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SOL (MSHA) V. TALON RESOURCES  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 93-16  
Petitioner : A.C. No. 46-07445-03534  
v. :  
: Campbell's Creek No. 2  
TALON RESOURCES, INC., :  
Respondent :  
:

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 93-393  
Petitioner : A.C. No. 46-07445-03551-A  
v. :  
: Campbell's Creek No. 2

RICHARD GARRETT, EMPLOYED BY :  
TALON RESOURCES :  
INCORPORATED, A/K/A :  
WYNCHESTER MINING COMPANY, :  
INCORPORATED, :  
Respondent :  
:

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 93-402  
Petitioner : A.C. No. 46-07445-03549-A  
v. :  
: Campbell's Creek No. 2

RICHARD ABRAHAM, EMPLOYED BY :  
TALON RESOURCES :  
INCORPORATED, A/K/A :  
WYNCHESTER MINING COMPANY, :  
INCORPORATED, :  
Respondent :  
:

DECISIONS

Appearances: Heather Bupp-Habuda, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Petitioner;  
Dina M. Mohler, Esq., Kevin A. Nelson, Esq., Kay,  
Casto, Chaney, Love & Wise, Charleston, West  
Virginia, for the Respondents.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to the Federal Mine Safety and Health Act of 1977. Docket No. WEVA 93-16, concerns a civil penalty proposal filed by the petitioner against the respondent Talon Resources, Inc., for an alleged violation of mandatory safety standard 30 C.F.R. 75.1701. The petitioner seeks a civil penalty assessment of \$2,000, for the alleged violation.

Docket Nos. WEVA 93-393 and WEVA 93-402 concern civil penalty proposals filed by the petitioner against the named individual respondents pursuant to section 110(c) of the Act for allegedly "knowingly" authorizing, ordering, or carrying out the alleged violation served on Talon Resources in Docket No. WEVA 93-16. The petitioner seeks civil penalty assessments of \$1,000, against each of the individual respondents for the alleged violations.

The respondents filed timely answers denying the alleged violations, and a consolidated hearing was held in Charleston, West Virginia. The parties filed posthearing briefs and I have considered their arguments in the course of my adjudication of these matters.

Issues

In Docket No. WEVA 93-16, the issues include (1) whether the corporate operator Talon Resources Incorporated (hereinafter Talon), violated the cited mandatory safety standard; (2) whether the violation was "significant and substantial" (S&S), (3) whether the violation was the result of an unwarrantable failure by Talon to comply with the cited standard; and (4) the appropriate civil penalty to be assessed, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

In the two individual section 110(c) cases, the principal issue is whether or not the named respondents knowingly authorized, ordered, or carried out the alleged violation, and if so, the appropriate civil penalties that should be assessed for the violation taking into account the relevant criteria found in section 110(i) of the Act. Also in issue is whether or not the violation was "S&S" and whether or not it was the result of an unwarrantable failure to comply with the requirements of the cited standard.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801, et seq.
2. The presiding Judge has jurisdiction to hear and decide this matter.
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

The Section 104(d)(1) "S&S" citation No. 2729003, issued on July 14, 1992, at 11:00 A.M., by MSHA Inspector Leo R. Inghram, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.1701, and it states as follows

The No. 3 entry of the No. 4 panel section 002-0 mined into an abandoned coal mine which could contain dangerous accumulations of water and gases. The mine was inaccessible and could not be examined for hazards. Test holes had not been drilled in any of the faces of the No. 4 panel prior to cutting into the abandoned mine. The mine operator continued to mine near the area where he cut into the abandoned mine without drilling test holes. A cross cut was mined between No. 4 and 5 entries which is within 200 feet of the abandoned mine (approximately 80 feet). Also, rooms were started to the right in the No. 5 entry of the No. 4 panel, and No. 1 room was approximately 175 feet away from where No. 3 entry cut into abandoned mine.

The mine operator did not have a map showing the abandoned mine and did not know how far or near the rest of the abandoned mine was to the No. 4 panel section, yet the operator continued to mine in the general area of the abandoned mine without drilling test holes. The operator cut into the abandoned mine at approximately 0930 on 7-13-92, and was observed mining in the general area near the abandoned mine at 0900 on 7-14-92. The mine operator has since (about 1000 A.M. 7-14-92) obtained an uncertified map of the abandoned mine, but has not transposed it on to his certified map of the Campbell's Creek No. 2 mine.

MSHA Inspector Leo R. Inghram, Jr. confirmed that he conducted a mine inspection on July 14, 1992, and issued a violation because of the failure by Talon to drill test holes while mining on an active section near an abandoned coal mine that could not be inspected (Tr. 10). He stated that he arrived

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at the mine at 7:20 A.M., and that two state mine inspectors were there. They told him that the respondent had cut into an old mine and they proceeded underground to the number four panel section to investigate the situation. Mr. Inghram found that the number three entry had cut into an abandoned coal mine and that Talon and MSHA were unaware that the mine was there and it was not shown on a map that had been submitted to MSHA (Tr. 12).

Mr. Inghram testified that he cited a violation of section 75.1701, after determining that mining was conducted within 200 feet of the abandoned adjacent mine without drilling the required test bore holes. Referring to a mine map (Exhibit G-2), he identified the area where the number three entry cut through into the abandoned mine. He stated that he was informed by the respondent operator that the breakthrough occurred the previous day, July 13, at approximately 9:00 A.M. (Tr. 15).

The inspector stated that after the breakthrough, mining continued in the last open crosscut between the number four and five entries, and rooms were started to the right off the number five entry. Although the entry numbers are not shown on the mine map, he stated that it was a common industry practice to number the entries from left to right, and he marked the map accordingly (Tr. 17). He believed that mining was taking place and he observed a mining machine loading a shuttle car, but was not sure whether it was in the crosscut or in the number one room (Tr. 18).

The inspector stated that he determined that the crosscut that was mined between the number four and number five entries was within 200 feet of the abandoned mine by taking into account the fact that the entries were on 80-foot centers, as shown by a map of the number four panel that was obtained by the state inspector from Talon and then given to him by the State inspector (Exhibit G-3; Tr. 19). The inspector explained that the drawings on the map were made "to try to determine a two hundred foot length from where they cut into the old mine", and that he and a state inspector (Gillian) used a rule or scale to make their calculations while "trying to determine the probable two-hundred foot limit line" (Tr. 21).

The inspector stated that the calculations shown on the map were made the same day the citation was issued, and that the calculations were made to determine how far the respondent would have to retreat away from the abandoned mine in order to continue mining without drilling the required test holes (Tr. 21). He explained that the solid line drawn on the map (Exhibit G-3), indicates where the breakthrough occurred, and the broken line reflects where mining could legally continue outby that line. He determined that mining could legally continue in the number two, three, and four rooms, and any areas outby the number two room,

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without drilling test holes. Mining could have been done in by the number two room but only if test holes were drilled in advance (Tr. 22-23).

The inspector stated that the 200 foot limits as shown on the map (Exhibit G-3), were drawn at an angle because "where they had cut through into the old mine, you could only see a short distance back in there and it appeared that the entry from the abandoned mine was coming in at this angle", as shown by the solid line (Tr. 23). He explained that his calculations were made "by visually looking at it" because he had no way of going into the area (Tr. 23). He confirmed that at the time the map was prepared, he and the state inspector did not have a map relating to the abandoned mine, and no one at the mine had such a map (Tr. 24). However, he recalled that he may have seen a copy of the abandoned mine map on the day the citation was issued, or the next day, but his notes reflect that the abandoned mine, identified as the "Big Bottom Coal Company," had not been recorded on the mine map at the time of his inspection (Tr. 27).

The inspector stated that previous to the breakthrough the abandoned mine was not part of the respondent's mine, but he believed that it would now be considered part of the mine because during his last visit there the old mine was being ventilated from the Campbell Creek mine breakthrough, and he has taken air samples at the old mine entries, and noticed "a small stream of water" coming out of one of the entries (Tr. 32-35). He confirmed that he has never entered the old Big Bottom mine from inside the Campbell's Creek Mine, and has no knowledge of anyone else going into the old mine (Tr. 36).

