FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 19, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 91-97 A. C. No. 40-02755-03525
v.	:	
FAITH COAL COMPANY, Respondent	:	Docket No. SE 91-533 A. C. No. 40-02755-03527
	:	Docket No. SE 92-315 A. C. No. 40-02755-03536
	:	Docket No. SE 92-316 A. C. No. 40-02755-03537
	:	Docket No. SE 92-343 A. C. No. 40-02755-03538
	:	Docket No. SE 92-372 A. C. No. 40-02755-03540
	:	Docket No. SE 92-373 A. C. No. 40-02755-03541
	:	Docket No. SE 92-375 A. C. No. 40-02755-03542
	:	Docket No. SE 92-463 A. C. No. 40-02755-03543
	:	Docket No. SE 92-464 A. C. No. 40-02755-03544
	:	Docket No. SE 92-488 A. C. No. 40-02755-03545
	:	Docket No. SE 93-78 A. C. No. 40-02755-03547
	:	Docket No. SE 93-79 A. C. No. 40-02755-03548 Docket No. SE-93-194 A. C. No. 40-02755-03549
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:	Docket No. SE 94-257
:	A. C. No. 40-02755-03565
:	
:	No. 15 Mine

DECISION

Appearances: Ann T. Knauff, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, TN, for Petitioner;
Russell Leonard, Esq., 603 Cumberland St., Cowan, TN, for Respondent;
Lonnie Stockwell, Faith Coal Company, Palmer, TN, for Respondent.

Before: Judge David Barbour

These consolidated cases are before me upon petitions for the assessment of civil penalties filed by the Secretary of Labor (Secretary) pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. ' 820). The petitions charge Faith Coal Company (Faith) with numerous violations of mandatory safety and health standards at its No. 15 Mine. The issues are whether Faith violated the cited standards and, if so, the amount of the civil penalties to be assessed.

The cases were heard in Jasper, Tennessee. The Secretary was represented by counsel, Ann T. Knauff. Faith was represented by counsel, Russell Leonard, and by its owner, Lonnie Stockwell. (Leonard's appearance was limited to one day and to one issue -- the effect of any civil penalties assessed on Faith's ability to continue in business.)

As indicated below, many of the alleged violations were settled. The settlements were explained thoroughly by counsel for the Secretary. I have considered the explanations and find them appropriate.

The settlements are approved. Although the Secretary proposed civil penalties for the settled violations, the parties understood that the penalties assessed will be those I find warranted in light all of the statutory penalty criteria; particularly, the criterion relating to Faith's ability to continue in business (Tr. II 259, 265-270, 330).

STIPULATIONS

The parties agreed that:

1. Faith was a contract operator for Tennessee Consolidated Coal Company (TCC).

2. Faith's contract with TCC was dissolved by mutual agreement on September 30, 1993.

3. Faith engaged in commerce.

4. The Act applied to Faith's No. 15 Mine, and the Commission had jurisdiction to hear and decide the cases.

5. The inspectors who issued the subject citations and

orders were authorized representatives of the Secretary and were acting within the scope of their authority when they inspected the mine.

6. The mine has been abandoned temporarily since October 1, 1993 (See Tr. II 9-10).

CONTESTED CITATIONS AND ORDERS

Docket No. SE 92-316

Citation/ Order No.	Date	30 C.F.R.	Assessment
3395933	2/26/92	75.1808	$20

Citation No. 3395933 states:

> The approved books and records being maintained in the mine office on the surface were not stored in a fire proof repository to minimize their destruction by fire or other hazards (Joint Exh. 6).

Inspector Clyde J. Layne testified that on February 26, 1992, he went to the mine and found that none of the approved books and records were kept in a fireproof structure as required by section 75.1808. Rather, they were lying in the open, on a desk (Tr. III 519). The mine office was housed in a metal "van-type truck body" (Tr. III 520; See Joint Exh. 6A). Layne considered the outside of the truck body to be fireproof, but the inside of the truck body was cluttered with combustible materials -- maps, paper bags, cardboard items and mine record books. Most of the books and records on a desk were in the midst of the clutter (Tr. III 522). If a fire started, the books and records would have burned (Tr. III 521-522).

Grinding wheels and torches were located inside the truck body (Tr. III 523). Although the truck body did not contain a central fire fighting system, there was a fire extinguisher at its rear.

The office was used on an intermittent basis. If a fire started and the approved books and records burned, miners probably would not have been endangered (Tr. III 525). Although Faith was negligent, Stockwell meant to correct the conditions that resulted in the violation but had not gotten around to it (Id.)

Faith abated the conditions by putting the books in an old, metal refrigerator (Tr. III 526). According to Layne, metal refrigerators were used as fire proof repositories at several other mines, and their use had been approved by the MSHA field office supervisor (Id. 527-528).

Stockwell did not disagree with the inspector's description of the conditions. However, he did not believe the conditions constituted a violation. He regarded the truck body as a fireproof repository (Tr. III 529).

The Violation

I ruled from the bench that the violation existed as charged. I stated:

> [T]hat the building itself is fireproof may well be true, but ... even though [the] building is made of metal ... if [Faith's] records are kept inside ... and in such ... condition that they are subject to fire, they must be stored in a fireproof repository inside the ... building (Tr. III 530).

I affirm the ruling.

Gravity and Negligence

I also find, based upon Layne's testimony, that the violation was not serious and that Faith was negligent in allowing the violation to exist.

DOCKET NO. SE 92-343

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396042	3/02/92	77.1104	$94

Citation No. 3396042 states:

> Accumulation[s] of combustible materials (loose wooden planks, and dry weeds) that could create a fire hazard had accumulated around the powder storage magazine on the surface (Joint Exh. 13).

Clyde Layne testified that on March 2, 1992, he observed a powder magazine sitting on wooden planks and surrounded by weeds. Layne believed that this condition was a violation of section 77.1104, which prohibits accumulations of combustible materials where they can create a fire hazard. Layne also believed that two miners were exposed to the hazard created by the conditions (Tr. III 538-539).

Layne found the alleged violation to be a significant and substantial contribution to a mine safety hazard (S&S) because the powder storage magazine was located near the road to the mine entrance and miners traveled along the road. If the accumulated combustible materials caught fire, they could heat the magazine to the point where the powder could explode and miners could be hurt (Tr. III 539, 545). Such a fire could be started by a forest fire, by lightning, or by a person flipping a cigarette butt out of the window of a passing car (Tr. III 542-543).

Layne did not know how long the conditions had existed. Nor did he know if his supervisor had told Stockwell that the location of the powder magazine was acceptable (Tr. II 540-541). Nonetheless, Layne believed Faith was negligent in allowing the conditions to exist (Tr. III 539-540).

According to Layne, the conditions were abated when Stockwell's brother, James Stockwell, removed all of the planks and all of the weeds from beneath and around the magazine (Tr. III 542, 544).

James Stockwell testified that the magazine was installed on March 1, 1992, the day before Layne cited Faith for the alleged violation, and that Layne's supervisor had approved the location of the magazine (Tr. III 548-549). James Stockwell asked the supervisor about the location of the magazine because he was concerned it might be too close to a telephone pole. According to James Stockwell, the supervisor stated that there was nothing wrong with the location (Tr. III 553).

James Stockwell also stated that the magazine was located on the side of a spoil bank and that a board was placed under it to level the magazine (Tr. III 550-551). The only "planting" Stockwell remembered near the magazine was one pine tree, approximately 10 feet away (Tr. III 552).

The Violation

I find that a violation of section 77.1104 existed. Although the witnesses' testimony was in conflict regarding the vegetation around the magazine, it is clear, as James Stockwell himself testified, that at least one wooden board was underneath the magazine. This board was enough to establish an accumulation of prohibited combustible material and the creation of a prohibited fire hazard.

Further, although I credit James Stockwell's testimony regarding a conversation with Layne's supervisor concerning the acceptability of the magazine's location, the conversation, as recounted by James Stockwell, involved the location of the magazine,

not the board under it, and the conversation does not impact the existence of the violation.

S&S and Gravity

The violation was neither S&S nor serious. The potential ignition sources catalogued by Layne (forest fire, lightning or a cigarette butt) were highly speculative. I conclude there was no reasonable likelihood of injury associated with the violation.

Negligence

Faith was negligent in allowing the violation to exist. It knowingly used the wooden board to level the magazine. The cited standard is clear. The circumstances required Faith to make sure combustible material was not allowed in the immediate vicinity of the magazine, and the company failed to meet its standard of care.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396041	3/2/92	75.1713-7(a)(1)	$94

> The operator did not maintain the required supply of first-aid equipment at the mine work site. The following items were missing; one stretcher and one broken-back board (Joint Exh. 12).

During the course of Layne's testimony regarding the alleged violation, it became apparent that the inspector had cited the wrong standard. He stated that he should have cited section 75.1713(a)(3), rather than section 75.1713-7(a)(1) (Tr. III 564). Counsel for the Secretary moved to amend the citation to allege a violation of section 75.1713(a)(3) on the grounds that there was an "understanding between the inspector and the operator about exactly which regulation was being violated" (Tr. III 565). Stockwell objected.

I denied the motion because I concluded there was confusion between the inspector and the operator about the standard. I also concluded that because Stockwell prepared to defend against the citation as written, it was too late to amend it. As a

result, I indicated the citation should be vacated (Tr. III 567-568). Nothing in the record convinces me I was wrong, and I affirm the bench ruling.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396045	3/2/92	75.202(a)	$147

Citation No. 3396045 states in part:

> The spacing of roof bolts were not maintained on 5 feet centers located approximately 700 feet inby the ... portal in that several permanent roof bolts were spaced from 5 1/2 to 9 feet apart. Approximately 7 bolts need to be installed in this area.
>
> This entry was driven by another operator and is being cleaned up to install a belt conveyor by the present operator. The [a]pproved [r]oof [c]ontrol [p]lan requires permanent roof supports to be installed on 5 feet by 5 feet [centers] (Joint Exh. 16).

Layne testified that on March 2, 1992, he inspected an entry that was being cleaned for the installation of a belt conveyor, he observed an area of the roof were the spacing of roof bolts exceeded the five foot limit specified in the roof control plan. Several of the bolts were as much as 9 feet apart.

Although the area was low and travel through it could only be done if a person crawled, tracks on the floor indicated to Layne that "people crawled through [the] area" (Tr. III 576, See also Tr. III 564-572, 576, 577).

When Faith took over the mine from the previous operator, the area had been "gobbed out" and travel through it had been impossible. Faith's miners cleared away the gob material and thereby made the area passable (Tr. III 594). The roof bolts had been installed by the previous operator. Nevertheless, in Layne's view, Faith became responsible for the condition of the roof when it assumed control of the mine (Tr. III 570-571).

To abate the condition, the roof bolting machine was moved into the area and the required additional roof bolts were installed (Tr. III 578).

Layne believed that the alleged violation was S&S because a roof fall accident "could be fatal" (Tr. III 582). Layne also believed that because the area had to be pre-shift examined prior to miners working in it, the company should have known of the existence of the improperly spaced roof bolts (Tr. III 379). However, he acknowledged that it was possible for management personnel to crawl through the area and to not see the improperly placed roof bolts, many of which where on the sides of the entry (Tr. III 582, 584).

Stockwell did not dispute that the roof bolts were misplaced. He also agreed that he had crawled through the affected area when Faith started to rehabilitate the entry (Tr. III 600). (Stockwell stated that he believed he was the only person who had crawled through the area (Tr. III 603-604).)

With regard to the general condition of the roof, Stockwell stated that "it was not as good as we [thought]" (Tr. III 602).

The Violation

To establish a violation of section 75.202(a), the Secretary must prove that the affected area was a place where a person or persons worked or traveled, and that the roof was not supported to protect the person or persons from roof falls. Here, the Secretary has met his burden of proof.

Layne believed that miners working to rehabilitate the entry, traveled under the affected roof. However, there also was credible testimony that miners could have traveled in adjacent intake and return entries rather than directly under the roof of the area in question. Given the low height of the entry at the affected point and the fact that miners could have traveled in the adjacent entries, I do not credit Layne's belief. This is especially true, because Stockwell offered a persuasive explanation for the tracks on the floor of the area -- i.e., that he crawled through the entry.

In any event, since Stockwell himself traveled through the affected area on at least one occasion and since Stockwell agreed that the cited roof bolts were not spaced as required by the roof control plan, I find that a violation of section 75.202(a) existed. The plan sets forth the minimum that is required to support the mine's roof. When, as here, an operator does not meet a minimum requirement of the plan, it is reasonable to conclude that the roof is not supported to protect miners, in this case, Stockwell, from a roof fall hazard.

S&S and Gravity

The Secretary did not establish the S&S nature of the violation. The sole testimony offered by Layne regarding an injurious roof fall was that a roof fall accident "could be fatal" (Tr. III 582). On its own, Layne's opinion does not establish "a reasonable likelihood that the hazard contributed to will result in an injury" (Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984)).

Nevertheless, this was a serious violation. The fact that the evidence established that only Stockwell crawled under the improperly supported roof does not diminish its gravity. The roof did not meet the minimum roof support requirements which means there was at least some likelihood that it would fall. Had it fallen on Stockwell, his death or serious injury almost certainly would have resulted.

Negligence

I also conclude Faith was negligent. If reasonable care had been exercised, the inadequately supported roof would have been properly bolted before it came to Layne's attention. As Layne correctly observed, Faith was the operator and therefore was responsible for the condition of the roof. Faith's negligence is mitigated to some extent by the fact that Faith did not install the roof bolts, and by the fact that the area in question was not subject to frequent visits by mine personnel.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3396047	3/3/92	75.208	$88

Citation No. 3396047 states:

> A readily visible warning or a physical barrier was not installed on the end of the permanent roof support to impede travel beyond permanent support in the crosscut connecting the Nos. 2 and 3 working places on the 001 section. There was a distance of approximately 15 feet that was not support[ed] with roof supports (Joint Exh. 19).

Layne testified that on March 3, 1992, he inspected a connection between two crosscuts. The roof in the connection was not supported for a distance of approximately 15 feet. Indications had not been placed at the end of the supported roof

to warn miners of the lack of support, nor had barriers been installed (Tr. III 629, 633). No miners were at work on the section when Layne observed the condition. However, Layne noticed that one cut had been taken out of the face and that the loading machine was parked approximately 40 feet outby the crosscut (Tr. III 630, 637-638). This signified to Layne that miners recently had worked on the section (Tr. III 630).

There was no indication that miners had passed through the crosscut. Layne did not note any tracks on the floor under the unsupported area (Tr. 630-631).

