## COMMISSION DECISIONS

This section contains all Decisions of the Commission issued through March 31, 1979 together with other Orders which, in the opinion of the General Counsel, may be of precedential value or interest.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, NW, SUITE 229
WASHINGTON, DC 20006

CHRISTOPHER COAL COMPANY

IBMA 77-7 Decided October 25, 1978

Appeal by Christopher Coal Company from a decision dated October 18, 1976, in Docket No. MORG 76-8-P, by Administrative Law Judge John F. Cook, assessing a civil monetary penalty of $6,500 for a violation of 30 CFR 75.329 contained in an imminent danger order of withdrawal issued at appellant's Osage No. 3 Mine.

Affirmed.

APPEARANCES: Alan B. Mollohan,Esq., Rose, Schmidt, Dixon, Haseley, Whyte and Hardesty, Attorney for appellant, Christopher Coal Company; John H. O'Donnell, Esq., Attorney for appellant, Mine Safety and Health Administration (MSHA) formerly Mining Enforcement and Safety Administration (MESA).

## DECISION

Having reviewed the record and considered the brief of the appellant and response thereto, the Commission finds that Christopher Coal Company has not demonstrated any reason why the findings of fact, conclusions of law, and decision of the Administrative Law Judge should not be affirmed. The record supports the decision and order of the Judge and the amount assessed for the violation is reasonable and in accord with the intent and purposes of the Federal Coal Mine Health and Safety Act of 1969. Furthermore, the arguments made on appeal to the Commission have been fully and fairly considered by the Judge in his decision and order.

## ORDER

WHEREFORE, pursuant to the authority contained in Section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969; Section 110(i) of the Federal Mine Safety and Health Act of 1977, and Section 301(c)(3) of the Amendments Act of 1977, IT IS ORDERED:

1) that the decision of the Administrative Law Judge issued October 18, 1976, assessing Christopher Coal Company a civil penalty in the amount of Six Thousand Five Hundred Dollars ($6,500.00) IS HEREBY AFFIRMED; and

2) that Christopher Coal Company pay the civil penalty assessed on or before 10 days from the date of this decision.

By the Commission:

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A.E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 27, 1978

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceedings |
| | : | |
| | : | Docket Nos. PITT 78-156-P |
| | : | PITT 78-157-P |
| v. | : | PITT 78-396-P |
| | : | PITT 78-397-P |
| REPUBLIC STEEL CORPORATION, | : | PITT 78-406-P |
| | : | PITT 78-407-P |
| | : | PITT 78-408-P |
| | : | PITT 78-409-P |
| | : | PITT 78-410-P |
| | : | |
| | : | Banning Mine |
| | : | Russelton Mine |
| | : | Clyde Mine |
| | : | Newfield Mine |

DIRECTION FOR REVIEW AND ORDER

The decisions of the Administrative Law Judge, approving a proposed settlement, is directed for review. It is found that the Judge's decisions may be contrary to law or Commission policy, and that a novel question of policy has been presented. The issue is:

> What reasons and facts support the Judge's determination that the proposed settlements should be approved?

The Commission cannot answer this question until the record reveals the Judge's reasons for, and the facts supporting his approval of the settlement. Accordingly, the case is remanded to the Judge for him to make a statement of reasons for approving the settlement and a statement of the facts of record that supported his determination. The Judge shall also enter the settlement agreement into the record.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 3, 1979

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| SECRETARY OF LABOR | : | |
| | : | |
| v. | : | Docket No. PITT 78-97-P |
| | : | |
| PENN ALLEGH COAL COMPANY, INC. | : | |
| | : | |

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by the Secretary of Labor is granted. The issues on review are those raised by the Secretary's petition, including:

1) Whether the administrative law judge erred in concluding that the standard at issue, 30 CFR §75.1710-1(a) is "null, void and unenforceable";

2) Whether the administrative law judge committed prejudicial errors of procedure by allegedly: (a) placing the burden of proving available canopy technology on the Secretary; (b) refusing to allow the Secretary to present certain evidence regarding available canopy technology; (c) taking official notice, sua sponte and without notice, of the record and decision in Florence Mining Co., No. M. 76-115, etc. (October 31, 1977); and failing to provide the Secretary with a reasonable opportunity to submit countervailing records and decisions for consideration.

The Secretary has also filed a motion to strike and expunge from the record a document issued by the administrative law judge on May 11, 1978, captioned, "Supplemental Memorandum Opinion on Invalidity of Canopy Standard." For the reasons that follow, the motion is granted.

A hearing in the present case was held on April 6, 1978. At the conclusion of the hearing, the judge read into the record his decision and order. On April 7, 1978, the judge issued a written "Memorandum Decision" reiterating the previous day's bench decision and adopting and confirming that decision. On April 12, 1978, the official record of the proceedings was certified to the Commission in accordance with Interim Procedural Rule 56. 1/

On May 5, 1978, twenty-eight days after the issuance of the written decision, the Secretary filed his petition for discretionary review with the Commission. On May 11, 1978, the administrative law judge issued the supplemental memorandum opinion that is the subject of the Secretary's motion to strike.

The supplemental memorandum opinion states that it was "filed to set forth more fully the Presiding Judge's views with respect to his finding of April 6, 1978, declaring the improved safety standard (30 CFR 75.1710-1(a)) relating to the use of canopies on electric face equipment null, void and unenforceable." The supplemental opinion sets forth at length the judge's views concerning the background behind the adoption of the standard at issue, the validity of that standard as adopted, and the authority of the judge to rule on the standard's validity.

Section 113(d)(1) of the Federal Mine Safety and Health Act of 1977 2/ provides:

> An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission ... assigned to such administrative law judge..., and shall make a decision which constitutes his

1/ 29 CFR §2700.56. This rule provides: "Within 5 days after a written decision has been rendered by a Judge, the docket clerk shall certify the official record of the proceedings to the Commission."

2/ 30 U.S.C. §801 et seq. (hereinafter "the Act").

> final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission.... [Emphasis added.]

Section 113(d)(2)(A)(i) of the Act provides:

> Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision.... [Emphasis added.]

It is clear that the written decision issued on April 7, 1978, is the "decision" constituting the judge's "final disposition of the proceedings" within the meaning of section 113(d) of the Act. 3/ The decision was issued by the judge and served upon the parties and the Commission; the record was certified to the Commission; and the Secretary filed a petition for discretionary review with the Commission within the statutorily prescribed period. In these circumstances, the Commission will not consider the further discussion of the issues undertaken by the judge and issued as a "supplemental memorandum opinion".

The statutory scheme for Commission review of judges' decisions contemplates that the first opinion of a judge announcing his final disposition of the proceedings will provide guidance to the aggrieved parties in the drafting of their petitions for discretionary review. Section 113(d)(2)(A)(iii) of the Act requires that objections in a petition to the judge's decision be supported by detailed

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3/ See also Interim Rules of Procedure 54 and 55, 29 CFR §§2700.54 and 55.

citations to the record and legal authorities, and confines Commission review to questions raised by the petition, where the direction only grants a petition. The filing by the judge of multiple opinions impedes the efforts of the aggrieved parties to timely comply with the requirements for petitions, encourages the hasty drafting of inferior petitions, and thus impairs the usefulness of this crucial document to the Commission. Moreover, the judge's action may create confusion as to the status of the issues, the deadlines for filing and granting of petitions and the exercise by the Commission of its power to direct review on its own motion. In short, the judge's action threatens the smooth functioning of the Commission's review process.

We further observe that the judge's issuance of a supplemental opinion may leave the impression that he failed to fully consider the case when he issued his first opinion, and that his first opinion did not adequately state the reasons for his decision. It may also unnecessarily detract from the appearance of his impartiality if his supplemental opinion anticipates and, fortuitously or not, "rebuts" contentions made in a petition for discretionary review.

For these reasons, the motion to strike filed by the Secretary is granted.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 10, 1979

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| UNITED MINE WORKERS OF AMERICA (UMWA), | : | Docket No. HOPE 76-16 |
| | : | Appeal No. IBMA 76-101 |
| Applicant-Respondent | : | |
| v. | : | |
| WESTMORELAND COAL COMPANY, | : | |
| Respondent-Appellant | : | |

## DECISION

This appeal from an administrative law judge's decision was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. Section 301, Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961.

At issue is an application for compensation filed by the United Mine Workers of America (UMWA), as authorized representative of the affected miners, pursuant to § 110(a) of the Federal Coal Mine Health and Safety Act of 1969. 1/ In the decision from which this appeal was taken, Administrative Law Judge Franklin P. Michels concluded that the miners involved were entitled to compensation under § 110(a) 2/ of

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1/ 30 U.S.C. § 801 et seq., as amended, hereafter "the Act."

2/ Section 110(a) of the Act provides:

"If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners

the Act. For the reasons that follow, the judge's decision is affirmed.

The claim for compensation arises as a result of the issuance of a withdrawal order under § 104(a) of the Act. The withdrawal order issued at 4:00 p.m. on June 11, 1975. It is not disputed that the miners working during the shift in which the withdrawal order issued are entitled to compensation and the entitlement of these miners is not an issue on appeal. 3/ Rather, the dispute on review concerns whether the miners on the shift that followed are entitled to compensation. 4/

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fn. 2/ (cont'd)
working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period for which they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift" (emphasis added).

3/ At the hearing the parties stipulated to the dismissal of the compensation claim for miners idled during the shift in which the withdrawal order issued subject to Westmoreland's payment to those miners of stipulated amounts. The judge ordered payment of the stipulated amounts and no issue concerning this payment is raised on appeal.

4/ In its answer to the application for compensation, Westmoreland denied that the withdrawal order idled any persons on the shift that followed and stated that "mine management" had decided to "idle the mine on that shift." Subsequently however, the parties stipulated to the identity of the miners on this shift who were idled and the amounts to be paid to these miners if the issues regarding the time of the termination of the withdrawal order are resolved in their favor. Joint Exhibit B; Tr. 2.

Section 110(a) of the Act provides that if a § 104 withdrawal order "is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation . . . for the period they are idled, but for not more than four hours of such shift." Thus, in determining whether miners are entitled to compensation under this provision, the time at which the withdrawal order was terminated must first be determined.

At the hearing in the instant case, the time of the termination of the withdrawal order was disputed by the parties. The Order of Termination was entered into evidence as Joint Exhibit D. The Order of Termination specified 11:00 p.m. as the time of its issuance. The dispute between the parties centered on the significance of the time noted on the Order of Termination. The UMWA contends that the 11:00 p.m. notation referred to the time at which the Secretary's inspector determined that the dangerous condition no longer existed and orally authorized the resumption of operations. Westmoreland contends that the notation referred to the time at which the termination order was signed by the inspector after he exited from the mine and arrived at Westmoreland's office, and, therefore, that the inspector's earlier, underground, oral termination of the withdrawal order necessarily occurred before 11:00 p.m.

The conflicting evidence of the parties on this issue is summarized adequately in the judge's decision. After

reviewing all of the evidence and drawing reasonable inferences therefrom, Judge Michels concluded that a preponderance of the evidence establishes that the withdrawal order was terminated at 11:00 p.m. This factual conclusion is supported by substantial evidence and we will not disturb it on review.

Therefore, we affirm Judge Michaels' conclusion that the withdrawal order at issue was terminated at 11:00 p.m. on June 11, 1975.

Westmoreland contends that the conclusion is based on hearsay. If the hearsay claim is to the testimony of the inspector, it cannot be sustained. The inspector was present at the hearing and available for cross examination. The fact that he may have refreshed his recollection from his notes is immaterial.

Having concluded that the withdrawal order was terminated at 11:00 p.m., it remains to be determined whether the order was terminated "prior to the next working shift." Based on the evidence of record, Judge Michels concluded that the "next working shift" started at 11:00 p.m. Therefore, he concluded that since the withdrawal order was terminated at 11:00 p.m., it had not been terminated prior to the next working shift. On the facts of the present case, we agree with the judge's conclusion that the subject termination order, issued at 11:00 p.m., did not issue "prior to" Westmoreland's "next working shift." We find it unnecessary

to our decision in this case, however, to address the broader question of what constitutes the beginning of a "shift" as that term is used in § 110(a) of the Act.

Accordingly, the decision of the administrative law judge is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 29, 1979

SECRETARY OF LABOR, :
: Docket No. BARB 77-245-P
v. :
:
PEABODY COAL COMPANY, :

DECISION

On October 11, 1978, the Commission granted a petition for discretionary review filed by Peabody Coal Company. Peabody asserts that Administrative Law Judge John F. Cook erroneously found Peabody to have violated 30 CFR §75.202, and that the $8,000 penalty assessed by the Judge is too high. We hereby affirm the Judge's decision and order.

The standard requires that "overhanging or loose faces and ribs shall be taken down or supported." We are of the opinion that Judge Cook correctly concluded that Peabody violated this requirement. The term "rib" as used in the standard is broad enough to cover the factual situation presented here. Peabody's contention would limit the required support or removal to ribs consisting solely of coal. This interpretation of the standard would frustrate its purpose which is to provide safety to the miners in all active underground roadways, travelways and working places.

IT IS SO ORDERED.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 6, 1979

| | | |
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| ALEXANDER BROTHERS, INC., Petitioner | : | |
| v. | : | Docket Nos. HOPE 78-161-167 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |

## DECISION

On March 1, 1978, Administrative Law Judge L. K. Luoma dismissed applications for review, filed by Alexander Brothers, Inc., of withdrawal orders issued under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977). The Judge found that the applications were not timely filed under section 105(a)(1) of that Act, and held, in accordance with precedents of the Interior Department's former Board of Mine Operations Appeals, 1/ that he could not extend the thirty day deadline of section 105(a)(1). On October 11, 1978, we granted a petition for discretionary review filed by Alexander Brothers.

We have considered the arguments of the parties, 2/ and we conclude that Judge Luoma correctly decided this case for the reasons he assigned. His order of dismissal is accordingly affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ Freeman Coal Mining Co., 1 IBMA 1, 21, 1971-73 OSHD ¶15,367 (1970); Consolidation Coal Co., 1 IBMA 131, 136, 1971-73 OSHD ¶15,377 (1971); Jones & Laughlin Steel Corp., 5 IBMA 1, 2 (1975).

2/ On January 31, 1979, the Commission denied a motion by Alexander Brothers to file a reply brief. On February 15, 1979, Alexander Brothers moved for reconsideration of that denial, and attached a brief in support of its motion. Neither the motion nor the brief present adequate reasons why the Commission should reconsider and reverse its previous ruling. The motion to reconsider is therefore denied.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW. 6TH FLOOR
WASHINGTON, D.C. 20006

March 9, 1979

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | |
| On behalf of John Koerner, Applicant | : | No. DENV 78-564 |
| v. | : | |
| ARCH MINERAL COAL COMPANY, Respondent | : | |

DIRECTION FOR REVIEW AND ORDER

The decision of the Administrative Law Judge, dated February 7, 1979, is directed for review. We find that the Judge's decision may be contrary to law or Commission policy, or that a novel question of policy is presented.

On September 12, 1978, the Secretary filed with the Commission his findings that John Koerner had brought a complaint of unlawful discrimination by Arch Mineral Coal Company, and that the complaint was not frivolously brought. He moved that Mr. Koerner be reinstated to his former position, or equivalent position, until a final Commission order on the complaint is issued. The motion was granted. On January 31, 1979, the Secretary filed a motion to vacate the order of reinstatement. The only stated basis for the motion was that "the parties have successfully negotiated a settlement of all matters formally in issue." Judge Malcolm P. Littlefield noted the ground for the motion, stated that "[a]s a result [of the settlement], continuation of the reinstatement order serves no purpose", and granted the motion to vacate. The terms of the settlement were not entered into the record; the record also does not disclose whether Mr. Koerner agreed to or acquiesced in the motion to vacate the reinstatement order.

The issue is: Were there sufficient grounds to grant the motion?

The Commission concludes that the record should be supplemented before we resolve this issue. Accordingly, we remand this case to Judge Littlefield for the limited purpose of supplementing the record

with answers to the following questions: What are the terms of the settlement agreement? Did Mr. Koerner agree to or acquiesce in the motion to vacate the order of reinstatement? The Commission otherwise retains jurisdiction of this case. The parties need not file briefs unless the Commission requests them to.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Testrab, Commissioner

Al E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006 March 26, 1979

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| RAY MARSHALL, SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. PIKE 78-70-P |
| v. | : | (Assessment Control No. 15-04020-2013V) |
| WOLF CREEK COLLIERIES COMPANY, Respondent | : | No. 4 Mine |

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969. 1/ The issue is whether the validity of an order of withdrawal under section 104(c)(2) can be challenged in a proceeding under section 109(a)(3) for assessment of a civil penalty for the alleged violation cited in the order. Wolf Creek did not request review of the order of withdrawal pursuant to section 105(a); rather, the first time it questioned the order's validity was at the penalty assessment hearing. The Administrative Law Judge vacated the withdrawal order on the ground that "the record in this case does not disclose the precedential notice and order cited by the inspector in his withdrawal order." 2/ Although he vacated the withdrawal order, the Judge did find a violation of a mandatory safety standard and assessed a penalty of $300. In assessing a penalty the Judge mitigated the amount because he had vacated the withdrawal order in which the violation was cited.

We have reviewed the decision in light of previous decisions of the Interior Department's former Board of Mine Operations Appeals interpreting the 1969 Act. Section 109(a)(3) provided, in relevant part, that "[a] civil penalty shall be assessed by the Secretary [of the Interior] only after ... a public hearing and the Secretary has determined ... that a violation did occur, and the amount of the penalty which is warranted, ..." 3/ The Board consistently held that the validity of a

1/ 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("the 1969 Act"). This case presents no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978).

2/ Section 104(c)(2) of the 1969 Act provided, in relevant part:

"If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection [referred to as "precedential notice and order" by the Judge below], a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection ..."

3/ In determining the amount of penalty warranted, section 109(a)(1) set forth six statutory criteria which the Secretary of the Interior was to consider.

withdrawal order is not an issue in a penalty proceeding under section 109 and that it is error to vacate an order in such penalty proceeding. Zeigler Coal Company, 2 IBMA 216, 223-224 (1973); Plateau Mining Company, 2 IBMA 303 (1973); Buffalo Mining Company, 2 IBMA 327 (1973); North American Coal Corporation, 3 IBMA 93, 120 (1974). We concur in the Board's interpretation of the 1969 Act.

Accordingly, the withdrawal order (No. 1-TF, January 29, 1976) is reinstated. This case is remanded for reassessment of the penalty without consideration of the vacated order as a mitigating factor.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank V. Jesbrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 27, 1979

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| SECRETARY OF LABOR, ex rel. ROY A. JONES | : | |
| v. | : | Docket No. NORT 78-415 |
| JAMES OLIVER AND WAYNE SEAL d/b/a OLIVER MINE MAINTENANCE COMPANY | : | |

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by the Secretary of Labor is granted. The issues on review are those raised by the petition, including whether the Administrative Law Judge has authority to censure attorneys.

On February 16, 1979, Administrative Law Judge Joseph B. Kennedy issued an "Order of Censure" against two attorneys. The order contained various findings by the Judge in support of his conclusion that the attorneys had engaged in misconduct. The Judge made his findings a matter of record, censured the attorneys, and sent a copy of his order to the Commission. The order was issued by the Judge even though the Commission had not made a determination under Interim Rule 5(b), 29 CFR §2700.5(b) (1978), that disciplinary proceedings were warranted. 1/

The Commission has cautioned Judge Kennedy that administrative law judges lack the authority to censure attorneys in such circumstances. In re Kale, No. D-78-1 (November 15, 1978). In Kale we held that a

1/ Interim Procedural Rule 5(b) states:

> Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the circumstances reported to the Commission warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, the Commission shall issue a show cause order to such individual and refer the matter to a Commission panel, a Commissioner, or a Judge for hearing and decision. The hearing tribunal appointed by the Commission shall give the individual adequate notice of, and opportunity for reply and hearing on, the specific charges against him, with opportunity to present evidence and cross-examine witnesses. The hearing tribunal shall render a decision incorporating findings and conclusions and issue either (1) an order dismissing the charges or (2) an appropriate disciplinary order, which may include reprimand, suspension or disbarment from practice before the Commission.

determination by the Commission that disciplinary proceedings are warranted must precede an order of censure. The Judge's order here was therefore not authorized, and is vacated. 2/ That Judge Kennedy apparently does not share this view of his authority does not justify his action. An administrative law judge must follow the rules and precedents of the Commission. 3/ We expect that in the future Judge Kennedy will follow this principle.

We also observe that procedural unfairness compounded the Judge's errors. Had Interim Rule 5(b) been followed here, the two attorneys would have been accorded elementary procedural safeguards: notice of the charges, an opportunity to reply and to be heard on them, and to present evidence and to cross-examine witnesses. The Judge accorded the two attorneys none of these rights.

The Commission will not countenance any further such abuse of its processes. It will not permit a Judge to discipline attorneys unless its rules of procedure and their procedural safeguards are followed.

Accordingly, the order of censure is vacated.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ The Secretary additionally requests that the Judge's findings be expunged from the record. Inasmuch as the Judge's order of censure has been so widely disseminated, expungement would remove from our records the evidence of the Judge's error and might deny to the censured attorneys the protection that we intend for our order to provide. We are therefore not inclined to grant this relief.

3/ Gindy Manufacturing Co., 1 OSHC 1717, 1973-1974 OSHD ¶17,790 (1974) (Occupational Safety and Health Review Commission); cf. Iowa Beef Packers, Inc., 144 NLRB 615, 54 LRRM 1109, 1112 (1963); Insurance Agents' International Union, 119 NLRB 768, 41 LRRM 1176, 1178 (1957). See also Ruhlen, Manual for Administrative Law Judges, 66-67 (Administrative Conference of the United States, 1974); and 5 U.S.C. §556(c).

# ADMINISTRATIVE LAW JUDGE DECISIONS

March 1, 1979 - March 31, 1979

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 1, 1979

| | | |
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| SECRETARY OF LABOR, | : | Civil Penalty Proceedings |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. DENV 78-521-P |
| Petitioner | : | A.O. No. 42-00085-02020 |
| v. | : | |
| | : | Docket No. DENV 78-522-P |
| WESTERN STATES COAL CORP., | : | A.O. No. 42-00085-02021 |
| Respondent | : | |
| | : | Docket No. DENV 78-523-P |
| | : | A.O. No. 42-00085-02018V |
| | : | |
| | : | Docket No. DENV 78-524-P |
| | : | A.O. No. 42-00085-02019V |
| | : | |
| | : | Dog Valley Mine |

## DECISIONS

Appearances: Edward H. Fitch, Trial Attorney, Department of Labor, Office of the Solicitor, Arlington, Virginia, for the petitioner;
Robert L. Morris, Esquire, Davis, Graham & Stubbs, Denver, Colorado, for the respondent.

Before: Judge Koutras

## Statement of the Proceedings

These proceedings concern petitions for assessment of civil penalties filed by the petitioner against the respondent on July 27 and 28, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with several mine safety violations issued pursuant to the 1969 Federal Coal Mine Health and Safety Act. Respondent filed timely answers in the proceedings, asserted several factual and legal defenses, and hearings were held in Salt Lake City, Utah, on November 15, and 16, 1978. Respondent filed proposed findings and conclusions and a brief, and the arguments contained therein have been considered by me in the course of these decisions.

## Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petitions for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for each alleged violation, based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

## Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Sections 109(a)(1) and (a)(3) of the 1969 Act, 30 U.S.C. §§ 819(a)(1) and (a)(3), now section 110(i) of the 1977 Act.

## Discussion

The alleged violations and applicable mandatory safety standards in issue in these proceedings are as follows:

DOCKET NO. DENV 78-521-P

Section 104(b) Notice of Violation 8-0005, 1 JODL, January 9, 1978, cites a violation of 30 CFR 75.517, and states as follows:

> The 440 volt power cable for the No. 3 belt drive located in the main South West section was not being fully protected in the No. 5 entry at the No. 1 crosscut in that, the outer half of the right front tire on the Wagner scoop tram serial no. 395.75 was sitting on this cable.

30 CFR 75.517 provides as follows: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

Testimony and Evidence Adduced by the Petitioner

Federal coal mine inspector Jerry O. D. Lemon testified that he issued the notice of violation on January 9, 1978, while inspecting the mine. When he walked in the section, mine personnel were in the process of moving a power unit and he observed the 440-volt power cable under the right front tire of a diesel scoop. The tire was resting on top of the cable, and was next to the right rib and "there was a little coal over the cable." He advised the people present that by "sitting on the cable" there was a violation of section 75.517. The scoop was thereupon backed up approximately a foot, the cable was pulled up out of the coal, and work commenced. He checked the cable after it was pulled out of the coal and could detect no visible damage (Tr. 14-17).

Inspector Lemon testified that the scoop is a big piece of machinery and it is easy not to see a cable along the rib. He did not believe the violation was intentional, and believed that the scoop operator simply did not see the cable. The scoop was being turned and was being used to facilitate the movement of the electrical unit, and the scoop bucket was about 3 or 4 inches off the ground while assisting in moving the unit. The scoop was idling and the operator was seated in the cab, and he did not observe the scoop move up on the cable. The tire, being close to the rib, would make it difficult for someone to walk between the rib and scoop (Tr. 17-20).

The inspector testified that the violation was nonserious because there was no damage to the cable. However, he considered the situation to be an unsafe practice because if the cable were damaged, it would present a hazardous situation in the event someone picked up an energized damaged cable (Tr. 20-21).

On cross-examination, Inspector Lemon indicated that the term "probable" as used in Part 100, Title 30, Code of Federal Regulations, with respect to the gravity of a violation, means "it is likely to happen." He marked the item labled "Probable" under the "Gravity" heading in numbered paragraph 1 on his inspector's statement (Exh. P-3), because he thought there might have been some damage to the cable, but he could not determine any damage from visual observation since he is not an electrical inspector. While the cable was "in good shape," there was a possibility that something could happen. The event against which the cited standard is directed, as that term is used in the "Gravity" statement, was the possibility of the electrocution of a mine employee in the event the cable were damaged (Tr. 23-29). He reiterated that the scoop was backed up first, and the cable was then lifted up and tied off by means of a piece of wire. The cable was lying under the right front tire. He also indicated that it is his practice to make notes at the scene of a violation and that he uses the notes as the basis for completing

his inspector's statement for each violation issued. He tries not to include anything in his statement other than what he observes, although he has included comments made by individuals on the scene, particularly in "imminent danger" cases and "serious-type" violations, and he has, on occasion, included such statements under "Remarks" on his report (Tr. 39-43).

Testimony Adduced by the Respondent

Roger J. Black, mine mechanic, testified that he is responsible for the maintenance of equipment in the mine, and that he was present the day Inspector Lemon cited the violation in question. He testified that the cable in question was originally lying in the cut of the rib where it is normally stored, but fell out and was lying at the side of the tire with some coal on top of it when the inspector happened on the scene. When it was pointed out to him, he pulled the cable up on the rib and tied it up. The cable had been "disconnected outside," and the fuses on the main transformer had been pulled. He had no recollection that the scoop was moved first before the cable was pulled up, but does not believe the scoop was moved (Tr. 47-48).

On cross-examination, Mr. Black stated that the cable fell off the rib down next to the scoop tire, and he was aware that the cable had been disconnected and deenergized because one cannot touch such a cable unless it is disconnected at the surface. He could not recall whether the scoop was backed off the cable, but he did remember pulling the cable up to the side of the tire. He indicated that the cable fell down from a cut in the rib some 3 feet after the scoop was parked, and he confirmed that the scoop was idling. He believed that the cable in question was being fully protected, but he did not realize it had fallen down from the rib. Since the scoop tires are concave, it is possible that the cable was situated in such a way that one would believe it was resting under the scoop tire (Tr. 49-54).

DOCKET NO. DENV 78-522-P

Section 104(b) Notice of Violation 8-0010, 2 JODL, January 19, 1978, cites a violation of 30 CFR 75.313, and states as follows:

> The methane monitor serial no. 269A mounted on the ST-5DS Wagner Scoop serial no. 395.75 being used inby the last open crosscut in the no. 7 entry of the Main South section to load coal was not being properly maintained or kept in a operative condition in that, this system would not automatically shut the diesel engine down when the monitor test button was pushed and the monitor indicator indicated 2 % methane.

30 CFR 75.313 provides:

> The Secretary or his authorized representative shall require, as an additional device for detecting concentrations of methane, that a methane monitor, approved as reliable by the Secretary after March 30, 1970, be installed, when available, on any electric face cutting equipment, continuous miner, longwall face equipment, and loading machine, except that no monitor shall be required to be installed on any such equipment prior to the date on which such equipment is required to be permissible under §§ 75.500, 75.501, and 75.504. When installed on any such equipment, such monitor shall be kept operative and properly maintained and frequently tested as prescribed by the Secretary. The sensing device of such monitor shall be installed as close to the working face as practicable. Such monitor shall be set to deenergize automatically such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane. An authorized representative of the Secretary shall require such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage determined by such representative which shall not be more than 2.0 volume per centum of methane.

Testimony Adduced by the Petitioner

Respondent conceded and stipulated to the fact of a violation of section 75.313, and indicated that it contests only the proposed assessment made in the amount of $120 (Tr. 58-59). Petitioner was permitted to present testimony by the inspector with respect to the violation, and particularly with respect to the question of gravity and negligence.

Inspector Lemon confirmed that he issued the citation on January 19, 1978, citing a violation of 30 CFR 75.313, after finding the methane monitor on an ST-5DS Wagner scoop, serial No. 395.75, was not maintained in a workable condition. He has never detected the presence of methane from bottle samples he has taken. He extended the abatement time after being advised that repairs could be made within 30 minutes. However, additional time was required by the operator because it was discovered that parts had to be ordered, and he granted an additional 2 or 3 days, or until 8 a.m., January 23, 1978, for abatement. He returned to the mine at approximately 11:35 a.m. on January 23, and after being advised by the section foreman that the machine had been repaired, he proceeded to

inspect the machine and found that the methane monitor was still malfunctioning in that it would not deenergize the machine. Under the circumstances, he had no alternative but to issue the order prohibiting further use of the machine (Tr. 59-62).

Inspector Lemon identified Exhibit P-9 as a "gravity statement" he prepared and stated that, being a new inspector, he had made a mistake in listing 20 miners as being exposed to any hazard. That figure should have reflected the number of persons working on the shift, which ranged from six to nine (Tr. 63). Although Inspector Lemon testified that a "possible hazard" was present, petitioner's counsel stipulated that in the absence of any methane, the violation cited was nonserious (Tr. 64, 73). Mr. Lemon believed the respondent should have been aware of the condition cited because methane monitors are required to be checked and calibrated periodically (Tr. 64-65).

On cross-examination, Inspector Lemon testified that he did not know whether the monitor in question had been calibrated and indicated that he found no problems with respondent's failure to check or calibrate methane monitors in the mine. To his knowledge, calibration had been made to insure compliance. Mr. Lemon did not fill out the "Good Faith" portion of his "gravity statement" and crossed it out because he is instructed not to fill out that portion when an order has been issued (Tr. 69-70).

Mr. Lemon did not know whether the machine in question was used on Thursday afternoon or Friday after he cited the violation. He confirmed that the methane monitor would not deenergize the machine when he tested it again on Monday, January 23, and he was told that there was a problem with linkage being disconnected on the solenoid. Mr. Lemon stated that he indicated on his gravity statement that the occurrence of the event against which the cited standard was directed was "probable." The "event" he referred to was that he believed it was likely that if the face were shot while equipment was running, and if 2-percent methane were found, which admittedly was not the case, the equipment would likely not shut down (Tr. 71-73).

Respondent's Testimony

Roger J. Black, mine mechanic, testified that when the citation issued on January 19, the scoop was taken out to the shop. The injector housing linkage had broken. The housing is not a stock item and an order was placed for a housing and the linkage was soldered in the housing and remounted on the injector pump. The scoop was taken back into the mine on January 23. When tested in idle speed, the scoop methane monitor would turn off the machine. When the machine was reved up to 1,800 rpms in Mr. Lemon's presence, it would not shut off and adjustments had to be made to the linkage in order to enable it to shut off at higher rpms (Tr. 83-86).

On cross-examination, Mr. Black testified that if the machine had not been reved up to 1,800 rpms, it would have shut down when the methane test button was activated. He could not recall telling Mr. Lemon that the machine had been in the shop, but believed he told him it would shut down at an idle speed (Tr. 86-87).

Section 104(b) Notice of Violation 8-0015, 4 JODL, January 30, 1978, cites a violation of 30 CFR 75.200-2, and states as follows:

> The approved roof control plan was not being complied with in the no. 3 entry face in the Main South West section in that the straight away face had been completely cleaned and no roadway timber had been installed. From the last roof support (road way) timber to the deepest point of penetration in the face it was an approximate distance of 42 feet.
>
> The approved roof control plan states that roof supports shall be installed to within 15 feet of the cleaned face, and that this roadway shall be maintained 15 feet wide on the straight and that these supports be installed on 5 foot centers and 4 feet from the rib line.

The notice was subsequently modified on February 6, 1978, to correct the citation reference from section 75.200-2 to 75.200 (Tr. 106-107, Exh. P-12).

30 CFR 75.200, provides:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative

and shall be available to the miners and their representatives.

Inspector Lemon testified that upon inspection of the mine on January 30, 1978, he found a violation of section 75.200 in that the respondent failed to follow its approved roof control plan (Exh. P-28) in that in the No. 3 entry face of the Main Southwest Section, the straightaway face had been completely cleaned and no roadway timber had been installed from the last roof support for a distance of approximately 42 feet from the point of deepest penetration. The roof plan requires that roof supports be installed within 15 feet of the face, that the roadway be maintained 15 feet on the straight, and that roof supports be installed on 5-foot centers approximately 4 feet from the rib line (Tr. 124). The mining cycle was in the cleanup stage, and under the plan, timber was required within 20 feet of the face. He determined the 42-foot distance by use of a tape thrown from the last roof support toward the face. His actual measurement was 44 feet, but he allowed 2 feet for the end of the tape tied to a rock. Six timbers set on 5-foot centers were required (Tr. 124-129).

Inspector Lemon believed the respondent was negligent in allowing the cited condition to exist. The face boss should have been aware of the fact that four timbers had not been set prior to the equipment completing the cleanup, although the face boss was not in the area at the time. The loader operator was negligent by going in the area because the roof control plan has been explained to the miners and the safety director has explained it to the men. Inspector Lemon observed the loader coming out of the area with a load of coal, but saw no one else there. He did not know whether the missing posts had been previously set, and he just did not see any. In addition, he saw no drilling or shooting taking place, but this could have been done on a previous shift. The operator is allowed to remove two posts during the cleanup process and three posts during the cleanup of the gob (Tr. 130-133).

Inspector Lemon indicated that roof falls have occurred in the older part of the mine, but the roof area at the point of the violation was tested and it was not drummy (Tr. 134, 138). He could not say whether the violation in question was serious. The roof at the last support was sound and he should have indicated "improbable," rather than "probable" on his gravity statement (Tr. 139).

On cross-examination, Mr. Lemon testified that he became the inspector at the mine in question in January 1978. He reiterated the method used to measure the 42-foot distance stated in the citation, and his tape did not cross a crosscut. The last timber support was at a corner where a turn was proceeding to the right at a crosscut. As he approached the face, he observed the loader leaving and coming toward him, and it was about 180 feet down the entry, and

safety director Bob Kales was with him. The crew began setting timbers within 10 minutes of his measurement (Tr. 141, 144-151).

Mr. Lemon testified that under a subsequent plan effective May 30 (Exh. P-29), timbers may be removed while cleaning the gob (Tr. 156). When he arrived on the scene, the area had been cleaned up and the loader had the last load in the bucket (Tr. 157). The roof at the last support was sound, and he visually observed the roof conditions. The roof looked good, sounded solid when tested, and he saw no cracks (Tr. 160). He could not check the roof inby the last support, and being unsupported, it could possibly come down. He could not state whether it would probably come down, but indicated it was a "good probability" and believed that it was probable there was going to be a roof fall in the unsupported area (Tr. 162). Although roof falls had occurred in mine areas which had been mined out over 10 or 15 years, this would still indicate that when pillars are pulled, that process would substantially affect the probability or possibility of a roof fall. However, in this case, pillars had not been pulled. When roof strata begins to take weight, the timbers will begin to split and start flaking. However, there was no weight on the timbers along the entry leading to the face area in question, and he saw no evidence that the timbers were taking weight in the entry or the faces. He did not go beyond the timber support and did not look beyond it (Tr. 162-165).

Petitioner's counsel stipulated that the mine roof conditions are such that roof bolts are required as in other mines (Tr. 168). Mr. Lemon confirmed that his notes taken on January 30 reflect that he did not believe the violation was "significant and substantial" (Tr. 171). Inspector Lemon indicated that the one person exposed to the hazard of unsupported roof was the loader operator, even though he was under a protective cab (Tr. 176).

Respondent's Testimony

John Danio, employed by respondent as a mining engineer for 2-1/2 years, holds a BS degree in mining engineering, and is a registered engineer in the States of Colorado and Utah. He wrote the roof control plan currently in effect at the mine and has been in the mine some 150 times in the working areas. He has surveyed the mine and is familiar with all of the places, including the old works, and the mine conditions (Tr. 180-183).