The inspector described the condition of the breakthrough on July 14, as follows at (Tr. 36-37):

- A. The number three entry had cut through into the old mine in the left-hand corner of the entry. And you could shine -- You could see back in there a little ways with your light, but the area was unsupported and it couldn't be examined at that particular time.
- Q. Okay. How big a hole, as far as feet or inches, would you say there was when you arrived on the fourteenth?
- A. I'm not --
- Q. Approximately.
- A. Approximately, I would say maybe right to ten feet. I'm not sure.

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Q. Eight to ten feet high?

A. Wide.

Q. And how high? Again, approximately.

A. This is speculation. Normally, the coal in this mine runs about ten foot high. So I would say on the Campbell's Creek Number two side, it was probably about ten feet high, something like that.

The inspector stated that he could not approach close enough to look into the old mine entry because the roof at the breakthrough area and corner were unsupported. Looking from a distance, he estimated that there was probably two or three feet of fallen rock on the old mine floor and that the height of the entry appeared to be "six feet or so", but he could not get close enough to look back into the old mine (Tr. 37-38).

The inspector stated that he based his "S&S" finding on the fact that the old abandoned mine was not being ventilated other than with the air leaking through from the Campbell mine, and that old mines can contain low oxygen levels and have water accumulations when they are not worked and water is not being pumped out. He confirmed that he made some tests at the mine opening during his inspection and he found no methane, and the oxygen was good. He explained that he was measuring the air coming from the Campbell's Creek mine and going into the abandoned mine, and he confirmed that air was being coursed through the old mine from a blowing fan in the Campbell mine. He determined that seven miners were affected by the citation, and he identified the respondent Richard Garrett as the day shift section foreman (Tr. 39-40). The inspector confirmed that old abandoned mines that are not ventilated or pumped of water, "could possibly contain dangerous accumulations of gas and water" (Tr. 41).

The inspector stated that after the initial breakthrough, mining continued for approximately three shifts, and he assumed that there were no hazardous conditions on the section while this mining was taking place (Tr. 42). After the initial breakthrough, mining continued "off to the right" and no further breakthroughs were made during this time (Tr. 44). The inspector described the areas where mining continued and he marked the entries and rooms on the mine map, and explained that the areas that are "blackened in" on the map are the areas and rooms that were mined after the breakthrough (Exhibit S-2; 45-46).

The inspector stated that he spoke with foreman Garrett on July 14, about the breakthrough, and informed him that he saw no evidence of any test holes being drilled while mining was still

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going on in the vicinity of the abandoned mine. Mr. Garrett informed him that no test holes were drilled and stated that "we don't have anything to drill with", and this is recorded in his notes (Exhibit S-4, pg. 8, Tr. 48). Mr. Garrett also informed him that he was aware of the fact that test holes were required to be drilled when near an old mine, and that he had called Mr. Abraham who told him to "start the mining to the right, off number five entry", and the inspector assumed that Mr. Garrett contacted Mr. Abraham on July 13, the day of the breakthrough into the abandoned mine (Tr. 48-49).

The inspector stated that he decided to cite the violation as a section 104(d)(1) unwarrantable failure citation because of Talon's high negligence for continuing to mine in close proximity to the abandoned mine without drilling test holes, and because there was no map indicating the extent of the abandoned mine and whether they were heading toward the old mine again (Tr. 49).

The inspector stated that according to his calculations the number one room off the number five entry was approximately 175 feet from the original breakthrough at the number three entry, and that the "probable two-hundred foot limit" shown by the solid and broken lines on Exhibit S-3, was based on the calculations that he and the state inspector made. He stated that "as far as actually knowing the limits of the old mine, no, we didn't know. And I don't think anybody else did either" (Tr. 50).

The inspector confirmed that the initial breakthrough was an accident and was not a violation. The violation was issued because of the mining that continued within 200 feet of the breakthrough area without drilling test holes to determine the location of the old abandoned mine (Tr. 51).

The inspector further explained the hazards associated with the failure to test drill within 200 feet of an abandoned mine (Tr. 51-57). He stated that the date on the map showing the Big Bottom Coal mine reflects that the last known date of mining was December 10, 1925 (Tr. 57). He further explained his "S&S" and "reasonably likely" gravity findings (Tr. 58-62).

The inspector stated that at the time of his inspection he did not ask anyone whether or not they had entered the old abandoned mine, and he saw no visible evidence that anyone had entered that mine. He believed that there was enough room from the size of the breakthrough for someone to go into the old mine (Tr. 63).

In response to further questions, the inspector confirmed that he did not speak to Mr. Abraham when the citation was issued, but he was not sure whether he spoke with him later that day. The inspector stated that "there was a lot of confusion



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going on outside. People were scurrying around, hunting a map" (Tr. 64). He further stated that "they were looking for a map to try to determine the location and extent of that old mine in relation to where they were mining so they would have a general idea of where to mine, probably away from that mine, I would say" (Tr. 64).

In response to a bench question as to whether he would have issued a violation if Talon had produced a map showing that the abandoned mine was further than 200 feet from where mining was taking place on July 14, the inspector stated that "I think we still had a violation because that mine was unsafely examined. The roof was not supported in that mine. It was driven many years ago" (Tr. 65). He explained that "the law requires them to examine an area of an abandoned mine when they approach within two hundred feet of this mine" (Tr. 66). He explained further that he would not have issued a violation if the respondent had produced a certified map showing that the abandoned mine was 500 feet away (Tr. 66).

The inspector reiterated that no one, including Mr. Abraham, informed him that anyone had entered the old mine and examined it and found it safe. He stated that he first learned about someone stating that they had entered the old mine during the taking of a deposition in this case (Tr. 68).

On cross-examination, Inspector Inghram stated that Talon was never required to drill test holes at the mine, and it was not required to do so after he issued the citation (Tr. 72). He confirmed that there was a second breakthrough approximately a month after the initial one, and that he went to the mine to examine the second incident and took notes. He confirmed that the second breakthrough occurred on August 17, 1992, and that the dotted line shown on map Exhibit S-2, showing the extension of the 200 foot limit from the old mine was "essentially a theorization of where that mine extends now" (Tr. 74). He confirmed that after the second breakthrough the previous map of the old mine received by Talon was not entirely accurate (Tr. 74).

The inspector confirmed that the conditions of the second breakthrough were the same as the first one, but he never required any test drilling, and he found no hazardous amounts of water, methane, or oxygen. However, mining was discontinued in the area and moved to a different area away from the breakthrough (Tr. 75-76).

The inspector stated that the highlighted solid line shown on map Exhibit G-3, is his estimation of the location of the abandoned mine on July 14, 1992. He confirmed that he and the state inspector drew this line based on "our observation of the old mine, it appeared it was going in that general direction.

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This is probable. This is not a survey", and that it was his "best guess as to where the mine lay" (Tr. 77). When asked if he was wrong, he replied "I may be wrong about the direction, but the mine was within that areas, according to the map that you submitted to us" (Tr. 77). He explained that map Exhibit S-2, submitted to MSHA, clearly shows a broken line labeled "200 ft. barrier", and that it falls within the crosscut at the No. one room (Tr. 78). He confirmed that this line does not go in the direction of the entry that cut into the old mine, and that it starts at the right-hand side of the Number three entry, and that the place that was actually mined through and opened up was on the left side of that entry (Tr. 79).

The inspector stated that he made no actual measurements to determine that the number one room was within 200 feet of the breakthrough, and that his calculations were based on the map submitted to MSHA, and that the calculations made at the time the citation was issued was based on an "imaginary line" of where he believed the mine was located (Tr. 80).

The inspector stated that he received no telephone call reporting the initial breakthrough and that he was unaware of any call made to MSHA by Mr. Abraham, or any calls to the state inspectors. He confirmed that these inspectors were at the mine because they knew about the breakthrough (Tr. 81). He confirmed that he issued the citation because mining was taking place within 200 feet of the abandoned mine that could not be examined for accumulations of water and gases and no test holes were being drilled (Tr. 82). He confirmed that his notes do not reflect the exact location where mining was taken place on July 14, "other than they were mining to the right, in rooms to the right" (Tr. 82-83).

The inspector confirmed that the Campbell's Creek mine has no history of dangerous accumulations of methane and that he did not issue the citation out of concern that dangerous levels of methane would be encountered during mining. With regard to the possibility of cutting into dead-end entries, the inspector stated "I don't know how the old mine lay and we still don't know for sure" (Tr. 89). He agreed that once the breakthrough occurred, the air from the Campbell mine was going out the old mine (Tr. 90).

