FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 2, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 93-974
	:	A.C. No. 15-16492-03540
v.	:	Docket No. KENT 94-51
	:	A.C. No. 15-16492-03541
NATS CREEK MINING COMPANY, Respondent	:	Docket No. KENT 93-877
	:	A.C. No. 15-16492-03537

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, Pikeville, Kentucky, for the Respondent.

Before: Judge Fauver

These are consolidated civil penalty cases under ' 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 **et seq**.

Docket No. KENT 93-877 involves five ' 104(a) citations issued on December 1, 1992, alleging significant and substantial violations due to a moderate level of negligence. Four of the citations allege that certain scoops were not equipped with operative methane monitors. The fifth alleges that a fire suppression system on a scoop was rendered inoperative by a missing hose.

Docket No. KENT 93-974 involves two ' 104(a) citations and a ' 107(a) imminent danger withdrawal order issued on December 8, 1992. The citations allege significant and substantial violations due to high negligence. One citation alleges that an underground battery charging station was not housed in an adequate fireproof structure and was in return air. The other alleges that non-permissible battery chargers were used while the battery charging station was ventilated with return air.

Docket No. KENT 94-51 involves three ' 104(a) citations and a ' 107(a) order issued on June 24, 1993. The citations allege significant and substantial violations due to high negligence. One citation alleges that an automatic fire sensor warning device for four conveyer belts was inoperative. The second citation alleges accumulations of combustible material around the conveyor belts. The third citation alleges that there were damaged, broken and stuck rollers on a conveyor belt and the belt came into contact with accumulations of combustible material.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Nats Creek Mining Co., Inc., operates Sugarloaf No. 2 Mine in Floyd County, Kentucky, as a contract miner for JRC Land and Equipment Company of Lexington, Kentucky. The mine produces about 160,000 tons of coal per year from one production section, operating three shifts, five or six days a week. The coal is sold in or with substantial effect upon interstate commerce.

Scoops

2. Scoops are used to load and haul coal from the face to a conveyor belt system.

3. The mine liberates about 17,600 cubic feet of methane daily. At that rate of liberation, methane could accumulate to an explosive concentration (5 to 15 percent) in about a 12-hour period if the mine fan were off.

4. On Saturday evening, November 28, 1992, there was a fatal accident when a scoop operator was crushed between the rib and his vehicle.

5. Inspector Mark Bartley went to the mine on December 1, 1992, to perform a spot electrical inspection and to assist in the investigation of the fatal accident. The investigation was handled jointly by MSHA and the Kentucky Department of Mines and Minerals.

6. MSHA issued a work-stoppage order to preserve the accident site and equipment. Under the MSHA order, the equipment

was to be kept in the same condition as it was on November 28, 1992.

7. Because the coal seam was only 34 to 38 inches high, MSHA ordered all the scoops to be brought out of the mine so that Inspector Bartley could examine them more thoroughly. Nine scoops were brought out of the mine. All were found in violation of at least one safety standard. Inspector Bartley issued 20 citations on the scoops.

8. All of the scoops were subject to being used to load coal at the face. Nats Creek acknowledged that seven of the nine scoops routinely were used at the face, but the company could not tell Inspector Bartley which three or four scoops were in service at the time of the fatal accident. No records were maintained to showed whether a scoop was used inby or outby the last open crosscut on any given date.

9. None of the nine scoops was tagged out of service or listed as out of service in the company's books as of November 28 through December 1, 1992.

10. All nine scoops were operative and subject to being used inby the last open crosscut. Inspector Bartley observed all of the scoops come out of the mine under their own power. Nats Creek's electrician confirmed that the scoops came out of the mine under their own power.

11. Methane monitors on the scoops are designed to give a warning when one percent methane appears in the atmosphere. At two percent, the methane monitors are designed to de-energize the machine to prevent a methane ignition.

12. Inspector Bartley tested the methane monitor on scoop No. 105A/R11079-210. When he found that it was inoperative, he issued ' 104(a) Citation No. 4017965. The methane monitor display on the scoop was missing and the whole internal component had been taken out of the monitor. The display was three inches in diameter, so that it was easy to see that the display was gone.