Layne discussed the condition with Stockwell. Layne stated that Stockwell told him the equipment had been moved to the section the previous day and that work had not yet begun on the section (Tr. III 632). Layne did not believe Stockwell because of the "fresh" cut at the face. (Id.).

Layne found the alleged violation to be S&S. Layne believed miners would take for granted that the roof was supported (Tr. III 632). The lack of any warning device or barrier to impede travel under the roof would reinforce this assumption. If the roof fell and hit a miner, the resulting injury would be "bad" or "fatal" (Id.).

Layne believed that Faith was negligent. The lack of a warning device or barriers should have been detected and corrected. Equipment had been in the area. The area had to be preshift examined. The condition was not noted in the preshift examination book (Tr. III 635, 642-643).

Stockwell maintained that the general area where the alleged violation existed was not a work site prior to Layne's visit (Tr. III 645).

The Violation

I fully credit Layne's testimony. It was consistent and persuasive. As Layne stated, the lack of support left 15 feet of exposed roof. There were no visible warnings of the end of permanent roof support nor any type of barrier. The standard requires readily visible warning signs or barriers under such conditions. The violation existed as charged.

S&S and Gravity

The inspector's testimony falls short of establishing the third element of the Mathies test. The obvious purpose of the standard is to alert miners to stay out of areas where the roof is not supported. The discrete safety hazard contributed to by the violation is that the roof will fall on miners who

unexpectedly venture under the unsupported roof. Analysis under Mathies, as further explained by the Commission in U.S. Steel Mining Company Inc., 6 FMSHRC 1834, 1836 (August 1984), requires the Secretary to establish "a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." In the context of a violation of section 75.208, the Secretary must establish that because a sign or barrier is missing, miners will be reasonably likely to proceed beyond permanent roof support and be injured.

I accept as fact that without a sign or barrier, miners will reasonably likely believe the roof is supported when it is not, and inadvertently, will proceed beyond permanent roof support. However, to find it reasonably likely that miners will be injured, the Secretary must offer some evidence regarding the instability of the subject roof.

Layne, without further amplification of what he meant, described the roof as "fair" (Tr. III 633). Also, he noted that the roof lacked visible signs of stress (Tr. III 633). Because the Secretary did not offer any testimony regarding an inherent instability of the roof in the area or any specific signs of instability, I cannot find that the violation was S&S.

Nevertheless, it was a serious violation. As I have found, without visible warning signs or barriers, miners would likely proceed under the unsupported area and subject themselves to the chance of death or serious injury. As Layne persuasively explained, they would assume the roof was supported properly (Tr. III 632).

In addition, Layne's testimony that work recently had taken place at the face was credible and I accept it as fact. Thus, miners had been in the general vicinity of the unsupported roof and easily could have been exposed to the hazard.

Negligence

Faith was negligent. The fact that miners had been working in the general area required that the area be preshift examined. The violation was obvious visually. Faith should have known of the existence of the unsupported roof and of the lack of visible signs or barriers. The condition should have been detected and corrected.

Docket No. SE 92-463

Citation/

Order No.	Date	30 C.F.R.	Assessment
3024224	5/28/92	75.208	$88

Citation No. 3024224 states:

> The first crosscut on the left side of the No. 1 room had been advanced approximately 22 feet inby the last row of permanent supports, and the area was not posted with a visible warning or provided with a physical barrier to impede travel beyond permanent support (Joint Exh. 29).

MSHA Inspector Tommy D. Frizzell testified that on May 28, 1992, he found that mining had advanced approximately 22 feet inby the last permanent roof supports in the No. 1 room, and that no warning device nor barrier had been installed (Tr. II 276-277, 280). (Frizzell was accompanied by Stockwell during the inspection.) Frizzell measured the unsupported area by tying a tape measure to his hammer and throwing the hammer to the end of the cut (Tr. II 287-288).

The mined area was in "low coal" (i.e., 38 inch coal) (Tr. II 277, 287). Because of the low coal, miners had to travel through the area by "crawling with [their] head[s] down" (Tr. II 278). The only light was from their cap lamps. It was difficult for miners to note the condition of the roof, and Frizzel therefore believed the presence of a warning device or barrier was necessary to alert miners to the fact they were approaching an unsupported area. (Frizzel stated that either a reflective streamer or a barrier that blocked the entry would have been acceptable (Tr. II 279-280).)

Frizzell issued the citation at approximately 8:20 a.m. The shift had stated at approximately 6:00 a.m. Frizzell believed that the preshift examiner should have detected the lack of a warning device or barrier (Tr. II 281). He also believed that equipment had proceeded under the unsupported roof because the area had been cleaned. In addition, he saw equipment tracks on the mine floor and remote control equipment was not in use at the mine (Tr. II. 279).

Frizzell found the alleged violation was S&S. The roof in the cited area was "fair roof" and Frizzell could not detect any "discontinuities" in it (Tr. II 281). Nonetheless, he explained that "[e]ven though the roof may look good on the surface ... when you go inby roof supports you're just gambling" (Tr. II 283). He explained, "roof falls ... [are] the No. 1 killer in

the coal mine industry" (Tr. II 295). Had a roof fall occurred while a miner was inby permanent roof supports, the miner could have been fatally injured (Tr. II 284).

In Frizzel's opinion, the person most likely to have been injured was the operator of a roof bolting machine, although any of the seven or eight miners who worked underground were potential targets of the hazard. (Tr. II 284-285, 292). Due to the low height of the coal, canopies were not required on the roof bolting machines and none were provided (Tr. II 297).

A streamer was installed within 25 minutes to abate the condition (Tr. II 286).

Stockwell agreed that a streamer was not hanging at the beginning of the unsupported area. However, he maintained one was in a place when he conducted the preshift examination at approximately 5:30 a.m. (Tr. II 298, 300, 303). He stated that it was normal practice at the mine to hang a streamer to warn of unsupported roof (Tr. II 298-299).

The Violation

As previously noted, the cited standard requires a visible warning device or a physical barrier at the end of permanent roof support. The parties do not dispute that neither a device nor a barrier was present. Therefore, I find that the violation existed as charged.

S&S and Gravity

Again, I conclude the Secretary has failed to establish a reasonable likelihood that the hazard would have contributed to an injurious roof fall. Frizzell's testimony regarding "fair roof" and the lack of "discontinuities," does not afford a basis for a finding of "reasonable likelihood," and the fact that roof falls are the No. 1 killer of the nation's miners does not speak to the specific circumstances upon which the violation is based.

Nevertheless, the violation was serious. Without a warning device or barrier, a miner intent on entering the area easily could have failed to recognize the lack of roof support; especially since the coal was low. Moreover, and as Frizzell observed, had falling roof hit a miner, death or serious injury could have been expected.

Negligence

Faith was negligent. The lack of a streamer or barrier was obvious visually. In failing to correct the condition, Faith failed to exhibit the care required of it by the circumstances.

Docket No. SE 92-373

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883375	4/13/92	70.208(a)	$50

Citation No. 9883375 states:

> The mine operator did not submit a valid respirable dust sample during the Feb[ruary]/March bimonthly sampling period from designated area sampling point [9]01-0 as shown on the attached advisory dated 4/7/92 (Joint Exh. 27).

Inspector Judy McCormick stated that Faith failed to submit a valid respirable dust sample for the designated area of the roof bolting machine for the bi-monthly period of February/March 1992 (Tr. III 654-655). As McCormick explained, an operator is responsible for collecting the required samples and for submitting them to MSHA. The operator also is responsible for determining when, during the bi-monthly period, the samples will be taken (Tr. III 656). The samples must be mailed within 24 hours of collection. MSHA allows seven days past the end of the sampling cycle for the mail to process. If a sample is not received within 7 days (in this particular case, by April 7, 1992), a violation of the regulation is assumed to exist (Tr. III 671). If a sample is received out of time, it is not considered a valid sample (Tr. III 673). McCormick stated that on April 8, 1992, she was advised by computer, that the subject sample had not been submitted (Tr. III 665).

Operators mail samples to MSHA. McCormick described as "very rare" those instances in which samples are lost in the mail (Tr. III 657). McCormick could not recall if Stockwell orally

claimed to have mailed the particular sample in question, but was certain she had not received from him a written notification that it had been mailed. (Tr. III 658).

When asked about the procedures an operator could follow if a sample sent by regular mail was lost, McCormick replied that the operator had to file a lost mail claim with the postal service (Tr. III 659).

On cross examination, McCormick indicated that MSHA's records showed a sample for the designated area was taken by Faith on March 31, 1992, and was processed by MSHA on April 8, 1992. However, the sample was discarded because it was invalid (Tr. III 670). In McCormick's opinion, the alleged violation was largely a "paper work violation," and she did not expect that any miners would become ill because of it (Tr. III 660).

Stockwell testified that the sample was late because he could not get enough sampling devices from TCC. Stockwell also maintained that if Faith's sample had been received on April 7 rather than April 8, 1992, "everything would have been fine" (Tr. III 675).

The Violation

The violation existed as charged. As McCormick's testimony made clear, the violation was based upon the presumption that samples received more than seven days after the end of the sampling cycle were not collected in a timely fashion. Counsel for the Secretary stated, "There is a presumption that ... any sample that is taken within [the] bimonthly sampling period, even if it's taken on the last day, will get to the processing center and through the processing [in] seven days ... and that's a perfectly reasonable presumption" (Tr. III 676).

I agree with counsel. Given the fact that operators and MSHA must rely on the postal service, the allocation of a seven day "grace period" by the agency is a rational way to compensate for any delay of the mail. Faith did not offer any evidence to rebutt the presumption.

Gravity and Negligence

Based upon McCormick's testimony I find that the violation was not serious, and that Faith was negligent.

Docket No. SE 93-348

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883544	2/18/93	70.201(c)	$50

Citation No. 9883544 states in part:

> On January 28, 1993, the operator was notified in writing by the District Manager to submit in writing ... the dates and shifts that respirable dust sampling was to be conducted on each mechanized mining unit. The notification was required to be submitted by February 15, 1993. This operator has failed to submit such notification (Joint Exh. 39).

The citation was issued by Inspector Newell Butler. Butler was an inspector in the health group. He worked under McCormick's supervision. McCormick stated that she approved issuance of the citation, that she reviewed it before it was issued, and that she had firsthand knowledge of the conditions leading to the citation. Therefore, McCormick was allowed to testify concerning the alleged violation (Tr. III 684-685).

According to McCormick, on January 28, 1993, all underground coal mine operators in MSHA's Birmingham, Alabama, subdistrict, were informed by letter that they were required to submit to the subdistrict office a schedule for conducting respirable dust sampling on their mechanized mining units. The schedules were required to be received by February 15, 1993, (Tr. III 686). In McCormick's opinion, 30 C.F.R. 70.201(c) authorizes the subdistrict manager to request such a schedule. (Section 70.201(c) states: "Upon request from the District Manager, the operator shall submit the date on which collecting any respirable dust samples required by this part will begin.")

McCormick explained that MSHA needed to know the date when an operator would begin sampling in order to monitor an operator's sampling program. McCormick described the letter of January 28, 1993, as a "standard letter" and stated that such letters usually were mailed to operators every six months by certified mail, return receipt requested (Tr. III 686).

McCormick identified Joint Exhibit 39A as a copy of the certified mail receipt from the letter that was sent to Faith. The receipt was signed by Christine Stockwell, wife of Lonnie Stockwell, but was not dated. McCormick stated that the person receiving the certified mail was supposed to fill in the date (Tr. III 688, 690). The receipt was returned to the MSHA subdistrict office in Birmingham on February 22, 1993, (Joint Exh. 39A at 4; Tr. III 690).

McCormick testified that when no schedule was received from Faith, the citation was issued (Tr. III 687). McCormick did not believe miners would suffer illness as a result of the alleged violation. She maintained that Faith was negligent in failing to file a response with the subdistrict office (Tr. III 691-692).

Stockwell testified that if he had received the January 28 letter within a reasonable time, he would have had "plenty of time" to respond (Tr. III 693). He stated that he believed the letter was picked up on February 13, 1993, and that he did not have the information needed. He agreed however, that the letter could have been at the post office for several days before it was picked up (Tr. III 694).

The Violation

As noted, section 70.201(c) requires an operator to submit a respirable dust sample collection schedule upon the request of the district manager. Stockwell does not dispute the fact that Faith did not timely comply with the district manager's request. The violation existed as charged.

Gravity and Negligence

McCormick's testimony regarded the non-serious nature of the violation was not disputed, and I credit it.

I also find that Faith was negligent in failing to timely comply with the letter of January 28. The fact that Stockwell had to pick up certified mail at the post office, and the fact that he and his wife had to leave their work early in order to do so, is irrelevant (See Tr. III 396-397). As a mine operator, Stockwell was on notice that the agency would mail communications to him by registered mail. It was his duty to make certain that the mail was received by Faith in a timely fashion and that the company made a timely response. Faith was negligent in failing to meet the duty.

Docket No. SE 93-365

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883549	3/4/93	70.100(a)	$119

Citation No. 9883549 states in part:

> Based on the results of 5 samples ... the average concentration of respirable dust in the working environment of mechanized mining unit (MMS) I.D. [No.] 001-0 was 6.3 mg/m 3 of air. The operator shall take corrective action to lower the concentration of respirable dust to within the permissible limit of 2.0 mg/m 3 and then sample each production shift until 5 valid samples are taken (Joint Exh. 46).

Judy McCormick testified that the citation was issued when the results of five samples submitted by Faith for the working environment of a mechanized mining unit revealed an average concentration of 6.3 milligrams per cubic meter of air. The cited standard requires the operator to maintain an environment of 2.0 milligrams or less (Tr. III 698).

McCormick explained that after an operator submitted required respirable dust samples to MSHA, the agency analyzed the samples and advised the Birmingham subdistrict office of the results of the analysis by a computer message. If the results indicated that the respirable dust concentration was above the permissible limit, a citation was issued (Tr. III 668-669). Here, the results indicated that the miner operating the coal drill had been exposed to an impermissible concentration of respirable dust
(Tr. III 699).

McCormick also stated that had any of the results indicated that the samples were contaminated or improperly analyzed, she would have called the MSHA laboratory and asked personnel to check the samples. In this instance, where there was one sample result that was inordinately high, she believed she had followed her normal procedures and called the laboratory, but she could not specifically recall having done so (Tr. III 702-703, 708).

McCormick thought the violation was S&S because of the presumption that exposure to respirable dust in excess of the standard can result in the contraction of pneumoconiosis (Tr. III 704). McCormick also found the alleged violation was the result of negligence on Faith's part (Tr. III 707).

