JUNE 1979

The following cases were Directed for Review during the month of June.

Southern Ohio Coal Co., v. Secretary of Labor, MSHA, VINC 79-98; (Interlocutory Review granted June 19, 1979)

Secretary of Labor, MSHA, v. Stash Brothers, Inc., PITT 79-44-P; (granted June 22, 1979)

Secretary of Labor, MSHA, v. Cut Slate, Inc., WILK 79-13-P; (granted June 22, 1979)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 7, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PIKE 77-89-P IBMA 77-67
B B & W COAL COMPANY, INC.	:	

DECISION

This is an appeal of a decision holding the operator, B B & W Coal Company, Inc., in default in a penalty proceeding under the Federal Coal Mine Health and Safety Act of 1969.

On July 29, 1977, the Mining Enforcement and Safety Administration (MESA) filed a petition for assessment of civil penalty with the Department of Interior's Office of Hearings and Appeals (OHA), seeking a total of $905 for 20 alleged violations. Billy McPeek, president of B B & W Coal Co., Inc., filed a pro se answer that raised certain defenses and moved that the petition be dismissed.

On October 20, 1977, Administrative Law Judge Kennedy issued a notice scheduling a hearing for November 29, 1977, along with a pretrial order requiring MESA and the operator to make various prehearing submissions. Specifically, the operator was required to submit by November 7th "a plain and concise statement ... of the reasons why each of the violations is being contested." MESA was ordered to file by November 7th a proposed stipulation regarding several factors including the statutory criteria for assessment of penalties. The pretrial order further ordered the operator to file a statement by November 21st regarding the extent of his agreement and disagreement with MESA's proposed stipulation, a statement whether the operator claims the amount of the penalties recommended will impair its ability to continue in business, and a list of the names of witnesses it intended to use and a brief summary of the subject matter of their testimony.

On November 13th Mr. McPeek mailed to the Office of Hearings and Appeals copies of the following two documents: (1) a letter to the Solicitor, dated November 7, 1977, which includes a summary of the reasons why he would like a hearing to contest the violations in question; and (2) a letter to the Solicitor dated November 12, 1977, which stated that he was unable to agree with any points in the Solicitor's proposed stipulation. The November 12th letter further stated that the operator intended to use the inspectors who cited the alleged violations as witnesses at the hearing. These documents were received by OHA on

November 16th. Judge Kennedy never issued a written ruling on the show cause order. However, on November 18th Judge Kennedy issued an amended notice of hearing changing the site for the November 29th hearing from Whitesburg, Kentucky to Abingdon, Virginia.

On November 22, 1977, for reasons unexplained in the record, Judge Kennedy cancelled the scheduled hearing and recused himself on grounds that he did "not believe he [could] hear and decide this matter with complete impartiality toward the respondent."

On November 28th the case was assigned to Administrative Law Judge Moore. On the following day Judge Moore entered a summary decision, in which he made the following finding: "There was no response to Judge Kennedy's order to show cause and in accordance with the procedures set forth in 43 CFR 4.544, Respondent is declared in default ..." 1/

On appeal, the operator argues that he did respond to and satisfy Judge Kennedy's order to show cause, and he notes that the hearing was scheduled to take place when Judge Kennedy recused himself.

We agree that, in the circumstances here, the operator did adequately respond to and satisfy Judge Kennedy's show cause order. Judge Kennedy apparently considered the show cause order satisfied since he transferred the hearing site to Abingdon, Virginia after receiving Mr. McPeek's response. Confusion may have occurred due to the fact that the response to Judge Kennedy's order to show cause was in the form of copies of letters to the Solicitor, but mailed to OHA, and because Judge Kennedy did not issue a written ruling on the show cause order prior to recusing himself.

The decision holding the operator in default is reversed and the case is remanded for a hearing. 2/

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank T. Vestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ 43 CFR 4.544(b) provided: "(b) Failure to respond to prehearing order. Where the respondent fails to file a response to a prehearing order the administrative law judge may issue an order to show cause why the operator should not be considered in default and the case disposed of in accordance with paragraph (a) of this section."

2/ Remand for hearing is the appropriate remedy, not, as requested by the operator, a dismissal of the penalty proceedings.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 7, 1979

SECRETARY OF LABOR,	:	Docket Nos.	BARB 78-82-P
MINE SAFETY AND HEALTH	:		BARB 78-83-P
ADMINISTRATION (MSHA)	:		BARB 78-84-P
	:		BARB 78-85-P
v.	:		BARB 78-98-P
	:		BARB 78-99-P
SHAMROCK COAL COMPANY	:		

DECISION

This penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1978) ["the Act"]. On October 30, 1978, Administrative Law Judge Steffey found that Shamrock Coal Company had violated 31 mandatory safety and health standards and assessed civil penalties totaling $16,673. Shamrock petitioned for discretionary review of several of the findings of violation and penalty assessments. On December 11, 1978, the Commission granted the petition in part. The issues that we directed for review were: (1) whether substantial evidence supports two of the findings of violation; and (2) whether substantial evidence supports the judge's penalty assessments with respect to twenty-one of the violations.

After a thorough review of the record below, the decision of the judge and the arguments of the parties, we conclude that the judge's findings of violation in issue are supported in the record by substantial evidence. Accordingly, we affirm the findings that Shamrock violated the safety standards cited in notices of violation numbered 9 LLL (7-81) and 3 RM (7-3).

Shamrock presents no persuasive reasons why we should overturn the penalty assessments of the judge. Shamrock's argument that the judge cannot make a de novo assessment of penalties, but must follow the criteria for assessment of penalties contained in the 30 CFR Part 100 procedures of the Secretary of Labor's Office of Assessments, is misdirected. Under section 110(i) of the Act, de novo assessment of penalties is within the authority of the Commission and its judges. 1/ Moreover, at the hearing counsel for Shamrock insisted that the judge refrain from consideration of the Secretary's Part 100 proposals. We conclude that the penalty assessments on review are based on the evidence in the record and reflect correct consideration of the statutory criteria set forth in section 110 of the Act. The penalties are appropriate and will not be disturbed.

1/ Section 110(i) provides:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil penalties, the Commission shall consider the operator's history of

Accordingly, the judge's decision is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ cont'd

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 person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 1979

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

DECISION

This is a discrimination proceeding under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §815(c)(1978). On September 12, 1978, on application of the Secretary of Labor, Acting Chief Judge Broderick issued an order of temporary reinstatement restoring John Koerner, the alleged discriminatee, to his job with Arch Mineral Coal Company. Thereafter the Secretary moved to vacate the temporary reinstatement order on the ground that the parties had negotiated a settlement. Administrative Law Judge Littlefield granted the motion on February 7, 1979. The record did not indicate whether Mr. Koerner agreed to the motion to vacate the reinstatement order.

The Commission directed review on March 9, 1979, to determine whether there were sufficient grounds to grant the motion. The case was remanded for the limited purpose of supplementing the record. The Secretary's submissions on remand indicate that Mr. Koerner was a party to the settlement and authorized the Secretary to move for vacation of the temporary reinstatement order.

The primary concern of the Commission in directing review was to assure that the alleged discriminatee voluntarily agreed to vacating the reinstatement order. It is the miner's rights that are being settled, and we must, therefore, insure that the settlement and vacation of the reinstatement order were agreed to by the miner, not just the Secretary and the operator.

The record now shows that Mr. Koerner was a voluntary party to the agreement. Our concern has been satisfied. Accordingly, the February 7, 1979 order of Judge Littlefield is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

JUNE 1, 1979 - JUNE 29, 1979

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

JUN 1 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VINC 79-52-P
	:	A.C. No. 11-01008-03004
v.	:	
PEABODY COAL COMPANY, Respondent	:	
and	:	
PEABODY COAL COMPANY, Applicant	:	Applications for Review
	:	Docket No. VINC 78-389
v.	:	Citation No. 269304; May 16, 1978
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. VINC 78-390
	:	Citation No. 269305; May 16, 1978
	:	Docket No. VINC 78-391
	:	Citation No. 269306; May 16, 1978
	:	Baldwin No. 1 Mine

DECISION

Appearances: Leo J. McGinn, Esq., MSHA Trials Branch, Office of the Solicitor, U.S. Department of Labor, for MSHA; Thomas F. Linn, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent/Applicant.

Before: Administrative Law Judge Michels

The above-captioned cases consist of three applications for review filed June 2, 1978, by the Peabody Coal Company (Peabody) pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(a), and a civil penalty proceeding concerning the same three citations filed November 8, 1978, pursuant to section 110(a) of the Act, 30 U.S.C. § 820(a). These four proceedings were consolidated at the hearing (Tr. 10). They concern the issuance by Inspector Jack J. Eddy of three citations on May 16, 1978, charging a violation of 30 CFR 75.1700 for allegedly permitting in

three instances an oil well hole to be drilled through the mine coalbed in active workings and for the maintaining of a barrier of less than 300 feet in diameter around those wells without the approval of the Secretary.

In each application for review, Peabody (1) denies that the circumstances justified the issuance of a citation under section 104(a) of the Act; (2) alleges that the actions of the inspector were arbitrary and capricious, without authority in fact or law, and exceeded his authority; and (3) asserts that the length of the abatement time was unreasonable, arbitrary, capricious, and not justified. In its answer, MSHA (1) admits the issuance of the citations; (2) denies the allegations otherwise; (3) asserts that the time to abate as extended was reasonable; and (4) alleges as an affirmative defense in the review cases that each of the citations has been abated and terminated and that the Act does not provide for review in these circumstances. 1/

The petition for assessment of civil penalties was filed November 8, 1978, charging violations of 30 CFR 75.1700 in the three cited instances of a drilled oil hole and asking a penalty of $840 for each, or a total of $2,520. Peabody answered with a general denial.

A hearing was held in St. Louis, Missouri, on March 7, 1979, at which both parties appeared through counsel. The parties have filed posthearing briefs and proposed findings and conclusions. Such of these as are not adopted herein or specifically rejected are hereby rejected as immaterial or not supported by the evidence.

Issues and General Conclusions

The general issues are:

A. Has Peabody violated 30 CFR 75.1700 as charged?

1/ MSHA also moved to dismiss the applications on June 15, 1978, asserting the same reasons stated in its affirmative defense and citing various authorities including Judge Richard Steffey's initial decision in Itmann Coal Company v. Secretary of Labor, HOPE 78-356 (May 26, 1978). The motion was denied by my order of August 22, 1978, but the hearing was delayed pending the filing of the prospective penalty case. The penalty case seeking assessment of civil penalties for the three citations upon which review was sought was filed November 8, 1978, and is included herein as Docket No. VINC 79-52-P.

The Commission's recent decision in Energy Fuels Corporation, DENV 78-410 (May 1, 1979), addresses this issue. Under that holding, I believe it is clear that the operator, in the circumstances shown, is entitled to a review of the citations.

B. Were the citations issued with reasonable promptness?

C. If Peabody violated the mandatory standard, what should be the penalty assessed based on the criteria set forth in section 110(i) of the Act? 2/

More specific issues are (a) whether 30 CFR 75.1700 governs the drilling of an oil or gas well through a section of a mine which has been worked out, although still an active part of the mine; and (b) whether MSHA acted arbitrarily and capriciously in requiring the building of extensive cribbing.

This decision holds that 30 CFR 75.1700 was violated by Peabody only because of its failure to notify the Secretary of the existence of the oil or gas wells after they had been located and that the section was not otherwise violated. This decision further holds that MSHA acted arbitrarily and capriciously in requiring the building of cribs. A nominal penalty is assessed.

Findings of Fact

Peabody Coal Company is the operator of the Baldwin No. 1 Mine which is a slope mine with 11 active sections. The size of the coal seam at the mine varies from 6-1/2 to 7 feet. Approximately 500 men are employed and the daily production is around 12,500 tons (Tr. 17-18).

Inspector Jack J. Eddy made a visit to the Baldwin No. 1 Mine on May 12, 1978, because he had been informed by his supervisor that oil wells were drilled through the active part of the mine. He asked Mr. Gary Craig, Peabody's assistant safety manager, for the location of these wells. Both went underground and attempted to determine the location of the wells from mine managers Jones and Laughland and two engineers. These persons did not seem to know the locations and Mr. Randall Dempsey, chief engineer, was called (Tr. 20-22). Mr. Dempsey was able to locate the wells and he apparently provided the engineers with a map showing their locations (Tr. 41).

After acquiring transportation, the engineers took the inspector to the well locations. One of the wells was identified as an oil well on the rib of the coal, but the other locations were not so identified. In each case, the wells were encased in blocks or pillars of coal of various sizes and the locations of the wells

2/ The issue of reasonableness of time for abatement was presented in the applications but was not raised during the hearing or in the posthearing briefs. Thus, the allegation as to abatement time is not considered as an issue.

could not be determined visually (Tr. 26-27). The wells were located generally in the centers of the coal pillars (Tr. 51; R-8, R-9, R-10). 3/ The distances from the well to the nearest opening were as follows for the respective wells: Patton No. 1, approximately 25 feet; Stevenson No. 1, approximately 20 feet; and Hoffman No. 2, approximately 25 feet (Tr. 128). These were "active workings" even though the mining operation had advanced beyond the wells (Tr. 26-27, 61). 4/ There was no plan for retreat mining in this area (Tr. 38).

The existence and location of these wells had not been reported to MSHA by Peabody, but MSHA learned this information through other sources (Tr. 20). Peabody officials did not believe the regulation, 30 CFR 75.1700, related to these wells which were in a mined-out area (Tr. 104, 122).

The first well is identified as Stevenson No. 1 and it is located between the No. 6 and the No. 5 Main East entries in the intake aircourse. This well is 2,093 feet deep and passes the coal seam at 286 feet based on a surface elevation of 471 feet. The hole which passes through the coal seam is 7-7/8 inches in diameter. Stevenson No. 1 is located within a pillar of coal near the end of a long rectangle which measures 40 by 380 feet. This was the only barrier around the well. Drilling the well began on February 6, 1978, and was completed on February 12, 1978 (Tr. 29-30; G-12, R-1, R-9). This well has been plugged (Tr. 47).

The next well upon which a citation was issued is identified as Patton No. 1. It is 2,141 feet deep and is located between the third and fourth Main East entries. A 7-7/8-diameter pipe passes through the coal seam at 342 feet based on a surface elevation of 470 feet. The coal pillar through which the well is drilled measures 64 by 54 feet. This well is located approximately in the center of that pillar. Patton No. 1 was started June 6, 1977, and was completed June 12, 1977 (Tr. 31-32; R-8, G-14, R-1).

The final of the three wells is identified as Hoffman No. 2, a dry well which is located between the No. 10 and No. 11 East Main entries. This well is 2,098 feet deep and it passes the coal seam at 332 feet based on a surface elevation of 480 feet. The size of the well hole through the coal seam is 7-7/8 inches in diameter. This well is drilled approximately through the center of the coal

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3/ Peabody's exhibits are identified with a capital "R" and a number; MSHA's with a "G" and a number.

4/ Peabody has not disputed in its posthearing brief that the well bores were in "active workings", that is, a place in a coal mine where miners are normally required to work or travel. See 30 CFR 75.2(g)(4).

pillar which measures 54 by 52 feet. Hoffman No. 2 was started April 21, 1978, and finished on April 25, 1978 (Tr. 32; R-10, G-13, R-1).

The inspector visited the Baldwin No. 1 Mine and determined the location of the oil wells on May 12, 1978, but he did not issue his citations until May 16 (Tr. 62). Inspector Eddy considered this to be an unusual situation and so before issuing citations, he consulted with the district and subdistrict managers who ultimately made the determination on the abatement procedures to be required. This was done before the citations were issued (Tr. 65). The decision by the MSHA managers that there was a violation included the procedure which would be required for abatement. The decision to issue the citations was not made by the inspector but by others in the district or subdistrict offices (Tr. 65). Inspector Eddy's supervisor, who had not inspected or seen the wells, told him to issue the citations (Tr. 55-56).

On May 17, MSHA made and communicated to Peabody its determination that cribbing would be required for abatement (Tr. 56). The conditions were thereafter abated by the construction of cribs pursuant to Peabody's plan approved by the MSHA district manager (Tr. 36). These cribs consisted of fire-resistant ties built box-like with the ties interlaced one on top of the other at the ends leaving spaces between them. The ties were wedged against the top (Tr. 37). The cribs or cribbing boxes are themselves separated. The plan drawn up for the cribbing is R-4 (Tr. 95). This plan provides: for Stevenson No. 1, 21 cribs and 714 ties surrounding one end of the coal pillar; Patton No. 1, 38 cribs and 1,292 ties completely surrounding the coal pillar; and Hoffman No. 2, 40 cribs and 1,280 ties completely surrounding the coal pillar.

The man-hours involved in building the cribs are shown on R-5 as totaling 511 hours. The total cost for the material, hauling and man-hours was $21,000 (Tr. 110).

The purpose of the cribs was not to hold up the roof, but to prevent or diminish subsidence which might cause a rupture of the oil pipe (Tr. 38, 64). A rupture of the piping or casing could turn loose explosive gases creating a fire hazard in the view of the inspector (Tr. 39). Nevertheless, generally cribs used to support top are put near the center of the entry or crosscut (Tr. 57) . Furthermore, the subsidence in this mine was normal and not very substantial (Tr. 109).

Subsidence was described by Mr. Eddy, the inspector, as a "squeezing, shifting of the earth" (Tr. 39). Witness William Jones, chief mine manager for Peabody, described subsidence in the following words:

> I use the word "squeeze." That's where your top comes down to meet the bottom and that happens because you have, several things can cause it. You could have an area that is overworked out, in other words, your extraction is greater than it should be, your bottoms would be soft and you would have very good top in the area. And that good top, if you had pressure and you opened your cavity would be a larger cavity than what the bottom would support, it pushes the pillars down into the bottom or the fire clay which closes up that area. This, I think, is what they're referring to as the subsidence.

(Tr. 115). The pressure is mainly from the top downward though it could be riding to the side (Tr. 116). 5/

Inspector Eddy, although he testified the subsidence at the Baldwin No. 1 Mine could cause a rupture of the oil well piping, had no special qualifications on the subject of oil well drilling and the special problems this may create in a mine. The inspector had been a coal miner for about 30 years prior to joining MSHA and he has been an inspector for about 9 years. As a coal miner, he had engaged in all practical coal mining and he also had been a foreman and mine manager for approximately 25 years (Tr. 16-17). Nevertheless, Mr. Eddy conceded that these oil wells created an unusual situation, one that he had never run into before (Tr. 65). He could not state whether, if subsidence occurred, the cribbing would or would not protect the oil well (Tr. 52).

Gary Craig, Peabody's assistant safety manager, who also did not appear to have any special qualifications in the field of oil well drilling, expressed the view that cribbing was a waste of time and money (Tr. 109). He testified that since the abatement he has examined the cribs and they have taken no more weight than is normal as the mine progresses and that is not a significant amount (Tr. 109). MSHA adduced no evidence contrary to such testimony about weight.

Randall Dempsey, area engineer for Peabody, supervises all mapping and plotting of the mine and supervises all permits issued for the mine. He has worked for Peabody for 9 years, has a B.S. degree in civil engineering from the University of Missouri and he has a registered professional engineer's license issued by the State of

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5/ "Subsidence" is defined in the Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968), as follows:

"Subsidence. (a). A sinking down of a part of the earth's crust. Fay. (b). The lowering of the strata, including the surface, due to underground excavations. See also maximum subsidence. Nelson. (c). Surface caving or distortion due to effects of collapse of deep workings. Pryor, 3."

Illinois (Tr. 117-119). Mr. Dempsey testified that subsidence could happen and that in some cases it might be severe enough to take safety precautions, although not necessarily barriers (Tr. 137). In his view, the barrier provided by the coal pillars, in the case of the oil wells here in issue, was sufficient protection (Tr. 138).

There was no evidence around the three wells of any oil, water or gas seepage. Also, there was no methane (Tr. 50, 107, 140).

Peabody has no direct control over the drilling of oil or gas wells through its Baldwin No. 1 Mine coal seam. The evidence is sketchy, but it appears that Peabody either owns or leases the underground coal and other persons own the oil or gas resources and have a right of access to such resources (Tr. 68, 135). The driller is not required to obtain a permit from the mine owner to drill, but management at the Baldwin No. 1 Mine, when aware the drilling is to take place, requires the driller to operate where it will not be hazardous to the mine. Ordinarily, the driller informs State authorities, who, in turn, advise the driller to contact the operator of the affected mine. It is possible that drilling could take place without the knowledge of the operator unless the actual drilling is heard inside the mine. In the instances of the oil wells in issue, Peabody had advance notification of the drilling (Tr. 133, 135-136). Mr. Dempsey was aware of the drilling and he imparted this information on two of the wells to the supervisor of the mine, but he could not recall whether he had advised the supervisor about the third well (Tr. 133).

Peabody, when it locates an oil or gas well while advance mining, notifies MSHA of that fact and seeks a permit if it intends to mine within a 300-foot diameter around the well. One such permit is R-6. In that instance, MSHA granted a permit to extract coal within a 300-foot diameter subject to certain stated conditions, including one that the barrier would be no less than required by State laws. The pillar of coal containing the oil well in that situation was 110 by 100 feet and the well was in one corner of the pillar 30 feet from each of the two nearest openings or edges (Tr. 119-120, 129). There have been many permits of this nature issued to Peabody, but the minimum distance involved from the edge of the pillar to the well was 30 feet. A number of permits were in the 30- to 50-foot range (Tr. 141).