Mr. Danio stated that in recently mined areas, bad roof has not been encountered. A year and a half ago, there was a roof fall in a belt entry, but he was in the area 8 or 10 hours before the rock fell and it was obvious to everyone that the top was bad. The area was dangered off and precautions were taken before the rock fell. He is unaware of any other roof falls in the mine within the past 5 years.

He described the roof conditions and roof strata in the mine. Older areas mined over 20 years ago have had roof falls, and those areas are still traveled, but have been timbered and are always checked and evaluated for hazardous roof conditions. Roof flaking does occur in the old areas, and, on occasion, small pieces of coal have been found in recently mined areas (Tr. 183-186).

Mr. Danio testified that the mine has an unusual roof control plan and part of the reason for that is the excellent nature of the roof rock, and that MSHA recognizes this fact. He also indicated that timbers must be recovered in order to remove coal from the crosscut and to facilitate the movement of equipment (Tr. 187-188).

The parties agreed that Mr. Danio's testimony would also be applicable to the subsequent timbering violations in issue in Docket Nos. DENV 78-523-P and DENV 78-524-P (Tr. 188).

On cross-examination, Mr. Danio testified that he believed the present roof control plan permits the development of two crosscuts off an entry, plus the advancement of the face, all in the same mining cycle. Anytime one entry is 20 feet or wider, two rows of roof supports must be installed. He also explained the circumstances under which timbers must be installed as the mining cycle advances (Tr. 188-194).

Mr. Danio confirmed that some roof settlement occurs during blasting at the face. As for roof faults, he indicated that some 50 holes have been drilled over the 440 acres of the mine and no roof faults have been encountered (Tr. 195-196). Mr. Danio did not observe the conditions cited by the inspector and had no personal knowledge of the violation (Tr. 202).

In response to questions from the bench, Mr. Danio testified that one possible explanation for the missing posts cited by Inspector Lemon was that the condition could occur by bad mining practices, that problems have occurred in the past, but management is working at improvements (Tr. 208).

DOCKET NO. DENV 78-523-P

Section 104(c)(1) Order 7-0111, 1 DKJ, December 30, 1977, cites a violation of 30 CFR 75.316, and states as follows:

> The line curtain was only being maintained to within 22 feet of the face of the No. 5 entry of the South West section. The face had been cut with a Joy cutting machine and all the curtain was extended and no additional curtain was available in the entry. The ventilation plan requires the line curtain be maintained to within 12 feet of the area of deepest penetration.

30 CFR 75.316, provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Section 104(c)(1) Order No. 7-0112, 2 DKJ, December 30, 1977, cites a violation of 30 CFR 75.200, and states as follows:

> Roof supports (timbers) were only being maintained to within 44 feet of the face of the No. 4 entry of the South West section. The approved roof control plan requires that timbers be maintained to within 15 feet of the face.

Section 104(c)(1) Order No. 7-0013, 3 DKJ, December 30, 1977, cites a violation of 30 CFR 75.200, and states as follows:

> Roof supports (timbers) were only being maintained to within 33 feet of the face of the No. 3 entry of the South West section. The roof control plan requires that timbers be maintained to within 15 feet of the face.

DOCKET NO. DENV 78-524-P

Section 104(c)(1) Notice 7-0110, 1 DKJ, December 30, 1977, cites a violation of 30 CFR 75.200, and states as follows:

> Roof supports (timbers) were only being maintained to within 38 feet of the face in the No. 6 entry of the South West section. The approved roof control plan requires timbers be maintained to within 15 feet of the face.

In both Docket Nos. DENV 78-523-P and DENV 78-564-P, respondent stipulated to the fact of violations with respect to the four citations issued by MSHA inspector Dick K. Jones, and the parties stipulated to the adoption by reference of the previous testimony of Mr. John Danio with respect to the prevailing roof conditions at the mine (Tr. 211).

Exhibit P-23 is a copy of the section 104(c) notice issued by MSHA inspector Dick K. Jones on December 30, 1977, at 9:35 a.m.

Exhibits P-14, P-15, and P-16 are copies of three section 104(c) orders issued by Inspector Jones at 9:40, 10, and 10:45 a.m., all on December 30, 1977, subsequent to the issuance of the underlying notice. Respondent stipulated to the admissibility of the notice and orders (Tr. 212-213).

MSHA inspector Dick K. Jones confirmed that he issued the 104(c) notices on December 30, 1977. Upon entering the mine to conduct an inspection, he proceeded to the face of the No. 6 entry and observed that timbers were only being maintained to within 38 feet of the face in the No. 6 entry at the southwest section. The approved roof control plan required timbers to be maintained to within 15 feet of the face. He verified the distance cited in his notice by means of a measurement made with his tape. Upon entering the section, he observed a piece of equipment coming out of the No. 5 entry, and there was a cutting machine parked just ouby the No. 6 crosscut (Tr. 217). Upon leaving the No. 6 entry, he encountered Section Foreman LaValley and informed him of the condition which he had found. Mr. LaValley responded "You are not telling me anything I don't know." He and Mr. LaValley then proceeded to the No. 5 entry and after observing the condition, he informed Mr. LaValley that he was issuing a notice of violation. He also informed him that he was issuing a violation for failure to have roof supports in the No. 6 entry. Mr. LaValley advised him he was aware of the condition and explained that it was not uncommon for him to come on the shift in the morning and find these conditions and that the afternoon shift was "leaving it this way." At that point, Safety Director Hales came to the scene and he (Jones) advised him as to what Mr. LaValley told him and Mr. Hales took notes. Mr. Jones then went to the No. 4 and No. 3 entries and upon finding the conditions noted in his orders, he issued the orders (Tr. 218-220).

Inspector Jones testified there were six entries in the area which he examined and the violations were issued on four of the entries. He believed the four entries had been mined on December 30 because of the manner in which they were cut and cleaned and the position of the equipment, and he believed that the afternoon shift left the entries in the conditions in which he found them. He described the mining cycle, and since each cycle advances some 10 or 11 feet, he believed mining advanced at least two times without roof supports being installed. The area was exposed to anyone walking in, but he did not observe anyone inby the last timber supports in any of the entries while he was there. He was convinced that the mining cycle had advanced without setting timbers, since there was no evidence that timbers had been installed. He observed equipment tracks, equipment was present, and mine management did not deny the fact that timbers had not been set, and, in fact, admitted it (Tr. 220-223).

With regard to the gravity of the conditions he found in the No. 6 entry, Inspector Jones testified that just inby the last support there was approximately 6 feet of loose coal which was nearly ready to fall and it had to be removed. He and Mr. Hales barred it down before abatement could begin and it came down very easily. While people were in the area prior to this time, he did not know whether that particular coal was loose at that time. Approximately a foot of coal was barred down, and had it fallen, he would not have wanted to be under it (Tr. 224). With regard to the line curtain violation in the No. 5 entry, a person working inside the line curtain area would be working in a dusty atmosphere and the mine was working with a small fan and mine ventilation was, at best, barely adequate. Since that time, conditions have improved with the installation of another fan. Other check curtains in the area were in bad shape, but he did not cite those because repairs were being made. He took no air readings at the face because once the area was closed by his orders, the hazards were eliminated. At the time he cited the violations, he believed the ventilation devices were in good shape because required face ventilation was being maintained (Tr. 225).

Mr. Jones testified that he considered the violations to be serious and that the section was in "bad shape." He went back to the section with respondent's engineer, Mr. Sikes, to show him the conditions, and took him to each place to show him the conditions. Mr. Sikes agreed with his findings, as did Safety Director Hales, who expressed embarrassment over the condition of the section (Tr. 227).

Mr. Jones identified Exhibit P-25 as the "gravity statement" he filled out in connection with the notice citing 38 feet of unsupported roof (Exh. P-23), and under the heading "Gravity" he checked the block "Probable" and remarked that "[t]imbers are the only means of roof support, and the top in this area is drummy and cracked and did not appear good." He also indicated on the form that two workers were exposed to the hazard and remarked that "[s]ince this face had been cut, both the coal scoop operator and the cutting machine operator had been beyond supports" (Tr. 229-230).

Mr. Jones identified Exhibit P-16 as the "gravity statement" he prepared in connection with the line curtain violation (Exh. P-14), and confirmed that he marked "probable," "none" under "Remarks," "disabling," and "none" again under "Remarks." He also confirmed that he noted that two workers were exposed to the hazard, that "the coal scoop operator and the cutting machine operator both had been operating this equipment inby the last line curtain," and that "the coal is loaded out with Wagner diesel coal scoops, and diesel fumes build up in the face when adequate ventilation is not provided" (Tr. 230-231).

Mr. Jones identified Exhibit P-19 as the "gravity statement" he prepared in connection with the citation concerning the 44-foot roof

support violation (Exh. P-17), and indicated that he marked "probable" under the "Gravity" heading, and remarked that "the roof inby the last roof support was cracked and drummy and was flaking off." He also confirmed that he indicated that any injury would be "permanently disabling," and that he remarked "these timbers are the only means of roof support and the only way to detect if the area is taking weight." He also noted on the form that two workers were exposed to the hazard and remarked that "the coal scoop operator and the cutting machine operator had been operating inby the last support" and "the coal scoop had violated the roof control plan to clean up and then the cutting machine had gone in and cut the face without setting any support" (Tr. 231-232).

Mr. Jones identified Exhibit P-22 as the "gravity statement" he prepared in connection with the 33-foot roof support violation (Exh. P-20), and confirmed that he indicated on the form that the condition was "under the direct observation of management," namely, the section foreman. He also confirmed that he marked "probable" and remarked "possible roof fall." He also noted on the form that the injury would be "disabling," inserted "none" under "Remarks," that two workers were exposed to the hazard, and remarked that "coal scoop operator, when making methane checks and operating equipment and when extending the line curtain was exposed to the hazard" (Tr. 233).

Regarding the line curtain violation, Inspector Jones testified that failure to extend the line curtain results in inadequate face ventilation and limitations on vision since the curtain is required to sweep dust away from the face area. In addition, there is a possibility of a dust ignition and the men can breathe in the dust. The ventilation plan required that the curtain be maintained to within 12 feet of the face, and the dust generated at the face is readily observable and should have alerted the operator that he was in violation. Although he observed a scoop coming out of an entry, he could not tell whether it was loaded or not, since he was by the first entry when he observed it come out. The place had been cleaned up and the gob had been cleaned, but he did not see the scoop inby the line curtain. He did not take any air measurements and the reason for this was the fact that he had closed down the entry when he issued his order and he believed this eliminated all hazards (Tr. 3-7, Nov. 16). He described the mining cycle which he believed took place and assumed that at least two cuts of coal had been taken over a half-day shift in the three entries where he cited roof control violations, and men were working under unsupported roof (Tr. 9-11). He confirmed that when he and respondent's Safety Engineer Sikes went back to look at the areas cited, Mr. Sikes did not disagree with his findings (Tr. 12). Based on his analysis of the mine roof control plan, a total of 12 additional timbers should have been installed in the three entries cited in his roof control violations, and failure to install them permitted more coal to be

mined on the shift. Failure to install the timbers, however, had a potentially detrimental effect on the safety of the miners (Tr. 15-16).

In response to questions from the bench, Inspector Jones indicated that at the time the violations were issued, the mine atmosphere was clear and no equipment was operating. His testimony concerning the hazardous conditions assumed that these conditions existed during prior normal mining operations inby the line curtain and timbering areas noted in his citations. Had it not been for the timbering violations, he would not have shut the section down because of the ventilation curtain violation in and of itself (Tr. 17). However, since a complete mining cycle had occurred, he believed that dusty conditions probably prevailed because of the failure to extend the curtain in question (Tr. 18).

On cross-examination, Mr. Jones testified as to his assumptions regarding the presence of the loader he observed coming out of the entry after he cited the violations. However, he was not prepared to state that the loader was in the face area. Assuming the loader had just gone into that area and scooped out some coal, it probably would have generated some dust. However, he conceded that the loader would not have generated much dust since the gob being scooped would be in a pile, and it would constitute 50 percent clay and rock (Tr. 19-24). Inspector Jones assumed the loader had been working at the face because coal had been cut and the gob removed. He did not check for methane (Tr. 27-28).

With regard to the notations made on his inspector's statement concerning the gravity of the ventilation curtain violation, particularly the fact that diesel equipment emits fumes, Mr. Jones candidly admitted that the statement was based on what he believed would have occurred in the normal course of mining, rather than what he actually observed (Tr. 30-34). Mr. Jones could not recall reviewing the preshift examiner's reports on the day of the citations (Tr. 35). He also indicated that he did not believe there was any direct relationship in the amount of air recorded at the last open crosscut and the amount of air at the working faces (Tr. 37-39). Although he observed some check curtains in disrepair, he saw no one inby those curtains, nor did he observe any equipment there (Tr. 46). The gist of the violation was the fact that the line curtain was installed 22 feet outby the face, the face had been advanced, and one mining cycle had been completed with no additional curtain being installed (Tr. 48). When he arrived on the scene, no one was at the face and no line curtain was installed (Tr. 51). Regarding his previous testimony concerning the roof conditions in the mine in question, Mr. Jones indicated that they were "average," and, although some roof areas sounded drummy, he could not be sure that this was indicative of the fact that it might fall (Tr. 54-55). Roof falls on the section in question were rare (Tr. 55). However, drummy roof and cracked

roof is indicative that it would probably fall (Tr. 57). He did not mean to imply that this roof condition prevailed throughout the mine, but only at the location of the violation (Tr. 57).

Mr. Jones did not know the number of times the mine was cited for violations of section 75.200 (Tr. 59). He was not aware of the fact that the Assessment Office may waive the normal assessment formula used to assess penalties, but was aware of the fact that inspectors' statements are used in assessing penalties (Tr. 73). Regarding Violation No. 7-0013 (Exh. P-20), Inspector Jones testified that the reason he noted a "possible roof fall" on his inspector's statement (Exh. P-22), while explaining in some detail in the "Remarks" on the other statements dealing with the other roof violations, was the fact that the conditions were different. In the case of this violation, the roof was not cracked (Tr. 77). Although the fact that the roof was cracked, drummy, and flaking in some areas, he did not see any significant difference in a roof condition which was not cracked, insofar as the probability of a roof fall was concerned (Tr. 78). Regarding his definition of "probable," he believed it does not mean greater than 50 percent, not necessarily greater than 30 percent, and possibly greater than 20 percent, depending on the prevailing conditions, such as equipment being used, roof supports, blasting techniques, etc. (Tr. 79).

John Danio was recalled as a witness for the respondent, and testified that he was present in the courtroom when Inspector Jones testified as to roof cracks. Mr. Danio stated that what sometimes appears to be roof cracks may, in fact, be face cleats or butt cleats which are natural phenomena which appear in coal pillars, and this structural phenomena is associated with all coal formations (Tr. 91). Given the lighting conditions in a mine, he does not believe that he would mistake such a cleat for a roof crack. Such cleats have a trend and direction; they can be mapped and identified as cleats (Tr. 92). He also testified that he was familiar with mine ventilation, and testified that the amount of air at the last crosscut is indicative of the amount of air that is available to ventilate a face. Since the mine does not have methane, sweeping mine ventilation characteristics are not critical, and a machine operator sitting at the controls would not be affected by diesel fumes, since the fan ventilation will carry the fumes away from him. Further, he would not be adversely affected by dust since he is away from the face area (Tr. 90-95).

On cross-examination, Mr. Danio conceded that he did not personally observe any of the conditions cited by Inspector Jones at the time the citations were issued, nor did he observe any cracks in the roof entry. Assuming the line curtain was 22 feet away from the face and in disrepair, as testified to by Inspector Jones, he assumed that 6,000 cfms of air would not reach the face (Tr. 95-97).

## Findings and Conclusions

The following findings and conclusions as to size of business, effect of penalty assessments, and history of violations apply to all dockets.

### Size of Business and Effect of Penalties Assessed on the Respondent's Ability to Remain in Business

The evidence and testimony adduced reflects that the mine in question is a one-section mine employing approximately 25 individuals working two shifts a day (Tr. 12). Respondent's Exhibit R-4, is a weekly report ending November 5, 1978, showing a total of 21 production employees, 4 administrative workers, and 4 truck drivers employed at the mine, and the average estimated yearly coal production to November 5, is shown as 73,822 tons. Although respondent's counsel questioned the accuracy of his own figures (Tr. 74-75), they are estimated figures, and respondent was afforded an opportunity to file additional information (Tr. 214). Mr. Danio testified that in addition to the mine in question, respondent also operates an open-pit gold leeching operation in Carlin, Nevada, and the total company employment is about 75 or 100. Government Exhibit P-26, a MSHA report, shows 1976 coal production as 65,471 tons and 1977 production as 83,354 tons (Tr. 202-206). Based on all of the available information presented in these proceedings, I find that respondent is a small mine operator and that fact is reflected in the penalties assessed by me in these proceedings.

Respondent presented no evidence that any penalties assessed by me in these proceedings will adversely affect its ability to remain in business. Under the circumstances, I conclude they will not.

### History of Prior Violations

Petitioner submitted a computer printout representing the prior history of violations at the Dog Valley Mine (Exh. P-27), and that history was received in evidence with no objections by respondent (Tr. 100, Nov. 16). Respondent was afforded an opportunity to file any posthearing corrections to the printout (Tr. 101), but has not done so and has not addressed the issue in its posthearing brief or proposed findings and conclusions. Petitioner stipulated that the mine has no prior history of any fatal roof falls (Tr. 12, Nov. 15).

The computer printout reflects a total of 226 prior violations for which civil penalties were assessed and paid by the respondent during the period January 9, 1976, to December 19, 1977. Taking into account the size of respondent's operation, I conclude that this reflects a moderately significant prior history of violations and this fact is reflected in the penalty assessments made by me in these proceedings.

DOCKET NO. DENV 78-521-P

Fact of Violation--30 CFR 75.517

In its answer filed September 18, 1978, respondent denied that a violation of 30 CFR 75.517 occurred, and asserted that the scoop tire was not on the cable in question, but merely next to it, and that this fact was confirmed by Mr. Joe Tenery, the foreman, and Mr. Roger Black, a mechanic who was present at the site at the time of the inspection. Further, respondent asserted that inspection of the cable, following the issuance of the notice, showed no damage to the cable.

Petitioner's position with respect to this violation is that the cable in question must be protected at all times, and the potential for cable damage is not only damage to the outer insulation, but damage to the inner wires and insulation as well. In such a case, a short-circuit may occur, and while it is true that the short-circuit protection would work, crossed wires may not allow this. Once a cable is hung, it should be hung in such a way as to prevent it from dropping on the floor where it may be run over by equipment. The fact that no one observed a cable being run over, does not excuse a violation because if it is run over, damage may have resulted inside the cable, and no one would know about it (Tr. 54-59).

I find that the preponderance of the evidence adduced in this proceeding supports a finding of a violation of 30 CFR 75.517. The standard cited requires that power cables be protected. The normal method by which the cable in question is protected, is to hang it up off the mine floor so as to protect it against being run over or damaged by equipment. While the inspector believed the scoop tire was resting on the cable, and the mechanic believed it was merely lying next to the tire, the fact is that the cable in question was lying on the mine floor, thereby exposing it to the possibility of being run over or damaged by the scoop. Further, the mechanic stated that the cable is normally stored along the rib in a cut made for that purpose, and at the time of the citation, it had apparently fallen from the rib and was resting on the floor. I find that petitioner's interpretation of the standard in question is a reasonable and correct one, and in the circumstances, I find a violation has been established.

Gravity

The inspector considered the violation to be nonserious, and petitioner's counsel stipulated that the citation was nonserious, but that the practice of running over a cable was serious (Tr. 37-38). Petitioner has presented no evidence that respondent makes it a practice to run over cables, and the notice of violation makes no such charge. Accordingly, I find that the violation is nonserious.

Good Faith Compliance

The evidence adduced reflects that the violation was immediately abated within 5 minutes, and in the circumstances, I conclude that respondent exercised rapid compliance once the citation issued.

Negligence

From the evidence presented, it would appear that the cable in question fell from its normal storage place alone the rib while the respondent was in the process of moving a power unit. The inspector testified that the violation was not intentional, and that it is easy for the scoop operator not to have seen the cable in question because of its position along the rib and the large size of the scoop which he was operating at the time of the citation. In this instance, he believed the scoop operator probably did not see the cable. In the circumstances, I cannot conclude that the operator was negligent in this instance and find that he could not reasonably have known of the condition cited. In the circumstances, I find that the respondent was not negligent.

DOCKET NO. DENV 78-522-P

Fact of Violation--30 CFR 75.313

In its answer filed September 18, 1978, respondent conceded a violation of 30 CFR 75.313, but contested the penalty assessment of $120 as excessive on the grounds that: (1) respondent has an excellent record showing few citations for significant past violations, (2) due to the size of its mining operation, the assessment is inappropriate, (3) there is no evidence that respondent was negligent, (4) the violation was not grave since immediate testing detected no methane, the methanometer was checked promptly upon notification of the violation and repaired immediately upon receipt of necessary parts, and (5) upon issuance of the order, immediate steps were taken to abate the violation. At the hearing, the respondent again conceded and stipulated to the fact of violation of the provisions of section 75.313, and indicated that it was contesting only the $120 initial civil penalty assessment levied with respect to the violation (Tr. 59). In the circumstances, I find that a violation has been established.

Good Faith Compliance

During the course of the hearing in this matter, petitioner's counsel asserted that at the time the order issued, good faith was nonexistent because the problem with the mechanical linkage probably existed all along and it took an order to gain compliance. However, the record shows that the respondent was having problems with the methane monitor which were obviously recognized by the inspector, since he issued several extensions of his notice. Inspector Lemon

conceded that on many occasions he will note on his notice that parts are needed to repair a piece of equipment and that he uses this as justification for extending the abatement time. He conceded that this is what occurred in this case and that he allowed 3 days to obtain parts because the mine is in a remote area and parts must be obtained from Price, Utah. Inspector Lemon also candidly admitted that he did not believe that the respondent was using the fact that parts were required as an excuse for not complying with the abatement, and conceded that parts were "probably" needed. In the circumstances, and based on the totality of the evidence presented, I conclude that respondent abated the violation in good faith, and under the circumstances presented, exercised normal good faith in achieving abatement.

Gravity

Petitioner stipulated that this violation was nonserious, and that is my finding (Tr. 73).

Negligence

An initial preshift or onshift inspection by the operator should have detected the inoperative monitor. I find that the respondent should have known about the inoperative condition of the methane monitor in question and that it failed to exercise reasonable care in preventing the condition cited. This constitutes ordinary negligence.

Fact of Violation--30 CFR 75.200

In its answer filed September 18, 1978, respondent denied that the violation occurred and contested the citation, but did not contest the proposed assessment of $115. As grounds for its contest of the citation, respondent asserted that: (1) it has an excellent record showing few past significant violations, (2) there is no evidence of negligence, the violation was not grave since no mining was taking place at the time of the inspection, and the only employees in the face area were timber men who were resetting the roof supports which had been removed to allow movement of machinery and cleaning behind the curtains. Further, respondent asserted that the roof had been checked in all seven faces of the mine both before and after the notice was issued and appeared sound, and even in the absence of supports, a roof fall was highly improbable. Further, respondent asserted that if the roof plan submitted by respondent on May 19, 1978, and approved by the Mine Safety and Health Administration on May 30, 1978, had been in effect at the time of the inspection, when the mine roof conditions were the same as they were when the new plan was approved, the alleged violation would have been, at most, de minimis and probably nonexistent.

At the hearing on November 15, 1978, respondent proposed to abandon its contest altogether with respect to the violation and moved to withdraw its contest with respect to both the fact of violation and the proposed assessment and indicated that it no longer wished to contest the violation and desired to pay the initial proposed assessment of $115 (Tr. 7-8). Petitioner opposed the motion to withdraw and respondent's offer to pay the assessment (Tr. 7-8). The parties were afforded an opportunity to present arguments on the record with respect to respondent's motion to withdraw its contest (Tr. 91-121).

In support of its opposition to respondent's motion to completely withdraw its contest, petitioner argued that once a petition for assessment of civil penalty is filed by MSHA, any proposed settlement must be agreed to by MSHA and approved by me in accordance with the Commission's rules. Petitioner's counsel asserted that he could not agree with respondent's offer of payment since he believed the facts warrant an assessment higher than that made by the assessment officer for the violation in question. Petitioner views respondent's attempts to withdraw at the hearing stage of the proceeding as an offer to settle the matter and that petitioner does not agree to any settlement. Since the matter is de novo before me, petitioner asserted that I am not bound by the prior assessment and should proceed with the matter and decide not only the question of violation, but also the amount of penalty to be assessed, taking into account the statutory criteria for assessment of civil penalties.

In support of its motion to withdraw, respondent argued that it simply wishes to abandon its appeal and pay the assessment, and that the question of settlement is immaterial. Respondent's counsel conceded that settlement discussions were, in fact, conducted between the parties, but that petitioner took the position that unless respondent agreed to abandon all of the section 75.200 violations at issue in the other dockets which are the subject of these proceedings, petitioner would not agree to the settlement of the instant case. That proposal was unacceptable to the respondent, and citing Commission Rule 29 CFR 2700.15(a), counsel argued that respondent has a right to withdraw a pleading at any stage of the proceeding with the approval of the Commission or one of its judges. Since counsel views the notice of contest as a pleading, he argued that it may be withdrawn at any time and that I have sole discretion in the matter, regardless of whether or not petitioner agrees to the withdrawal. With respect to Commission Rule 2700.27(c), dealing with Commission approvals of proposed settlements, counsel took the position that the rule only deals with contested penalties, and since respondent did not contest the penalty assessed for the violation, that rule is inapplicable.

After consideration of the arguments made at the hearing, respondent's motion to withdraw its contest was denied and respondent was afforded an opportunity to present any evidence it desired in support

of its position regarding any penalty assessment to be made by me with respect to the violation (Tr. 116-118).

Respondent's reliance on Commission Rule 2700.15(a) in support of its motion to withdraw its contest, is rejected. As noted in Ranger Fuel Corporation, 2 IBMA 186 (1973), once a petition for assessment of civil penalty is filed with a judge, jurisdiction vests, and the request for a hearing on the merits of the petition, not being a pleading, may not be withdrawn. In addition, it is well settled that civil penalty proceedings before the Commission or one of its judges is a de novo proceeding, and that the prior proposed assessment made pursuant to Part 100, Title 30, Code of Federal Regulations, is in no way controlling. See Gay Coal, Inc., 7 IBMA 245 (1977); Boggs Construction Company, 6 IBMA 252 (1976); Lewis Coal Company, 6 IBMA 263 (1976). The jurisdiction of the judge to proceed in a civil penalty proceeding is not affected by the method of computation utilized by the Office of Assessments in arriving at an initial proposed civil penalty. Buffalo Mining Company, 2 IBMA 226 (1973); Eastern Associated Coal Corporation, 3 IBMA 132 (1974). Further, it is also clear that a judge lacks the authority to order MSHA to recompute proposed assessments of civil penalties. Clinchfield Coal Company, 3 IBMA 154 (1974); Consolidation Coal Company, 3 IBMA 161 (1974).

I am of the view that my responsibility under the law in a contested proceeding, in which a mine operator has requested a hearing, is to afford him that opportunity and to adjudicate the case and issue a decision based on the record made at the hearing, including a realistic and even-handed consideration of the statutory criteria with respect to the assessment of civil penalties which have been proven by a preponderance of the evidence.

On the facts presented in this case, I conclude that respondent's untimely attempt to withdraw its contest at the hearing and its offer to pay the initial assessment is an offer of settlement which must be concurred in by MSHA and approved by me pursuant to Rule 2700.27(d). Since MSHA did not agree to the proposed settlement, there is nothing to approve, and my previous ruling made at the hearing, denying respondent's motion to withdraw, is reaffirmed.

Responded conceded the fact of violation, and, in addition, after consideration of the testimony and evidence adduced by petitioner and respondent with respect to the citation, I conclude that the record supports a finding of a violation of section 75.200.

Negligence

Except for the testimony of Mr. Danio, respondent presented no testimony in defense of the cited condition. Mr. Danio did not view the condition cited and had no personal knowledge of the condition which the inspector observed. The inspector believed the face boss

should have been aware of the fact that the timbers were not installed. The fact that he may not have been in the area during the cleanup or when the citation issued is immaterial. An operator is presumed to know the requirements of his own roof control plan and the section foreman is responsible for seeing to it that the plan is followed during his working shift. I find that the respondent failed to exercise reasonable care to prevent the violation, and that this constitutes ordinary negligence.

Gravity

Inspector Lemon testified that at the time he observed the condition cited, he observed a loader coming out of the area of unsupported roof with a load of coal. However, he saw no one else there and no coal drilling or shooting was taking place. He tested the roof and it was not drummy, and at the point where the last support was installed, the roof was sound. Beyond that point, the roof appeared to be sound upon visual inspection and he observed no cracks. Although he indicated that the probability of a roof fall increases when pillars are pulled, in this instance, no pillars had been pulled, and the entry and working faces were not taking weight.

In this case, the inspector could not conclude whether the violation in question was serious, and indicated that his gravity statement should have indicated "improbable," rather than "probable." However, the fact remains that the required roof support was not installed and the loader operator was observed coming from the area. While the actual roof conditions up to the point of last roof support were good and the roof area immediately beyond that point appeared sound upon visual inspection, the inspector did not venture beyond that point to test the roof because additional timbers had not been installed. Roof falls are unpredictable, and unsupported roof presents a hazard to miners working in such areas. In the circumstances, I find that the condition cited presented a potential danger of a roof fall and consequently, I conclude that the violation was serious.

Good Faith Compliance

The inspector testified that the section crew began the installation of the required roof timbers within 10 minutes of his making his measurements to support the citation. I find that this constituted rapid abatement of the cited violation and good faith compliance.

DOCKET NO. DENV 78-523-P

Fact of Violation--30 CFR 75.316

In its answer of September 18, 1978, respondent denied that it was in violation of its ventilation plan or section 75.316, and

asserted that no violation of section 75.316 was alleged in the citation, that the ventilation plan in effect at the time of the citation required that line curtains be maintained to within 12 feet of the area of deepest penetration in any face when coal is being cut, mined or loaded, and since no cutting, mining or loading of coal was taking place at the time of the inspection, there is no violation. In support of its opposition to the proposed assessment of $1,200, respondent argued that the amount is inappropriate in view of its excellent past history of violations, its size of business, lack of negligence, and prompt abatement upon issuance of the order. Further, respondent argued that the violation was not grave in that testing in the mine established that there was sufficient ventilation to keep methane levels in the mine below 1.0 volume per centum as required by section 75.308.

Failure by an operator to comply with any provision of its ventilation plan constitutes a violation of the provisions of 30 CFR 75.316. Peabody Coal Company, 8 IBMA 121 (1977); Valley Camp Coal Company, 3 IBMA 176 (1974); Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). The fact that coal was not being cut or loaded at the precise moment that the inspector arrived on the scene and observed that the line curtain had not been advanced as required is immaterial, and respondent's proposed interpretation of the standard cited is rejected. It is clear to me from the testimony by the inspector that the curtain in question had not been advanced while coal was being cut, mined, and loaded during the shift preceding his inspection, and respondent has presented no evidence to rebut this testimony. Where an inspector describes a condition alleging a violation which occurred during the working shift immediately preceding the shift in which the inspection is made, a prima facie violation may be found on the basis of the inspector's findings that he could find no evidence of compliance. Rushton Mining Company, 6 IBMA 329 (1976). Here, the order issued by the inspector described the condition which he believed constituted a violation, and he specifically cited section 75.316, as did the petition for assessment of civil penalty. Consequently, respondent's contention that the citation failed to cite the standard violated is rejected.

Based on the foregoing, I find and conclude that the petitioner has established a violation of 30 CFR 75.316 as charged in the citation.

Gravity

The inspector testified that the line curtain violation, standing alone, would not have prompted him to issue a closure order (Tr. 17). Although he did testify that he found other line curtains in disrepair, he did not cite the respondent for this condition, and his notice is limited to the fact that the line curtain in question was

not extended the required distance to the face. I conclude that the seriousness of the situation presented must be considered in light of the prevailing conditions. Here, it is clear that the inspector did not take any air readings or otherwise test for dust accumulations, methane, etc., and based his findings on conditions which he believed existed on the previous shift while coal was being mined. Further, at the time the citation issued, petitioner conceded that the area in question was not dusty, and had been cleaned up (Tr. 24-25). Since petitioner has the burden of proof, I cannot conclude that the violation was serious, even though one may assume that the failure to extend the curtain in question may have had some adverse impact on the mine environment. Although I have sustained the fact of violation on the basis of inferences based on the inspector's finding that mining had taken place on the previous shift, absent any evidence as to what the actual prevailing conditions were at that time, I cannot conclude that the question of the seriousness of a violation can be determined on inferences. Although the inspector's gravity statement reflects that the cutting machine and scoop operator were exposed to diesel fumes building up at the face, it is clear that this was an assumption by the inspector. Respondent's testimony indicates that ventilation was adequate, that the machine operators were operating away from the face environment, that the fans installed on the equipment would disperse any diesel fumes, and no methane buildups were present. The inspector did not check the preshift books, and he admitted that at the time the violation issued, the mine ventilation devices were in "good shape" since the required face ventilation was being maintained (Tr. 225). Based on the totality of the circumstances presented, I find that this violation was nonserious.

Good Faith Abatement

Inspector Jones testified the entire crew was assigned to correct the conditions cited, and petitioner stipulated that the respondent exercised good faith in abating the violation (Tr. 12, 14). I find that the violation cited was abated in good faith by the respondent once it was issued, and that respondent exercised normal compliance in this regard.

Negligence

The inspector testified that the condition cited was readily observable to anyone walking in the area where the line curtain had not been advanced. He also testified that the section foreman on duty during the period the citation issued advised him that he was not surprised at the conditions cited and that the preceding shift had left the section "this way" in the past. Further, the inspector testified that after issuing the citation, he and the mine safety director went back to the section to observe the conditions. Neither the safety director nor the section foreman testified in this proceeding, and in the circumstances, the inspector's testimony

is unchallenged. Based on his testimony, I can only conclude that the respondent should have been aware of the conditions cited, that it failed to exercise reasonable care in preventing the condition cited, and that its failure in this regard constitutes ordinary negligence.

With respect to Inspector Jones' testimony concerning the conversation that he had with Section Foreman LaValley, Inspector Jones produced the notes which he made concerning this conversation at the time he cited the violations which are in issue in Docket No. DENV 78-523-P (Exh. P-31). His notes confirm his testimony that Mr. LaValley had admitted that the previous shift had left the section in "this kind of situation," and that Mr. LaValley had expressed some concern over the fact that his working shift was being held responsible for the conditions of the section.

Inspector Jones identified Exhibit P-31 as the notes which he took with respect to the conversation he had with Mr. LaValley at the time he initially observed the conditions which led to his citations, and the conversation he had with Mr. Sikes after taking him back to the section to observe the conditions (Tr. 233). Respondent objected to the introduction of the notes made by Inspector Jones on the ground that the notes are not contemporaneous, but rather, collateral notes on matters which respondent was not aware of prior to the hearing. The essence of respondent's objection is its assertion that failure to make the notes available earlier in the proceedings, deprived respondent of an opportunity to make an informed judgment as to whether it should litigate the violations in the first instance. The objection was overruled and the notes were received (Tr. 82, Nov. 16).

Respondent's counsel questioned Inspector Jones regarding his normal and usual practice with respect to notetaking. He indicated that it was his usual practice to take notes so as to be able to recollect what transpired with respect to a given violation which is issued, that the notes are maintained in his personal custody, and once written, he does not change them nor take them out of his personal notebook. He takes notes at the mine site at the time of the citation, and his inspector's statements are written up after he goes back to his office, and, at times, he has referred to his notes in compiling these statements (Tr. 83-88).

Respondent's objections to the introduction of the inspector's notes are again rejected and my previous ruling in this regard is reaffirmed. It is clear to me that the notes in question were contemporaneous notes made at or near the time of the issuance of the citation. The inspector was cross-examined and respondent has not been prejudiced. The inspector was free to refresh his recollection from his notes, UMWA v. Westmoreland Coal Company, Commission Docket No. 76-16, January 10, 1979. Further respondent had ample opportunity

to obtain the notes prior to hearing, but failed to avail itself of the discovery procedures in this regard. Respondent's counsel was given an opportunity to review the notes at the hearing and to cross-examine the inspector. Respondent could have called Mr. LaValley as a witness, but did not do so. Consequently, in light of all of these circumstances, respondent's assertions of "foul play" are rejected.

Respondent's preshift report for December 30 (Exh. R-1), contains a notation concerning "timbers" for the No. 3 entry, but no such notations for the Nos. 4 or 6 entries where the timbering citations were issued. However, respondent failed to call the preshift examiner who purportedly conducted the inspection and prepared the report and I have given it little weight as any indication that the conditions cited did not exist as charged.

Fact of Violation--30 CFR 75.200

In its answer of September 16, 1978, respondent contested both the fact of violation and the proposed penalties assessed for two violations of section 75.200 (7-0112, 7-0113), and its defense was identical to that asserted in Docket No. DENV 78-522-P concerning Violation No. 8-0015, 75.200, issued January 30, 1978. As for its contest of the proposed assessments of $1,200 for each of the roof control violations in this docket, respondent asserted that they are grossly disproportionate to the amount of penalty assessed for the subsequent similar violation issued in the previous docket ($115).