13. Inspector Bartley examined the AR-4 Elkhorn scoop and found that there was no methane monitor on the scoop. He then issued Citation No. 4017967. Nats Creek's electrician confirmed that there was no methane monitor on the scoop. This is the scoop that was involved in the fatal accident.

14. Inspector Bartley examined scoop No. 486-1193 and found that the read-out methane monitor display was missing and the monitor did not work. He then issued Citation No. 4017975.

15. Inspector Bartley determined that all four of the methane monitor violations were significant and substantial. There was a known history of methane liberation at the mine. There was no other automatic de-energization device on the equipment. There was no other automatic methane detection device on the section. The inoperative methane monitors could significantly and substantially contribute to an explosion or an ignition.

16. Inspector Bartley determined that a moderate level of negligence was involved in each of the methane monitor violations.

17. Inspector Bartley examined the AR-4 Elkhorn scoop, the one involved in the fatal accident, and found that, in addition to missing a methane monitor, it had an inoperative fire-suppression system. A hose to the activator was missing. Because of this condition, he issued Citation No. 4017968.

18. The manual activator is a pressurized cylinder. A button on the one-time-use cylinder is designed to pop a bladder cap on the cylinder seal to release pressure out of the cylinder. The pressure travels through a hose to force a chemical discharge to put out a fire. The hose is 1/4 to 1/2 inch in diameter and about eight feet long. The system is manually activated; that is, the operator has to hit the button on the cylinder to cause the system to work. The button is within arm's reach of the operator's compartment. The hose is an essential part of the fire-suppression system. Without it, there is no way to discharge the chemical to suppress a fire. The fire-suppression system is an enclosed, self-contained system. The missing hose rendered the system inoperative. Nats Creek's superintendent and electrician told Inspector Bartley that the scoop was subject to being used in and inby the last open crosscut. There was no indication on the scoop that it was restricted to use outby the last open crosscut.

19. Inspector Bartley determined that the violation was significant and substantial. If there had been a fire on the vehicle, there would have been no way to extinguish the fire readily. If the scoop operator had been trapped, he could have been burned alive. The scoop came out of the mine under its own power. It was not tagged out of service and it was subject to being used anywhere in the mine.

20. Inspector Bartley determined that a moderate level of negligence was involved in this violation. He could not tell how long the hose had been missing, but noted that the hose connections were dirty, indicating that the hose had been missing for a substantial period.

Battery Charging Station

21. On December 8, 1992, Inspector Donnie R. Johnson found that the battery charging station was ventilated with return air and that no intake air was supplied to the station.

22. Inspector Johnson determined that the observed conditions constituted an imminent danger. Non-permissible equipment was in the charging station. There were open energized circuits in the charging units. Return air was coming into the battery charging station from the face area. A worked-out coal panel to the right of the station could produce methane or toxic fumes. Coal dust coming from the face could cause an ignition or an explosion. An ignition or explosion could blow out permanent ventilation controls. Coal dust could propagate an explosion or fire throughout the mine. The charging station was 20 or 25 crosscuts outby the working section. Based upon the conditions observed, Inspector Johnson issued imminent danger withdrawal Order No. 3516672.

23. Inspector Johnson issued ' 104(a) Citation No. 3516674 on December 8, 1992, charging a violation of 30 C.F.R. ' 75.340(a)(1). The regulation requires that underground battery charging stations be located in noncombustible structures or areas or be equipped with a fire-suppression system. The equipment must be ventilated by intake air that has not been used to ventilate working places. The battery charging station was not housed in a fireproof structure or equipped with a fire-suppression system. It was not ventilated with intake air. Two brattices had been removed to allow the return air from the 001-0 section to pass through and ventilate the battery charging station, where six energized 480-volt batteries were charging scoop batteries.

24. The coal ribs that formed the battery charging station were not insulated or fireproofed. The station was located between pillar blocks of coal that were left when the entries were mined and developed with crosscuts connecting the entries. There was no enclosing structure. The exposed coal ribs and coal dust on the floor were combustible. The station was littered with empty cardboard boxes and open cans which contained

hydraulic fluid. Inspector Johnson found about 45 empty cardboard boxes piled up between batteries and a brattice.