Discussion of Facts and Law

The inspector in these citations charged a violation of 30 CFR 75.1700 for each oil well drilled, stating, in substance, that the

barrier was less than 300 feet in diameter and that there had been no approval given by MSHA for the smaller barrier. 6/ The cited regulation, 30 CFR 75.1700, which is identical to section 317(a) of the Act, requires (1) that the operator take measures to locate an oil or gas well penetrating its mine, and (2) that when located, the operator shall establish and maintain barriers around such oil and gas wells in accordance with the State laws and regulations, except that such barriers shall not be less than 300 feet in diameter subject to exceptions for lesser or greater barriers depending upon the circumstances. 7/

A contention of Peabody is that the citations were not issued with reasonable promptness as required by section 105(a) of the Act and, thus, that no violation of the regulation occurred. The conditions, as shown by the evidence, were observed by the inspector on May 12, 1978, and the citations were not issued until 4 days later on May 16. The 12th was a Friday, so the 13th and the 14th were non-business days. Thus, the time of the investigation and the time of the issuance of the citations were separated by 1 business day. Normally, a citation is issued on the same day the condition alleged to be a violation is found. In this instance, however, the inspector was not certain either that the conditions were violations, or if violations, what corrective action should be recommended. He consulted with his superiors because of the unusual nature of the

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6/ The condition or practice described is the same in each of the three citations except for the locations and size of the pillars. That in Citation No. 269306 reads as follows:

"The operator permitted an oil well drill hole to be drilled through the mine coal bed in active workings in a pillar approximately 380 feet by 40 feet between the No. 5 east and No. 6 east Main entries. This was at the survey station No. 209+54. The Mine Safety and Health Administration did not give approval nor were they aware of the drilling taking place. The barrier was less than 300 feet in diameter."

7/ The regulation, 30 CFR 75.1700, in full text reads as follows:

"Oil and gas wells. Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier."

matter and ultimately the district and subdistrict managers determined the course of action which the inspector was to take. It does not appear to me to be inappropriate that the inspector would consult his superiors in these circumstances. The consultation took a little extra time; thus, the delay of 2 business days does not seem unreasonable. This is particularly so where there is no showing that such delay was in any way prejudicial to Peabody. Accordingly, I reject this contention of Peabody and hold that the citations were issued with reasonable promptness.

The principal argument made by Peabody is that 30 CFR 75.1700 does not cover wells drilled after an area has been mined. Peabody argued during the hearing that the regulation covers only the discovery of a well already in existence as mining progresses. It based this argument on asserted differences in the two situations. Peabody contended that mining into a new area where a well is located presents a special hazard because pressures may have been built up which will burst out suddenly if the well casing is ruptured. On the other hand, it maintained that where wells are drilled in a mined-through area and are maintained and producing, there is no pressure and the hazard is not that which 30 CFR 75.1700 was intended to cover. Peabody, in its posthearing brief, takes essentially the same position, but stresses more the fact that MSHA itself was not sure about the way to handle this matter. Peabody also contends in its brief that cribbing was not a proper barrier.

MSHA argues that the requirement is for a 300-foot barrier around any oil or gas well in active workings whether it is before or after the area is mined. MSHA contends that the danger is the same in either case.

The statutory provision and the regulation, 30 CFR 75.1700, as noted above, are one and the same. In my view, there is no ambiguity in this section of the Act. It requires the operator to establish and maintain appropriate barriers wherever and whenever oil or gas wells are located. Nevertheless, a review of the legislative background may be useful in giving a context to this provision of the law.

The requirement for barriers around gas or oil wells was originated by Congress in the Federal Coal Mine Health and Safety Act of 1969. This was section 317(a) of the 1969 Act and it became mandatory safety standard 30 CFR 75.1700. This provision was not changed by the 1977 Act; hence, the background and history under the 1969 Act is relevant.

The Senate Report for the 1969 Act in its section-by-section analysis explains the reason for the section:

> Numerous inundations of gas into coal mines have been caused by cutting into or approaching too near gas wells. The sudden introduction of oil or gas into coal mines presents hazards that are difficult to handle. All possible precautions should be exercised to safeguard against penetrating oil and gas wells by the operators.

Leg. Hist., Federal Coal Mine Health and Safety Act of 1969 (Comm. Print, 1970), pp. 83-84. I have found no other comments in the 1969 Act's Legislative History particularly useful in interpreting this section of the Act; however, see pages 869 and 1136, Legislative History, supra.

Congress, in requiring the operator to establish and maintain "barriers" around located gas and oil wells, did not indicate the kind of barrier it intended and there is little to suggest the exact purpose of the barrier other than for the brief explanation quoted above.

A "barrier," as defined in Webster's Third International Dictionary (1966), is "a material object or set of objects that separates, keeps apart, demarcates, or serves as a unit or barricade." In the mining industry, the term appears to have a more specific meaning. A Dictionary of Mining, Mineral and Related Terms (Department of the Interior, 1968), defines the term as follows:

> barrier. a.) Blocks of coal left between the workings of different mine owners and within those of a particular mine for safety and the reduction of operational costs. It helps to prevent disasters of inundation by water, of explosions, or fire involving an adjacent mine or another part of a mine and to prevent water running from one mine to another or from one section to another of the same mine. Mason, v. 1, p. 312. See also barrier pillar. b.) A low ridge by wave of action near the shore. Fay.

The same dictionary defines a related term thusly:

> barrier pillar. a.) A solid block or rib of coal, etc., left unworked between two collieries or mines for security against accidents arising from an influx of water. Zern. b.) Any large pillar entirely or relatively unbroken by roadways or airways that is left around a property to protect it against water and squeezes from adjacent property, or to protect the latter property in a similar manner. Zern. c.) Incorrectly used for a similar pillar left to protect a roadway or airway, or a group of roadways or airways, or a panel of rooms from a squeeze. Zern.

Based on these definitions, a "barrier" ordinarily would consist of a coal pillar or a rib of coal and the purpose is not only

to keep fluids and gases out of the mine, but also to prevent "squeezes," that is, the squeezing down of the top, at least from adjacent property. As a historical matter, it appears that the use of the coal pillar was originally developed by the petroleum and natural gas industry to prevent subsidence due to mining from rupturing or dislocating a well bore. Quarto Mining Company, Docket No. M 77-48 (Initial Decision, Judge Michels) (December 5, 1977), p. 3.

The term "barrier", as used in the statute, would, I believe, generally define a coal pillar, and its principal purpose, as referred to in the legislative history quoted above, would be to safeguard against penetrating oil and gas wells by operators. Nevertheless, there is nothing in the statute or the legislative history limiting the type of barrier to be used or its purpose so long as it relates to protection against hazards from wells. The Act and the regulation require simply that measures are to be taken to locate wells--there being no implication that such must be in existence when the coal is mined--and that appropriate barriers be established and maintained when a well is located. The oil wells in issue in this proceeding now exist; thus, the required measures to locate and to provide for appropriate barriers must be taken. These particular wells were located when the drillers made known to Peabody the fact that the oil wells were to be drilled and where they were to be located.

As indicated, ordinarily the barrier to be established and maintained would be the coal barrier, but when that no longer exists or only partially exists, other kinds of barriers made from other materials may have to be used. It is significant that the Act and the regulation, when referring to "barriers," or to a "barrier," in no place limits these to coal barriers; thus, they can be made of other substances. The use of barriers may be required to protect against subsidence if there is a risk that such a condition would rupture the wells and release gases or liquids. The regulation is clearly broad enough to protect the miners from hazards of such a rupture as well as ruptures from accidental cutting in the mining process.

The courts have consistently held that the 1969 Act, because it is safety or remedial legislation, should be broadly construed. The same construction would be applicable to the 1977 Act. In District #6, UMWA v. Interior Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (D.C. Cir. 1976), the court stated: "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred." See also St. Mary's Sewer Pipe Company v. Director of U.S. Bureau of Mines, 262 F.2d 378 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974); UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976); Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974). If the statutory provision reflected in 30 CFR 75.1700 is not interpreted to include

wells drilled in mined-out areas, there would appear to be no practical way in which MSHA could take measures in appropriate instances to protect miners against the protential hazards of such well bores. The condition found by the inspector in this case did not constitute imminent danger and so, unless there is a violation, he would be powerless to correct the condition, though it is determined to be a safety hazard. Therefore, it appears especially important to construe the Act so as to implement the remedial purpose in this particular section.

Under 30 CFR 75.1700, after the wells have been located--in this case after notification to Peabody by the drillers--the second sentence of the regulation becomes operative. Therein, the Secretary or his authorized representative is empowered to permit or require lesser or greater barriers. It necessarily follows and is implied from the language of the Act, particularly where the minimum of 300 feet in diameter will not be provided, that the Secretary must be notified of such fact.

In these instances, in each case the coal pillar or barrier through which the well was drilled is significantly smaller than 300 feet in diameter. Consequently, it was necessary for Peabody to inform the Secretary and to obtain the necessary authorization. Such a notification is designed to give and would give the Secretary an opportunity to investigate or to otherwise make a determination if the lesser barrier is adequate. If it is found not adequate, then MSHA determines the size and type of any substitute barrier. Based on the evidence and the reasonable implications therefrom, I find that no notification was given to MSHA by Peabody as to the existence and location of the three oil wells.

The violations of 30 CFR 75.1700 as to the oil wells here in issue were, in my view, solely the failure to notify the Secretary and not the failure to take other action such as the construction of additional barriers. The facts show that Peabody had no control over whether a well would be drilled into the Baldwin No. 1 Mine, although it apparently could exercise some influence over the exact location of the well. Because Peabody could not prevent the drilling and because it had already mined the coal which would have constituted a 300-foot coal barrier, it can hardly be held liable for the failure to establish and maintain such a coal barrier. It can, however, be held for the failure to maintain a substitute barrier if that should thereafter be determined as necessary.

Thus, I find that Peabody as to each of the oil wells, violated 30 CFR 75.1700 as alleged because of its failure to notify the Secretary or his authorized representative that such wells had been located.

The primary challenge in these cases, however, is directed toward the requirements which MSHA imposed upon Peabody as an abatement measure. Peabody, as the statement of facts fully outline, was required to build cribs around each of the pillars at a cost to it of $21,000. The position of Peabody, in effect, is that all of this cribbing was unnecessary and of little or no value.

As I found above, under 30 CFR 75.1700 the operator is obliged to notify MSHA that it has located oil or gas wells even if they are drilled after the area has been mined out. Further, it seems clear to me that under 30 CFR 75.1700, MSHA, after such notification, is obliged to make a determination of the adequacy of the existing barriers, which may be based upon an investigation. Thereafter, MSHA must advise the operator of the measures it must take, if any, to adequately protect the miners against potential hazards. While MSHA seems to have made that determination in this case it has, on the other hand, charged Peabody with violations of failures to have proper barriers prior to the making of the determination. In its posthearing brief, MSHA makes clear its view that the lack of a sufficient barrier constitutes the violation (MSHA Brief, pp. 2 and 3).

In the instances of these oil wells, the barriers of coal which were respectively 40 by 380 feet, 74 by 54 feet and 54 by 52 feet, all were obviously less than the 300 feet in diameter minimum required by the regulation regardless of where the wells were located within the pillars. In my view, the proviso reading "or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier" is applicable to the conditions found. The "greater barrier" means in the instance of advance mining, a barrier of coal exceeding 300 feet in diameter, but in instances such as these oil wells where the coal has been partly removed before the drilling, it means one that exceeds the existing diameter or measurement.

Thus, as to the wells involved, MSHA should have made an initial or preliminary determination based on the depth of the mine, other geologic conditions and other factors as to the corrective action, if any, needed for the safety of the miners. Thereafter, if MSHA found that some additional barriers were necessary, its proper course of action would be to direct Peabody to erect such barriers and to fix a reasonable time for their completion. There would be no violation unless Peabody failed to comply within the time fixed and if it did fail it could be cited for a violation of 30 CFR 75.1700 even though the original lack of barriers is not a violation. MSHA did not so enforce the regulation, but found violations for the initial absence of barriers.

While MSHA did not follow the procedures outlined above, it did make a determination that additional barriers were needed and it is

my view that any such determination is reviewable. This is not an abatement procedure; rather, it concerns an initial determination by MSHA that barriers are needed based upon the depth of the mine, other geologic conditions or other factors. I will proceed hereafter to consider whether MSHA has shown on this record justification for its determination that greater pillars are needed.

The only evidence in support of the additional barriers was the testimony of the inspector and as disclosed in the findings of fact, the inspector was not an expert in this field. The inspector had never been faced with a situation similar to this and considered it sufficiently unusual to go to his superiors for a determination as to what action to take. The inspector did not know whether the corrective action taken would prevent rupturing of the pipes.

Furthermore, the inspector who had investigated the matter did not make the determination that cribs were necessary. The decision was made by Mr. Eddy's superiors, apparently including the subdistrict manager. The person or persons who made the decision are not identified in this record. There is no indication whatsoever that this person or persons had any firsthand knowledge of the Baldwin No. 1 Mine. The supervisor who told Mr. Eddy to issue the citations did not inspect the mine and had not viewed the conditions for which the citations were issued (Tr. 55-56).

On the other hand, Peabody's witnesses both testified to the effect that the use of the cribs was unnecessary and a waste of effort. These witnesses had viewed the scene and were fully familiar with conditions at the mine. Peabody's Randall Dempsey, a licensed engineer, has the best technical background of the three witnesses. While Mr. Dempsey conceded that in some instances it might be necessary to take safety precautions where an oil well is drilled through a small pillar, it was his opinion that the coal pillars existing as to each of the wells in issue were sufficient.

The Baldwin No. 1 Mine has been given permits many times for mining closer to wells than the mandated 150 feet and many of the permits were in the range of 30 to 50 feet. No evidence was adduced to show that the circumstances as to the wells in issue were markedly different from the other cases in which permits were granted or that the somewhat lesser distances involved were significant.

While it was revealed that the Baldwin No. 1 Mine had some subsidence, the evidence establishes that this is a normal condition. There is no evidence that the degree of subsidence was in any way unusual or that it was significant so far as the oil wells are concerned. No methane was detected and there was no evidence of any gas or oil leaks. In particular, there was no evidence that the extensive cribbing, while possibly preventing some subsidence, would be effective against an oil pipe rupture. The evidence is mostly to the contrary, that is, that the cribbing would be ineffective.

Furthermore, because this is a mined-through area, there seems to be little or no danger of an accidental rupturing of an oil well and a sudden release of gas under pressure which may be occasioned by such a rupture. This is because the coal has already been mined in the area. No retreat mining is planned, but if it should take place, the locations of the wells are known and thus this particular danger would not be presented.

There are other circumstances bearing on the matter. The testimony indicates that there is no pressure on the wells which are active and pumping oil. The oil can be obtained only by pumping. Also, one of the wells, Stevenson No. 1, was securely plugged below the coal seam with cement. As to this particular well, the possibility of a gas leak would appear to be extremely remote, if not entirely eliminated. There is no evidence that a rupture in this case would present any potential hazard. MSHA's brief makes no claim of a significant hazard stating only that "the possibility of subsidence cannot be ruled out, and the reality of potential danger associated with the presence of oil or gas wells in underground workings was not entirely eliminated" (MSHA Brief, p. 4).

I find on the basis of the evidence of record that MSHA has failed to show that the cribs were necessary considering the depth of the mine, geologic conditions and other factors and that in the circumstances its action requiring that they be built was arbitrary and capricious. 8/

In summary, Peabody violated 30 CFR 75.1700 by its failure to notify the Secretary or his authorized representative of the existence of the three oil wells. It did not violate the regulation by its failure to provide the cribbing which was ordered or required as a corrective measure. The question of erecting the cribs is now moot as they are already in place, but I further hold that MSHA did not prove the necessity for the building of such cribs and that its actions in the circumstances were arbitrary and capricious. MSHA in its posthearing brief seems to come close to admitting that the crib requirement was excessive, stating "It is possible that in this

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8/ It should be stressed that this finding is based upon the evidence which the parties have presented. I have little doubt that the MSHA officials proceeded with good motives. Nevertheless, if MSHA had valid reasons for ordering the cribs, it failed to reveal them on the record. It may be that MSHA believes it is not required to justify such action and thus did not develop the evidence. If so, it cannot prevail because as I have held above, MSHA has the burden to prove the need for the corrective action it orders under this regulation.

case, a lesser barrier would have been determined as adequate, but this decision rests not with the Operator but with the Secretary or his authorized representative * * *" (MSHA Brief, p. 3).

Assessment of Civil Penalties

Having found that Peabody has violated 30 CFR 75.1700, it is necessary to make specific findings on the statutory criteria set forth in section 110(i) of the Act for the purpose of assessing an appropriate penalty.

Peabody is a large company. There is no evidence that the penalties to be assessed herein will have an effect on the operator's ability to continue in business. The history of prior violations is shown by Government Exhibit No. G-10. This history will be taken into account although no prior violation of 30 CFR 75.1700 is shown. The testimony indicates that Peabody otherwise has complied with this regulation. Insofar as the building of the cribs is concerned, it appears that Peabody made good faith efforts to achieve rapid compliance (Tr. 66).

The inspector testified that the violations in this case were serious because of the potential hazards from the possible rupturing of gas or oil pipes. However, it is clear that the inspector was addressing himself to the failure to provide the larger barriers, a condition which has not been found to be a violation. The only violation found here was the failure to notify the Secretary of the existence of the wells and such a failure to notify could be serious. However, in this proceeding it appears that any danger resulting from such failure was remote. I therefore find the violations to be only slightly serious.

Finally to be considered is the matter of negligence. Peabody adduced evidence that it had always notified the Secretary in instances where it had located wells on advance mining. In these instances, it did not notify the Secretary because it believed that it was not required by the law to do so. While Peabody should have known the requirements of the law and the regulations, in this case because of the unusual circumstances, I find that it is liable only for slight negligence.

Considering the above and also the good faith difference of view over the application of the regulation to the particular condition shown, I believe that only a nominal penalty is warranted. Accordingly, Peabody is assessed $25 for each of the three violations, or a total of $75.

Conclusions

1. The Baldwin No. 1 Mine owned by Peabody Coal Company is subject to the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction in this matter.

3. The Applications for Review should be denied and those proceedings dismissed.

4. Peabody Coal Company violated 30 CFR 75.1700 as found herein and should be and is assessed a penalty of $75.

ORDER

It is ORDERED that the applications for review are hereby DENIED and the proceedings for review are DISMISSED.

It is FURTHER ORDERED that Peabody Coal Company pay the penalties assessed herein in Docket No. VINC 79-52-P in the sum of $75 within 30 days of the date of service of this decision upon it.

Franklin P. Michels

Franklin P. Michels
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

June 4, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-198-P
	:	A.O. No. 15-02002-03001 F
v.	:	
EASTOVER MINING CO., Respondent	:	Darby No. 4 Mine

DECISION

Pursuant to notice this matter came on for an evidentiary hearing on Thursday, May 31, 1979. After the receipt of testimony and documentary evidence from respondent's eyewitnesses with respect to the violations charged 1/ and the circumstances advanced in mitigation and exculpation the following disposition was effected:

1. With respect to the charge that a bolter helper was killed as a result of his failure to move safety jacks in the sequence required by the approved roof control plan and safe mining practice due to inadequate training and supervision, the parties, after consultation with the Presiding Judge, agreed to settle the 75.200 charge by payment of a penalty of $1,000. Because of the time lapse, one and one/half years after the incident, it was impossible to determine what conditions existed immediately before the roof fall or the roof control plan that was being followed. It was clear beyond doubt, however, that Mr. Bennett was killed because of precipitous, unanticipated, and

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1/ Pursuant to Rule 611(a) of the Federal Rules of Evidence, the Presiding Judge reversed the order of proof to facilitate his understanding of the conditions charged. Under the authority of Rule 615 these witnesses were sequestered.

unpredictable behavior that was unforeseeable and unpreventable by the operator. In this connection, the evidence showed that with respect to the particular conduct charged the operator had an adequate safety training program supported by disciplinary sanctions. It also showed that with an awareness that he was working under bad roof, Mr. Bennett, contrary to his training, instructions and common caution attempted to remove one or more safety jacks prior to installation of permanent support.

Under the circumstances, it was agreed that only slight negligence could fairly be imputed to the operator. See MESA v. NACCO Mining Co., VINC 76-99-P, decision of December 17, 1976 (Merlin, J.); MESA v. Mathies Mining Co., PITT 77-13-P, decision of April 12, 1977 (Merlin, J.); Island Creek Coal Company, (NORT 74-1007-P) decision of November 5, 1975, (Kennedy, J.), modified 6 IBMA 240 (1976). Here, as in the cases cited, the consequences of the violation, while extremely serious, resulted from circumstances of employee negligence not reasonably foreseeable or preventable by the operator that diminished the operator's responsibility under the doctrine of imputation to that of slight negligence. Compare National Realty and Construction Company, Inc. v. OSHRC, 489 F.2d 1257 at 1266-1267, n. 37 (D.C. Cir. 1973); MSHA v. Grundy Mining Co., Inc., BARB 78-168-P, decision of June 19, 1978 (Kennedy, J.).