At the hearing of November 15, respondent conceded the fact of violations and indicated that it desired only to contest the amount of the penalties assessed for Violation Nos. 7-0112 and 7-0113 (Tr. 7). In the circumstances, I find that respondent violated the provisions of 30 CFR 75.200 as alleged in Citation Nos. 7-0112 and 7-0113, issued on December 30, 1977. Aside from respondent's admission that it was in violation of the cited standard, the evidence adduced by the petitioner in support of its assertions that respondent violated the cited standard, support a finding of violation in both instances. Further, it is clear that the failure of a mine operator to comply with a provision of its own roof control plan concerning roof support consitutes a violation of section 75.200 of the mandatory safety standards. Peabody Coal Company, 8 IBMA 121 (1977); Affinity Mining Company, 6 IBMA 100 (1976); Dixie Fuel Company, Gray's Knob Coal Company, 7 IBMA 71 (1976).

Good Faith Abatement

Inspector Jones testified that the entire crew was assigned to correct the conditions cited, and petitioner stipulated that the respondent exercised good faith in abating the violations (Tr. 12, 14). I find that the violations cited were abated in good faith by the respondent once they issued, and that respondent exhibited normal compliance in this regard.

Gravity

Although Inspector Jones observed no men working under the unsupported roof areas or equipment operating in that area at the time he issued the citations, the fact is that mining had taken place in the areas cited on the previous shift, coal had been cut and loaded out, and the area cleaned up. Thus, it is clear to me that men had worked under unsupported roof during the previous mining cycles and were exposed to that hazard. The fact that the roof did not fall on them does not detract from the fact that working under unsupported roof exposed the men working in those areas to potentially hazardous and dangerous conditions.

The evidence and testimony adduced by the respondent in these proceedings supports its contention that the roof conditions in the mine are generally good, but this does not excuse the failure of the respondent to install the roof supports required by its plan. Further, the fact that the roof control plan permitted the removal of one support post near the face to facilitate the movement and maneuvering of equipment during the mining cycle, does not excuse the failure to install the remaining posts required by the plan or to reinstall the posts removed once the mining cycle is completed. Here, the evidence establishes that the respondent failed to install a total of at least 12 additional roof support timbers in the three entries cited by the inspector.

The fact that mine roof conditions are generally good does not insure against roof falls which could occur at any time in a mine as the mining cycle advances and conditions change. Mr. Danio confirmed that some roof settlement does occur during blasting at the face, and while he also indicated that roof faults have not been encountered, he based this on some 50 roof holes drilled over the 445 acres which comprise the limits of the mine. While it is true that the mine in question does not have a history of roof falls, Mr. Danio did indicate that a roof fall occurred approximately a year and a half ago, but that the operator was aware of the loose roof conditions in that instance and dangered the area off. He also indicated that some roof flaking occurs in older mine areas and small pieces of roof coal have been found in areas more recently mined.

As for the actual roof conditions which existed at the time of the citations, Inspector Jones indicated that the roof in the No. 3 entry was not cracked. As a matter of fact, his testimony does not reflect the actual roof conditions which existed at the area cited in Citation No. 7-0013. As for the roof conditions which existed in the No. 4 entry (Citation No. 7-0012), he testified that it was cracked, drummy, and flaking, inby the last roof support, and this testimony remains unrebutted.

I find that both violations were serious. Men were working under unsupported roof and were exposed to a potential hazardous situation, particularly in the No. 4 entry.

Negligence

Both of the roof suport citations in this case were cited by Inspector Jones during his inspection on December 30, and the citations involve the failure of the respondent to maintain roof support timbers to within 15 feet of the face in entry Nos. 3 and 4 in the Southwest section of the mine, as required by its approved roof control plan. Inspector Jones testified that he believed the conditions cited existed for at least two mining cycles because each cycle advances some 10 to 11 feet, and since the timbers which were in place at the time of his inspection were installed to within 44 feet of the face in the No. 4 entry, and to within 33 feet of the face in the No. 3 entry, he believed that mining had advanced at least two cycles during the previous shifts without the installation of additional roof support timbers. He also indicated that coal had been cut during these previous shifts and that the entries were loaded out and cleaned, but no additional roof support was installed. Further, when he confronted the section foreman with the conditions of the entries, the section foreman candidly admitted that the timbers were not installed, admitted that he was aware of this fact, and attributed the failure to install the required roof supports to the fact that the previous shift had left the section in the condition found by Mr. Jones. Subsequently, when Safety Director Hales was taken to the area cited by Mr. Jones, Mr. Jones related to him what the section foreman had told him, and according to Mr. Jones' testimony, Mr. Hales expressed some embarrassment over the conditions of the entries, as did Mine Engineer Sikes, who Mr. Jones claims agreed with his findings.

Except for the testimony of Mr. Danio, respondent failed to call any other witnesses in defense of the roof support citations. Thus, Inspector Jones' testimony, documented by his notes taken at the time in question, has not been rebutted by the respondent. After listening to Mr. Jones' testimony and viewing him on the stand during the course of the hearing in this matter, I find him to be a credible witness and I accept his testimony concerning the conversations he had with mine management with respect to the conditions he found at the time of the citations. As for Mr. Danio's testimony, he was not present when the citations were issued, nor did he view the conditions cited by Mr. Jones. However, Mr. Danio candidly admitted that one possible explanation for the failure to install the additional roof supports in question was "bad mining practices" and "problems" which have occurred in the past (Tr. 208).

Based on the foregoing, I believe it is clear that the respondent was well aware of the fact that the required roof support timbers were not installed as required by its own roof control plan.

While the evidence presented by the petitioner suggests a somewhat cavalier attitude by mine management with respect to its own roof support plan then in effect, and borders on gross negligence, I cannot conclude that the record supports a finding of a deliberate and reckless disregard for safety. While the section foreman on the shift in question admitted he was aware that the timbers were not installed, he attributed this to inaction by the previous shift, and Mr. Danio attributed it, in part, to bad mining practices. None of the mine personnel from the previous shift were called to testify by either the petitioner or the respondent and there is no explanation as to why the required timbers had not been installed after the area was mined and cleaned up.

In view of the foregoing, I find that the respondent failed to exercise reasonable care to prevent the violation and failed to exercise reasonable care to correct the cited conditions which it knew existed, and that this failure on its part constitutes ordinary negligence as to both section 75.200 Citation Nos. 7-0112 and 7-0113.

DOCKET NO. DENV 78-524-P

Fact of Violation--30 CFR 75.200

In its answer of September 18, 1978, respondent contested both the alleged violation and the proposed penalty assessment of $500, and its arguments in support of its contest were the same as those made in the previous dockets. However, at the hearing, respondent conceded the fact of violation and contested only the amount of the proposed civil penalty (Tr. 7). I find that the evidence adduced establishes a violation of section 75.200.

Good Faith Abatement and Negligence

My previous findings and conclusions, with respect to good faith abatement and negligence concerning the roof support violations in Docket No. DENV 78-523-P, Citation Nos. 7-0112 and 7-0113, are herein incorporated by reference as my findings and conclusions concerning Citation No. 7-0110 in this docket. I find that respondent exercised normal good faith compliance in abating the cited condition, and failed to exercise reasonable care to prevent a condition which it knew existed and that this failure on its part constitutes ordinary negligence.

Gravity

With regard to the actual roof conditions which existed in the No. 6 entry at the time the citation issued, Inspector Jones testified and confirmed his previous finding that the roof was drummy and cracked. He also testified that he found some 6 feet of loose roof coal present inby the last support which was ready to fall and had

to be barred down. While he did not know whether that condition existed on the previous shift while men were working in that area, it is reasonable to conclude that it did, and respondent presented no testimony or evidence to rebut the inspector's testimony. In the circumstances, I conclude and find that the violation was serious.

Petitioner's Assessment Procedures and Inspector Practices

During the course of the hearing and in its posthearing brief and proposed findings and conclusions, respondent emphasized what it believes to be a most inadequate and often misleading use of the inspector's statement, a form usually filled out by an inspector after a citation is issued. The form contains information regarding negligence, gravity, and good faith compliance, and it is completed by the inspector who issues a citation and used by the assessment officer in evaluating a particular violation and arriving at an initial civil penalty assessment. While I am in agreement with the respondent's observations that these statements sometime contain inadequate and unsupported conclusions, and often present only the unfavorable portions of an inspector's comments or observations, I cannot conclude that this results from any deliberate or conscious effort by the inspector to bolster or support his actions. For the most part, I believe the practices complained of result from the use of standardized subjective forms which place the inspector in the position of making a one-sided evaluation in order to support the action taken by him. Further, once the matter is referred to the assessment officer, unless there is some imput by the operator at a conference, the only information available to the assessment officer is the bare notice and the inspector's statement.

One example of what I consider to be a misleading inspector's statement is Exhibit P-9, dealing with a violation of section 75.313 (Docket No. DENV 78-522-P). Although the inspector checked several of the gravity blocks, he indicated "none" under the "Remarks" portion of the form, completely struck out the "Good Faith" portion, and indicated that 20 workers were exposed to the hazard presented by the violation. During the hearing, the inspector testified that he extended the notice several times because of needed parts to repair a methane monitor, that he made a mistake in noting that 20 miners were exposed to any hazard, when, in fact, it should have reflected only those actually working on the shift, and that he crossed out the "Good Faith" portion of the form because he is instructed not to fill that portion out when an order has been issued. While it would appear from the evidence presented at the hearing, that the scoop in question was initially removed from the mine to effect repairs, but subsequent problems ensued once the scoop was brought back into the mine, and the violation was nonserious because of the lack of methane, those facts are not reflected in the inspector's statement.

Another example noted in these proceedings is Exhibit P-3, concerning the cable violation (Docket No. DENV 78-521-P. The inspector's statement indicates "probable" and "disabling" under the "Gravity" portion of the form, when, in fact, the testimony at the hearing reflected that the cable was disconnected and not energized, and the inspector testified that the violation was nonserious. While the form on its face contains a space for the inspector to note conditions or circumstances which might have decreased the severity of the condition, it is simply marked "none" in the "Remarks" portion.

I take note of the fact that the inspector who issued the aforementioned citations was a new inspector who was simply attempting to perform his duty to the best of his ability, and the fact that he candidly admitted on reflection that his written analysis of the situation made at the time of the event may have been somewhat misleading is to his credit. However, this is an area which should be addressed by MSHA in its inspector training programs, particularly when it results in a somewhat unrealistic or subjective assessment evaluation by an assessment officer who all too often is engrossed in applying "special formulas" and other such mathematical machinations in attempting to apply the criteria set forth in Part 100, Title 30, Code of Federal Regulations, to any given violation.

Having made my observations with respect to problems which are encountered with inspectors' statements and the application of Part 100, it is only fair to make some observations with respect to an operator who "sleeps" on his rights. In these cases, the mine operator had a full and fair opportunity to avail himself of the opportunity to submit any information pertaining to the cited violations to the Assessment Office and to request a conference for the purpose of bringing to the attention of the Assessment Office mitigating circumstances which he believes warrant consideration in arriving at a fair and equitable initial civil penalty assessment. Apparently, this was not done in these cases. Further, the respondent presented little substantive testimony in defense of the cited violations and the principal thrust of its case centered on an attack on MSHA's enforcement practices. Enforcement of the Act and the promulgated mandatory safety and health standards lies with the Secretary and is solely within his jurisdiction and authority. My jurisdiction is limited to the adjudication of cases after the operator has been afforded an opportunity to be heard. In these cases, I cannot conclude that the enforcement practices complained of by the respondent were so arbitrary or capricious as to warrant dismissal of the citations and the petitions for assessment of civil penalties filed by the petitioner. To the contrary, I believe it is clear from the record that the respondent has had a full and fair opportunity to be heard and to present its defense.

## Conclusion

On the basis of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established, as follows:

Docket No. DENV 78-521-P

| Citation No. | Date | 30 CFR Section | Assessment |
|---|---|---|---|
| 8-0005 | 1/09/78 | 75.517 | $25 |

Docket No. DENV 78-522-P

| | | | |
|---|---|---|---|
| 8-0010 | 1/19/78 | 75.313 | $25 |
| 8-0015 | 1/30/78 | 75.200 | $250 |

Docket No. DENV 78-523-P

| | | | |
|---|---|---|---|
| 7-0111 | 12/30/77 | 75.316 | $150 |
| 7-0112 | 12/30/77 | 75.200 | $1,000 |
| 7-0113 | 12/30/77 | 75.200 | $850 |

Docket No. DENV 78-524-P

| | | | |
|---|---|---|---|
| 7-0110 | 12/30/77 | 75.200 | $1,000 |

## ORDER

Respondent is ORDERED to pay the penalties assessed in these proceedings, as indicated above, in the total amount of $3,300 within thirty (30) days of the date of these decisions.

George A. Koutras
Administrative Law Judge

Distribution:

Edward Fitch, Trial Attorney, Office of the Solicitor, MSHA, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Robert L. Morris, Esq., Western States Coal Corp., 2600 Colorado National Bldg., 950 17th Street, Denver, CO 80202 (Certified Mail)

Standard Distribution

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 5, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | Civil Penalty Proceedings |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PITT 78-368-P |
| Petitioner | : | A/O No. 36-00906-02016 V |
| v. | : | |
| | : | Docket No. PITT 78-369-P |
| GATEWAY COAL COMPANY, | : | A/O No. 36-00906-02017 V |
| Respondent | : | |
| | : | Gateway Mine |

DECISION

Appearances: David F. Barbour, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia, for Petitioner MSHA;
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against Gateway Coal Company, the respondent.

At the outset of the hearing, operator's counsel challenged MSHA's assessment procedures. I held that the hearing before me is de novo in all aspects, and that MSHA's assessment procedures are not involved stating in this respect as follows (Tr. 16-17):

> I hold I have no jurisdiction to review the Secretary of Labor's assessment procedures. There is no point in taking evidence regarding the assessment procedures because it does not lie within my jurisdiction to do anything about it.
>
> The hearing before the Administrative Law Judges of the Commission in penalty cases are entirely de novo. The proposed assessments not only are not binding upon me, but I wholly reject any notion that they have an influence potential, or actual, upon the ultimate determination I make in any given instance.

I determine the existence of a violation in a hearing such as this based solely upon the record, documentary and testimonial, which is made before me. Where I conclude a penalty exists, I determine the amount of penalty in accordance with the statutory criteria, based, once again, solely upon the record made before me.

I note that section 2700.24 requires that the petition for civil penalties include the proposed penalties. This, obviously, has to do with the settlement process concerning which, as both counsel well know, Congress expressed serious concern.

This concern found expression particularly with respect to the reduction of original assessments. But this, again, dealt only with the settlement process. Once we come to a hearing on the merits, as we are doing here, the entire matter is de novo; and I am not influenced by anything except the record that is made before me in this room.

It makes no difference in this penalty proceeding whether the alleged violation was cited in an order of withdrawal, or in a notice of violation. The issue before me is not whether a notice, instead of an order, should have been issued; or whether, in particular, the issuance of an unwarrantable order was justified.

The Act very specifically sets forth the type and nature of hearing to be held in penalty cases. I do not believe the Administrative Law Judges have been given the authority to oversee the Secretary's assessment procedures; especially where, as here, those procedures have no effect whatsoever on the fulfillment and discharge of my responsibilities.

Item 7-0121

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator regarding this item. At the conclusion of the taking of evidence, the parties presented oral argument (Tr. 78-88). A decision was then rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation as follows (Tr. 88-91):

Based upon the testimony which I have heard this morning, I find the violation existed. I accept the inspector's description of the cited condition as consisting of loose coal, coal dust, and float coal dust ten feet wide, 50 feet long, and up to six inches in depth with most of the depth consisting of float coal dust.

The inspector's testimony regarding the condition is the most detailed and, therefore, the most persuasive evidence on the point. I also accept the inspector's opinion that this condition existed for more than eight hours.

I conclude that the operator should have been aware of these accumulations, and that it did not take the necessary steps to clean them up. I further accept the inspector's view that the materials in question should have been cleaned up before the midnight shift ended and that because they were not so cleaned up, the operator permitted them to exist within the purview of section 75.400. For all these reasons, therefore, I find a violation.

With respect to gravity, the inspector on direct testimony referred to danger from explosion, fire, and dust among other things. However, on cross-examination, the inspector stood by his contemporaneous written statement to the effect that it was improbable that any of these hazards would occur. He specifically referred to the good condition of the rest of the section, which was rock dusted, the good condition of the roof, and the presence of water hose. In this connection, I also note the limited extent of the accumulation. Therefore, while the violation is serious because it presents a danger to the safety of the miners, it is not as serious as it would first appear. In light of the foregoing, I conclude the violation is of ordinary gravity.

Based upon the facts already set forth, I find the operator was negligent because it should have been aware of the accumulations, and should have cleaned them up at least on the prior midnight shift.

I take into account the history of prior violations shown on the printout. However, in the absence of the definitive information regarding statistics for violations of section 75.400, I cannot accept the Solicitor's ballpark representation that the operator's violations of that mandatory standard amounting to approximately 56, is excessive when compared with the record of other operators. However, as operator's counsel himself pointed out, there were 18 violations of section 75.400 in 1977. I take all the foregoing into account in considering the operator's prior history as well as the fact that its record apparently improved with respect to 75.400 in 1978.

In accordance with the stipulations agreed to by the parties, I find the operator is large in size. In accordance with the stipulations agreed to by the parties, I find this violation was abated in good faith. In accordance with the stipulations of the parties, I find that the assessment of any penalty will not affect the operator's ability to continue to do business.

In light of all foregoing factors, the penalty of $400 is hereby assessed.

Item 7-0117

The Solicitor moved to withdraw this item without prejudice because the inspector could not testify due to a serious illness. The motion, which was granted from the bench, is hereby affirmed (Tr. 10).

Item 7-0128

The parties recommended a settlement of $400 for this violation of section 75.400. The Solicitor advised that the accumulations in this instance were comparable to those in Item 7-0121 concerning which a hearing had been held, and that in this instance also, the inspector would testify that the occurrence of any danger was improbable. Accordingly, the recommended settlement of $400 was approved from the bench and is hereby affirmed (Tr. 92-94).

Item 7-0131

The parties recommended a settlement of $400 for this violation of section 75.400. Once again, the Solicitor advised that although this violation was composed of three separate accumulations, it was comparable in nature and extent to those already considered. Accordingly, the recommended settlement of $400 was approved from the bench and is hereby affirmed (Tr. 94-95).

Item 7-0133

The parties recommended a settlement of $2,500 for this violation of 75.400 which involved 4,400 feet of loose coal, coal dust, and float coal dust. According to the Solicitor, the violation was visually obvious and very serious, although in mitigation of gravity, the Solicitor stated there were no roof or electrical defects. I approved the recommended settlement from the bench on the ground that $2,500 was a substantial penalty which would effectuate the purposes of the Act. The approval of the settlement is hereby affirmed (Tr. 97-99).

Item 7-0110

The parties recommended a settlement of $300 for this item, which was a violation of 75.1107-1(b), because eight sprays on the continuous miner were not working. The Solicitor pointed out that gravity was mitigated because 12 other sprays on the machine had not been cited, and there were no electrical defects or accumulations of grease or oil on the machine. Accordingly, the recommended settlement was approved from the bench and is hereby affirmed (Tr. 95-97).

Item 7-0111

The parties recommended a settlement of $500 for this violation of 75.601 which involved the use of a jumper cable without short-circuit protection for one hundred feet. In mitigation of the penalty amount, the Solicitor pointed out that the operator had shown an improving safety record with respect to this mandatory standard. I found the violation serious and stated that were it not for the operator's improving safety record, a higher penalty would have been imposed. However, in view of all the circumstances, the recommended settlement was accepted from the bench and is hereby affirmed (Tr. 99-101).

ORDER

I note that the originally assessed amounts were $4,000 for each of the accumulations violations. These amounts are excessive, especially with respect to violations where the inspector himself admitted the occurrence of any danger was unlikely. The originally assessed amounts of $1,500 for the other violations also were too great in light of the circumstances. I state, as I have before, that the imposition of such large amounts unwarranted by the facts does not serve any valid program purpose.

The operator is ORDERED to pay $4,500 within 30 days.

Paul Merlin
Assistant Chief Administrative Law Judge

Issued: March 5, 1979

Distribution:

David F. Barbour, Esq., Mine Safety and Health Administration, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

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Distribution Cont'd.

Administrator, Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. BARB 79-60-P |
| | : | A/O No. 01-01721-03001 |
| v. | : | |
| | : | Coal Branch Strip Mine |
| HALLMARK & SON COAL COMPANY, Respondent | : | |

DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT ADDITIONAL INFORMATION

The Solicitor recommends settlement approval for the originally assessed amounts. However, the Solicitor gives no reasons beyond the bare statement that the proposed settlement is reasonable in light of the alleged gravity and negligence of each violation. The gravity and negligence of the violations are not explained. The parties must recognize that once a matter is before the Commission recommended settlements cannot be approved solely because the operator now agrees to pay the assessed amounts.

Accordingly, the Solicitor is ORDERED on or before March 15, 1979 to submit information sufficient to support his recommendation. Failure to do so will result in issuance of a show cause order and dismissal of the petition.

Paul Merlin
Assistant Chief Administrative Law Judge

Issued: March 5, 1979

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 5, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Applications for Review of Discrimination |
| | : | Docket Nos. PITT 78-458 |
| On behalf of: | : | PITT 79-36 |
| | : | PITT 79-35 |
| DAVID PASULA, WILLIAM KALOZ, RALPH PALMER, JAMES COLBERT, BRYAN PLUTE, LAWRENCE CARDEN, Complainants | : | Montour No. 10 Mine |
| v. | : | |
| CONSOLIDATION COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Eddie Jenkins, Esq., Robert Cohen, Esq., Office of the Solicitor, Department of Labor, for Complainants;
Kenneth J. Yablonski, Esq., United Mine Workers of America, for Complainants;
Anthony J. Polito, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent;
Karl Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Administrative Law Judge Charles C. Moore, Jr.

These consolidated actions were brought by MSHA on behalf of David Pasula and those members of his working crew that were idled on two separate occasions. David Pasula alleges discrimination in that he was fired and the other workers alleged discrimination in that they were deprived of two half-shifts of work and payment because of a complaint of a safety violation. Pasula, the continuous miner operator, had been previously reinstated pursuant to an order issued by Acting Chief Administrative Law Judge Broderick, but he was not actually reinstated as a continuous miner operator. He was paid at the rate appropriate for a continuous miner operator, however.

On May 31, 1978, David Pasula was on a crew working the 12 midnight to 8 a.m. shift. When he got to his continuous miner he found the methane monitor on the machine inoperative and so informed a mechanic and his section foreman. The mechanic decided that an entire module was necessary, and the section foreman telephoned the shift foreman to see if such a module was available.

The shift foreman inquired and learned that the part which the mechanic said was necessary would not be available until the next morning. The exact sequence of events following is not clear, but, the shift foreman was at the face area and did request that David Pasula operate the continuous miner without a methane monitor for a period of time. David Pasula may have been willing to operate the machine for a time, but not as long a time as the shift foreman desired (until 8 a.m.). There was testimony that some Federal inspectors do not consider it a violation to operate a continuous miner without a methane monitor for short periods of time as long as the required 20-minute methane checks are made. Regardless of the exact communications, Mr. Pasula did not operate the continuous miner as requested and as a result, his crew could not produce coal in the the 1 West section. The assistant master mechanic, who might have been able to repair the machine (I say this because the next day a mechanic did repair the machine in about half an hour without replacing the module), was in the 1 Northeast section working on a continuous miner which had been partly buried by a roof fall.

Mr. Pasula and the other complainants in his crew were sent home and paid for 4 hours even though they did not work quite that long. It is the contention of these crew members that there was other work to do in the mine which they could have been assigned to do, and that they were sent home after 4 hours only because Mr. Pasula refused to operate the continuous miner without a methane monitor. They thus contend that they were deprived of 4 hours of pay on May 31, 1978.

Subsequent to the crew's midnight departure from the 1 West section, the chief mechanic and other mechanics fixed the other continuous miner in 1 Northeast section by replacing a number of the gears and then extracting the miner from beneath the rock fall area. When the Pasula crew arrived for their next shift on June 1, 1978, starting at midnight, they were assigned to the 1 Northeast section where the continuous miner had been under a roof fall during their previous shift. During the repair of that continuous miner, new gears had been mixed with old gears and as a result, the machine was extra noisy because the gears did not mesh properly. It was the testimony of all of the knowledgeable people that addressed the subject that gear meshing noises of this sort do reduce in volume as the machine is operated. Repairs on the miner had been completed on the shift previous to Mr. Pasula's and the machine was used in mining for several hours during that previous shift.

The machine was so noisy, however, that the operator (who had a hearing loss) shut it off when the shuttle cars were not in position to load coal, whereas his usual procedure is to let the machine idle while the shuttle cars are not in the area.

Pasula noted the loudness of the machine but nevertheless, operated it for about an hour and a half before he decided he had had enough. He stated that he had a headache, that his ears hurt and he was nervous and that when he attempted to complain to the section foreman, he found the section foreman asleep in the dinner hole. This was later denied by the section foreman. I find it unnecessary to determine whether the section foreman was asleep or not because it is clear that Mr. Pasula thought he was or he would not have phoned the shift foreman directly instead of talking first to the section foreman. No one has suggested an ulterior motive on Mr. Pasula's part regarding this direct contact with the shift foreman, and no one has suggested a reason why he should invent the story that the section foreman was asleep.

Mr. Pasula told the shift foreman about the noise the machine was making, told him about his headache, nervousness and hurting ears and requested that a noise level test be made on the machine before he operated it further. After that conversation, the shift foreman telephoned the mine manager to inquire as to whether they were required to make a noise level test in the circumstances, and he was informed that the law did not require such a test.

Subsequently, the assistant master mechanic, the shift foreman, a member of the safety committee, and the section foreman met at an intersection near the face where the continuous miner was located. At the time, Mr. Pasula and his helper were doing some other work that had been assigned and were not present when one of the mechanics started the machine so that the others could listen to it run. Even though he had not heard the machine running at the face with all motors running, the safety committeeman had already agreed with management that the machine was not too loud to operate before Mr. Pasula and his helper returned to the scene. When Mr. Pasula heard this, he became very upset. Harsh words were spoken and Mr. Pasula continued to demand that a noise level reading be taken on the machine. Management refused to comply. Mr. Pasula then said he would not operate the machine and that nobody was going to operate it.

There is some question as to whether anybody ever asked the helper to run the machine, but it does not matter because he would not have run it in any event. He so testified and it is a general longstanding mine custom that when one miner will not operate a piece of equipment, another one will not. The section was then shut down and the miners on that particular crew were taken from the mine. All, except Mr. Pasula, were paid for 4 hours of work and he was paid for 3-1/2 hours, the difference being that he had refused to run the machine and was therefore not paid for the last half hour. At one

point during the discussions, Mr. Pasula said he wanted to call a Federal inspector to take a noise level reading. He was told he could not use any phone on mine property for that purpose. Before leaving the mine, Mr. Pasula did ask for other work, but was told that with the miner down and, with no production, there would not be any other work.

Mr. Pasula was subsequently fired and he filed a grievance under the union contract. This resulted in an arbitration proceeding before David L. Beckman, Esq., and his written decision in the matter was received in evidence as Consol Exhibit No. 10. A copy of that decision was also attached as Exhibit A to Respondent's answer to the complaint.

As to the weight that should be given to the decision of the arbitrator by me, the cases cited in the briefs indicate that it is a matter of discretion. In exercising that discretion, according to the cases, I should consider the qualifications of the arbitrator and the type of hearing that was held. From the information submitted during the trial it appears that the arbitrator was a well-qualified attorney and that the testimony before him was under oath.

Mr. Beckman, of course, had to rely on the evidence presented to him and I have no idea as to what that evidence was. I have noted some findings in his opinion that are inconsistent with the evidence presented to me and with my knowledge of the regulations involved. He may have been told otherwise, but the statement on page 13 of the opinion to the effect that an inspector has no authority to shut down a machine because of a noise violation is incorrect. While several of the witnesses indicated their understanding that noise violations would not result in closure, there is no question but that if a noise violation, like any other violation, is unabated, and if the inspector does not consider a further extension of time justified, a withdrawal order will be issued. And such orders have been issued. The implication that noise violations are not serious enough to close a mine is not correct. Also, it appears that Mr. Beckman's reliance on the inspector who tested the noise level of the machine may have been misplaced. The machine had been running for approximately 2 hours after Mr. Pasula and his crew left the mine by the time the noise level test was made by the inspector. The purpose of allowing the machine to idle during that time was to let the gears mesh and reduce the noise level on the machine. Assuming that the idling of the machine had the effect that it was designed to have, i.e., reduce the noise level, and despite the inspector's possible testimony before Mr. Beckman and his statement in writing which he presented to Respondent, the machine was still too noisy for anyone to legally operate for an 8-hour shift.

The machine in question was producing 93 decibels with only the pump motor running and was producing 103 decibels with the pump motor

and the conveyor running and while mining coal. The limit for an 8-hour shift is 90 decibels. It would have, therefore, been illegal to require an operator to sit in this machine and idle the engine for an 8-hour shift. While evidence was introduced as to how much time, during an 8-hour shift, a mining machine is actually cutting coal, tramming, idling, or off, such evidence was inconclusive. This is especially true since Consolidation Coal, the proponent of the study, was of the erroneous opinion that it was standard practice to shut the machine off while awaiting a shuttle car.

I cannot imagine what prompted the inspector to imply, if not state, that a machine producing 93 decibels could not be involved in a violation of the standard. As previously stated, it certainly would be a violation if one miner were to idle the machine for 8 hours. It would clearly be a violation if any miner operated the machine cutting coal at 103 decibels for an hour and a half because that would be a violation even if the machine only produced 102 decibels. 1/ The inspector did not appear before me to explain his evaluation of the machine, and in the absence of any such explanation, I will not accept his statement that the machine was in compliance with the noise standard, because that compliance obviously depends on how long a particular miner is exposed to either the 102 or 93 decibel levels. I therefore agree with the contention in MSHA's reply brief that Consol Exhibit No. 12 does not show that the continuous miner was in compliance with the noise standard.

Arbitrator Beckman's decision, despite differences pointed out above, generally agrees with the facts as I have found them here. His decision was based on the wording of the union contract, however, and not on the language of section 105(c) of the Federal Mine Safety and Health Act of 1977. Under the union contract, if a miner thinks that his health or safety is in jeopardy (the wording is similar to the description of an imminent danger under the Federal law) he is entitled to have a member of the safety committee examine the situation. If management and the safety committee member agree that there is no hazard involved, then the miner is supposed to go back to work. At least that is the way the contract was interpreted by Mr. Beckman and according to Consol's reply brief filed on February 2, 1979, that decision has been affirmed. The Federal provision states "No person shall discharge or in any manner discriminate against * * * a miner * * * because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * of an alleged danger or safety or health violation * * *." (Emphasis added.)

Arbitrator Beckman concludes that David Pasula was fired because of his refusal to operate a continuous miner and because of his past

1/ See 30 CFR 70.510.

record. That past record is referred to on page 14 of Mr. Beckman's decision and includes four items. The first was for insubordination on December 22, 1976, which resulted in a verbal warning. Details are not contained in the file. The second on January 27, 1977, concerned a confrontation with a mine pay clerk and a written warning was issued to Mr. Pasula. The confrontation involved work that Mr. Pasula had done and not been paid for. I think the pay clerk should have received the written warning. The third item on March 22, 1977, concerned a charge of altering a medical form and there was an arbitrator's decision which was introduced in evidence as Consol Exhibit No. 3. There are three lines obliterated on page 3 of the exhibit and two lines obliterated on page 4. So, I must assume that whatever was said in these five lines, it was something Consol did not care to include in the record. Whatever that material was, I do not see how it could rehabilitate that decision in view of the evidence that was presented at the hearing in the instant case. The evidence that was presented to me indicated that Mr. Pasula had done nothing wrong, but I have no idea what evidence was presented before Arbitrator Pollock. In any event, the arbitrator was presented with the question of whether or not Mr. Pasula altered medical forms. Instead of deciding that question either on the evidence or if necessary by assigning the burden of proof, the arbitrator proceeded to strike a balance somewhere in between. He found Mr. Pasula somewhat guilty, but not altogether guilty and therefore modified the penalty imposed by the company. Consol Exhibit No. 3 does not indicate that Mr. Pasula was wrong in connection with the medical records event. The doctor who failed to fill out the proper forms may have deserved a suspension, but not Mr. Pasula. As to the fourth charge mentioned by Mr. Beckman, interference with management, which resulted in a 3-day suspension for Mr. Pasula, the evidence indicates that on that occasion there was a labor dispute and that Mr. Pasula and his fellow workers complied with the directions of the safety committeeman. But, on June 1, 1978, when Mr. Pasula chose to ignore the advice of the safety committeeman, he was fired. I find the entire record of Mr. Pasula's so-called past misconduct, contrived and unconvincing. I therefore, completely disagree with Mr. Beckman's decision in this regard.

It is the position of MSHA and the union, that Consolidation Coal Company's actions have shown that whenever a section is shut down because of a safety complaint by a miner, then the miners will be sent home for the second half of the shift, but if it is for some other reason, the miners will be given other work for the remainder of the shift. I find that no such pattern has been established. If, on May 31, 1978, the section had been shut down because the continuous miner was inoperative due to a faulty methane monitor, the fact that the miners were sent home, rather than being given other work to do, would not establish discrimination. Certainly the fact that they were paid for 4 hours of work, but not required to actually stay in the mine for that 4-hour period would indicate that there was no vindictiveness on the part of management.

But, the section was not shut down because of the faulty methane monitor. It was shut down because of David Pasula's refusal to run the machine without that necessary piece of equipment. Despite his equivocation, evasiveness and nonresponsiveness, I find that Shift Foreman Neal did try to get Mr. Pasula to run the machine for the remainder of the shift without an operable methane monitor. On Mr. Pasula's refusal, the section was closed and the miners were sent home. Several mechanics, including the assistant master mechanic, were working on a continuous miner which had been buried in another section, and I have no doubt that they, or at least the assistant master mechanic could have fixed the methane monitor in a short period of time. The fact that there were other pieces of equipment in the section with discrepancies is not important because if it had been important, Mr. Neal would not have asked Mr. Pasula to operate the machine without the methane monitor. Mr. Bigley, the assistant master mechanic, said he could not leave the other section with the mechanics working on the partially buried continuous mining machine, because of the danger in that other section. He was somewhat over-dramatic as though he thought that his presence would somehow keep the roof from falling on these other mechanics, but if he really thought they were in danger, and if management had been interested in keeping Mr. Pasula's section open, all of the mechanics could have come over to the 1 West section, fixed the methane monitor, repaired whatever discrepancies existed, and then gone back to their half-buried continuous miner. The fact that management chose not to pursue this course of action is a further factor indicating that they were punishing Mr. Pasula and his crew for his refusal to operate the continuous miner illegally for an 8-hour period.

I find that all miners working in the 1 West section on May 31, 1978, in Mr. Pasula's crew who were idled and unpaid for half of that shift and who are also Complainants in these proceedings, are entitled to be paid for the second half of the shift.

As to the incident on June 1, 1978, which resulted in the firing of Mr. Pasula, I have already indicated what I think of Mr. Pasula's past record of disciplinary actions. Inasmuch as the abusive language used by Mr. Pasula was directed towards Mr. Cushey, a fellow miner, and not towards supervisory personnel, that language could not reasonably be a part of the justification for his discharge. This leaves only Mr. Pasula's insubordination in refusing to operate the continuous miner as a possible justification for the action taken by the company. The company argues that Mr. Pasula's refusal to allow anyone else to operate the continuous miner was a dispositive factor. It was apparently when Mr. Cushey, the safety committeemen, suggested that Mr. Fisher operate the machine that Mr. Pasula said that the machine was down and nobody was going to operate it. But as stated earlier, according to mine custom, Mr. Fisher would not have operated

the machine in any event. Also, the company seems to be taking inconsistent positions regarding Mr. Pasula's authority. On the one hand, the company says he shut down the machine and refused to allow anybody to operate it by an oral statement, and on the other hand, the company is saying that he had no authority to do so. There was no evidence that any foreman told the miners that Mr. Pasula lacked authority to shut down the machine. On the contrary, their actions seemed to concede that he did have that authority.

It must be remembered, that when Mr. Pasula refused to run the continuous miner, it was not a flat refusal. He refused to run it until or unless a noise level test was made, and he demanded that such a test be made. He even informed his superiors that he knew how to make the test himself if they would provide the apparatus. And while I have indicated earlier that the machine could have well been producing enough noise to justify a notice of violation, it does not really matter. The Act protects a miner who is disciplined because he alleges a violation, whether a violation exists or not. There is no doubt in my mind that Mr. Pasula was discharged because he was complaining about the noisy machine and demanding that a noise level test be made. Management's evidence indicated to me that it does not take noise violations too seriously. The refusal of management to allow Mr. Pasula to use a phone on mine property to call in a Federal inspector for the purpose of taking a noise level test adds nothing to management's attempt to show a good faith discharge of Mr. Pasula.

