FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 22, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 99-156
Petitioner	:	A. C. No. 46-08707-03507
v.	:	
	:	Hiope No. 8
HIOPE MINING, INC.,	:	
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner,
Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, P.C., Abingdon, Virginia, for the Respondent.

Before Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Hiope Mining, Inc. pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815. The petition alleges a significant and substantial violation of the Secretary's mandatory health and safety standards attributable to Respondent's unwarrantable failure and proposes a civil penalty of $1,500.00. A hearing was held in Abingdon, Virginia on March 13-14, 2000. Petitioner submitted a brief on April 27, 2000. Following receipt of the hearing transcript, Respondent submitted a reply brief on June 15, 2000. For the reasons set forth below, I affirm the citation and assess a penalty of $1,500.00.

Findings of Fact

On May 17-19, 1999, John B. Sylvester, Jr., an inspector with the Secretary of Labor's Mine Safety and Health Administration (MSHA) conducted an inspection of the Hiope mine, an underground coal mine located in McDowell County, West Virginia. Over the course of the inspection he issued a total of 15 citations, four of which, he concluded were Significant and Substantial (S&S). Respondent did not contest 14 of the citations. The only citation at issue here was written on May 19, 1999, at 8:55 p.m., when Inspector Sylvester observed

accumulations of coal and float coal dust that he concluded violated 30 C.F.R. § 75.400.[1] He issued Citation numbered 7183561, which identified the condition or practice as:

> On the 001-0 section coal and float coal dust is being allowed to accumulate on the mine floor and on the ribs. In the No. 2 face coal is being allowed to accumulate for a distance of 55 feet and the last line open cross-cuts from No. 4 heading to No. 9 heading hasn't been cleaned up at all for a distance of 250 feet. The accumulations range from 1 to 14 inches in depth. The section was producing coal at the time the citation was issued. No one was in the process of cleaning the section at this time. Citation No 7183548 was issued 5-17-99 for these same conditions.

The citation was issued pursuant to § 104 (d)(1) of the Act[2] because Inspector Sylvester determined that the violation was significant and substantial and the result of the operator's unwarrantable failure. As noted in the body of the citation, the inspector's assessment of the operator's negligence as "high" was based, in part, on the issuance of at least one prior citation for similar conditions only two days earlier in the same section of the mine. Upon issuance of the citation, the foreman, the continuous miner operator and the two shuttle car drivers directed their efforts to cleaning and the citation was terminated at 10:50 p.m., slightly less than two hours after it had been issued.

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[1] 30 C.F.R. § 75.400, entitled Accumulation of Combustible Materials, provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

[2] Section 104(d)(1), 30 U.S.C. § 814(d)(1), provides in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. . . .

Subsurface coal extraction at the Hiope mine was conducted on three shifts. The first and second shifts actively mined coal. The third, midnight or "hoot owl," shift was devoted to maintenance activities, described by Hiope's President, Ronald Combs, as including cleaning, rock dusting and moving the conveyor belt. The crews for the first and second shifts consisted of six men, a foreman, a continuous miner operator, two shuttle car drivers and two roof bolters. According to the testimony of the mine (and #1 shift) foreman, Gerald Tatum the #1 and #2 shifts were operating "shorthanded" with a "skeleton crew" of six men. The #2 shift foreman at the time, Raymond Poszich,[3] described a "normal" crew as consisting of at least two more men, an electrician and a scoop operator who would normally perform most of the cleaning and rock dusting duties.

Both Mr. Tatum and Mr. Poszich testified that the other five members of their crews were fully occupied operating equipment that was actively engaged in the production of coal and were available for cleaning only if their piece of equipment was inoperable. As a consequence, cleaning duties were generally the responsibility of the foreman, who had many other duties, including providing supplies to the roof bolter, making inspections of the mine every two hours and hanging centerlines and line curtains. While Mr. Tatum testified that he performed some of these duties while operating a scoop and doing cleaning and that he and his crew tried to clean as much as they could, Mr. Poszich testified that they simply didn't clean unless equipment broke down. I find that Mr. Poszich's testimony, based upon his lack of a current employment relationship with Respondent and the findings of Inspector Sylvester, more accurately described the cleaning effort during the production shifts. In actual practice, if mining operations were uninterrupted by equipment breakdowns, very little cleaning was performed on the first and second shifts.