2. With respect to the charge that the operator failed to take down or support loose roof in violation of 75.202, the evidence showed that neither Mr. Bennett nor any other miner responsible for the work place in question was aware of or had any reason to believe that a concealed slickensided horseback rock was resting on the safety jacks. The removal of the jack or jacks did, of course, result in a failure to support loose roof that was fatal to Mr. Bennett. In view, however, of the uncontradicted evidence that the roof had been sounded and found firm before the jacks were set; the fact that unintentional roof falls have never, standing alone, been considered violations of 75.202; the fact that the charge here was predicated on a claimed admission by the bolter, denied under oath at the hearing, that a jack had been set under an observed crack; and the fact that the conduct charged should fairly be considered subsumed under the 75.200 violation, the charge was ordered dismissed.

The premises considered, it is ORDERED that the parties' settlement of the 75.200 violation be, and hereby is APPROVED and that respondent pay the agreed upon penalty of $1,000 on or before Monday, June 11, 1979. It is FURTHER ORDERED that, subject to payment, the captioned petition be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Issued: June 4, 1979

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203
June 5, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 78-494-P
Petitioner	:	A.O. No. 14-02502-02020V
v.	:	
	:	No. 18 Mine
SHAMROCK COAL COMPANY,	:	
Respondent	:	

DECISION

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

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty 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

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 a civil penalty charging one violation of the Act as follows:

Order No.	Date	30 CFR Standard
7-0132	11/01/77	75.329

Answer

On July 21, 1978, Respondent, Shamrock Coal Company, filed a detailed answer thereto, which denied the allegation and requested a hearing thereon.

Tribunal

A hearing was held on Wednesday, February 14, 1979, in Knoxville, Tennessee. Both MSHA and Shamrock Coal Company (Shamrock) were represented by counsel. Posthearing briefs were filed by both parties.

Evidence

1. Stipulations

The following stipulations were entered:

(a) The proceeding is governed by the 1969 Act and 1977 Act (Tr. 6).

(b) The Judge has jurisdiction (Tr. 6).

(c) Shamrock is the operator of the No. 18 Mine and is subject to the Acts' jurisdiction (Tr. 6).

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

(d) The No. 18 Mine currently employs 262 people (Tr. 7).

(e) The total production of Shamrock for 1977 was 1.3 million tons. The total production for the controlling interested party, Mr. B. Ray Thompson, was 1.4 million tons in 1977 and projected to be 1.5 million tons in 1978 (Tr. 7).

(f) The ability of Respondent to stay in business will not be affected by any civil penalty assessed in this matter (Tr. 7).

(g) The inspectors who issued the notices and orders herein at issue were duly authorized representatives of the Secretary (DAR) (Tr. 7-8).

(h) Copies of the notices and orders which are the subject of the hearing were properly served on a representative of the operator (Tr. 8).

(i) The No. 1 mine's previous history of violation is as follows: January 1, 1970 through April 8, 1974, 113 violations, $6,623 penalty paid; January 1, 1970, through May 1, 1977, 249 violations, $17,117 penalty paid (Tr. 8).

2. Testimony

A. Michael F. Detherage

MSHA initiated its case through the testimony of Mr. Detherage, the DAR who issued the 104(c)(2) order herein at issue (Tr. 9-15). The inspector has been a DAR since 1975 (Tr. 11-12). Previously, he had worked in Southeastern Kentucky during his apprentice period (Tr. 12). He had been certified as an electrician by the Federal Government but was not certified as a foreman by any jurisdiction (Tr. 13-14). He identified Government Exhibit No. 99 as Order No. 1 MFD, herein at issue, as served on Mr. Charles L. Rice, superintendent of the mine (Tr. 15; Govt. Exh. No. 99).

The order charges Respondent with the failure to establish a bleeder system for a panel in the F section of the mine (Tr. 16-17). There were, however, other bleeders in this active working section (Tr. 17). The area was not sealed (Tr. 18). The system that they had previously been following had involved cutting across a previously mined set of rooms leaving a path for ventilation (Tr. 19). They mined out the pillars with a continuous miner (Tr. 18). They were doing nothing in lieu of this system (Tr. 19-20). The required ventilation was 9,000 cfm in the last open crosscut. This was complied with (Tr. 20). Small amounts of methane were released at the mine (Tr. 21).

He testified there was a ventilation system, however, according to him, there was no bleeding for the area that had been pillared (Tr. 21). He concluded that there had been an unwarrantable failure because there could have been a buildup of methane and an ignition (Tr. 21-22). The inspector understood "unwarrantable" as meaning that the operator knew or should have known of the violation (Tr. 22). The operator knew of the violation because it was working in the area every day and the operator turned a map into the district office that showed the crosscuts to the old works had been left out (Tr. 23).

This left-out area was brought to the attention of the inspector by someone in the district office (Tr. 23). One of the reasons he went to the mine was to investigate conditions seemingly appearing on the district office map (Tr. 23). He could not enter the area because it had been pillared out and fallen (Tr. 23). Therefore, all he could rely on was the aforementioned map (Tr. 24).

On November 2, 1977, the next day, he issued a termination of the order (Tr. 25; Govt. Exh. No. 100). It was issued because there were two bleeders cut across to the righthand from the place from which they were mining (Tr. 25). The operator demonstrated good faith in affecting rapid compliance (Tr. 25-26).

The inspector is 30 years old and has had no experience in operation management or control of the general practices of mining (Tr. 26A).

Though he did not remember whether he prepared the withdrawal order before he arrived at the mine, he did know he was going to prepare it based on the map (Tr. 27-28). Testimony with respect to the district office map was accepted into evidence over Respondent's objection, however, no ruling as to probative value was made at that time and this fact will be addressed here (Tr. 33). The map was never introduced. The map, it was alleged, was not presented by counsel for MSHA because the inspector who possessed it was part of another case which had been resolved (Tr. 31).

Respondent's lawyer averred that he did not know that Shamrock also lacked a copy of the map (Tr. 31-32).

At the office, prior to the inspection, Messrs. Ken Dixon and Larry Lang went over the map and showed Inspector Detherage the deficiency and suggested that the inspector take action as the condition was dangerous (Tr. 34).

Mr. Lang had had a disagreement with an employee of Shamrock Coal Company (Tr. 34). The order was issued on the suggestion of Mr. Lang and Mr. Dixon (Tr. 34-35).

Mr. Detherage made no attempt to observe the actual condition as it was impossible to get into the area to check it out (Tr. 35), therefore, the only source of information with reference to the violation was on the map submitted (Tr. 36-37).

In May of 1977, Mr. Detherage and Mr. Lang had previously written an order of this type (Tr. 38), however, the inspector had never been in this particular set of rooms, though he was a regular MSHA inspector.

According to the map, with respect to other panels, Shamrock was establishing a bleeder system (Tr. 39). The .01 of 1 percent of methane that was found at the mine was not found in the F section (Tr. 40-41). The mine was approximately 7 square miles and the sample showing methane had been taken more than a mile away from the F section, at the fan (Tr. 42).

The witness believed that there would have been the possibility of an ignition (Tr. 45). There also could possibly have been a methane buildup (Tr. 46). He failed to bring the map because nobody told him to bring it (Tr. 49). He further testified that the map for which the order was issued, showed a set of rooms that was stopped. He was unable to testify which of two separate panels the order referred to (Tr. 52). The map used herein did not purport to show the pillar recovery system (Tr. 53). Said map was provided by Respondent and was submitted for the ventilation plan (Tr. 54).

Mr. Detherage did not remember checking the map posted at the mine on November 1, 1977, which was the most up-to-date map including prescribed changes (Tr. 59).

Inspector Detherage attempted to sketch the panels involved, but stated that there was no way that the absence of a bleeder could be observed (Tr. 63), nor would a smoke tube test be conclusive on the subject (Tr. 64).

In again discussing the missing map, Mr. Detherage stated that he thought inspector Albert F. McFarland was supposed to have had it, however he did not know if Mr. McFarland had actually found it (Tr. 65).

The sketch drawn by Inspector Detherage was acceppted into the record, over Respondent's objection, however, no ruling as to probative value was made at that time (Tr. 66; Govt. Exh. No. 99A).

B. Gordon Couch

Respondent initiated its case through the testimony of Gordon Couch, who has worked at Shamrock as company safety inspector since

August of 1977 (Tr. 76). He has worked in mining for about 20 years (Tr. 73). Previously, he had worked as a mine foreman and had been a Federal mine inspector (DAR) since 1970 (Tr. 74). He had became a coal mine inspector supervisor in 1975 at the subdistrict office in Barbourville until August of 1977 (Tr. 75-76). The order at issue was issued after he went to work for Shamrock (Tr. 77).

He testified based on what he personally observed of bleeder systems at Shamrock (Tr. 78). The map upon which the order was based was submitted to MSHA as part of an effort to get a ventilation plan approved (Tr. 79), however, the map was not returned to Shamrock (Tr. 79-80).

The witness remembered the bleeder system because a road had sunk in the area of the panels in question (Tr. 81). He knew they had a bleeder system because they cut in two places (Tr. 81). The bleeder had been established at the time the order was issued (Tr. 82).

The reason that he knew the bleeders had been established before the order was issued is that this area at issue is two panels behind where a continuous miner had been covered up and removed from the surface (Tr. 83). Several mountain breaks were between the covered continuous miner panel and the panel at issue. They had several bleeders where the surface had slid in (Tr. 83-84).

The map, which had to be kept up-to-date at the mine, did reflect the bleeder system (Tr. 84-85). The witness believed that any violation was on the map, not in the mine, however, to his knowledge there was no violation on the map submitted (Tr. 86).

Mr. Couch testified as to the description of the bleeders (Tr. 90-94). He further testified that no methane was being released by the F section as shown by an MSHA report of May 16-31, 1978 (Tr. 94-98). However, it probably would not show the situation in November 1977 (Tr. 99).

The witness believed that the map submitted did not reflect the bleeder system because they were not pillaring at the time (Tr. 101). He thought that they were in the development process (Tr. 101).

C. John Henry Sizemore

Respondent's second witness was John Henry Sizemore, general mine foreman at the mine (Tr. 105-106). He stated that the area in question was provided with a bleeder system which was adequate and proper (Tr. 107, 112).

Mr. Detherage brought the violation with him from the Barbourville office and laid it on Mr. Sizemore's desk. He never went to check the bleeder system and did not take a smoke tube test and did not check an outcrop (Tr. 108).

Where the road collapsed as referred to, supra, they had to place a 2-inch plastic pipe to retain the integrity of the bleeder system (Tr. 110-111), however, he believed the pipe was added after the violation was written (Tr. 172).

Mr. Sizemore never detected methane from the section (Tr. 116).

Issues Presented

1. Whether Order No. 1 MFD, November 1, 1977, recites a violation of 30 CFR 75.329.

2. Assuming that a violation has been established, what is the appropriate penalty to be imposed?

Discussion

A. General

The standard herein at issue provides as follows:

Bleeder Systems

> On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

Two aspects of proof have been put in contest by the litigants with respect to the existence of a violation.

The first issue is whether MSHA has established a prima-facie case in demonstrating the existence of a violation on November 1, 1977. The question presented is whether the best-evidence rule is properly invoked by Respondent to bar the testimony of Inspector Detherage with reference to the ventilation map forwarded to the Barbourville office.

The second issue, on the merits, is whether, assuming MSHA has established its prima-facie case, the testimony of Respondent's witnesses Mr. Couch and Mr. Sizemore, successfully rebuts the Petitioner's showing.

B. Best Evidence

The best evidence rule has been defined as requiring that "in proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than a serious fault of the proponent." McCormick on Evidence, § 230 (2nd ed., 1972). The rule has been limited to legally operative documents. See Id. at §§ 233-234.

The map in question is clearly a legally operative document as Inspector Detherage testified that he did not inspect the mine, but issued the order based on the map (Tr. 24, 27-28, 36-37).

The issue of whether the map is a writing within the meaning of the rule, must give greater pause. It has been suggested that the limitation of the rule to writings rests on the principle that writings exhibit a finess of detail generally lacking in other chattels. Id. at § 232. The rationale prohibiting alternative admission is the protection of this detail. See id. Modern comment has suggested that a judge should have the discretion to apply the rule to other chattels in light of the need for precision, the ease and difficulty of production, and the simplicity or complexity of the inscription. Id.; 4 Wigmore, Evidence, § 1182 (1972); cf. United States v. Duffy, 454 F.2d 809 (5th Cir. 1972) (shirt with three-letter laundry mark not required for testimony on mark). In the Judge's view, the exercise of discretion should also rely on the quality and nature of the proferred secondary evidence, see McCormick, at §§ 231, 233.

The proponent explained the failure of production on three grounds: (1) the inspector who possessed the map was a part of another case which had earlier been resolved, therefore, the inspector was no longer available, as he had left the hearing room (Tr. 31), (2) Inspector Detherage's testimony that he did not bring the map because nobody told him to bring it (Tr. 49), and (3) Inspector Detherage's testimony that he did not know whether Inspector McFarland, who was supposed to have brought the map, had actually found it (Tr. 65). Clearly, MSHA has not presented a case of dire necessity for the production of its secondary evidence.

Further, though these explanations could rationalize the failure to introduce the original map, they do not serve as adequate to justify the failure to introduce a copy of that map. Nor has MSHA attempted to explain this failure (Brief of MSHA, pp. 2-4). The void created by the absence of the map is purportedly filled by testimony of Inspector Detherage and a sketch made during the hearing in support of his testimony (Govt. Exh. No. 99A).

The inspector testified that he had never been in this particular set of rooms, though he was the regular MSHA inspector for the mine (Tr. 38). Further, when shown a map, the inspector was unable to state which set of rooms, as between two separate panels, were involved in the alleged violation (Tr. 52). Further, Inspector Detherage had not originally identified the alleged deficiency on the submitted map. MSHA employees Dixon and Lang had identified it at the Barbourville office (Tr. 34), and recommended action (Tr. 34). I conclude that the probative value to be given Inspector Detherage's testimony is of de minimus value on the subject of the contents of the map on which this alleged violation was based.

Therefore, as there is obviously a need for precision, there was no apparent difficulty of production, the map's inscriptions are relatively complex, and the proffered secondary evidence is inherently and in actuality, unreliable as to the crucial issue of which panels were alleged to be in violation (Tr. 52), I conclude that no probative value will be given the testimony of Inspector Detherage with respect to the district office map, as it fails to meet the requirements of the best-evidence rule. The motion of Respondent to strike said testimony will be granted. Without said testimony, MSHA has failed to establish a prima-facie case for the existence of the violation.

C. Merits

Assuming, arguendo, that the testimony of Inspector Detherage were admissible, MSHA has still failed to preponderate. The inspector introduced no evidence that pillar recovery had been initiated when the map was submitted. The regulation, by its terms, is not effective until the process has at least begun. 2/ 30 CFR 75.329. It was Mr. Couch's opinion that the map at issue, if it did not show a bleeder system, did not show one because the operator had not started pillaring (Tr. 101). Therefore, even if MSHA had introduced the map, it could very well be that there would have been no violation established.

As noted, supra, Inspector Detherage had not seen the panels (Tr. 38) or checked the up-to-date map at the mine (Tr. 59) which would allegedly have reflected the system (Tr. 84-85).

2/ I express no opinion as to whether the regulation requires bleeders to be in place during or after recovery.

On the other hand, Mr. Couch stated that he had personally observed the bleeder system (Tr. 78). He remembered this particular one because a continuous miner had covered two panels behind this panel (Tr. 83). Mr. Sizemore and Mr. Couch testified that they remembered this bleeder because of a road collapse which affected it (Tr. 110-111; 78-83).

Weighing the personal observations of Respondent's witnesses backed by detailed explanations in support of their memories against the testimony of the inspector who could not remember from the map on which the violation was based, which panel was involved, I conclude that Petitioner has failed to preponderate.

Findings of Fact

Upon consideration of the record as a whole, I find:

1. The Judge has jurisdiction over the subject matter and the parties in this proceeding.

2. A bleeder system sufficient to comply with 30 CFR 75.329 did exist at the Shamrock No. 18 Mine on November 1, 1977.

3. The inspector did not inspect the mine, but issued the order based on the district-office map that was not offered into evidence.

4. The inspector neither saw the panels involved nor checked the up-to-date map at the mine.

5. The accumulated probative evidence fails to establish the fact of a violation cited above.

Conclusions of Law

1. This case arises under the provisions of sections 110(a) of the 1977 Act and 109(a)(1) of the 1969 Act.

2. All procedural prerequisites established in the statutes cited above have been complied with.

3. Testimony by Inspector Detherage with reference to the map upon which this order was issued is given no probative value and is struck for failure to comply with the best evidence rule.

4. Exhibit No. 99A is given no probative value and is struck for failure to comply with the best evidence rule.

5. The Government has failed to establish a violation of either 30 CFR 75.329 or the Act.

ORDER

WHEREFORE the above-captioned is DISMISSED.

Malcolm P. Littlefield

Malcolm P. Littlefield, Judge

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

June 5, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WILK 79-63-PM
Petitioner	:	A/O No. 06-00345-05001
v.	:	
	:	Southington Pit and Mill
NEW HAVEN TRAP ROCK-TOMASSO,	:	
Respondent	:	Docket No. WILK 79-92-PM
	:	A/O No. 06-00012-05001
	:	
	:	North Branford Plant #7
	:	
	:	Docket No. WILK 79-93-PM
	:	A/O No. 06-00013-05001
	:	
	:	Plant #1 Quarry and Mill
	:	
	:	Docket No. WILK 79-101-PM
	:	A/O No. 06-00271-05001
	:	
	:	Helming Brothers Plant

DECISION

Appearances: Ronald C. Glover, Esq., Office of the Regional Solicitor, Department of Labor, Boston, Massachusetts, for Petitioner MSHA;
Robert B. Smith, Esq., and Edward Kutchin, Esq., Boston, Massachusetts, 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 New Haven Trap Rock-Tomasso, heard on May 15, 1979.

At the outset of the hearing, the 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 and that it is not my function to reapply MSHA's point system stating in this respect as follows (Tr. 12-14):

I hold that I have no authority to review the manner in which the Secretary of Labor arrives at proposed penalty amounts, whether by a point system or otherwise. I further hold that I am not bound in any way to follow or apply the point system or any other system the Secretary of Labor uses to arrive at a proposed penalty amount. Section 105(d) of the Act sets forth that when an operator disagrees with the proposed assessment, the Secretary of Labor shall notify the Commission, and the Commission shall afford an opportunity for a hearing under section 554 of the Administrative Procedure Act.

Section 110(a) of the Act provides that the operator of a mine shall be assessed a civil penalty by the Secretary which shall not be more than $10,000 for each violation. Thereafter, section 110(i) provides that the Commission has the authority to assess all civil penalties provided in this Act. Further, section 110(i) provides that in assessing civil monetary penalties, the Commission 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 person charged in attempting to achieve rapid compliance after notification of a violation.

Part 100 of 30 CFR contains a so-called point system which apparently is used by the Department of Labor in determining the amount of proposed civil penalty. In my view, Part 100 has nothing whatsoever to do with the Commission. Part 100 only concerns the Department of Labor. This is made clear by section 100.2 of Part 100 which refers only to the Office of Assessments, Mine Safety and Health Administration, Department of Labor. Section 100.6 of 30 CFR makes clear that if an operator disagrees with a proposed assessment arrived at under the point system, it can then request a hearing before the Federal Mine Safety and Health Review Commission.

Accordingly, it is clear to me that when a case comes to the Commission and its administrative law judges, the point system is left behind and is no longer a factor. The administrative law judge is to apply the six criteria set forth in section 110(i) solely in his own judgment, based upon the evidence presented before him in the hearing which as already noted is given in accordance with section 554 of the Administrative Procedure Act. I have no authority to express any views with respect to how the

Secretary of Labor reaches his proposed penalty amount, and I am not bound in any way to even consider that system when I determine what should be an appropriate penalty amount.

The Act makes clear that my task is to give an operator who disagrees with the actions of the Secretary of Labor the opportunity to have a de novo hearing. In my opinion, a de novo hearing is one in which the entire slate is wiped clean. Indeed, the Commission and its administrative law judges would not be independent if they were forced to follow some system devised by the Secretary of Labor in determining penalty amounts, and any hearing that was held on such a basis would not in my opinion truly be a de novo hearing. Therefore, based upon the evidence which I hear, I will determine for myself whether a violation exists in each instance, and where I determine that a violation does exist, then I will determine in my judgment in light of the six criteria set forth in section 110(i) what the appropriate amount of civil penalty should be.

At the hearing, counsel for both parties agreed to the following stipulations: (1) the operator is the owner and operator of the subject surface mine which is an open quarry; (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) I have jurisdiction in these cases; (4) the inspector who issued the subject notices was a duly authorized representative of the Secretary; (5) true and correct copies of the subject notices were properly served upon the operator; (6) imposition of penalties in these matters will not affect the operator's ability to continue in business; (7) all the alleged violations were abated in good faith; (8) the operator is medium in size; (9) the operator has no history of prior violations; (10) all the witnesses who will testify are accepted as experts generally in the field of mine health and safety (Tr. 4).