The violation was abated when Faith submitted five samples that revealed an average concentration of 1.6 milligrams of respirable dust per cubic meter of air (Tr. III 705).

Stockwell maintained that the sample McCormick thought was inordinately high showed such an "extreme difference" that "somewhere someone should have picked up and followed up on it to see what was going on" (Tr. III 712).

The Violation

Judy McCormick was a professionally competent and responsive witness. I credit her statement that if a sample showed an average concentration of over 5.0 milligrams per cubic meter of air her practice was to call the MSHA laboratory to inquire about the sample (Tr. III 708). Given the number of sample results that were subject to McCormick's review, I do not find it remarkable she could not remember if she called about the particular sample in question. However, I infer from her testimony that she did follow normal procedures and that she was advised nothing was amiss with regard to the sample in question. I therefore conclude that the samples were valid, analyzed properly and that the violation of section 70.100(a) existed as charged.

S&S and Gravity

As McCormick accurately stated, the violation was S&S (See Consolidation Coal Co.,. 8 FMSHRC 890 (June 1986), aff'd 824 F. 2d 1071 (D.C. Cir. 1987). Overexposure to respirable dust leads to pneumoconiosis, which in turn leads to disability and death. Thus, the violation also was serious.

Negligence

I agree with McCormick that Faith was negligent. In places where miners normally are required to work or travel, it is the duty of the operator to maintain the average concentration of respirable dust to which each miner is exposed at or below 2.0 milligrams per cubic meter of air. Faith failed to meet this duty.

Docket No. SE 94-96

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883661	10/14/93	70.208(a)	$50

Citation No. 9883661 states in part:

> The mine operator did not submit a valid respirable dust sample during the

> Aug[ust]/Sept[ember] bimonthly sampling period from designated area sampling point 901-0 (Joint Exh. 59).

McCormick testified that she issued the citation because Faith failed to submit a respirable dust sample for the area in which the roof bolting machine operator was working during the referenced bi-monthly period. The sampling procedure that Faith should have followed was the same as that she had described with respect to Citation No. 9983375 (infra) (Tr. III 717-718).

McCormick was advised by counsel that Faith's defense to the citation was that mining had ceased in September 1993, and she was asked if she knew if the mine was producing coal during the August/September bi-monthly sampling period. McCormick replied that "the computer had not been notified in any way that the mine was not producing" (Tr. III 718). Rather, MSHA was notified the mine had ceased production after the sampling cycle passed, that is, after September (Tr. III 719).

McCormick explained that normally an operator notified the appropriate MSHA field office by telephone when a mine ceased operation and followed up the telephone call with a letter to the appropriate MSHA district manager. The letter is required by 30 C.F.R. ' 70.220(a) (Tr. III 719, 721-722). If Stockwell had called her office and stated that the mine was closed or closing, a message would have been left on her desk. She neither spoke with Stockwell nor received such a message (Tr. III 721).

The alleged violation was abated on November 29,1993. It was around that time MSHA was notified the mine had gone into a non-producing status (Tr. III 722).

In McCormick's view, there was a violation of the cited standard because "the entire sampling cycle of August and September was worked by the operator without collecting a dust sample" (Tr. III 720). McCormick did not consider the violation to be S&S. She did believe it was due to Faith's negligence (Tr. III 723).

Stockwell testified that the mine was shut down a few days before the end of September 1993. He stated that after production ceased, MSHA inspectors McDaniels and Layne came to the mine to conduct an inspection. He told the inspectors that the mine was not producing coal and that he would no longer be conducting bimonthly sampling. He asked the inspectors to "take appropriate action to take care of it" and they told them that they would (Tr. III 728).

Stockwell also stated that he called McCormick's office and spoke with a woman, whose name he did not know. He left a

message for McCormick about the mine ceasing production (Tr. III 728-729). Stockwell never wrote a letter to MSHA to report the mine had closed (Tr. III 729).

The Violation

MSHA charged a violation in this case because it assumed that production was ongoing during the entire bimonthly sampling cycle (Tr. III 720). The basic premise of Faith's defense was that if it established production ceased before the end of the sampling cycle, a violation would not have existed.

While I agree there would have been no violation if production ended on or before September 30, I find that the defense was not established. As McCormick noted, section 70.220(a) requires an operator to report a change in the operational status of the mine to the MSHA District Office within 3 working days after the change occurs. Although the regulation

does not state how notification is to be accomplished, the agency's Program Policy Manual(PPM) states that the notification must be in writing (V PPM 15). This is a reasonable interpretation of the regulation and an operator is bound by it.

Stockwell admitted he did not advise MSHA in writing that production had ceased and there is no evidence beyond Stockwell's self-serving assertion to confirm that the mine ceased production before the cycle ended. Accordingly, I find that the violation existed as charged.

Gravity and Negligence

Faith does not dispute McCormick's testimony with regard to the gravity of the violation, and I find that it was not serious (Tr. III 723). Based on McCormick's testimony I find also that Faith was negligent (Tr. III 723).

Citation/ Order No.	Date	30 C.F.R.	Assessment
9883662	10/14/93	70.208(a)	$50

The parties stipulated that the testimony given with respect to Citation No. 9883661 would apply to Citation No. 9883662 (Tr. III 725-726).

The Violation

On the basis of the stipulation I find that the violation existed as charged.

Gravity and Negligence

On the basis of the stipulation I find that the violation was not serious and that Faith was negligent.

Docket No. SE 92-464

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024223	5/27/92	77.402	$88

Citation No. 3024223 states:

> Two hand-held electric (110 volt AC) drills and one hand-held electric grinder observed in the shop were not equipped with controls requiring constant pressure by hand or finger to operate the tools in that the controls were equipped with locking devices (Joint Exh. 30).

Frizzell stated that on May 27, 1992, he observed two hand held electric drills and one electric grinder at the mine. The equipment was located on the surface. The drills and grinder were equipped with trigger locks. (He explained that a trigger lock was one that "if you lock the trigger down, [the equipment will] continue to drill or to grind ... without any pressure being applied by the finger" (Tr. II 305)). Frizzell believed a violation of section 77.402 existed because the standard requires hand-held power tools to be equipped with controls that require constant hand or finger pressure to operate or to be equipped with equivalent safety devices (Id.). According to Frizzell, the regulation prevents a drill that gets stuck or "hangs" while drilling into a surface from twisting and breaking the drill operator's finger or arm (Tr. II 306-307). Also, if the drill is dropped, the regulation prevents the drill from continuing to operate and from drilling into the operator's body (Tr. II 316).

Frizzell found the alleged violation to be S&S (Joint Exh. 30).

Frizzell observed the equipment lying on a bench. He did not recall operating the equipment (Tr. II 318). However, he picked up the drills and the grinder, tested the locking devices, and in each instance found that the devices were capable of being engaged (Tr. II 309, 311). Although he did not see anyone using the equipment, the equipment was not tagged-out, and Frizzell believed anyone could have picked up and use the drills and grinder at any time (Tr. II 309-310).

Frizzell explained to both James Stockwell and Lonnie Stockwell that trigger locks were not permitted, and neither corrected him or said that the trigger locks were not present (Tr. II 320-321).

Because the locking devices were obvious, Frizzell believed that Faith's management should have known of their presence, and that Faith was negligent in allowing them to exist.

Stockwell testified that Frizzell was mistaken, that what Frizzell thought were trigger locks, were not. Because his brother had a hot temper, Stockwell did not try to explain to Frizzell that the drills and grinder were not in violation of the standard (Tr. II 315, 324). Rather than have his brother and the inspector get into a heated disagreement, Stockwell defused the situation by removing the equipment from the property.

The Violation

Section 77.402 prohibits locking devices by requiring that hand held power tools be operated through constant hand or finger pressure. I credit Frizzell's testimony that the power drills and the grinder were equipped with locking devices. Further, despite Stockwell's avowal that he "trie[d] with all the strength within [him] to avoid confrontations," it seems highly unlikely to me that he would have accepted a violation he was certain was erroneous (Tr. II 327). I conclude therefore, that the violation existed as charged.

S&S and Gravity

The Secretary did not establish that the violation was S&S. Frizzell did not testify about the circumstances under which the equipment was used and the frequency with which it was used. He did not testify regarding similar violations that had lead to injuries. I can not draw any conclusion from the record regarding the likelihood of injury, and I therefore, can not find the violation was S&S.

Nevertheless, the violation was serious. Frizzell persuasively explained that without pressure sensitive controls, the drills could twist and pose a risk to fingers and hands. He also testified that without such controls, it was possible a drill operator inadvertently could drill into himself or herself (Tr. 316-317). I accept his testimony regarding the gravity of the violation.

Negligence

In failing to ensure that the trigger locks on the cited equipment had been rendered dysfunctional, Faith failed to meet the standard of care required by the circumstances. Therefore, I find that Faith was negligent.

Docket No. SE 94-42

Citation/ Order No.	Date	30 C.F.R.	Assessment
3202273	7/22/93	75.324(a)(2)	$412

Citation No. 3202273 states:

> The fan house was not provided with air-lock doors to prevent the ventilation being disrupted when equipment is taken through the single explosion door. Equipment and mantrips enter the mine through the door at regular intervals and the ventilation is short-circuited (Joint Exh. 58).

Air lock doors to a mine fan house are designed to protect a fan mine and a ventilation system in the event of an explosion in that they stop the force of a blast from affecting the fan and from disrupting ventilation (Tr. II 339). Frizzell testified that the fan house for the No. 15 Mine was located on the surface, just outside the portal. There was only one door to the fan house. There were no air lock doors. Therefore, each time the door was opened, the main ventilation of the mine was short-circuited and 30,000 cubic feet of air per minute (CFM) escaped into the atmosphere (Tr. II 339-340).

When Frizzell issued the citation, the fan house door had been left open. Frizzell noted that it also was opened every time equipment or a person passed through it (Tr. II 341-342). Frizzell originally believed the condition represented a violation of 30 C.F.R. ' 75.333(d)(3). The standard requires doors that are used to control ventilation within an aircourse to

be installed in pairs to form an airlock. However, he modified the citation to allege a violation of section 75.324(a)(2) because opening the fan house door affected mine ventilation by at least 9,000 CFM (Tr. II 343). Frizzell regarded the opening of the door to be an intentional change of ventilation and stated that Stockwell was the person designated to make such changes at the mine (Tr. II 366).

Frizzell found that the alleged violation was S&S. He believed that Faith seldom conducted mining with more than 10,000 or 11,000 CFM at the last open cross cut. Thus, a loss of 30,000 CFM when the fan house door was open left less than the required 9,000 CFM at the last open crosscut (Tr. II 340, 348, 356-357). He also feared that because of the loss of ventilation coal dust could accumulate underground and/or low levels of oxygen could build up (Tr. II 348-349).

Frizzell did not know how long the fan house had lacked air lock doors (Tr. II 351).

Frizzell cited the violation on July 22, 1993. He gave Faith until August 5, 1993 to abate it. When no action was taken by August 30, 1993, he issued a withdrawal order for failure to abate (Tr. II 351-352; Joint Exh. 58 at 4).

On cross examination, Frizzell agreed that the fan could generate as much as 60,000 CFM (Tr. II 357). Despite this, he maintained that, if 30,00 CFM were lost, there was no guarantee that 9,000 CFM would reach the last open cross cut (Tr. II 367).

The Violation

I conclude that the Secretary did not establish a violation of section 75.324(a)(2). The standard requires that a person designated by the operator, supervise any intentional change in ventilation that affects the section ventilation by 9,000 CFM. Therefore, in order to prove a violation, the Secretary must show, among other things, that a change in ventilation affects section ventilation by 9,000 CFM or more.

Frizzell took no air measurements on the section. While his testimony establishes that 30,000 CFM was lost at the fan house when the door was opened, his belief that this invariably resulted in a loss of 9,000 CFM at the last open cross cut or in less than that amount was entirely speculative. In fact, the Secretary offered no substantive evidence regarding the change in section ventilation when the door was opened.

While it is possible to establish a violation on the basis of a reasonable inference, there are too may imponderables to permit such an inference here. For example, and assuming that Stockwell did not supervise the ventilation changes when the door was open, while Frizzell knew the amount of air that was being lost at the fan house, he did not know for certain the amount that entered the mine, let alone the amount that reached the section. Clearly, the amount was diminished when the door was open, but whether the diminution "affected the section ventilation by 9,000 [CFM]" (30 C.F.R. ' 75.324(a)(2)) is a question that cannot be answered on the basis of this record.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024817	3/22/93	75.220	$88

Citation No. 3024817 states:

> The roof control plan was not compatible with the equipment that was being used in that the cutter bar was 11 feet long and the roof bolter could only roof bolt to within 2 feet of the face. The loading controls of the loading machine were 10'6" from the gathering head of the machine. This would create an opening of 13 feet from the last row of roof bolts when the place was cleaned up with the loader. The controls of the loader would be 2.6 feet outby the last bolts (Joint Exh. 56).

MSHA inspector Billy Layne explained that prior to the introduction of automatic temporary roof support systems (ATRS) on roof bolting machines, it was possible to install roof bolts up to the face. However, once the machines were equipped with ATRS, they could only bolt to within two feet of the face. The roof control plan at the mine was adopted by Faith prior to Faith's acquisition of a roof bolting machine with an ATRS (Tr. II 468-470).

The bar on the cutting machine used at the mine took an 11 foot cut. Therefore, when the face was mined, the cut of 11 feet, plus the two feet where the bolting machine had been unable to bolt during the previous mining cycle, created an unsupported area of 13 feet. The approved roof control plan stated, "The operating controls of the loading machine shall not advance inby the last row of roof bolts" (Joint Exh. 54A at 12; See Tr. II 474-475). The controls of the loading machine were 10 1/2 feet from the gathering head of the machine. This meant that the loading machine operator had to proceed under unsupported roof to

do his or her job (Tr. II 471-474, 475). (Layne explained that when he wrote in the body of the citation that the controls of the loading machine would be "outby" the last row of roof bolts, he really meant "inby" (Tr. II 475-476, 492).)

Layne did not see the loading machine in operation when its operator was inby the last row of roof bolts (Tr. II 478). Therefore, he did not see the loading machine operator acting in violation of the roof control plan. Accordingly, Layne described the violation as "hypothetical" (Tr. II 478, 493). Layne stated further that the violation would not have existed if cutting machine operators limited the depth to which the bar undercut the coal (Id.)

Layne described the mine roof as consisting of "real fragile shale" and laminated sandstone (Tr. II 479). He did not consider it to be "real good roof" (Id.). Any time a miner proceeded inby the last row of roof bolts, the miner created a hazard to himself or herself. Here, the roof could have fallen and the miner could have been injured seriously or killed (Tr. II 483).