I think management had had enough of Mr. Pasula and his health or safety complaints and decided to get rid of him. The other miners on the crew just happen to be caught up in the same situation, but the fact remains that they were punished i.e. discriminated against, because of Mr. Pasula's complaint. They and Mr. Pasula are thus entitled to pay for a full shift on June 1, 1978. This ruling of course applies only to miners who are complainants in these proceedings. Mr. Pasula is entitled to remain in his position as a continuous miner operator and is entitled to actually operate the equipment rather than merely being paid as a continuous miner operator.

## ORDER

It is therefore ordered that Consolidation Coal Company pay to the complainants herein the difference between what they were actually paid for work on May 31, 1978, and June 1, 1978, and the appropriate pay for working two entire shifts. It is further ordered that Mr. Pasula be actually reinstated in his former job as a continuous miner operator. This order is to be complied with within 30 days and the

previously issued temporary reinstatement order will remain in effect until the instant order becomes a final and enforceable order of the Federal Mine Safety and Health Review Commission.

Charles C. Moore, Jr.
Administrative Law Judge

Issued: March 5, 1979

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 7, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding<br><br>Docket No. DENV 78-576-P<br>02-01195-03003 |
| v. | : | Kayenta Mine |
| PEABODY COAL CO. Respondent | : | |

DECISION

On February 23, 1979, the Mine Safety and Health Administration (MSHA), moved the Judge to approve a settlement to which the parties had agreed, and dismiss the above-captioned.

The alleged violations and proposed settlements are as follows:

| Number | Date | 30 CFR Standard | Assessment | Settlement |
|---|---|---|---|---|
| 00387806 A | 6/08/78 | 77.509 | $655.00 | $624.00 |
| 00387806 B | 6/08/78 | 77.516 | 655.00 | 624.00 |
| 00387806 C | 6/08/78 | 77.516 | 655.00 | 624.00 |
| 00387806 D | 6/08/78 | 77.516 | 960.00 | 768.00 |
| 00387806 E | 6/08/78 | 77.505 | 655.00 | 624.00 |
| 00387806 F | 6/08/78 | 77.505 | 655.00 | 624.00 |
| 00387806 G | 6/08/78 | 77.807 | 655.00 | 624.00 |

As grounds to support the proposed 20% reduction in each assessment MSHA avers:

> "Each of the alleged violations was part of a 107(a) [imminent] (sic) danger order. Further investigation has revealed that the gravity of each individual alleged violation was not as great as initially evaluated. In addition, the violations were all issued in connection with a temporary power system of small size and there is some question as to the application of a number of the cited provisions of the National Electrical Code to the temporary conditions existing at the time the order was issued."

As the above settlement is within the bounds of reason, does not shock the conscience, and will effectuate the deterrent purpose of civil penalties under section 110(a), it is hereby APPROVED.

The above-captioned is DISMISSED.

The hearing scheduled for Thursday, May 3, 1979, in Denver, Colorado, is hereby VACATED.

Malcolm P. Littlefield

Malcolm P. Littlefield
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 8 1979

| | | |
|---|---|---|
| MAGMA COPPER COMPANY, Applicant | : | Application for Review |
| v.. | : | Docket No. DENV 78-533-M |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | San Manuel Mill |
| and | : | |
| UNITED STEELWORKERS OF AMERICA, Respondents | : | |

## DECISION

Appearances: N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, Phoenix, Arizona, for Applicant;
Michael V. Durkin, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent MSHA.

Before: Administrative Law Judge Lasher

## I. Statement of the Case

Applicant seeks review of Order No. 376821 dated July 26, 1978, which was issued by MSHA inspector Chester A. Pasco. The order was issued pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977 1/ citing Applicant with failing to abate a previously issued citation within the time required. The citation, which was issued earlier on July 26, 1978, by Inspector Pasco, cited Applicant for refusing to pay a representative of the miners for his participation in an inspection conducted on July 26, 1978. 2/

1/ 83 Stat. 742, 30 U.S.C. § 801 et seq., herein the Act.

2/ Both the citation and order charge a violation of section 103(f) of the Act which provides:

"(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the

The application for review which initiated this proceeding was timely filed and perfected on August 14, 1978. Applicant challenges both the order and the citation which latter document indicates that there were two MSHA inspectors present at the mine whose intent was to form two parties to expedite the inspection and that Applicant refused to allow a second representative of miners to accompany the second MSHA inspector without suffering a loss in pay.

A hearing was held in Phoenix, Arizona, on November 13, 1978, at which both parties were represented by counsel. 3/

## II. Findings of Fact

The essential happenings involved in this matter are not in substantial dispute.

Magma Copper Company operates a large copper mine and mill in the vicinity of San Manuel, Arizona. MSHA, successor to MESA, inspects these operations periodically. The mill, which includes the crushing facility, even though it is located near the mine site (Tr. 56), has a mine identification number separate from that of the mine. The mill consists of a mine crusher, a mill crusher, a concentrator, a molybdenum plant, and a filter plant. The mill I.D. number covers several buildings, some of which are one-quarter mile long and three stories tall. 4/

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fn. 2 (continued)
purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

3/ The United Steelworkers of America, having failed to timely respond to the prehearing order issued October 17, 1978, was dropped as a party at the hearing (Tr. 3-9).

4/ Prior to March 9, 1978, the responsibility for regulating health and safety standards in the metal and nonmetal mining industry

On July 26, 1978, inspectors Chester A. Pascoe and Thomas Aldrette, authorized representatives of the Secretary, arrived together at the San Manuel Mill to continue an ongoing regular "entire mine" inspection (Tr. 34-35, 55) of the mill which had begun the previous week. The inspectors drove to the site in the same car and coordinated their planned inspection on the way to the site. They had been orally assigned to conduct this inspection by their supervisor (Tr. 55). When they arrived at the mill, a conversation with company officials ensued in which the inspectors discussed the fact that they were going to continue the inspection and indicated that they "would like a miners' representative to accompany each inspector." They were advised that Applicant would furnish two miners' representatives, but that only one would suffer no loss of of pay (Tr. 37). Miners' representatives did not accompany the inspectors the previous week because the unions had not furnished Applicant with a list of such representatives (Tr. 37-39, 52).

Inspectors Pascoe and Aldrette selected Ernest Badia to accompany them on their inspection (Tr. 51, Ct. Exh. 1). The inspectors knew that a second representative would have been selected had they requested one (Tr. 47-48), but they were also aware that Applicant's position was that so long as one representative was being paid, no other representative would be paid for the same period of participation (Tr. 95).

After the inspectors asked that they be provided two representatives of miners and that both representatives be paid for the time spent assisting in the inspections (Tr. 37), Horace Carter, Assistant Director of Safety and Industrial Hygiene, read them a portion of section 103(f) of the Act, which stated: "However, only one such representative of miners who is an employee of the Operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection" (Tr. 95). Inspector Pascoe then issued the citation and, subsequently, the order based on the Applicant's refusal to pay the second representative of miners. They provide as follows:

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fn. 4 (continued)
belonged to the Mining Enforcement and Safety Administration (MESA). Mine operators were issued mine identification numbers to identify the function which was being regulated (Tr. 46, 91). In large operations, MESA assigned separate numbers to parts of the operation which had an integrated function or operated in a functionally related manner (Tr. 47). I conclude that the mill and its related facilities covered by the same I.D. number are a mine as defined in section 102(b)(3) of the Act.

Citation #376720: 'A representative of miners was not given the opportunity to accompany an authorized representative of the Secretary of Labor on a Safety and Health inspection. The Company allowed a representative of miners to accompany one MSHA inspector on the inspection, but refused to allow a representative of miners the opportunity to accompany second [sic] MSHA inspector on the same property (same I.D. No.) without suffering loss of pay. The intent was to form two (2) parties to expedite the inspection.'

Order #376821: 'Mr. Horace A. Carter, Assistant Director of Safety and Hygiene, stated that the Company's interpretation of the Act was that they would provide one representative of miners for each inspection; therefore, they would not provide a second representative of miners on the same property (I.D. No.) without loss of pay.'

The citation was issued at 11:05 a.m. and it required that abatement be completed by 12:30 p.m. The inspectors then went to lunch. After they returned, Mr. Carter indicated that his position had not changed. Consequently, Inspector Pascoe issued the order of withdrawal.

Ernest Badia, the representative of the miners who was provided with pay, accompanied Pascoe. However, a representative of the miners with pay was not provided to Inspector Aldretti. Pascoe and Aldretti examined separate parts of the mine (mill) as planned and their inspections took them a distance of 7 miles apart. The inspections took approximately 2 hours. The inspectors saw each other again when they subsequently returned to the safety engineer's office to do their paper work. There was no connection between the activities of the two inspectors during the full period of their respective inspecting (Tr. 37, 40-45, 47).

Inspector Pascoe did not request that a second representative be asked whether he desired to walk around without pay in order to justify the order of withdrawal because the second representative would have to stand the loss of a day's wages (Tr. 61).

The regular inspection in question took approximately 6 days (Tr. 62) off and on during the period July 19 - August 1, 1978 (Tr. 57, 58).

## III. Discussion

The Applicant maintains that while the Act grants representatives of miners the right to volunteer for walk-around activities, it limits the number of representatives who shall be paid for such activities to one. Applicant contends that it was not in violation of section 103(f) of the Act, since it did pay one of the two miners' representatives for participation in the inspection conducted on July 26, 1978.

MSHA contends that one representative should be paid for accompanying each inspector conducting an inspection, and, that there is no limitation on the number of inspectors (Tr. 99). MSHA's position in this connection is more fully set forth in Interpretative Bulletin No. 1, issued April 1, 1978, 43 FR 17546 at 17549: 5/

> [T]here are also occasions when there is more than one inspector at a mine, such as when the mine is so large that it is necessary to send several inspectors in order to most effectively or efficiently conduct inspection activity. Inspectors may also arrive to conduct special "spot inspections" at a mine where a "regular inspection" of the mine is already in progress. There are also situations when several inspectors are dispatched to a mine at which there are special safety and health problems needing concentrated attention. Where more than one inspector is on the mine property at the same time, the inspectors frequently go to different areas of the mine, and for all practical purposes, they could be inspecting different mines.
>
> Under such circumstances, if representatives of miners are accompanying each inspector, one such representative accompanying each inspector is protected against loss of pay. If, regardless of the number of inspectors engaged in inspection activity at a mine, one and only one representative of miners were protected against loss of pay, an anomaly would result in that the decision to send several inspectors, rather than a single inspector, to a mine would adversely impact the protection against loss of pay, thereby eroding the participation right itself. The manner in which inspectors were assigned would thus determine the scope of a statutory right.

Insofar as the precise issue in this case is concerned, section 103(f) of the Act is not vague or ambiguous. It consists of five sentences which are examined separately below.

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5/ This Interpretative Bulletin, which I find to be inconsistent with the governing legislation, insofar as it seeks to construe and implement the Act involved, is to be distinguished from legislative-type regulations duly promulgated in compliance with the rulemaking provisions of the Administrative Procedure Act. Morton v. Ruiz, 415 U.S. 199, 39 L.Ed.2d 270, 94 S. Ct. 1055 (1974).

1. "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of Subsection (a) for the purpose of aiding such inspection and to participate in the pre- or post-inspection conferences held at the mine."

This sentence is preliminary and of general application. It requires that an authorized miner representative (singular) be given the opportunity (a) to accompany the "Secretary or his authorized representative"--not every given inspector--during the physical inspection of a mine, and (b) to participate in any conferences held before or after the inspection.

The phrases "the physical inspection" and "such inspection" refer to one inspection. The purpose of allowing accompaniment by operator and miner representatives is clearly specified as "aiding the inspection," not aiding the inspector. Furthermore, the inspection referred to must be one "made pursuant to the provisions of subsection (a)." In my decision in another case of first impression, Kentland-Elkhorn Coal Corporation v. Secretary of Labor, Docket No. PIKE 78-399, issued simultaneously herewith, I have concluded that the quoted clause was intended to be restrictive, and that during the legislative history of the Act, Congress clearly expressed its intent to limit accompaniment with no loss of pay to the regular "entire mine" inspections described in the third sentence of section 103(a).

2. "Where there is no authorized miner representative, the Secretary or his authorized miner representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine."

This second sentence applies only where there is no authorized miner representative (union) at the mine. In such a special situation, consultation by the Secretary, acting through an inspector, with a reasonable number of miners is required.

3. "Such representative of miners 6/ who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection 7/ made under this subsection."

6/ Singular.
7/ Singular.

This third sentence requires that the miner representative, whether appointed by a union, or otherwise selected where there is no union, if he is an employee, 8/ shall be paid at his regular rate of pay for the period of time he participates in the inspection. 9/

4. "To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives."

This gives the Secretary, acting through an inspector, discretion to allow each party more than one representative to accompany him on the inspection (singular) provided the number is equal.

5. "However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss in pay during the period of such participation under the provisions of this subsection."

This expressly limits the pay provision to one miner representative/employee per inspection regardless of the number of inspectors conducting the inspection, and regardless of the number of operator's and miners' representatives accompanying them. The language is plain and admits of no more than one meaning. The word "However," clearly links this provision with the preceding sentence and both should be read together. Thus, if the Secretary permits accompaniment by more than one representative, only one is entitled to suffer no loss of pay.

Congress could not have expressed the limitation of the "pay" provision of 103(f) more clearly. This is not some inadvertent ambiguity which has found its way into the statute. It is a strongly-worded clear-cut restriction constituting an integral part of this new statutory provision first introduced into the mine safety scheme by the 1977 Act. While Congress sought to encourage miner participation in regular inspections, it also drew a distinct line as to how many mine representative/employees would be paid for their time of participation in the inspection. Its plain meaning is that it provides inspection participation rights without loss of pay to one miner representative/employee per regular inspection--not per inspector. Contrary to MSHA's contention, I do not find this reading to result in an absurdity, nor am I inclined to follow MSHA's Interpretative Bulletin where it directly contradicts the Act. I have found

8/ By inference, a miners' representative can be selected who is not an employee.

9/ Since the word "inspection" used here is not qualified by the word "physical" as in the first sentence, I conclude that it includes both the physical inspection and the pre- and post-inspection conferences.

the legislative history to be of little value in deciding this issue. In the parts thereof pointed to by the parties as support for their positions, the Congressional source being quoted was not directly addressing the question with which we are concerned. To draw inferences favorable to one party or the other from some word or phrase idly dropped in the context of remarks directed to some other issue or subject matter is not warranted. This, indeed, is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute. March v. United States, 506 F.2d 1306, 1314 (D.C. Cir., 1974).

It is clear from the record that on July 26, 1978, the two inspectors were conducting but one regular inspection of the mine (mill). Applicant, by agreeing to pay one miners' representative for his participation therein was in compliance with section 103(f) of the Act. I find merit in the application.

IV. Conclusions of Law

Where a single regular "entire mine" inspection is being conducted pursuant to section 103(a) of the Act by two or more inspectors, only one representative of miners is entitled to participate in the inspection without loss of pay even though the group conducting the inspection is divided into two or more parties to simultaneously inspect different areas of the mine.

ORDER

All proposed findings of fact and conclusions of law submitted by the parties not expressly incorporated in this decision are rejected.

The citation and order which are the subject of this proceeding are vacated.

Michael A. Lasher, Jr., Judge

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Michael V. Durkin, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 8 1979

| | | |
|---|---|---|
| KENTLAND-ELKHORN COAL CORPORATION, Applicant | : | Application for Review |
| | : | Docket No. PIKE 78-399 |
| v. | : | |
| | : | Feds Creek No. 1 Mine |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | |
| and | : | |
| UNITED WORKERS OF AMERICA, Respondents | : | |

DECISION

Appearances: C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, for Applicant;
Leo J. McGinn, Esq., Office of the Solicitor, Department of Labor, for Respondent.

Before: Administrative Law Judge Lasher

## I. Statement of the Case

Applicant seeks review of Order No. 063798, dated June 23, 1978, which was issued by MSHA inspector Vernon E. Hardin. The order was issued pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977 1/ citing Applicant with failing to abate a previously issued citation within the time required. The citation which was issued by Inspector Hardin on June 20, 1978, cited Applicant for refusing to pay employee Douglas Blackburn, the representative of the miners, for his participation in an electrical inspection at Applicant's preparation plant on May 23 and May 24, 1978. 2/

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1/ 30 U.S.C. § 801 et seq.

2/ The citation charged a violation of section 103(f) of the Act which provides:

"(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners

The Application for Review which initiated this proceeding was timely filed on June 28, 1978. Applicant contends that both the citation and order, each of which charge violations of section 103(f) of the Act, are invalid and seeks to have them vacated. 3/

A hearing was held in Princeton, West Virginia, on December 7, 1978, at which both parties were represented by counsel. 4/ Inspector Hardin testified for MSHA and Roger Bartley, Applicant's safety director, testified for the Applicant.

## II Discussion and Findings of Fact

Applicant contends that it was not in violation of section 103(f) of the Act, since, on May 23 and 24, 1978, it did pay one of two miners' representatives present for participation in an inspection. The facts are not in substantial dispute. According to Inspector Hardin, two separate inspections were being conducted on the dates

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fn. 2 (continued)
shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

3/ In paragraph 7 of the application, Applicant alleges that on May 23 and 24, 1978, two MSHA inspectors were present at the Feds Creek No. 1 Mine and preparation plant; that each inspector was accompanied on his inspection by a representative of the miners; and that one of these representatives suffered no loss of pay as a result of his partipation in the inspection.

4/ The United Mine Workers of America, upon motion of applicant, was dropped as a party by my order entered on the record at the hearing since the UMWA had not responded to my prehearing order and had made no appearance at the hearing.

in question: the one he was conducting was a specialized electrical inspection which was not part of a regular inspection of the mine which was being conducted independently by a second MSHA inspector, Aaron Hall. The record amply reveals that these inspectors did not travel together, did not coordinate their inspections, and were functioning separately on the dates in question. According to Inspector Hardin, his electrical inspection was one which is required to be conducted once annually by the MSHA manual, whereas the inspection conducted by Inspector Hall was one of at least four regular inspections required to be conducted annually by the Secretary of every mine in its entirety by section 103(a) of the Act. The report of his inspection filed by Inspector Hardin (Court Exh. 1) indicates that it was a coal mine safety and health electrical CBA inspection (Tr. 42). The electrical inspection was not part of the regular inspection of the entire mine conducted by Inspector Hall. The evidence clearly indicates, and I conclude, that these were two separate inspections (Tr. 16-18, 35-42, 48-53).

Inspector Hall was accompanied by Kenneth Smith, a slate picker, who was paid for his participation in Inspector Hall's regular "entire mine" inspection, which would have taken approximately 1 month to complete. Respondent admits that it refused to pay another employee, Douglas Blackburn, for his participation in the 2-day electrical inspection conducted by Inspector Hardin both at the time the citation was issued and again when the order of withdrawal was issued. 5/

Applicant's argument at the hearing that replacing Blackburn and Smith with less experienced miners might have an adverse affect on safety has been considered. However, it has no direct relevance in determining the primary legal issue involved in this proceeding and that is whether Applicant was required to pay Blackburn for the time he expended in participating in the inspection conducted by Inspector Hardin so that Blackburn would "suffer no loss of pay during the period of such participation" as required by the Act. Since Inspector Hardin's inspection was a separate inspection from Inspector Hall's, it would ordinarily be concluded at this point that both the citation and order were properly issued and that the relief sought by the application should be denied. 6/

5/ Applicant did pay Blackburn after the order of withdrawal was issued and the order was then terminated by Inspector Hardin at 8:50 a.m. on June 23, 1978.

6/ This is a case of first impression. I have held in another matter, MSHA v. Magma Copper Company, Docket No. DENV 78-533-M, issued simultaneously herewith, that the right of a miner representative/employee to participate in an inspection without loss of pay granted by section 103(f) of the Act is expressly limited to one representative per inspection--not per inspector.

Applicant, however, in its brief raised for the first time a purely legal issue which I find dispositive of this case. Applicant contends that the provisions of section 103(f) of the Act granting miner representatives the right to participate in an inspection with pay is limited to the regular "entire mine" inspections conducted pursuant to section 103(a) of the Act. 7/ There is no question but that the first sentence of section 103(f) is a general section against which the remaining sentences must be read and it does expressly limit the types of inspections in which the operator's and miners' representatives have a participation right to those "made pursuant to the provisisons of subsection (a)." On the face of it, this is a restriction--why else include the quoted language at all? Moreover, Congress' intent to limit walkaround rights under 103(f) is further demonstrated by its elimination of such rights for "any inspection" as previously provided in section 103(h) of the 1969 Act.

What is the extent of this limitation? Applicant places great emphasis, and I believe properly so, on the remarks of Congressman Perkins, Manager of the Committee of Conference for the House of Representatives, in his report to the House. They follow.

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.
>
> Section 103(a) of the conference report provides that authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations for the purpose

7/ More specifically, in its posthearing brief at page 15, Applicant makes the following contention:

"B. Order No. 063798 was improperly issued because section 103(f) of the Act provides miner representatives the right to participate in inspections at no loss of pay only where the inspection is conducted pursuant to section 103(a) of the Act. Inspector Hardin's electrical inspection was not conducted pursuant to section 103(a).

The plain language and legislative history of section 103(f) of the Act establish that the right to participate in inspections at no loss of pay exists only for a limited type of inspection. Specifically, section 103(f) limits walkaround rights with no loss of pay to "physical inspection[s] of any coal or other mine made pursuant to the provisions of subsection (a)" of section 103 of the Act. Section 103(a) provides for at least four annual "inspections of each underground coal or other mine in its entirety." These four annual inspections of an entire mine are identified in the MSHA Citation and Order Manual (A-1) by the code letters AAA, and are distinguished therein from all other types of inspections."

of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this act. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this act, and his experience under this act and other health and safety laws.

In carrying out the requirements of clauses (3) and (4) - concerning imminent dangers or compliance with standards - the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year and of each surface coal or other mine in its entirety at least two times a year.

In addition to the regular inspections of each mine in its entirety as specified in section 103(a), section 103(g)(1) provides that whenever a representative of a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further, section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.

Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-conferences, at no loss of pay only during the four regular inspections of each

underground mine and two regular inspections of each surface mine in its entirety, including pre- and post-inspection conferences.

The original section 103(a) of the Federal Coal Mine Health and Safety Act of 1969 provided that--

In carrying out the requirements of clauses (3) and (4) of this subsection in each underground mine, such representatives shall make inspections of the entire mine at least four times a year.

Section 103(a) of the 1969 Act did not include the new provisions--

The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to the act, and his experience under this act and other health and safety laws.

Section 103(h) of the 1969 act provided generally that--

At the commencement of any inspection * * * the authorized representative of the miners at the mine * * * shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection

Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator." Vol. 123, No. 174, Cong. Rec. H 11,663 (daily ed. October 27, 1977); Legislative History, Committee Print (July, 1978), 1347, 1356-1358. [Emphasis supplied.]

It could, of course, be argued that the Act is not ambiguous and that Congressman Perkins' remarks should be ignored since reference to the legislative history is not warranted. Pursuing this approach, the points of argument would seem to be that:

1. Section 103(a) 8/ does not say "four entire mine inspections will be conducted annually."

2. It does say--expressly in its first sentence--that the Secretary shall make frequent inspections (entire mine or otherwise) for various purposes and--expressly in the third sentence-that at least four entire mine inspections annually will be made for the purpose of determining if imminent danger or violations exist.

3. The 103(f) limitation to inspections made pursuant to "the provisions (plural) of subsection (a)" cannot simply ignore the first sentence of 103(a) and confine itself to the third sentence.

I am unable to adopt the above rationale for the reason that Congress, by tacking on to its grant of accompaniment rights the phrase "* * * during the physical inspection * * * made pursuant to * * * subsection (a)" must have had something in mind other than blanket coverage of all inspections. This phrase becomes a meaningless appendage if--via confinement to the general opening sentence

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8/ Section 103(a) provides:

"Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or othe requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

of section 103(a)--it is construed to cover all inspections. The only specific kind of inspection mentioned in 103(a) is the regular inspection mandated in the third sentence thereof. As categories of inspection go, the regular is the most important kind--of an entire mine, conducted at least quarterly, for the purpose of finding violations and seeking out imminent dangers.

The widely-quoted admonition of Justice Murphy in Harrison v. Northern Trust Co., 317 U.S. 476, 87 L.Ed. 407, 65 S. Ct. 361 (1943), is particularly applicable here. After first noting that the court below had refused to examine the legislative history of section 807 of the Revenue Act of 1932 on the ground that it was unambiguous, Justice Murphy made this observation:

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination. * * * So, accepting the Circuit Court's interpretation of Illinois law as to the incidence of the tax, we think it should have considered the legislative history of § 807 to determine in just what sense Congress used the words 'payable out of'.

Similarly, the purpose to be achieved here is to secure that construction of the Act which gives effect to the Congressional purpose. For this reason, considerable weight must be given the statement of Congressman Perkins. At the outset of his remarks, he noted that indeed there was an "ambiguity." His statement--made on behalf of the Committee, not just himself--reveals that the ambiguity referred to is precisely that with which we are dealing. In explaining the ambiguity, he pointed his remarks directly to the legal question under discussion, the meaning of the phrase "physical inspection * * * made pursuant to the provisions of subsection (a)." This is not the situation which occurs so frequently when reference to the legislative history is sought--where we are asked to draw inferences from some indiscriminately dropped word or phrase uttered by a speaker focused on an issue extraneous to the one under discussion. It is a relevant, unequivocal statement by the Conference Committee of Congressional intent made at the most significant stage of the legislative process. It cannot be ignored. 9/

9/ See also Cass v. U.S., 417 U.S. 72, 40 L.Ed.2d 668, 94 S. Ct. 2167 (1974), where the Court again declined to "ignore the clearly relevant" legislative history of a problem Act. I am aware that the Respondent's Interpretative Bulletin, 43 F.R. 17546, April 25, 1978, at page 17547, directly contradicts the Conference Committee's indication of the types of inspections covered. The Bulletin covers all inspections mentioned in both the first and third sentences of

I conclude that the clearly expressed intent of Congress is to require accompaniment with no loss of pay only for the so-called regular entire mine inspections mandated by subsection 103(a). Relying thereon, I also find that the section 103(f) phrase "physical inspection * * * made pursuant to the provisions of subsection (a) * * *" "refers to the inspections expressly referred to in the third sentence of section 103(a) of the Act, that is, the regular inspections which the Secretary, in carrying out his responsibility to determine either if an imminent danger exists or if there is compliance, must conduct of a mine in its entirety at least four times a year.

In the instant case, a miner representative/employee was permitted accompaniment on the regular inspection of the entire mine conducted by Inspector Hall on May 23 and 24, 1978, without loss of pay. I conclude that accompaniment by a miner representative/employee without loss of pay on Inspector Hardin's electrical inspection on the same 2 days was not required by section 103(f) of the Act. There is merit in the application.

## ORDER

All proposed findings of fact and conclusions of law submitted by the parties not expressly incorporated in this decision are rejected.

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fn. 9 (continued)
section 103(a), while the Committee intended that only the regular inspections mandated by the third be covered. While an agency interpretation is usually entitled to great weight, in this instance the Respondent appears to have leapt the chasm between what the law is and what it ought to be. In my decision in MSHA v. Magma Copper Company, supra, I noted that the Bulletin is to be distinguished from regulations promulgated in compliance with the Administrative Procedure Act. In divining the Congressional intent underlying section 103(f) in the specific respect involved here, I believe the only objective approach is to accept the clearly relevant interpretative aid of the legislative history rather than the construction urged by the enforcement agency. Congress has anticipated the question posed in this proceeding and answered it.

The relief sought in the application herein is GRANTED. Order No. 063798 dated June 23, 1978, and Citation No. 063792 dated June 20, 1978, are VACATED.

Michael A. Lasher, Jr., Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 12 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. NORT 78-417-P |
| Petitioner | : | A/O No. 44-00280-02025 |
| v. | : | |
| | : | Camp Branch No. 1 Mine |
| CLINCHFIELD COAL COMPANY, | : | |
| Respondent | : | |

## DECISION

Appearances: Inga Watkins, Esq., Trial Attorney, Office of the Solicitor, Department of Labor, for Petitioner; Gary W. Callahan, Esq., Attorney for Respondent.

Before: Chief Administrative Law Judge Broderick

## Statement of the Case

This proceeding was commenced on September 25, 1978, by a petition for the assessment of a civil penalty filed under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a penalty for an alleged violation of the provisions of 30 CFR 77.207.

Following discussions between counsel pursuant to a prehearing order, the case was called for hearing on the merits on January 25, 1979, in Abingdon, Virginia. Clarence A. Goode, a Federal mine inspector, testified on behalf of Petitioner; George W. Strong, superintendent of the subject mine, testified on behalf of Respondent. Both parties have filed posthearing briefs. All proposed findings and conclusions contained in the briefs not adopted herein are rejected.

## Regulation

30 CFR 77.207 provides: "Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites and working areas."

Issues

1. Whether there was any illumination in the areas covered by the citation involved herein in addition to the cap lamps of the miners and inspector.

2. Whether the illumination in the areas covered by the citation was sufficient to provide safe working conditions.

3. If a violation has been established, what is the appropriate penalty?

Findings of Fact

1. At all times relevant to this proceeding, Respondent, Clinchfield Coal Company, was the operator of a coal mine in Dickenson County, Virginia, known as the Camp Branch No. 1 Mine.

2. Respondent is a large operator and any penalty assessed herein will not affect its ability to continue in business.

3. On September 19, 1977, Federal Mine Inspector Goode made an inspection of the subject mine, including both underground and surface areas.

4. Inspector Goode's inspection of the surface areas was conducted between 9:30 and 11 p.m. on September 19. The night was cloudy.

5. Inspector Goode had previously inspected the mine on September 16, 1977, during daylight hours and did not observe light structures in the area of the head house and stacker belt. He returned on September 19 at night to determine the illumination in the area.

6. On September 19, 1977, at approximately 11 p.m., Inspector Goode issued Notice of Violation No. 4 CAG, charging a violation of 30 CFR 77.207.

7. At the time the citation referred to in Finding No. 6 was issued, there were no functioning outside lights at or near the head house or the conveyors leading from the head house to the stacker transfer point.

Discussion

There is sharp and total disagreement between Mr. Goode and Mr. Strong as to the existence of functioning lights at the time and place referred to in the notice. I am accepting the testimony of Mr. Goode, because he was present at the time in question, and

Mr. Strong was not. Mr. Sam Murphy, mine foreman, who accompanied Mr. Goode on his inspection, was not called as a witness by Respondent. Mr. Goode's testimony is cooroborated by the notes which he made at the time of his inspection. Mr. Goode is an experienced mine inspector. There is no adequate reason shown in this record to conclude that he was totally mistaken or was fabricating as to the condition he stated that he observed.

8. Because of the absence of functioning lights in the areas described in Finding No. 7, illumination sufficient to provide safe working conditions was not provided in those areas.

Discussion

The only illumination in the areas in question was that provided by the cap lamps of the miners and the inspector. The area in question had supplies, railroad tracks, rocks and coal spillage which constituted stumbling hazards. There were moving conveyors and moving parts at the transfer point and the stacker belt which could be hazardous to those working in and around them, if insufficiently illuminated. The cap lamps did not provide sufficient illumination to obviate these hazards since the cap lamp provides only a directed beam of light and does not provide diffuse illumination to allow a person to see to the periphery of his vision. I reject the testimony of Mr. Strong that "the cap light provides adequate illumination for a man working along one of these conveyors" (Tr. 81).

9. At the time the notice of violation was issued, there was one miner working in the area in question. However, the area was traveled by other miners to pick up supplies and to do maintenance and cleanup work along the belt.

10. The condition described in Finding No. 8 was moderately serious.

11. Respondent's history of previous violations does not include any violations of 30 CFR 77.207. Any penalty assessed herein will not be increased because of a history of previous violations.

12. The parties stipulated that Respondent demonstrated good faith in attempting to effect rapid compliance after the notice was issued.

13. The absence of illumination in the areas in question was discussed with Respondent's officials prior to the date the notice was issued. Respondent knew or should have known of the existence of the condition described in Finding No. 8. Respondent was negligent.

Conclusions of Law

1. Respondent was subject to the provisions of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., as of September 19, 1977.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of this proceeding.

3. The condition described in Finding No. 8 constituted a violation of the mandatory safety standard contained in 30 CFR 77.207.

4. A violation of the safety standard in 30 CFR 77.207 can be established without reference to specific illumination measurements such as footcandles of light.

Penalty

Considering the criteria in section 109(a) of the 1969 Act, I conclude that a penalty of $150 is appropriate for the violation.

Therefore, it is ORDERED that Respondent shall pay a civil penalty in the amount of $150 for the violation on September 19, 1977, of 30 CFR 77.207. The penalty shall be paid within 30 days of the date of this decision.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

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Gary W. Callahan, Esq., Attorney for Clinchfield Coal Company, Lebanon, VA 24266 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 14, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | Civil Penalty Proceedings |
| v. | : | Docket No. PITT 79-12-P<br>A/O No. 36-00917-03001 |
| HELVETIA COAL COMPANY,<br>Respondent | : | Lucerne No. 6 Mine |
| KEYSTONE COAL MINING CORP.,<br>Respondent | : | Docket No. PITT 79-5-P<br>A/O No. 36-05038-03001 |
| | : | Margaret No. 11 Mine |

DECISION

The above-captioned cases are petitions for the assessment of civil penalties. Each petition is for the assessment of an alleged violation of 30 CFR 50.20.

The parties have filed Joint Stipulations of Fact. From the stipulations it appears that in PITT 79-5-P an assistant mine foreman slipped and fell and fractured his arm while chipping ice on a slope outside the mine and that in PITT 79-12-P an assistant mine foreman while building a brattice wall, picked up a concrete block, slipped and injured his back.

The alleged violations are due to the operator's failure to fill in lines 5 thru 12 of Form 7000-1 with respect to the foregoing occurrences. Lines 5 thru 12 of the form deal with information regarding accidents. The operator contends that since these occurrences were not accidents under the regulations it did not have to complete these lines. The Solicitor argues that the receipt of such information is necessary for MSHA to properly discharge its responsibilities.

Part 50 of the regulations sets forth inter alia the reporting requirements for accidents, occupational injuries and occupational illnesses. Section 50.2 sets forth a list of definitions for terms "as used in this Part" including inter alia:

* * *

(e) "Occupational injury" means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

* * *

(h) "Accident" means,

(1) A death of an individual at a mine;

(2) An injury to an individual at a mine which has a reasonable potential to cause death;

(3) An entrapment of an individual for more than thirty minutes;

(4) An unplanned inundation of a mine by a liquid or gas;

(5) An unplanned ignition or explosion of gas or dust;

(6) An unplanned mine fire not extinguished within 30 minutes of discovery;

(7) An unplanned ignition or explosion of a blasting agent or an explosive;

(8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

(9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;

(10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;

(11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes;

(12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

* * *

In his brief the Solicitor admits that what happened in these cases did not constitute an "accident" within the meaning of the quoted definition. Moreover, on Form 7000-1 questions 5 thru 11 are under a heading entitled "Accident information."

It is clear that the term "accident" is a word of art which has a specific meaning and which by the express terms of section 50.2 applies to all of Part 50. Accordingly, the Solicitor's admission that these cases do not involve "accidents" as defined in section 50.2(h) is dispositive. Since no "accidents" were involved, the reporting requirements in section 50.20 for "accidents" do not apply.

I have carefully considered the Solicitor's argument that the definition of "accident" is not for the purpose of completing the forms but for the purpose of identifying what occurrences must be promptly reported to MSHA for possible investigation. I cannot accept this interpretation because it is contrary to the terms of the regulations which as already noted, expressly make the definitions applicable to Part 50 in its entirety. I also have reviewed the Solicitor's representation that it is necessary for MSHA to receive the information in question. If this is so, it would be a simple matter to amend the regulations so that MSHA can obtain this data.

In light of the foregoing, I conclude that no violations existed and that therefore no penalties can be assessed in these cases.

## ORDER

It is hereby ORDERED that the petitions for assessment of civil penalties filed herein be DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Issued: March 14, 1979

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 15, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. DENV 77-79-P |
| | : | A/O No. 05-02820-02004 |
| v. | : | |
| | : | Maxwell Mine |
| C F & I STEEL CORPORATION, Respondent | : | |

## DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, Department of Labor, for Petitioner; Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown, Denver, Colorado, for Respondent.

Before: Judge Moore

On August 17, 1977, the Mine Safety and Health Administration filed a petition for assessment of a civil penalty in accordance with section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 818(a). The above-stated petition was based on Notice of Violation No. 1 DLJ issued in April 21, 1977, alleging a violation of 30 CFR 75.316.

The 104(b) Notice No. 1 DLJ states: "The ventilation, methane and dust control plan was not being complied with. No. 1 unit turn out, left, where coal was being cut, mined and loaded, the end of the vent tube was 30 feet from the working face.