Citation No. 212801

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. 44-46). A decision was then rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation as follows (Tr. 46-48):

I find the violation occurred. The mandatory standard requires that cab windows shall be in good condition. There is no dispute that the side vent window had a crack of approximately 3 inches. I find therefore that the

window was not in good condition and accordingly, that a violation existed.

I further find that the violation was of moderate gravity. I recognize that the inspector testified that the occurrence of an injury was likely, whereas his written statement completed at about the time of the inspection indicated the opposite. However, it is clear to me from the testimony that it was possible that the 3-inch cut could have gone across the vent entirely and could have cut the operator of the cab, when the glass fell out. On this basis, I find the violation was of moderate gravity. If the major part of the window had been involved, this would have been a much more serious violation. I further find that the operator was negligent and that the degree of negligence was moderate. This truck was inspected on Saturday and the inspection took place on Tuesday. Either the inspection on Saturday missed this crack or the crack occurred between 6 a.m. Monday morning when work began for the week and the time the inspection took place. In any event, however, the crack on Tuesday was visible and the cab was being operated over roads at least part of which were rough and caused vibrations. Accordingly, I find the operator was guilty of moderate negligence.

I further incorporate the stipulations with respect to the operator's ability to continue in business, good faith abatement, no history of prior violations and medium size. In light of all the foregoing factors and in accordance with the mandate of section 110(i) of the Act, a penalty of $75 is hereby imposed. 1/

The foregoing bench decision is hereby affirmed.

Citation No. 212802

This violation is based upon a failure to have an audible warning device on a piece of mobile equipment. The penalty originally assessed was $106. The parties recommended a settlement of $86. The Solicitor advised at the hearing that the equipment in question had been checked previously on the day the violation was found and that when it was checked it was found to be in appropriate working order. In addition, the Solicitor advised that the area in question was not heavily traveled. Accordingly, neither negligence nor gravity was as great as originally was thought. On this basis, I accepted from the bench the recommended settlement of $86.

1/ The original assessment had been $32.

Citation No. 212803

This violation was for a cracked safety glass in the window of a cab. Since the Solicitor advised at the hearing that the circumstances of this violation were the same as those in Citation No. 212801, an assessment of $75 was agreed to by counsel for both parties. I accepted the Solicitor's representations and a penalty of $75 was assessed for this item.

Citation No. 212804

This violation is based upon the failure to provide a "no smoking" sign in an area where explosion hazards might exist. The penalty originally assessed was $60. The parties recommended a settlement of $32. The Solicitor advised at the hearing that he had recently received information that the sign was in an area subject to inclement weather, that for 4 days previous to the date of the citation there had been a major storm in the area which blew the sign down and that the operator, even with the exercise of due diligence, could not have replaced the sign any faster. Accordingly, it appears that the operator's negligence was minimal. On this basis, I accepted from the bench the recommended settlement.

Citation No. 212805

This violation is based upon the failure to provide berms for a portion of a roadway. The penalty originally assessed was $114. The parties recommended a settlement of $84. The Solicitor advised at the hearing that the roadway in question was not well-traveled and that immediately prior to issuance of the citation the road had been washed out by inclement weather so that the operator was not negligent. Based upon the foregoing factors, I accepted from the bench the settlement of $84.

Citation No. 212806

This violation is based upon the failure to provide a cover for an electrical junction box. The penalty originally assessed was $122. The parties recommended a settlement of $105. The Solicitor advised at the hearing that although the cover was not present all the wires involved were thoroughly and properly insulated, thereby reducing the hazard of electrical shock. The Solicitor further advised that this was an area where employees did not usually work. On the basis, therefore, that gravity was less than had originally been evaluated, I accepted from the bench the settlement of $105.

Citation No. 212807

This violation is based upon the failure to guard a 5-foot crusher motor. The penalty originally assessed was $122. The parties

recommended a settlement of $85. The Solicitor advised at the hearing that the machine in question did have a railing but that because of vibrations the railing recently had become loose. Because of this, the Solicitor advised that the operator was less negligent than had originally been thought because the Office of Assessments did not know that there had been any railing at the time they proposed the initi assessment. On this basis, I approved from the bench the settlement of $85.

Citation No. 212808

This violation is based upon the failure to have guards around an item that was being welded. The penalty originally assessed was $90 and the parties recommended a settlement of $80. The Solicitor advised at the hearing that the operator has a very adamant policy instructing its employees that guarding is required and that this policy is strongly enforced. The employee disregarded this policy and in accordance with the operator's strong policy a letter regarding his failure to follow instructions was placed in his file and was sent to the union steward. On this basis, the Solicitor took the position that the operator was guilty of only minimal negligence. In light of the circumstances presented, I accepted from the bench the settlement of $80.

Citation No. 212815

The Solicitor moved to withdraw the citation on the ground that it had been improperly issued and his motion to do so was granted from the bench.

Citation No. 212817

The Solicitor moved to withdraw this citation on the ground that it had been improperly issued and the motion was granted from the bench.

Citation No. 212833

The alleged violation was for a failure to provide a midrail on a conveyor walkway. The cited mandatory standard, 30 CFR 56.11-2 provides that such walkways be of substantial construction and provided with handrails. Admittedly, the walkway in question had a handrail. Accordingly, I held that it satisfied the cited standard. The Solicitor then moved to amend the citation to reflect a violation of another mandatory standard. From the bench I denied the motion to amend because the operator was not afforded sufficient notice. Accordingly, no penalty was assessed with respect to this item.

Citation No. 212834

This violation is for a failure to provide guarding on moving machinery. The penalty originally assessed was $78 and this is the amount of the recommended settlement. The Solicitor advised at the hearing that just prior to the inspection the guarding in this case had been taken off for repair and maintenance purposes. In addition, the Solicitor advised that the area in question was not well-traveled and there were no employees in the general area. Based upon these factors, I approved from the bench the recommended settlement of $78.

Citation No. 212835

This violation is based upon the failure to provide a guard for a balance wheel. The original assessment was $90 and this is the amount of the recommended settlement. The Solicitor advised at the hearing that the balance wheel was not located in a well-traveled portion of the plant. Accordingly, gravity was only moderate. Therefore, I approved from the bench the recommended settlement of $90.

Citation No. 212836

This violation is based upon the failure to provide a handrail on a portion of the platform for the sandplate. The initial assessment was $56 and the recommended settlement was for this amount. The Solicitor advised at the hearing that there were several mitigating factors. He stated that the total distance from the walkway to the ground level was only 5 to 6 feet and that a great deal of sand had fallen on this walkway so that any employee involved would only have fallen 3 or 4 feet into soft material. In addition, the Solicitor stated that the violation was the result of the action of one of the operator's employees which was contrary to the operator's own stated policy. In light of the foregoing circumstances, I accepted from the bench the recommended assessment of $56.

Citation No. 212838

This citation is for failure to provide a fire extinguisher on a fuel truck. The initial assessment was $60 and this is the amount of the recommended settlement. The Solicitor advised at the hearing that the cited truck without a fire extinguisher was parked between two other trucks each of which was equipped with an operating fire extinguisher and that therefore gravity was only moderate. In light of these circumstances, I accepted from the bench the recommended penalty of $60.

Citation No. 215486

The Solicitor moved to withdraw this citation on the grounds that it had been improperly issued. The motion was granted and no penalty was assessed for this item.

Citation No. 215487

The violation in this case was based upon the fact that the emergency brake on the front-end loader was not adjusted properly. The initial assessment was $32 and the recommended settlement was for this amount. The Solicitor advised that the primary braking system was in proper working order and that therefore gravity was greatly mitigated. I pointed out that I was not bound by the original assessment amount which appeared to me to be low, but that in view of the fact that the primary braking system was operating satisfactorily, the recommended penalty was accepted.

ORDER TO PAY

The operator is hereby ORDERED to pay $938 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judg

Issued: June 5, 1979

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 5, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VINC 79-66-PM
	:	A.O. No. 47-00235-05003
v.	:	
	:	Waukesha Quarry & Mill
WAUKESHA LIME & STONE COMPANY, INC., Respondent	:	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Frederic G. Baldowsky, Esq., Miller & Niebler, Milwaukee, Wisconsin, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This is a civil penalty proceeding charging Respondent with a violation of section 103(a) of the Federal Coal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a). The violation charged is the refusal of Respondent to allow the Federal mine inspector to enter its premises on July 10, 1978, for the purpose of conducting a mine inspection. Respondent admits that it refused to permit the inspector to enter and inspect its premises. As affirmative defenses, Respondent states that it operates a quarry which is not a mine within the meaning of that term in the Act, and that a nonconsensual inspection of its premises without a valid search warrant would violate rights guaranteed to Respondent under the fourth amendment to the Constitution.

Respondent moved for a continuance of the proceeding during the pendency of a civil action in the United States District Court for the Eastern District of Wisconsin, wherein the Secretary of Labor is seeking to have Respondent enjoined from refusing to admit authorized representatives of the Secretary of Labor to inspect Respondent's facilities. The motion was denied by order issued March 15, 1979.

Pursuant to notice, the matter was called for hearing on the merits on April 23, 1979, in Milwaukee, Wisconsin. Walter C. Brey, a Federal mine inspector, testified for Petitioner. Douglas E. Dewey, president of Respondent, James L. Harris, foreman of Respondent's "dust plant," and George Hart, sales manager of Respondent, testified on behalf of Respondent.

At the conclusion of the testimony, counsel stated their respective positions on the issues raised by this proceeding and waived their rights to file written proposed findings and conclusions. All proposed findings and conclusions not incorporated herein are rejected.

STATUTORY PROVISIONS

Section 103(a) of the Act provides in part:

> Authorized representatives of the Secretary * * * 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 other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided * * *.

* * * * * * *

Section 3(h)(1) of the Act provides in part:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground * * *.

* * * * * * *

ISSUES

1. Is Respondent's stone quarry a "mine" subject to the provisions of the Act?

2. Does the Act require or permit nonconsensual inspections without valid search warrants?

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

FINDINGS OF FACT

On the basis of the pleadings, stipulations of the parties, the testimony and other evidence introduced at the hearing, I make the following findings of fact.

1. On July 10, 1978, Respondent was the operator of a limestone quarry in Waukesha County, Wisconsin, known as the Waukesha Quarry and Mill.

2. Respondent's operation consists in drilling and blasting solid rock from the quarry, crushing it into different sizes for sale to customers as agricultural lime, as a base for concrete or blacktop and for other uses. The process of making agricultural lime involves pulverizing the limestone and bagging it. The employees involved in this process are exposed to silica dust.

3. Respondent employs between 21 and 28 workers. Its operation extends over approximately 90 acres of land. The quarry has been operating since 1870 and has an expected future life of more than 10 years. It is one of the largest quarrying operations in the State of Wisconsin. However, in comparison with mining operations throughout the country, Respondent is not a large operator.

4. State and Federal safety inspectors have regularly inspected Respondent's facililty since prior to 1967.

5. Inspector Walter Brey began inspecting Respondent's facility in 1974; he visited the premises on an average of three times per year prior to July 10, 1978.

6. From April 25 through April 27, Inspector Brey conducted a regular health and safety inspection at Respondent's facility. Twenty five citations were written charging violations of mandatory sasfety standards. Twenty one were terminated by April 27.

7. Inspector Brey returned to the facility in May and again on July 10, 1978, to check on the unabated citations.

8. The purpose of the visit on July 10, 1978, was to do a resurvey of dust exposure in the AgLime building.

9. Respondent has had a problem of employee explosure to silica dust in its Aglime plant.

10. On July 10, 1978, Respondent's president, Douglas Dewey, informed the inspector that he would no longer be allowed to inspect the premises without a search warrant. This took place following Respondent's receipt of an assessment order imposing penalties for

the alleged violations found during the April inspection. A search warrant had not been demanded of either Federal or State inspectors prior to this time.

11. On July 10, 1978, Inspector Brey issued a citation charging Respondent with a violation of section 103(a) of the Act for refusal to allow an authorized representative of the Secretary to conduct an inspection of the mine premises.

CONCLUSIONS OF LAW

IS A STONE QUARRY A "MINE" AS THAT TERM IS DEFINED IN THE ACT?

The Act defines a "mine" to include an area of land from which minerals are extracted in nonliquid form. Respondent's facility is an area of land from which it extracts limestone and processes it. "Limestone" has been defined as "a sedimentary rock containing calcium carbonate (calcite), or calcium magnesium carbonate (dolomite), or any combination of these two carbonates at least to the extent of 50 percent of the rock." 1/ "Mineral" has been defined as "an inorganic substance occurring in nature, though not necessarily of inorganic origin, which has (1) a definite chemical composition or, more commonly, a characteristic range of chemical composition, and (2) distinctive physical properties or molecular structure" and as including "every inorganic substance that can be extracted from the earth for profit whether it be solid, such as rock, fireclay, the various metals, and coal, or fluid, such as mineral waters, petroleum, and gas." 2/ The Senate Labor Committee Report on S.717, which was the basis for the 1977 Act, states that:

> [I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. [3/]

The Federal Metal and Nonmetallic Mine Safety Act, P.L. 89-577 (1966), repealed P.L. 95-164 (1977), defined the term "mine" in much the same way except for the exclusion of coal. The Senate Committee Report on the 1966 Act stated that a "mine" is "an area of land from which

1/ A Dictionary of Mining, Mineral and Related Terms (Paul W. Thrush, comp.) (1968), p. 643.
2/ Id., p. 710.
3/ S. Rep. No. 95-181, 95th Cong., 1st Sess., 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 602.

minerals (minerals include sand, gravel, crushed stone, quartz, etc.) other than coal or lignite are extracted in nonliquid form." 4/

State 5/ and Federal 6/ courts have included limestone quarries within the definition of "mine."

The parties have stipulated that Respondent's operations affect interstate commerce.

It is clear, therefore, and I conclude, that Respondent is the operator of a mine and is subject to the provisions of the Mine Safety and Health Act of 1977.

DOES THE ACT DIRECT NONCONSENSUAL WARRANTLESS INSPECTIONS OF MINES?

Section 103(a) of the Act requires ("Authorized representatives * * * shall make") frequent inspections of mines. It prohibits giving "advance notice of an inspection" and thus necessarily prohibits obtaining the operator's consent. It does not specifically address the question whether a search warrant is required, but since the authorized representatives "shall have a right of entry to, upon, or through any coal or other mine," it is clear that a warrant is not required. The Senate Commmittee Report on S.717 states that the above language "is intended to be an absolute right of entry without need to obtain a warrant." 7/

I conclude, therefore, that section 103(a) of the Act directs nonconsensual warrantless inspections of mines.

DOES THE COMMISSION HAVE JURISDICTION TO RULE ON A CONSTITUTIONAL CHALLENGE TO SECTION 103(a) OF THE ACT?

Respondent argues that if section 103(a) is interpreted to require or permit inspections without a search warrant, it would violate the fourth amendment's proscription against unreasonable searches and seizures. As a general proposition, an administrative agency does not have power to rule on constitutional challenges to the organic statute of the agency. Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361 (1974); Public Utility Commission v. United States, 355 U.S. 534 (1958); Spregel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).

However, it is the responsibility of an administrative agency to determine whether a provision of the statute it administers may

4/ S. Rep. No. 1296, 89th Cong., 2d Sess., (1966), 1966 U.S. Code Cong. and Adm. News, p. 2846.
5/ Lambert v. Pritchett, 284 S.W.2d 90 (Ky. 1955).
6/ Marshall v. Texoline Co., Civ. Action CA 4-78-49 (N.D. Texas 1979).
7/ S. Rep. No. 95-181, supra, note 3 at 615.

constitutionally be applied to facts found by the agency. Construction of its organic statute is peculiarly the duty of the agency, and a cardinal rule of construction requires that if possible, a statute be construed to avoid conflict with the Constitution. NLRB v. Mansion Home Center Management Corp., 473 F.2d 471 (8th Cir. 1973).

For these reasons, I will address the constitutional issues raised by Respondent. There is a strong presumption in favor of the constitutionality of an act of Congress. Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); FHA v. The Darlington, 358 U.S. 84 (1958). In Marshall v. Barlows, Inc., 436 U.S. 307 (1978), the Supreme Court held that section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), was unconstitutional insofar as it purported to authorize inspections without warrant. However, the Court expressly exempted: "[C]ertain industries (which) have such a history of government oversight that no reasonable expectation of privacy could exist for the proprietor over the stock of such an enterprise. Liquor (Colonade) and firearms (Biswell) are industries of this type." 436 U.S. 313.

Replying to the Secretary's argument that requiring warrants for OSHA inspectors would overturn warrantless inspections in other statutes, the Court said:

> The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulation might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply.

With respect to coal mines, it has been held that warrantless searches authorized by the Federal Coal Mine Health and Safety Act did not contravene the fourth amendment. Youghiogheny & Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973); accord, United States v. Consolidation Coal Company, 560 F.2d 214 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, 98 S. Ct. 2481 (1978), reinstated, 579 F.2d 1011 (1978). Congress has determined that the mining industry historically and inherently has posed grave threats to the health and safety of those employed in it. It is a closely-regulated industry, and both coal and metal/nonmetallic mines have been subjected to Federal warrantless inspections for many years. In the Senate Report on the 1966 Federal Metal and Nonmetallic Safety Act, 30 U.S.C. § 721, it is stated that "the number and severity of the injuries experienced each year by persons employed in the extractive industries should be alarming to an America that prides itself on its * * * concern for the welfare of its citizens." 8/

8/ Quoted in S. Rep. No. 95-181, 95th Cong., 1st Sess., 3 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 591.

I conclude that the mining industry, including stone quarrying, is a pervasively regulated industry and that warrantless nonconsenual inspections are mandated by the Act and do not constitute unreasonable searches prohibited by the fourth amendment to the Constitution.

DOES REFUSAL TO ADMIT AN INSPECTOR CONSTITUTE A VIOLATION OF THE ACT FOR WHICH A PENALTY MAY BE IMPOSED?

Section 103(a) authorizes inspections of mines. "Authorized representatives of the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations * * * (and) shall have (a) right of entry to, upon, or through any coal or other mine."

Section 104(a) allows an inspector to issue a citation to an operator who has violated the Act:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this Act, he shall, with reasonable promptness issue a citation to the operator * * *.

Likewise, section 110(a) states that an "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, shall be assessed a civil penalty by the Secretary * * *."

Therefore, I conclude that refusal to admit an inspector constitutes a violation for which civil penalties may be assessed.

PENALTY

Section 110(i) of the Act directs that in assessing a penalty, I consider six criteria: the operator's history of previous violations, the size of the business of the operator, 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 in attempting to achieve rapid compliance. There is no evidence concerning the operator's history of previous violations except the testimony that 25 citations were issued from April 25 through April 27, 1978. I do not consider that this history is such that penalties should be increased because of it. The operator's business is moderate in size. There is no evidence that penalties will have any effect on the operator's ability to continue in business and therefore, I conclude that they will not.

The violation was intentional. Respondent argues that it relied in good faith on what it conceived to be the protection of the fourth

amendment and that this fact should mitigate the amount of the penalty. However, the evidence shows that warrantless inspections authorized by the Metal and Monmetallic Safety Act have been conducted on Respondent's premises since at least 1967. The reliance on the fourth amendment was precipitated, not by a desire for privacy, but because penalties were assessed for alleged safety violations. I reject the argument for mitigation, and conclude that insofar as the negligence criterion is concerned, the penalty should be increased because the violation was intentional and thus the equivalent of gross negligence.

I conclude that the violation was serious. The inspector was in the course of a dust survey of Respondent's operation. There was an admitted problem of silica dust in its AgLime plant. Exposure to excessive concentrations of silica dust could result in silicosis, a serious debilitating disease. Twenty five citations were issued during the course of a 2-day inspection in April. Refusal to admit an inspector could result in a lessening of health and safety consciousness and indirectly could cause illness or injury to Respondent's employees. Respondent has not demonstrated good faith in attempting to achieve rapid compliance, since it is not making any attempt to comply.

Based on the testimony and other evidence introduced at the hearing and on the contentions of the parties, and considering the criteria in section 110(i) of the Act, I conclude that a penalty of $1,000 should be imposed for the violation found.

ORDER

Therefore, Respondent is ORDERED to pay the sum of $1,000 within 30 days of the date of this decision as a civil penalty for a violation of section 103(a) of the Act.

James A Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution:

Eddie Jenkins, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Muller and Niebler, Esqs., S.C., Attorneys for Respondent, 611 North Broadway Street, Milwaukee, WI 53202 (Certified Mail)

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

June 5, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PITT 79-157-P
Petitioner	:	A/O No. 36-00803-03003
v.	:	
	:	Oakmont Mine
HARMAR COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

ORDER TO PAY

The Solicitor has filed a motion to approve a settlement in the above-captioned action. This case has one violation. The violation was for section 75.1714-2(b) on the ground that a miner was found working without his self rescuer device. The Solicitor advises that the miner left his self rescuer approximately 125 feet away from the immediate area in which he was working and that the miner stated that he had forgotten to take it with him. The amount originally assessed was $98. The Solicitor recommends a reduction to $44 on the ground that the operator was not negligent.