The inspector testified about possible water hazards in the old mine, and confirmed that he found no dangerous accumulations of water (Tr. 91). He stated that he was not sure of the mine elevations, and confirmed that he saw water coming out of the mouths of the abandoned mine. He believed that it was possible that dangerous water levels would be encountered by mining into the old mine because the respondent did not know the actual extent of the mine. He stated that he could not examine the mine in any detail, but based on his past experience, he believed that

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water can accumulate in a mine that is not being maintained (Tr. 94). He confirmed that he did not know what the conditions were in the abandoned mine other than what he could see through the breakthrough (Tr. 93-94, 96).

The inspector stated that he based his "S&S" finding "on the probability that they could cut in this mine at another location away from this original breakthrough and then possibly encounter accumulations of water or low oxygen or whatever" (Tr. 97). He further stated that he based his finding "on what was possible", and "not this particular fifty or sixty or eighty here that I could see" (Tr. 97). He confirmed that he did not include the Number 2, 3, and 4 rooms off the Number 5 entry as part of the affected areas described in his citation for the following reasons (Tr. 99):

THE WITNESS: Because when I obtained the mine map and the calculations on the mine map made by the state inspector and myself, it was determined that those rooms -- And this is a probable two-hundred-foot limit -- it was determined by Mr. Gillian and myself that those Number two, three and four rooms were not within the two-hundred-foot limit and were very unlikely to cut into that mine.

We didn't know the extent of this. We don't know the extent -- I can't say that two, three and four entries were within two hundred feet of that old mine. But I could say with a little calculation on the mine map and things that the crosscut between number four and number five entry and number one room was probably within two hundred feet of that old mine.

The inspector confirmed that when he was at the breakthrough area on July 14, a curtain may have been installed at that location, but he was not sure (Tr. 101). He confirmed that when he took the air samples shown in Exhibit R-1, the Big Bottom Mine had been incorporated as part of the Campbell's Creek Mine (Tr. 102). He explained where he took one of the samples at the surface of the Big Bottom Mine. He confirmed that the citation was terminated without the drilling of any test holes, and that after the second breakthrough, he still did not require the drilling of any test holes (Tr. 104).

In response to further questions, the inspector stated that when the August 17, 1992, accidental breakthrough occurred, he did not believe that the 200 foot barrier lines shown on map Exhibit S-2, were shown on that map, and no citation was issued at that time because based on the map, the breakthrough was not

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within 200 feet of the abandoned mine, and it was an accident because the respondent had no knowledge of the old mine area and mining had ceased in that area (Tr. 107).

With regard to the highlighted 200 foot line shown on Exhibit S-3, the inspector explained that he drew it at an angle toward the top of the map rather than to the left or right in another direction because "to the right is where they were mining or wanting to mine on this panel, starting these rooms off the Number five entry. So we drew the line to the right and our two-hundred-foot line to the right so that they could come out by there and continue mining. They were wanting to continue mining" (Tr. 108). He stated further that "we were calculating on this map to determine whether they could go ahead and mine, so that they could be within two hundred feet -- or would be two hundred feet away from that old mine, so they could go ahead and continue production that day" (Tr. 109).

The inspector stated that the breakthrough entry was "driven straight ahead where they cut through", and that the entry of the old mine "was going to the right, as near as I remember". When asked if it was on an angle to the right, he replied "I don't know how radical, but it was going to the right, according to this, not as much as I thought, well, it's still a pretty good angle" (Tr. 109).

MSHA Special Investigator Charlie M. Meadows testified that he conducted a combined investigation of the two individual respondents, beginning in August, 1992, and ending on December 2, 1992. He stated that he interviewed nine individuals, including Keith Stephens, and the two respondents in these proceedings (Tr. 116-119). He stated that after speaking "with mine management and associates of management" it was determined that after cutting through into the old mine, which was not a violation, "they elected to go ahead and mine in a close proximity of the old mine that they cut into, not knowing what was there at that point in time" (Tr. 120).

With respect to respondents Abraham and Garrett, Mr. Meadows stated that based on the "testimony" he received, which was "pretty close", "each one of them stated that they cut into the old mine" (Tr. 120). Mr. Meadows stated that Mr. Abraham and Mr. Garrett had a telephone conversation and "they elected to go ahead and mine the breakthrough and turn the rooms". When the second shift came on, shift foreman Stephens was instructed by Mr. Garrett "to go ahead and mine in that area" (Tr. 121).

Mr. Meadows stated that Mr. Stephens was also "Charged with a civil penalty". However, the petitioner's counsel confirmed that this was not the case, and that no civil penalty proceeding was filed against Mr. Stephens (Tr. 122).

Mr. Meadows stated that Mr. Garrett told him that after the initial breakthrough was made he called Mr. Abraham, who was not aware of the old mine, and Mr. Abraham told him to mine through the crosscut and to start mining to the right off the number five room (Tr. 122).

Mr. Meadows stated that he spoke with Mr. Abraham and was informed that when Mr. Garrett called him Mr. Abraham checked the available mine map at the mine office and the old mine was not shown. Mr. Abraham then called the lessee of the coal seam and an old map was obtained from an engineering company and it was plotted onto the mine map. Mr. Meadows stated that Mr. Abraham explained to him that "he didn't think he was in violation of the law when they started to the right because he wasn't going toward the old mine", and Mr. Garrett stated that he was following Mr. Abraham's instructions (Tr. 123).

Mr. Meadows explained further that he was told by Mr. Garrett that after he informed Mr. Abraham that "he worked the crosscut between number four and five", Mr. Abraham told him to "pull the equipment back and start the section to the right". Mr. Meadows also believed that Mr. Garrett told Mr. Abraham that air was going into the old mine, that there was no water at the area that was cut through, and that Mr. Garrett believed he could turn the crosscut between four and five because the entries was up ahead of where the crosscut would be (Tr. 125). Mr. Meadows stated that as far as he knew, Mr. Garrett and Mr. Abraham did not discuss any test drilling (Tr. 126).

Mr. Meadows stated that Mr. Garrett told him that "he knew he should have been drilling test holes in that area" but that he didn't have a drill to use (Tr. 126-127). Mr. Meadows stated that he prepared a separate memorandum (Exhibit 5-a) concerning Mr. Garrett's Admission that he knew that mining without test drilling was a violation, but Mr. Garrett did not want this statement to be in his signed statement (Exhibit 5; Tr. 127-128). Mr. Meadows stated further that he prepared a memorandum of his interview with Mr. Abraham from his notes recording what Mr. Abraham told him (Exhibit S-6). Mr. Meadows also identified a statement taken from second shift foreman Keith M. Stevens (Exhibit S-7).

On cross-examination, Mr. Meadows explained what occurred and what was said when he conducted his interviews with Mr. Garrett and Mr. Abraham (Tr. 154-173). In response to certain bench questions, Mr. Meadows stated that Mr. Abraham never admitted that he knew that test holes needed to be drilled. Mr. Meadows confirmed that Mr. Abraham was not aware of the existence of the old mine before the initial breakthrough was made, and that he recommended that Mr. Abraham be charged pursuant to section 110(c) of the Act because he knew about the old mine after the breakthrough, directed that mining continue in

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that area, and admitted that he instructed Mr. Garrett to continue mining (Tr. 173-174). He further explained his reasons for recommending a section 110(c) proceeding against Mr. Garrett (Tr. 175-176).

Keith M. Stephens, employed at the mine as an evening shift section foreman, testified that he was working on the second shift in July, 1992, and that there were ten miners on his crew. He confirmed that he worked on July 13 and 14, 1992, and changed shifts with first shift foreman Richard Garrett. He stated that on July 13, Mr. Garrett told him that he had cut into the old mine at the number three entry but did not encounter any gas or water (Tr. 184). Mr. Stephens stated that he asked Mr. Garrett about test drilling, and Mr. Garrett replied "no, we're going to back up and go to the right", and instructed him "to finish the breakthrough between four and five, back the miner back and mine on the rooms on the right. He already had them marked off with red paint" (Tr. 184).