At the time the citation was issued, the mine's posted cleanup program called for cleaning and rock dusting to be performed "after each work cycle." A work "cycle" consisted of the continuous miner making a cut 15-20 feet deep - the fresh cut was then to be roof bolted and cleaned, with loose coal being removed or "pushed up" to the face where it would be loaded out when the continuous miner returned to make another cut. After the citation was issued, Inspector Sylvester observed that Hiope was violating its own cleanup program. Within a month of the issuance of the citation, Hiope's president amended the program to specify that cleaning was required to be done after each 16 hour "producing period." It also provided that: "During the producing period a scoop will be utilized as much as possible to do cleaning." The change, in essence, brought the written cleanup program into conformance with the existing cleaning practice and was intended, in part, to assure that an inspector would not be able to refer to a failure to follow an established cleanup program in support of a citation.

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[3] Mr. Poszich no longer worked at the Hiope mine at the time of hearing.

Hiope cannot strenuously dispute inspector Sylvester's description of the accumulations as noted in the citation. Mr. Poszich, the foreman on duty at the time, testified that he did not disagree with that description. The primary defense is that the citation was issued "prematurely" because, due to delays in roof bolting, cleaning could not have been done in the subject areas[4] and that there is no reliable evidence that cleaning was not being done on cycle.

The mine was developed with nine entries, each 20 feet wide and spaced 50 feet apart on center. Cross cuts connecting the entries were made on centerlines spaced 80 feet apart. The mine was developed in the following sequence: cuts were made first in the #9 entry, followed by #8 and, in order, down to #5, where the conveyor belt was located. That process was repeated until those entries were mined up to where the next cross cut would be located. Cross cuts were then made, turning right, i.e. from #8 entry toward #9 entry. Each cross cut through 30 feet of coal had to be made with 2 cuts of the continuous miner. When the cross cuts from #5 to #9 had been completed, mining began on the left side and the #4 through #1 entries were cut and connected with cross cuts which became an extension of the #5 to #9 cross cut. When the second shift started work on May 19, 1999, the #4 through #9 entries had been mined up to the next cross cut and cross cuts had been made completely through from the #4 to the #9 entry. The Pre-shift report for the second shift, which was done between 2:00 and 3:00 p.m on May 19, 1999, by Mr. Tatum, described the condition of the mine as, "needs bolted" for entries #1, #2, #3, #4, #6 and #8 and "needs cleaned" for entries #5, #7 and #9. "Needs bolted" means that the continuous miner had made a 15-20 foot cut and that it had not yet been roof bolted. Such areas are "dangered off", by hanging a reflector warning that no one can enter the area where the roof is unsupported. "Needs cleaned" means that the area had been roof bolted and could then be cleaned. No distinction was made between entries and cross cuts in the report because the cross cut was viewed as a continuation of the entry. For example, the cross cut from #6 to #7 was made by bringing the continuous miner up entry #6, where it would make a right turn toward entry #7. Two more cuts would be made, completing the cross cut between #6 and #7 — all of which would be referred to as mining in the #6 entry. Consequently, the preshift report entry that #6 "needs bolted" means that the final cut of the cross cut from #6 to #7 had been made and needed to be roof bolted.

There are factual disputes about the exact state of development of the mine on May 19, 1999, both at the beginning of the second shift and when the inspector arrived on section 1 at about 8:35 p.m. I find that at the time the inspector arrived the mine was developed as depicted in Government's Exhibit #18, a copy of which is attached as Appendix I, with the exception that the #5 through #9 entries were advanced no more than a few feet beyond the cross cut. I also find that at the beginning of the second shift the cross cuts from #4 to #9 had been cut through. There is no dispute that by the time Inspector Sylvester arrived the cross cuts from #4 through #9 had been cut through. Mr. Poszich testified that his shift did no mining on the right side (#5-#9) and mined only on the #3, #2 and #1 entries. The only witness that testified to the contrary

[4] Mandatory Safety Standards for underground coal mines provide that "[n]o person shall work or travel under unsupported roof * * * ." 30 C.F.R. § 75.202(b).

was Walter McGlothlin, a shuttle car operator who stated that the continuous miner started in the #6-#7 cross cut. However, he was impeach with his deposition testimony that mining was done only in the #4 through #1 entries on the second shift.