I accept the Solicitor's representations. Under the circumstances I find the operator was not negligent. Although a penalty must be assessed because a violation occurred the absence of negligence is relevant in determining the appropriate penalty assessment. I note that in Docket No. PITT 79-120-P I approved a settlement of $72 for a violation of the same mandatory standard where the operator was not negligent. The difference in the penalty amount is justified by a difference in gravity. My review of the citations in both cases indicates that the miner in this case was in a less dangerous location. It should not, however, be necessary for me to independently review the citations to find reasons to support the Solicitor's recommended settlements. The Solicitor himself should furnish the requisite data.

ORDER

The operator is ORDERED to pay $44 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Issued: June 5, 1979

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

June 7, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-62-PM
Petitioner	:	A.C. No. 10-00310-05001
v.	:	
	:	Coeur D'Alene Pitt & Plant
CENTRAL PREMIX CONCRETE COMPANY,	:	
	:	Docket No. DENV 79-126-PM
	:	A.C. No. 45-00995-05002
Respondent	:	
	:	Yakima Pit & Plant

DECISION

Appearances: Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; R. M. Rawlines, Central Pre-Mix Concrete Co., Spokane, Washington, for Respondent.

Before: Judge Chares C. Moore, Jr.

At the beginning of the hearing in Spokane, Washington, Respondent announced that he was withdrawing his notice of contest in DENV 79-126-PM and that he had already sent his check in the amount of the proposed assessment to the assessment officer. It was explained to him that the course of action which he followed was inappropriate in a case where a complaint had been filed. In view of his obvious misunderstanding and the fact that the attorney for the Government had no objection, it was agreed that this be considered a settlement and that judgment would be entered for the amount of the original proposed assessment.

Docket No. DENV 79-62-PM involves two citations, 347017, alleging that an unguarded conveyor with a walkway was not equipped with an emergency stop cord and Citation 347018, alleging that the electric motor on the head pulley of a conveyor did not contain a cover plate over the electrical connections.

As to the first alleged violation, the standard 30 CFR 56.9-7, requires that unguarded conveyors with walkways contain an emergency stop cord. There is no dispute about the facts. There was a conveyor that was unguarded and there was no stop cord. There was what could be considered a walkway but it contained a chain across the entrance

and a sign saying "Do not enter while operating." It was the contention of Respondent that the chain and sign constituted a guard because no one was allowed in the area while the conveyor was operating. I think it more reasonable, however, to consider the chain and sign not as a guard for the conveyor, but as factors which prevent the chained-off area from being a walkway. And if there is no walkway, there is no requirement of a stop cord and therefore, no violation. The citation is accordingly VACATED.

As to Citation No. 347018, alleging a violation of 30 CFR 56.12-32, there is no question that the violation occurred. Respondent's only defense was that it contracted out its electrical work and that the independent contractor must have left the electrical cover plate off. While that may be a mitigating circumstances, it is certainly no defense to the charge. In view of the stipulations regarding four of the six statutory criteria, and the fact that there was good faith abatement and little negligence on Respondent's part, I assess a penalty of $30 for the violation found.

ORDER

It is therefore ORDERED that Respondent pay to MSHA a civil penalty in the total sum of $56 within 30 days of the entry of this order.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Issued: June 7, 1979

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Administrator for Metal & Non-Metal, 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

June 7, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-68-PM
Petitioner	:	A.C. No. 35-00432-05001
v.	:	
	:	St. Helens Quarry
DWIGHT IRBY CONSTRUCTION CO.,	:	
Respondent	:	

DECISION

Appearances: Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Dwight Irby, pro se, St. Helens, Oregon.

Before: Judge Charles C. Moore, Jr.

By a complaint filed on November 20, 1978, Respondent was charged with four violations of the Act and regulations. The complaint was based on Citation No. 345421, charging that a jaw crusher fly wheel was not properly guarded, Citation No. 345422, charging that the small elevated deck of the jaw crusher fly wheel was not provided with a railing, Citation No. 345423, charging that compressed oxygen was stored with oil and grease, and Citation No. 345424, charging that the ramp leading to the feed hopper was not provided with berms.

The mine in question is a relatively small mine working only slightly more than 1,400 manhours per year. Respondent's Exhibit Nos. 1-6 are photographs of the mine depicting various aspects and showing just about the entire mine. Solid basalt is mined by shooting explosives, and then crushing and grading the debris into various sizes of gravel and stone. The normal method of shooting at this mine was by drilling what are termed "coyote holes" and implanting the explosives therein. A coyote hole is made by drilling a hole big enough for a man to enter at right angles to the face of the basalt for a certain distance, then drilling two other holes at right angles to the first hole for implanting the explosives. The top view of the coyote hole would be in the shape of a "T," but the dimensions of the various arms are not brought out in the testimony. Respondent did try other methods of blasting, but testified that coyote holes were much cheaper. */

*/ Respondent actually did no blasting himself, but contracted the work out to an independent blaster.

While coyote holes are not prohibited by the Act and regulations, a number of miners consider them as a hazardous method of operation and the evidence indicates that Inspector Tallmadge, who issued all of the citations involved in this case, attempted to discourage Respondent from using coyote holes. Respondent is of the opinion that he was harassed by the inspector because of his use of the coyote holes. It was his statement that if an inspector gets down on you, he can always find something to cite you for, and while I am inclined to agree with the latter statement as a general proposition, if the inspector in this case had been carrying out a personal vendetta against Respondent, I am sure he would have found more than four violations.

The first two citations mentioned above, involve the area of the jaw crusher. The jaw crusher is basically two pieces of large flat steel which come together periodically as the blasted basalt is fed in from a hopper. The engine which powers the jaw crusher in this mine is mounted on metal framework which is about 2 feet above ground level. The engine contains a fly wheel and the outer part, that is the part away from the engine, was guarded, but there was no guard, according to the inspector's testimony, on the inner side of the fly wheel. It was his opinion that because of a V-belt driving the fly wheel a pinch point existed. I can accept the inspector's testimony regarding the pinch point, a point where a serious injury could occur if a miner were to be caught either by his hand or a piece of his clothing, but I cannot accept his opinion that the pinch point in this case was sufficiently accessible to constitute a violation of the standard. It was surrounded by 2-foot high framework. In order to get caught in this pinch point, a miner would have to climb through the framework. This would be a more difficult task than merely removing the guard, which Respondent placed on the inner side of the fly wheel in order to abate the citation. The framework itself was a guard and while the guard could be evaded, it could not be evaded so easily as the simple fly wheel guard which the inspector required. I find there was no violation of the standard.

I also find that the top of the framework was not a platform requiring a guard rail as charged in Citation No. 345422. Respondent's employee Mr. Cecil had thrown some screening over the framework and stored some material there just to get it out of the way. Inspector Talmadge considered the framework with some material on top of it, perhaps some boards which he remembered, as a walkway. The "platform," however, was 2 feet high and had no steps leading to it. It would certainly have been difficult to step onto a platform 2 feet high and in my opinion, it was not a work platform. There would have been no purpose in having a work platform in the area since a platform of that height would have made working on the equipment more difficult rather than easier. I find there was no platform and that the guard rail required by the inspector was not necessary.

Citation No. 345423 charges that compressed oxygen and acetylene cylinders were stored with oil and grease. The inspector issued the citation because he saw the oxygen and acetylene tanks in the back of a shed and saw oil and grease cans in the same shed. There was also a large grease gun which may or may not have contained grease at the time the inspector saw it, and it may have been sitting just inside the door or just outside the door of the shed. Testimony brought out by Respondent himself established that the grease gun was kept outside of the shed during working hours but was placed inside for overnight storage. Since the grease gun contained grease, oxygen and grease were stored together, but the inspector did not issue his citation on the basis of the grease gun. He issued it because of the cans he saw in the shed labeled "Grease." Respondent's witnesses, however, clearly established that the grease cans were used to store nuts and bolts and other odds and ends and that they did not, in fact, contain any grease. I will not rule on the question of whether overnight storage of the grease gun itself in the same shed with the oxygen is a violation, but I do rule in Respondent's favor insofar as the specific charges in this case are concerned. I find the various cans labeled "Grease" did not contain grease and that therefore, the citation was improperly issued.

Citation No. 345424 charges that the ramp leading to the feed hopper was not provided with a berm or other protective barrier. In Cleveland Cliffs Iron Company v. MSHA, Docket No. VINC 78-300-M, issued on September 8, 1978, I stated at page 3: "Inasmuch as it is the elevation which creates the hazard that berms are designed to alleviate, the intent of the regulation must be to require those berms wherever there is a hazard created by the elevation."

In the case quoted above, the road was elevated approximately 40 feet above the surrounding terrain and the banks were at an angle of approximately 60 degrees from the horizontal. In my opinion, that elevated roadway presented a clear hazard. In the instant case, the roadway is 12 feet long, 9 or 10 feet wide and the elevation varies from 0 at the beginning up to 4 feet at the hopper. The articulated front-end loader that operates on this ramp is itself 10 feet long. If therefore, the front-end loader is as close to the hopper as it can get, the back wheels would only be 2 feet onto the ramp and almost on level ground. In my opinion, this is not a type of elevated roadway which is sufficiently hazardous to require berms. In fact, the berms which were built in order to abate the citation may have created a hazardous condition themselves.

ORDER

It is therefore ORDERED that all four citations involved in this case be VACATED and that the case be, and it hereby is, DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Entered: June 7, 1979

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Administrator for Metal & Non-Metal, Mine Safety and Health, U.S. Department of Labor,

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 8 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VINC 79-118-PM
Petitioner	:	A.O. No. 47-00218-05001
v.	:	
	:	Lannon Quarry and Mill
HALQUIST STONE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, United States Department of Labor, for Petitioner; Paul Binzak, Esq., Kraemer and Binzak, Menomonee Falls, Wisconsin, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding was commenced by the filing of a petition for the assessment of a civil penalty charging that Respondent violated section 103(a) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a), by refusing to permit a duly authorized representative of the Secretary to inspect Respondent's facility.

Pursuant to notice, the case was called for hearing on the merits on April 23, 1979, in Milwaukee, Wisconsin. Walter C. Brey, a Federal mine inspector, testified on behalf of Petitioner. No witnesses were called by Respondent. At the conclusion of the hearing, counsel orally stated their respective positions on the issues presented, and each waived his right to file written proposed findings and conclusions. All proposed findings and conclusions not incorporated herein are rejected.

STATUTORY PROVISIONS

Section 103(a) of the Act provides, in part:

> Authorized representatives of the Secretary * * * 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 anay citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided * * *.

* * * * * * *

ISSUES

1. Does the Federal Mine Safety and Health Act of 1977 require or permit nonconsensual inspections of mine facilities without valid search warrants?

2. Did Respondent on June 1, 1978, refuse a Federal mine inspector access to its mine premises?

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

FINDINGS OF FACT

On the basis of the pleadings, stipulations of the parties, the testimony and other evidence introduced at the hearing, I make the following findings of fact:

1. On June 1, 1978, Respondent was the operator of a stone quarry located in Waukesha County, Wisconsin, known as the Lannon Quarry and Mill.

2. Respondent's operation includes a large pit area where stone is extracted by blasting and crushed to different sizes. It also includes a stone cutting operation where building stone is jarred loose from the earth by black powder, extracted with a fork lift and cut into different sizes.

3. Respondent employed approximately four men in its quarry operation and approximately seven or eight in its stone cutting operation.

4. Respondent's operation has been visited by Federal inspectors since at least 1974, on an average of three times a year.

5. On May 31, 1978, Federal mine inspector Walter C. Brey began a safety and health inspection of Respondent's Lannon Quarry. Three citations were issued on that date as the safety part of the inspection was completed.

6. On June 1, 1978, Inspector Brey returned to Respondent's quarry to complete the health part of the inspection. He placed dosimeters to measure noise exposure and respirable pumps to measure dust exposure on selected employees.

7. Approximately 2 hours after the inspection began on June 1, 1978, Mr. Bud Halquist, who was in charge of the limestone operations for Respondent, approached the inspector and told him that he was harrassing Respondent and would not be allowed to remain on Respondent's property unless he got a search warrant. The inspector picked up his health equipment and left the property.

8. On June 1, 1978, at about 10:05 a.m., Inspector Brey issued a citation alleging a violation of section 103(a) of the Act for denial of right of entry and served it on Respondent.

9. I find as a fact that Respondent refused to permit the continuation of a health and safety inspection of its mining facility by an authorized representative of the Secretary on June 1, 1978.

CONCLUSIONS OF LAW

DOES THE ACT DIRECT NONCONSENSUAL, WARRANTLESS INSPECTIONS OF MINES?

Section 103(a) of the Act requires ("Authorized representatives * * * shall make") frequent inspections of mines. It prohibits giving "advance notice of an inspection" and thus necessarily prohibits obtaining the operator's consent. It does not specifically address the question whether a search warrant is required, but since the authorized representatives "shall have a right of entry to, upon, or through any coal or other mine," it is clear that a warrant is not required. The Senate Committee Report on S.717 states that the above language "is intended to be an absolute right of entry without need to obtain a warrant." 1/

I conclude, therefore, that section 103(a) of the Act directs nonconsensual, warrantless inspections of mines.

Respondent has conceded, and I conclude that its stone quarry is a mine as that term is defined in the Act.

1/ S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 615.

DOES THE COMMISSION HAVE JURISDICTION TO RULE ON A CONSTITUTIONAL CHALLENGE TO SECTION 103(a) OF THE ACT?

In the decision I issued on June 5, 1979, in the case of Secretary v. Waukesha Lime & Stone Company, Inc., Docket No. VINC 79-66-PM, I discussed the constitutional issue raised here, recognizing that an administrative agency does not have the power to rule on a constitutional challenge to the organic statute of the agency.

However, it is the responsibility of an administrative agency to determine whether a provision of the statute it administers may constitutionally be applied to facts found by the agency. Construction of its organic statute is peculiarly the duty of the agency, and a cardinal rule of construction requires that if possible, a statute be construed to avoid conflict with the Constitution. NLRB v. Mansion Home Center Management Corp., 473 F.2d 471 (8th Cir. 1973).

I concluded in Waukesha, and conclude here, that the mining industry, including stone quarrying operations, is a pervasively regulated industry, that warrantless, nonconsensual inspections are mandated by the Act and do not constitute unreasonable searches under the fourth amendment.

DOES REFUSAL TO ADMIT AN INSPECTOR CONSTITUTE A VIOLATION OF THE ACT FOR WHICH A PENALTY MAY BE IMPOSED?

In the Waukesha decision, supra, I concluded that refusal to permit an authorized representative of the Secretary to conduct an inspection of a mining facility constitutes a violation of the Act for which a civil penalty may be assessed. I reiterate that conclusion in this case.

PENALTY

The Act directs that in assessing a penalty, I consider six criteria: the operator's history of previous violations, the size of the business of the operator, 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 in attempting to achieve rapid compliance. There is no evidence concerning the operator's history of previous violations except the testimony that three citations were issued on May 31, 1978. I do not consider that this history is such that penalties should be increased because of it. The operator's business is small in size. There is no evidence that penalties will have any effect on the operator's ability to continue in business and therefore, I conclude that they will not.

The violation was intentional and thus the equivalent of gross negligence. I conclude that the violation was serious. Refusal to admit an inspector could result in a lessening of health and safety

consciousness and indirectly could cause illness or injury to Respondent's employees. Respondent has not demonstrated good faith in attempting to achieve rapid compliance, since it has made no effort to comply.

Based on the testimony and other evidence introduced at the hearing and on the contentions of the parties, and considering the criteria in section 110(i) of the Act, I conclude that a penalty of $700 should be imposed.

ORDER

Wherefore, Respondent is ORDERED to pay the sum of $700 within 30 days of the date of this decision as a civil penalty for a violation of section 103(a) of the Act.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution:

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Paul Binzak, Esq., Kraemer and Binzak, S.C., North 89, West 16800, Appleton Avenue, Menomonee Falls, WI 53051 (Certified Mail)

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

June 13, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. MORG 79-56-P
Petitioner	:	A/O No. 46-01433-03011
v.	:	
	:	Loveridge Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENTS

ORDER TO PAY

On June 1, 1979, the Solicitor filed a motion to approve settlements in the above-captioned proceeding.

In his motion, the Solicitor advises the following:

1. The attorney for the Secretary and the respondent's attorney Michel Nardi have discussed the alleged violations and the six statutory criteria stated in Section 110 of the Federal Mine Safety and Health Act of 1977.

2. Pursuant to those discussions, an agreed settlement has been reached between the parties in the amount of $1,458. The original assessment for the alleged violations was $2,002.

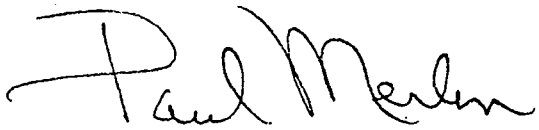
3. A reduction from the original assessment is warranted because each of the violations was committed by one of four independent contractors engaged in construction activities at the Loveridge Mine and plant area. The contractors are West Virginia Electric Company, Industrial Contracting, Neely Construction Company and Iron Working Contractors. Accordingly, the operator's negligence in these circumstances should be reduced. The proposed settlement amounts have been reached by reducing negligence points approximately one-half thereby computing a new total number of points. These points were converted, by the use of the penalty conversion table, to the amounts proposed herein as settlement of this claim is as follows:

CITATION NO.	DATE	STANDARD	ORIGINAL AMOUNT		PROPOSED SETTLEMENT
18804	8/10/78	77.402	$140		$106
18806	8/10/78	77.402	$180		$130
18808	8/10/78	77.701	$130		$98
18810	8/10/78	77.505	$130		$98
18812	8/10/78	77.516	$130		$98
18814	8/10/78	77.516	$170		$130
18844	8/8/78	77.204	$170		$114
18845	8/8/78	77.205	$160		$114
18846	8/8/78	77.205	$160		$106
18847	8/8/78	77.204	$160		$114
18848	8/8/78	77.1112	$122		$90
14259	8/9/78	77.402	$180		$130
15174	8/29/78	77.410	$170		$130
				TOTAL	$1,458

In Secretary of Labor, Mine Safety and Health Administration v. Republic Steel Corporation (79-4-4) dated April 11, 1979, the Federal Mine Safety and Health Review Commission held that under the 1969 Act, the Secretary of Labor could issue citations against the owner of a coal mine for violations committed by independent contractors. Under the present Act, an operator is specifically defined to include an independent contractor as well as the operator. However, I believe the fact that the independent contractor now is specifically defined as an operator does not limit the Secretary's discretion with respect to whom to cite. Chief Judge Broderick reached the same conclusion in Secretary of Labor, Mine Safety and Health Administration v. Old Ben Coal Company (VINC 79-119-P) dated April 27, 1979. Accordingly, the citations against the operator here are proper. The Commission also held in Republic that where an enforcement action is undertaken against the operator, the independent contractor may also be proceeded against in a separate or consolidated proceeding. I believe the amount of the penalty properly can take into account the circumstances of the violations. Chief Judge Broderick also reached the same conclusion in the Old Ben case cited above. Accordingly, I accept the Solicitor's representations.

ORDER

The operator is ORDERED to pay $1,458 within 30 days from the date of this decision.



Paul Merlin
Assistant Chief Administrative Law Judge

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

June 14, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. MORG 79-107-P
	:	A.O. No. 46-02845-03002
v.	:	
	:	
LAUREL RUN MINING COMPANY,	:	Mine No. 1
Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT
AND DISMISSAL

The Laurel Run Mine is not a gassy mine. A methane emission has, so it is claimed, never been detected. Even so, section 305(a)(3) of the Act, 30 CFR 75.503 requires that "all electric face equipment" taken into or used inby the last open crosscut be maintained in a permissible condition. In addition, section 305(g) of the Act, 30 CFR 75.512 requires that "all electric equipment" whether or not used in the face area be frequently examined, tested, and properly maintained to assure safe operating conditions. It seems clear therefore that any violation of 75.503 would be a violation of 75.512. On the other hand, not every violation of 75.512 is a violation of 75.503.

On April 6, 1978, the safety record at the Laurel Run Mine led a mine inspector to conclude that because of the "number of permissibility citations" (75.503) issued at the mine the "program for proper maintenance of the electrical equipment at the mine was in need of upgrading". For this reason, he issued a citation charging a violation of 75.512.

The Solicitor moves to withdraw this charge on the ground that evidence which shows a pattern of permissibility violations does not properly lie under 75.512. I believe this is correct because:

1. The citation does not comply with the notice requirements of section 104(e)(1) of the Act, as amended, 30 U.S.C. § 814(e)(1).

2. The citation does not charge that the pattern of permissibility violations alleged were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety hazard. 1/

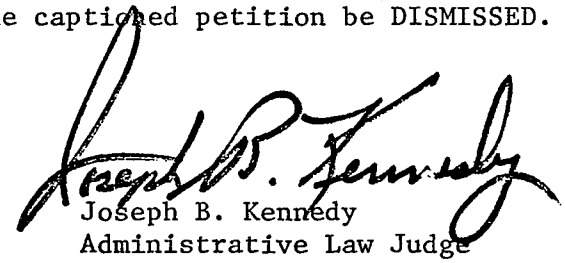
3. The Secretary has not issued the rules mandated by section 104(e)(4) of the Act establishing the criteria for determining when a pattern violation occurs.

4. It has been determined that absent the authority conferred by section 104(e) instances of repetitive violations of the permissibility standard must be charged individually or not at all. See Alabama By-Products Corporation v. MSHA, Docket No. BARB 77-73, Decision of October 13, 1978, Luoma, J. 2/

Accordingly, it is ORDERED that the motion to withdraw Citation 13265 be, and hereby is, GRANTED.