25. There was no fire-suppression system or automatic fire-fighting equipment at the charging station. Two small hand-held five-pound fire extinguishers were in the area. There were hoses and jugs of water in the charging station. However, Respondent's superintendent was aware that firefighting problems would be compounded by trying to use water to fight an electrical fire. At least two of the battery chargers and the batteries were against the coal ribs. Batteries being charged generate heat. The charging unit also produces heat. Hydrogen is a by-product of the battery charging process. It is very explosive, with an explosive range of 4 to 74 percent. As the plates in the batteries expand, they push up liquid. Any hydrogen on top of the liquid in the cell is pushed out into the atmosphere.

26. Return air was used to ventilate the battery charging station. The air passed through the last working place in the active section before it ventilated the charging station. Inspector Johnson observed that the battery charging station was energized. He could hear the chargers humming, the batteries bubbling, and he could smell the distinctive odor associated with charging batteries. The cords for the charges and the batteries were plugged together. Three scoops and four sets of batteries were being charged.

27. Inspector Johnson determined that this was a significant and substantial violation. The mine liberates methane. If return air containing methane and coal dust from the face passed over the energized electrical components in the charging station, and a spark was released, the spark could have caused a fire or an explosion. The battery chargers were not permissible equipment. If there had been an explosion, it could have blown out the ventilation controls between the return and intake air courses. If the ventilation controls had been blown out, the fresh air going to the working face could have been contaminated. If the single mine fan had been blown out by an explosion, there would have been no ventilation in the mine.
It was highly likely that if mining had continued, the conditions found by the inspector would result in serious injury.

28. Inspector Johnson determined that high negligence was associated with the violation charged in Citation No. 3516674. The violation had existed for a substantial period, probably a month. The mine superintendent concurred in this estimate. He told Inspector Johnson, before they went underground, that there was a problem with the charging station. He did not mention then that it was being ventilated with return air, but confirmed later that it was ventilated that way. There was no evidence of any

efforts to fireproof the battery charging station, to ventilate it with intake air, or to keep the return air out of it. The conditions found by the inspector were obvious to anyone with a reasonable knowledge of mining practices and ventilation control. The cited conditions should have been discovered and corrected during the routine preshift examinations, but they were not reported in the preshift examination records.

29. The citation was terminated after abatement of the violative conditions. The coal ribs were insulated with a noncombustible sealer to form a fire protection barrier between the coal ribs and the charging units. The mine floor was cleaned up. Rock dust was applied to all the areas. The cardboard containers, plastic containers and empty oil cans were removed from the underground area of the mine. Double airlock doors were installed. A brattice and regulators were installed. The changes allowed intake air to ventilate the charging station. After ventilating the station, the air coursed out into the return air course. All the corrective actions were completed in one day.

30. Inspector Johnson issued ' 104(a) Citation No. 3516675 on December 8, 1992. Originally, the citation cited a violation of 30 C.F.R. ' 75.503. During the hearing an amendment was allowed to conform to the proof. The cited regulation was changed to 30 C.F.R. ' 507-1(a), which provides that electric equipment used in return air outby the last open crosscut must be permissible equipment. Non-permissible 480-volt battery chargers were found at the charging station in return air.

31. For the same reasons given for his findings as to Citation No. 3516674, Inspector Johnson determined that this was a significant and substantial violation involving a high level of negligence, and was highly likely to result in fatal injuries.

Conveyor Belt System

32. On June 24, 1993, Inspector Johnson began a quarterly inspection of the mine. Advance mining was underway. When he arrived at the mine, he met with the superintendent, who told him that because a rock-picking table was being repaired the conveyor belts were not moving. Inspector Johnson informed the superintendent that he would start traveling the conveyor belts that day, since they would not be operating. Inspector Johnson entered the No. 2 belt entry portal to crawl the belts. Along the No. 1 conveyor belt Inspector Johnson observed three conditions that caused him to issue ' 107(a) Order No. 4027494, finding an imminent danger: The automatic fire sensor warning

device was inoperative. There were damaged and stuck rollers. There were extensive accumulations of loose coal, coal dust and float coal dust. Inspector Johnson saw no evidence of efforts to correct these conditions. Methane was being liberated at the rate of about 17,600 cubic feet per day. Inspector Johnson feared that when the conveyor belts started again, the three conditions would combine to result in a serious mine fire or a coal dust explosion. He immediately returned to the surface to issue a ' 107(a) order and to put a red tag on the No. 2 portal canopy for the belt conveyor to show that it was closed by a' 107(a) order.