I find, as Mr. Poszich testified, that mining on the second shift occurred only in the #3, #2 and #1 entries. Critically, when Inspector Sylvester arrived, the #2 entry had been driven in approximately 70 feet, the last cut of which had not been roof bolted. The first 55 feet of entry #2, however, had been bolted and should have been cleaned prior to the next cut being made. The inspector found excessive accumulations throughout the first 55 feet of the entry, accumulations that he was certain did not result from the last cut because of their extensiveness and location. There was a suggestion, in Mr. McGlothlin's testimony, that the accumulations may have been of recent origin because there may have been a cross cut started with a left hand turn from the #2 entry and that substantial spillage occurs when turns are made. I reject that suggestion because neither the #2 nor the #1 entry had been driven to the point where a cross cut would have been made and other testimony was uniformly to the effect that cross cuts were made by turning to the right.

There were also excessive accumulations throughout the length of the cross cuts from #4 entry to #9 entry. Respondent is correct in its contention that cleaning could not be done under unsupported roof and areas "in-by" unsupported roof. However, that would excuse the failure to clean only in the second cut that had not been roof bolted. At the start of the second shift the #4-#5 and #5-#6 cross cuts had been cut though and bolted, as indicated on the preshift report and the testimony of Scott Honaker, one of the roof bolters. I reject the contrary testimony of Steve Blackwell, the other roof bolter, that bolting was done in the #5-#6 cross cut on that shift. There is a dispute in the testimony as to the location of the roof bolter when the inspector arrived. He testified, consistent with his notes, that the bolter was at the last row of bolts in the #7-#8 cross cut. The roof bolters testified that they were working in the #6-#7 cross cut at the time. While I find that it is unlikely that the roof bolter was in the #7-#8 cross cut,[5] its location when the inspector arrived is of little significance. Even if the roof bolter was in the second cut of the #6-#7 cross cut, such that cleaning could not have been done there or in the area of the second cuts of the #7-#8 and #8-#9 cross cuts, there were excessive accumulations that should have been cleaned previously in the entire cross cut from #4 through the first cut of the cross cut in #6-#7 and the first cuts of the cross cuts in #7-#8 and #8-#9.

With respect to possible ignition sources, Inspector Sylvester testified that there were several present, including sparks from the continuous miner, worn or damaged insulation on electrical cables and improperly maintained permissible equipment. In addition to the combustible accumulations, the mine liberated methane. While the Hiope mine was not a particularly gassy mine, mining operations were, at the time, occurring only 20-30 feet above an abandoned mine where serious methane problems and several ignitions had been experienced.

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[5] As noted above, the preshift report indicates that that cross cut had been bolted at the start of the second shift and no additional mining had been done on that side.

Test results in the record generally show zero or very low concentrations in areas where coal was not actually being cut. However, as Inspector Sylvester testified, methane concentrations are not predictable and he had been told by the continuous miner operator that concentrations at or above 2% had been encountered.[6] Mr. Poszich testified that he had experienced methane concentration sufficient to shut down the continuous miner the same day that the subject citation was issued. Sparks are produced when the continuous miner's bits strike roof material and provide an efficient ignition source at the very location that methane is likely to be liberated. Other ignition sources include the equipment, which is powered by electricity. Wear and damage to trailing cables supplying 480 volts of electricity is not uncommon. In fact, Inspector Sylvester issued a citation on May 17, 1999, having found worn insulation in five locations on the trailing cables of the continuous miner. Sparks or flames in electrical controls also can provide an ignition source if the equipment is not maintained in "permissible" condition. Inspector Sylvester also issued a citation on May 17, 1999, for failure to maintain the continuous miner in permissible condition.