Referring to map Exhibit S-2, Mr. Stephens explained where he continued mining after his discussion with Mr. Garrett. He stated that he asked Mr. Garrett about test drilling because "I didn't know if we were going straight ahead or what we was going to do" (Tr. 188).

Mr. Stephens identified his prior signed statement given to special investigator Meadows (Exhibit S-7), and he stated that he did not tell Mr. Meadows that "I felt we should test drill the crosscut", and that he does not use the word "basically" (Tr. 189-192). He further explained what Mr. Garrett told him as follows at (Tr. 191):

THE WITNESS: The way he told me was after I asked him, I said, "What about test drilling?" He said, "Finish the break, back up and start the rooms to the right."

THE WITNESS: Yes, Sir, I asked him, "What about test drilling?" But I didn't know -- At that time, I didn't know if we were going on or what we was going to do.

JUDGE KOUTRAS: And he just said, "Turn to the right and continue on."

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Do you remember him specifically telling you, "Forget test drilling"?

THE WITNESS: He said, "No, we're not going to drill. We're going to pull back to the right."

Mr. Stephens further explained the testimony that he gave during his deposition of October 12, 1993, (Exhibit S-10; Tr. 195-197). He agreed that he testified that during his discussion with Mr. Garrett he told him that "he felt" test holes should be drilled, and he did so because "it's the law" (Tr. 198).

Mr. Stephens confirmed that on July 13, 1992, the respondent did not have a drill for drilling test holes, and that he at no time entered the abandoned mine because the top was not supported (Tr. 201). He stated that at the start of his shift he looked into the number three entry where he cut the crosscut between four and five and that he took an air reading and tightened the curtain to prevent too much air from going into the old mine. Although two or three feet of roof had fallen at the breakthrough area, the roof was "smooth looking" (Tr. 202).

On cross-examination, Mr. Stephens stated that he was able to see approximately 100 to 150 feet into the old mine and observed no water. From his visual observation, it appeared to him that the direction of the old mine was "at a slight angle to the right" (Tr. 203). He confirmed that he made methane tests and found none present, and stated that he would not have continued mining the crosscut or rooms if he believed it was not safe to do so, and that "I just went ahead and knocked it through" (Tr. 204). He explained that he did not hesitate to mine the crosscut between the four and five entries because "they were past where the breakthrough was, and the angle of the entry of the old mine that had breakthrough" (Tr. 205). He "guessed" that the crosscut was mined approximately 25 to 30 feet back from the face of four and five, and confirmed that he did not mine the number one room (Tr. 205).

Mr. Stephens confirmed that Mr. Meadows came to his home to interview him and take his statement and he explained what transpired. He also explained what occurred when there was a second breakthrough in August, 1992, and confirmed that the mine was never placed under a drill plan (Tr. 206-210).

#### Respondent's Testimony and Evidence

Richard Garrett testified that he has been employed by Talon Resources, Inc., as a mine foreman for 17 years, and that he had 14 years of mining experience prior to this job. He confirmed that July 13, 1992, was his first day of official duty at the Number 2 mine, and that he had served at another mine as foreman on different shifts (Tr. 219).

Mr. Garrett described the prevailing mine conditions at the number three entry breakthrough area on July 13, and the conditions immediately prior to that event, and he stated that everything was normal and there were no indications that they

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were about to cut through into an old mine. He confirmed that he was with the miner operator when he cut into the old mine, and he indicated that the coal seam was "level to the eye" but sloped toward the working face of the area where they were working (Tr. 220-223).

Mr. Garrett stated that the miner made a 20-foot cut up the right side of the number three entry and when it cut the left side the rib fell out leaving a 3 foot-by-5 foot hole at the top of the coal seam, "and with all of our air gushing in it we knew immediately we had cut into an old mine" (Tr. 223). The equipment was deenergized and the hole into the old mine was cut larger to approximately 14 feet wide and to the same 8 to 10 foot height that was being mined at that time. The area was cleaned up and roof bolted, and he made air and gas tests. He detected no methane or water and measured 33,000 cubic feet of air going through the breakthrough. He looked through the opening with his light and could see approximately 100 to 150 feet and observed no dangerous accumulations of water (Tr. 226-227). He then proceeded to the surface and telephoned Mr. Abraham and explained to him as follows (Tr. 227-228):

Q. What specifically did you tell him?

A. I told him we had cut into an old mine and we had no water, no methane. And there was so much air going into it, you didn't have to worry about taking an air sample. And our conversation went from where can we mine and stay mining coal? And I told him about the crosscut that I could put through.

And I was as much responsible for going ahead and mining as Mr. Abraham was, because I felt it was safe. I told him I could put the breakthrough through and set up on a panel of rooms outby in number five entry, and that is what we did.

Mr. Garrett stated that after speaking with Mr. Abraham, he returned underground and that either he or Mr. Stephens continued mining the Number 1 room, and it was cleaned, rock dusted, and ventilated by the next day when the inspectors were there. Mr. Garrett stated that before any mining continued he went into the old mine for approximately 200 feet, or to what would be the first crosscut, and he marked the location with an "X" on map Exhibit S-2. He stated that he went into the mine to "see what I had cut into and what lay around me" (Tr. 229). He stated that he encountered no water, and from his experience "it looked like the mine had been mined in front of me, the direction I cut into



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it" (Tr. 230). He explained that the old mine "ran basically in the same direction as the number three entry" that he had cut into, rather than off a small angle to the right (Tr. 230).

Mr. Garrett stated that when he changed shifts with Mr. Stephens he explained the breakthrough, the conditions that existed, and what he planned to do next, and that Mr. Stephens did not object. Mr. Garrett could not recall any mention of drilling (Tr. 232). When the inspectors arrived the next day, July 14, the number one room and breakthrough areas had been cleaned up and he voluntarily told the inspectors about what had occurred. He did not believe that the inspectors would have known when the mining took place if he had not told them. He confirmed that when he spoke to Mr. Abraham on July 13, he (Abraham) told him that he was going to notify MSHA and/or the state inspectors about the breakthrough (Tr. 233). Mr. Garrett confirmed that MSHA never required any test drilling while he has been mining at the Campbell Creek mine (Tr. 236).

Mr. Garrett confirmed that he was interviewed by MSHA special investigator Meadows and signed a statement, and he explained as follows (Tr. 237-239):

- Q. Did you ever tell Mr. Meadows during that conversation that you knew mining coal without test drilling was a violation of the law?
- A. I never told Mr. Meadows in no words to that. I'm quite sure I told Mr. Meadows, Mr. Inghram and plenty of people that I understand the law about test drilling, when I should and when I shouldn't. But, no, I made so such statement to Mr. Meadows as that.
- Q. Did you tell Mr. Meadows that you knew you should have been test drilling when you were mining on July 13, but you didn't test drill?
- A. No, sir.

JUDGE KOUTRAS: What is your understanding of the law.

THE WITNESS: That if I am approaching an old works or abandoned mine that can't be preshifted or checked, that I'm supposed to test drill.

JUDGE KOUTRAS: In this case, when they cut through, that was an old abandoned mine, was it not?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: It couldn't be checked?

THE WITNESS: I checked part of it after that.

JUDGE KOUTRAS: By eyeballing it. Before you turned right and started drilling, did you check --

THE WITNESS: Before I started mining? I checked it before I started mining, Yes, sir.

JUDGE KOUTRAS: Did it ever cross your mind that maybe you should have drilled some bore holes before turning right and continuing mining?

THE WITNESS: I felt with what I seen in the old mine and with the eye level of our mine and the abandoned mine I cut into, with the air that I pushed into it when I cut into it, if I cut into it again, there would be no hazard, because I felt there couldn't be no accumulation of water. And if did cut in where there was gas, I would immediately, with the air I had, I would flush it. I felt that I didn't have no danger.

On cross-examination, Mr. Garrett testified further about his prior statement to Mr. Meadows and his breakthrough conversation with Mr. Stephens (Tr. 240-244). He could not recall mentioning test drilling, but stated that "maybe we did tell him we weren't going to test drill, because we weren't", and that "we all knew we didn't have a drill" (Tr. 242-243). He confirmed that when he went into the old mine another miner went with him "on his own" (Tr. 246).