33. When Inspector Johnson advised the mine superintendent that he had issued an imminent danger order, the mine superintendent called the section by phone to have miners from the face start to abate the cited hazards. The superintendent did not express disagreement with the order or assert that miners already were on their way to address the cited violations. When the inspector had arrived at the mine and said he was going to crawl the belts, the superintendent said, ". . . I don't think it looks too good, probably dirty. . . ." Mine Manager Travis Miller acknowledged the condition of the belts: "We had been there and like Billy [Martin, the superintendent] said, well, they're probably dirty." The superintendent testified further, "I did go straight to the phone right then and I called inside and I told the boss, the section foreman, to get people down there on the number one belt. That's the reason . . . I didn't go up the belt with him. . . . I called to get people to correct the problem if there was anything wrong with the belt line because, I knew he was going to check it." Tr. 356-359. It was not until the MSHA inspectors came to the mine that the superintendent called to have miners clean up the belts.

34. The imminent danger order was terminated the following afternoon after the fire sensor was repaired, the accumulations were cleaned up, and the rollers were repaired or replaced.

Fire Sensor System

35. The first condition that contributed to issuance of the above imminent danger order was cited in ' 104(a) Citation No. 4027495, dated June 24, 1993. The regulation cited (30 C.F.R. ' 75.1103-1) requires that a fire sensor system be installed on each underground belt conveyor, to give warning automatically when a fire occurs on or near the belt and to provide both audible and visual signals that permit rapid location of the fire. The fire sensor system was not maintained in an operative condition for the Nos. 1, 2, 3, and 4 conveyor

belts. The fire sensor cable had been severed between the automatic indicator and the alarm signal box. The cable also had been severed at several locations along the No. 1 conveyor belt.

36. At Inspector Johnson's request, the company electrician, George Bush, tried to activate the fire sensor system. It would not function. As he crawled the belt, Inspector Johnson found that the fire sensor cable had been cut or worn through in several locations, where the cable had dropped down beside the belt conveyor, which rubbed against the cable until it was severed or badly worn.

37. Fire sensors are contained in the cable, spaced at intervals of 125 feet. If a fire occurs, when the sensor is heated to 125 degrees the circuit opens and automatically indicates which belt conveyor is on fire. There were four belts underground. The fire sensor would not work for any of them. One or two miners were assigned to monitor more than a mile of belts. Each belt was 1,400 to 2,000 feet long. The belt entries also served as secondary escapeways.

38. The fire sensor system was needed to respond to a fire quickly, to extinguish it or to try to keep it under control. Without the system, a fire could be raging out of control before being detected. In the event of fire, the ventilation system would pull the smoke to the face where the miners were working. The only firefighting system in place was the manually activated water line which extended along the belt conveyors.

39. Although the belts were not running, the section was engaged in advance mining. Miners could blast and extract coal at the face to have it ready to load when the belts started to run again. Inspector Johnson observed that some miners were at the face and some were repairing the rock-picking table on the outside.

40. Inspector Johnson determined that the fire sensor violation was significant and substantial. Without the system, there was no way to detect a fire on the belt conveyors until someone encountered smoke or flames. Inspector Johnson expected that the belts would be turned back on as soon as the repairs were completed on the picking table. He believed that the observed conditions were likely to result in a mine fire or explosion if normal mining operations were resumed. There was friction between the belt and the damaged rollers. There were areas where the combustible accumulations touched the bottom of the belt. If the friction resulted in a fire, there was no system in place to warn of it or to locate it.

41. Inspector Johnson determined that the violation involved high negligence. The fire sensor system was required to be checked weekly. The belt line was required to be checked daily, within three hours after the beginning of a production shift. The miners had been underground 2 hours 50 minutes when Inspector Johnson issued the citation. The cable had been severed in several locations. The control box for the fire sensor system has a warning light to show any short-circuit in the system. The severed cable should have short-circuited the system, but Inspector Johnson found that the warning light control box was not functioning, perhaps because of dead batteries. It did not appear that the control box had been touched in a long time. All that had to be done was to push an easily accessible test button once each week to see if the system was working. There was no mention of the non-functioning system or of the severed cable in the preshift examination records or in the weekly examination records. There was no evidence that the company was about to begin repairs of the cable and the fire sensor system.