With respect to the two 75.503 violations charged, my independent evaluation and de novo review of the circumstances lead me to conclude that the motion to approve settlement of these charges at the amounts originally assessed, $122.00 each, is in accord with the purposes and policy of the Act.

Consequently, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED, that respondent pay the agreed upon penalty of $244.00 on or before Monday, June 25, 1979, and that subject to payment the captioned petition be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

1/ This is rather inexplicable since even in the absence of methane an ignition from a nonpermissible piece of electric face equipment can cause a mine fire or explosion.

2/ On November 28, 1978, the Commission vacated its order docketing this decision for review, thereby allowing it to become a final decision of the Commission. The Secretary did not seek review of the decision by the courts. This means that until the Secretary acts to implement section 104(e) it is, for all practical purposes, a dead letter and unenforceable.

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

JUN 14 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 78-583-P
Petitioner	:	A.C. No. 15-09365-02004
v.	:	
	:	No. 1 Surface Mine
CREEKVIEW COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Marvin Tincher, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner,
Tollie Young, President, Creekview Coal Corporation, for Respondent.

Before: Judge Lasher

This proceeding arose under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970). Pursuant to section 301(c)(3) of the Federal Mine Safety and Health Act of 1977, proceedings pending at the time such Act takes effect shall be continued before the Federal Mine Safety and Health Review Commission.

A hearing on the merits was held in Lexington, Kentucky, on May 21, 1979. After considering evidence submitted by both parties, and argument, I entered a detailed oral opinion on the record at the close of the hearing. It was found that the six violations charged did occur. It was further determined that a penalty otherwise warranted by consideration of the various penalty assessment criteria provided by statute would have no adverse affect on Respondent's ability to continue in business. Respondent was assessed penalties totaling $356.

Respondent is ordered to pay the penalties assessed of $356 within 30 days from the date of this decision.

Michael A. Lasher, Jr., Judge

Distribution:

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

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. PITT 79-168
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 231633 January 26, 1979 Westland Mine
UNITED MINE WORKERS OF AMERICA, Respondent	:	

DECISION

Appearances: James T. Hemphill, Jr., Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Washington, D.C., for Applicant;
Barbara K. Kaufmann, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent MSHA.

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 105(d) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company for review of an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 104(d)(2) of the Act.

Pursuant to a notice of hearing issued April 6, 1979, this case was set for hearing on June 5, 1979, in Pittsburgh, Pennsylvania. The hearing was held as scheduled. The operator and MSHA appeared and presented evidence (Tr. 5-55). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, agreed to have a decision rendered from the bench, and set forth their positions in oral argument.

Bench Decision

The decision rendered from the bench is as follows:

This case is an application for review of an order issued under section 104(d)(2) of the Act.

The order recites that in violation of section 75.1707 air was escaping from the track haulageway to the intake escapeway through three man doors and through a hole in a permanent stopping, which hole had been covered with a brattice cloth.

After the testimony of the inspector, the Solicitor moved to have the order vacated with respect to the three man doors on the grounds that the inspector's own statements made a finding of unwarrantable failure impossible. The Solicitor's motion was well taken under the circumstances and from the bench the order was vacated in part in accordance with the motion.

This leaves for consideration the air which was coming through the hole in the damaged stopping from the track haulageway to the intake escapeway. The operator's inspector-escort agreed with the inspector that air was coming through the hole from the track haulageway to the intake escapeway. Accordingly, the existence of a violation under section 75.1707 is undisputed and I find it existed as alleged.

There remains for consideration unwarrantable failure with respect to this aspect of the order. It appears that the hole in the stopping had been caused by a roof fall on the track haulage side of the stopping. Falling material apparently knocked out some of the blocks in the stopping. The inspector believes the operator was guilty of unwarrantable failure because the debris from the fall was covered with some rock dust. The area had been rock dusted on January 20, and the intake escapeway had been subject to its weekly examination on January 22. Accordingly, the inspector believed that the hole already existed before rock dusting had been done on January 20 and therefore before the fire boss examination on January 22. The order was, of course, issued on January 26. The inspector testified he had been told by a man in the mine that the hole had been there on January 22, but the inspector did not take the man's name and does not know who he is.

Contrary to the inspector's testimony is the testimony of the fire boss, a union member, who stated that when he saw the stopping on January 22 during his fire boss run there was nothing wrong

with it, and that no brattice curtain was even there at that time. After due consideration, I accept the testimony of the fire boss. The testimony of the fire boss is especially persuasive because as the mine map demonstrates, his route of travel inby meant that he was directly facing the stopping in question. Indeed, he could not miss it. I found him a credible witness. Accordingly, I must reject the inspector's inference that the hole existed as far back as January 20 and January 22.

Insofar as the record before me is concerned, the inspector's finding of unwarrantable failure is based solely upon his conclusion that the fire boss either missed or failed to report the stopping which was already damaged. This is a conclusion I do not accept. I have not overlooked the inspector's reliance upon the presence of rock dust on the fallen debris. However, the direct testimony of the fire boss is simply more persuasive to me than the inferences to be drawn from the presence of rock dust.

Whether the brattice cloth was put up at some undefined later time after January 22 is not before me. The Solicitor has presented no evidence for such a theory to support a finding of unwarrantable failure. The inspector's opinion was not asked about this issue. I can only decide this case on the evidence presented, and I cannot supply evidentiary gaps.

Here the most probative evidence before me demonstrates that the inspector's theory of unwarrantable failure, however well-intentioned, cannot be sustained.

The order is therefore vacated, and the application for review is granted.

I express my appreciation to both counsel for a very helpful oral argument.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 231633 be VACATED and that the operator's application for review be GRANTED.

Paul Merlin
Assistant Chief Administrative Law Judge

Issued: June 15, 1979

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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

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. MORG 79-70
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 012744 December 28, 1978 Shoemaker Mine
UNITED MINE WORKERS OF AMERICA, Respondent	:	

DECISION

Appearances: James T. Hemphill, Jr., Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Washington, D.C., for Applicant;
Barbara K. Kaufmann, Esq., and Sidney Salkin, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for Respondent MSHA.

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 105(d) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company for review of an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 104(d)(2) of the Act.

Pursuant to a notice of hearing issued April 6, 1979, this case was set for hearing on June 5, 1979, in Pittsburgh, Pennsylvania. The hearing was held as scheduled. The operator and MSHA appeared and presented evidence (Tr. 5-46). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, agreed to have a decision rendered from the bench, and set forth their positions in oral argument.

Bench Decision

The decision rendered from the bench is as follows:

This case is an application for review of an order issued under section 104(d)(2) of the Act. The parties agree that the issues are (1) the existence of a violation and, (2) unwarrantable failure.

The order recites that the distances between the nearest roof bolt and the three corners in question exceeded the 5 feet specified by the roof control plan. The inspector's testimony concerning his measurements of these distances and his conclusion regarding a violation of page 12 of the roof control plan are undisputed. I accept this evidence and based upon it I find a violation of section 75.200. Counsel for the operator during oral argument conceded the existence of a violation.

The inspector also testified that these excess distances existed for several days, during which the area in question had been idle but had been preshifted. The inspector's conclusions in this respect were based upon the appearances of the area, consisting of footprints and rock dust. The inspector also relied upon the presence of many dates left by preshift examiners during the several days in question. This testimony also is undisputed, and I accept it. The fact that the cited violations existed for several days justifies the inference, without more, that the operator knew or should have known about the violation. I hold that this alone constitutes unwarrantable failure.

I note that during oral argument counsel for the operator conceded that the operator should have known about the existence of the violation. However, I further accept the testimony of the inspector to the effect that the operator's superintendent told him that he, the superintendent, knew about the violations, but because men were on vacation and because the section was idle, the condition had not been corrected. I hold this actual knowledge further demonstrates the existence of unwarrantable failure. I note that during oral argument counsel for the operator conceded the existence of actual knowledge on the part of the operator.

The operator's defense apparently is based upon the section foreman's action in allegedly beginning to abate the violations upon the morning in question, shortly before the order was issued. Even if this testimony regarding the initiation of abatement is accepted, I hold that it makes no difference. In my opinion, it does not matter that the operator may have

started to correct the violation a few hours before the order was issued. The violations already had existed for several days and remained in existence when the order was issued. The fact that the operator may have recently begun abatement does not therefore preclude issuance of the order. Even if the inspector had ascertained what the operator was doing, it would not have made any difference. The order still should have been issued. The violation existed just too long.

Even assuming that pursuant to section 301(c) of the 1977 Amendments, the decision of the former Board of Mine Operations Appeals of the Department of the Interior in Zeigler Coal Company, 7 IBMA 280 (1977), remains in effect, it does not help the operator here. The Board in Zeigler defined unwarrantable failure as conditions or practices the operator knew or should have known existed and therefore should have abated prior to discovery by the inspector. The evidence in this case makes clear that the cited violation should have been abated long before discovery by the inspector. The operator exhibited a lack of due diligence, indifference, and a lack of reasonable care in this instance. Accordingly, under the Zeigler decision the order is valid.

In light of the foregoing, the order is upheld and the application for review is dismissed.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 012744 be UPHELD and that the operator's application for review be DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Issued: June 15, 1979

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

June 18, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 78-575-PM
Petitioner	:	A.O. No. 04-02065-05001
v.	:	
	:	Garnett Pit & Mill
MASSEY SAND AND ROCK COMPANY,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Office of the Regional Solicitor, U.S. Department of Labor, San Francisco, California, for the petitioner; Jack L. Corkill, Indio, California, 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 September 25, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for 10 alleged violations of the provisions of mandatory safety standard 30 CFR 56.14-1, set forth in 10 citations issued by a Federal mine inspector on March 28 and 29, 1978. Respondent filed an answer and notice of contest on October 23, 1978, denying the allegations and requesting a hearing. A hearing was held in Indio, California, on March 12, 1979, and the parties waived the filing of written posthearing proposed findings, conclusions, and briefs, but presented oral argument on the record.

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

violations, 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 violations.

Applicable Statutory and Regulatory Provisions

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

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

3. Interim Commission Rules, 29 CFR 2700.1 *et seq*.

Discussion

The petition for assessment of civil penalties filed in this proceeding charges the respondent with 10 violations of mandatory safety standard 30 CFR 56.14-1, and the violations were noted in the following citations issued by MSHA inspector Hilario S. Palacios during site inspections which he conducted on March 28 and 29, 1978:

March 28, 1978

376001. The pinch point on the rollers underneath the skirt boards of the main feed chute of the No. 5 conveyor belt at the pit were not guarded on the south side.

376002. The pinch points on the rollers underneath the skirting of the feed chute of the No. 5 conveyor to the No. 4 conveyor belt at the pit were not guarded on both sides.

376003. The pinch points on the rollers underneath the skirting of the No. 3 belt by the head pulley of the No. 4 belt at the pit were not guarded on both sides.

March 29, 1978

376005. The pinch points on the rollers underneath the skirting of the feed chute of the No. 1 belt at the pit were not guarded on the north side.

376006. The pinch points on the rollers underneath the skirting of the feed chute of the fine sand belt at the mill were not guarded.

376067. The pinch points on the rollers underneath the skirt boards of the feed chute of the wet sand belt at the mill were not guarded.

376010. The pinch points on the rollers underneath the skirt boards of the feed chute of the lower belt at the mill were not guarded.

376012. The pinch points on the rollers underneath the skirt boards of the feed chute of the left to the crusher at the mill were not guarded on the north side.

376013. The pinch points on the roller underneath the skirt boards of the feed chute of the second sand belt at the mill were not guarded.

376014. The pinch points on the rollers underneath the skirt boards of the feed chute of the first dry sand belt at the mill were not guarded.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Hilario S. Palacios, confirmed that he inspected the mine facility in question on March 28 and 29, 1978, and examined the 10 belts in question to ascertain whether they were properly guarded. He identified Exhibit P-1 as a diagram of a belt which is representative of the belts he inspected. All of the belts were equipped with skirt boards as depicted in the diagram and they were not guarded at the pinch points, that is, the point on the belt where the belt and skirt board come together. He indicated that these pinch points have a "wringer" effect, and if someone were to be caught in these pinch points, he could not get out. He believed that the stop cords were inadequate and not sufficient for compliance because once a man is caught in the pinch point beneath the skirt boards, damage would have occurred. He also believed that four men were exposed to a hazard of getting caught in the moving belt parts because they are usually working around tail pulleys greasing or shoveling or walking along the walkway, and in one instance, one man was walking along taking care of a couple of feeder belts (Tr. 7-14).

Inspector Palacios testified that when he called the violations to the attention of the respondent's representatives, they ceased operating the belts and began installing screen guards over the pinch points. He believed the respondent knew of the conditions cited because stop cords were installed from one end of the belt to the other, and one could tell by observation that the pinch points were

not guarded. The belt tail pulleys and takeup pulleys were guarded, and the ones where no one could get at were guarded by location. He believed that the safety standard which he cited applied to the belt skirt board locations and he cited page 2 of a MESA memorandum dated December 19, 1975 (Exh. P-2), which states that section 57.14-1 may be cited for failure to provide guards at skirt board locations on a belt, and he believes that the industry recognizes the need for guarding these areas. He also identified Exhibits P-3 and P-4 as pictures of similar belts to the ones he cited which show skirt boards and guards, and he believes this supports his view that the industry recognizes the need to guard those locations (Tr. 14-21).

On cross-examination, Inspector Palacios conceded that the manufacturer of the equipment depicted in Exhibits P-3 and P-4 may not be the only manufacturer of such equipment, but it is the only guarded equipment that he has seen. Theoretically, every roller and belt traveling in the same direction constitutes a pinch point, and while all moving parts on a belt are similar, all pinch points are not. He confirmed that the belts were immediately stopped when the violations were called to the attention of company management. He would not consider the MESA memorandum previously referred to as an "advisory circular" to district offices (Tr. 21-25).

On redirect, Inspector Palacios testified that he considered the MESA memorandum to be mandatory on him. In all 10 citations, his concern was with the pinch points beneath the belt skirting, and he believed that someone walking adjacent to the belt or working around it could get his hand or clothing caught in those pinch points. The height and elevation location of the belts varied, and he indicated that if a man can reach 7 feet, he can stick his hand into a pinch point. Some of the belts in question were waist-high, others were higher, and others had work platforms around them where a man could perform work around the pulleys. Mr. Palacios did not believe that someone getting his hand caught between a roller and belt would be seriously injured because, unlike the skirt board "wringer" pinch points, there is no pressure exerted which would create a pinch point (Tr. 25-29).

Mr. Palacios could not state whether any one of the belts cited by him were more frequently worked upon than others, although he did indicate that he observed one man working on three belts, and that the usual work entails greasing and cleaning. He did not know whether greasing was performed while the belt was running because he had never observed that type of work being performed. He believed the danger present on all 10 belts cited was the same, and walking near the belts or shoveling under the tail pulleys would expose men to the pinch points. Men would likely spend more time at the feeder belts, such as the one involved in Citation No. 376001, than at the other belts. The person assigned to that belt normally works for 4 hours performing maintenance to insure the belt runs properly or he is cleaning material off the belt. The belts in question are used

to move materials and men do not ride them. He did not know how many men would be at any of the locations cited by him at any given time (Tr. 30-36).

Inspector Palacios stated that abatement was achieved by the installation of screens over the pinch points. With respect to the skirting which was installed on all of the belts, he indicated it varies in size depending on the materials moved along the belt. Regarding the skirting depicted on his sketch, Exhibit P-1, he indicated that if someone fell against the skirting, it would be pretty difficult for him to put his hand into the pinch point and he would have to do it intentionally. He has seen someone do precisely that (Tr. 36-39).

On recross, Mr. Palacios indicated that he observed no one shoveling around the belts on the days the citations issued, and that some of the belts are elevated with an open area underneath where materials can fall to the ground and are cleaned up there. Of the four people he observed around the belts, one was "stationed down below taking care of the three belts," but he could not recall any mucking or maintenance being performed at the time. The "moving machine" parts that he was concerned with in this case are the belt rollers (Tr. 40-43). He indicated that respondent has no prior history of violations (Tr. 47).

Respondent's Testimony

Milton H. Mathers, respondent's production foreman at the Garnett Plant, testified that the plant is inspected at least once a year by MSHA and OSHA, but the skirt guarding question has never previously come up in these inspections. He described the belt system and the components, and stated that the components, such as head, drive, and snub pulleys, have been guarded. Since the time guarding was required on the skirt boards, the emergency stop cords had to be moved and attached to the guard just before the skirting. The belt components are greased when the belt is shut down, and greasing is performed by means of grease line fittings located just outside the belt frames. One can stand away from the belt, at a distance of 6 inches or a foot, attach a grease gun to the grease line and grease the components, and the grease line usually comes out of the guarding. One or two men work on the belt system. One is an operator who observes the conveying system while it is running and he is watching for breakdowns, belt tears, etc. The second man is a laborer who cleans out from under the belt, and shoveling is conducted while the belt is running and also when it is stopped. Shoveling is only done along the middle part of the belt between the head and tail pulley, and only along the ground level of the belt and not at the elevated portion. Any shoveling at the tail pulley is away from the guarded areas, and that location is guarded. The roller area between the skirting and head pulley is not required to be guarded. A stop line runs along the length of

the belt and no one has ever mentioned the fact that the skirting area needed to be guarded. He described the skirting used on the belts in question, indicated that they were not like the pictures depicted in Exhibits P-3 and P-4, but ran approximately 2 or 3 inches inside the belt, sloping away, and the outside edge of the belt has no weight on it (Tr. 55-62).

On cross-examination, Mr. Mathers testified that while the areas in question are now guarded, prior to that time it was possible in some instances for someone to come in contact with the rollers while greasing, and that at the time of the citations, three employees were assigned to the belt system. Also, in some places it was possible to shovel in the area where the stop cord was located, that is, just past the tail pulley (Tr. 62-63).

On redirect, he stated that before the guards were installed, the stop cord was a little lower than the belt and a person would have to go under the cord or fall through it to get caught in the rollers. Such a person would have to deliberately stick his arm in or not watch what he was doing in order to get caught in the roller (Tr. 63). However, loose clothing could get caught in the roller, but one would have to be close to the equipment for this to happen. The belt travels at a constant speed, roughly 300 rpms (Tr. 64).

James W. Harris, Engineering Representative, Aetna Life and Casualty Company, testified he is familiar with section 56.14-1 of the mandatory safety standards in question. He stated that there are other standards recognized by the conveying industry, namely, the American National Standards Institute or ANSI standards. He cited ANSI Standard 6.01.1.1, which covers belt conveyors which are fixed in place, and indicated that the standards mention guarding troughing and skirting area rollers, as well as life lines. He does not consider troughing and idler or return rollers to be part of the drive train components of the conveyor system. He identified a MESA publication concerning surface mining fatalities indicating that head, tail and takeup pulleys should be guarded, unguarded conveyors should be equipped with emergency stop devices or cords along their full length, and that pulleys or conveyors should not be cleaned manually while the conveyor is in motion. He also identified an MSHA "fatalgram" dated December 15, 1979, reporting an accident involving someone whose arm was caught between a moving conveyor belt and troughing roller, and MSHA's recommendation in that case was that "Persons under the influence of alcohol shall not be permitted on the job 55.20-1," but there is no recommendation as to guardings (Tr. 65-72).

Discussion

Fact of Violation

Petitioner's Arguments

Petitioner's counsel candidly admitted that all of the citations which were issued by the inspector in this case were issued because of the failure of the respondent to install guards at the belt skirt board pinch point locations cited by the inspector. Counsel also indicated that while the inspector cited 10 separate violations, he could just as well have cited one violation as a "practice," but designating 10 separate locations where they occurred. He conceded that the citations were rapidly abated by the respondent, and that the inspector was most impressed with the company's cooperation and concern for safety. As for the gravity presented by the violations, he indicated that the initial assessments made by the Assessment Office in the amount of $8 each, answers that question. Counsel believed that the penalties should be somewhat higher because of the severity of the injury which could result from the violations (Tr. 43-50). Counsel indicated that he considered the roller pinch points to be a "similar exposed moving machine part" and that the addition of the skirt board becomes critical because of the additional danger (Tr. 74). In support of his theory of the case, counsel cited Judge Moore's decision in Dravo Lime Company, IBMA 77-M-1, October 28, 1977, holding that a skirted belt, in combination with a catwalk and ladder next to idler pulleys which are unguarded, constitutes a pinch point and "similar exposed moving machine parts which may be contacted by persons, and which may cause injury * * *" (Tr. 83).

Inspector Palacios confirmed that he issued the citations because of the presence of the skirt boards and stated that if a skirt board were not present on the belts in question, he would not have cited a violation because the addition of the skirt board is what creates the hazard, since it has a tendency to squeeze someone in. The "similar exposed parts" are the combination of rollers and belt, but the skirt board itself is not such a moving part. The presence of the skirt boards led him to believe that someone could be injured (Tr. 76).