Layne also believed Faith was negligent in allowing the violation to exist (Tr. II 485).

Stockwell stated that although it was "possible" for a loading machine operator to be under unsupported roof, he did not think it was "very likely" (Id.). According to Stockwell, it was mine practice to hang streamers at the last row of roof bolts. When an equipment operator reached that point, he or she would be warned not to proceed (Tr. II 506-507). Stockwell stated he told operators they would be fired if they operated equipment inby permanent roof supports. He never observed an operator doing so (Tr. II 507).

The citation was abated when Faith removed the loading machine from its roof control plan. Effectively, it agreed to no longer use the machine for clean up work (Tr. II 504-505).

The Violation

Section 75.220 requires that each mine operator develop and follow a roof control plan. Once the plan has been approved by MSHA and has been adopted by the operator, provisions of the plan must be followed as though they were mandatory safety standards. Here, the provision of the plan that was allegedly violated required Faith to ensure that the operating controls of the cited loading machine not advance beyond the last row of roof bolts (Joint Exh. 54A at 12).

As Layne candidly stated, he did not observe the loading machine operated with its controls positioned inby the last row

of roof bolts (Tr. II 478). Rather, he premised the violation upon his belief that the equipment operator had to proceed under unsupported roof in order to load coal after it had been cut (Tr. II 475).

The Secretary need not prove the existence of a violation by the testimony of a person who observed it. As has been noted previously, the Secretary may establish a violation by inferences derived from circumstantial evidence -- for example, tire tracks or foot prints may prove that equipment or persons went beyond permanent roof support. However, the inferences must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. Garden Creek Pocahontas, 11 FMSHRC 2148, 52-53 (November 1989).

Here, the problem is that the facts from which the violation is to be inferred do not invariably lead to a conclusion that the operating controls of loading machine proceeded inby the last row of roof bolts. Layne agreed the equipment's controls would not have proceeded beyond the last row of roof bolts if the depth of the undercut was limited, and there was no testimony to establish that Faith's practice was to fully undercut the coal. If such a practice existed, it is reasonable to assume the testimony of miners who had worked for Faith would have been helpful to the Secretary, yet he called no such witnesses to testify. Further, Stockwell's contention that he never had seen a scoop operated inby permanent supports was not refuted or otherwise challenged.

Weighing all of this, I conclude that although the Secretary proved a violation was possible, proof of a possibility did not meet his burden.

Docket No. SE 93-78

Contested Violations

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024472	8/19/92	75.203(a)	$50

Citation No. 3024472 states:

> The method of mining on the 001 section exposed miners to hazards caused by excessive width in a crosscut between the No. 2 and No. 3 entries. The crosscut was driven from 21[feet] to 26 feet wide for 20 feet. The widest point was 26 feet.

> The operator had installed timbers and cribs in the area for additional support (Joint Exh. 31).

The parties stipulated that the distances recorded on the citation were correct. The parties also agreed that Faith had installed sufficient roof support by the time the inspector arrived to narrow the roof over the crosscut to permissible limits. In other words, at the time the citation was issued, the crosscut was not "excessively wide" (Tr. II 379).

MSHA inspector Johnny McDaniel testified that a violation existed because the roof strata had been weakened when the roof was cut excessively wide and that although supplemental roof supports had been installed, the citation would impress upon the an operator the need to keep entry widths to allowable distances (Tr. II 381-382). In McDaniel's view, there was a violation the minute the entry was cut too wide. The addition of the posts to support the roof rectified the hazardous condition but did not vitiate the violation.

Stockwell maintained that during advance mining it was virtually inevitable that an entry would be cut wide, and if the excessive width was timely corrected by setting posts or installing other roof supports, there was no violation (Tr. II 389). I tend to agree with Stockwell, but I need not reach this defense because I conclude the Secretary has not otherwise met his burden of proof.

In pertinent part, the cited standard requires that mining methods not expose any person to hazards caused by excessive widths of crosscuts. To establish a violation, in addition to proving excessive widths, the Secretary must prove that a person was exposed to a hazard from roof weakened by those widths. Here, the crosscut was cut excessively wide for a distance of 20 feet; and I accept McDaniel's testimony that cutting the crosscut excessively wide weakened the roof strata and created a hazard. However, there was no testimony upon which to base a finding that any person was exposed to the hazard, and without evidence of exposure, I cannot find the Secretary proved the alleged violation.

I cannot assume equipment operators were exposed to the excessively wide roof without testimony regarding the distance of the inby end of the equipment from its operator's compartment when the cutting and cleanup operations were in progress. Nor can I assume that miners who set the posts were exposed to the hazard. There was no testimony regarding the practice of setting

posts under such circumstances. It may be, for example, that miners worked from behind temporary roof supports. Finally, there was no testimony that miners were exposed to the hazardous roof after the crosscut was driven, but before the posts were set.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024476	8/27/92	75.1107-16(b)	$50

Citation No. 3024476 states:

> A rubber-tired mine tractor ... was not provided with a fire suppression device in proper operating condition and in accordance with the requirements in National Fire Code 17 ... one of the two actuating bottles had been punctured, or the air seal broken (Joint Exh. 33).

McDaniel testified that the fire suppression system on the cited mine tractor was of the dry chemical type. The system included two bottles ("actuating bottles") that contained compressed air. The bottles were interconnected with a chemical container. To use the system, a pin was driven into a metal seal inside an actuating bottle. The seal was punctured and the air within the bottle was expelled, spreading a fire suppressing chemical (Tr. II 393, 402). The actuating bottles were installed at different locations on the tractor so that they could be quickly activated if the need arose. (Tr. II 403).

McDaniel found that one of the bottles on the tractor was useless. There was a hole in the seal and the compressed air had escaped (Id.). With one bottle useless, the fire fighting system was compromised (Tr. II 394, 397).

Fire suppression equipment must be examined on a weekly basis, and McDaniel believed Faith should have known of the violation because the punctured bottle was obvious visually. However, McDaniel did not know how long the bottle had been punctured (Tr. II 395). He agreed the bottle's seal could have been punctured between required examinations (Tr. II 397).

The person most likely to be endangered by the lack of a fully operative fire suppression system was the operator of the tractor (Tr. 398).

The Violation

Section 75.1107-16(b) requires that each fire suppression system be tested and maintained in accordance with the requirements in the National Fire Code (NFC). According to McDaniel, the pertinent part of the code violated was NFC No. 17; Subsection D. Subsection D requires, in part, that the amount of expellent gas for dry chemical systems be checked to ensure that "there is enough to provide an effective discharge" (Joint Exh. 33A). Obviously, this means the system must be maintained to provide an effective discharge of chemicals.

I agree with counsel for the Secretary that the fact the system came with two actuator bottles means both bottles had to be maintained in operative condition to have an "effective discharge" of chemicals. As counsel stated, "both bottles in the system had to be maintained to have [the system] operate as designed" (Sec. Br. 72). I conclude therefore that the violation existed as charged.

Gravity and Negligence

This was not a serious violation. As McDaniel stated, the system retained at least part of its original capacity to fight a fire (Tr. II 394, 397). In addition, the testimony did not establish any conditions associated with the violation that would have made a fire likely.

McDaniel could not say how long the actuator had been punctured. He agreed it could have happened between the required inspections of the system (Tr. 397). I conclude therefore that Faith's negligence in allowing the violation to exist was low.

Docket No. SE 94-256

Citation/ Order No.	Date	30 C.F.R.	Assessment
3202337	6/07/93	75.313	$50

> The methane monitor on a scoop loader ... used to load coal (one of two scoops on the 001 section) would not operate. The

> operator stated the unit was "jumped" out to permit the machine to operate.
>
> The operator stated that the monitor stopped working after he removed it from loading coal; however it was observed loading and hauling coal shortly before it was examined (Joint Exh. 62).

McDaniel testified that the methane monitor on one of the two scoops used on the 001 Section was not working. He tested the monitor by using its test control. When he twisted the test button, the machine would not deenergize. Prior to testing the machine, McDaniel saw it loading two cars of coal (Tr. II 413).

McDaniel stated that after he saw the scoop operating and after he tested its monitor, Stockwell arrived on the section. McDaniel spoke with Stockwell about the monitor. Stockwell explained that it had been "jumped out" (Tr. II 415, 418). (When a methane monitor is "jumped out," the monitor's shut off mechanism is bypassed electrically to allow the machine to operate regardless of methane (Tr. II 415-416).) To the best of McDaniel's recollection, Stockwell took the scoop to the surface after discussing the monitor with McDaniel.

McDaniel acknowledged that a methane monitor was a "very delicate" piece of equipment and that it was "easy for it go down" (Tr. II 418, 419).

Normally the No. 15 Mine does not liberate methane and no methane was detected at the time the violation was cited. When methane was liberated, it was in "very small quantities" (Tr. II 419).

Stockwell testified that he "jumpered out" the monitor because he was going to use the scoop as a means of transportation. He maintained the only time the methane monitor had to be working was when the scoop was loading coal. Stockwell also asserted McDaniel could not have tested the methane monitor by turning a knob because the monitor had a test button (Tr. II 428). Or, if McDaniel did test the monitor, he did so after Stockwell brought the scoop into the mine as a means of transportation, not when it was used to load coal (Tr. II 426).

The Violation

I conclude that the Secretary has not established a violation of section 75.313. The standard cited relates to mine fan stoppages when persons are underground. The citation was

issued because the methane monitor on the loading machine was inoperable. 30 C.F.R. ' 75.342(a)(1) requires methane monitors to be installed on all loading machines and section 75.342(a)(4) requires that once installed, the monitors be maintained in permissible condition.

The citation does not charge a violation of section 75.342(a)(4). It is an axiom of due process that a respondent must be advised correctly of the standard it is alleged to have violated. When the citation is defective, it must be modified to reflect the proper standard, or it must fail. Here, the citation was not modified.

Finally, I note the Secretary's contention that Stockwell's testimony that he intentionally bypassed the methane monitor should result in a post-hearing finding of unwarrantable failure (Sec. Br. 150). Given the defective citation, I need not reach the issue. I observe, however, that if the correct standard had been cited, I would not have found unwarrantable failure. The original citation did not charge unwarrantable failure and Faith was not given notice that such an allegation was at issue.

Docket No. 93-365

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024810	3/16/93	75.1722(a)	$88

Citation No. 3024810 states:

> The No. 2 belt drive was not suitabl[y] guarded in that chicken wire was being used to guard the moving parts of the belt drive (Joint Exh. 48).

On March 16, 1993, MSHA inspector Billy Layne observed that chicken wire was used to guard the No. 2 belt drive. The wire was not mounted on a frame. The guard was "just wired up" at the top (Tr. II 445, 454). The wire was located four to six inches away from the moving parts of the belt drive (Tr. II 457).

If the wire had been framed, it might have been acceptable as a guard because it would have been stable enough to keep a person from pushing into the belt drive (Tr. II 446). However, given the way the chicken wire was installed, Layne believed it "would take no effort to get it into the moving parts" (Tr. II 450).

Layne stated that the discharge roller of the belt drive was turning. The roller was located approximately four and one half

feet off of the mine floor. In addition, there were other moving parts at various heights ranging from between 12 inches to four and one half feet off the floor (Tr. II 440-441).

Usually, the area around the belt was wet, but in this instance, the belt had not been operating long and the area was dry. In addition, the floor was level (Tr. II 442).

Layne testified that the belt had been installed recently (Tr. II 443-444). Layne was certain it was not in place when he conducted a "pre-opening" inspection of the mine (Tr. II 445). To the best of Layne's recollection, the condition was abated when Faith built a metal frame and secured the wire to the frame (Tr. II 447, 451).

Layne regarded the violation as S&S because belt drives have to be cleaned and without adequate guards, miners doing the cleaning can become caught in the belt drive mechanisms. Normally, only one person is assigned to clean around a belt drive (Tr II 450).

Layne was of the opinion that many of the fatalities that occur in coal mines involve inadequate guards at belt drives (Tr. II 447). He testified that in addition to being killed by belt drives, miners have had limbs severed or broken (Tr. II 447-448). Here, the particular danger presented by the lack of an adequate guard was that a miner would stumble and fall toward the pinch point of the belt drive and the chicken wire would not keep the miner from falling into the pinch point (Tr. II 456).

Layne believed Faith should have known of the inadequate guard, but he also recognized that the belt was newly installed, and he speculated that Faith might not have had time to make certain the guard met the standard's requirements (Tr. II 448-449).

Stockwell maintained that a few days before the inspection, another MSHA inspector had not found the guard to be out of compliance (Tr. II 460). In addition, he believed that when Layne saw the belt drive, the chicken wire was nailed to a wooden frame (Tr. II 461). Stockwell admitted, however, that he was not at the belt drive when Layne cited the violation (Tr. II 464).

The Violation

Section 75.1722(a) requires that drive and takeup pulleys "which may be contacted by persons, and which may cause injury," shall be guarded. The evidence establishes that the requirements of the standard were not met.

I accept Layne's testimony that the chicken wire was not

secured at the bottom of the drive. Layne saw the belt drive and the "guard" on March 16, 1993. Stockwell did not. I also accept Layne's opinion that the pinch point on the belt drive could be contacted. As Layne testified, any miner who stumbled or fell against the unsecured chicken wire could have been caught in the pinch point. The wire would not have been effective in breaking the miner's fall and keeping him or her from the moving parts.

I also conclude that contact with the pinch point could have caused an injury. After all, the belt was traveling over the rollers at the rate of 390 feet per minute (Tr. II 465). The violation existed as charged.

S&S and Gravity

The violation was S&S. While it is true the belt was newly installed and few, if any, miners had yet been exposed to the hazard created by the inadequate guard, I must view the hazard in terms of continued normal mining operations (U. S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1994)).

As Layne noted, during the course of continued normal operations, miners would have been assigned to clean up in the vicinity of the belt drive. Also, the floor around the belt drive would have become wet and slippery (Tr. II 442). I conclude, therefore, that it was reasonably likely that as mining went on, a miner would have slipped, fallen against the chicken wire and been pulled into the belt drive's pinch point. The miner would have been lucky if he or she was maimed. (I note in this regard, Layne's unrebutted testimony that many of the fatalities recorded by MSHA involve inadequate guards at belt drives (Tr. II 447).)

In addition to being S&S, this was a serious violation. As I have found, the exposure of miners to the hazard meant that dismemberment or death could have been expected.