42. Citation No. 4027495 was terminated the next day, after the automatic fire sensor system was restored.

Accumulations of Combustible Material

43. The second condition that contributed to issuance of the imminent danger order was cited in ' 104(a) Citation No. 4027496, on June 24, 1993. The cited regulation (30 C.F.R' 75.400), prohibits the accumulation of coal dust, float coal dust, loose coal, and other combustible material in active workings or on electric equipment in active workings. Inspector Johnson found accumulations of loose coal, coal dust, and float coal dust alongside and beneath the No. 1 conveyer belt and in the connecting crosscuts. The accumulations extended about 1,440 feet, from 1 inch to 30 inches deep. In the areas where Inspector Johnson saw one inch of float coal dust it was scattered across the entire entry, from rib to rib. The area was dry. The accumulations were black. The energized 4,160-volt cable was buried in the loose coal and float coal dust alongside the belt conveyor.

44. Inspector Johnson measured the accumulations with a measuring tape, using his hand to rake the coal back until he reached the mine floor. His close inspection of the accumulations verified that it was loose coal, coal dust and float coal dust. Large quantities of coal dust were raised into the air as he crawled through the accumulations. Miners had worked or traveled in the area where the combustible

accumulations were found. The area was required by regulation to be traveled daily during the preshift examination.

45. For the same reasons given for his findings as to Citation No. 4027495, Inspector Johnson determined that this was a significant and substantial violation and involved high negligence. It was reasonably likely to result in serious injuries to 12 miners working on the head drive and at the face. The 4160-volt cable buried in the accumulations was energized and was the main power cable. Roof conditions were fair, but some loose material had fallen out from between the roof bolts. The power cable went through the area where the roof had sloughed. If a piece of the roof fell on the cable in the accumulations, the cable could have been cut, resulting in a hot flash. The hot flash could have ignited the float coal dust. When the belt was running again, there would be friction between the belt and the rollers that were broken or stuck. Also, there would be friction as the belt rubbed against the metal frame of the belt assembly. The belt runs 250 to 450 feet per minute. There were shiny and worn places on the steel frame, indicating that the belt had rubbed against it. Additionally, there were rollers with shiny, smooth and worn places, indicating that the belt was rubbing on them, rather than rolling over them. Inspector Johnson saw no evidence of efforts to clean up the accumulations. The accumulations were easily visible alongside the belt, as was the 2 1/2-inch power cable where it dropped down into the accumulations from the mine roof. Inspector Johnson estimated that the accumulations would fill one, or possibly two, coal trucks. There was no mention of the accumulations in the preshift examination records.

46. The citation was terminated the next day, after the accumulations had been cleaned up and rock dust had been applied to the area.

Conveyor Belt Rollers

47. The third condition that contributed to the issuance of the imminent danger order was cited in ' 104(a) Citation No. 4027497, on June 24, 1993. The cited regulation (30 C.F.R. ' 75.1725) requires that machinery and equipment be maintained in safe operating condition and that machinery and equipment in unsafe condition be removed from service immediately. Inspector Johnson found damaged, broken, or stuck rollers at several locations along the No. 1 belt conveyor, beginning at the No. 2 mine portal and extending to the conveyor tail piece, about 1,440 feet. The damaged, broken, or stuck rollers allowed the conveyor

belt to contact the dry accumulations of loose coal, coal dust, and float coal dust beneath the belt.

48. There are two layers of 3-inch steel rollers. The top rollers are five to six feet apart. The bottom rollers are 10 to 12 feet apart. The rubber conveyor belt is designed to reduce friction by moving on rotating rollers rather than rubbing against them.

49. Inspector Johnson found that 19 rollers were defective. The conveyor belt had not been taken out of service. Some rollers were broken. The belt had cut through the tops of some of the rollers. Some rollers had dropped down in the middle. Some had broken off the end of the supporting frame. Some would not roll because there was coal jammed between the frame and a roller. Inspector Johnson tried to turn some of the rollers with his hands; he could not move them. In addition to the 19 stuck and broken rollers, Inspector Johnson saw rollers with shiny, smooth and worn places, indicating that the belt was rubbing on them, rather than rolling over them.