Mr. Garrett admitted that he told Mr. Meadows that he did not go into the old mine because the roof was unsupported, and because he had been threatened with a state personal violation, did not know if he could legally enter the old mine, did not want to bring on any more violations, and wanted to protect the men on his section (Tr. 248, 251).

Mr. Garrett confirmed that in his deposition he stated that he had walked approximately 150 to 200 feet into the old mine. He estimated that the distance from the crosscut between the number four and five entry to the number three entry breakthrough into the old mine was less than 200 feet (Tr. 253-254). He confirmed that he had never experienced a breakthrough prior to July 13, 1992, and stated as follows at (Tr. 254-255):

Q. So having no experience in this matter, how could you determine what made it safe to continue mining?

A. If I couldn't detect any methane, if I

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couldn't see any water and if I had thirty thousand feet of air going through it and the mine was eye level, what else could I look for?

Q. So, are you saying that you were relying on your experience of seventeen years, I think you said, at Talon, and however many, thirty years, as a coal miner?

A. Yes, Ma'am.

JUDGE KOUTRAS: Mr. Garrett, let me ask you this: How can you be reasonably assured that -- Even through you made a determination that the conditions at the breakthrough area were not hazardous, how could you predict what the conditions would be in some other area if you cut through?

THE WITNESS: I couldn't, sir, other than that the mine was level. I could presumably predict that there was no hazardous water. There might be some.

Mr. Garrett stated that if he knew he was mining in the direction of an old mine he would test drill, and that he had no assurance that he might not accidentally cut into it again, and while he didn't know his exact position he had a presumably good idea from the rooms he was in that he was going away from the old mine. He arrived at these conclusions after examining the old mine and before continuing mining (Tr. 257).

In response to further questions, Mr. Garrett confirmed that he did not tell Inspector Inghram that he had gone into the old mine because he had a state inspector with him who had threatened to cite him with a personal violation and he was afraid to say anything. He did tell Mr. Inghram that he thought it was safe to mine in the direction that mining was progressing in the rooms, but was afraid to tell him that he had determined that the old mine was in the opposite direction (Tr. 262). He confirmed that he was in fact cited by the state and fined \$50 for mining at the breakthrough without test drilling (Exhibit R-8; Tr. 264).

Richard H. Abraham, President, Talon Resources, Inc., testified that he has worked in the mining industry since 1968, and is a certified miner, mine foreman, and electrician, and is certified to take respirable dust samples (Tr. 267). He stated his understanding of the intent and purpose of section 75.1701, as follows at (Tr. 268):

THE WITNESS: Okay. It is my general understanding of the law that the purpose of 75.1701 is to ascertain dangerous conditions of gases or water prior to the

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intentional breakthrough into an abandoned area of that mine, abandoned area of another mine or an area of that mine inaccessible.

And it does talk about three different cases; one which would be the same mine, which would be by certified engineers, then could mine within fifty feet with no test drilling. Or if it's the same mine that wasn't certified by engineers, it would be two hundred feet. Or if it's a different mine and, I assume, different I.D. Number which would be the case of big bottom, again, it would be two hundred feet.

Mr. Abraham also believed the the word "approaches" found in the statutory language of section 75.1701, is significant because if mining is being done in a direction opposite from the old mine, this would not be "approaching" the old mine (Tr. 269). With regard to mining "parallel" to the old mine, Mr. Abraham stated that at another mine where parallel mining was within 200 feet of an abandoned mine, he and MSHA agreed to a plan where drilling was not required (Tr. 269-270). He acknowledged a distinction between a known and unknown hazardous abandoned mine (Tr. 271). He also alluded to another mine where a planned drilling procedure is in effect (Tr. 273-274).

Mr. Abraham stated that it is his understanding that there is no legal requirement for test drilling breakthroughs between entry ways, and that the sole purpose of drilling is to determine the atmosphere and presence of dangerous accumulations of water in an abandoned mine (Tr. 275). He confirmed that there was no drilling equipment at the mine at the time the breakthrough occurred, and that prior to speaking with Mr. Garrett on July 13, 1992, he was not aware of the existence of the old Big Bottom mine (Tr. 276).

Mr. Abraham confirmed that Mr. Garrett called him and informed him that he had accidentally penetrated an old mine but had no inundation of water, and that the air was leaving the number three entry of the Campbell Creek mine and going into the old mine. Mr. Abraham stated that he engaged the "speaker phone" and went to the engineering office where Ken Abraham, the mine engineer and safety director is located, to look at a mine map (Exhibit R-2), and he explained the discussions that took place, including the mark-up of the map (Tr. 280-284).

Mr. Abraham stated that based on the spad mark location of the breakthrough given to him by Mr. Garrett he knew where the abandoned mine had been penetrated. After further discussion about the conditions encountered by Mr. Garrett, and his belief that he had penetrated the old mine "head on", Mr. Abraham decided that it was safe to continue mining in a direction that

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he believed was away from the old mine, and he instructed Mr. Garrett "to turn it on the side, ninety degrees, which would be that way, and mark up five rooms" (Tr. 284-287). He also allowed Mr. Garrett to cut the breakthrough between the No. 4 and 5 entries so as not to leave two dead entries in the mine, and he did so after instructing Mr. Garrett to take additional safety precautions.

Mr. Abraham stated that based on the location of the initial penetration of the old mine, the distance between that point and the number one room where mining continued was in fact 198 feet (Tr. 298). Mr. Abraham explained how he calculated this distance, and he stated that if five rooms had been marked up, as he instructed, rather than six, mining in those rooms, except for the crosscut breakthrough which he authorized, would not have been within 200 feet of the old mine (Tr. 290-291).

Mr. Abraham stated that after his discussion with Mr. Garrett on July 13, he instructed him to cut the breakthrough and start the rooms. He then consulted with his engineer, and they determined that the breakthrough was not a reportable accident. However, he reported it to the state agency, and as a matter of courtesy, also reported it to MSHA. No one came to the mine that day, and he assumed that Inspector Inghram was there the next day in response to his call, but learned later that he was there for a scheduled inspection (Tr. 297).

Mr. Abraham explained where mining had continued after the breakthrough, as follows at (Tr. 301-302):

- Q. When you went back in and mined that day, what area of the mine were you working in?
- A. We worked room number two through six.
- Q. And still proceeding in the same direction you've testified to, approximately a ninety degree angle from the breakthrough?
- A. We were approximately mining in a direction ninety degrees from the direction that we thought big bottom was in. And the number two, three, four, five and six are parallel to the number one entry which is referenced in the citation, yes.
- Q. Did you start mining again once you had the map of what everyone thought the big bottom mine looked like at that time?
- A. I think what happened is while the inspectors were there on the surface, Tom Law appeared

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with the hard copy of this Big Bottom Coal Company. And upon examination of that or upon this line that Mr. Ingram and Mr. Gillian elected to make the boundaries

of Big Bottom Coal Company, it was basically decided that the number one entry was the only one within the two hundred feet.

And to avoid all argument, if I would go to two through six, I could go mine there with or without a map. And Mr. Inghram seemed to be content to allow us to do that as long as we only stayed in two through six and we sent this hard copy to the engineers and have it put on to here and have it back the next morning as a certified map.

Q. Were you required to test drill two through six?

A. We were not.

Mr. Abraham confirmed that he reported the second August breakthrough, but MSHA did not come to the mine to inspect it and he was not put on any test drilling program (Tr. 303). He stated that he advised MSHA that the map that he had was obviously inaccurate, that he did not want to drill in that area because it was non-productive, and that he would only drill if it were absolutely necessary for him to mine in that direction, and that he was abandoning the area (Tr. 303).

Mr. Abraham stated that he did not believe that the law required any test drilling before mining the crosscut between the number 4 and 5 entries. Those entries had not cut into the old mine, and that by instructing Mr. Garrett to back up 30 feet to connect the two entries together, he believed it was very unlikely that he would again be cutting into the old mine while connecting the two entries (Tr. 307).

Mr. Abraham stated that he was not "approaching" the old mine when the crosscut or number one room were being mined. He confirmed that he knew that the crosscut would be within 200 feet of the old mine, but that the number one room would not. However, he did not believe that he was required to test drill while mining a crosscut because that is not his interpretation of section 75.1701, and he did not believe that this was MSHA's interpretation (Tr. 308). He stated that the mine drilling plans do not include the drilling of breakthroughs, and that drilling is only done when there is adjacent mining advancing toward an abandoned mine (Tr. 309). He further explained as follows at (Tr. 309-310);

THE WITNESS: We did not drill the breakthroughs. We only drilled those entries going toward that mine. We didn't drill anything going back the other way.