Respondent's Arguments

At the close of the testimony, respondent's counsel moved for a dismissal of the case on the ground that the inspector cited section 56.14-1 simply because of the presence of the skirt boards, and the standard does not mention such skirt boards, nor are they "similar moving parts" because they are welded to the side of the belt itself (Tr. 78). Regarding the gravity of the situation, counsel argued that the areas at the tail pulley where a man would be shoveling have always been guarded and stop cords were installed in compliance with section 57.9-1. As for any negligence, counsel argued that guards

have always been provided when required, the cited section makes no mention of anything other than drive train components, and that the skirt board memorandum relied on by the inspector cannot be charged to the respondent since it is obviously addressed to someone within the agency to clean up an apparent unclear interpretation. Respondent maintains it has always acted in good faith in complying with safety requirements and that the stop cords were installed along the full belt lengths in compliance with a standard which it believed took care of the matter (Tr. 84-85).

Respondent's counsel indicated that the violations were initially assessed at $52 each, but reduced at the conference stage because of the rapid compliance demonstrated by the respondent in abating the conditions cited. Counsel expressed a concern that the company would be cited for 10 violations and have that on its record. He explained that a stop cord was installed along the entire length of the belts in compliance with section 57.9-7, that prior to starting the belts, there is a 12- to 15-second delay siren that sounds to warn persons of the startup, and that in all of the years that the company has been inspected, the problem has never been brought to its attention, and had it known, it would have corrected the situation (Tr. 52-53).

Findings and Conclusions

The condition or practice cited by the inspector in all 10 of the citations issued in this case charges the respondent with a failure to provide guards at the "pinch points on the rollers underneath the skirting (or skirt boards)" of certain designated conveyor belts. The gravamen of each charge is the assertion by the inspector that the respondent violated section 56.14-1 by failing to install a guard as required by that standard which reads as follows: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

Although the inspector generally alluded to the hazards which may result from someone getting his hand or clothing caught in a pinch point due to the "wringer" effect which he described, he indicated that the hazard presented at all 10 belt locations which he cited were identical, that is, anyone walking near the belts or shoveling under the belt tail pulleys would be exposed to the pinch points at the rollers beneath the belt skirting and could get their hand or clothing caught in those pinch points. However, it seems clear from his testimony that he was unaware of any specific work activities taking place at any of the locations cited which could reasonably have exposed men to danger. In addition, although he indicated that the height and elevation of each belt varied, that some were waist-high and others

higher, he did not specify which belt locations were readily accessible to someone walking by or working around the pinch points. Further, while he indicated that men usually work around tail pulleys greasing or shoveling, he could not state whether greasing is performed while the belt is moving because he never observed that type of activity going on. As for any cleanup activity, he observed no one shoveling around the belts in question and indicated that some of the belts are elevated and allow materials to fall to the ground below where they are cleaned. However, he did not indicate which belts were cleaned from the ground and which were not. As for the tail pulleys and takeup pulleys, he stated that they were, in fact, guarded, and those where no one could get at were guarded by location, that is, they were apparently so inaccessible that physical guards were not required. And, as for the skirt boards in question, he indicated that if someone fell against them, it would be difficult to get their hands into the pinch point, and one would have to do it deliberately.

I believe it is clear from the testimony of the inspector that he issued the citations in question solely because of the presence of the skirt boards which were permanently attached to the belt frames, and in the absence of the skirt boards, he would not have cited any violations. In issuing the citations, the inspector followed an interpretative memorandum issued to all metal and nonmetal district and subdistrict managers by the then Acting Assistant Administrator for Metal and Nonmetal Mine Health and Safety on December 19, 1975. The concluding paragraph of that memorandum states that "Skirt board locations, head pulleys, tail pulleys, open shaft ends, and other pinch points on conveyor belts can be cited for lack of guards under Mandatory Standard 55, 56, 57.14-1." It is obvious in this case that the inspector viewed that memorandum as a directive which required him to cite a violation whenever he discovered a skirt board installed on a belt at a location which he believed constituted a "pinch point." While I cannot fault the inspector for following what he believed was the proper procedure for citing violations of section 56.14-1, the action taken by him must be examined in light of the language of the standard and the circumstances which prevailed at the time of the citations, particularly since the standard, on its face, does not specifically refer to "pinch points" or "skirts."

I have carefully reviewed the Dravo Lime Company decision cited by the petitioner in support of its case, and aside from the fact that the decision by Judge Moore is not binding on me, the facts are distinguishable. Judge Moore made a finding that in the absence of a skirt, a belt idler pulley does not normally constitute a pinch point. However, he concluded that the combination of a skirted belt with a catwalk and ladder next to it caused the idler pulley to become "similar exposed moving machine parts which may be contacted by persons, and which may cause injury." Judge Moore observed that drive pulleys, head pulleys, tail pulleys, and takeup pulleys all contain

pinch points, and that was undoubtedly the reason why these particular pulleys were specifically included in the standard. Thus, by interpreting the standard in the way that he did, Judge Moore, in effect, added "idler pulley" to the standard, and, if I were to accept petitioner's arguments in this case, I would add "skirt board" or "roller" to the standard. I find this to be a most unsatisfactory method or procedure for enforcing or promulgating mandatory standards, violations of which will subject a mine operator to monetary civil penalties and possible mine closures.

In this case, the respondent takes the position that it was never notified of the memorandum relied on by the inspector, that it complied with the guarding requirements of section 57.9-7 by installing safety stop cords along the belt walkways, and that the belt tail pulleys have always been guarded. Respondent's counsel asserted that it stands ready to comply with any clear and unambiguous safety standard which it is apprised of, but finds it basically unfair to expect compliance with a standard such as section 57.14-1, which, in effect, has added a guarding requirement for skirt boards by means of an internal memorandum communicated only to MSHA's district and subdistrict offices.

The requirement of the mandatory safety standard in issue in this proceeding is that certain designated machine parts, as well as similar exposed moving parts which may be contacted by persons, and which may cause injury to such persons, must be guarded. The standard makes no mention of pinch points or skirt boards. It seems to me that if the Secretary deems it desirable to include these factors in the standard, he should specifically take steps to amend the standard accordingly. Further, if the Secretary deems it desirable to distribute to his enforcement personnel an interpretive memorandum regarding any safety standard, basic fairness dictates that it also be circulated to mine operators so that they are made aware of the ground rules. It seems clear to me that any basic changes or revisions in the application of safety standards set forth in the regulations must be accomplished in accordance with the rulemaking provisions of the Act, United States v. Finley Coal Company, 493 F.2d 285 (6th Cir. 1974). Further, enforcement of a standard that fails to inform a party what he must do to comply therewith does not comport with due process requirements. Cape and Vineyard Division v. OSAHRC, ____ F.2d ____ (1st Cir. No. 74-1223, decided March 3, 1975). Where regulations are subject to civil sanctions, parties against whom such regulations are sought to be enforced are entitled to receive fair warning of the conduct required or prohibited thereby. Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962); Jordan v. DeGeorge, 341 U.S. 223 (1951). They are further entitled to be free from the arbitrary application of regulations which are capable of multiple interpretations. Bowie v. City of Columbia, 378 U.S. 347 (1964). As pointed out by the Fifth Circuit in Stokes v. Brennan, 476 F.2d 699, 701 (1973): "Far from impeding the goals of law enforcement, in fact, the disclosure of

information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law."

While I subscribe to the proposition that the Act should be liberally construed to insure the safety and health of miners, I also believe that rational and workable interpretations must be applied so as to insure that those mine operators who are regulated by the Secretary clearly know what is to be expected of them in terms of compliance. I do not believe that an internal memorandum, addressed only to the enforcing arm of the Secretary, summarily advising mine inspectors to ipso facto cite a violation when skirt boards are encountered, thereby expanding the scope of the codified standard, serves to put an operator on notice as to what his responsibilities are. This is particularly true in proceedings brought under the 1977 Act which provides for assessment of civil monetary penalties for violations. Prior to the enactment of the 1977 law, metal and non-metal mine operators were not subjected to civil penalties. A citation issued under the now repealed Metal and Nonmetallic Mine Safety Act simply imposed a duty on an operator to abate the condition cited within the time fixed for abatement, and his failure to do so resulted in a closure order effectively shutting down the mine. There were no provisions for the imposition of monetary civil penalties. However, under the 1977 law, metal and nonmetal mine operators are now subjected to civil penalty assessments for proven violations of any mandatory health or safety standard. In this setting, it seems to me that basic fairness dictates that the Secretary clearly and precisely advise an operator of what his responsibilities are, and the way to do this is to promulgate clear, rational, and understandable guarding standards. Based on the facts and evidence developed in this proceeding, I am of the view that the present guarding standards are ripe for Secretarial scrutiny so as to insure clear understanding by both the enforcers and enforcees.

On the basis of the facts developed in this proceeding, it is clear that the inspector acted on the basis of the internal memorandum concerning skirt boards. However, that memorandum is not a mandatory standard and is in no way binding on an operator, particularly when there is no evidence that the respondent in this case was even aware of it. See North American Coal Corporation, 3 IBMA 93 (1974); Kaiser Steel Corporation, 3 IBMA 489, 498 (1978). I find that the memorandum's language goes beyond any reasonable and clear reading of the plain terms of section 56.14-1. I cannot conclude from the facts presented in this proceeding, as did Judge Moore in Dravo, that a skirt board can be construed to be a "similar exposed machine part." Nor can I conclude that anyone reading section 56.14-1 can reasonably conclude or know that skirt boards, in and of themselves, are required to be guarded. While I recognize the fact that serious injuries, as well as fatalities, have occurred when persons become

entangled in a moving belt, that does not justify a general indictment of all such devices, particularly in situations where they are isolated, otherwise adequately guarded, are located in areas where no one is likely to come into contact with them, or are covered by other pertinent standards. As indicated earlier, if the Secretary feels that all potential pinch points, or all skirted areas of belts should be guarded, then it is incumbent on him to promulgate and articulate this by means of a clear and unambiguous standard. The present guarding standards, in my view, leave much to the imagination. For example, one standard allows the installation of a stop cord along the entire length of an unguarded belt as satisfactory protection against someone falling against a moving belt which may be loaded with materials. Although every roller on a belt may constitute a potential pinch point, there is no requirement for guarding "ordinary" rollers on the theory that someone is not likely to get "seriously" injured if he caught his hand or clothing in such a situation. No distinctions are made in loaded and empty belts, and the term "pinch point" is not further defined. Although some of the belts which are isolated and out of reach are apparently deemed to be "guarded by location" and need not be physically protected with a guard or screen, the inspector in this case failed to distinguish them since he obviously believed they all required guards because of the installation of skirt boards.

I believe that when an inspector cites a violation of section 56.14-1, it is incumbent on him to ascertain all of the pertinent factors which lead him to conclude that in the normal course of his work duties at or near exposed machine parts, an employee is likely to come into contact with such parts and be injured if such parts are not guarded. On the facts presented in this proceeding, I cannot conclude that the inspector made any real assessment of all of the circumstances which prevailed at each of the locations cited by him at the time the citations issued. I conclude that he relied solely on the memorandum which he interpreted as an instruction to cite a violation whenever he encountered a skirt board attached to a belt, without any real consideration given as to whether one was likely to come into contact with moving parts during the course of his duties. Here, the testimony of the inspector reflects that while he believed that the area where the belt and skirt board came together constituted a pinch point, he also believed that it would be difficult for someone falling against the skirt board to become entangled in the pinch point unless he deliberately reached into that area.

In view of the foregoing, I conclude and find that petitioner has failed to establish a violation of the cited standard, and my finding in this regard is based on the following:

1. The inspector relied solely on an internal memorandum which he viewed as a mandatory requirement that he cite a belt with a guarding violatioin when a skirt board was attached.

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2. The inspector failed to determine whether each of the locations cited by him did in fact present a hazard, that is, he failed to ascertain whether, in the normal course of his duties, it was likely that a miner would be exposed to a hazard of becoming entangled in a pinch point.

3. The evidence adduced by the petitioner does not establish that it was likely that any miner would, in the normal course of his duties, become entangled in any of the belt locations cited simply because of the fact that a skirt board had been installed at those locations.

ORDER

In view of the foregoing findings and conclusions, it is ORDERED that the petition for assessment of civil penalties filed in this proceeding be DISMISSED, and the citations isssued be VACATED.

George A. Koutras
Administrative Law Judge

Distribution:

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Standard Distribution

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

June 19, 1979

SECRETARY OF LABOR,	:	Discrimination Complaint
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. NORT 78-382
ON BEHALF OF ROBERT L. WEST,	:	
Complainant	:	Elkins No. 6 Mine
v.	:	
	:	
ELKINS ENERGY CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Robert A. Cohen, Esq., and Ann Rosenthal, Attorney, Department of Labor, for Complainant; Buddy H. Wallen, Esq., and Gerald L. Gray, Esq., Clintwood, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a written order dated November 27, 1978, as amended December 1 and 11, 1978, a hearing in the above-entitled proceeding was held on January 16 through January 18, 1979, in Wise, Virginia, under section 105(c) of the Federal Mine Safety and Health Act of 1977.

The discrimination complaint in this proceeding was filed on September 29, 1978, alleging that complainant, Robert L. West, had been discharged on April 4, 1978, by respondent in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977. Complainant was reinstated on July 10, 1978, under an order of temporary reinstatement issued July 3, 1978. The discrimination complaint was amended on November 15, 1978, to allege that complainant had again been unlawfully discharged on September 28, 1978. The Secretary made no finding under section 105(c)(2) as to whether the discrimination complaint with respect to the second discharge was frivolously brought. Therefore, complainant was not temporarily reinstated after the second discharge and consequently has been without work since September 28, 1978, the date of the second discharge.

Issues

Counsel for complainant filed a posthearing brief on May 4, 1979, and counsel for respondent filed a reply brief on May 29, 1979. Both briefs agree that the complaint raises the following two issues:

1. Whether complainant Robert L. West was discriminated against in violation of section 105(c) of the Act when he was "laid off" on April 4, 1978.

2. Whether complainant Robert L. West was discriminated against when he was fired by Elkins Energy on September 28, 1978.

Findings of Fact

I am listing below the findings of fact on which I shall base my decision in this proceeding. Nearly every fact in this case was the subject of testimony by two or more witnesses. Therefore, my findings of fact necessarily involve some credibility determinations. In my discussion of the parties' arguments I shall refer to various findings of fact and, if those findings are based on credibility determinations, I shall hereinafter explain why I have elected to accept the testimony of one witness as being more credible than that of another witness.

1. Elkins Energy Corporation, the respondent in this proceeding, owns four underground coal mines at the present time (Tr. 442). The Elkins No. 6 Mine is the only one directly involved in this proceeding. The No. 6 Mine produced an average monthly quantity of 15,766 tons of clean coal for the months of September, October, and November 1977 (Tr. 10). A miners' strike occurred on December 6, 1977, and lasted through March 26, 1978 (Tr. 211). After the strike, the No. 6 Mine produced an average monthly quantity of 11,000 tons of clean coal for the months of April, May, and June 1978 (Tr. 11). Elkins Energy is owned by William Ridley Elkins, Hershel Elkins, and Dale Meade. Ridley Elkins is vice president and part owner; Dale Meade is a partner and chief electrician; and Hershel Elkins is a partner and supervisor of insurance, labor relations, and union arbitrations (Tr. 441; 444; 453). Other persons apparently own varying interests in Elkins Energy, but their names are not given in the record (Tr. 461).

2. Robert L. West, the complainant in this proceeding, began to work for Elkins Energy at the No. 6 Mine on November 16, 1977. For 3 days after November 16, 1977, West was shown around the mine and given an opportunity to familiarize himself with its methods of operation. At the end of 3 days, West was assigned to be the section foreman on the night shift which worked from 3 p.m. to 11 p.m. on Monday through Friday of each week (Tr. 17; 19; 179). West was paid a monthly salary of $1,925 (Tr. 19; 181) until the week following the miners' strike (March 27, 1978) when his salary was raised to $2,100 per month (Tr. 215-216).

3. During the strike, that is, from December 6, 1977, to March 26, 1978, only four men worked at the No. 6 Mine. One of those men was Douglas Shelton who was superintendent of the No. 6 Mine.

The other three men were West, John Ed Mullins, and Morrell Mullins. John Ed Mullins had been an electrician at the No. 6 Mine and Morrell Mullins had been the day-shift section foreman at the No. 6 Mine prior to the strike (Tr. 144-146; 556-557). The duties of all men during the strike were to preshift the mine, to keep the ventilation in good condition, and to maintain the equipment (Tr. 45; 185). During the strike, the four men were paid only half of the salary which they normally received when the mine was actually producing coal (Tr. 355).

4. On February 28, 1978, while the strike was still in progress, West was working with John Ed Mullins at the belt feeder when a rock fell on West's head and shoulders (Tr. 47). John Ed rendered first aid and Morrell and John Ed succeeded in transporting West out of the mine on the conveyor belt (Tr. 176). John Ed took West to the hospital in Wise, Virginia, which is about 20 miles from the No. 6 Mine (Tr. 175). No one was on duty on the surface of the mine when West was injured although Doug Shelton, the superintendent, normally remained on the surface when the other three men were underground (Tr. 159; 389; 568). Doug Shelton had called on the telephone before the three men went into the mine on February 28 to advise them that he would be coming to the mine at a subsequent time (Tr. 168; 357; 568). After the accident, West told Doug Shelton that he would thereafter go underground only when someone had been assigned to remain on the surface of the mine (Tr. 49; 150; 390).

5. The strike ended on March 26, 1978, and on the next day, March 27, 1978, West resumed the duties of section foreman on the night shift. West worked for 6 days, or until April 4, 1978, when, at about 9:30 a.m., West received a call from the superintendent of the mine, Doug Shelton, advising West that Ridley Elkins had asked Doug to lay off all the men on the night shift because the No. 6 Mine was not producing enough coal to justify retention of the night shift (Tr. 58; 405).

6. West went to the No. 6 Mine about 2:30 p.m. on April 4, 1978, to collect his personal belongings and found that the miners on his shift were dressed in their working clothes and were waiting outside the mine preparatory to entering the mine to work the night shift. West went into the mine office and asked Doug Shelton why the men on the night shift had reported for work if the night shift had been discontinued. Doug explained to West that between 9:30 a.m. and the time that West had come to pick up his personal equipment, Doug had received another call from Ridley Elkins retracting his orders to lay off the second shift and modifying his instructions so as to have Doug lay off only those men who had originally been hired to work on a third shift which would begin at 11 p.m. and end at 7 a.m. (Tr. 60; 407).

7. Doug then reminded West that West and a repairman named Hugh Stidham had originally been hired to work on the third shift and

that West and Stidham were being laid off until such time as management might determine whether a third shift would be economically advantageous (Tr. 61; 391; 409). Although Doug could not recall their names, he had tentatively hired two miners who lived at Clintwood, Virginia, to work on the third shift. Doug also called those two men on April 4, 1978, and told them that they would not be needed. They had expected to report for work at 11 p.m. on the night of April 4, 1978, to begin working on the third shift and on the basis of that expectation had resigned their jobs at another mine (Tr. 391; 429). They were fortunately able to return to the mine where they had been working after Doug had advised them that they would not be needed at the No. 6 Mine for the third shift (Tr. 391; 429). Doug waited until after Stidham had reported for work on April 4, 1978, to lay him off (Tr. 128), but Stidham was rehired as a belt man a few days later. Stidham's substitute job as a belt man required him to crawl around on the wet mine floor which caused Stidham's arthritis to react so painfully that he was forced to stop working for Elkins Energy (Tr. 126; 130).

8. Ridley Elkins and Doug Shelton had conferred before the strike and had tentatively decided to start a third shift as soon as the strike had ended. The third shift was planned as a maintenance shift. The men on the maintenance shift would do the kinds of work which were difficult to accomplish while coal was being produced. Work on the maintenance shift would consist of applying rock dust, hanging ventilation curtains, installing roof bolts, hauling supplies into the mine, and preparing belt structures for advancement of the belt to keep pace with production at the faces (Tr. 268; 346; 457). The third shift was not instituted immediately after the strike because a lot of equipment broke down soon after the strike which had an adverse effect on production (Tr. 56; 126; 153; 303-304; 360; 445; 449). Both Ridley Elkins and Doug Shelton stated that the third shift was not actually begun until production after the strike had been built back up to the quantity that had been produced before the strike (Tr. 359; 361; 444; 457).

9. Despite management's claim that the third shift was not begun until post-strike production reached pre-strike levels, the facts show that the third shift was begun on or about May 1, 1978, but post-strike production through June 1978 was only 11,000 tons per month as compared with 15,766 tons before the strike (Tr. 266-268; 448).

10. Qualified section foremen are difficult to find. Therefore, when Doug Shelton and Ridley Elkins tentatively decided before the strike to institute a third shift after the strike, Doug began looking for a section foreman so that he could hire one before the strike and have him available to take over supervision of a third shift if conditions existing after the strike warranted commencement of a third shift. Since West was hired as the prospective third-shift foreman

on November 16, 1977, and the miners' contract did not expire until December 6, 1977, it was necessary to utilize West as a section foreman on the second shift until such time as a new contract could be negotiated. West's assumption of the position of section foreman on the second shift brought about a change in assignment of existing mine personnel because Don Shelton, who was acting as the second-shift section foreman when West became second-shift section foreman, had to be reassigned to the position of helper to the operator of the continuous-mining machine. Don, who was a brother of Doug Shelton, the mine's superintendent, was a foreman-trainee at the time West was hired and Don did not obtain his papers as a mine foreman until January 10, 1978 (Tr. 17-18; 307; 346; 376; 379; 457; 565).