30 CFR 75.316 states:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation

equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The respondent filed an answer to the petition on September 19, 1977, denying the alleged violation. A hearing on the merits was held in Pueblo, Colorado, on September 12, 1978. The Government introduced one witness, Donald Jordan, a Federal coal mine inspector and four exhibits. The respondent introduced two witnesses, Paul Montoya, an assistant mine foreman for C F & I Steel Corporation at the Maxwell Mine, and James Robert Morris, a mine superintendent for C F & I Steel Corporation. Respondent also introduced two exhibits, C F & I Exhibit Nos. 1 and 3 which are sketches of the relevant area of the Maxwell Mine cited in Notice No. 1 DLJ.

Petitioner and respondent presented two quite distinct depictions of the shape of the cut and the location of the blower tubing in the relevant area of the Maxwell Mine. The petitioner contends that the relevant cut was 30 feet in length, 18 feet wide, and that the mouth of the blower tubing was situated at the start of the cut approximately 30 feet from the face. Petitioner argues that respondent thus violated the ventilation plan which requires the blower tubing to be within 10 feet of the face (Tr. 7, 9).

The respondent, on the other hand, contends that the relevant cut was made at an angle and that while the lefthand side of the cut may have been 30 feet in length, the depth of the cut was only 10 feet. Respondent argues that the ventilation control plan (Govt. Exh. 2) only requires that 3,000 cfm of air be delivered within 10 feet of the point of deepest penetration rather than requiring the mouth of the blower tubing to be situated within 10 feet of the working face.

The relevant section of page 2 of the ventilation plan reads:

Ventilation and Dust Control

A minimum of 3,000 cfm of air will be delivered to within 10 feet of each face where coal is being cut, mined, or loaded. The device used will be flame-resistant line brattice or 18 or 24 inch flame-proof tubing and auxiliary ventilation fans. Where exhaust ventilation of the face is used the minimum mean entry velocity for dust and methane control will be determined after operation begins.

Respondent's Exhibit Nos. 1 and 3 are diagrams depicting the area of the alleged violation as respondent contends it to be. Government Exhibit No. 3 is a diagram of the cut and ventilation

tubing as the Government contends it existed. None of the three diagrams are drawn-to-scale and that creates a problem. Because where angles are involved, nonscale drawings can be extremely deceptive. Two inspectors measured the lefthand edge of the cut by tying a weight to their measuring tape and throwing it into the cut. The respondent's foreman, Mr. Montoya, did not deny that the left-hand edge of the cut was in fact 30 feet long, and I will accept the measurement as a fact. If I also accept Mr. Montoya's estimate that the deepest penetration of the lefthand side of the cut was only 10 feet from the crosscut containing the ventilation tubing */ then a scale drawing would show an entirely different picture than that shown in Respondent's Exhibit Nos. 1 and 3. A scale drawing would approximate a right triangle with an altitude of 10 feet, a hypotenuse of 30 feet, and a base slightly in excess of 28 feet. The angle where the new cut first began would only be between 19 and 20 degrees. The new entry being started, would have a width in excess of 28 feet, whereas most entries and crosscuts in this mine were between 18 and 20 feet.

I might accept the fact that the inspectors in measuring the lefthand cut, which they thought to be perpendicular to the crosscut, were in error as to the angle by 10 or 20 degrees, but an error of 70 degrees is completely unreasonable. I reject Mr. Montoya's drawings and accept Government Exhibit No. 3, even though it is also not drawn-to-scale. I would like to point out, however, even if I accepted respondent's version as correct, there would still be a violation of the ventilation plan because that plan requires that line curtains or tubing "shall be maintained to within 10 feet from the area of deepest penetration to which any portion of the face has been advanced." (See page 8 of Govt. Exh. 2). Obviously, in referring to "tubing" the plan means the intake end of the tubing because it would do no good to have a central section of the tubing run past or within 10 feet of a face. And, according to Mr. Montoya's description of the scene, the intake end of the tubing was in the face of the crosscut and 30 feet from the deepest penetration of the entry that was to be driven.

I find that a violation occurred, that respondent was negligent, that a moderate degree of gravity was involved and that there was good faith abatement. The history of prior violations is substantial. While evidence as to the actual size of the company or the mine was not produced, the ventilation plan does show that 160 miners were employed in respondent's Maxwell Mine, It is not a small mine and in the absence of evidence to the contrary, I will assume that any penalty assessed will not affect its ability to continue in business. I find a civil penalty of $800 to be appropriate.

*/ The terminology may be somewhat confusing because the crosscut had been driven first and the ventilation tube placed therein and the cut that was being made in the area of the violation was supposed to be the beginning of an entry.

## ORDER

It is hereby ORDERED that respondent pay to MSHA a civil penalty in the amount of $800 within 30 days of the entry of this decision.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Issued: March 15, 1979

Distribution:

Leo J. McGinn, Esq., MSHA, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown, 1100 United Bank Center, Denver, CO 80290 (Certified Mail)

Administrator for Coal Mine Safety and Health

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 16, 1979

| | | |
|---|---|---|
| CLIMAX MOLYBDENUM COMPANY, Applicant | : | Applications for Review |
| | : | Docket No. DENV 79-159-M |
| v. | : | Citation No. 333329 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Climax Mine |

DECISION

On February 12, 1979, the Mine Safety and Health Administration (MSHA), by and through its attorney, moved to dismiss the above-captioned. On February 26, 1979, Applicant filed a statement in opposition to the motion.

The motion avers that the citation was fully abated and the citation had been terminated on December 27, 1978. Applicant's statement does not deny this factual allegation, and asserts that there is no relevant distinction between abated and unabated citations.

As Respondent's factual assertion has not been rebutted, it will be taken as established. I have previously ruled that an abated citation can not be reviewed through an Application for Review, eg. Sully Miller Construction Co., DENV 78-454-M et. al. (November 2, 1978).1/ Stare Decisis dictates the disposition which must be made of this case.

WHEREFORE the above-captioned is DISMISSED.

Malcolm P. Littlefield
Administrative Law Judge

1/ a copy is appended hereto.

Distribution:

William Schoeberlein, Esq., and Charles W. Newsom, Esq., Dawson, Nagel, Sherman & Howard, 2900 First of Denver Plaza, 633 Seventeeth Street, Denver, CO. 80202 (Certified Mail)

Mr. Edward L. Farley, President, Oil Chemical and Atomic Workers International Union, Local No. 2-24410, P.O. Box 949, Leadville, CO. 80461 (Certified Mail)

Mr. Edward Matheson, Chairman, International Brotherhood of Electrical Workers, Local Union No. 1823, P.O. Box 102, Minturn, CO. 81645 (Certified Mail)

Joseph M. Walsh, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Arlington, Va. 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

November 2, 1978

| | | |
|---|---|---|
| SULLY MILLER CONSTRUCTION CO., Applicant | : | Applications for Review |
| v. | : | Docket Nos. DENV 78-454-M |
| | : | 78-455-M |
| SECRETARY OF LABOR, | : | 78-456-M |
| MINE SAFETY AND HEALTH | : | 78-457-M |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | Upland Plant No. 69 |

DECISION

The above-captioned Applications for Review were filed pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq. (hereinafter referred to as the 1977 Act).

Subsection 105(a) provides in relevant part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. * * * If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission * * *.

Subsection 105(d) provides in relevant part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a)

or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, * * * the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing * * *.

On the surface, the above-cited statutory provisions would appear to support the full review of citations in a section 105 Application for Review. A similarly broad construction of the predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, P.L. 91-173, 30 U.S.C. § 815, provided by a Board of Mine Operations Appeals' opinion, Freeman Coal Mining Corp., 1 IBMA 1 (1970), was overruled by UMWA v. Cecil D. Andrus, Secretary of the Interior, ____ F.2d ____, U.S. Court of Appeals, D.C. Circuit, No. 76-1208, May 9, 1978.

The legislative history of section 105 in the 1977 Act supports the conclusion that the present review provision is a cognate of the 1969 Act review provision. (See Conference Report on S. 717, 95th Cong., 1st Sess.) As UMWA, supra, is controlling as to the scope of available review under the 1969 Act and places a limitation thereon, it follows that the 1977 Act is similarly limited.

A full review of the facts incident to an alleged violation is available upon the filing of a civil-penalty petition under section 105(d). The mandatory language of the penalty provision, section 110(a), 1/ means that such a petition must be filed unless the citation is invalidated by MSHA. Therefore, ultimately, the operator will be heard fully. The expense of duplicate full review of citations would be in derrogation of the prime purpose of the Act, namely, protection of the miner. 2/

I hold that the operator's interest in a section 105 review is limited to the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104.

---

1/ Section 110(a). "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

2/ Section 2. Congress declares that --

"(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner; * * *."

It is hereby ORDERED that: the Secretary's motion is GRANTED and the Applications for Review are DISMISSED.

Malcolm P. Littlefield
Administrative Law Judge

Distribution:

Rutan & Tucker, Attorneys at Law, Wells Fargo Bank Building, 401 Civic Center Drive West, Post Office box 1976, Santa Ana, California, 92702 (Attn: Michael D. Rubin, Esq.) (Certified Mail)

Robert A. Cohen, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Robert Rojestki, 930-21st. Avenue West, Virginia, Minnesota 55792 (Certified Mail)

Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, California 90013

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 16, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DONALD BROOKS, Complainant | : | Application for Review of Discrimination |
| | : | Docket No. HOPE 79-76 |
| v. | : | No. 1 Mine |
| SEWELL COAL COMPANY, Respondent | : | |

ORDER FINDING DEFAULT AND GRANTING RELIEF

On October 26, 1978, the Secretary filed a complaint on behalf of Donald Brooks, in which it is alleged that Respondent refused to pay Mr. Brooks for the time he accompanied a Federal inspector during an inspection of the subject mine. The complaint asked that the Commission find that Mr. Brooks had been discriminated against by Respondent for engaging in actions protected under section 105(c) of the Federal Mine Safety and Health ACt of 1977; that the Commission order Reespondent to pay full back pay and employment benefits for the 6-hour period involved and that Mr. Brooks' employment record be cleared of any unfavorable references resulting from said discrimination.

On February 13, 1979, Complainant filed a "Motion to Dismiss" because Respondent had not replied to the complaint. On February 27, 1979, I issued an order to show cause why Respondent should not be held in default and the relief requested in the complaint granted.

Respondent did not answer the order to show cause within the requisite time specified. On March 12, 1979, Respondent filed a response to the order which states that "counsel for Sewell Coal Company has no record of the filing of the complaint but has contacted the Commission Docket office and will file an answer as soon as one is received at this office." This response does not adequately show cause for Respondent's failure to answer. Respondent therefore is in DEFAULT.

Therefore, IT IS ORDERED that the Complainant's motion is GRANTED and Respondent is found by reason of its default to have discriminated against Mr. Brooks.

IT IS FURTHER ORDERED that Respondent pay Mr. Brooks full back pay and employment benefits for the 6-hour period involved on May 9, 1978.

Respondent IS FURTHER ORDERED to remove any unfavorable references resulting from the said discrimination from Mr. Brooks' employment record.

/James A Broderick
James A. Broderick
Chief Administrative Law Judge

Distribution:

By certified mail.

Mr. Donald Brooks, Craigsville, WV 26205

Mr. Ralph Dado, Vice President for Operations, Sewell Coal Company, Nettie, WV 26681

R. M. Neville, Esq., Secretary and Corporate Counsel, Pittston Company, 1 Pickwick Plaza, Greenwich, CT 06830

Thomas P. Piliero, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Gary W. Callahan, Attorney for Sewell Coal Company, Lebanon, VA 24266

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 21 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. BARB 78-595-P |
| | : | (A/O No. 15-02502-02022) |
| v. | : | |
| | : | No. 18 Mine |
| SHAMROCK COAL COMPANY, Respondent | : | |

## DECISION

Appearances: John H. O'Donnell, Attorney, Office of the Solicitor, Department of Labor, for Petitioner;
Neville Smith, Attorney, Manchester, Kentucky, for Respondent.

Before: Judge Littlefield

### Introduction

This is a proceeding for assessment of civil penalties against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary

under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On July 31, 1978, the Mine Safety and Health Administration (MSHA), 1/ through its attorney, filed a petition for assessment of civil penalties charging 16 alleged violations of the Act.

Answer

On August 28, 1978, Respondent filed a detailed response to the allegations and requested a hearing thereon.

Tribunal

A hearing was held in Knoxville, Tennessee, on February 14, 1979. Both MSHA and Shamrock Coal Company were represented by counsel (Tr. 4).

Evidence

The Judge held a prehearing conference before bringing the hearing to order and heard preliminary discussions bearing on the issues on the part of counsel for both parties.

The Judge, after hearing all evidence, studying the record, reviewing the exhibits, giving sympathetic regard to mitigating circumstances, and fully considering the criteria shown in section 109(a)(1) of the Act, made findings of fact, conclusions of law and issued an ORDER on the record, rendering his decision from the bench. Sixteen violations were found as originally charged.

1/ Successor-in-interest to the Mining Enforcement and Safety Administration (MSHA).

Findings of Fact and Conclusions of Law

The findings of fact, conclusions of law, and ORDER made on the record from the bench are hereby incorporated herein by reference and are AFFIRMED (Tr. 21-26).

Civil Penalties Assessed

| Notice No. | Date | Section 30 CFR | Penalty |
|---|---|---|---|
| 7-0115 | 08/24/77 | 75.316 | $ 55 |
| 7-0119 | 08/24/77 | 75.1101-1 | 45 |
| 7-0121 | 08/24/77 | 75.515 | 45 |
| 7-0122 | 08/24/77 | 75.1202 | 50 |
| 7-0133 | 11/01/77 | 75.316 | 55 |
| 7-8001 | 12/07/77 | 75.1103 | 45 |
| 7-8002 | 12/07/77 | 75.1107 | 50 |
| 7-8003 | 12/07/77 | 75.1107 | 50 |
| 7-8004 | 12/07/77 | 75.1710 | 55 |
| 7-8005 | 11/21/77 | 75.1710 | 55 |
| 7-8006 | 11/21/77 | 75.1710 | 55 |
| 7-8007 | 11/21/77 | 75.1710 | 55 |
| 7-8008 | 11/21/77 | 75.1107-1 | 50 |
| 7-8009 | 12/27/77 | 75.400 | 45 |
| 7-8010 | 12/27/77 | 75.316 | 45 |
| 7-8011 | 12/27/77 | 75.1722(a) | 45 |
| | | Total | $800 |

Disposition

The Judge was notified by letter from the Office of the Solicitor, U.S. Department of Labor, that the Respondent had submitted payment of $800, as ordered for the 16 violations found by the Judge in his BENCH decision. WHEREFORE the above-captioned is CLOSED.

Malcolm P. Littlefield

Malcolm P. Littlefield
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Shamrock Coal Company, P.O. Box 10388, Knoxville, TN 37919 (Certified Mail)

Neville Smith, Attorney, P.O. Box 441, Manchester, KY 40962 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 21 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. BARB 78-495-P |
| Petitioner | : | (A/O No. 02502-02021) |
| v. | : | |
| | : | No. 18 Mine |
| SHAMROCK COAL COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: John H. O'Donnell, Attorney, Office of the Solicitor, Department of Labor, for Petitioner;
Neville Smith, Attorney, Manchester, Kentucky, for Respondent.

Before: Judge Littlefield

Jntroduction

This is a proceeding for assessment of civil penalties against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary

under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On June 23, 1978, the Mine Safety and Health Administration (MSHA), 1/ through its attorney, filed a petition for assessment of civil penalties charging five alleged violations of the Act.

Answer

On July 21, 1978, Respondent filed a detailed response to the allegations and requested a hearing thereon.

Tribunal

A hearing was held in Knoxville, Tennessee, on February 14, 1979. Both MSHA and Shamrock Coal Company were represented by counsel (Tr. 4-5).

Evidence

The Judge held a prehearing conference before bringing the hearing to order and heard preliminary discussions bearing on the issues on the part of counsel for both parties.

The Judge, after hearing all evidence, studying the record, reviewing the exhibits, giving sympathetic regard to mitigating circumstances, and fully considering the criteria shown in section 109(a)(1) of the Act, made findings of fact, conclusions of law and issued an ORDER on the record, rendering his decision from the bench. Five violations were found as originally charged.

1/ Successor-in-interest to the Mining Enforcement and Safety Administration (MSHA).

Findings of Fact and Conclusions of Law

The findings of fact, conclusions of law, and ORDER made on the record from the bench are hereby incorporated herein by reference and are AFFIRMED (Tr. 21-24).

Civil Penalties Assessed

| Notice No. | Date | Section 30 CFR | Penalty |
|---|---|---|---|
| 6-0029 | 04/27/76 | 75.1710 | $ 50 |
| 6-0083 | 08/03/76 | 77.216(c) | 55 |
| 6-0085 | 08/03/76 | 77.215(h) | 45 |
| 7-0029 | 02/15/77 | 75.1713-5 | 50 |
| 7-0134 | 08/24/77 | 75.316 | 50 |
| | | Total | $250 |

Disposition

The Judge was notified by letter from the Office of the Solicitor, U.S. Department of Labor, that the Respondent had submitted payment of $250, as ordered for the five violations found by the Judge in his BENCH decision. WHEREFORE the above-captioned is CLOSED.

Malcolm P. Littlefield

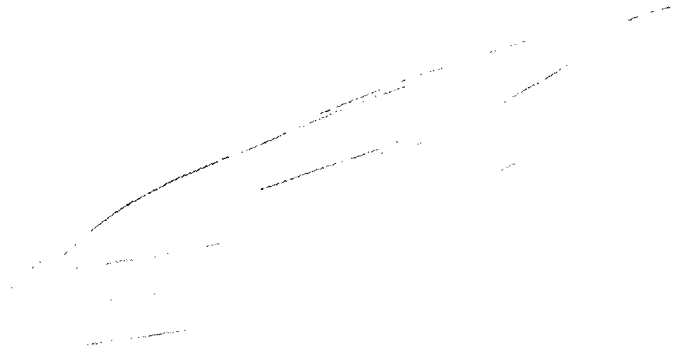
Malcolm P. Littlefield
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Shamrock Coal Company, P.O. Box 10388, Knoxville, TN 37919 (Certified Mail)

Neville Smith, Attorney, P.O. Box 441, Manchester, KY 40962 (Certified Mail)



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 2 1 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. BARB 78-138-P |
| Petitioner | : | (A/O No. 15-02502-02013) |
| v. | : | |
| | : | No. 18 Mine |
| SHAMROCK COAL COMPANY, | : | |
| Respondent | : | |

## DECISION

Appearances: John H. O'Donnell, Attorney, Office of the Solicitor, Department of Labor, for Petitioner;
Neville Smith, Attorney, Manchester, Kentucky, for Respondent.

Before: Judge Littlefield

## Introduction

This is a proceeding for assessment of civil penalties against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary

under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On January 17, 1978, the Mine Safety and Health Administration (MSHA), 1/ through its attorney, filed a petition for assessment of civil penalties charging 20 alleged violations of the Act.

Answer

On January 31, 1978, Respondent filed a detailed response to the allegations and requested a hearing thereon.

Tribunal

A hearing was held in Knoxville, Tennesee, on February 14, 1979. Both MSHA and Shamrock Coal Company were represented by counsel (Tr. 3).

Evidence

The Judge held a prehearing conference before bringing the hearing to order and heard preliminary discussions bearing on the issues on the part of counsel for both parties.

The Judge, after hearing all evidence, studying the record, reviewing the exhibits, giving sympathetic regard to mitigating circumstances, and fully considering the criteria shown in section 109(a)(1) of the Act, made findings of fact, conclusions of law and issued an ORDER on the record, rendering his decision from the bench. Twenty violations were found as originally charged.

1/ Successor-in-interest to the Mining Enforcement and Safety Administration (MSHA).

Findings of Fact and Conclusions of Law

The findings of fact, conclusions of law, and ORDER made on the record from the bench are hereby incorporated herein by reference and are AFFIRMED (Tr. 19-25).

Civil Penalties Assessed

| Notice No. | Date | Standard 30 CFR | Penalty |
|---|---|---|---|
| 7-0040 | 04/26/77 | 75.601-1 | $ 65 |
| 7-0046 | 05/02/77 | 75.1710 | 55 |
| 7-0047 | 05/02/77 | 75.1710 | 55 |
| 7-0048 | 05/02/77 | 75.1710 | 55 |
| 7-0051 | 05/02/77 | 75.516-2 | 70 |
| 7-0052 | 05/02/77 | 75.1103-1 | 65 |
| 7-0057 | 05/02/77 | 75.701 | 70 |
| 7-0058 | 05/02/77 | 75.1100-2(b) | 100 |
| 7-0059 | 05/02/77 | 77.400 | 100 |
| 7-0065 | 05/05/77 | 75.1107-1(b) | 65 |
| 7-0069 | 05/05/77 | 75.518 | 100 |
| 7-0070 | 05/05/77 | 75.1100-2(e) | 65 |
| 7-0073 | 05/05/77 | 75.1106-3(c) | 65 |
| 7-0074 | 05/05/77 | 75.1106-3(a)2 | 65 |
| 7-0075 | 05/05/77 | 75.601-1 | 25 |
| 7-0076 | 05/05/77 | 75.601 | 25 |
| 7-0077 | 05/05/77 | 75.517 | 50 |
| 7-0078 | 05/05/77 | 75.1105 | 65 |
| 7-0079 | 05/05/77 | 75.1102 | 95 |
| 7-0080 | 05/05/77 | 75.518 | 95 |
| | | Total | $1,350 |

Disposition

The Judge was notified by letter from the Office of the Solicitor, U.S. Department of Labor, that the Respondent had submitted payment of

$1,350, as ordered for the 20 violations found by the Judge in his BENCH decision. WHEREFORE the above-captioned is CLOSED.

Malcolm P. Littlefield
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Shamrock Coal Company, P.O. Box 10388, Knoxville, TN 37919 (Certified Mail)

Neville Smith, Attorney, P.O. Box 441, Manchester, KY 40962 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 2 1 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. BARB 78-137-P |
| Petitioner | : | (A/O No. 15-02502-02010) |
| v. | : | |
| | : | No. 18 Mine |
| SHAMROCK COAL COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: John H. O'Donnell, Attorney, Office of the Solicitor, Department of Labor, for Petitioner;
Neville Smith, Attorney, Manchester, Kentucky, for Respondent.

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of civil penalties against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary

under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On January 16, 1978, the Mine Safety and Health Administration (MSHA), 1/ through its attorney, filed a petition for assessment of civil penalties charging 20 alleged violations of the Act.

Answer

On January 31, 1978, Respondent filed a detailed response to the allegations and requested a hearing thereon.

Tribunal

A hearing was held in Knoxville, Tennessee, on February 14, 1979 Both MSHA and Shamrock Coal Company were represented by counsel (Tr. 3-4).

Evidence

The Judge held a prehearing conference before bringing the hearing to order and heard preliminary discussions bearing on the issues on the part of counsel for both parties.

The Judge, after hearing all evidence, studying the record, reviewing the exhibits, giving sympathetic regard to mitigating circumstances, and fully considering the criteria shown in section 109(a)(1) of the Act, made findings of fact, conclusions of law and issued an ORDER on the record, rendering his decision from the bench. Twenty violations were found as originally charged.

1/ Successor-in-interest to the Mining Enforcement and Safety Administration (MSHA).

Findings of Fact and Conclusions of Law

The findings of fact, conclusions of law, and ORDER made on the record from the bench are hereby incorporated by reference and are AFFIRMED (Tr. 21-27).

Civil Penalties Assessed

| Notice No. | Date | Standard 30 CFR | Penalty |
|---|---|---|---|
| 6-0050 | 06/17/26 | 75.1725 | $ 50 |
| 6-0098 | 09/29/76 | 75.1100-2(b) | 50 |
| 7-0017 | 02/02/77 | 70.100(b) | 10 |
| 7-0027 | 02/14/77 | 75.303 | 45 |
| 7-0033 | 03/02/77 | 75.329 | 50 |
| 7-0038 | 04/26/77 | 75.503 | 50 |
| 7-0039 | 04/26/77 | 75.701 | 100 |
| 7-0041 | 04/26/77 | 75.200 | 40 |
| 7-0045 | 05/02/77 | 75.316 | 45 |
| 7-0049 | 05/02/77 | 75.400 | 50 |
| 7-0050 | 05/02/77 | 75.400 | 50 |
| 7-0053 | 05/02/77 | 75.516 | 50 |
| 7-0054 | 05/02/77 | 75.202 | 50 |
| 7-0055 | 05/02/77 | 75.303 | 60 |
| 7-0056 | 05/02/77 | 75.515 | 50 |
| 7-0060 | 05/02/77 | 75.507 | 45 |
| 7-0061 | 05/02/77 | 75.316 | 55 |
| 7-0064 | 05/05/77 | 75.503 | 50 |
| 7-0066 | 05/05/77 | 75.503 | 50 |
| 7-0067 | 05/05/77 | 75.503 | 50 |
| | | | $1,000 |

Disposition

The Judge was notified by letter from the Office of the Solicitor, U.S. Department of Labor, that the Respondent had submitted payment

of $1,000, as ordered for the 20 violations found by the Judge in his BENCH decision. WHEREFORE the above-captioned is CLOSED.

Malcolm P. Littlefield

Malcolm P. Littlefield
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Shamrock Coal Company, P.O. Box 10388, Knoxville, TN 37919 (Certified Mail)

Neville Smith, Attorney, P.O. Box 441, Manchester, KY 40962 (Certified Mail

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 21 1979

| | | |
|---|---|---|
| RAY MARSHALL, | : | Civil Penalty Proceeding |
| SECRETARY OF LABOR, | : | |
| Petitioner | : | Docket No. PITT 79-86-P |
| | : | Assessment Control No. |
| | : | 36-06113-03004 |
| v. | : | |
| | : | Westland No. 2 Mine |
| CONSOLIDATION COAL CO. | : | |
| Respondent | : | |

## DECISION

On March 9, 1979, the Mine Safety and Health Administration (MSHA), moved the Judge to approve a settlement to which the parties had agreed, and dismiss the above-captioned.

The alleged violations and proposed settlements are as follows:

| Number | Date | 30 CFR Standard | Assessment | Settlement |
|---|---|---|---|---|
| 23226 | 7/17/78 | 77.1003 | $106.00 | $106.00 |
| 233770 | 7/24/78 | 75.1719-4 | 48.00 | 36.00 |
| | | Total | $154.00 | $142.00 |

As grounds to support the proposed reduction in the penalty for citation No. 233770 MSHA avers:

> "A reduction from the original assessment is warranted because the negligence of the operator in citation No. 233770 did not merit an allocation of nine points. By reducing this amount of five points and by applying the figures supplied in the penalty conversion table, an appropriate penalty is $36:00 rather than $48.00."

As the above settlement is within the bounds of reason, does not shock the conscience and will effectuate the deterrent purpose of civil penalties under section 110(a), it is hereby APPROVED.

The above-captioned is DISMISSED.

The hearing scheduled for Wednesday, March 14, 1979, in Pittsburgh, Pennsylvania, was VACATED.

Malcolm P. Littlefield
Administrative Law Judge

Distribution:

Regional Solicitor, U.S. Department of Labor, Room 14480-Gateway Bldg., 3535 Market Street, Philadelphia, Pa. 19104 (Att: Marshall H. Harris and Barbara Krause Kaufmann, Attorneys)(Cert. Mail)

Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, Pa. 15241 (Att: Karl T. Skrypak, Attorney) (Cert. Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON VIRGINIA 22203

MAR 2 1 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. BARB 78-637-P |
| | : | (A/O No. 15-02502-02024) |
| v. | : | |
| | : | No. 18 Mine |
| SHAMROCK COAL COMPANY, Respondent | : | |

DECISION

Appearances: John H. O'Donnell, Attorney, Office of the Solicitor, Department of Labor, for Petitioner;
Neville Smith, Attorney, Manchester, Kentucky, for Respondent.

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of civil penalties against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of

title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On August 17, 1978, the Mine Safety and Health Administration (MSHA), 1/ through its attorney, filed a petition for assessment of civil penalties charging nine alleged violations of the Act.

Answer

On September 14, 1978, Respondent filed a detailed response to the allegations and requested a hearing thereon.

Tribunal

A hearing was held in Knoxville, Tennessee, on February 14, 1979. Both MSHA and Shamrock Coal Company were represented by counsel (Tr. 4-5).

Evidence

The Judge held a prehearing conference before bringing the hearing to order and heard preliminary discussions bearing on the issues on the part of counsel for both parties.

The Judge, after hearing all evidence, studying the record, reviewing the exhibits, giving sympathetic regard to mitigating circumstances, and fully considering the criteria shown in Section 109(a)(1) of the Act, made findings of fact, conclusions of law and issued an ORDER on the record, rendering his decision from the bench. Nine violations were found as originally charged.

1/ Successor-in-interest to the Mining Enforcement and Safety Administration (MESA).

Findings of Fact and Conclusions of Law

The findings of fact, conclusions of law, and ORDER made on the record from the bench are hereby incorporated herein by reference and are AFFIRMED (Tr. 14-17).

Civil Penalties Assessed

| Notice No. | Date | Section 30 CFR | | Penalty |
|---|---|---|---|---|
| 7-0129 | 09/26/77 | 75.316 | | $200 |
| 7-0131 | 09/29/77 | 75.202 | | 25 |
| 8-0012 | 02/21/78 | 75.400 | | 35 |
| 8-0013 | 02/21/78 | 75.200 | | 25 |
| 8-0014 | 02/21/78 | 75.200 | | 25 |
| 8-0015 | 03/01/78 | 75.1710 | | 35 |
| 8-0016 | 03/01/78 | 75.1710 | | 35 |
| 8-0017 | 03/01/78 | 75.1710 | | 35 |
| 8-0018 | 03/01/78 | 75.1710 | | 35 |
| | | | Total | $450 |

Disposition

The Judge was notified by letter from the Office of the Solicitor, U.S. Department of Labor, that the Respondent had submitted payment of $450.00, as ordered, for the nine violations found by the Judge in his BENCH decision. WHEREFORE the above-captioned is CLOSED.

Malcolm P. Littlefield

Malcolm P. Littlefield
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Shamrock Coal Company, P.O. Box 10388, Knoxville, TN 37919 (Certified Mail)

Neville Smith, Attorney, P.O. Box 441, Manchester, KY 40962 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 22, 1979

| | | | | |
|---|---|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceedings | | |
| | : | Docket Nos. | A.C. NO. | Mine |
| v. | : | PITT 79-55-P | 36-00973-03003 | Banning |
| | : | -108- | -00809-03006 | Newfield |
| | : | -124- | -00808-03001 | Russellton |
| REPUBLIC STEEL CORPORATION, Respondent | : | | | |

ORDER APPROVING SETTLEMENT AGREEMENTS
AND DIRECTING PAYMENT

Appearances: Inga Watkins, Esq., Office of the Solicitor of Labor, for Petitioner
B. K. Taoras, Esq., Attorney for Republic Steel Corporation, Respondent

On March 21, 1979, in open court, counsel for Petitioner moved for approval of settlement agreements in each of the above docket numbers.

With respect to Docket No. PITT 79-55-P, the parties agreed to settle the matter for payment of $295, the amount of the original assessment. The violation charged was of 30 CFR 75.200. The hazard was reduced by circumstances and the negligence was slight.

With respect to Docket No. PITT 79-108-P, the parties agreed to settle the matter for payment of $122, the amount of the original assessment. The citation charged a violation of 30 CFR 75.1725. The condition was not serious, there was a minimal history of prior violations of this standard and the condition was abated in good faith.

With respect to Docket No. PITT 79-124-P, the parties agreed to settle the matter for payment of $180, the amount of the original assessment. The citation charged a violation of 30 CFR 75.507. The condition was not serious and there was a minimal history of prior violations of this standard.

Having duly considered the matter, I conclude that the settlement agreements should be approved as being consistent with the policy of the Act.

Therefore, it is ORDERED that the settlement agreements are APPROVED. Respondent is ORDERED to pay within 30 days of the date of this decision

the following amounts:

| | | |
|---|---|---|
| Docket No. PITT 79-55-P | - | $295 |
| -108-P | - | 122 |
| -124-P | - | 180 |

Upon payment of this amount, the proceedings will be DISMISSED.

James A. Broderick
Chief Administrative Law Judge

Distribution:

B. K. Taoras, Esq., Attorney for Republic Steel Corporation, Coal Mining Division, 604 Fayette Bank Building,Uniontown, PA 15401

Inga Watkins, Esq., Trial Attorney, MSHA, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 26, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. BARB 78-606-P |
| | : | A.O. No. 15-07166-02023V |
| v. | : | |
| | : | Sinclair No. 2 Mine |
| PEABODY COAL COMPANY, Respondent | : | |

## DECISION

Appearances: John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner;
Thomas F. Linn, Esquire, St. Louis, Missouri, for the respondent.

Before: Judge Koutras

## Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on August 7, 1978, by the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for two alleged violations of mandatory safety standards 30 CFR 75.200, and 75.1400, set forth in section 104(c)(2) orders, issued by Federal mine inspectors Arthur J. Parks and Thomas M. Lyle in October and December 1977. Respondent filed an answer and notice of contest on September 7, 1978, denying the allegations and requesting a hearing. A hearing was held in Evansville, Indiana, on December 12, 1978, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

## Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing

regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation, based upon the criteria set forth in section 109(a)(1) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

## Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Interim Commission Rules, 29 CFR 2700.1 et seq. 43 Fed. Reg. 10320-10327, March 10, 1978.

## Stipulations

The parties stipulated to the following:

1. At all times relevant, the mine was owned and operated by Peabody Coal Company, a large coal mine operator. The mine employed 219 persons underground, 25 persons on the surface, and has a daily production of 3,000 tons of marketable coal (Tr. 5).

2. Any penalty assessed for the alleged violations will not adversely affect the respondent's ability to remain in business (Tr. 5).

## Discussion

104(c)(2) Order No. 7-0127, 1 AJP, issued on October 18, 1977, by Federal coal mine inspector Arthur J. Parks, citing a violation of 30 CFR 75.200, states as follows:

> The approved roof control plan (September 2, 1977) was not being followed on the No. 2 Unit (I.D. 004) Northwest Mains in that entries and crosscuts were being driven in

excessive widths (Last crosscut between No. 1 & No. 2 entries- 23 ft. 5 inches; No. 4 entry at the feeder- 22 ft. 8 inches; No. 4 entry 2 crosscuts inby the feeder- 24 ft. No. 5 entry 30 feet inby spad no. 915-21 feet). Responsibility of Albert Knight, mine manager; Byron Bailey and Charles Chumley, Asst. Mine Managers; and Roy Stills and James Griggs, Section Foremen.

30 CFR 75.200 provides as follows:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Testimony and Evidence Adduced by Petitioner

MSHA inspector Arthur J. Parks testified that he is familiar with the Sinclair No. 2 Mine which is located near Drakesboro, Kentucky, near Muhlenberg County and is in the Kentucky No. 9 seam. A conventional method of mining is used there, i.e., the coal is cut, reeled and then shot and loaded out with a loading machine. Continuous mining machines are not presently utilized (Tr. 9-10). On October 18, 1977, he issued to assistant mine manager Byron Bailey, section 104(c)(2) Order of Withdrawal No. 1 AJP, citing 30 CFR 75.200, because he observed places that were wider than the 20-foot width that the roof control plan called for. The first place that he noticed in excess of 20 feet was the last open crosscut on the return side of the unit. The crosscut between Nos. 1 and 2 entries, which is the last open crosscut on the return, was 23 feet 5 inches. He made this determination by using a 50-foot tape line. In addition, he found three

other places where the roof control plan had not been followed. Two places were in front of the feeder, which is in the No. 4 entry, and another place was in front of the power center, which is in the No. 4 entry. The fourth place listed on the face of the order is No. 5 entry, 30 feet inby spad No. 915; the width at that point was 21 feet. Under the roof control plan, the maximum width that each of these entries could be was 20 feet (Tr. 16). He was at the mine to investigate a roof fall, which, in turn, prompted him to check for wide places or other violations. The roof-bolting pattern seemed to be satisfactory.

Inspector Parks indicated that cutting wide places weakens the top, which, in turn, may result in a roof fall since the top weakens when the entry is too wide. Coal at the Sinclair No. 2 Mine averages 58 inches in height. In some places, one can stand up, but in other places it is difficult to even walk, and it has been determined that a 20-foot height in this coal seam works best. With the exception of shift changes, as a rule, there is someone in the area 24 hours a day. The cracks in the roof presented a danger of a potential roof fall. He sounded the roof and, in his opinion, it sounded drummy. From his visual examination of the roof, he determined that some timbers needed to be set in quickly to compensate for the wide entries in the crosscuts (Tr. 17-20).

Inspector Parks found the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard because a roof fall could be fatal or permanently injuring. Such a roof fall previously occurred in the fourth crosscut from the face of the No. 3 entry, where the entry and crosscut widths were approximately 18 feet. From this incident, he arrived at the conclusion that if the roof fell in an area with that width, it would be likely in areas where the width is even wider, e.g., the face. Mr. Parks believed the operator should have known of the condition, and that with reasonable effort, should have known that certain areas were too wide. The last open crosscut between No. 1 and No. 2 entries, which is 23 feet 5 inches, is the place where an air measurement is customarily taken by the face boss or preshift examiner. Since the air measurement is determined by measuring across the crosscut and then multiplying the height to get the area and then multiplying that by the linear reading on the anemometer to find out what the quantity of air is passing throught the crosscut, in measuring the width, respondent would have determined that the crosscut was 3 feet 8 inches too wide and could have set some timbers in it. In addition, the face boss marks the width of the face for the cutter and driller to follow, and by so marking the area, the width is determined (Tr. 22-24).