Negligence

Even though the belt was newly installed, Faith was obligated to make certain the belt drive was guarded properly. Because it installed a "guard" that did not prevent contact by miners, Faith was negligent.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3024814	3/17/93	75.220	$128

Citation No. 3024814 states:

> The supplement to the operators roof control plan dated July 22, 1992, was not being complied with in that the last pillar had been split for the belt line and cribs had not been installed for the crosscut on the right hand side of the belt line. The operator's [roof control plan] supplement ... requires that cribs ... be installed in the last open crosscut on the right hand side of the belt line (Joint Exh. 51).

Inspector Layne testified that on March 17, 1993, during the course of the inspection of the mine, he visited a crosscut on the right hand side of the belt line. Approximately five miners were working in the area (Tr. VI 213). Cribs were being installed in the vicinity. Immediately adjacent to the crosscut, the beltline had been driven through a pillar, splitting the pillar. (Tr. VI 215-216; Joint Exh. 51B). According to Layne, under the approved roof control plan, cribs should have been installed prior to mining the pillar (Tr. VI 216, 218, 219). The approved roof control plan stated, "cribs will be set 5 ft. apart (max)" and "where practical, cribs ... will be set prior to making the split." No cribs had yet been set in the subject crosscut (Tr. VI 218; Joint Exh. 51A).

Layne claimed that Stockwell told him cribs were not installed because Stockwell had to keep the area open to haul gob material and that there would not have been room for equipment to pass through the area if cribs had been installed (Tr. VI 222, 246, 256-257). This meant to Layne that equipment had passed through the area where the cribs were missing (Tr. VI 223). Indeed, according to Layne, extensive work had been done inby the cited area (Tr. VI 245).

Layne testified that the roof in the area was not known as being "really good" and that the mine had a history of roof falls (Tr. VI 225, 226). Although roof bolts had been installed, the area still needed cribs for adequate support of the roof (Tr. VI 229).

According to Layne, "[anyone] that has any ... qualifications" should have known the cribs were required (Tr. VI 221). He described the lack of cribs as "real obvious" (Tr. VI 231). Layne believed that the crosscut had lacked cribs for more than three or four shifts (Tr. VI 233). In Layne's view, the

condition should have been noted during the daily preshift examination and should have been corrected (Tr. VI 234).

Layne believed the condition was S&S. Layne stated that given the compromised roof "[y]ou could expect to have a fall in that area" (Tr. VI 247). Ram cars had traveled under the roof as they transported the gob (Tr. VI 249). Layne stated of the roof, "It's roof you would want to pay attention to" (Tr. VI 251). If the roof had fallen and struck a miner, it was likely that the miner would have sustained permanently disabling injuries or have been killed (Id.)

To abate the condition, Faith installed cribs as required (Tr. VI 254).

Because the crosscut was part of an escapeway, Stockwell maintained that if cribs had been used, they would have blocked the escapeway. Also, he noted that the roof control plan required cribs to be set prior to splitting a pillar "where practical." He maintained that it was not "practical" to set the cribs because of the escapeway problem and because the crosscut could not have been used to haul gob if cribs narrowed it (Tr. VI 277-278). In any event, he believed pillar support of the roof was adequate, even after the pillar in question had been split (Tr. VI 276). Finally, although Stockwell stated that Layne was in error when he testified that equipment had passed through the crosscut, he confirmed that miners had worked in the area prior to the day of the inspection (Tr. VI 285).

The Secretary's Motion

Counsel for the Secretary moved that the doctrine of res judicata be invoked and that Stockwell be barred from raising defenses to this and two other alleged violations. According to counsel, Stockwell pleaded guilty to criminal charges involving two counts of violating the Mine Act in a case before a United States Magistrate Judge, in the United States District Court for the Eastern District of Tennessee, and on June 24, 1992, a judgment was filed in the case (U.S. v. Lonnie Ray Stockwell, Case No. 92-074M, CR-1-92-00033-01.) The judge magistrate sentenced Stockwell to three years of probation and ordered Stockwell to pay a fine of $1,500. As a condition of the probation, Stockwell was ordered to refrain from any serious unwarrantable violation of the Act pertaining to roof support and ventilation.

Subsequently, Stockwell was ordered to show cause why probation should not be revoked. The order was supported by a

report from Stockwell's probation officer. The report stated that Stockwell had been cited for several unwarrantable violations, including the citation here at issue (Citation No. 3024814) and two other alleged violations. (The latter two alleged violations are included in Docket No. SE 93-366 (Tr. V 61-62).)

The judge magistrate held a probation revocation hearing at which MSHA inspectors testified. Following the hearing, the judge issued an order which stated in part:

> Having heard all of the witnesses and the argument[s]...it is concluded and the [judge] finds serious life threatening violations of the [Mine Act] including but not limited to the conduct of mining well beyond the 12-foot limit beyond roof support were committed or caused to be committed by the defendant in late 1992 and early 1993 in ... Faith Coal Company Mine No. 15 (United States v. Lonnie Ray Stockwell, D. Tenn (September 16, 1993) (Memorandum and Order) 3.)

The judge magistrate revoked Stockwell's probation and sentenced him to six months in prison. Subsequently, the judge denied Stockwell's motion for a new trial and no further appeal was taken.

In moving that the doctrine of res judicata be invoked, Counsel asked that I be bound by the findings of the judge and conclude that the three violations described in the citations and order occurred (Tr. V 31-32, 35, 61-62). Counsel argued that because the judge "found that the violations had occurred at least as issued," no testimony or other evidence should be admitted into the record regarding the alleged violations (Tr. V. 62).

I denied the Secretary's motion. I concluded that I could not determine from the judge's memorandum and order that his decision was based upon his finding that the three alleged violations had occurred as charged (Tr. V 64). I stated:

> [G]iven the general wording of [the judge's] finding that there was a serious, life threatening violation of the Act, including, but not limited to, the conduct of mining well beyond the 12-foot limit beyond roof support in late 1992 and early 1993; and given the number of alleged violations he was

> asked to consider and upon which he apparently based his finding, I cannot conclude that he must have been referring to the three violations referenced in [the Secretary's] motion (Tr. V 65-66).

I also noted that if I were wrong and the judge had made specific findings concerning the violations' existence, apparently he had taken no evidence and made no findings with respect to negligence and gravity (Tr. V 66). Indeed, these concepts, as applied under the Mine Act, were not relevant to the criminal proceeding. Under both the doctrines of res judicata and collateral estoppel, the issues for which preclusion is sought in the second action must be identical to the issues decided in the first action (See Parkland Hosiery Co, Inc. v. Shore, 439 U.S. 327, 336, n5 (1979)).

For these reasons, I affirm my bench ruling denying the Secretary's motion.

The Violation

Section 75.220 requires an operator to follow its approved roof control plan. The evidence with regard to this alleged violation establishes that Faith did not do so and that the violation existed as charged. The supplement to the roof control plan of July 22, 1992, required that where practical, prior to splitting a pillar, cribs be set as shown on an attached map (Joint Exh. 51B). Layne convincingly testified that the pillar in question had been split to accommodate a beltline, and that cribs had not been set. The only question is whether it was practical to set cribs.

Stockwell testified that it was not practical because if cribs were installed there would not have been sufficient clearance to use the crosscut as a passageway for hauling gob, and because the crosscut could not have been used as an escapeway. However, Stockwell's testimony was overcome by Layne's observation that if Faith had used other available areas to dump the gob, it would not have had to travel through the crosscut. In addition, and as counsel for the Secretary observed, the regulations allow escapeways 4 feet in width when supplemental roof support (e.g., cribs) is necessary. Since the roof control plan provided for a maximum distance between the cribs of 5 feet, the cribs could have been installed and the crosscut could still have been part of a valid escapeway.

I conclude that the violation existed as charged.

S&S and Gravity

The violation was S&S. The cited standard was violated. I accept the testimony of Layne that the failure to set the cribs weakened the roof in the crosscut. I also accept his testimony that roof in the area was not "really good" (Tr. VI 225). By Faith's own admission, miners passed under the area of inadequately supported roof. Given the nature of the roof, the fact that it was inadequately supported, and the exposure of miners to the hazardous roof, I conclude it was reasonably likely that as mining continued and miners passed through the crosscut, a roof fall accident would have occurred. In the event of such an accident, it also was reasonably likely the miners involved would have suffered death or at least serious and disabling injuries. This was roof "you had to pay attention to" and Faith paid no attention to the requirement that the roof be supported adequately (Tr. VI 251).

The violation was serious. As noted, I accept Layne's testimony that the roof was not consistently stable. I also accept his testimony that splitting pillars without installing supplemental support weakened the roof. This common sense observation simply reflects the fact that in mining, as in the rest of life's ventures, rarely is less more. By Stockwell's own admission, the crosscut had been traveled and miners who passed through it had been subjected to hazards that easily could have resulted in serious injury or death.

Negligence

Since miners had traveled through the crosscut, the area had to be preshift examined. The lack of cribs was visually obvious. The violation should have been detected and corrected. Faith failed to exhibit the care required.

Docket No. SE 93-366

Citation/ Order No.	Date	30 C.F.R.	Assessment
3202244	3/17/93	75.220	$2800

Citation No. 3202244 states:

> The approved roof control plan dated 4-7-92, was not being complied with in that the following conditions [were] observed in the area of survey station No. 114 [:] a place had been driven 24 feet on the left side and 27 1/2 [feet] on the right side inby roof supports; a neck had been driven off this place 23 feet inby roof supports; also a crosscut had been driven into an

> unsupported area in an adjacent entry which had been advanced inby the crosscut and roof supports had not been installed. The approved roof control plan requires cuts not to exceed 10 feet when conventional equipment is used (Joint Exh. 54).

In addition to finding the conditions constituted a violation of section 75.220, MSHA inspector Larry Anderson, found that the violation was S&S and was caused by Faith's unwarrantable failure to comply with the cited standard.

Anderson testified that when he inspected the mine on March 17, 1993, he was underground with Stockwell and asked him to identify their location on a mine map. Stockwell pointed to Survey Station No. 114. No miners or mining equipment were in the area at the time (Tr. VI 296, 333). However, miners were in the mine doing "dead work" -- i.e., work not directly related to production (Tr. VI 292-297).

Under the roof control plan, when coal was cut with conventional equipment, the cut could not exceed 10 feet in length (Tr. VI 298; Joint Exh. 54A at 13). Anderson noticed that the ribs in the area were jagged and did not have the "look" of coal cut with the continuous mining machine (Tr. VI 299). He believed conventional equipment had been used.

Anderson stated that near Survey Station No. 114, he saw two areas across from one another that had been driven in excess of the allowed limit. One area had been driven 24 feet beyond roof supports. The other had been driven 27 1/2 feet beyond roof supports (Tr. VI 303-304).

In general, the roof in the area had places where water was coming through. Also, the roof was exhibiting scaling, and had fallen at several locations. (Tr. VI 304). Anderson explained that the roof was shale, and that the water made the shale slip and "just fall out for no reason at all" (Tr. VI 305).

In the same general area, Anderson observed a neck driven 23 feet inby roof supports (Tr. VI 306). From observing the coal ribs in the neck, Anderson determined that the neck area also had been driven with conventional equipment (Id.). There was no roof support in the neck between the last row of roof bolts and the face (Tr. VI 308). The roof condition in the neck was similar to that in the other two areas.

Finally, in an adjacent entry, Anderson observed an area where a crosscut had been driven through, into an unsupported area. Anderson stated, "you cannot advance an entry or a crosscut into an unsupported area unless that area is inaccessible, which this one wasn't" (Tr. VI 309). Anderson identified paragraph 4 on page 5 of the roof control plan as the provision prohibiting the condition he observed (Id.). This portion of the plan required that openings creating an intersection be permanently supported or that at least one row of temporary supports be installed before any other work or travel was permitted in the intersection (Joint Exh. 54A at 5). The unsupported area was approximately 20 feet wide and 30 feet long. In Anderson's opinion, under the roof control plan, roof bolts should have been installed on five foot centers in the area (Tr. VI 311-312, 330).

Anderson measured the areas of unsupported roof with his tape measure. Rather than travel under the roof, he tied the tape to his hammer and threw it to the end of each area (Tr. VI 313).

The areas where the unsupported roof conditions occurred were part of an intake air course. An intake air course must be examined on a daily basis during each production shift (Tr. VI 399). In Anderson's opinion, the conditions were visually obvious and should have been observed during the examinations (Tr. VI 312). In addition, he maintained the conditions were the result of more than ordinary negligence on Faith's part, and that they represented "complete and total disregard for the safety ... of the people [who] work[ed] for [Faith]" (Tr. VI 352).

In finding that the alleged violation was S&S, Anderson considered the generally poor roof conditions in the subject area of the mine, the expanse of unsupported roof and the "strong evidence" that persons had been working under unsupported roof (Tr. VI 316). This "strong evidence" was the fact that to cut the coal for the cited distances, the cutting machine operator, the scoop and the tractor operator, in addition to others, would have had to proceed beyond the last row of permanent roof supports (Tr. VI 317). (Later, Anderson recanted his testimony with respect to the tractor operator. Nevertheless, he believed the tractor operator still was subject to danger in that a roof fall could have traveled into the area where roof supports were installed and could have endangered the tractor operator and others working under supported roof (Tr. VI 350-352).)

Anderson stated that Stockwell conducted the preshift examination on March 17, 1993, as well as on some preceding days.

This meant that Stockwell examined the areas where the conditions existed. There were no references to the conditions in the preshift examination book (Tr. VI 320). When Anderson served the citation on Stockwell, Stockwell did not respond to it other than to state that he was not aware of the conditions (Tr. VI 314).

Anderson did not know when the areas had been cut. However, because mining had advanced approximately 500 to 600 feet inby the areas, he judged the areas had been there "for quite some time" (Tr. VI 321).

The conditions were abated by installing timbers to support the roof (Tr. VI 325).

Faith called Dwight D. Morrison as a witness. Morrison was a surveyor for TCC. He testified that he and one other TCC employee were the only surveyors used at the No. 15 Mine (Tr. VI 361). He stated that on April 19, 1993, he went to the mine to measure the areas referred to in the alleged violation (Tr. VI 363-364, 392). He claimed that he found "some differences" between his measurements and the measurements that appear on the citation (VI 365). With respect to the first two areas mentioned in the citation, Morrison found that the left side had been driven 15 feet from the last row of roof bolts, and the right side had been driven 19 feet from the last row of roof bolts (Tr. VI 366-367). In addition, Morrison claimed that on the left side there was a second row of roof bolts that was difficult to see, and that the inspector may not have noticed (Id.). The final area listed on the citation was not observed by Morrison (Tr. VI 367-368).

On cross examination, Morrison admitted that he had no way to know whether the conditions he found on April 19 1993, existed on March 17, 1993 (Tr. VI 369).