JUDGE KOUTRAS: You mean to tell me when you got within two hundred feet, you didn't drill holes?

THE WITNESS: We drilled them in the faces going toward the old works, but not in crosscuts that were ninety degrees. They were not going in the direction of --

JUDGE KOUTRAS: Even though they're within two hundred feet.

THE WITNESS: Even though they're within two hundred feet. That was the fifteen-minute dissertation I tried to give you in the beginning. There has been more than one application of this where to say that you drill in all areas within two hundred feet is not true. It is not done.

Mr. Abraham explained the mine elevations and he believed that it was impossible to encounter an accumulation of water had they cut through again between the number four and five entries (Tr. 311-313).

On cross-examination, Mr. Abraham clarified his earlier testimony and stated that he determined the 198 feet distance between the abandoned mine and the crosscut between the number 4 and 5 entries after his conversation with Mr. Garrett on July 13, and that it was his belief at that time that the room would be outside the 200 foot area (Tr. 314-316).

Mr. Abraham reiterated his belief that it was not a violation to cut through a crosscut "unless you are approaching the old works" (Tr. 319). He also believed that the accidental breakthrough told him everything he needed to know in order to make a complete assessment with respect to the continuation of mining (Tr. 320-321). He further confirmed that all mining that took place after the accidental breakthrough, and that was within 200 feet of the abandoned mine, was done at ninety degrees away from that mine (Tr. 330). He reiterated his belief that even if the ninety degree direction of mining is within 200 feet of an adjacent mine he would still not be in violation because the mining is not "approaching" the abandoned mine (Tr. 331).

#### Findings and Conclusions

##### Preliminary Matters

During a brief off-the-record trial conference with the parties prior to the taking of testimony in these proceedings, I

discussed with the parties certain proposed stipulations drafted by the petitioner's counsel (Tr. 7). However, the stipulations were inadvertently omitted from the record. In any event, based on the pleadings filed by the parties, including the respondent's discovery responses and posthearing proposed findings and conclusions, I conclude and find that the following facts and conclusions are not in dispute:

1. The presiding judge and the Commission have jurisdiction to hear and decide these cases.

2. The respondent Talon Resources Inc., is the owner and operator of the Campbell's Creek No. 2 Mine, and the operations of that mine are subject to the jurisdiction of the Mine Act.

3. Respondents Richard Abraham and Richard Garrett are agents of Talon Resources Incorporated within the meaning of Section 110(c) of the Mine Act.

4. MSHA Inspector Leo Inghram, Jr. was acting in his official capacity as an authorized representative of the Secretary of Labor on July 14, 1992 when he issued the Section 104(d) Citation No. 2729003.

5. A true copy of Citation No. 2729003 was served on Talon Resources Incorporated or its agent and the two individual Respondents, as required by the Mine Act.

6. Citation No. 2729003, marked Secretary's Exhibit No. 1, is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

7. Petitioner's Proposed Assessment Data Sheet, Exhibit No. 8, accurately sets forth (a) the number of assessed non-single penalty violations charged to the Campbell's Creek No. 2 mine for the period from January 1990 through September 1992, (b) the number of inspection days per month during this time period, and (c) the actual annual tonnage for the Campbell's Creek No. 2 mine in 1991.

8. Petitioner's Assessed Violations History Report, Exhibit No. 9, may be used in determining an appropriate civil penalty assessment for the alleged violations against Talon Resources Incorporated, Richard Abraham, and Richard Garrett.

Fact of Violation - Docket No. WEVA 93-16

Talon is charged with a violation of mandatory safety standard 30 C.F.R. 75.1701, for mining near an underground entry that had accidentally holed through into an unknown abandoned mine. The relevant language of statutory section 75.1701, which



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was in effect at the time the citation was issued on July 14, 1992, states as follows:

Whenever any working place approaches within 50 feet of abandoned areas in the mine as shown by surveys made and certified by a registered engineer or surveyor, or within 200 feet of any other abandoned areas of the mine which cannot be inspected and which may contain dangerous accumulations of water or gas, or within 200 feet of any workings of an adjacent mine, a borehole or boreholes shall be drilled to a distance of at least 20 feet in advance of the working face of such working place ....

Section 75.1701, was redesignated as section 75.388, effective August 16, 1992, 57 F.R. 20914, and it states as follows:

- (a) Boreholes shall be drilled in each advancing working place when the working place approaches
  - (1) To within 50 feet of any area located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined;
  - (2) To within 200 feet of any area located in the mine not shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined; or
  - (3) To within 200 feet of any mine workings of an adjacent mine located in the same coalbed unless the mine workings have been preshift examined.

Although the inspector contended that no one knew the extent of the abandoned mine, or whether the mining that took place after the breakthrough on July 13, 1992, was again heading toward or away from the abandoned mine (Tr. 51), the petitioner argued in support of its case that Inspector Ingram, with State Inspector Gillian, determined from existing maps of the No. 2 mine that both of the cited locations where mining took place after the initial breakthrough were within 200 feet of the opening hole of the No. 3 entry where the breakthrough into the abandoned mine was made. The petitioner points out that inspector Inghram estimated that the crosscut that was mined was 80 feet from the opening, and that the first room was 175 feet from the opening, and that since Talon has maintained that no map of the adjacent mine was available at the time

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these areas were mined, the only point from which to measure the 200 feet distances was the one and only No. 3 entry opening into the abandoned mine. The petitioner further relies on the testimony of respondents Garrett and Abraham admitting that both of the mined locations after the breakthrough were within 200 feet of that area. Since no test drilling was done prior to the mining of these areas, the petitioner concludes that a violation of section 75.1701, has been established.

Talon maintains that section 75.1701, applies only when a working place "approaches" to within 200 feet of any workings of an adjacent mine. Talon argues that in order to establish a violation, the petitioner must prove by a preponderance of the evidence that Talon was "approaching" or mining in the direction of the abandoned Big Bottom mine when it mined the crosscut between entries 4 and 5, and the No. 1 Room off of the No. 5 entry. In support of its argument, Talon states that given what is now known of the parameters of the Big Bottom Mine from maps it obtained, mining did not approach the Big Bottom Mine on July 13, 1992, after the breakthrough, and the testimony of respondents Abraham and Garrett demonstrates that they had a reasonable belief that the mining in the crosscut and the No. 1 Room would not approach the Big Bottom Mine since that mine was hit "head on," according to Garrett, when it was cut through in the Number 3 entry, and based upon Abraham's assessment of where the old mine was likely to lay.

Talon further argues that by retreating 20 to 30 feet from the faces of the No. 4 and 5 entries before mining the crosscut, the conditions on both sides of the crosscut were known, and that under these circumstances, section 75.1701, is inapplicable to the mining of the cross-cut because that regulation was promulgated to guard against mining into areas that may contain dangerous accumulations of water and gas.

Talon argues further that the petitioner failed to establish a violation of section 75.1701, with respect to the mining of the No. 1 Room in that, at the time the citation was written, the inspector had no evidence that said mining was in fact within 200 feet of the Big Bottom Mine. Talon believes that it is clear from the inspector's testimony that the assertion that the No. 1 Room was within 175 feet of the Big Bottom Mine was based upon his calculation of the room's distance from an imaginary line that he and the state inspector estimated would represent the extent and angle of the Big Bottom Mine, and that the inspector admitted that the imaginary line does not represent the actual extent and angle of the Big Bottom Mine.

Citing South East Coal Co., Inc., 3 FMSHRC 1766 (July 1981), Talon suggests that since the Big Bottom Mine was ventilated by air rushing from the Campbell's Creek Mine, and is now an approved part of the ventilation plan for the Campbell's Creek

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Mine, and since Mr. Garrett examined the Big Bottom Mine and was satisfied that it presented no hazardous accumulations of water or gas, Talon could mine to within 50 feet of the Big Bottom Mine without drilling test holes. However, since the mining in both the crosscut and the No. Room were more than 50 feet from the Big Bottom Mine, Talon concludes that no violation of section 75.1701, has been proved in this case.