While the excessive widths were visually observable, Mr. Parks also measured the places that were cited on the face of the order, and these were from the narrowest points of the entry and/or crosscuts and were not from duck nests (i.e., a V-shaped cut in the back

of the rib that occurs as a result of a cutterman sumping too far to the right, thereby pulling his bar too far to the left). If he had found that an effort had been made to hold the width of the ribs to 18 feet and the general rib line was 18 feet, he doubts that he would have cited any violations because the average rib line would probably have been 20 feet or no more than 20 feet. The ribs were not straight; they were full of duck nests, and there were duck nests on the entries. With regard to the probability of injury or death occurring to a miner due to the condition, Mr. Parks indicated the area in front of the feeder would be the most dangerous, and his reason for this opinion is that when men are traveling through this area, due to the car and feeder noise, the men might not hear the top working (Tr. 25-29).

Inspector Parks terminated the order on October 20, 1977, 2 days after it issued, and he believed the operator did not demonstrate good faith in abating the condition because the 100 timbers which had to be set in order to terminate the order, could have been set on the second and third shifts on October 18. However, the foremen at the mine had gone on strike and, as a result, there was no one to set the timbers earlier, and when he returned to the mine on the 19th, he saw only three men underground (Tr. 34).

On cross-examination, Mr. Parks stated that the term "excessive widths," as used in his order, means in excess of 20 feet. When he issued the order, he was aware of the provision on page R-5 of the MESA Manual that defines an "excessive width" as 12 inches or more than the planned opening width; however, he later testified he was not aware of it. According to the MESA Manual, the widths cited in the order would not have been excessive (Tr. 36-40).

Mr. Parks testified that he made the measurements with a cloth tape measure, and assistant mine manager Byron Bailey held the other end of the tape measure for him. He doubted that the tape could have stretched enough through use to make a difference in measuring. He did not know when the last crosscut between Nos. 1 and 2 entries (23 feet 5 inches wide) was mined (Tr. 41-45). With regard to the first area that he noted which was 23 feet 5 inches and located in the last open crosscut, Mr. Parks indicated the men were still working in the general vicinity. He did not determine upon first seeing the area, that it was an unwarrantable failure when he found out that it was excessively wide, since he thought that it was a mistake. However, after he saw three more places that were too wide, he determined that it was a practice throughout the mine and that some timbers should be put up. Although he observed seven places that were in violation due to excessive widths, he documented only four on his order. When he went back to terminate the order and to check over the rib, he found, in total, approximately 16 places that were too wide. Once he issued the order, he would not terminate it until all the wide places on the run were timbered, thereby making the area

safe. After he came back to terminate, he found that there were other places that were wider than the ones that he cited (Tr. 54-57).

Inspector Parks testified that he cited only four places because he was satisfied in his mind that if he started writing up one citation after another, that those working at the mine could continue working and endangering themselves if there were more wide places. His intent was to get the units shut down and make the people aware of the bad top or bad conditions from the excessive widths and get the condition corrected (Tr. 59-63). When he inspected the top and areas where the excessive widths existed, he sounded the top, however, he prefers to rely upon the examination of the roof, since he cannot tell a great deal on the basis of sound. He was, nonetheless, satisfied with it. Although he did not like the looks of the roof, he understands that the pinning pattern in roof control can hold the roof in place even if it has cr ks in it. The areas were pinned and he did not observe a pin patter violation. Timbers are frequently knocked out by equipment running through, especially on the corners where the shuttle cars are running through since they are wide machines (Tr. 69-70). Although he found no areas in the entries cited to be less than 20 feet wide, the entry and the crosscut at the roof fall were 18 feet wide and on previous occasions he did measure other areas on the unit and some were less than 20 feet and some crosscuts were 17-1/2 feet wide (Tr. 74-76).

Mr. Parks believed the wide places are caused by the creation of duck nests, i.e., the cutterman getting off his mark and then trying to get back on, but not really knowing where he is. It is a multiplying effect and the area could keep getting wider and wider, and while the rib line could be perfectly straight, there could still be an excessive width. He described where his measurements were made from the rib line, and he indicated there were no straight rib lines throughout the unit (Tr. 77-81).

Inspector Parks inidcated that when he returned to the mine the next day, there were few people there because of a strike. He referred to a memorandum from his superiors who advised the inspector to consider issuing section 104(c) unwarrantable failure orders rather than 104(b) notices.

When he returned to the mine, he did not see very many men there and he assumes that there was not a sufficient number of men working to terminate the order. He found four more places that needed to be timbered before he could terminate the order, but he did not issue a notice or order on those other areas because the mine was still under a closure order and no work was being performed. Had it not been for the strike, he does not know whether good faith would have been shown, but he can reasonably expect it to be shown (Tr. 84-87).

In response to bench questions, Mr. Parks stated that in order to abate the order, 100 posts were set all over the unit, but at the four locations with excessive widths, approximately 30 posts were set. The posts that were set in the other locations were set in connection with other wide places and entries not cited in his order. The ultimate effect of his withdrawal order, therefore, went to other wide places which he did not cite and which the operator was required to abate anyway. Aside from the wide places that he found, these locations were in compliance with the other provisions of the roof control plan, and he did not notice a violation of the roof-control pattern according to the pin pattern (Tr. 97-98).

Respondent's Testimony

Albert Knight, general mine manager, testified he was at the mine surface on October 18, 1977, and became aware of the subject order when the face foreman called him and told him that an order had been issued on the section. When he arrived at the cited area, he saw that the rib had broken and they began timbering it out so that it could be abated on the second shift. He was not present when the order was abated, but subsequently learned that 18 to 25 timbers had to be installed to take care of the four areas cited in the order. A work stoppage had been called by the face foremen and mine management personnel based on the (c) orders and notices that had been issued to the Sinclair No. 2 Mine and to other mines during that period of time (Tr. 104-105).

Mr. Knight did not consider the alleged violation to be caused by an unwarrantable failure, and he did not believe that it was noticeable enough for anyone to pay much attention to it (Tr. 110-111). The roof control plan (Exh. P-2) calls for the width of openings on the entries to be 20 feet and rooms to be 26 feet. For entries, that plan calls for roof support to consist of crossbars plus supplementary timbers and crossbars, if needed. With respect to rooms, they are not timbered unless they have an abnormal condition. The roof support plan requires that they timber out any entries. The belt entry was timbered up to the tailpiece and the other entries were timbered up (Tr. 114-116).

Mr. Knight described "duck nests," and stated it is possible to avoid creating them by having a conscientious machine operator. Cutting machine operators are shown where to cut by the face boss marking the ribs and the center line with florescent paint. Even though mine management shows the areas to be cut, it is still possible for duck nests to be created through error or inexperience on the part of the machine operator (Tr. 117-120).

He observed each of the areas cited by Inspector Parks in his order, and in his view, each of the wide areas were caused or created by cutting duck nests, and the roof above the duck nests was roof-bolted (Tr. 121-122).

Mr. Knight alluded to a meeting held by mine management with local MSHA officials in Madisonville to discuss the issuance of unwarrantable failure notices at the mine. The work stoppage by the mine foremen was caused by the issuance of these orders and the foremen were concerned because they took them personally and viewed them as a reflection on their job performance. Since that meeting, he received no more unwarrantable failure orders (Tr. 123).

On cross-examination, Mr. Knight stated that the meeting with MSHA was not intended to intimidate anyone. He clarified his previous statement that no subsequent 104(c)(2) orders were issued, and indicated that one was issued on October 27, 1977, for a section 75.1704 hoist violation, and indicated that another general inspection has not been completed at the mine (Tr. 130). Mr. Knight was not present on the section when Mr. Parks issued his order or made his measurements (Tr. 139).

104(c)(2) Order No. 7-0166, 1 TML, issued on December 30, 1977, by Federal coal mine inspector Thomas M. Lyle, citing a violation of 30 CFR 75.1400, states as follows:

> A qualified hoisting engineer was not provided on the surface at or near the hoist facility of the Sinclair underground No. 2 Mine on the third shift while persons were underground in the event of an emergency should arise to withdraw such persons from the underground workings. Responsibility of Ruben Thorpe, supt. and Bill Hampton, mine foreman third shift.

30 CFR 75.1400 provides as follows:

> Every hoist used to transport persons at a coal mine shall be equipped with overspeed, overwind, and automatic stop controls. Every hoist-handling platforms, cages, or other devices used to transport persons shall be equipped with brakes capable of stopping the fully loaded platform, cage, or other device; with hoisting cable adequately strong to sustain the fully loaded platform, cage, or other device; and have a proper margin of safety. Cages, platforms, or other devices which are used to transport persons in shafts and slopes shall be equipped with safety catches or other no less effective devices approved by the Secretary that act quickly and effectively in an emergency, and such catches shall be tested at least every 2 months. Hoisting equipment, including automatic elevators, that is used to transport persons shall be examined daily. Where persons are transported into, or out of, a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, except that no such engineer shall be required for automatically operated cages, platforms, or elevators. [Emphasis added.]

Petitioner's Testimony and Evidence

MSHA inspector Thomas M. Lyle confirmed that he issued the order in question and served it on Bill Hampton, the third shift foreman. Mr. Lyle testified that he arrived at the mine at 4 a.m. on December 30, 1977, and encountered no one in the area of the foreman's office nor in the hoist room, where normally a man would be on duty. After walking through the bath house and the supply room which he originally had passed through, he encountered a supply clerk of who he asked the whereabouts of the foreman and hoistman. The supply clerk told him that Mr. Hampton was the foreman and to the best of his knowledge was also the hoistman and that he and the other men were underground (Tr. 142-145).

He then went to the shop and asked foreman Randy Plunkett as to where Mr. Hampton might be located and was told that Mr. Hampton was in the mine with two other foremen. He was also told by Mr. Plunkett that Mr. Hampton was the hoisting engineer. He asked Mr. Plunkett whether he was certified to run the hoist and was told that he was not and that he did not know anything about running one. He then asked Mr. Plunkett if he was aware that section 75.1400 of the Code of Federal Regulations requires that a hoisting engineer be on duty at all times. Mr. Plunkett responded that he was aware of the provision, but that he was not the mine foreman, but would try to get in touch with Mr. Hampton. However, Mr. Plunkett was unsuccessful in doing so. In the meantime, Mr. Lyle called his supervisor, Clyde Turner, and told him what he had found at the mine and that he was going to issue a 104(c)(2) order. At 5:45 that morning, Byron Bailey, the assistant foreman on the day shift, came in and Mr. Lyle told Mr. Bailey that he was going to issue an order. Mr. Bailey replied that he did not know exactly why Bill Hampton was underground, but that both he and Mr. Hampton were aware that they were supposed to keep a qualified hoisting engineer on duty and said that there is no excuse. Mr. Bailey finally got in touch with Mr. Hampton by telephone and told Mr. Hampton that an order was in the process of being issued and that he should withdraw the men from the mine and bring them outside (Tr. 146-155).

Mr. Lyle described the hoisting device in question and its operation. He indicated that it was possible for men to walk out of the mine without using a hoist unless they were injured. However, at the time the order issued, the slope was icy and, in his opinion, two men could not carry an injured man out of the mine on a stretcher and up the slope. If they should be successful in doing so, it would take an extremely long time.

He spoke with Mr. Hampton after he came out of the mine and Mr. Hampton told him that he knew that there was supposed to be a hoist man on top, but that there were only two men besides himself who were working and he just could not sit around while they were

in the mine rock dusting, so he went in the mine to help them. Mr. Hampton then told him that he promised that it would not happen again (Tr. 155-162).

Mr. Lyle testified that he believed the violation could have contributed to a "significant and substantial" safety hazard because if someone underground other than Mr. Hampton had been injured, it would have taken Mr. Hampton probably 10 or 15 minutes to walk up to the hoist room and drop the car. In addition, someone would have to have been ready to help load the car and bring them out. It would have probably taken 30 minutes to do all this. Had there been a hoist man on the surface, if someone were to be injured, all that would have been necessary would be to call him and tell him to drop the car and then load the injured man and bring him straight out. In a matter of approximately 3 minutes, the injured man would have been brought to the surface and would be on his way to a hospital (Tr. 163-165).

Mr. Lyle testified that he made a finding that the violation was an unwarrantable failure because Mr. Hampton is a mine foreman, he had been trained in operating a hoist and had certification papers as to his ability and, he was aware of the requirement that someone be on duty to operate the hoist. In addition, on other occasions complaints had been made that men were going into the mine on Sundays without a hoisting engineer and he and other inspectors had talked to the company personnel at the mine. He had talked with Ruben Thorpe, the superintendent of the mine, and the last of these conversations was right after the miners went on strike, sometime around December 5 or 6, 1977 (Tr. 165-167).

Although 30 CFR 75.1400 contains the caveat that a hoisting man need not be present if there are automatically operated cages, platforms or elevators, Mr. Lyle did not believe that it would be applicable to the situation at hand because Sinclair No. 2 Mine does not have an automatic cage. Even the emergency escapeway requires a person to raise it. He served the notice of abatement (Exh. P-5) on Mr. Hampton 1 hour and 15 minutes after he issued the order. With regard to whether or not good faith was exercised, upon arriving at the mine, he did not receive much cooperation on the surface since the mine foreman was underground with two other foremen, except that he was called for. After Mr. Bailey arrived, however, he cooperated with him. He abated the violation after going down to the hoisting room with the day shift hoistman, Larry Cleveland. He checked the hoist as Mr. Cleveland operated it. Since Mr. Cleveland was a qualified hoisting engineer and was on duty at the time, he abated the violation. Mr. Cleveland was not present at the time he issued the order of withdrawal, and, in his opinion, Mr. Cleveland showed a good degree of proficiency with respect to operating a hoist (Tr. 167-170).

On cross-examination, Mr. Lyle confirmed that the mine was not in operation on the day he issued his order, except for nonunion personnel, and this was due to the nationwide miners' strike. The three people that were underground did not use the slope car, and apparently walked into the mine. He did see Mr. Hampton walking near the iron core of the portal. From his reports, it was a practice on Sunday for supervisory personnel to walk into the mine and inspect it for hazardous conditions and then walk back out. The slope was 732 feet long from the portal to the bottom and was at a 16-degree angle. He has walked down the slope and to the best of his recollection, there is a handrail. The slope, however, was severely frozen (Tr. 172-176).

Mr. Lyle testified that in addition to the hoist telephone, there was also a mine telephone underground that connects with the office on the surface and could be used if one was unable to reach anyone in the hoist house. If someone was in the shop and it would take him approximately 3 minutes to get over to the hoist house, he would consider that as being in close proximity to the hoist house. Had there been a qualified hoisting engineer in the bathhouse, office, or in the shop, he would not have issued the order regardless of whether the hoisting engineer was dressed, because in an emergency situation, he could have summoned someone out of the mine. In addition to the regular slope hoist, there is an emergency slope hoist. On the basis of Mr. Plunkett's earlier statement, he does not know whether or not Mr. Plunkett could operate the emergency hoist (Tr. 180-183).

Since it is likely that none of the three men were transported into the mine by a hoist, Mr. Lyle still believed that a qualified hoisting engineer has to be on the surface. He does not recall anyone ever commenting to him that when people walked into a mine and contemplated walking out of the mine, that in that case no hoisting engineer had to be in the hoisthouse. He does not know how long it takes for the hoist car or the hoist to get down to the bottom since he has never timed it (Tr. 186-187).

During a strike such as the one that was underway on December 30, 1977, Mr. Lyle agreed that it is a prudent and good mining practice to go in and inspect the mine on a regular basis and make sure that the integrity of the mine is maintained. He does not know if that is what Mr. Hampton and his two associates were doing that day, since they told him that they were rock dusting. Although Mr. Hampton, a qualified hoisting engineer, was on the surface at 6 a.m., as evidenced by the fact that he gave Mr. Hampton the order at that time, he did not abate the order until 7:15 a.m., because he was never asked to abate until Mr. Cleveland arrived, since he was told that they were going to discuss it (Tr. 188-189).

In response to questions from the bench, Mr. Lyle indicated that there is no question in his mind that the system of taking

people underground constitutes hoisting, and he does not consider it haulage. However, he did not know why it is not haulage, and neither he nor his fellow inspectors, to the best of his recollection, have questioned whether this particular device is a hoisting device. The slope in question is a designated escapeway (Tr. 195-205).

Respondent's Testimony

General mine manager Albert Knight testified he was at the mine the day the order issued and he confirmed that the mine was not working because of a nationwide miners' strike. The first shift was timbering, and the shift in question was fire-bossing and dusting. He did not know whether the hoisting device was used by the third shift on the day the order was issued. Normally, they had not been using it as the men had been walking in the mine and then walking out. He was told by Mr. Hampton that on the day the order issued, he walked in the mine and they walked out. In his opinion, it is not necessary to use the hoisting device to get underground since it is possible to walk in and to walk out of the mine. The slope is approximately 750 feet in length and is at a 16-degree angle. There are handrails which go all the way to the bottom. The hoisting device is used to transport men, but most of the time it is used for supplying the mine (Tr. 214-218).

Mr. Knight testified that it takes approximately the same time to walk from the bottom area up the full 700 feet to the portal as it would to use the hoisting device to bring a group of people out of the mine--approximately 7 minutes. Whether or not section 75.1400 requires a hoisting engineer to be on duty if the hoisting device is not used to take persons underground, has been an argument with the union people for about 3 years. Up until this particular order was written, he has consistently maintained that a hoisting engineer is not necessary when the device is not being used to get underground. Since the order issued, they have had a hoistman on duty on the surface and he described the operation of the hoist (Tr. 218-220).

Mr. Knight testified that during the strike, it was customary on the third shift to walk in and out of the mine and not use the device. Prior to the time the order was issued, the only time that the necessity of having a hoist was brought up was when the hoistman, a union employee, brought up the fact of going in and out of the mine and that it was against the law. When the mine is not on strike, the hoistman is on duty 24 hours per day. He is a qualified hoisting engineer and is on call 24 hours per day; thus, if he had been needed on the morning of December 30, 1977, he could have arrived at the mine in about 6 minutes, even though he lives about 5 or 6 miles from the mine (Tr. 221-223).

On cross-examination, Mr. Knight testified that while he could not recall the temperature on the day in question, he confirmed there could have been ice on the slope, even though it had been cleaned. The mine met the requirements of section 75.1402 and there are two telephones in the hoisthouse equipped with speakers and a page system which can be heard over the entire surface of the mine. He was not on the mine property at the time the order was issued, and has no idea why it took so long for the inspector to inform Mr. Hampton that the order of withdrawal had been issued. Normally, during a production shift, men are hauled in and out of the mine (Tr. 223-226).

## Findings and Conclusions

### Fact of Violation--30 CFR 75.200

In its posthearing brief, petitioner argues that it has established by a preponderance of the evidence that the areas cited were in fact wider than the 20 feet allowed by the mine-approved roof-control plan. Although conceding that the inspector cited only four places that had excessive widths, when, in fact, he observed 16 additional such places, petitioner asserts that the respondent understood that mining excessive widths would not be tolerated and the listing of the additional places would simply have been an exercise in futility. Further, although there were "duck nests" in the places cited, petitioner maintains that the inspector made actual measurements of the wide places, but did not include any part of a duck nest in his measurements. Regarding the Inspector's Manual provision defining "excessive" widths, petitioner argues that the roof-control plan is controlling and the Inspector's Manual reference is only relevant when weighing the gravity of the violation.

Petitioner points out that the excessive widths were not caused by rib sloughing and the inspector believed they resulted from a practice in the unit in question to mine areas at excessive widths, and considering the fact that the inspector observed some 16 places with excessive widths, and it took 18 to 25 timbers to abate the four places described in the order, petitioner maintains there was a practice of being indifferent about the excessive width problem on the part of the respondent, and the face boss told the inspector that the problem resulted because the cutting machine operator on the second shift was prone to cut too wide.

### Respondent's Arguments

In its posthearing brief, respondent argues that petitioner failed to establish a violation of section 75.200. While conceding that its roof-control plan restricts the widths of entries and crosscuts to 20 feet, respondent argues that its plan does not indicate that widths greater than 20 feet are excessive. Citing section 75.201, which provides that the method of mining followed in a mine

shall not expose miners to unusual dangers from roof falls caused by excessive widths of rooms and entries, respondent asserts that the record is devoid of any "unusual dangers from roof falls" attributable to openings or widths beyond those specified in its plan. Further, respondent cites petitioner's 1974 Inspector's Guidelines, which define the term "excessive" as "12 inches or more" than the planned opening width and argues that the facts adduced, when applied to the section 75.201 definition of "excessive" and the Inspector's Guidelines, cannot support a finding that excessive widths existed at the mine as charged in the citation. Respondent also argues that the wide areas cited resulted from "duck nests," which in respondent's opinion, are normal conditions caused by the cutting machine.

I find that the preponderance of the evidence adduced in this proceeding supports a finding of a violation of section 75.200. It is clear from the evidence presented, that the widths of the entries and crosscuts cited by the inspector were driven in widths in excess of the approved roof-control plan. It is also clear that the failure to comply with the roof-control plan constitutes a violation of section 75.200. Peabody Coal Company, 8 IBMA 121 (1977). Respondent's suggestion that the inspector's measurements are suspect is rejected. I fail to understand how one can calibrate a tape measure, as suggested by respondent, and respondent was free to take its own measurements, but did not do so. Respondent's personnel assisted the inspector in taking his measurements and I find the inspector's testimony regarding those measurements to be credible. Respondent's assertion that the wide places measured by the inspector resulted from "duck nests" caused by the cutting machine bar is likewise rejected. Respondent concedes that the measurements were made in the general vicinity of the duck's nests and the inspector's testimony that he was careful to avoid the duck nests while making his measurements, stands unrebutted. Under the circumstances, I find that the inspector's measurements as stated in his order, were accurate and that petitioner has established that the wide places did, in fact, exist as stated on the face of the order.

Respondent's reliance on the cited Inspector's Manual instructions and guidelines regarding the interpretation of the term "excessive widths" as a defense to the citation, is rejected. The Inspector's Manual does not have the force and effect of law or a mandatory standard and is not controlling. Here, the roof-control plan and provision with regard to the widths of the areas cited is controlling and any deviation from that provision is a violation not only of the plan, but also of section 75.200. Even if the Inspector's Manual reference at 75.201-1 (Exh. R-5) were deemed to be controlling, it seems clear to me that the inspector followed the exception noted which states: "[I]f it is evident that excessive widths are prevalent and are caused by poor mining practices, a violation shall be cited." In this case, it is clear from the inspector's testimony that he believed the excessive widths resulted from poor mining practices in that the cutting machine operator consistently failed to

cut straight entries and crosscuts and that mine management failed to insure that the marked-out areas were, in fact, cut straight. Respondent's own witness conceded that wide entries were, in part, due to poor mining practices. Further, although not detailed in his order, the inspector cited numerous other locations where the entries and crosscuts were driven too wide and it is obvious to me from his testimony that he believed the excessive widths which he found on the day of his inspection were prevalent, were caused by bad mining practices on that day, and that the area cited was not adequately supported. While it may have been better for the inspector to have included these other areas in his order, the fact that he did not, does not detract from his unrebutted testimony and findings made at the time the order issued.

Size of Business and Effect of Penalty Assessment on the Respondent's Ability to Remain in Business

The parties have stipulated that the respondent is a large coal mine operator and that any civil penalty assessed by me in this matter will not adversely affect its ability to remain in business, and I adopt these stipulations as my findings in this regard.

Good Faith Compliance

The inspector's conclusion that the respondent demonstrated lack of good faith in abating the conditions cited is rejected. In support of his conclusion in this regard, the inspector testified that 100 roof-support timbers had to be set to abate the conditions cited and that due to a mine foremen's "strike" or work stoppage, adequate personnel were not available to do the work. However, it is clear that the 100 timbers were, in fact, required to support not only the areas cited, but the additional areas which concerned the inspector and which the respondent was required to abate before he would terminate the order. Thus, it is clear that substantial work had to be performed before termination of the order occurred. As for the work stoppage by the foremen, while these individuals are part of mine management, there is no evidence that the work stoppage was, in fact, condoned by the mine superintendent or that it took place for the purpose of avoiding compliance. That work stoppage apparently took place because the foremen believed MSHA's enforcement practices with respect to the issuance of unwarrantable failure violations were unjustified and reflected on what they perceived was an attack on their job performance. Aside from the merits of that controversy, I take note of the fact that the work stoppage subsequently resulted in a meeting with local MSHA district enforcement officials for the purpose of discussing the matter further and there is no evidence that the respondent subsequently failed to make a diligent effort to comply. Given the circumstances presented, I cannot conclude that the time taken to abate (2 days) was untimely or an indication of a lack of good faith. The affected area was closed by the order and

the inspector himself recognized that no men were available to do the work and he did not specifically fix any time for abatement since his order effectively closed down the area where excessive widths were being driven. Further, while the respondent could have taken the position that it was only required to install enough additional roof support to abate the specific areas cited by the order, it did, in fact, install all of the additional roof support as required by the inspector in the other areas which concerned him and it obviously did so to terminate the order so that production could resume. In view of the totality of the circumstances which prevailed at the time in question, I conclude and find that the respondent exercised normal compliance once the order issued and should not be penalized further by adopting petitioner's suggestion that it exhibited a lack of good faith in abating the conditions once the order issued.

Negligence

Respondent's suggestion that the wide areas cited resulted from "duck nests" created by the machine operator and that the respondent cannot be held accountable for this practice, is rejected. As indicated earlier, the inspector took into consideration the existence of duck nests, but he specifically stated that the measurements he made were of the wide entries and crosscuts. Further, he specifically stated that the mining widths are controlled underground by the face boss marking the required widths of the cuts and that in the event the cutting machine operator is wide of those marks, it is the responsibility of the face boss to take corrective action on the scene to insure that the areas are cut as marked and in accordance with the roof-control plan. I agree with these observations by the inspector and I find and conclude that on the day in question, the wide areas cited were caused by the failure of the cutting machine operator to cut within the areas apparently marked out by the face boss and that with a little more attention on his part, the conditions cited could have been prevented. Respondent admitted that the conditions cited were, in part, caused by poor mining practices and resulted from "likely errors" on the part of the machine operator. In the circumstances, I find that the violation cited resulted from the respondent's failure to exercise reasonable care to prevent or correct the conditions which it knew or should have known existed and that this failure on its part constitutes ordinary negligence. I find nothing in the record to support any conclusion that respondent recklessly and deliberately caused the conditions cited.

Gravity

Respondent's proposed finding that the violation cited was nonserious is rejected. The inspector was in the mine on the day his order issued for the purpose of investigating a roof fall which had occurred in an area where the mining width was approximately 18 feet. He was concerned over the fact that the cutting of entries and crosscuts at widths more than that called for by the roof-control plan

would, over a period of time, likely weaken the roof and cause another possible roof fall, unless additional roof support was installed in those areas. Considering all of the wide places which he found during his inspection, I cannot disagree with the inspector's conclusions in this regard. Although it is true that the roof areas in question were bolted in accordance with the roof-control plan, the fact is that the inspector testified the roof sounded drummy and he believed additional support was required to compensate for the wide areas cited. In the circumstances, the failure of the respondent to follow its roof-control plan by cutting wide entries and the failure to install additional roof support was serious and presented a potential for additional roof falls in the cited areas. I find that the violation was serious.

History of Prior Violations

Petitioner introduced a computer printout of the prior history of violations pertaining to the Sinclair No. 2 Mine (Exh. P-6). That history reflects a total of 145 paid violations for that mine during the period January 1, 1970, to April 4, 1977. During that same period of time, the history for the operator/controller (Kennecott Copper Corporation) reflects a total of 857 paid violations.

Respondent contends that at the time the order issued on October 18, 1977, the history of violations attributable to the respondent should be "zero" since on July 1, 1977, the corporate stock of Peabody Coal Company had been sold by Kennecott Copper Corporation, the prior owner, to Peabody Holding Company, the present owner. Respondent points to the fact that the mine was previously owned by the Kennecott Copper Corporation and that the ownership period, as reflected on the face of the printout, ended on June 30, 1977. At the time of the violation in question, respondent argues that the Peabody Holding Company (PHC), and not Kennecott, was the controlling company, and that petitioner has introduced no evidence respecting the prior history of violations attributable to PHC. Since petitioner has listed only those violations attributable to Peabody Coal Company when it was owned by Kennecott, and since MSHA's Office of Assessments recognized the fact when a mine is sold to a new operator, that new operator starts out with a "clean slate" (Tr. 251), respondent asserts that petitioner is now estopped from arguing the contrary. Further, respondent argues that significant management changes were made in Peabody Coal Company after the sale of that company by Kennecott to PHC on July 1, 1977, including most directors, many officers, the president, and the chief executive officer, and that such changes were doubtlessly deemed to be an improvement over the prior management arrangement. In the circumstances, respondent argues that the prior history, as reflected in the printout, should not be considered as part of its prior history of violations, insofar as any assessment of the instant violation is concerned, and any penalty assessed must reflect a "zero" history.

Petitioner points out that since the effective date of the 1969 Act until July 1, 1977, the corporate stock of the Peabody Coal Company was owned by Kennecott Copper Corporation. On July 1, 1977, the corporate stock of the Peabody Coal Company was sold to Peabody Holding Company, which became the new owner of the Peabody Coal Company since the holding company, in fact, became the new owner of the corporate stock of the Peabody Coal Company. Peabody Coal Company is a wholly-owned subsidiary of the holding company and is its only asset. Petitioner argues that while corporate stock changes owners, the liability of the corporation remains constant and intact. Here, petitioner argues that the mine was not, in fact, sold to a new operator, only the corporate stock was sold, and Peabody Coal Company and its assets remained intact.

After full consideration of the arguments presented, I conclude and find that on the basis of the record here presented, petitioner has the better part of the argument, and its proposed finding on this issue is adopted as my finding, and respondent's arguments to the contary are rejected. I find that the prior history of the Peabody Coal Company, as reflected in the printout, and notwithstanding the transfer of stock, may be considered by me in assessing a civil penalty in this matter. While respondent alluded to certain management changes at the uppermost levels of the holding company, the fact is that there is no evidence that mine management has undergone any changes, that the holding company is, in fact, the present owner of Peabody Coal Company, that the company is, in fact, its sole asset, and that there has been a continuity of operation of the mine in question, and that the only change has been in the sale of stock. While it may be true that MSHA's Assessment Office considered that an actual change in mine ownership had taken place, I am not bound by that fact, and based on previous proceedings involving the manner in which the Assessment Office evaluates any given citation at any given time, I doubt whether that office made other than a cursory evaluation of the question.

On the facts presented in this proceeding, I find that the prior history of violations with respect to the mine in question, when viewed in light of the size of Peabody's total coal mining operations, does not constitute a significant prior history of violations, and that fact is reflected in the penalty assessed by me in this matter. The same can be said for the prior history of Kennecott's overall total history as reflected in the printout. For an operation of its size, I cannot conclude that the 145 paid violations over a period in excess of 6 years for the mine, or the 857 violations over that same period for the size of Kennecott's mining operations can be said to be significant.

Fact of Violation--30 CFR 75.1400

The pertinent part of the mandatory safety standard cited in Order No. 1 PML (7-166) on December 30, 1977, reads: "[W]here persons

are transported into, or out of a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, * * *."

Petitioner's Arguments

Regarding the hoist violation, petitioner concedes that due to a nationwide mine strike, only management and supervisory personnel were working at the mine. Although there was an emergency drop cage hoist in the intake shaft which requires an engineer on the surface to operate it, petitioner argues that the slope hoist, located in the designated escapeway, is the only other means of entering and exiting the mine, and that persons normally ride into and out of the mine to change shifts by use of that hoist, and it is also used to get miners and supplies underground. The hoist is operated by a cable on a hoist drum; the cable attaches to an automatic brake and other cars, and the cars are dropped down into the slope or pulled up out of the slope to the mine portal. The cars are on a track, and normally two cars, including the brake car, can convey 30 to 40 persons in each car into and out of the mine. The hoist does not have an automatically operated cage, platform or elevator, and normally there is a qualified hoistman in the house 24 hours a day when coal is being produced, or the normal maintenance shift is employed. The cars were on the surface when the inspector made his inspection, and injured persons have been taken out of the mine by being hauled up the slope by the hoist and car.

Although it is true that the men who were underground may have walked down the slope in the mine, the slope was wet, muddy and icy, and an injured person could not be carried out on a stretcher without riding on the cars with the use of the hoist. Regarding the man who was supposedly "on duty," petitioner points out that it took the foreman an hour to get to the surface once he was called from underground, and the other man lived 5 or 6 miles from the mine. As for the definition of the term "hoist," petitioner cites the definitions of that term as used in Webster's Dictionary and Bulletin 95, A Glossary of the Mining and Mineral Industry, and points out that the mechanics of the hoist device in question qualifies it as a hoist as that term has always been considered in the mining industry. Further, the fact that a vertical cage or bucket is not involved is immaterial argues petitioner, since the standard language "other such equipment" includes the hoist device in question.

Finally, petitioner argues that the fact that persons went underground without the use of the hoist, does not matter since persons are transported underground in the mine by the hoist and while anyone is underground, a hoist engineer must be on duty, and the slope must be available as long as anyone is in the mine.

Respondent's Arguments

Respondent argues that on the day the citation issued, due to a strike, no union personnel were in the mine, but three management personnel were underground. These three individuals walked into and out of the mine without using a device usually employed for transporting men and material into and out of the mine, namely, a track-mounted car or set of cars to which is attached a cable with the other end of the cable attached to a drum on the mine surface. Respondent asserts that this device is used principally for the haulage of materials and supplies, although it is also used to transport men during normal production shifts, and the hoisting engineer is usually a union employee. The mine slope entrance descends some 730 feet at a slope of some 16 degrees and has handrails and a walkway to facilitate walking into and out of the mine. Since the legislative history of section 314(a) of the 1969 Act, the statutory counterpart of section 75.1400, intended the standard to apply only where men are regularly transported in and out of the mine by hoist, respondent submits that persons were not being transported into or out of the mine with any degree of regularity because the third shift customarily walked into and out of the mine without the use of the personnel transport device as they did on the day in question. Thus, as to the third shift, particularly during the strike, respondent asserts that the hoist was not customarily or regularly used for the transportation of personnel. Since persons were not being transported into or out of the mine on the third shift with any degree of regularity, respondent maintains that no violation occurred.

Finally, respondent argues that the term "hoist" is not further defined and that Congress intended section 75.1400 to apply to those instances in which a hoist is the sole or principal means of entering and exiting a mine, and that since the standard speaks of "hoist-handling platforms, cages, and elevators," respondent submits that the type of hoist to which Congress was addressing itself is a device designed to lift persons in a more or less vertical fashion from the depths of a coal mine. Also, since the device in question was not in use, the mine was not one "where persons are transported into or out of a coal mine" by a hoist, because the word "where" connotes more than merely location and may be used to indicate the situation or circumstances to which relates the remainder of the clause in which the word "where" is used. And, respondent asserts that it has steadfastly maintained that the last sentence in section 75.1400 refers to situations in which persons are transported into or out of a mine, rather than a location at which persons are sometimes transported into or out of the mine. Further, since the evidence shows that a qualified engineer was on the surface and near the "hoist-house" and since a qualified hoisting engineer, who is on a 24-hour call, was only 6 minutes from the mine at the time the order issued, respondent maintains that a qualified hoisting engineer was "on duty"

within the meaning of section 75.1400, and respondent cites the testimony of the inspector who considered a man to be "on duty" when he is 5 or 6 minutes from the hoist house.

It is clear from the evidence adduced in this proceeding that the hoisting device in question is, under normal circumtances, used to transport men and materials underground. In such circumstances, it is also clear to me that section 75.1400 requires that a qualified hoisting engineer be on duty while anyone is underground. On the facts presented in the instant case, it is clear that on the day in question, the three management individuals went underground by walking down the slope incline and the hoist was not used because the mine was idle due to a strike. Aside from the requirement in section 75.1704-1(b), which provides that escape shafts include elevators, hoists, cranes, or other such equipment, and that they be manned by an attendant during coal-producing or maintenance shifts, I find nothing in section 75.1400 that requires a mine operator to use any hoisting device to transport men or supplies underground. Nor do I find anything in that standard which requires an operator to install such a hoist or to have it available for the transportation of men to the surface in the event of emergencies.

Except for a drop cage hoist in the intake shaft, which is used in emergencies and requires an engineer on the surface to operate, the slope in question is the only means of entering and exiting the mine. Petitioner's proposed interpretation of section 75.1400, if accepted, would require an operator to maintain the slope hoisting device in question operational at all times when miners are underground. Thus, if an operator decides to close the device or car trips down for maintenance, and the men walk in and out of the mine for any given shift while the device is inoperative, petitioner seemingly would require a qualified hoisting engineer to be on duty. In my view, such a result is not only illogical, but I can find no authority in any mandatory standard for such a requirement. Here, the evidence establishes that the slope in question was an escapeway and was so designated on the mine map. In the circumstances, since petitioner's arguments in support of its interpretation of the standard focus on the fact that the lack of a qualified engineer would not permit the expeditious removal of a miner in the event of an emergency, it seems to me that the inspector should have cited sections 75.1704 or 75.1704-1 which require that escapeway slopes be maintained in safe condition to allow quick escape of miners in the event of emergencies, and that an attendant be on the surface in a position to hear or see a signal for the use of the hoist and who be readily available to operate it.