50. Some of the rollers were in accumulations of coal dust. For the same reasons given for his findings as to Citations Nos. 4027495 and 4027496, Inspector Johnson determined that this was a significant and substantial violation and involved high negligence.

51. The damaged rollers were obvious and clearly visible to anyone crawling along the belts to make the belt examinations. There were two production shifts a day. The belts and rollers were required to be examined twice every work day. There was no report of defective rollers in the preshift examination records.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Scoops

Four citations charge a violation of 30 C.F.R' 342(a)(1) for having a defective or missing methane monitor on a scoop.

Respondent contends that the four citations should be vacated because the inspector could not testify that the cited scoops were used to load coal while having a defective or missing methane monitor.

Section 75.342(a)(1) provides:

> MSHA approved methane monitors shall be installed on all face cutting machines, continuous miners, longwall face

equipment, loading machines, and other mechanized equipment used to extract or load coal within the working place.

"Working place" is defined as "the area of a coal mine inby the last open crosscut." 30 C.F.R. ' 75.2.

Respondent states that its evidence shows that all scoops were checked to be sure the methane monitors were operative before a scoop was used to haul coal and that if a scoop was not in permissible condition it was rendered inoperative by not hooking the necessary wiring back up to the circuit breaker. It states that if a methane monitor became inoperative during the production shift, the scoop was returned to the battery barn where it was replaced with a new scoop or the methane readout or display unit was replaced.

The Secretary contends that no records or other identification was used to restrict any scoops from being used inby the last open crosscut, and that when the inspector asked the company which scoops had been used at the face it was unable to identify them. Scoops with defective methane monitors were not listed in the examination records, nor were they tagged out of service or marked in any way to prevent their use inby the last open crosscut.

The company acknowledged that seven of the nine scoops routinely were used to load or haul coal at the face, but the company could not tell the inspector which three or four scoops were in service at the time of the fatal accident. No records were maintained to show whether a scoop was used inby or outby the last open crosscut on any given date.

On balance, I find that the inspector properly found that the cited scoops were subject to being used to load coal at the face at any time. The defective or missing methane monitors therefore constituted violations of 30 C.F.R. ' 75.342(a)(1).

The evidence also supports the inspector's finding that the violations were significant and substantial. There was a known history of methane ignitions at this mine. There was no other automatic de-energizing device on the equipment. There was no other automatic methane detection device on the section. The defective methane monitors could significantly and substantially contribute to an explosion or ignition. It was reasonably likely that the violations would result in serious injury. The violations were therefore significant and substantial. Mathies Coal Company, 6 FMSHRC 1 (1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573 (1984).

The evidence supports the inspector's finding of a moderate degree of negligence. The operator failed to take reasonable steps to ensure that scoops with defective or missing methane monitors were not used to load coal inby the last open crosscut.

A fifth citation alleges that the AR-4 Elkhorn scoop, the one involved in the fatal accident, had an inoperative fire suppression system (in addition to missing a methane monitor), in violation of 30 C.F.R. ' 1100-3. A hose to the activator on the fire suppression system was missing.

The company contends that the AR-4 scoop was not used to load coal but was used only to transport persons and supplies, and therefore was not required to have a fire suppression system.

I find that the inspector properly determined that the scoop was not "transportation" equipment within the meaning of the regulations, based upon the representations of company personnel to the inspector and the fact that a scoop is designed to haul coal and is not designed to transport people.

Moreover, ' 75.1100-3 requires that "All firefighting equipment shall be maintained in a usable and operative condition." If a vehicle has a fire suppression device, it compromises safety and violates this section if the firefighting device does not work.

By regulation, Nats Creek was required to adopt a program for the instruction of all miners in the location and use of firefighting equipment, including operation of fire suppression equipment available in the mine. Presuming Nats Creek's compliance with the training regulations, drivers of the cited scoop would have been trained in the operation of the fire suppression system on the equipment. The scoop was not equipped with any other firefighting equipment. It is likely that a scoop driver would have relied on the fire suppression system available within arm's reach. A scoop driver's reliance on the inoperative fire suppression system could have significantly and substantially contributed to a serious fire hazard, resulting in serious injury. The violation was reasonably likely to result in serious injury and therefore was significant and substantial.