In response to Talon's arguments concerning the interpretation of the term "approaches", the petitioner states that it is an "absurd" position that is not encompassed in the plain meaning of the statutory regulation, and has no basis in regulatory or legislative history, or applicable case law.

Petitioner states that the legislative history of the 1969 Coal Act and the 1977 Mine act do not disclose any commentary on the purpose or application of section 75.1701, in general or specifically with respect to the word "approaches." The petitioner states further that in three cases in which Commission Judges have addressed section 75.1701, the term "approaches" did not have a meaning or an application denoting an angle or direction of mining. TAC & C Energy Inc., 8 FMSHRC 1452 (September 1986); South East Coal Co., 3 FMSHRC 1766 (July 1981); Johnson Bros. Coal Co., Inc., 2 FMSHRC 094, 916 (April 1980).

Citing Webster's Ninth Collegiate Dictionary definition of "approaches" as "to draw closer to" or "to come very near to", the petitioner concludes that neither of these refer to a direction or angle. The petitioner further asserts that section 75.388(a), rewrites and clarifies section 75.1701, and confirms that "approaches" has no directional or angular meaning or application in section 75.1701. Citing the section 75.388(a) language that "[b]oreholes shall be drilled in each advancing working place when the working place approaches -- (1) To within 50 feet...; (2) To within 200 feet...; or (3) To within 200 feet of any mine workings of an adjacent mine....", the petitioner concludes that by separating the language after "approaches" and adding the word "to" to "within," the plain meaning of "approaches" is emphasized.

The petitioner takes the position that any angle or direction of mining is irrelevant because "it is the nearing of mining to the stated distance before the adjacent mine that is important." Similarly, petitioner believes that it is irrelevant whether Talon was mining towards the opening to the adjacent mine in entry three after it turned ninety degrees to the right of the opening to cut the crosscut and the room in question, because this mining occurred within 200 feet of the opening in entry three. Petitioner finds equally unpersuasive

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Talon's contention that it was not required to test drill crosscuts or to drill in all mining circumstances within 200 feet of an adjacent mine.

In further support of its position, Talon cites the petitioner's admission that Webster's Dictionary defines "approach" as "to draw closer to", and its "non sequitur statement" that "any angle or direction of mining is irrelevant because it is the nearing of mining to the stated distance before the adjacent mine that is important". Talon suggests that these admissions by the petitioner support its contention that the term "approaches" does indeed have a directional meaning. Since the mining that occurred on July 13, 1992, after the breakthrough was away from, rather than nearing toward or approaching the abandoned Big Bottom Mine, Talon concludes that no violation of section 75.1701, occurred.

The requirement found in section 75.1701, for the drilling of boreholes applies to (1) working places within 50 feet of abandoned areas in the mine that are shown on a certified mine survey; (2) working places within 200 feet of any other abandoned areas of the mine, which cannot be inspected; and (3) working places within 200 feet of any workings of an adjacent mine. On the facts of this case, and given the statutory language "in the mine" and "of the mine", I conclude and find that the first two borehole requirements apply only to the same Campbell's Creek No. 2 Mine that was inspected on July 14, 1992, and that in order to support a violation of either of those requirements, it must be established that drilling was not done within 50 or 200 feet of any abandoned areas in that mine. Since there is no evidence that the two cited locations that were mined after the cut-through on July 13, 1992, were abandoned areas of the Campbell's Creek No. 2 Mine, I conclude and find that the first two drilling requirements stated in section 75.1701, do not apply in these proceedings.

With respect to the third requirement for drilling in working places that are within 200 feet of any workings of an adjacent mine, it would appear that the abandoned Big Bottom Mine was adjacent to the Campbell's Creek Mine. The inspector testified that the initial breakthrough into the abandoned mine was accidental and did not constitute a violation of section 75.1701. The inspector described two locations in the Campbell's Creek mine where mining continued after the initial breakthrough without drilling test holes. The first location was a crosscut between the No. 4 and 5 entries, allegedly within 200 feet of the breakthrough, and the second location was the No. 1 Room of the No. 4 panel, allegedly within 175 feet of the breakthrough.

Talon does not dispute the fact that the crosscut entries were within 200 feet of the abandoned Big Bottom Mine. With regard to the No. 1 Room off of No. 5 entry, Talon takes issue with the accuracy of the inspector's calculations placing that location within 200 feet of the breakthrough location. However, Mr. Abraham confirmed that the room was within 200 feet of the breakthrough and he was quite precise at placing it 198 feet from the breakthrough (Tr. 289-291). Mr. Garrett said it was less than 200 feet (Tr. 253). Under all of these circumstances, I conclude and find that both of the cited locations were within 200 feet of the adjacent Big Bottom breakthrough entry.

The thrust of the petitioner's case is that Talon continued mining in the general area near the abandoned Big Bottom mine after the initial breakthrough on July 13, 1992, without drilling test holes. The inspector gave three reasons for issuing the citation citing a violation of section 75.1701, and they are as follows:

Failure to drill test holes while mining within 200 feet of the abandoned mine (Tr. 15).

Failure to drill test holes while mining within 200 feet of the abandoned mine that could not be inspected for accumulations of water and gases (Tr. 82).

Failure to drill test holes to determine the location of the abandoned mine while continuing to mine within 200 feet of the abandoned mine area (Tr. 51).

Aside from the inspector's explanations as to why he issued the citation, I believe the pivotal issue is Talon's interpretation of the term "approaches" found in section 75.1701, and the petitioner's equally vigorous position that a violation has been established because Talon conducted mining within a 200 foot area of the breakthrough without drilling test holes, regardless of whether the working faces were being advanced in the direction of the abandoned mine breakthrough area or away from that area.

Black's Law Dictionary, Rev. Fourth Ed., 1968, defines "approach" as "to come nearer in space. Thus, an "approaching" street car is one coming near to , in point of time and place". "Approaches" is defined as " a way, passage, or avenue by which a place ... can be approached".

In a decision issued by me on February 17, 1977, pursuant to the 1969 Coal Act, Mining Enforcement and Safety Administration v. Robinson & Phillips Coal Co., Docket No. HOPE 76.113-P, I vacated an order that was issued for an alleged violation of 30 C.F.R. 75.1701, and stated as follows at pg. 16, slip opinion:

I believe that it is clear that the regulation requires the drilling of one or more boreholes into the face as mining advances towards an abandoned area of the mine and that the purpose of this requirement is to insure against accidental holing through into unknown quantities of gas or impounded water. (Emphasis added).

In South East Coal Company, Inc., 3 FMSHRC 1766 (July 1981), former Commission Judge Richard Steffey dismissed a proposed penalty assessment for an alleged violation of 30 C.F.R.

75.1701, after concluding that MSHA had failed to prove violation. At several places in his decision Judge Steffy made references to the drilling requirements of section 75.1701, in the context of the direction of mining toward abandoned mine areas. He stated in relevant part as follows at 3 FMSHRC 1771-1772:

Anyone who reads the first sentence of section 75.1701, ... will see that the requirement for the drilling of boreholes becomes increasingly necessary, depending upon the amount of information one possesses with respect to the "abandoned areas" toward which one is advancing.

\* \* \*

If one advances toward abandoned areas not shown on certified maps, he must start drilling boreholes ....

\* \* \*

... it was doubtful if the area toward which the rooms were being driven constituted "abandoned areas"....

\* \* \*

Since the "abandoned areas" toward which the respondent was advancing ...  
(Emphasis added)

Section 75.1701, does not unequivocally require test drilling under all mining circumstances. The first two requirements cover test drilling within 50 feet of an abandoned mine area that has been surveyed and certified by a registered engineer, and within 200 feet of any other abandoned mine which cannot be inspected and which may contain dangerous accumulations of water or gas. In both of these instances, I conclude that the requirements for drilling are intended to prevent accidental

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penetration into known abandoned mine areas where hazardous accumulations of water or gases may be present. The 50 foot "safety zone" obviously takes into consideration the fact that the abandoned area has been surveyed and its location is known with reasonable certainty.

In the case of an unsurveyed abandoned mine area that is known but cannot be inspected, the margin of safety is increased to 200 feet, and I believe that this is based on the fact that the abandoned area cannot be inspected, and even though its general location may be known, without a survey or an inspection, it would be difficult to establish with any reasonable certainty whether or not mining is advancing in the direction of the abandoned area, or whether it is in close proximity to that area.