After careful consideration of the arguments presented, including the facts and evidence adduced in this proceeding, I conclude that respondent's proposed interpretation and application of section 75.1400 is correct and petitioner's arguments and proposed

interpretation and application are rejected. I find that the critical phrase "where persons are transported into, or out of a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, * * *" as applied to the facts of this case, refers to the circumstances in which persons are transported into or out of a mine, rather than the location at which such transportation is had. Under the circumstances, since the management personnel in question were not transported underground by means of the hoisting device in question, I conclude that section 75.1400 is inapplicable and that petitioner has failed to establish a violation.

It is clear from the citation issued by Inspector Lyle that he was concerned over the fact that no one was on the surface to attend the hoist while persons were underground in the event an emergency should arise to withdraw such persons from underground, and petitioner's proposed interpretation and application of the cited standard is consistent with the language of the order. However, as concluded above, I believe the standard is inapplicable to the facts presented, and that the inspector should have cited sections 75.1704 or 75.1704-1(b). If petitioner believes those sections are inapplicable, then it should consider promulgating a safety standard to cover circumstances such as those presented in this case.

With respect to the question of whether the device used to transport men in and out of the mine was, in fact, a "hoist" within the meaning of section 75.1400, I conclude that it was, and I adopt petitioner's proposed findings and conclusions as the basis for this conclusion. The fact that the device was not a platform, cage, or elevator, and did not move in a vertical fashion, is immaterial as correctly argued by the petitioner. The mechanics and workings of the transportation device in question, including the definitions cited by the petitioner, including the phrase "or other devices used to transport persons" support petitioner's position on this issue. However, since I have found the cited section to be inapplicable, this issue is moot.

In view of the foregoing, I conclude and find that the cited standard is inapplicable to the conditions cited by the inspector, and that the petitioner has failed to establish a violation of section 75.1400. Accordingly, the petition for assessment of civil penalty, insofar as it seeks a civil penalty assessment for the section 104(c)(2) order, Citation No. 7-0166, December 30, 1977, is dismissed.

## Penalty Assessment and Order

In view of my findings and conclusions made with respect to the section 104(c)(2) order issued October 18, 1977, Citation No. 7-0127, I find that a civil penalty in the amount of $4,000 is appropriate in

the circumstances presented, and respondent is ordered to pay that amount within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Thomas F. Linn, Esquire, P.O. Box 235, 301 North Memorial Drive, St. Louis, MO 63166 (Certified Mail)

Standard Distribution

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 27, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. DENV 78-569-PM(A) |
| | : | A.O. No. 10-00089-05002 |
| v. | : | |
| SUNSHINE MINING COMPANY, Respondent | : | Sunshine Mine |

DECISION AND ORDER

Appearances: Joseph Walsh, Trial Attorney, Department of Labor, Office of the Solicitor, Arlington, Virginia, for the petitioner;
Piatt Hull, Esquire, Wallace, Idaho, for the respondent.

Before: Judge Kennedy

On March 21, 1979, the captioned matter came on for an evidentiary hearing in Spokane, Washington. After carefully reviewing and considering the testimony and documentary evidence, the Presiding Judge found that the Secretary had failed to establish by a preponderance of the evidence that:

1. On the night shift on April 11 or the day shift on April 10, the operator endangered the safety of the miners by any lack of diligence or due care in the furnishing of ground support on the hanging wall of the 5215 Stope.

2. That the violation of 30 C.F.R. § 57.3-22 charged did not, therefore, occur.

Accordingly, it was ordered that the petition for assessment of a civil penalty be dismissed with prejudice.

The premises considered, it is ORDERED that the bench decision and order of March 21, 1979, be, and hereby are, CONFIRMED and that the imminent danger closure order 347008 issued April 12, 1978 be, and hereby is, VACATED.

Joseph B. Kennedy
Administrative Law Judge

Issued: March 27, 1979

Distribution:

Piatt Hull, Esq., Hull and Hull Chartered, P.O. Box 709, Wallace, ID 83873 (Certified Mail)

Joseph Walsh, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 27, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. DENV 78-568-PM(A) |
| | : | A.O. No. 10-0089-05003 |
| v. | : | |
| SUNSHINE MINING COMPANY, Respondent | : | Sunshine Mine |

DECISION AND ORDER

Appearances: Joseph Walsh, Trial Attorney, Department of Labor, Office of the Solicitor, Arlington, Virginia, for the petitioner;
Piatt Hull, Esquire, Wallace, Idaho, for the respondent.

Before: Judge Kennedy

On March 21, 1979, the captioned matter came on for an evidentiary hearing in Spokane, Washington. After hearing the witnesses and considering the documentary evidence the Presiding Judge rendered a bench decision in which he concluded that on the basis of a preponderance of the credible evidence:

1. The ground on the hanging wall in the J-8 Stope was loose and inadequately supported on the afternoon of April 6, 1978, a violation of the mandatory safety standard set forth in 30 C.F.R. § 57.3-22.

2. That the violation was extremely serious in that it posed a real and potential danger to life and limb.

3. That the condition was one that was known to the operator based on the imputed knowledge of Mr. Rudd, the Production Foreman responsible for the J-8 Stope.

4. That Mr. Rudd's failure to correct the condition was the result of a high degree of ordinary negligence.

Thereafter and after considering the other statutory criteria, including the fact that this was first offense, the Judge determined that the amount of the penalty warranted and that best calculated to deter future violations and ensure voluntary compliance was $5,000.00. It was ordered, therefore, that for the violation found the Sunshine Mining Company pay a penalty of $5,000.00 within ten (10) days.

The premises considered, it is ORDERED that the bench decision and order of March 21, 1979, be, and hereby are, CONFIRMED and that respondent pay a penalty of $5,000.00 on or before Saturday, March 31, 1979.

Joseph B. Kennedy
Administrative Law Judge

Issued: March 27, 1979

Distribution:

Piatt Hull, Esq., Hull and Hull Chartered, P.O. Box 709, Wallace, ID 83873 (Certified Mail)

Joseph Walsh, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 28 1979

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| SECRETARY OF LABOR, | : | Civil Penalty Proceedings |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. BARB 78-648-PM |
| Petitioner | : | A.C. No. 08-00024-05001 |
| v. | : | |
| | : | Docket No. BARB 78-649-PM |
| FLORIDA CRUSHED STONE CO., | : | A.C. No. 08-00024-05002 |
| Respondent | : | |
| | : | Brooksville Gay Quarry |

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
Mary L. Applegate, Esq., Holland & Knight, Tampa, Florida, for Respondent.

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The Mine Safety and Health Administration (MSHA) filed petitions for the assessment of civil penalties on August 24, 1978, alleging that the Respondent committed certain violations of Chapter 30 of the Code of Federal Regulations. On September 27, 1978, Respondent filed its answers contesting the violations. A hearing was held in Tampa, Florida, on February 6, 1979, at which both sides were represented by counsel. The two dockets were consolidated for the purpose of hearing and decision (Tr. 81).

At the beginning of the hearing, MSHA counsel requested approval of settlements for the full assessed amounts for Citation Nos. 092811, alleging a violation of 30 CFR 56.14-1 assessed at $140; 092815, alleging a violation of 30 CFR 56.12-8 assessed at $106; and 092827, alleging a violation of 30 CFR 56.6-42 assessed at $66. These citations are all in Docket No. BARB 78-648-PM. MSHA counsel asserted that in light of the statutory criteria and the factual circumstances involved in these three citations, he felt such settlements were appropriate (Tr. 6). Respondent's counsel concurred with this assessment (Tr. 7). After reviewing the oral representations by both parties, the settlements were approved by the undersigned. Accordingly, I hereby AFFIRM my approval of those settlements.

Following this, both parties presented evidence regarding the eight citations which alleged violations of 30 CFR 56.9-87 (Tr. 21, 44, 53, 61, 68, 78, 88, 91). This regulation requires mobile heavy-duty equipment must be provided with audible warning devices. On the basis of the evidence presented, and in light of the statutory criteria, a decision was made from the bench to assess Citation Nos. 092808, 092809, 092820, 092824, 092825 in Docket No. BARB 78-648-PM; and Citation Nos. 092829 and 092830 in Docket No. BARB 78-649-PM at $100 each. Citation No. 092818 in BARB 78-648-PM was assessed for $200.

The following findings of fact were made as to each citation:

1) There was, in fact, a violation as admitted;

2) The operator is at least medium or medium-to-large in size;

3) The penalties assessed would not affect the operator's ability to continue in business;

4) There is no history of previous violations;

5) The operator took steps to rapidly comply after notification of the violation;

6) The operator was negligent;

7) The violation was serious.

(Tr. 115-119). The decision finding eight violations of 30 CFR 56.9-87 and assessing a total penalty for these violations of $900 is hereby AFFIRMED.

After issuing a decision from the bench on the eight violations of 30 CFR 56.9-87, as discussed above, MSHA counsel advised that the parties had negotiated a settlement of the remaining citations involved in these proceedings for the full amounts of the original assessments (Tr. 121). Since there had been no unwarranted lowering of the proposed penalties, and such a disposition assured adequate protection of the public interest, this settlement was accepted. Accordingly, I hereby AFFIRM these additional settlements for the amount of $2,236.

In summary, the amount of $3,176 has been assessed for Docket No. BARB 78-648-PM and $272 has been assessed for Docket No. BARB 78-649-PM.

It is ORDERED that Respondent, within 30 days of the date of this decision, pay the total penalties of $3,448 assessed in these proceedings.

Franklin P. Michels
Administrative Law Judge

Distribution:

Leo J. McGinn, Esq., MSHA Trials Branch, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Mary Applegate, Holland & Knight, P.O. Box 1288, Exchange National Bank Building, Tampa, FL 33601 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

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|---|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | Civil Penalty Proceeding<br><br>Docket No. DENV 77-79-P<br>A/O No. 05-02820-02004 |
| v. | : | Maxwell Mine |
| C F & I STEEL CORPORATION,<br>Respondent | : | |

STAY ORDER

The effective date of my decision in the above-case is hereby STAYED pending a ruling on a motion for reconsideration.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

Entered: March 29, 1979

Distribution:

Leo J. McGinn, Esq., MSHA, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown, 1100 United Bank Center, Denver, CO 80290 (Certified Mail)

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Application for Review of Discrimination |
| | : | Docket No. PITT 78-458 |
| On behalf of: DAVID PASULA, Complainant | : | Montour No. 10 Mine |
| v. | : | |
| CONSOLIDATION COAL COMPANY, Respondent | : | |

STAY ORDER

The effective date of my decision in the above case is hereby STAYED pending a ruling on a motion for reconsideration.

Charles C. Moore, Jr.
Administrative Law Judge

Entered: March 29, 1979

Distribution:

Eddie Jenkins, Esq., MSHA, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 29, 1979

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. VINC 79-67-P |
| | : | A.O.No. 12-00336-02007F |
| v. | : | |
| | : | Squaw Creek Mine |
| PEABODY COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Robert A. Cohen, Trial Attorney, Department of Labor, Office of the Solicitor, Arlington, Virginia, for the petitioner;
Thomas F. Linn, Esq., St. Louis, Missouri, for the respondent.

Before: Judge Koutras

## Statement of the Proceedings

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent on November 30, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged mine safety violations issued pursuant to the 1969 Federal Coal Mine Health and Safety Act. Respondent filed a timely answer in the proceeding, asserted several factual and legal defenses, and a hearing was held in Evansville, Indiana, on January 31,1979. The parties filed proposed findings and conclusions and a brief, and the arguments contained therein have been considered by me in the course of this decision.

## Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the

respondent for each alleged violation, based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

## Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Sections 109(a)(1) and (a)(3) of the 1969 Act, 30 U.S.C. §§ 819(a)(1) and (a)(3), now section 110(i) of the 1977 Act.

## Stipulations

The parties stipulated to the following (Tr. 4-5):

1. The jurisdiction of the presiding Judge.

2. Respondent is a large coal mine operator and any civil penalty imposed will not affect its ability to remain in business.

3. During the period in question in this proceeding, the Squaw Creek Mine employed approximately 220 miners and daily coal production was 5,000 tons.

## Discussion

The alleged violations and applicable mandatory safety standards in issue in this proceeding are as follows:

Notice 104(b) 1 FCW, April 20, 1977, issued by mine inspector Fred C. Wheatley, alleges a violation of 30 CFR 77.1710(g) and states as follows:

> A fatal fall of person accident occurred at 9 p.m., April 19, 1977. The victim was performing repair work on a 5 ton capacity overhead hoist in the Model 1360 Bucyrus Erie dragline at pit ID 001 while standing on top of drag

drive gear housing where no work platform was provided approximately 16 feet above the floor level. No safety belt and line or other safety devices were being used.

The notice was modified on April 27, 1977, as follows:

> A review of the circumstances surrounding the violation described in 104(b) notice of violation No. 1 FCW dated April 20, 1977, indicates the violation occurred because of unwarrantable failure on the part of the operator. Therefore Notice No. 1 FCW dated April 20, 1977, is hereby modified as being issued under 104(c)(1) instead of 104(b).

The notice was terminated on April 28, 1977, and the termination notice states:

> Company safety rule No. 105(i) requiring safety belts and lines be used as designed has been amended to require safety belts and lines anytime when an employee is performing duties when working in an elevated position where a work platform is not provided, and has been distributed to all employees and posted in conspicuous locations throughout the mine.

30 CFR 77.1710(g) provides as follows:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> * * * * * * *
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Notice 104(c)(1) 2 FCW, April 20, 1977, issued by Federal mine inspector Fred C. Wheatley, cited a violation of 30 CFR 77.1708, and states as follows:

> A workman was fatally injured when he fell approximately 16 feet from the top of the gear case of the drag drum gear on the Model 1360 Bucyrus Erie dragline at the Pit ID 001. The victim was performing repair work on a five ton capacity overhead hoist where no work platform was provided and a safety belt and line or other devices to protection [sic] a person from falling was being used. The operator's program of instructions with respect to safe

procedures to be followed was not thorough in that the safety rules only required that safety belts and lanyards be worn as designated. The designated areas were not defined and the safety program with respect to safety regulations and procedures to be followed at the mine was not posted in conspicuous locations throughout the mine. Mine management was informed of the provisions of section 77.1708 Title 30 Code of Federal Regulations and the necessity of a means to protect a person from falling where performing work from elevated positions where a safe work platform is not provided and the necessity to include a safe job procedure in the program of instructions with respect to safe job procedures on June 16, 1977.

The notice was modified on April 21, 1977, to correct the date shown on the continuation to the notice (June 14, 1977) to read June 16, 1976.

The notice was again modified on April 27, 1977, to reflect that it was being issued as a section 104(b) notice rather than a 104(c)(1) notice on the ground that a review of the circumstances surrounding the notice indicates the violation did not occur because of an unwarrantable failure by the operator.

The abatement time was extended on April 28, 1977, and the reasons given for the extension are as follows:

> The operator has amended the job safety rules to require all employees to use safety belts and lines when performing work from an elevated position. Copies of the amendment has [sic] been distributed to all employees and posted in conspicuous locations throughout the mine. A job safety program has been developed for performing work from an elevated position and has been posted at conspicuous locations throughout the mine. Said notice is hereby extended to allow time to monitor the training program to determine if the training program is adequate to satisfy the requirements of section 77.1708.

The notice was terminated on June 1, 1977, and the termination notice states that the company safety rules were modified to require all persons to use safety devices when there is a danger of falling. The modified safety rules were posted at conspicuous locations, and safety meetings were held with employees with regard to the use of such safety devices.

30 CFR 77.1708 provides as follows:

> On or before September 30, 1971, each operator of a surface coal mine shall establish and maintain a program

of instruction with respect to the safety regulations and procedures to be followed at the mine and shall publish and distribute to each employee, and post in conspicuous places throughout the mine, all such safety regulations and procedures established in accordance with the provisions of this section.

Testimony Adduced by the Petitioner

MSHA inspector Fred C. Wheatley testified he went to the mine on April 19, 1977, to assist in the fatal accident report. The mine in question is a surface mining operation where the coal is exposed by removing the overburden for the purpose of loading and processing the coal by use of a large shovel and dragline. He examined the accident scene and everything was normal except for a portion of the overhead hoisting equipment which had been damaged and the overhead hoist was positioned over a large gear case. From information provided by people who were in a position to know, it was determined that the victim fell from the bull gear housing or cover, and he was positioned on the top of the housing approximately 16 feet from the main floor of the machine with another workman who was assisting him in making repairs to the hoist. Mr. Wheatley identified Exhibit P-3 as a sketch of the area where the victim was standing, and indicated that he climbed up to the area and took the measurements depicted on a sketch, Exhibit P-4. From statements of eyewitnesses, the victim was in the process of making repairs to the overhead hoist assembly that had been damaged at the time he fell. The victim was not utilizing a safety belt or any other safety device to prevent falling. There were no handrails or platforms in the immediate area (Tr. 8-19).

Mr. Wheatley testified that from information received during his investigation it was determined that the victim had previously been up on the gear box without using a safety belt and that a supervisor stated that he climbed up on the gear housing with two workman to assess the hoist damage and that they did not use safety belts or other safety devices. Mr. Wheatley was not able to determine whether mine management ever informed the victim that he had to wear a safety belt when proceeding to the top of the gear housing, and nothing was available to indicate that the victim had ever been instructed at any time to use a safety belt with a line attached. In his opinion, a safety belt with a line attached could have been utlized by the victim while performing his work and there was a place to attach a line to a safety belt directly overhead at the hoisting assembly which is installed on a track or rail. He also determined that the area from where the victim fell was an area where there was a danger of falling and from the 6-foot height of the year case, its shape, and the configuration of the machine, it was obvious that there was a danger of falling. While there was room for someone to place his feet to stand, the area was inadequate, in terms of size and shape, and the work being performed, for a platform (Tr. 19-25).

Inspector Wheatley testified that safety belts were located on the dragline and they were located on the main machine deck or floor in a steel drum, he examined the belts and all but one were packed in the original packaging, and it did not appear that any of them had been used. He determined that the victim was an experienced miner and had been assigned to the machine in question for 4 to 5 weeks as the second shift operator. Repair work on the machine would be part of his normal duties but he did not know if the operator would generally work without direct supervision. After completing his physical investigation at the accident scene, an accident investigation hearing was held on April 20, and subsequent to that, he decided to issue the violations in question (Tr. 25-28).

The respondent had a safety program in effect at the time of the accident, Exhibit P-7, and safety belts are mentioned and item 105, page 5, of the company safety rules provides that "safety belts and lanyards shall be worn as designated." However, he was unable to find any areas or machines where the requirement for safety belts were specifically designated as areas where safety belts would be required. In his view, the safety rule is inadequate for the purpose of informing a miner where safety belts must be worn because the lack of designations is no real requirement that belts be used. From statements made during his investigation, he could only find one person who stated that the use of safety belts with lanyards attached was discussed and this was in the case of a recently employed person during orientation. Experienced miners told him they had not been required to use belts and lines in installing the hoist that was damaged and being repaired at the time of the accident. The victims' immediate supervisor suggested a need for caution, but issued no instructions as to the use of safety belts and that the caution may have come not more than 3 hours before the accident occurred. On one previous occasion, an employee working on the construction of a coal hopper fell and was injured and the matter was discussed with mine management and a violation of section 1710(g) was issued and this occurred in June 1976. The use of a belt could have greatly reduced the severity of the accident fatality which occurred in the instant case (Tr. 28-42).

Mr. Wheatley identified Exhibit P-8 as a statement of the operator's policy regarding the use of safety belts published after the accident and he believes it makes it clearer. The safety program had been published in the form of a company safety rule book and a safety manual distributed to supervisory employees. He could find no posting of the company's safety program in conspicuous locations during his investigation. He could find no evidence that the accident victim had been instructed in the use of a safety belt either shortly before the accident or at any time (Tr. 43-46).

On cross-examination, Mr. Wheatley testified that he had seen the company safety rule book (Exh. P-7) prior to the accident. Conflicts

in the Federal safety regulations and company safety rules are resolved in favor of the Federal regulations and they are controlling, and the company safety rules incorporate applicable Federal and state safety laws by reference. He denied that he was informed that the words "as designated" used in safety rule 105(i) referred to "as designated by federal regulations." In his view, a violation of section 1710(g) occurs when a man is not wearing a safety belt where there is a danger of falling, and this is true regardless of whether the company requires the use of safety belts where there is a danger of falling (Tr. 47-57).

The question of whether or not there is a danger of falling depends on the particular location in any given situation, and in some situations, this may be at a height of 2 feet. It would also depend on how sure the footing is in a particular area, whether there is a firm hand hold, or whether grease, mud or ice are present, but other safety regulations cover those situations (Tr. 57-59).

Mr. Wheatley confirmed that he climbed on the gear housing during his investigation, got all the way to the top and was wearing a safety belt with no difficulty. There was a small amount of grease on the housing but it was not a contributing factor. The machine was in transit at the time of the accident and was not being used to dig coal (Tr. 63). While in transit, the machine became bogged down in loose fill and was shut down in order to construct additional firm footing, and in the process of coming out of the fill area, the crane broke loose from its mooring (Tr. 66).

Inspector Wheatley confirmed that the section 77.1710(g) violation was originally issued as a section 104(b) citation, but subsequently modified to show it was issued pursuant to section 104(c)(1) as an unwarrantable failure, and that the section 77.1708 violation was initially issued as a section 104(1)(1) notice, but subsequently modified to show it was issued pursuant to section 104(b) (Tr. 74-78).

Inspector Wheatley testified that he measured the distance of the fall and was assisted in this task by Mr. Thomas Beulow, an engineer, and possibly by Mr. Alan Cook, respondent's employee. Prior to his fall, Mr. Woods and his crew were engaged in repairing the hoist, but he could not recall whether Mr. Woods was instructed not to perform any work on the hoist and to leave it alone. The master mechanic and foreman were not present when Mr. Woods fell. When he (Wheatley) climbed to the top of the housing he observed a sledge-hammer and one or two other tools there. Mr. Woods' location prior to his fall was established through interviews with witnesses, and the information he received indicated that a foreman and another worker had climbed up on the gear housing without safety belts shortly prior to the accident for the purpose of assessing the damage to the hoist and no work was performed at that time (Tr. 79-92).

Mr. Wheatley stated that the side opposite the one from which Mr. Woods fell had a guardrail for a portion of the way, and he did not require that a platform be constructed on the hazard as part of the abatement. He issued the section 77.1708 violation because the safety belt rule was not thorough and the mine safety regulations and procedures were not posted in conspicuous locations throughout the mine. The words "as designated" as used in the safety belt rule is not complete because of the lack of designations. He did not know that mine management had taken the position that the words "as designated" referred to the Federal regulations. With respect to the posting of the safety rules, he checked the bulletin boards near the changehouse, the one in the office, and the one in the shop, but he was not sure about others. He was looking for something that would suffice as a safety program, and simply posting the yellow company safety rule book would not suffice to meet the requirements of section 77.1708. However, he would have to conduct further research to determine what would suffice at the particular mine in question (Tr. 93-110).

Mr. Wheatley identified Exhibit R-10 as a booklet containing the Federal standards and the company rules. The booklet is customarily posted on the mine bulletin boards, but he was unable to find it posted on the three bulletin boards he examined. He could not recall examining the bulletin board on two case loading machines, or the ones at the tipple, the 7W dragline, the 191 shovel, or the 5760 shovel. He did recall examining other bulletin boards, but could not recall which ones. Although he inspected the dragline during its erection, he did not do so prior to the accident while it was being moved (Tr. 113-121).

Inspector Wheatley testified that he had some knowledge of the safety contact program at the mine but was not familiar with the use of exception reports (Tr. 123).

On redirect, Mr. Wheatley identified the accident report of investigation which was prepared and the cause of the accident is shown as "a failure of management to require workman to wear safety belts where there is a danger of falling" (Exh. P-10; Tr. 131). He testified that circumstances such as the work position, type of terrain or objects below, and the configuration of the general area would be considered in determining whether there is a danger of falling in any given instance. He does not believe that MSHA policy dictates that he designate mine areas where there is a danger of falling and he has never requested mine management to put up signs designating such areas (Tr. 132-134).

In response to questions from the bench, Mr. Wheatley stated that it was never determined why Mr. Woods was not wearing a safety belt, but he believed he would have worn one had he been specifically instructed to do so. The work platform that was constructed at the

point from which Mr. Woods fell was subsequently constructed to facilitate the repairs on the hoist and there is no safety requirement for such a platform at that location. He attached a safety line at several places while climbing the housing during his investigation, but could not recall precisely where he attached it (Tr. 145-149).

William Yockey, mine safety committeeman and president of UMWA Local 1189, testified that at the time of the accident he was not aware of any mine area which was posted as requiring the use of safety belts. With regard to the posting of a company safety program, he indicated that there are times when none were posted on bulletin boards, but they could have been posted on one or two boards. He has observed a safety book posted in the shop and on the shovel where he worked. There are 19 or 20 bulletin boards, but he could not say whether one was posted on all of them. Sometimes people will remove them from the boards or they may blow away.. He has observed men working in elevated areas at the mine without safety belts. He discussed the use of safety belts with the mine safety superintendent for the purpose of clarifying how they were to be used, but prior to that time no one ever specifically showed him how to use one (Tr. 156-161).

Mr. Yockey stated that a safety belt was available to Mr. Woods, but he believed that use of the belts was not emphasized enough at the mine. One supervisor might specifically designate someone to wear a belt while another one would not. If he were told to wear a belt he would do so, but if no one told him to wear it he would not. He could not recall any specific training that he received with respect to the use of safety belts, and indicated that a belt is not a complicated piece of equipment. However, there have been some questions as to whether the lanyard should be hooked on the front or back of the belt. He has been directed by mine foremen to use belts. As for the other men, some are afraid to climb and others are not and the use of a safety belt varies among these individuals (Tr. 162-166).

On cross-examination, Mr. Yockey testified that in any particular situation the question of whether or not a danger of falling exists depends on a number of different factors. He considered Mr. Woods to be a very safe worker with some 30 years' service. He surmised that Mr. Woods did not wear a belt because he was the type of person who did his job when it needed to be done, and as an experienced operator he needed little supervision, but would do what he was told (Tr. 167-169).

Mr. Yockey stated that no one ever told him not to wear a safety belt. He has received instructions on the Part 77 surface mining regulations. He has observed a safety book, Exhibit P-10, posted on three bulletin boards, and a safety book, Exhibit P-7, on some of the boards, but not all of them. Most of the boards are open, and he has reviewed posted material (Tr. 170-172).

In response to bench questions, Mr. Yockey stated that he has worked in elevated areas while repairing a boom without using a safety belt, and he has observed others working on elevated cranes, and haulage trucks which are 20 to 25 feet above ground, without using such belts. He personally does not like to wear a safety belt because it gets in his way while he is working. However, if instructed to do so, he would wear a belt. He does not believe it practical or feasible to designate every elevated area in a mining operation where a belt should be worn. He recalled two occasions where a foreman or master mechanic instructed him to wear a belt. During the time that he worked with Mr. Woods, he (Woods) wore a safety belt when making repairs on the shovel. He was not at the mine when the accident occurred (Tr. 176-183).

Mr. Yockey stated that there are occasions where common sense dictates that a safety belt be worn and he does not have to be told (Tr. 184).

Charles E. Stilwell, second shift dragline oiler, was working with Mr. Woods on the day of the accident and he was standing directly across from him on the gear housing when he fell. He was not wearing a safety belt and was not specifically instructed to wear one. Had he been so instructed, he would have worn one. He, Mr. Woods, and foreman Bob Siegel were on the gear housing earlier in the shift and were not wearing safety belts. Mr. Siegel did tell them to be careful. He had been up a third time with an electrician. He and Mr. Woods generally made repairs on the dragline and it was part of their job. On the day of the accident, Mr. Siegel told them that he was going to get the mechanic who would instruct them what to do, but he could not remember Mr. Siegel telling them not to go up on the housing. Mr. Woods asked him to go up and he did. He never wore a belt on the dragline because he was never at any place where he thought he needed one. Since the accident, he wears one if instructed to do so (Tr. 186-193).

On cross-examination, Mr. Stilwell detailed the movements of the dragline prior to the accident. During the movement of the machine, the 30-ton hoist came loose from the hoist cables and a 5-ton hoist electrical box became dislodged and was hanging over the machine. The machine was then shut down in order to assess the damage. One of the foremen then advised the crew to "let it go," and then the master mechanic arrived on the scene and instructed the crew to install a grease line on the machine. While preparing to do this, Mr. Woods was just finishing tying a rope on the five-ton hoist by himself in order to move it. Foreman Siegel arrived on the scene and assisted in moving the hoist, and then left to get the electricians and master mechanic Jim Binkley. Mr. Siegel informed the crew that the mechanic would instruct them what to do when he arrived and asked them to "be careful." Mr. Woods insisted on climbing up on the housing to try and straighten it out and Mr. Stilwell suggested they wait for

the mechanic. However, he decided to go with Mr. Woods since Mr. Woods was the leadman. Mr. Woods climbed up on the gear housing by means of a ladder on the front of the machine and he and Mr. Woods were using a torch while working on the gear housing and they were there about 10 minutes before Mr. Woods fell. Mr. Stilwell identified Exhibit R-1 as a sketch of the scene where he and Mr. Woods were positioned prior to the fall. While he and Mr. Woods were on the gear housing they used two or three handholds located on the inspection covers in climbing up to the housing. During the three times that he climbed the housing, he did not believe he was in danger of falling, and at no time was he instructed by the company to make repairs on the hoist. Mr. Siegel told them that the mechanic would instruct them further when he arrived at the scene and he believed that they were to leave the machine alone until he arrived, but Mr. Woods overruled him (Tr. 194-207).

Mr. Stilwell testified that when he and Mr. Woods were on the machine, the footing was secure and he was wearing goggles. Safety belts were provided on the machine and Mr. Woods must have known they were there. Mr. Woods was a safe hard worker. During the three times he was on the gear housing, he never considered using a safety belt because he did not feel uneasy. He has received miner training, has attended periodic safety meetings with the foremen, and has observed a safety book posted on the bulletin board in the tipple and preparation plant. A company safety book was also stored in the electrical room of the No. 1360 dragline on the day of the accident and he believes that the dragline operator and the groundman knew it was there. He receives safety contact training as part of the company annual training program and believes that he receives as much training as miners from other companies (Tr. 208-217). He was aware of the company practice of writing up employees for safety infractions and as far as he knows neither he nor Mr. Woods have ever been cited by the company for violating safety rules (Tr. 217-222).

Donald E. Allen, assistant superintendent, Broken Arrow Mine, testified he was at the Squaw Creek Mine on the day of the accident on April 18, 1977, where he was employed as assistant superintendent as a supervisor on the 1360 dragline. He described the movement of the dragline on April 18, and indicated that it first became bogged down in loose fill material and then broke a cable on the overhead hoist. His job was to get the machine into production and to acquaint the crew with dragline stripping procedures since they were all shovelmen. After the cable broke, he discussed the situation with Mr. Stilwell, Mr. Siegel, and Mr. Woods and he instructed Mr. Stilwell to tie off the hoist and leave it because he was not concerned with it. Four or five safety belts were on the machine at the time of the accident (Tr. 236-247).

Robert W. Siegel, pit foreman, Squaw Creek Mine, described the movement of the dragline on the day of the accident and the damage

which occurred to the machine while it was in transit. He advised Mr. Stilwell and Mr. Woods that he was going to get an electrician to deenergize the machine and they proceeded with their regular cleanup duties while he was gone. He and Mr. Woods then climbed up on the gear case to visually inspect the crane. As he climbed up, he felt they had good handholds and good footing. He did not feel there was a danger of falling when he mounted the gear case. He then left the area and returned and told Mr. Woods that he would summon the master mechanic to look at the machine, and that nothing else needed to be done. After finding master mechanic Binkley, he advised him to check out the machine to determine any needed repairs. He subsequently learned about the accident (Tr. 248-258).

Mr. Siegel testified that he was unaware that Mr. Woods and Mr. Stilwell were using a torch and hammer to attempt to make repairs on the crane until after the accident. When he mounted the gear case to inspect the damaged hoist, he saw no mud or grease that would interfere with his footing and he felt secure in his footing and it did not occur to him to use a safety belt because he felt he had adequate footing and handholds to reach the area. Safety belts were available on the machine and were stored some 10 to 15 feet from the gear case. There were four to six belts and Mr. Woods knew where they were located. The barrel where the belts were stored was labeled, and Mr. Woods was familiar with the use of the belts (Tr. 258-260).

Mr. Siegel testified that he partipates in the company safety program through personal safety contacts, safety meetings, and exception and observation reports of the employees. Safety contacts consist of a foreman personally contacting employees on a safety topic, and safety meetings involve written materials which are read to the men concerning accidents or new programs. He obtains safety literature from the safety department for use at the meetings and records are kept of the meetings and contacts. He identified Exhibit R-2 as a supervisor's safety contact book used by all supervisors and he explained the use of the books. If he finds that an employee has engaged in an unsafe work practice or has violated a safety rule on Federal regulation he files a safety observation and exception report. Repeat violations may result in disciplinary action against the employee and he identified Exhibit R-3 as the report form. He made a safety contact with Mr. Woods on April 18, 1977, and discussed footing and slips and falls with him. Previously, he had four other safety contacts with Mr. Woods and other employees. He has told employees to use a safety belt and has found an employee not using one when he should have. In that instance, he instructed the employee to get his safety belt and wear it. He has also advised employees at safety meetings and daily contacts that safety belts should be used where there is a danger of falling (Tr. 260-268).

Mr. Siegel testified that Mr. Allen instructed Mr. Woods to proceed with cleanup, and maintenance and repair on the machine

grease line and not to worry about the crane. The use of the torch, hammer, and pry bar by Mr. Woods in his efforts to make repair were contrary to instructions (Tr. 270).

On cross-examination, Mr. Siegel stated that Mr. Woods and Mr. Stilwell engaged in an unauthorized act in climbing up on the machine but Mr. Stilwell was not disciplined. However, they generally engaged in repair work as part of their duties. He was not aware that they were up on the gear housing prior to April 18. When they climbed up on April 18, he advised them to be careful as they climbed up and he did not believe they were in danger while standing on top of the gear housing. Had there been work done there he probably would have required men to use safety belts. However, he would have performed no work there until the whole situation was evaluated. He has written up employees for failing to wear safety belts but could not recall the last time he did that (Tr. 270-282).

Mr. Siegel stated that the dragline crew was relatively new to that equipment but were experienced miners. He believes Mr. Woods would have worn a safety belt had he been told to and the area from which he fell was elevated. While on the gear housing, he could hold on to the hoist itself and the side of the gear case. While up on the housing, they were holding on to the crane and he could stand without holding onto anything (Tr. 283).

In response to questions from the bench, Mr. Siegel testified that the practice of each man determining whether to use a safety belt in a given situation is a good practice because they have to use common sense to protect themselves and a supervisor cannot be there every minute to tell them to use a belt (Tr. 288).

Mr. Siegel stated that procedures involving the use of safety belts has not changed since the accident although the memorandum of instruction has been modified. Occasional safety talks on safety belts are held, but prior to the accident, no specific safety talks on safety belts were conducted at the mine (Tr. 292).

Robert E. Thomas, safety manager, Indiana Division, testified he has responsibility for safety over nine of respondent's mining operations, including supervision over the mine safety supervisors. His responsibilities include enforcement of Federal safety laws, company safety rules, safety training and orientation, safety management program, and accident investigations. Safety management includes safety observations, safety meetings, safety contacts, and exception reports. He partipated in the accident investigation and identified several photographs of the scene (Tr. 295-300).

Mr. Thomas testified that the company has a program of instructions concerning safety regulations and procedures used at the mine at the time of the accident. The foremen conduct training sessions

concerning safety standards and the program is audited and evaluated each month, and he meets with the mine superintendents to discuss the evaluations. Each new employee partipates in a safety orientation program and in an 8-hour retraining program. Annual retraining is required by the union wage agreement of 1974, and he described the 15 safety topics covered, which include instructions in Federal laws and regulations. He identified Exhibit R-7 as the safety management program manual used by the foremen in their safety training, safety contacts, and safety exception report program. Each foreman is required to have a 10-minute safety meeting each week, and daily safety contacts when they are assigned a job. Mass safety meetings are held prior to and after vacation periods and holdings. He also sends copies of accident reports to the mines to be used by supervisors and foremen in their safety discussions with the men. Special training is also conducted for welders, and all of the programs are constantly monitored. Safety topics have included the use of safety belts and lanyards when working at heights. Safety memos are posted on bulletin boards or used at meetings with the men (Tr. 300-314).