Stockwell believed that Anderson may have missed a second row of roof bolts in the first area because they were underneath a ledge. Despite this, he agreed that a violation of the roof control plan existed in the first and second areas. ("I'm not saying that the violation did not exist...It did exist. But ... it is much too severe .... Some of my men went beyond the ... limit ... [p]robably three to five foot beyond what should have been gone" (Tr. VI 372, 373). Stockwell maintained that, at most, three miners were affected by the conditions (Tr. VI 351).

Stockwell also disputed the presence of the last area mentioned on the citation. He claimed that he never located it

and that when the citation was abated, the abatement did not include the area (Tr. VI 373).) However, he agreed he did not protest to Anderson that the citation, as written, was in any way incorrect. He stated that he and Anderson "just don't communicate very well, and it's better ... if I don't argue the point with him" (Tr. VI 390).

Finally, Stockwell maintained that the conditions existed in places that did not have to be examined daily. Because the unsupported areas were not as great as those found by the inspector, and because they existed in places that were not required to be examined daily, the failure to detect and correct the conditions was not due to more than ordinary negligence (Tr. VI 383-384).

The Violation

I conclude the violation existed as charged. Anderson's testimony was compelling. He viewed each of the areas described in the citation. He measured the areas. Stockwell was present when at least two of the areas were measured. As the recipient of the citation, he knew of Anderson's allegations with respect to all of the areas. Stockwell's assertions that Anderson's measurements were wrong and that the last area mentioned did not exist are completely undermined by his failure on March 17, to disagree in any fashion with Anderson's assessment of the conditions. It defies reason that Stockwell, as the representative of Faith, would have declined to advise the inspector of his mistakes when the "mistakes" had the potential for costing the company money. Stockwell's claim that he and Anderson did not communicate very well, and therefore, that he held his tongue, simply is not believable (Tr. VI 390). To observe that Stockwell is not shy about expressing his opinions, is to state the obvious.

S&S and Gravity

The violation existed as charged. The hazard associated with the violation was that the unsupported roof would fall on miners working under it. Given the fact that the roof in the area was of an unstable nature, and given the fact that miners went under the unsupported roof, as Stockwell admitted, I conclude it was reasonably likely the violation would have contributed to a roof fall that would have resulted in death or serious injury. Anderson was right to find that the violation was S&S.

The violation also was very serious. Stockwell admitted that miners traveled and/or worked under unsupported roof in two of the areas, and I find that they also did so when they cut into the adjacent entry

Although no roof falls yet had occurred in the cited areas, I accept Anderson's testimony that the shale roof was scaling, and was in poor condition. I also accept Anderson's testimony that water posed a problem for roof control, in that it made parts of the roof subject to sudden, unanticipated falls. Exposing miners to unsupported roof under such conditions was equivalent to requiring them to play Russian roulette.

Unwarrantable Failure and Negligence

Anderson was right as well to find that the violation was the result of Faith's unwarrantable failure to comply with its roof control plan. The Commission has defined unwarrantable failure as conduct that is not justifiable and inexcusable. It is conduct that is the result of more than inadvertence, thoughtlessness or inattention. In short, unwarrantable failure is aggravated conduct constituting more than ordinary negligence (Emery Mining Corporation, 9 FMSHRC 1997, 2001 (December 1987)).

Mining had moved well inby the cited areas and I accept Anderson's testimony that the violation existed for several months. I also accept his testimony that the areas existed in an intake air course that had to be examined daily. Further, given the generally unstable nature of the roof in the area, I conclude that Faith had a high standard of care to ensure that the roof was supported adequately. Faith's failure to meet that standard over a period of several months constituted more than ordinary negligence.

Citation/ Order No.	Date	30 C.F.R.	Assessment
3203325	3/17/93	75.203(a)	$3,100

Order No. 3202245 states:

> Mining methods [were] not compatible with effective roof control on the 001 section in that sightlines had not been used to determine the direction of mining. Several pillars were not uniform in size or shape and the entries had not been driven according to projections (Joint Exh. 55).

In addition to a violation of section 75.203(a), Anderson found that the cited condition was S&S and that Faith unwarrantably failed to comply with the standard.

By way of background, Anderson explained that sight lines are determined by hanging plumb bobs from two separate spads, lining up the strings holding the bobs and sighting the point where the strings align on the face. Once the sight line on the face is established, the width of the entry is marked on the face by measuring from the center of the line (Tr. VI 406-407).

Spads are set according to the mine map and the sight lines are a way of making sure mining is done in conformance with projections on the map (Tr. VI 407). Anderson stated that it is usually the section foreman who is responsible for making certain that the mine is driven according to the mine plan and in conformance with the sight lines (Tr. VI 408).

According to Anderson, one danger of not conforming to sight lines is that pillars may not be of adequate size to support the roof (Tr. VI 409). The resulting hazard is that the roof may fall. Another danger of mining off plan is that miners may break into abandoned workings. The workings may contain water or oxygen deficient air and these elements may inundate the active workings (Tr. VI 410). A final danger is that if miners are cut off from the surface, would-be rescuers will not know for certain the mine has been driven true to the mine map, and will misdirect rescue efforts (VI 412-413).

Anderson was alerted to the alleged violation when he looked at the mine map and noted irregular variations in pillar sizes (Tr. VI 414). Anderson identified an area on the mine map where he believed sight lines had not been used. He stated that he didn't "see a straight place for any distance on [this portion of] the map" (Tr. VI 417, 435-436; Gov. Exh. 5 (left center portion within blue circle)). (Anderson testified that Gov. Exh. 5 was not the exact map that he used when he cited the alleged violation. Rather, it is a latter version of the map, and it depicts more of the mine than actually existed on March 17. However, it includes the cited area (Tr. VI 446).) Anderson maintained that if sight lines had been used, the map would have "looked like a checkerboard" (Id.).

Anderson stated that although the mine map alerted him to the possibility of a violation, he based the order both on the map and on a visual examination of the areas shown on the map. During his underground inspection, he checked pillar sizes and shapes, and he checked entries to determine if they were straight (Tr. VI 419).

Anderson agreed that if adverse roof conditions were encountered, a mine operator could narrow entries and use additional roof supports. He also agreed that there were times when entries had to be moved out of line. He stated that there

was a lot of bad roof at the mine (Tr. VI 441). He maintained, however, that the cited irregularities were so extensive they could not have been the result of adverse roof conditions (Tr. VI 447-448).

Anderson testified that some areas where sightlines had not been used were driven by the previous mine operator. He did not include these areas in the order (Tr. IV 442-443).

By reviewing the dates on the mine map, Anderson determined that Faith had been mining without sightlines for between 30 to 60 days (Tr. VI 420). In Anderson's opinion, Faith should have known of the existence of the violation by observing that the underground entries and crosscuts were not straight and that the pillars were therefore irregular (Tr. VI 423).

The violation was S&S because it resulted in small pillars that put undue stress on the mine roof, and because it raised the possibility that miners unintentionally could cut into old works (Tr. VI 425). (He agreed, however, that no old works were shown on the mine map adjacent to the cited area (Tr. VI 444).) In Anderson's view, it was highly likely that the failure to use sightlines could have lead to the injury of miners because some pillars were much too small (Tr. IV 426). He estimated that some were less than half of their required size (Tr. VI 426-427).

Anderson believed that Faith should have known from past experience that it had to use sightlines. Moreover, Faith received mine maps on a monthly basis and a review of the maps should have indicated the mine was not being driven as required (Tr. VI 431).

Finally, Anderson testified that he had cited the wrong standard. Rather than cite section 75.203(a), which requires that the method of mining not expose any person to hazards caused by excessive widths of rooms, crosscuts, and entries; and that pillar dimensions be compatible with effective control of the roof, he should have cited 30 C.F.R. ' 75.203(b), which requires that a sightline or other method of directional control be used to maintain the projected direction of mining (Tr. VI 430, 449-450).

Stockwell testified that the area he understood to be encompassed by the order was much more restricted than that testified to by Anderson. The area that Stockwell thought was involved included one end of a long and narrow pillar. Stockwell maintained that the narrow configuration was due to an engineering mistake. While there were two or three other places that were deliberately off projection, they were caused by bad roof conditions (Tr. IV 459-460, 463; Gov. Exh. 5 (upper left

pink "x")). Most of the area identified by Anderson as being included in the violation was mined by the previous operator (Tr. VI 466).

Stockwell also maintained that surveyors from TCC came to the mine every three or four days to set spads, and that Faith used the spads to establish and follow the sightlines. As he put it, "[W]e followed the sightlines. We followed the spads set by the TCC surveyors" (Tr. VI 471). Stockwell maintained that there was a two or three week period when the affected area was mined, and that TCC's surveyors came to the mine to set spads on the average of every third day during that period (Tr. VI 472).

Motions to Vacate and to Amend

Based on Anderson's admission that he should have cited section 75.203(b), Faith moved to vacate the order of withdrawal. Counsel for the Secretary countered by moving that the order be conformed to the proof (Tr. VI 449-450). I reserved ruling on the motions. Having considered the record, I deny the motion to vacate, and grant the motion to amend.

The law is clear, amendment is to be freely granted where the opposing party is not prejudiced, and this is especially so when the Secretary seeks to allege a substantively related subsection of the standard applied to the cited conditions (Cyprus Empire Corp., 12 FMSHRC 911, 916 (May 1990)). As counsel for the Secretary points out, the essence of the allegation is that Faith did not use sightlines or other methods of directional control to maintain the projected direction of mining in rooms and entries. The inspector testified that he discussed the use of sightlines with Stockwell in conjunction with the order. The order itself indicates that it was abated following such a discussion (Tr. VI 430; Joint Exh. 55). I credit Anderson's testimony.

The order's wording is not a model of clarity. It refers to "mining method" and "effective roof control," phrases that harken back to section 75.203(a). It also states that "sightlines had not been used," which refers obviously to section 75.203(b). I conclude, however, that the confusion inherent in this wording was overcome by Anderson's discussion with Stockwell, and Faith was on notice that the essence of the violation was the failure to use sightlines or other methods of directional control on the 001 Section.

Moreover, Faith did not show prejudice. It was fully prepared to defend.

The Violation

The issue is whether the Secretary has established that in the cited area, sightlines were not used to control mining direction. I conclude that he has not.

Anderson did not see any surveying or mining being conducted. He had no first-hand knowledge of whether or not sightlines were used. Therefore, the Secretary had to prove the violation by circumstantial evidence. For this reason, the Secretary relied upon Anderson's testimony that the mine map's depiction of irregularly shaped entries and pillars was a visual "tip off" that sightlines had not been used, and upon Anderson's observation, that he looked at the size and shape of the entries and crosscuts to "be sure that they're straight" (Tr. VI 419).

Stockwell countered by testifying, among other things, that such deviations from projections as existed were deliberately made as a result of adverse roof conditions, something that Anderson believed was possible but not likely, given what he viewed as the extensive nature of the deviations (Tr. VI 469). Stockwell also testified that even in the areas where deviations existed, Faith had used sightlines:

> Q: Is it your testimony that ...you ...purposefully mined ... in these directions and in the way that it's shown on this map [Gov. Exh. 5]? Did you do that by design?
>
> A: I did it by design, by spads placed in place by T.L.C. surveyors. They came over there during this time every three or four days. Every time we'd get ... another area opened up, they'd come and set us spads to keep us on the sightlines, and we'd follow the sightlines. The spads are still in place if you want to took at them if you want to go see. But, yes ... we followed the sightlines. We followed the spads set by the T.L.C. surveyors (Tr. VI 471).

To find that a violation existed, I must find this testimony is not credible.

I cannot do so on the basis of this record. As noted, even though he considered it unlikely, Anderson agreed that the deviations could have been caused by roof problems, and indeed, the record is replete with testimony regarding adverse roof conditions. Also, the Secretary did not offer evidence that the required spads were not in place, or testimony from miners that it was a practice at the mine not to follow sightlines. Clearly, such testimony would have been extremely helpful to the Secretary, and its absence raises questions regarding the strength of the Secretary's proof. Lacking such testimony, I

cannot discredit Stockwell's insistence that sight lines were followed and that deviations were necessitated by poor roof. Therefore, I conclude that the Secretary has not established a violation of section 75.203(b).

Remaining Civil Penalty Criteria

Having made dispositive findings regarding all of the alleged violations contested by Faith; including the gravity of the violations and Faith's negligence, I turn to the remaining civil penalty criteria.

Ability To Continue In Business

The Act requires that I consider six criteria when I determine the amount of any penalties to be assessed (30 U.S.C. ' 820(i)). One of the criteria is the effect of the civil penalties on the operator's ability to continue in business. As a general rule, in the absence of evidence that the imposition of civil penalties will effect adversely the operator's ability to continue in business, it is presumed that no such effect will occur (Sellersburg Stone Company, 5 FMSRHC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). However, the operator may rebutt the presumption.

Counsel for the Secretary argued that Faith had sufficient assets to pay the penalties proposed and that when I evaluated the company's financial status, I should include all assets of the Stockwell family. Counsel stated that the family's money had been commingled with Faith's assets and, in addition, Mrs. Stockwell had undertaken liabilities in support of the mine (Tr. II 15). In the alternative, counsel argued that because Faith effectively was out of business, consideration of the ability to continue in business criterion was irrelevant and the penalties assessed should be those proposed (Tr. II 16).

Stockwell maintained that it would be wrong to consider all of the family's assets. He testified that although Faith's profits and losses were reported to the IRS on Schedule C of the Stockwells' joint federal income tax return, he was the sole proprietor (Tr. II 137-138). He stated that all of the funds derived from the mine were reinvested in it.

With respect to the commingling of family and company funds, Stockwell explained that when Faith did not have enough money to meet a payroll or to purchase or repair equipment, Mrs. Stockwell wrote checks for the necessary amounts from her personal account. However, Faith always repaid her and she redeposited the payment in her personal account (Tr. II 18). According to Stockwell,

there was no intent to co-mingle funds in a joint venture, and the family's assets should not be viewed as assets available to the company (Tr. II 19).

Moreover, although the Stockwells filed joint federal tax returns, there was a separate schedule for Faith that bore Stockwell's name only (Tr. II 20). While it was true that Mrs. Stockwell had authority to sign Faith's checks, she had that authority only as a convenience to Stockwell so that she could buy parts or pay bills when Stockwell was absent (Tr. II 21). Mrs. Stockwell did not keep books for the company and she had no functions within the mining operation (Tr. II 64).