With respect to any drilling within 200 feet of any workings of an adjacent mine, section 75.1701 does not mention surveys or inspections of those areas. If the location of such a mine is not known because it does not appear on the mine map, or because it has not been surveyed or inspected, one would not know whether mining is being conducted within 200 feet of such an area, and would have no way of knowing whether or not drilling test holes is necessary or required. However, once the location of the adjacent mine is made known, one could argue that the drilling of test holes would be required under all circumstances within 200 feet of the adjacent mine, regardless of the directional track of the mining taking place within this area. However, given the fact that the intent of section 75.1701, is to prevent the accidental holing through into adjacent mine workings, and considering the regulatory term "approaches" in context, and together with the language requiring the initial drilling of a test hole to a 20 foot distance in advance of the working face, and maintaining subsequent drilling to at least 10 feet in advance of the advancing working face, language that denotes the direction of mining, I find no logical reason to require the drilling of test holes as a preventive measure to preclude accidentally holing into a known adjacent mine area when the direction of mining is clearly, or with some reasonable certainty, taking place away from, or in the opposite direction, of such an area.

The petitioner's contention that the abandoned mine "was completely unknown to Respondents in every respect" is not well taken. Although it is true that the mining which continued after the breakthrough was done without the benefit of a map or the drilling of test holes, and that Talon was unaware of the existence of the old mine prior to the breakthrough, the evidence presented in these proceedings, including Talon's credible testimony, supports a conclusion that Talon had enough knowledge

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of the conditions in the old mine, as well as where the mine was located, to provide it with a reasonable basis for believing that it was safe to continue mining on a track away from, rather than in the direction of, the old mine.

Evening shift foreman Keith Stephens, who mined the crosscut between the No. 4 and 5 entries, testified that he could see 100 to 150 into the old mine after the breakthrough, and he observed no water and made methane tests which showed no methane present. He also testified that he did not hesitate to mine the crosscut because it was past the area of the breakthrough and the angle at which the breakthrough entry was made, and was approximately 25 to 30 feet back from the No. 4 and 5 faces. He stated that he would not have mined the crosscut if he did not believe it was safe to do so.

Respondent and mine foreman Richard Garrett, who was present when the initial breakthrough occurred on July 13, 1992, testified that he could see into the old mine for approximately 100 to 150 feet, and that he observed no water, detected no methane, and measured 33,000 cubic feet of air per minute going through the breakthrough into the old mine. He further testified that after notifying Mr. Abraham of the breakthrough, and before continuing mining, he walked into the old mine for a distance of approximately 200 feet, found no water, and observed that the old mine lay in the same direction as the breakthrough entry, rather than at a small angle to the right. Based on his 31 years as Talon's mine foreman, and his observations of the old mine on July 13, Mr. Garrett believed that the mining that continued after the breakthrough was in the direction opposite to and away from the old mine.

Although Mr. Garrett did not inform Inspector Inghram that he had gone into the old mine at the time of his inspection on July 14, 1992, and told special investigator Meadows that he had not gone into that mine, I find his explanations for not telling the inspectors to be both reasonable and plausible under the circumstances. Having viewed Mr. Garrett in the course of the hearing, he impressed me as a credible individual. I take note of the fact that the areas that were mined on July 13, had been cleaned up, ventilated, and bolted when the July 14, inspection took place, and that the inspectors would not have known when the mining occurred if Mr. Garrett had not volunteered the information. I also note that Mr. Garrett accepted the responsibility for the continued mining and he believed that it was safely done.

Respondent Abraham testified that based on the spad mark where the breakthrough occurred, he knew where the old mine had been penetrated, and based on the fact that it was penetrated "head on", and the prevailing conditions as reported to him by Mr. Garrett, Mr. Abraham believed that it was safe to continue mining. Inasmuch as the miner machine backed up 30 feet from



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the point of penetration and turned ninety degrees to the right to continue mining, Mr. Abraham had reason to believe that mining was on a track away from the old mine, was no longer "approaching" that mine, and that it was unlikely that the old mine would again be cut into while connecting the two entries and mining the No. 1 Room. This proved to be true as no further breakthroughs occurred in those areas.

Inspector Inghram's calculations with respect to the 200 foot area within which he believed mining was prohibited in any direction without first drilling test holes were made with the No. 3 entry breakthrough location as his initial point of reference, and the two mine maps which he marked up during his testimony use that location as the initial point of reference (Petitioner's Exhibits 2 and 3).

Although the inspector testified that his estimation of the location of the old mine on July 14, 1992, as shown by the highlighted solid line on petitioner's map exhibit 2, was based on his "observation of the old mine", he confirmed that he did not enter the old mine. Although he stated that he could see a short distance into the old mine (Tr. 23), he later testified that he could not approach the breakthrough area close enough to look into the old mine and only viewed it from a distance (Tr. 37). He confirmed that mining continued "off to the right" and that no further breakthroughs occurred during this time period (Tr. 44).

The inspector confirmed that his estimation of the location of the old mine was based on his "best guess" as to the probable general direction of the old mine, and that his calculation of the 200 foot area from the breakthrough which is labeled "probable 200 foot limit" on map exhibit 3, was based on an "imaginary line" of where he believed the old mine was located. He confirmed that the cited mining took place to the right of that location. Having examined the maps marked up by the inspector, it is clear to me that the cited crosscut and No. 1 room that were mined after the breakthrough were approximately 90 degrees and to the right of, and away from, the old mine area as described by the inspector. Based on this evidence, I find that it supports Talon's belief that it was mining away from the old mine after the breakthrough, and that it was not again "approaching" that mine.

After careful consideration of the arguments presented by the parties, I agree with Talon's position concerning the interpretation and application of section 75.1701. I conclude and find that the term "approaches" modifies each of the three regulatory drilling requirements, and that in order to establish a violation it must be established by a preponderance of the

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evidence that the mining taking place within the 50 to 200 foot areas stated in the regulation was in the direction of the abandoned or adjacent mine areas.

On the facts of this case, I find that immediately prior to the breakthrough into the old adjacent mine, the mining in the Campbell's Creek mine was advancing in the direction of the old mine and that it was clearly approaching that area. However, after the breakthrough, I find that mining continued in the opposite direction and away from the old mine, and was clearly not again approaching that area. Since the purpose of drilling test holes is to determine the safeness of the area toward which mining is advancing, I conclude and find the drilling requirement found in section 75.1701, with respect to the adjacent mine in question did not apply, and that a violation has not been established. Under the circumstances, the disputed citation IS VACATED.

Fact of Violation. Docket Nos. WEVA 93-393 and WEVA 93-402.

I adopt and incorporate by reference in these two section 110(c) cases my prior findings and conclusions in Docket No. WEVA 93-16, concerning the mine operator Talon Resources.

In order to establish a violation chargeable to the two individual respondents, it must first be established that the mine operator violated the cited mandatory regulation in question. Since I have concluded that a violation has not been established, the citations served on the two individual respondents in these proceedings ARE VACATED.

#### ORDER

In view of the foregoing findings and conclusions IT IS ORDERED AS FOLLOWS:

1. Section 104(d)(1) "S&S" Citation No. 3729003, issued on July 14, 1992, citing an alleged violation of 30 C.F.R. 75.1701, IS VACATED, and the petitioner's proposal for assessment of civil penalty in Docket No. WEVA 93-16, IS DENIED AND DISMISSED.
2. The petitioner's proposed civil penalty assessments filed against the individual respondents pursuant to section 110(c) of the Act in Docket Nos. WEVA 93-393 and WEVA 93-402, based on the vacated section 104(d)(1) "S&S" Citation No. 3729003, are DENIED and DISMISSED.

George A. Koutras  
Administrative Law Judge

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Distribution:

Heather Bupp-Habuda, Esq., Office of the Solicitor,  
U.S. Department of Labor, 4015 Wilson Blvd., Rm. 516,  
Arlington, VA 22203 (Certified Mail)

Dina M. Mohler, Kevin A. Nelson, Esqs., KAY, CASTO, CHANEY,  
LOVE & WISE, P.O. Box 2031, Charleston, WV 25327 (Certified  
Mail)

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