Conclusions of Law

Significant and Substantial

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (footnote omitted)

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[6] Methane is a highly combustible gas . Continuous mining machines are equipped with methane monitors that sound a warning when methane concentration reaches 1% and automatically shut the machine down at concentrations of 2%.

See also, Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The Violation

The conditions found to exist, as described above, violated § 75.400. While they were the product of normal mining operations, the extensive accumulations existed at the time of the citation because Hiope failed to clean as part of the normal mining cycle. Any argument that the areas in question could not have been cleaned because they had not been roof bolted is unavailing because the great majority of the areas noted in the citation had been roof bolted. As the inspector noted, the #2 entry had not been cleaned for a distance of 55 feet to the last row of bolts. That distance would have been mined in three cycles, with a continuous miner making cuts of 15-20 feet. Those cuts had been roof bolted and should have been cleaned prior to the next cut being made. Similarly, there is no viable excuse for allowing accumulations to exist in the cross cuts from #4 to #6 and in the area of the first cuts in the other cross cuts from #6 to #9.

Hiope argues that the only evidence that clean up was not being done on cycle was testimony from Raymond Poszich who was referring to a later time period when the mine was operating under the new cleanup plan. However, Mr. Poszich's testimony quite clearly was directed to the time frame of May 19, 1999, not a later period.[7] The excessive accumulations

[7] See, e.g., transcript pages 113 ("that was an accepted plan when we got there") and 155 (the cited accumulations would not have been cleaned up until the midnight shift, had the inspector not arrived). While he did refer to the amended cleanup plan, it appears to have been for

found by Inspector Sylvester are also ample proof that cleaning was not being done on cycle. Hiope also contends that Inspector Sylvester's testimony is unreliable for a number of reasons, including his lack of recollection of the exact status of roof bolting and the mining sequence. However, as noted previously, there is little dispute as to the accuracy of Inspector Sylvester's description of the excessive accumulations. Those accumulations existed in areas that clearly had been roof bolted and should have been cleaned.

The Commission's decisions long ago made clear that § 75.400 is directed at preventing accumulations — not to cleaning them up within a reasonable time. As stated in *Utah Power and Light Co.*, 12 FMSHRC 965, 968 (May 1990):

> In defining a prohibited "accumulation" for section 75.400 purposes, the Commission explained [in *Old Ben Coal Co.*, 2 FMSHRC 2806 (October 1980)] that "some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." *Old Ben II*, 2 FMSHRC at 2808. The Commission emphasized that the legislative history relevant to the statutory standard that section 75.400 repeats "demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." *Old Ben I*, 1 FMSHRC [1954 (December 1979)] at 1957. . . . .

Here, Hiope allowed lose coal, float coal dust and related combustible materials to remain in the active workings of the mine in numerous areas that had been roof bolted and should have been cleaned. These were clearly "accumulations" as defined in, and in violation of, § 75.400.

Likelihood of Injury

There can be little dispute that combustible accumulations contribute to the hazard of ignition or propagation of a fire and that any injury resulting from such a hazard could be serious and possibly fatal. The critical factor in the S&S determination, therefore, is whether there was a reasonable likelihood that the hazard would result in an injury. There were several ignition sources in the area and the mine was known to liberate methane. Sparks from the continuous miner, damaged trailing cables from the miner and other equipment and improperly maintained equipment were potential ignition sources. Inspector Sylvester had cited Hiope because insulation on the trailing cable of the continuous miner was worn in five places. Concentrations of methane sufficient to shut down the continuous miner had been encountered the same day that

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illustration purposes. No attempt was made on cross examination to establish that he was referring to a time frame other than when the citation was issued.

the citation was issued. The active workings in question were also located approximately 20-30 feet above an abandoned mine that had far more significant methane problems, including several ignitions. These factors give rise to a reasonable likelihood that the hazard contributed to by the accumulations would result in an injury. Accordingly, I find that the violation was significant and substantial.

Unwarrantable Failure

In *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999), the Commission reiterated the law applicable to determining whether a violation was the result of an unwarrantable failure.