Mr. Thomas described the safety exception program. At the time of the accident, employees were required to use safety belts and lines where there was a danger of falling, and it was enforced through training topics such as Exhibit R-8, and employees who violated the requirement would be subject to an exception report and warned, and they could be dismissed. Safety rule 105(i), set out in Exhibit R-9, is the safety belt requirement. Rule 100(a) incorporates applicable State and Federal laws as a part of the company's safety rules, but they are not reproduced. Although he could not recall specifically telling anyone to wear a safety belt, he has discussed it with men on the job sites. Safety rules and Federal regulations are posted at the mine on the bulletin boards. They are usually posted on the boards at the shop and garage area, the washhouse, the preparation plants, large machines, and in places where there are large groups of people, including parking lots and different job sites. Items posted include memorandums, safety topics, accident reports, safety directives, safety books, etc. The materials are available for inspection by anyone and it is difficult to keep the documents on the bulletin boards (Tr. 315-321).

Mr. Thomas testified he saw Inspector Wheatley during the accident investigation and observed him climbing the gear housing, and with the safety belt and lines, he had a problem climbing and does not remember seeing him climb all the way to the top (Tr. 322-324).

On cross-examination, Mr. Thomas stated that the company conducted an accident investigation and prepared a written report. He developed the report and although the report states that the accident was caused by the failure to use a safety belt and lanyard, he disagrees with the statement. He does not know why Mr. Woods fell. Had he worn his belt, it could have prevented the accident. Aside from

the accident, the area from which Mr. Woods fell is not normally considered an area where there is a danger of falling since it is easy to get to and the housing casing is 18 inches wide. He believed that very few people would realize that someone could fall from the housing while performing work there. He knows of no mining guidelines to determine potential fall areas on heavy equipment. There has been one previous accident involving a construction supervisor who was injured in 1975 while working at a height at the preparation plant and he was not wearing a safety belt. He received a letter from MSHA reemphasizing the use of safety belts and he solicited it because of a disagreement concerning an accident where an employee fell some 10 to 12 inches while washing down a bulldozer radiator. MSHA issued a citation, but it was subsequently vacated when it was learned where the man was actually standing (Tr. 329-339).

Mr. Thomas stated that there are a few areas in some of the respondent's mines where signs are posted requiring that safety belts be worn, i.e., sometimes on the drill mast. He is not aware of any specific company guidelines on when safety belts should be worn (Tr. 339-343).

In response to bench questions concerning a photograph of mine employee Cook standing on the gear housing (Exh. R-5) without a safety belt, Mr. Thomas stated that it is within Mr. Cook's discretion whether to wear a safety belt (Tr. 351). He believes that no one recognized the hazard at the time Mr. Woods fell (Tr. 353).

Alan W. Cook, assistant safety manager, Indiana Division, testified that his duties are similar to those of Mr. Thomas, with a particular emphasis on training, and he conducts and implements company safety programs. He was at the mine on the day of the accident for the purpose of conducting the accident investigation. He climbed the gear housing to assist inspector Wheatley in making his measurements, and he identified Exhibit R-5 as a photograph showing him on the housing. Mr. Wheatley did not tell him to wear a safety belt while standing on the housing, but later in the afternoon told him that no one was to go up on the hoist drum unless they use a safety belt and a lanyard. He observed Mr. Wheatley climb up the gear case and he was experiencing difficulty in tying off the line as he climbed up. He did not see him on top of the drum, however (Tr. 368-373).

Mr. Cook stated that after the violation was written, he and Mr. Wheatley checked two bulletin boards in the office and shower room although there were others on the mine premises. The boards normally contain safety rules and procedures. When he mounted the gear housing, he did not believe there was a danger of falling. He described the materials normally posted on mine bulletin boards, and he usually personally checks the boards (Tr. 375-379).

Mr. Cook identified two file boxes containing employee contact and exception reports filed since the program began in 1973. The files are kept at the Squaw Creek Mine and each mine has similar files. The files contain some 1,500 sheets of safety contacts, and approximately 1,800 more exception and observation reports. These records are maintained as part of the safety management program and accident prevention program. He identified safety contacts made with Mr. Woods and Mr. Stilwell (Exh. R-12). Safety contacts are a regular program at the mine. He also identified Exhibit R-13 as a record of safety training received by Mr. Woods in 1976. He personally has told employees to wear safety belts. He also identified Exhibit R-14, indicating that Mr. Woods received a copy of the company safety rules on January 23, 1973, and Exhibit R-15 as safety observations conducted on Mr. Woods prior to the accident, and it contains no notations of any unsafe acts on his part (Tr. 380-400).

Mr. Cook testified that there were possibly six safety belts located on the dragline in question in a barrell labeled "safety belts" (Tr. 401). He testified as to company policy concerning the use of exception reports (Tr. 405-407).

On cross-examination, Mr. Cook testified that he did not know whether a bulletin board was located on the dragline and he saw no safety manuals posted there on the day of the accident (Tr. 408). He did not know whether Mr. Woods received specific training on the use of safety belts (Tr. 412).

In response to bench questions, Mr. Cook stated that if he had to climb the gear housing, the question as to whether he would wear a safety belt would possibly depend on the kind of work he had to do (Tr. 420). The repairs made to the gear housing the day of the accident were unusual and it is not a place from which work is normally done (Tr. 425).

Inspector Wheatley was recalled by the court and stated that after listening to all of the testimony, he would still take the same action that he took when he issued the citations in question, given the circumstances available to him at the time. Some of the material introduced by the respondent during the hearing is new to him and some he had little knowledge of and the company safety programs was never brought to his attention. He examined the bulletin boards on April 20 and he saw nothing which indicated the posting of a safety program (Tr. 428-430). He did not attempt to locate all mine bulletin boards. He checked only the change room, office, and the shop and observed none of the materials there (Tr. 433).

## Findings and Conclusions

### Fact of Violation--30 CFR 77.1710(g)

Petitioner asserts that while it could be argued that section 77.1710(g) provides little guidance for an operator to determine if

there is a danger of falling, thus requiring the use of safety belts, the regulation is capable of enforcement under the factual situation presented in this case. In support of its position, petitioner argues that the use of an 18-inch wide narrow area elevated 16 feet above the dragline floor as a work area, created a condition where there was a danger of falling. Placed in a tenuous position on top of the dragline gear housing without the proper means of support from a work platform or by using a safety, would place a worker in obvious danger of falling, argues petitioner.

Petitioner points to the fact that respondent's Foreman Siegel indicated that he would have required the use of safety belts if he knew that work was being performed on top of the gear housing, and that respondent's accident report indicates that the use of safety belts should have been required. Petitioner takes the position that if safety belts are, in fact, required to be worn, the type of activity a worker is engaged in, should be irrelevant. Since a worker, such as the accident victim in this case, could change his work activity in a very short period of time, e.g., 1 minute, he could be merely observing the damaged overhead hoist and the next minute he could be attempting to repair it if safety belts are required then they should be worn on all occasions when a worker is exposed to high elevations.

Petitioner asserts that the obvious intent of section 77.1710(g) is to require miners to wear safety belts and that the failure of a miner to wear his belt when required, is, per se, a violation, notwithstanding my prior decision to the contrary in Peabody Coal Company, DENV 77-77-P, decided August 30, 1978, a decision which petitioner avers merely shifts the burden of the miners' protection to the individual employees and away from the mine operator.

Petitioner argues that the testimony in the instant case clearly establishes that respondent never actually required the use of safety belts as a uniform policy and that there was no attempt to enforce the requirements of section 77.1710(g) on the date of the accident. Further, petitioner asserts that the accident victim's attempts to repair the overhead hoist were not outside the scope of his responsibilities as the dragline operator, that repair work on the dragline was part of his normal duties, and he was never actually directed to stay off the gear housing by management. As a matter of fact, asserts petitioner, since Mr. Woods and his foreman had been up on the gear housing previously without wearing safety belts, it was only natural for him to assume that no safety belts would be required if he had occasion to go up on top of the gear housing for a second time to perform repair work.

With regard to respondent's general enforcement of safety belt requirements at the mine, petitioner cites the testimony of UMWA Local 1189 President William Yockey, who testified that it would

depend on the particular foreman who happened to be enforcing the policy, and that when required to do so by mine management, he would wear a belt. Also cited is the testimony of Mr. Stillwell, the dragline helper, who testified that Mr. Woods would have worn a safety belt if he was directed to do so by management. Therefore, argues petitioner, Mr. Woods' failure to use a safety belt cannot be considered as intentionally disregarding company policy, because there was no company policy requiring their use.

Respondent argues that the record supports a finding that it required the use of safety belts where there is a danger of falling, and that the rule regarding the wearing of belts was implemented through teaching and training methods and was subject to discipline for those employees failing to comply, and clearly identified safety belts were available on the dragline. Respondent cites the testimony of UMWA President Yockey who indicated that he does not generally wear a safety belt because he believes it interferes with his welfare, that it is not always practical to require the wearing of such belts when someone is working in an elevated position, but that he will wear such a belt if instructed by a foreman and required to do so.

Respondent argues that section 77.1710(g), by its specific terms, does not state that the operator is guilty of a violation if an employee does not wear a safety belt when he is required to do so, and that the question of when to or not to wear a belt is a matter of individual common sense and judgment. Citing North American Coal Corporation, 3 IBMA 93 (1974), and my previous decision in MSHA v. Peabody Coal Company, DENV 77-77-P, August 30, 1978, applying the North American ruling, respondent argues that it has complied with the requirements of section 77.1710(g) by providing safety belts, instructing the employees in their use, and requiring them to wear the belts when working in elevated areas. Further, respondent argues that two additional factors emphasize its lack of responsibility for the violation, namely, the fact that Mr. Woods was acting outside the scope of his instructions, and secondly, except for Inspector Wheatley, it was the opinion of the witnesses that a safety belt was not necessary under the circumstances of this case.

Respondent's safety rule regarding the use of belts and lanyards is contained in a 1972 company publication (Exh. R-9). Rule 105(i) at page 6 of that publication, states as follows: "Safety belts and lanyards shall be worn as designated."

Rule 100(a) provides that applicable state and Federal laws are incorporated by reference as part of the company's safety rules, and subsection (d) provides that since it is impractical to include rules to meet all contingencies in emergencies not provided for in the rules, employees are required to act under the advice and direction of their supervisor.

It is clear that at the time the citation issued, respondent's safety belt and lanyard rule left much to the imagination and that it was subject to several interpretations, several of which were forthcoming during the course of the testimony adduced in this case. While it is true that respondent has an elaborate and comprehensive safety program, replete with procedures, directives, pamphlets, booklets, files, etc., etc., I quite frankly and candidly am at a loss to understand why it failed to adopt a safety rule regarding the use of safety belts and lanyards so as to make it absolutely clear and understandable to a person of ordinary intelligence. Respondent's own safety manager did not understand the language "as designated" (Tr. 317-318), and it is obvious from the arguments presented during the hearing, that respondent obviously takes the position that since all applicable Federal mine safety regulations were incorporated by reference in Peabody's safety rulebook, an employee was accountable for understanding each and every regulation, including complying with the same. Such an explanation and rationale in defense of the violation is simply unacceptable. I am of the view that an operator, particularly one the size of Peabody Coal Company, with all of its resources, should have taken the initiative to insure that its workforce clearly understood its published safety belt rule. Only after the fatality occurred, did Peabody see fit to publish a company policy concerning the use of safety belts (Exh. P-8). The memorandum of April 21, 1977, issued a day after the accident, cites section 77.1710(g), company safety rule 105(i), and directs each supervisor to contact each of his employees and to read to him the following mine policy: "Any time an employee is performing one's duties in an elevated work area and where a work platform is not provided, a safety belt shall be worn and a lanyard shall be utilized."

Respondent's arguments that Mr. Woods acted outside the scope of his instructions and that in the opinion of several witnesses presented in its behalf, a safety belt was not necessary, are rejected and cannot serve as a basis for absolving respondent from any responsibility for the violation. Having viewed the witnesses, listening to their testimony, and viewing the photographs of the 18-inch wide gear housing in question, elevated some 16 feet above the dragline floor, I am convinced and I find that the area in question was, in fact, an area where there was a danger of falling and that safety belts or lines were required to be worn.

With regard to respondent's assertion that Mr. Woods was acting outside the scope of his instructions, even if that were true, it does not excuse the fact that he was not instructed to wear a belt while on top of the gear housing. As pointed out by petitioner, Pit Foreman Siegel indicated that had he known that Mr. Woods was going to perform work on top of the gear housing, he would have instructed him to wear a belt. On the facts presented in this case, I can only conclude that Mr. Siegel should have known from the situation presented that it was likely that Mr. Woods would again climb up on the housing.

As a matter of fact, that is precisely what happened in this case, not only once, but at least twice.

While it may be true that Mr. Siegel cautioned the men to "be careful," he did not specifically instruct or caution them with respect to the use of safety belts. Since it is clear that the foreman and the men had earlier climbed atop the gear housing to inspect the damage without wearing safety belts, the foreman should have known that it was likely that the men would again climb up to effect repairs and he should be specifically instructed them to use the safety belts provided. Although Mr. Siegel testified it did not occur to him to use safety belts because he felt he had adequate footing and had used handholds to reach the area atop the gear housing, it is clear to me, as indicated above, that an 18-inch wide area atop the gear housing where men are standing and working, is an area where safety belts should be required to be worn.

Although there is merit to respondent's suggestion that the question of when to or when not to wear a safety belt, is a matter of individual common sense and judgment, that proposition assumes that all individuals working at the mine are endowed with those attributes, and based on the fact that persons have been known to be killed or seriously injured by failing to wear safety belts or lines, I can only conclude that a mine operator must be held accountable and responsible to some degree for the protection of those who lack common sense and good judgment. This can only be accomplished by forceful and meaningful safety belt and lanyard rules, policies, training programs, and procedures. On the basis of the evidence adduced in this proceeding, I cannot conclude that respondent's program in this regard was adequate, nor can I conclude that respondent's requirements with respect to the use of safety belts was clearly articulated to all employees or emphasized or enforced with due diligence, and my reasons in this regard follow.

Mr. Yockey testified that there is no consistency with respect to the company safety belt rule, and that one supervisor may designate someone to wear a belt, while another would not. He candidly admitted that he would wear a belt only if told to by his supervisor, and he indicated that some men wear belts and others do not. The decision as to whether a belt should be worn is left to the individual employee. As Mr. Yockey indicated, if the employee is not afraid to climb, he does not wear a belt; if he fears climbing, he does. Mr. Yockey observed individuals working on elevated cranes without wearing belts.

Mr. Stilwell, who was with Mr. Woods on top of the gear housing when he fell, testified that he was standing directly across from Mr. Woods when he fell to his death and he was not wearing a safety belt and was not instructed to wear one. He had gone up on the gear housing earlier with Mr. Woods and Foremen Siegel, and no belts were worn by anyone. Since the accident, Mr. Stilwell wears a belt only if specifically instructed to do so.

With regard to any specific training concerning the use of safety belts, Mr. Yockey testified that aside from discussions as to how to install a lanyard, he could recall no specific training in the use of belts, although he did indicate that a belt is not a complicated piece of equipment. Mr. Stilwell said nothing about any safety training in the use of belts, and it is clear that he will only wear one if specifically required to do so, notwithstanding the fact that he witnessed one of his co-workers get killed by not wearing a belt. Mr. Siegel said he probably would have instructed Mr. Woods and Mr. Stilwell to wear belts had he known they were going to climb up on the gear housing to perform work. However, he did not believe it necessary to so instruct them when they all climbed up to inspect the gear housing, even though he saw fit to caution them as they were climbing up. He also endorsed the practice of permitting each individual to decide for himself when to wear a safety belt, and indicated that little has changed since the accident in question, and while occasional safety talks on safety belts are held, prior to the accident, no specific safety talks on the use of safety belts were conducted at the mine. Assistant Safety Manager Cook climbed on top of the gear housing after the fatal accident to assist Inspector Wheatley in taking certain measurements and he was not wearing a safety belt (see Exhibit R-5, a picture of Mr. Cook on top of the gear housing). He did not wear a belt because he did not believe he was in danger of falling, but he also indicated that if he had to climb up again, the question of whether he would wear a belt or not would depend on the kind of work he had to perform.

Although Mr. Siegel and Safety Manager Thomas both alluded to employee safety talks and exception reports, Mr. Siegel could not recall the last time he had written up an employee for failing to wear a safety belt, and Mr. Thomas could not recall specifically telling anyone to wear a safety belt, although he stated he discussed it with men on the job sites. Mr. Thomas also indicated that few mine areas are posted with signs advising as to the requirement for using safety belts, and is unaware of any specific company guidelines concerning when safety belts should be worn.

Respondent cannot escape liability and accountability for the failure of its employees to wear safety belts where the evidence adduced indicates that it did not effectively and forcefully enforce its safety rule in this regard. Respondent cannot fail to promulgate a clear and concise safety rule regarding the use of safety belts, fail to properly train and supervise its employees in their use, and then hide behind its lack of knowledge concerning an employee's dangerous working practice. It seems to me that it should not be a difficult task for mine management to identify those areas in a mine where an employee is normally and regularly expected to perform certain job tasks and if that area is elevated to a degree where there is danger of falling, a supervisor or foreman should see to it that an employee has and wears a safety belt. In this case,

while the dragline in question was equipped with safety belts stored in a barrell and clearly labeled, three employees, including a foreman, climbed to the top of the gear housing, not once, but twice, to inspect and then to perform work, and on neither instance did any of them wear safety belts.

On the facts and evidence adduced in this proceeding, I find that respondent has failed to establish that at the time the violation issued, it had a clear and understandable safety requirement designed to assure that all employees wear safety belts where there is a danger of falling, and that it enforced such a requirement with due diligence. To the contrary, I find that respondent's purported safety belt rule as set forth in rule 105(i) and as interpreted and applied at the mine in question, failed to adequately inform an employee of the requirement for wearing safety belts where there is a danger of falling. I also find that the practice of permitting each employee to decide for himself when to wear a belt, coupled with somewhat inconsistent supervisory practices regarding the wearing of such belts and a lack of a regular and consistent company policy in this regard, is an indication that respondent did not at that time, in fact, have a safety system designed to assure that employees wear safety belts where there was a danger of falling. While respondent's overall safety program seems adequate on paper, as attested to by the voluminous exhibits introduced in support of its position, I simply cannot find that its safety program met the tests laid down in the North American Coal Corporation case at the time the citation issued.

The prior Peabody case decided by me on August 30, 1978, concerned a driller helper who lost his balance while standing on top of a cable reel of a drill rig, and sustained multiple leg fractures when he caught his leg between the cable and cable reel. The evidence adduced in that proceeding established that mine management maintained a policy of requiring its employees to wear safety belts and that the policy was enforced with due diligence. Further, the evidence established that Peabody established and conducted training and instructional programs for its employees with regard to the use of safety belts, and had taken disciplinary action against employees for violations of company policy regarding the use of such belts. The evidence also established that the employee who was injured as a result of failing to wear a belt which was provided him, received such instructions and was aware of company policy regarding the use of safety belts. Further, it was established that the supervisor was some 3-1/2 miles from the accident scene when the man was injured, that when last observed by the supervisor the drill rig was operating properly, and there was no indication that repairs were needed or that a supervisor was required to be at the rig or had reason to know that the driller helper was on the rig without a safety belt.

I find that the facts presented in this case are distinguishable from those presented in the prior Peabody case which I decided, and

I believe it is clear from the discussion above with respect to my findings and conclusions concerning this matter, that respondent cannot avail itself of the North American decision, nor my interpretation and application of that decision in the prior Peabody case as a defense to the instant citation of section 77.1710(g). I find that petitioner has established a violation of section 77.1710(g) as charged, and respondent's arguments to the contrary are rejected.

Size of Business and the Effect of the Penalty on Respondent's Ability to Continue in Business

The parties stipulated that respondent is a large coal mine operator and that any civil penalty assessed by me in this matter will not adversely affect its ability to continue in business, and the stipulation is adopted as my finding in this regard.

History of Prior Violations

Although petitioner does not discuss respondent's prior history of violations in its posthearing brief, it did submit a computer printout for the Squaw Creek Mine reflecting a total of 45 paid violations for the period April 18, 1975, to April 18, 1977. One prior violation of section 77.7110(g) is noted as being issued in a section 104(b) notice of July 28, 1975, for which an assessment of $94 was made. In the circumstances, based on the evidence presented, I cannot conclude that the prior history for the mine in question is significant and warrants any increased civil penalty.

Negligence

Petitioner submits that the violation was caused by respondent's negligence and I agree. While the record in this case indicates that Mr. Woods was an experienced and conscientious worker with a good safety record, there is no explanation as to what caused him to lose his balance and fall to his death, nor is there any explanation as to why he would climb to the top of the gear housing without using a safety belt which was provided. One witness speculated that he did so to "get the job done," and he also stated that Mr. Woods climbed to the top of the gear housing contrary to instructions to "leave it alone" because he was concerned and conscientious and wanted to see what could be done to repair the damaged equipment. However, it is also clear that the foreman should have anticipated that Mr. Woods and Mr. Stilwell would again climb to the gear housing, since they had done so earlier and did not wear belts, although the foreman did caution the crew to be careful. In the circumstances, I find that the record supports a finding that respondent failed to exercise reasonable care to prevent the violation in that its supervisory personnel should have specifically advised Mr. Woods to wear a belt which was provided on the dragline while he was on top of the gear housing. Its failure to do so, coupled with the failure of mine

management to promulgate a clear and concise safety rule pertaining to the requirements for the use of safety belts, constitutes ordinary negligence.

Good Faith Compliance

Respondent abated the violation by publishing a clear statement of company policy with regard to the wearing of safety belts, instructing supervisory personnel to discuss the requirement with mine employees. I find that respondent demonstrated good faith compliance in abating the citation.

Gravity

It is clear from the evidence presented, that had Mr. Woods worn a safety belt, he probably would not have sustained fatal injuries. Petitioner suggests that the violation was serious, and I am in agreement with that assessment. In the circumstances here presented where it is clear that a safety belt could possibly have prevented the fatality, I can only conclude and find that the violation was serious.

Penalty Assessment

Petitioner recommends a civil penalty in the amount of $2,000 for the violation of section 77.1710(g). Taking into account the fact that safety belts were provided on the dragline in a clearly labeled container, and given the fact that Mr. Woods may have been instructed not to attempt further repairs on the machine, but did so anyway on his own, petitioner's recommended penalty does not appear to be unusually low. However, considering the fact that in this case, several employees climbed to the top of the gear housing without wearing safety belts and stood on an 18-inch wide area in full view of a foreman, and given the fact that I have found respondent's safety belt requirement to be somewhat anemic, not only in terms of its being clearly understood, but also in terms of inconsistent enforcement, I believe that a more substantial penalty is warranted. Accordingly, respondent's recommended civil penalty is rejected, and I assess a penalty of $3,500 for the violation.

Fact of Violation--30 CFR 77.1708

Petitioner asserts that while it has never contested the fact that respondent has a written safety program which is distributed to its employees, it was not in compliance with section 77.1708 on April 20, 1977, when Inspector Wheatley checked the bulletin boards since he looked on the bulletin boards in the change room, shop, mine office, and on the dragline, but was unable to locate any evidence of a posted safety program. Further, petitioner submits that respondent's safety rules (Exh. R-9) are totally inadequate for the

purpose of informing its employees when safety belts must be worn. Citing the language--"Safety belts and lanyards shall be worn as designated"--petitioner asserts that this could indicate to employees that belts need to be used only when specifically required either by posted sign or by oral request from a foreman. Since all operators must comply with the regulations as a minimum, petitioner asserts further that the inadequacy of respondent's safety rules cannot be corrected by merely adopting the Federal regulations.

Respondent asserts that petitioner has failed to establish a violation of section 77.1708, and that even petitioner's evidence supports a finding that respondent had a viable safety program and that there was posting in numerous places of documentary safety procedures and precautions. Respondent points to the testimony of UMWA Local 1198 President Yockey in support of its assertion that pamphlets and books relating to safety procedures had, in fact, been posted, and that while all of 19 or 20 bulletin boards throughout the mine did not always have materials on them, miners would from time to time remove materials for their own use. As to its safety program, respondent asserts that it has established procedures for taking corrective action against employees observed violating safety rules, that it had held safety meetings with employees, had posted its safety rules and pamphlets, conducted safety contacts with its employees, reproduced and distributed safety regulations and rules, training topics, memorandums, conducted safety audits and training, and, in fact, had a comprehensive safety program with instructions, procedures and practices.

Respondent argues further that the evidence establishes that the inspector conducted a most superficial investigation when he checked only three or four of the 19 or 20 mine bulletin boards and that he admitted that the safety materials produced at the hearing were new to him and that he had never seen them. Under the circumstances, respondent argues that petitioner has failed to establish a violation of section 77.1708.

## Discussion

Inspector Wheatley gave two reasons for citing a violation of section 77.1708. He believed that respondent's safety rule regarding safety belts was not thorough, and he found that respondent's safety rules and regulations were not posted in conspicuous locations throughout the mine. In support of his citation for failure to conspicuously post the safety rules, the inspector testified that he checked the bulletin boards near the change house, the mine office, and the shop. He was not sure about other bulletin boards and indicated that while he was looking for something that would suffice as a safety program, simply posting a copy of the "yellow book" (respondent's health and safety rules, Exh. R-9) would not suffice to meet the requirements of section 77.1708. When queried as to what would

suffice, he indicated that further research would be required at the particular mine in question.

Section 77.1708 does not address itself to the quality of a mine operator's safety program. The standard merely requires three things, namely, the establishment and maintenance of a safety program, publication of the program, including distribution to the employees, and the posting of the program in conspicuous places throughout the mine. Insofar as section 77.1708 is concerned, the fact that the inspector did not believe the company safety rule pertaining to safety belts to be thorough, is immaterial. If MSHA desires to monitor the quality and adequacy of such training programs, it should promulgate a specific standard covering that matter. Here, the standard cited speaks to the establishment of a program and the posting and distribution of the program to mine employees.

On the facts and evidence adduced in this proceeding, it is clear that respondent had established an elaborate safety and health training program, and the evidence and testimony produced on this question attests to that fact. Petitioner concedes that respondent has a written overall safety program which was distributed to all employees, and its evidence produced in support of the cited violation has not convinced me otherwise. The thrust of petitioner's case is its assertion that on April 20, 1977, the company safety program was not posted on three or four mine bulletin boards examined by the inspector.

On the basis of the preponderance of the evidence adduced in this proceeding, I conclude and find that petitioner has failed to establish a violation of section 77.1708. Respondent presented credible evidence from its witnesses, including testimony by the president of the local union who was called as petitioner's witness, indicating that there are 19 to 20 bulletin boards scattered throughout the mine and that safety materials and pamphlets were, in fact, posted on these boards from time to time, but that some of the materials had been removed. The fact that the inspector found three or four boards with no materials posted, is not persuasive, particularly in the circumstances here presented where the inspector could not recall how many boards he checked, and candidly admitted that he quite frankly did not know what he was looking for in terms of a safety program. Here, respondent fully met the first two requirements of the standard cited since the evidence supports a finding that it had established an ongoing safety program which had, in fact, been published and distributed to employees. As for the conspicuous posting of the program throughout the mine, I have found that petitioner has failed to establish that this was not done and the basis for that finding is the cursory investigation conducted by the inspector covering three or four boards, the fact that he was somewhat confused as to what he was looking for, and the fact that respondent's evidence and testimony reflected that safety materials were, in fact, posted on many, or at least more than three or four bulletin boards.

## ORDER

In view of my findings and conclusions made with respect to Citation No. 7-0021, April 20, 1977, 30 CFR 77.1710(g), respondent is ORDERED to pay a civil penalty in the amount of $3,500 within thirty (30) days of the date of this decision. With regard to Citation No. 7-0022, April 20, 1977, 30 CFR 77.1708, the petition for assessment of civil penalty, insofar as it seeks a civil penalty assessment for that alleged violation, is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Robert A. Cohen, Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Thomas F. Linn, Esq., Peabody Coal Company, 301 North Memorial Drive, P.O. Box 235, St. Louis, MO 63166 (Certified Mail)

Standard Distribution

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MAR 3 0 1979

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding<br><br>Docket No. DENV 78-576-P<br>02-01195-03003 |
| v. | : | Kayenta Mine |
| PEABODY COAL CO. Respondent | : | |

AMENDED DECISION

On March 7, 1979, the Judge rendered a Decision approving a settlement wherein a 20% assessment reduction was agreed to by the parties. Petitioner's motion included specific settlement figures for each violation.

On March 23, 1979, Petitioner moved to modify the Decision on grounds that the digits were improperly transmitted by Petitioner. As noted in the Decision of March 7, 1979, a 20% reduction does not shock the conscience, is within the bounds of reason and will effectuate the deterrent purpose of civil penalties. The digits in the Decision are hereby AMENDED as follows to properly reflect the settlement of the parties:

| Number | Date | 30 CFR Standard | Assessment | Settlement |
|---|---|---|---|---|
| 00387806 A | 6/08/78 | 77.509 | $655.00 | $524.00 |
| 00387806 B | 6/08/78 | 77.516 | 655.00 | 524.00 |
| 00387806 C | 6/08/78 | 77.516 | 655.00 | 524.00 |
| 00387806 D | 6/08/78 | 77.516 | 960.00 | 768.00 |
| 00387806 E | 6/08/78 | 77.505 | 655.00 | 524.00 |
| 00387806 F | 6/08/78 | 77.505 | 655.00 | 524.00 |
| 00387806 G | 6/08/78 | 77.807 | 655.00 | 524.00 |

Malcolm P. Littlefield
Malcolm P. Littlefield
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 30, 1979

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. BARB 79-113-P |
| | : | A/O No. 15-10780-03002 |
| v. | : | |
| | : | Mary Beth No. 2 Mine |
| MARY BETH COAL CO., INC., Respondent | : | |

DEFAULT DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, Department of Labor, for Petitioner; Lindell Begley, Safety Director, Mary Beth Coal Co., Inc., Bulan, Kentucky, for Respondent.

Before: Judge Cook

On November 20, 1978, the Mine Safety and Health Administration filed a petition for the assessment of civil penalty in the above-captioned case. An answer was filed by Respondent Mary Beth Coal Co., Inc., on December 19, 1978. A notice of hearing was issued on January 25, 1979, setting the hearing for 9:30 a.m., March 13, 1979. A copy of the notice was sent by certified mail to the Respondent. A return mail receipt indicated that it was delivered on February 1, 1979.

On March 13, 1979, the hearing commenced. Counsel for MSHA appeared. No one appeared to represent the Respondent (Tr. 4-5). Following this determination, a brief recess was taken. Following this recess, counsel for MSHA indicated that he had spoken by telephone to Mr. Begley, the respresentative of the Respondent during the recess. The result of that conversation was that Mr. Begley stated he would not be appearing at the hearing (Tr. 6).

Thereupon, it was noted on the record that title 29, section 2700.26, subsection (c) states: "Where the respondent fails to appear at a hearing, the Judge shall have the authority to conclude that respondent has waived its right for hearing and contest of the proposed penalties and may find respondent in default" (Tr. 7). The respondent was then found in default (Tr. 7).

It was also noted that the above section continues as follows: "Where the Judge determines to hold respondent in default, the Judge shall enter a summary order imposing the proposed penalties as final and directing such penalties be paid" (Tr. 7). Counsel for MSHA then filed Exhibits M-1(a) and M-1(b) which were the proposed assessments of September 5, 1978, concerning Mary Beth Coal Co., Inc., and the Mary Beth No. 2 Mine. Payment was then ordered to be made in the amount of the proposed penalties as set forth in Exhibit M-1(b) within 30 days of the issuance of that order.

ORDER

Accordingly, the order is reaffirmed and Respondent is directed to pay the penalty assessed in the amount of $784 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Issued: March 30, 1979

Distribution:

Eddie Jenkins, Esq., Office of the Solicitor, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Lindell Begley, Safety Director, Mary Beth Coal Co., Inc., P.O. Box 200, Bulan, KY 41722 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

March 30, 1979

| | | |
|---|---|---|
| PERMAC, INC., | : | Applications for Review |
| Applicant | : | |
| v. | : | Docket No. NORT 79-69 |
| | : | Citation No. 0693222 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. NORT 79-70 |
| ADMINISTRATION (MSHA), | : | Citation No. 0693221 |
| Respondent | : | |
| | : | Docket No. NORT 79-71 |
| | : | Citation No. 0693223 |

DECISION GRANTING MOTION TO DISMISS

Appearances: T. E. Stafford, Director of Personnel, Permac, Inc., for Applicant;
Edward Fitch, Esq., Office of the Solicitor, Department of Labor, for Respondent.

Before: Judge Cook

Applications, apparently pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 for review of citations issued pursuant to section 104(a) of the Act, were filed for Permac, Inc. In its application, Permac alleged that all of the citations have been abated.

On March 9, 1979, MSHA filed an answer and a motion to dismiss. In its motion, MSHA alleged, that "section 105(d) of the Act does not authorize review of these abated citations and consequently these actions must be dismissed."

The Applicant filed no response to this motion and the time allowed for such a response has passed.

The motion to dismiss will be granted because the Applicant in these proceedings is not challenging the reasonableness of the length of abatement time fixed in the citations and the Applicant is premature as to a review of the citations on any other issue. There is no showing that a notice of proposed assessment of penalty has been issued in these cases as yet.

Section 104(a) of the 1977 Act provides for the issuance of citations by an inspector for violations committed by an operator of a mine.

Section 105(a) of the 1977 Act provides in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. * * * If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission * * *. [Emphasis added.]

Section 105(d) of the 1977 Act also sets forth provisions for the assessment of penalties where the Secretary believes an operator has failed to correct a violation within the period permitted for its correction. Under this provision, the operator also has 30 days within which to contest the Secretary's "notification of the proposed assessment of penalty."

Section 105(d) of the 1977 Act provides in pertinent part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, * * * the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing * * *. [Emphasis added.]

A study of subsection 105(d) shows that Congress provided for review to be obtained as relates to three categories of actions taken by representatives of the Secretary of Labor. First, an operator is permitted to "contest the issuance or modification of an order issued under section 104." Second, an operator is permitted to obtain review of a "citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b)" of section 105. Third, an operator is permitted to obtain review of "the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104."

In view of subsection 105(a), the words of subsection 105(d) referring to review of "a citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) * * *" must be read to mean that the citation can be reviewed when the notification of proposed assessment is reviewed.

It is therefore clear that the time for the Applicant to file an application to review a citation will not begin to run until after a notice of proposed assessment of penalty has been received by the operator, except in the instance where the operator intends to contest the reasonableness of the length of abatement time fixed in the citation. The issue as to the validity of the citation will then be determined in the civil penalty proceeding.

The operator can then contest both the fact of violation (i.e., the citation) and the amount of the penalty, assuming there is a violation. If he fails to file such a notice within 30 days as provided, both the citation and the penalty become a final order of the Commission.

This interpretation is supported by the legislative history. An extensive discussion of this history is contained in decisions on similar motions by Judge Steffey in Itmann Coal Company v. MSHA (HOPE 78-356), dated May 26, 1978, and Judge Merlin in United States Steel Corporation v. MSHA (PITT 78-335), dated July 11, 1978.

The Procedural Rules of the Federal Mine Safety and Health Review Commission contain certain regulations relating to the processing of applications for review of citations and orders. Part of these rules are contained in 29 CFR 2700.18(a). If it were not for the fact that the intent of Congress is expressed in subsections 105(a) and (b) and subsection 105(d) of the 1977 Act, it would be possible to argue that 29 CFR 2700.18(a) allows review of citations generally rather than only as to the reasonableness of the length of abatement time. However, the word "citation" in the regulation cannot be construed to grant more than the type of review of a citation which the statute itself grants at that stage, and that is a review of the reasonableness of the time for abatement. Unlimited review of the citation will eventually be obtained, but that will take place during the course of the civil penalty proceeding.

In view of the statements of the Court of Appeals in Sink v. Morton, 529 F.2d 601 (4th Cir. 1975), it is clear that no due process problem arises in this instance.

The court therein noted that the District Court:

> [T]hough concluding that the obligation of the plaintiff to "exhaust his administrative remedies under the Act [was] entirely reasonable and in accord with accepted principles of administrative law," held that the plaintiff

had made a showing of irreparable harm, without any countervailing interests of safety, by reason of the "failure of the Secretary of the Interior to utilize his discretion in order to provide a hearing before a mine closure order is issued" and had "had no opportunity to present his case to the appropriate authorities." For these reasons, it granted an injunction against the enforcement of the notice and withdrawal orders "pending a final administrative determination of the issues involved." [Footnote omitted.]

at 603.

The Court of Appeals ruled that the District Court erred in this finding. It went on to state:

> Nor is it of any moment that the inspector's withdrawal orders were issued without a hearing. By appeal, the plaintiff can obtain a hearing, which, by the terms of the Act, is to be held as soon as practicable, and he is accorded the right to apply, as an incident to that appeal, for a temporary stay of the orders. Such procedure accords the plaintiff due process. Due process does not command that the right to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings. Reed v. Franke (4th Cir. 1961) 297 F.2d 17, 27.

at 604.

Accordingly, MSHA's motion to dismiss is GRANTED. IT IS THEREFORE ORDERED that the above-captioned proceedings be, and they hereby are, DISMISSED.

John F. Cook
Administrative Law Judge

Issued: March 30, 1979

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