Battery Charging Station

Two citations were issued in conjunction with a' 107(a) imminent danger order on December 8, 1992.

Citation No. 3516674 charges a violation of 30 C.F.R. ' 75.340(a)(1), which requires that underground battery charging stations be located in noncombustible structures or areas or be equipped with a fire suppression system. Additionally, the regulation requires that battery charging stations be ventilated by intake air. The citation was issued for several reasons. The inspector found 45 combustible cardboard boxes piled between batteries and a brattice in one area of the station. The battery charging station was littered with empty oil cans. The coal ribs which formed the battery charging station were not adequately insulated or fireproofed. The station was located between pillar blocks of coal; there was no enclosing structure. The exposed coal ribs and coal dust on the floor were combustible. At least two of the battery chargers and the batteries were against the coal ribs.

No fire suppression system was in place. There was no automatic firefighting equipment. Two small hand-held 5-pound fire extinguishers were in the area. There were hoses and jugs of water in the charging station, but using water on an electrical fire would only compound the problem. The batteries and the charging units generate heat. Hydrogen, which can quickly reach an explosive level, is a by-product of the battery charging process.

Return air, with potentially high quantities of coal dust, float coal dust, toxic or explosive fumes, methane, and carbon monoxide, was ventilating the battery charging station. The air came from the last working place on the active section.

Citation No. 3516675, as amended, charges a violation of 30 C.F.R. ' 75.507-1(a), which requires that electric equipment used in return air outby the last open crosscut be permissible. The citation was issued because non-permissible 480-volt battery chargers were being used in the battery charging station.

The company contends that the two citations are duplicative in that they involve only one violation, i.e., ventilating the battery charging station with return air. It states that both citations were terminated through one action taken by the operator, i.e., changing the ventilation of the battery station to intake air.

However, the battery charging station was not housed in a fireproof structure, it was ventilated with return air, and non-permissible equipment was being used in it while it was ventilated with return air. These are distinct, separate violations. Despite the fact that the violations arose out of a

single mining activity (battery charging) there were separate violations of two separate regulations. Separate proof was offered for each violation. See: Southern Ohio Coal Company, 4 FMSHRC 1459, 1462 (1982). Thus, to abate the violation of ' 75.340(a)(1), substantial separate actions were required besides changing the ventilation to intake air. The coal ribs housing the station were insulated with a noncombustible sealer to form a fire protection barrier between the coal ribs and the charging units. The mine floor was cleaned. Rock dust was applied to all the areas. The cardboard containers, plastic containers and empty oil cans were removed from the underground area of the mine.

The company also contends that the two violations were not due to high negligence because there were mitigating circumstances. It states that the battery charging station was being ventilated pursuant to directions given by a prior MSHA inspector and had been ventilated that way for a substantial period before the citations.

Three or four days before the citation was served, the Mine Superintendent, Billy Martin, told Inspector Johnson that he had a ventilation problem concerning the battery charging station, and showed him a small drawing or map to indicate the problem. The problem he described did not indicate that station was in return air. The inspector was leaving and stated that when he returned (several days later) he "would try to help him on the ventilation" problem. Tr. 234. When the inspector returned, on December 8, 1992, he examined the battery charging station and found that it was in return air. The inspector testified that Martin had not told him, several days earlier, that the station was in return air.

In looking back at the situation, the inspector testified that "when I issued the imminent danger [order] [it] was my understanding that Mr. Martin didn't know that he could use this neutral air to dump into this charging station ...." Tr. 232.

Travis Miller, the Mine Manager, testified that the battery station "was ventilated pursuant to the direction of [Inspector] Sloan and to his satisfaction." Tr. 273. However, Mr. Miller had no firsthand knowledge of the condition of the battery station prior to December 8, 1992. I do not find that the prior inspector, Marcus Sloan, approved the ventilation pattern for the battery station that was later found by Inspector Johnson on December 8, 1992.