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp*., 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

A consideration of the above factors compels a conclusion that the violation was the result of Hiope's unwarrantable failure. The accumulations were extensive and existed in several areas that should have been cleaned, had proper effort been devoted to cleaning in the normal mining cycle, i.e. after roof bolting had been completed. The record of prior violations by Hiope indicates that it had been cited for violations of § 75.400 seven times in the six months preceding the issuance of the instant citation. With one exception, the circumstances of those violations have not been explained and I do not consider that they should have put Hiope on a heightened alert for such violations. The § 75.400 violation cited in May 17, 1999, however, resulted from the same practice that prompted the violation at issue here, and clearly put Hiope on notice that delaying cleaning efforts and allowing accumulations to exist in the active workings was a violation of a mandatory health and safety standard. Nevertheless, Hiope did not change its ways. No cleaning had been done on the #2 shift and no cleaning was being done when the inspector arrived in the area despite the fact that the need for cleaning had been noted on the preshift inspection report and additional areas had been roof bolted and should have been cleaned. Cleaning was not initiated until the citation was issued, some five hours after the shift had begun. At that point, four miners worked two hours to abate the conditions cited. It is apparent that, had the inspection not taken place, substantial accumulations would have been allowed to remain in the active workings until the midnight shift began.

Hiope places significance on the fact that, on May 18, 1999, Inspector Sylvester found the mine clean and observed some cleaning being done during the #1 shift. However, Inspector Sylvester arrived at the mine virtually at the beginning of the #1 shift that day. Under the cleaning process actually followed by Hiope, the mine would normally have been clean by the end of the midnight shift. Attention to cleaning in the presence of an inspector who had issued a citation for excessive accumulations during the same shift the previous day is hardly indicative of a proper ongoing cleaning program. As the inspector testified; "If I was there [on the 18th], they were doing cleanup, I guarantee it."

The situation presented here is comparable to that in *Utah Power and Light Co., supra,* where an operator made a conscious decision to mine in a manner that allowed accumulations to exist. While the unwarrantable failure finding in that case was reversed, the reversal was predicated on the operator's good faith belief that its cleanup plan was consistent with applicable regulations and that its cleanup methods were safer than alternative procedures. In addition, the operator there had been cited in the past for deviating from its cleanup plan and was understandably reluctant to change its procedures. Those factors stand in sharp contrast to the situation presented in this case. Here, Hiope's conscious decision to mine in a manner that allowed unlawful accumulations to exist was a deviation from its cleanup program, a deviation for which it had been issued a citation only two days earlier. Hiope's response to the May 17 and May 19, 1999 citations was not to conform to its cleanup program and eliminate the accumulations. Rather, Hiope determined to change its cleanup program to formalize its deficient cleaning procedures. Under the Commission precedent discussed above, it was long ago made clear that deferring cleanup efforts and allowing accumulations to exist for even one shift, much less two shifts, was a violation of § 75.400.

The citation is affirmed as significant and substantial and due to Hiope's unwarrantable failure to comply with a mandatory health and safety standard.

The Appropriate Penalty

Hiope Mining Inc. is a relatively small operator, with production of 56,060 tons of coal in 1998. It has a relatively good history of violations, having been cited for violations of the Act forty-five times, including the instant violation, during fifty-one inspection days in the two year period ending on May 19, 1999. Thirty-seven of the violations involved single penalty assessments and none of those finally adjudicated was specially assessed. The parties have stipulated that the proposed penalty of $1,500.00 would not affect Hiope's ability to continue in business and that the violation cited was abated timely and in good faith. The gravity of the violation was serious in that six miners were exposed to a reasonable likelihood of serious injury. The operator's negligence was high. Although Hiope's subsequent amendment of its cleanup program raises concern about future compliance with the standard, it did promptly abate the violation in this case. Weighing these factors, which are required to be considered under § 110(i) of the Act, I find that the proposed penalty of $1,500.00 would properly effectuate the deterrent purposes underlying the Act's penalty assessment scheme.

ORDER

Based upon the foregoing, citation number 7183561 is **Affirmed** and Hiope Mining Inc. is **Ordered** to pay a civil penalty of $1,500.00 within 30 days.

Michael E. Zielinski
Administrative Law Judge

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