With regard to the family's assets, Stockwell stated that he and his wife jointly own a farm of approximately 213 acres, which they bought in 1969 (Tr. II 114-115).) He also stated that the family home and the five and one half acres on which it stands, is owned by his wife (Tr. II 24-25). The property was purchased and titled in Mrs. Stockwell's name before Stockwell became involved in Faith (Tr. II 25, 105). (At one time, the Stockwells had a larger home. However, it burned in January 1990, and the Stockwells moved into a smaller house (Tr. II 25, 78, 106-107). Stockwell stated that his homeowner's insurance had been cancelled shortly before the fire and that he and his wife "lost everything" in the fire (Tr. II 79).)

The Stockwells also own 165 acres of land in Sequatchie County, Tennessee. According to Stockwell, the land is "just sitting there" (Tr. II 103, 111).

Stockwell maintained that Faith begun operating the No. 15 Mine in late 1990 (Tr. II 26). Prior to that time, the mine was abandoned (Tr. II 12-13). To finance the startup costs and to purchase equipment, Stockwell borrowed over $174,000 from the First National Bank of Shelbyville.

Stockwell identified a letter dated February 14, 1994, from the bank. It stated that an indebtedness of $119,268.64 on the loan was past due. The bank demanded that the account be brought up to date. Payments on the loan are $3,300 per month (Tr. II 29, 145; D. Exh. 2). (The original amount due was $174,531.30 (Tr. II 164); D. Exh. 4).)

Stockwell testified that he had attempted to obtain consolidation loans to prevent foreclosure but had been unsuccessful because he did not have sufficient collateral

(Tr. II 35-36). He stated that if the bank canceled the loan, he would have no hope of returning to mining (Tr. II 127). He added that if he could not continue operating the mine, he would spend

the rest of his life trying to pay what he owes (Tr. II 133). Stockwell also stated that all of Faith's mining equipment is held as collateral for the bank loan; as well as all of his farm equipment (Tr. II 145). According to Stockwell, the value of the mining equipment has decreased substantially, because TCC has changed from conventional mining to continuous mining machines (Tr. II 83).

Stockwell added that he also owns $20,533 on a loan he incurred to purchase a home for his father. The loan is delinquent (Tr. II 47, 69; D. Exh. 5).

According to Stockwell, when the mine was operating, it produced approximately $375,000 per year in income. Salaries and other expenses took all of the income. In fact, according to Stockwell, Faith still owes approximately $30,000 in open accounts (Tr. II 33, 62, 142). When Stockwell went to prison, the mine was shut down.

Stockwell maintained his liabilities exceeded his assets by approximately two to one, and that he is facing current liabilities of approximately $300,000 (Tr. II 35). The family (Stockwell, his wife and teenage daughter) is surviving off of his wife's teaching income (Tr. II 53-54). Since returning from prison, he has been unemployed except for working on his farm property which earns him $100 to $150 per week (Tr. II 38).

Stockwell described his financial future as "very bleak...if I don't get back [to mining]" (Tr. II 53; See also Tr. II, 58, 127). He stated that he would like to resume mining as soon as his probationary period ends (Tr. II 58, See also Tr. 127). Stockwell maintained that although he was out of business temporarily, at some point Faith could "turn around to be a profit-making business" (Tr. VI 198). He described the mine as in a state of "temporary cessation" (Tr. II 14).

Finally, Stockwell testified he would not be surprised to learn that he owes MSHA $31,800 in unpaid civil penalties (Tr. II 121). He acknowledged he owes up to $4,200, perhaps more, to the Office of Surface Mining and that he owes the United States government approximately $1,000 in fines levied as a result of his criminal conviction. He stated that he had already paid the government $500 and had arranged to "work off" the rest (Tr. II 124).

Buford Ayers, an assistant supervisor of the Farmer's Home Loan Administration (FHLA), testified that the FLHA loaned the Stockwells the money to finance the farm property and that the current balance due was $55,408.18 (Tr. II 183). Ayers stated that the last financial statement by the Stockwells to the FLHA

indicated that the Stockwells had a personal net worth of $164,000. However, the figure included the value of mining equipment that was then estimated at $250,000. Payments to the FHLA had to be made annually. The amount due was $5,043. As of the date of the hearing, the Stockwells were not in arrears (Tr. II 187-188).

Ayers was of the opinion that if the First National Bank of Shelbyville foreclosed on its loan to the Stockwells, they would be forced to default to the FLHA; or, as Ayres put it, "I just don't see how they can make it" (Tr. II 191).

Robert Taylor, an officer of the First National Bank of Shelbyville testified that Stockwell owes the bank approximately $119,000 (Tr. II 150). Taylor stated that the original loan was made to Faith, Stockwell and Mrs. Stockwell (Tr. II 158). The loan is secured by Faith's mining equipment, by a deed of trust on the 165 acres in Sequatchie County, and by a deed of trust for the house the Stockwells occupy (Tr. II 165-166). Taylor stated that the only equipment he considered worth anything was a loading machine, which he evaluated at approximately $15,000 (Tr. II 175-176). He estimated the land that secures the loan as worth approximately $40,00 to $50,000.

According to Taylor, the Stockwell's have tried to avoid bankruptcy and have made an offer to settle their debts, but the bank has rejected the proffered settlement (Tr. 152). Unless Stockwell is able to secure another loan to cover the indebtedness or unless the Stockwells reach a settlement with the bank, the bank will foreclose (Tr. II 153). Foreclosure will include a writ of possession on all of Faith's mining equipment.

Taylor also stated that in the bank's view, Stockwell and Mrs. Stockwell were equally liable for the loan (Tr. II 170-171).

Ann Wilson, the comptroller of TCC, described Faith as "one of the smaller operations" with whom TCC contracted (Tr. V. 86). She testified that to the best of her knowledge the No. 15 Mine was no longer operated and that TCC had no intention of entering into another contract with Faith (Tr. V 76).

According to TCC's records, it paid Faith a total of $119,327.17 in 1990, $282,324.89 in 1991, $209,224.23 in 1992 and $218,556.20 in 1993. The last payment being made to Faith in October 1993 (Tr. V 78-79; Gov. Exh. 3). The total paid in four years was approximately $819,432 (Tr.V. 79).

TCC advanced monies to Faith on occasion. These advances were to provide working capital. In Wilson's opinion, an advance

indicated an operator lacked funds to pay for something. However, TCC would not make an advance without collateral (Tr. V 86-87). TCC deducted amounts due it for supplies from coal payments to Faith. If Faith did not mine enough coal to pay through deductions, it wrote a check back to TCC. Wilson identified two such checks that were signed by Chris Stockwell and that bore the names "Faith Coal Co., Lonnie or Chris Stockwell" (Tr. 81-82; Gov. Exh. 3 at 10).

At the close of the testimony on the ability to continue in business criterion, Stockwell's counsel argued that if Faith and Stockwell had any chance of going back into the coal mining business, that chance would be precluded by any further indebtedness (Tr. II 204-205).

Counsel for the Secretary countered that if a mine operator could not afford to run a mine in a safe and healthful manner, it was MSHA's duty to shut down the operation (Tr. II 207). Counsel pointed out that the total penalties proposed in these cases is approximately $17,000 and that the equity on the farm land on which the FLHA holds the mortgage is more than that (Tr. II 209). Also, Counsel maintained that the Stockwells have no realistic possibility of resuming mining (Tr. II 214). Therefore, the ability to continue in business criterion really is irrelevant.

Settlement Suggestion

Following introduction of most of the evidence on the criterion, I issued a bench ruling regarding "what the ability to continue in business criter[ion] means and how ... it should be applied" (Tr. III 241). I indicated that my ruling was provisional, and that I would express my complete views in the written decision (Id.).

I then stated that in my view, any penalties assessed in these cases should be more then minimal but less than those proposed. (Tr. III 244). Based upon that ruling I suggested, off the record, a settlement plan that I believed was equitable to the parties. The suggestion was rejected by counsel for the Secretary because, in the Secretary's view, Faith's history of prior violations and Stockwell's criminal conviction, did not warrant any reduction of the proposed penalties. Further, counsel maintained that Faith had not met its burden of proof with respect to the ability to continue in business criterion (Tr. III 249-252).

Findings on Ability To Continue in Business Criterion

As I noted at the hearing, the assessment of a civil penalty is mandatory for any violation found to exist (30. U.S.C. ' 820(a); Spurlock Mining Company, Inc., 16 FMSHRC 697,699 (April 1994); Tazco, Inc., 3 FMSHRC 1895 (August 1981). As I also noted, although some Commission judges have held that the criterion is no longer relevant when an operator is effectively out of business (See Spurlock Mining Company, Inc., 15 FMSHRC 629 (April 1993) (ALJ Melick), aff'd in result 16 FMSHRC 697), other judges have found the fact that a company has ceased to operate to be a basis for reducing penalties, sometimes to nominal amounts (Iron Mountain Ore Co., 11 FMSHRC 1840, 1850 (November 1986) (Judge Morris); CRO Coal Co., Inc., 2 FMSHRC 2247, 2249 (August 1980) (ALJ Steffey)).

In general, I agree with Commission Administrative Law Judge George Koutras that the essence of the civil penalty assessment process requires a balancing of all the statutory criteria, including, obviously, the ability to continue in business criterion, (Broken Hill Mining Co., Inc., 15 FMSHRC 1331, 1348-49 (July 1993)). Further, I view weighing the criteria and equalizing the balance as affording the judge considerable discretion. (Penalties are assessed de novo by the judge and the judge is not bound by the formula for assessment that the Secretary has adopted (Shamrock Coal Co., 1 FMSHRC 469 aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersbrug Stone Co., 5 FMSHRC 287, 291-292 (March 1983).)

The question is whether Faith offered sufficient credible evidence to prove that the size of any penalty assessed would effect its ability to continue in business, and if so, the extent to which that proof and the other criteria should impact the civil penalties.

In answering the question, I note first my agreement with the Secretary's contention that the assets of both Stockwell and his wife should be considered when evaluating the ability to continue in business criterion. Although Faith was organized as a sole proprietorship and although Stockwell was the titular sole proprietor, there is no doubt that Mrs. Stockwell made her personal assets available to the company when required and that, in effect, she served as a full financial partner in the business. Mrs. Stockwell had the authority to sign checks on Faith's behalf (Tr. II 19). Mrs. Stockwell also wrote checks for the company from her personal account, checks that allowed the company to continue in operation when it did not have enough

money to cover current expenses (Tr. II 18, 65). Moreover, when Faith needed a loan to purchase mining equipment and initiate mining, Mrs. Stockwell signed for the loan along with her husband (Tr. II 61). But for Mrs. Stockwell, Faith would not have been able to go into and to continue with the business of mining. The company functioned fiscally as a husband and wife partnership, and I will look to the realities of the business rather than to its formalities.

Those realities lead me to conclude at the hearing that the Stockwells were in precarious financial straits, and nothing since has caused me to change my view (Tr. III 245-247). I accept as fact that the Stockwells owe the First National Bank of Shelbyville, $119,268.64. I also accept as fact that collateral on this loan includes the mining equipment at the No. 15 Mine, the deed of trust on the 165 acres in Sequatchie County and the property and house where the Stockwells are living (Tr. 165-166). In addition, I accept Stockwell's and Taylor's testimony that the mining equipment has lost most of its value and that the land that secures the loan is worth less than half the amount due (Tr. II 175-176).

Ayers credibly stated that he was thoroughly familiar with all aspects of the FLHA loan on the farm; and I find persuasive his opinion that if the Stockwells are unable to make arrangements with the First National Bank, they will default on the FLHA loan. Ayers stated that if the Stockwells defaulted, he did not know how they "could make it," and neither do I (Tr. II 191).

Scenarios can be devised by counsel for the Secretary concerning how the Stockwells can be assessed the full amount of the proposed penalties and pay them, but counsel is not a professional banker; Taylor and Ayers are, and I give great weight to their testimony and to their opinions.

I conclude from their testimony that additional debt of the type proposed by the Secretary will force the Stockwells to default on their obligations to the bank, and to the FLHA; with the result that they may loose the mining equipment, their house, farm and their other property.

To say that this would have a detrimental effect on Faith's ability to continue in mining, understates the matter. Stockwell indicated a desire to continue mining and I take him at his word (Tr. II 58, 127). As long as he has the equipment, his return to the business remains a possibility. Once the equipment is gone, so is the reasonable likelihood of resuming operations.

Stockwell's sins of commission and omission under the Act already have resulted in penalties other than those the Secretary

seeks here. If Stockwell returns to mining, he will do so with first-hand knowledge of the civil and criminal sanctions engendered by violations of the Act and regulations. Given this, I do not believe assessing penalties less than those proposed in these cases will lessen his incentives for compliance.

I think it is fair to state that the Secretary's approach to penalty amounts is driven by a desire to make it as difficult as possible for Stockwell ever to mine again. Counsel for the Secretary was candid about this -- "If a mine operator cannot afford to run the mine in a safe and healthy way, it is our business to shut it down" (Tr. II 207). However, civil penalties are remedial not punitive, and the ability to continue in business criterion is not intended to be used to thwart mining. Rather, it is to be used to encourage the continuation or resumption of safe mining. If the Secretary believes an operator should be barred from mining, other remedies are available, as Stockwell's experience before the judge magistrate has shown.

Therefore, when assessing civil penalties in these cases, I will afford more weight than would otherwise be the case to the ability to continue in business criterion.

Size and Good Faith Abatement

Faith is small in size, and unless otherwise specifically noted, the company demonstrated good faith in attempting to achieve rapid compliance.

History of Previous Violations

Faith Coal Company has a large history of previous violations (Joint Exh. 61).

Penalty Amounts

When all of the criteria are considered, I conclude that the resulting assessments should be more than minimal but less than proposed.

ORDER

Docket No. SE 91-97

This case was assigned to Commission Administrative Law Judge Gary Melick. On September 20, 1991, the parties agreed to settle the matter and they filed a joint motion to approve the settlement. Judge Melick rejected the settlement and scheduled the matter for hearing.

A hearing was conducted on September 24, 1991. It was not completed because Faith requested and received permission to present additional evidence and to call additional witnesses. Judge Melick set December 4, 1991, as the date the hearing would resume. Subsequently, the matter was the subject of numerous continuances and stays for reasons fully outside the control of the judge. (The chronology of the case is documented in Secretary's post trial brief at pages 5-9.)

The case was reassigned to me with the understanding that Faith would have the opportunity to present additional evidence and call additional witnesses during the subject consolidated hearings. At the beginning of the second session of hearings, Stockwell stated that Faith would not present any additional documentary evidence or offer any further witnesses (Tr. V 17-18, 22-23).