However, I find that Mr. Martin's effort to get advice from Inspector Johnson concerning the ventilation of the battery station several days before December 8, 1992, is a mitigating factor that serves to reduce the operator's negligence from high to moderate as to the violations involving ventilating the battery station in return air. This factor does not mitigate the high negligence involved in the failure to maintain the battery station in a noncombustible structure or area, which is an important part of the violation of ' 75.340(a)(1).

The evidence sustains the inspector's finding of significant and substantial violations as to the battery charging station.

Belt Conveyors

Three ' 104(a) citations were issued in conjunction with a ' 107(a) imminent danger order on June 24, 1993.

The imminent danger order was issued based upon the inspector's finding that a combination of hazards constituted an imminent danger: the automatic fire sensor system for four conveyor belts was inoperative; extensive accumulations of loose coal, coal dust and float coal dust were present; and there were damaged, broken, and stuck rollers.

The imminent danger order was terminated the following afternoon, after the fire sensor system was repaired, the accumulations were cleaned up, and the rollers were repaired or replaced.

The company contends that the imminent danger order was improper because the conveyor belts were not running and were in the process of being cleaned and repaired at the time of the inspection.

However, when Inspector Johnson arrived at the mine on June 24, 1993, advance mining was underway in the active workings. He met the mine superintendent, who told him the belt conveyors were not running because a rock-picking table was being repaired. Inspector Johnson crawled the belts. Even though the shift had begun three hours earlier, he saw no evidence of any effort to repair the fire sensor system, the rollers, or to clean up the extensive accumulations of loose coal, coal dust, and float coal dust.

The evidence sustains the imminent danger order and the three ' 104(a) citations. The violations were significant and substantial, as they were reasonably likely to cause serious

injury. The violations were obvious and demonstrated high negligence.

Claim of Financial Hardship

Travis Miller, the mine manager, testified concerning Nats Creek's ability to pay the penalties proposed by the Secretary. In general, he stated that the price of coal was low and the cost of mining it was high. These are common complaints in the mining industry. He testified that the Sugarloaf No. 2 Mine was losing money, but he had no information about assets, liabilities, owners' salaries, business structure, or any other financial data. To support his testimony, he offered a one-page unaudited and unsigned consolidated income statement for the five months ending May 31, 1994 (Respondent's Exhibit 2). The preparer of the statement was not identified. No company records or tax returns were offered to support the figures in the statement.

At the close of the hearing the judge gave Nats Creek 15 days from the date of the hearing to submit an audited financial statement. No such statement was submitted.

The burden is on a mine operator to establish that payment of the assessed civil penalties will adversely affect its ability to continue in business. Absent proof that the imposition of civil penalties would adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Co., 5 FMSHRC 287 (1987), aff'd. 736 F.2d 1147 (7th Cir. 1984).

Mr. Miller's testimony and the one-page unaudited income statement do not meet Nats Creek's burden of proof that payment of the penalties assessed would affect the operator's ability to continue in business.

Civil Penalties

Respondent produces about 160,000 tons of coal a year.

From June 30, 1990, to June 30, 1994, Respondent had 135 violations of mine safety and health standards, for which it paid $17,320 in civil penalties, and was cited with 48 other violations with proposed civil penalties of $86,290 which are in litigation.

As to each of the violations in the cases at bar, Respondent made a good faith effort to achieve rapid compliance after being

notified of the violation. The factors of negligence and gravity are discussed above.

Considering all of the criteria for assessing civil penalties in ' 110(i) of the Act, I find that the following civil penalties are appropriate:

Citation No.	Date	Civil Penalty
4017965	12/1/92	$ 235
4017967	12/1/92	$ 235
4017975	12/1/92	$ 235
4017980	12/1/92	$ 235
4017968	12/1/92	$ 235
3516674	12/8/92	$6,500
3516675	12/8/92	$4,500
4027495	6/24/83	$2,000
4027496	6/24/83	$5,000
4027497	6/24/83	$4,000

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated the mine safety standards as alleged in each of the 10 citations involved in these cases.

3. The evidence sustains the two ' 107(a) orders involved in these cases.

ORDER

1. The 10 citations and the two ' 107(a) orders involved in these cases are AFFIRMED.

2. Respondent shall pay civil penalties of $23,175 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, 415 Second St., P.O. Box 351, Pikeville, KY 41502 (Certified Mail)

/lt