposed to de-energize the cable, could have failed and the an ignition could have resulted. Indeed, even if the circuit breaker functioned properly an arc or spark would have occurred first and the coal dust could have ignited. The fact that the continuous miner may have been "down" at the time the violation was cited is beside the point, because Middle Creek expected to



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repair it and resume mining presently. Given the extent and nature of the accumulations and the presence of numerous potential ignition sources, I conclude the violation was very serious.

Because I have found that Wyatt and Salyers actually knew of the existence of the accumulations and failed to take steps to eliminate them, I find that both exhibited more than ordinary negligence in allowing the violation to exist.

I also find that Wyatt exhibited good faith in attempting to achieve rapid compliance with section 75.400 after the violation was cited.

There is no evidence that Wyatt and Salyers, acting on behalf of Middle Creek, had any history of being cited previously for knowingly violating the Act or the mandatory health and safety standards promulgated pursuant thereto.

#### CIVIL PENALTY

The Secretary has proposed that a civil penalty of \$700 be assessed against Wyatt for the violation of section 75.400 and that a civil penalty of \$400 be assessed against Salyers. I find both these proposals somewhat excessive in view of the fact that Wyatt and Salyers, especially Salyers, appeared to me to be persons of limited means. Still, if section 110(c) is to have a deterrent effect, penalties assessed pursuant to it must be more than a slap on the wrist. Those penalized must realize that the authority of their positions carries a heightened responsibility to act to eliminate violative unsafe conditions once they are known. Accepting the continuing existence of violations by doing nothing to eliminate them after discovery is to fail to act in accord with the responsibility the Mine Act places upon those who function on the corporate operator's behalf.

I therefore assess a civil penalty of \$400 against Wyatt for his knowing violation of section 75.400 and a civil penalty of \$200 against Salyers for his knowing violation of section 75.400.

#### ORDER

DOCKET NO. VA 92-83

The Secretary's petition to assess a civil penalty against Henry Salyers for the violation of Section 75.400 is GRANTED. Henry Salyers is ORDERED to pay a civil penalty of two hundred dollars (\$200) within thirty (30) days of the date of this decision for the violation of section 75.400 as cited in Citation No. 3507925 on February 14, 1991, at Middle Creek's No. 1 Mine.

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DOCKET NO. VA 92-84

The Secretary's petition for assessment of civil penalty against Darryl Keene is DISMISSED.

DOCKET NO. VA 92-89

The Secretary's petition for assessment of civil penalty against Steve Vinson is DISMISSED.

DOCKET NO. VA 92-93

The portion of the Secretary's petition for assessment of civil penalty assessment against Jimmy Wyatt for the violation of section 75.517 as cited in Citation No. 3507924 is DENIED. The portion of the Secretary's petition for assessment of civil penalty against Jimmy Wyatt for the violation of section 75.400 is GRANTED. Jimmy Wyatt is ORDERED to pay a civil penalty of four hundred dollars (\$400) within thirty (30) days of the date of this decision, for the violation of section 75.400 as cited in Citation No. 3507924 on February 14, 1991, at Middle Creek's No. 1 Mine.

David F. Barbour  
Administrative Law Judge

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