The parties resumed settlement negotiations. As a result, the parties agreed to resubmit their original motion to approve the settlement, with the understanding that it be reviewed in the context of the evidence that has been offered regarding the affect of any penalties assessed on Faith's ability to continue in business (Sec. Br. 8).

Given the civil penalty criteria noted above, I conclude that no reduction in the settlement is warranted. The settlement is approved.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3023421	8/28/90	75.312	$ 20	$10	$10
3023422	8/28/90	75.316	$ 20	$10	$10
3023422	8/28/90	75.316	$ 20	$10	$10
3023347	9/24/90	75.505	$ 20	$10	$10
3023348	9/24/90	75.1704(2)(c)(2)	$ 20	$10	$10
3023350	9/24/90	75.403	$ 20	$10	$10
3023351	9/24/90	75.904	$ 20	$10	$10
3023410	9/24/90	75.1801	$ 20	$10	$10
3023411	9/24/90	75.1803	$ 20	$10	$10
3023412	9/24/90	75.1805	$ 20	$10	$10
3023413	9/24/90	77.501	$ 39	$23	$23
3023418	9/25/90	75.400	$ 20	$10	$10
3023420	9/25/90	75.400	$ 39	$23	$23
3023354	9/26/90	75.503	$ 20	$10	$10
3023355	9/26/90	75.400	$ 39	$23	$10

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 91-533

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3023423******	8/28/90	75.303(a)	$300	$ 78	$ 50
3023681*	12/26/90	77.1605(k)	$200		$134
3023416****	9/24/90	75.804(b)	$450	$275	$150
3023353****	9/25/90	75.220	$450	$275	$150
3023461****	9/26/90	75.316	$400	$275	$125
3023462****	9/26/90	75.303(a)	$400	$275	$125

(* Tr. IV 73) (Faith agreed to withdraw its contest of the citation.)

(**** Tr. VI 200-205) (The Secretary agreed to reduce the penalty based upon litigation strategy.)

(****** Tr. IV 743) (The Secretary agreed to vacate the associated section 104(b) withdrawal order.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to vacate Order No. 3023423.

SE 92-315

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395346*	12/2/91	'75.400	$85	$58

(* Tr II 257) (Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the civil penalty shown.

Docket No. SE 92-316

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395933	2/26/92	75.1808	$20	$20

Citation No. 3395933 is affirmed, and Faith is **ORDERED** to pay the penalty shown.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395936*	2/26/92	49.98	$20	$13
3396027*	2/26/92	75.403	$58	$42
3396028*	2/26/92	75.303(a)	$20	$13

3396029*	2/26/92	75.313-1	$20	$13
3396030*	2/26/92	70.210(b)	$20	$13

(*Tr. IV 748. Faith agreed to withdraw its contest of the citations.)

Faith is **ORDERED** to pay the penalties shown.

DOCKET NO. SE 92-343

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3396042	3/2/92	77.1104	$ 94	$40
3390641	3/2/92	75.1713-7(a)(2)	$ 94	$ 0
3396045	3/3/92	75.202(a)	$147	$40
3396047	3/2/93	75.208	$ 88	$40

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to vacate Citation No. 3396041.

The Secretary is **ORDERED** to modify Citation No. 3396045 by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citation No. 3396047 by deleting the S&S finding.

Settled Violations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3396046*	3/3/92	75.1313(c)	$ 88		$59
3395940***	3/02/92	77.505	$ 88	$50	$40
3396043***	3/02/92	77.807	$ 88	$50	$40
3396044***	3/02/93	77.513	$ 88	$50	$40
3396035**	3/02/92	77.400(a)	$ 88	$50	$40
3396036***	3/02/92	77.513	$ 88	$50	$40
3396039*****	3/3/92	75.203(e)	$147	$88	$65
3396040***	3/3/92	75. 202(a)	$147	$88	$65
3396081*****	3/3/92	75.220	$147	$88	$65
3396082*******	3/3/92	75.212(c)	$147	$58	$42
3396048*******	3/5/92	75.203(e)	$147	$58	$42

(Tr. III 532) (* Faith agreed to withdraw its contest of the citation.)

(Tr. IV 780) (** The Secretary agreed to delete the S&S finding.)

(Tr. III 532-535, Tr. IV 781, 783-784) (*** The Secretary agreed to modify the negligence finding to low.)

(Tr. IV 782-785) (***** The Secretary agreed to reduce the number of miners affected by the violation.)

(Tr. III 535-537, Tr. IV 785-786) (******* The Secretary agreed to modify the negligence finding to low and to reduce the number of miners affected by the violation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3396035 by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citations No. 3395940, 3396043, 3396044, 3396036, and 3396040, by reducing the negligence findings to low.

The Secretary is **ORDERED** to modify Citations No. 3396039 and 3396081, by reducing the number of miners affected by the violations.

The Secretary is **ORDERED** to modify Citations No. 3396082 and 3396048, by reducing the negligence findings to low and by reducing the number of miners affected by the violations.

Docket No. SE 92-372

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3396083****	3/4/92	75.212(c)	$ 88	$50	$40
3396084*****	3/5/92	75.400	$147	$94	$72
3396085*	3/9/92	75.212(c)	$ 50		$40
3396038*****	3/4/92	75.212(c)	$147	$94	$72

(Tr. IV 767) (* Faith agreed to withdraw its contest of the citation.)

(Tr. IV 764-765) (**** The Secretary agreed to reduce the penalty based upon litigation strategy.)

(Tr. IV 766-768) (***** The Secretary agreed to reduce the number of miners affected by the violation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3396084 by reducing the number of miners affected by the violations.

DOCKET No. SE 92-373

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883375	4/13/92	70.208(a)	$50	$40

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3395800	5/01/92	75.403	$50	$40

(Tr. IV 642) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 92-375

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3396037****	3/02/92	77.516	$88	$50	$40

(Tr. IV 748-749) (**** The Secretary agreed to reduce the penalty based upon litigation strategy.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 92-463

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024224	5/28/92	75.208	$88	$75

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024225*	5/28/92	75.220	$88	$59

(Tr. II 273-274) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 92-464

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024223	5/27/92	77.402	$88	$59

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 92-488

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024222*	5/27/92	70.508(a)	$50	$40

(Tr. II 257) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 93-78

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024472	8/19/92	75.203(a)	$50	$ 0
3024476	8/27/92	75.1107-16(b)	$50	$30

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Citation No. 3024472.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3014473**	8/19/92	75.511	$88	$50	$40
3024474*	8/20/92	75.601-1	$88		$59

(Tr. II 377-378) (** The Secretary agreed to delete the S&S finding.)

(Tr. II 377) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3014473 by deleting the S&S finding.

Docket No. SE 93-79

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3024477*	8/27/92	75.503	$50	$40
3024478*	8/27/92	75.1714(3)(e)	$50	$40

(Tr. II 374) (* Faith agreed to withdraw its contest of the citations.)

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 93-194

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024675**	11/16/92	75.306(a)	$128	$50	$40
3024737*	12/01/92	75.388(b)	$128		$85
3024745*****	12/01/92	75.316	$128	$94	$72

(Tr. II 328) (* The Secretary agreed to delete the S&S finding.)

(Tr. II 328) (** Faith agreed to withdraw its contest of the citation.)

(Tr. IV 750-752) (***** The Secretary agreed to reduce the number of miners affected by the violation.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3024745 by reducing the number of miners affected by the violation.

Docket No. SE 93-195

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024705*	12/08/92	75.512	$ 50	$40	$40
3024706*	12/08/92	77.516	$ 75		$50
3024707*	12/08/92	75.515	$ 75		$50
3024708*	12/08/92	75.904	$ 50		$40
3024709*	12/08/92	75.601-1	$ 75	$58	$50
3024710**	12/08/92	75.900	$ 75	$50	$40

3024711***	12/14/92	75.313-1	$111	$75	$50
3024712***	12/14/92	75.318	$ 75	$50	$40
3024713*	12/14/92	75.1101-3	$111		$74
3024801*	12/14/92	75.316	$ 50		$40

(Tr. II 430-432) (* Faith agreed to withdraw its contest of the citation.)

(Tr. II 430) (** The Secretary agreed to delete the S&S finding.)

(Tr. II 430-431) (*** The Secretary agreed to modify the negligence to low.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citation No. 3024710 by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citations No. 3024711 and 3024712, by reducing the negligence to low.

Docket No. SE 93-257

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024802******	12/14/92	75.364(a)(1)	$117	$50	$40

(Tr. II 432-433) (****** The Secretary agreed to vacate the associated section 104(b) withdrawal order.)

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Order No. 3024767.

Docket No. SE 93-300

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
9883495********	1/08/93	70.207(a)	$300	$50	$40

(Tr. II 257-258) (******** The Secretary agreed the violation was technical and should not have been specially assessed.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 93-348

Contested Citation.

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883544	2/18/93	70.201(c)	$50	$40

Faith is **ORDERED** to pay the penalty shown.

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024880*	3/02/93	75.364(i)	$ 50		$40
3202181****	3/02/93	75.512	$ 50	$ 20	$13
3202182*	3/02/93	75.1101-23(c)(1)	$ 50		$40
3202183*	3/02/93	75.220	$ 88		$59
3202185*	3/02/93	75.220	$ 50		$40
3202186****	3/02/93	75.507	$ 88	$ 50	$40
3202187*	3/02/93	75.603	$ 88		$59
3202189**	3/03/93	75.606	$ 88	$ 50	$40
3202190**	3/03/93	75.400	$128	$ 94	$72
3202191***	3/04/93	75.340(a)(1)	$147	$103	$78
3202192*	3/04/93	75.516	$ 88		$59
3202193*	3/04/93	75.503	$ 50		$40
3202194*	3/04/93	75.523-3(b)(1)	$ 88		$59
3202196**	3/04/93	75.523-3(b)(1)	$ 88	$ 50	$40

(Tr. IV 752, 754, 756, 760) (* Faith agreed to withdraw its contest of the citation.)

(Tr. IV 757-759, 761-762) (** The Secretary agreed to delete the S&S finding.)

(Tr. Tr. 759-760) (*** The Secretary agreed to modify the negligence to low.)

(Tr. IV 753-754, 756) (**** The Secretary agreed to reduce the penalty based on litigation strategy.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citations No. 3202189, 3202190 and 3202196, by deleting the S&S finding.

The Secretary is **ORDERED** to modify Citation No. 3202191, by reducing the negligence to low.

Docket No. SE 93-365

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883549	3/4/93	70.100(a)	$119	$90
3024810	3/16/93	75.1722(a)	$ 88	$59
3024814	3/17/93	75.220	$128	$86

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3024808**	3/16/93	75.1101-23	$ 88	$ 50	$40
3202198*	3/16/93	75.361(b)	$ 50		$40
3202199*	3/16/93	75.1103	$ 88		$59
3202200**	3/16/93	75.400	$128	$ 50	$40
3024811*	3/17/93	75.342(a)(4)	$ 50		$40
3024812*	3/17/93	75.503	$ 50		$40
3024813*	3/17/93	75.1107	$ 88		$59
3024815****	3/17/95	75.372(a)(1)	$128	$100	$67
3024816*	3/17/93	75.360(b)(6)	$128		$82
3202241*	3/17/93	75.400	$ 88		$59
3202242*	3/17/93	75.503	$ 50		$40
3202243*********	3/17/93	75.1107-16(b)	$ 88	$ 70	$53
3202247***	3/22/93	75.1101-23	$128	$ 88	$65
3202306*	3/29/93	75.350	$ 88		$59
3202307*	3/29/93	75. 370(a)(1)	$ 88		$59

(Tr. II 435-436, Tr. IV 739, Tr. V 181) (* Faith agreed to withdraw its contest of the citation.).

(Tr. II 434-435, Tr. IV 738) (** The Secretary agreed to delete the S&S finding.)

(Tr. II 436-437) (*** The Secretary agreed to modify the negligence finding too low.)

(Tr. VI 206) (**** The Secretary agreed to reduce the penalty based on litigation strategy.)

(Tr. IV 740-741, Tr. V 182-183) (********* The parties agreed to reduce the penalty based on mutual litigation risks.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify Citations No. 3024808 and 3202200, by deleting the S&S findings.

The Secretary is **ORDERED** to modify Citation No. 3202247 by reducing the negligence to low.

Docket No. SE 93-366

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202244	3/17/93	75.220	$2800	$2128
3203325	3/17/93	75.203(a)	$3100	$ 0

Settled Order

Citation/ Order No.	Date	30 C.F.R	Assessment	Settlement	Penalty
3202285*********	3/29/93	75.360(g)	400	$175	$117

(Tr. IV 735-736) (********* The parties agreed to leave the order as written and to reduce the penalty based on mutual litigation risks.)

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Order No. 3203325.

Docket No. SE 93-411

Settled Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202184*	3/02/93	75.370(a)(1)	$50	$40
3202188*	3/02/93	75.360(f)	$50	$40

(Tr. II 258) (* Faith agreed to withdraw its contest of the citations.)

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 94-42

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202246	3/22/93	75.364(a)(1)	$360	$0
3024817	3/22/93	75.220	$ 88	$0

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty

3202246******3/22/93 75.360(a)(1) $360 $183 $139

(Tr. IV 787-790) (****** The Secretary agreed to vacate the associated section 104(b) withdrawal order.)

Faith is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to vacate Citations No. 2302246 and 3024817, and to vacate Order No. 3202497.

Docket No. SE 94-75

Settled Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202543*	9/28/93	75.503	$50	$40

(Tr. II 259) (* Faith agreed to withdraw its contest of the citation.)

Faith is **ORDERED** to pay the penalty shown.

Docket No. SE 94-96

Contested Citations

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
9883661	10/14/93	70.208(a)	$50	$35
9883662	10/14/93	70.208(a)	$50	$35

Faith is **ORDERED** to pay the penalties shown.

Docket No. SE 94-256

Contested Citation

Citation/ Order No.	Date	30 C.F.R.	Assessment	Penalty
3202337	6/07/93	75.313	$50	$0

The Secretary is **ORDERED** to vacate Citation No. 3202337.

Docket No. SE 94-257

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement	Penalty
3202544*******	9/28/93	75.1107-16(b)	$225	$50	$40
3202565******	9/28/93	75.1107-7(c)	$225	$50	$40

(Tr. II 374-375) (****** The Secretary agreed to vacate the associated section 104(b) order of withdrawal.)

Faith is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to vacate Orders No. 3202555 and No. 3202556.

Dismissal of Proceedings

Faith shall pay the assessed penalties within 30 days of the date of this decision. The Secretary shall modify and vacate the referenced citations and orders within the same 30 days. These proceedings are **DISMISSED**.

David F. Barbour
Administrative Law Judge

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