11. The strike lasted longer than Doug Shelton or Ridley Elkins expected (Tr. 429). By the end of the strike, Elkins Energy was in difficult financial circumstances because it had received little or no income during the strike and the legislation pertaining to strip mining had forced Elkins Energy to close its surface mines and lay off approximately 300 miners (Tr. 458-459; 461;). When production at the No. 6 Mine continued to lag below pre-strike levels, Ridley Elkins decided to postpone the institution of a third shift at the No. 6 Mine. In an effort to economize, Ridley instructed Doug Shelton to lay off any miners who had been hired for the third shift (Tr. 391; 427). The only miners on Ridley's payroll who had been hired for the third shift were West and Stidham (Tr. 391).

12. On April 4, 1978, the day West was laid off, it was necessary for Doug to reinstate his brother, Don Shelton, as the section foreman on the second shift (Tr. 362; 407). Don Shelton had been working as the helper for the operator of the continuous-mining machine (Tr. 20). Another person had to be obtained to fill Don's position as helper to the operator of the continuous-mining machine. Randall Goins was transferred from another of Elkins' mines to be the section foreman on the third shift which was initiated on or about May 1, 1978 (Tr. 267; 362; 449). Not long after Goins had been assigned as section foreman on the third shift, Don Shelton elected to resume his union job of helper for the operator of the continuous-mining machine and Goins was moved from the third shift to fill the position of section foreman on the second shift which had been left vacant when Don Shelton resumed his union job (Tr. 268). Consequently, there was no net economic benefit to Elkins Energy in laying off West because vacancies were merely created which had to be filled by the hiring of a new section foreman or the transfer of miners from one place to another. Also see Finding No. 27, <u>infra</u>.

13. On April 5, 1978, the day after his discharge, West went to Norton, Virginia, and filed a discrimination complaint with the Mine Safety and Health Administration alleging that he had been discharged for diligently trying to uphold the Federal and state mining laws (Exh. 2; Tr. 68). On the afternoon of the same day on which the

complaint had been filed, Doug Shelton called West on the phone and asked him if he would be willing to accept a position at another mine owned by Elkins Energy. West stated that he would be willing to accept a substitute position and Doug told West that he would see what could be done. During the conversation, Doug asked West if West had filed a discrimination complaint against him and West confirmed that he had (Tr. 69; 251; 369-370; 399; 404).

14. West's complaint of April 5, 1978, alleges that during his employment by Elkins Energy he had advised his crew that if he remained their section foreman, he would (1) restore ventilation, (2) stop cutting into auger holes on the return side in No. 6 entry, (3) stop miners from smoking in the mine, and (4) make sure that someone was always on the surface when men were underground (Exh. 2). In his direct testimony at the hearing, West repeated that he had brought the four items listed above to the attention of the mine superintendent, Doug Shelton. Additionally, West stated at the hearing that he had complained to Doug about the failure of the miners on the first shift to install temporary supports in all places from which coal had been removed and West also objected to Doug's failure to have an up-to-date mine map showing the location of auger holes (Tr. 21). West stated that he actually had a list of 27 items about which he had complained, but no one at the hearing asked him to identify any complaints besides the ones enumerated above (Tr. 27). Finally, West stated at the hearing that Doug had ridden a gasoline-powered dune buggy in the No. 6 Mine during the strike and West had told Doug that riding the dune buggy in the mine was a violation of law and dangerous because the engine on the dune buggy created noxious fumes in the mine and might cause an explosion (Tr. 42; 401).

15. Several witnesses were called in support of West's claim that he had complained about safety violations to Doug Shelton, the superintendent of the No. 6 Mine. Hugh Stidham, a former repairman at the No. 6 Mine, testified that he had heard West complain to Doug about ventilation curtains being knocked down by the first shift, about the failure of the miners on the first shift to install temporary supports, and about the auger holes which had been encountered (Tr. 110; 113-114).

16. James Falin, a former mechanic at the No. 6 Mine, supported West's statements with respect to smoking in the mines by testifying that he had seen the men smoking in the mine when West was not in their vicinity (Tr. 135).

17. John Ed Mullins, a former electrician at the No. 6 Mine, supported West's claims that he had complained about safety. John Ed stated that he had heard West complain to Doug (1) about West's claim that fly curtains were needed in the mine, (2) about West's intention of stopping the men from smoking in the mine,

(3) about West's position that no men should be allowed to go underground unless there was a person on the surface who would be able to hear the mine phone, and (4) about West's objection to Doug's having ridden the dune buggy into the mine during the strike (Tr. 148-150). John Ed stated that he had not personally made any complaints about safety at the No. 6 Mine and that West had made more complaints about safety than the day-shift section foreman, Morrell Mullins (Tr. 167-172).

18. Robert Hilton, a former roof bolter on the second shift at the No. 6 Mine, testified that West tried to get fly curtains at the No. 6 Mine but was unable to do so. Hilton said that the other curtains were often torn down by the shuttle cars and were kept rolled up most of the time. Hilton said that if men were accustomed to smoking out of the mine, they continued to do so when they were underground working in the mine. Hilton said that he heard West say that he was going to have a talk with Doug about the fact that the men were smoking in the mine because West could not allow the men to smoke. Hilton, who worked on West's shift, stated that temporary supports were supposed to be installed but that they did not practice following the law. Hilton said they did not have timbers underground for use as temporary supports and that none were brought underground for that purpose. Hilton found the roof unsupported when he went to each place to install roof bolts and no temporary supports were ever installed until he and his helper went into a place to install roof bolts (Tr. 298-302). The roof-control plan for the No. 6 Mine requires that roof bolts be installed within 5 minutes after the continuous-mining machine completes loading coal from a given working place (Tr. 248).

19. The detailed complaint which West made about the ventilation curtains was that they were completely down every afternoon when he went in to start his shift at 3 p.m. He said that a period of from 30 minutes to an hour was required every afternoon to rehang the curtains and that his insistence that ventilation be properly maintained was a hindrance to production which management could not tolerate (Tr. 188; 237; Exh. 2). West conceded during cross-examination that if management had laid him off because he was a hindrance to production, that production should have increased after West was laid off on April 4, 1978 (Tr. 193). The evidence shows, however, that production did not decrease after West was hired and did not increase after he was discharged (Tr. 10-11; Finding No. 1, supra).

20. Before the strike, when West was section foreman on the second shift, he was not required under 30 CFR 75.303 to make a preshift examination on his shift because no production followed the second shift (Tr. 250; 589). Despite the fact that West was not required to make a preshift examination, he stated that he made such an examination any way and that he would make an entry in the onshift reporting book if he found that any place needed scooping or bolting

(Tr. 54). West stated on cross-examination, however, that he corrected the violations he observed and that it was unnecessary to report in the book the violations which he had corrected (Tr. 199). West later stated that he made at least one entry in the preshift and onshift book pertaining to lack of proper ventilation (Tr. 205). West first stated that miners had smoked in his presence in the mine until he told them not to do so (Tr. 26). Later West said that he did not report the miners' smoking in the book because he did not personally see them smoking (Tr. 200). West eventually justified his failure to make entries in the book by stating that Doug Shelton told him not to write down every violation he saw in the preshift book so that the inspectors would not read the entries in the book regarding the violations and then check to see if the violations had been corrected when they made their examination of the mine (Tr. 233).

21. West said that he started to search the miners for smokers' articles one or two times, but about 4 days after he began to work at the No. 6 Mine, Doug told him not to bother with searching the men for smokers' articles because they resented it and were inclined to slack off on production if they were searched (Tr. 235; 254). Robert Hilton, who was a roof bolter on West's shift, stated that he had never been searched for smokers' articles at the No. 6 Mine and had never seen anyone else searched for smokers' articles (Tr. 316).

22. Although West said that the roof-control plan required temporary supports to be set within 5 minutes after the coal was removed unless the roof bolters were ready to enter the work place to bolt, West did not have temporary supports set on his own shift in places left unsupported by the preceding shift. The foregoing conclusion is supported by the testimony of at least two miners who worked on West's shifts. Robert Hilton, who worked on West's shift before the strike, stated that temporary supports were rarely set in any of the places before he entered them to bolt (Tr. 248; 301). Earl Houseright, who worked on West's third shift after West's temporary reinstatement, said that most of the time there were no supports in the places when he entered them to bolt. Thus, West left his men exposed to roof falls until such time as they bolted the roof despite the fact that the temporary supports are required to be installed within 5 minutes after the coal has been removed. Houseright also said that he would set from four to eight temporary supports, depending on the condition of the roof, but he said that he did not know how many were required by the law or roof-control plan (Tr. 652). West stated twice during the hearing that he did not know whether the roof-control plan required installation of six or eight temporary supports (Tr. 39; 248). West also said that he had to send outside the mine to get timbers for making temporary supports when the miners on his own production shift removed coal from working places at a faster rate than the roof bolters could enter the working places to install roof bolts (Tr. 255).

23. Jackson Sturgill, a former section foreman on the third shift at the No. 6 Mine, supported West's position by stating that the men on the second shift failed to install temporary supports after removing coal from working places and that he often found as many as eight places in need of bolting where no temporary supports had been erected (Tr. 290). At the time Sturgill testified, the second shift was supervised by Randall Goins who was not working at the No. 6 Mine at the time West made his complaints to Doug about the failure of the men on the first shift to install temporary supports. Sturgill, however, did not support West's claims that Doug was indifferent about men smoking in the mine. Sturgill testified that he searched the men for smoking articles and that Doug approved of the searches and that Doug personally told the men not to smoke in the mine (Tr. 292). Doug testified that he violated Federal law by failing to search the men for smoking articles because he believed that the miners resented it and that the searches caused them to believe that the superintendent did not trust them; nevertheless, Doug was opposed to smoking in the mine and warned the men of the dangers inherent in smoking in the mine (Tr. 422-425).

24. Doug Shelton also admitted during his testimony that West talked to him about ventilation curtains being down at the face and Doug agreed that he had refused to buy the kind of fly curtains that West wanted him to get because he believed they were unnecessary when the ventilation curtains were installed in accordance with the ventilation plan for the No. 6 Mine (Tr. 350; 371; 373-374; 383; Exh. A). Doug further admitted that the miners on neither the first nor second shift were installing temporary supports after they had cleaned up the coal and he agreed that this was a problem which West discussed with him (Tr. 354). Doug also agreed that it was a violation of the law for him to ride the dune buggy in the mine and he further agreed that he did not always have a man on the outside of the mine when men were underground and that he recognized that failure to do so was a violation of the law (Tr. 388; 401).

25. Doug, on the other hand, denied that West had discussed the problem of mining into auger holes with him, but Doug conceded that the continuous-mining machine had cut into auger holes because the mine map did not correctly show their location. Doug stated that MSHA cited the mine for violating the requirement that the mine map show the location of the auger holes and that the map had to be updated for that purpose (Tr. 351; 353). Doug said there was a drill on the back of the scoop which was available for testing the coal in advance of mining to determine whether an auger hole or an abandoned mine might be in the vicinity of active mining operations, but Doug noted that the drill could be detached from the scoop and that it was usually necessary to hunt for the drill when it was needed (Tr. 352; 385). Doug denied West's claim that the drill was not used to search for dangerous conditions in advance of the cutting operations of the continuous-mining machine (Tr. 386; 425-426).

26. Ridley Elkins testified that it was his decision to lay off the miners who had been hired to work on the third shift, but he denied that he gave instructions to lay off West by name (Tr. 442; 444). Ridley stated that section foremen should make their complaints to the superintendent who is hired for that purpose because Ridley expects the superintendent either to take action on complaints or inform him about the complaints (Tr. 444).

27. Ridley Elkins had a detailed knowledge of everything that happened at the No. 6 Mine. He knew precisely what equipment had broken down at the mine after the strike and readily enumerated the motors, etc., that had to be replaced (Tr. 448-449). Ridley knew that the shuttle cars were alternatively taken from the mine for the purpose of being rebuilt and he knew how long the mine operated with only one shuttle car before a small shuttle car was brought in to assist the remaining large one in maintaining production while one large car was out of the mine for repair (Tr. 448). Ridley personally brought in a section foreman to work on the third shift when the third shift was instituted and Ridley personally transferred the foreman to the No. 6 Mine from another mine because the foreman liked Ridley and wanted to work in a mine where he would often see Ridley (Tr. 450). Ridley knew of two men at Clintwood, Virginia, who could be hired for the third shift when it was instituted and he had advised Doug of their availability (Tr. 429-430). Doug discussed the minute details of the operation of the mine with Ridley in that Doug stated that Ridley "knew from day to day what was going on, and he would tell me" what to do (Tr. 390).

28. At the time of the hearing, Doug Shelton no longer worked as superintendent of the No. 6 Mine because Doug had personally gone into the coal business after forming Shelton Coal Company (Tr. 343). Morrell Mullins, who had worked at the No. 6 Mine as section foreman on the first shift, had accepted the position of superintendent at the coal company owned by Doug Shelton. Morrell was, therefore, extremely supportive of Doug Shelton's position in this proceeding to the extent that he understood Doug's position. For example, he stated that West might have found the ventilation down at times when West reported for work at 3 p.m. on the second shift, but Morrell said that he also found the curtains down nearly every morning after the men on West's second shift had completed their work (Tr. 558; 571). Morrell said that it was just about "an every morning thing" that Doug was "onto him" about preventing the men from smoking in the mine, although he said that their search policy for smokers' articles was not as stringent as it could have been (Tr. 560). Morrell stated that the men on his shift did not install temporary supports as they should have, but he claimed that the men on West's shift also failed to install temporary supports (Tr. 564). Morrell stated that West's entries in the preshift and onshift book were just a repetition of the word "None", meaning that West had reported no hazardous conditions. Morrell said that West might enter something different

once in a while just to vary the appearance of the report, but Morrell said that West never did report a significant safety violation in the books (Tr. 570).

29. Morrell was present when Doug Shelton rode the dune buggy into the mine during the strike and he personally did not tell Doug that his doing so was a violation of the law (Tr. 573). Morrell stated that he had seen men smoking in the mine, but that he had not reported them to Doug or made an entry of that fact in the preshift or onshift book (Tr. 574). Morrell did not make an entry in the book about the fact that he found on a daily basis that temporary supports were not being installed (Tr. 588). Likewise, although Morrell found the ventilation curtains were constantly torn down and lying in the mud, he did not make any entries in the book about that either (Tr. 588).

30. West stated that he made a round of the faces every 20 to 25 minutes and tested for methane if there was machinery in the face area either extracting coal or bolting the roof (Tr. 55). Robert Hilton, who was a roof bolter on West's shift, stated that West could not have made a check for methane in his working place without his seeing West do so, but he said that in all the time that West worked in the mine, he had seen West make only one methane test (Tr. 310).

31. Chief Administrative Law Judge James A. Broderick issued an order of temporary reinstatement on July 3, 1978, requiring that Elkins Energy reinstate West to the position of section foreman at the rate of pay and with work duties equivalent to those which had been assigned to him immediately prior to his discharge on April 4, 1978. After the reinstatement order had been issued, Doug Shelton and Ridley Elkins conferred about the matter and concluded that West should be assigned to work on the third shift since that was the shift for which he had originally been hired (Tr. 410). When Doug called West on Saturday, July 8, 1978, and advised him that the only place they could use him was on the third shift, West agreed to work on that shift. West reported for work on Monday, July 10, 1978 (Tr. 70). The working hours on the third shift were from 11 p.m. to 7 a.m. and the third shift was a maintenance shift during which the miners performed duties such as rock dusting, roof bolting, rehanging or extending ventilation curtains, and making repairs to equipment (Tr. 71).

32. Jackson Sturgill had been hired on May 1, 1978, to be the section foreman on the third shift (Tr. 266). The reinstatement of West meant that two section foreman would be working on the third shift. Therefore, Doug advised Sturgill that he was being promoted to the position of mine foreman on the third shift and that Sturgill should use West as an ordinary workman. Under Doug's instructions, West would be required to act as an ordinary laborer because Sturgill was told to assign West various tasks which could best be done by

two men, but since West was to be given only one man to assist in performing the tasks, West would be required to do the work of an ordinary laborer (Tr. 72; 268-269). After West had done the work of a laborer for a few days, he complained to Sturgill about being assigned a laborer's work instead of a supervisor's duties. Sturgill agreed with West that West was being utilized in an improper manner and thereafter assigned at least two men to do any tasks delegated to West. The assignment of at least two miners to assist West in performing each job enabled West to work in the capacity of a supervisor. Sturgill stated that although he stopped treating West as an ordinary laborer, his doing so was contrary to the instructions which had been given to him by Doug (Tr. 74; 291-292).

33. After West had been reinstated for about 1-1/2 months, Doug told Sturgill that they could no longer afford to pay two section foremen to work on the third shift and Sturgill was laid off (Tr. 279; 416; 422; 439-440; 458). About 2 weeks after West was reinstated, Doug Shelton resigned as superintendent of the No. 6 Mine and began to operate his own coal business under the name of Shelton Coal Company (Tr. 416-417; 446-447). The name of the new superintendent hired by Ridley Elkins was Donnie Short (Tr. 80; 446; 671). [NOTE: West stated that Doug left about 2 weeks after West was reinstated (Tr. 79), but if that were correct, Sturgill would have been laid off by Doug's successor, Donnie Short, whereas both Sturgill and Doug agreed that Doug was superintendent when Sturgill was laid off (Tr. 279; 439-440). The actual date that Doug left is immaterial to the real issues in this proceeding.]

34. West first stated that he only complained to Short about three things: (1) the condition of the roadway on the surface leading to the No. 2 portal, (2) the condition of the intake haulageway, and (3) the disparity in West's and Sturgill's pay, that is, West said that he only received his regular salary after reinstatement of $2,100 per month regardless of the number of weekends he worked, whereas every time Sturgill worked on Saturday, he was paid $100 in addition to his regular salary (Tr. 217). At a subsequent time in his testimony, West stated that he also complained to Short about the fact that the ventilation curtains were down at the face each day and that temporary supports were not being set (Tr. 239). Short denied that West had made any safety complaints to him (Tr. 681). Short also denied that any foreman had complained to him about curtains being down on a daily basis (Tr. 697).

35. Ridley Elkins on September 28, 1978, discharged West for having failed to perform his duties and for having been found asleep on the third shift which began at 11 p.m. on September 27, 1978, and ended at 7 a.m. on September 28 (Tr. 451-452). West denied that he was asleep (Tr. 91), but he did admit that he had failed to make any methane checks in the mine after approximately 5:30 a.m. even though four miners were roof bolting in two different headings up to about

7 a.m. (Tr. 84-85; 623; 647; Leland Maggard's Deposition, pp. 19-20). West said that his failure to make the methane checks did not expose the miners to any danger because no methane had ever been detected in the No. 6 Mine and there was no likelihood that methane would be released unless actual production was in progress, and the only activity at the time he failed to check for methane, was roof bolting (Tr. 92; 223).

36. Based on credibility determinations hereinafter explained, I have made findings of fact for the events which occurred on the third shift beginning on September 27, 1978. The facts set forth in these findings of fact are based on the testimony of all the men who worked on the third shift, namely, Robert L. West (Tr. 81-101; 219-253), Donnie L. Dockery (Tr. 596-615), H. Doyle Phipps (Tr. 618-636), Earl Houseright (Tr. 638-653), James Kelly (Tr. 654-669), and the deposition of Leland B. Maggard. Leland Maggard's deposition will hereinafter be cited as "Dep., p. ___".

(1) The third shift was a maintenance shift on which no coal was produced. The sole function of the maintenance shift was to get the mine in proper condition for producing coal when the day shift reported for work at 7 a.m. On the night of September 27, 1978, the primary work which needed to be done was roof bolting and preparation of materials for advancement of the conveyor belt (Tr. 81-82). Therefore, all five of the men on West's crew worked on the surface of the mine for about an hour. They loaded supplies and prepared a new section of conveyor belt. Around midnight, West sent four of the men underground to install roof bolts. There were two roof-bolting machines in the mine. Leland Maggard ran one of the machines and Earl Houseright acted as his helper. Doyle Phipps operated the other roof-bolting machine and James Kelly was his helper (Tr. 619-621; 638-639; 648; 655-656; Dep., p. 6).

(2) Donnie Dockery was what is known as the "outside man." Generally, it was his responsibility to stay near the mine office so that he could be of assistance in case of an emergency. He also performed odd jobs such as sharpening bits. On the night of September 27, West asked Dockery to accompany him and the other men on his crew to the portal of the mine so that Dockery could splice the belt which was going to be used in advancing the belt conveyor. Dockery could perform his duties as outside man while splicing the belt because there was a telephone at the portal as well as one in the mine office. Dockery was inexperienced at splicing belts so West elected to remain on the outside of the mine to explain belt splicing to Dockery instead of going into the mine either to check the faces before the men began roof bolting or to make the methane tests which are required to be made every 20 minutes when equipment is operating at the face (Tr. 599; 620; 622; 639; 643; 657; Dep., p. 10).

(3) West remained on the outside of the mine with Dockery until 5 a.m. at which time he told Dockery that he was going into the mine to obtain the scoop so that the belt they had prepared could be taken into the mine for use in advancing the belt conveyor. While he was underground, West went to the heading in which Maggard and Houseright were installing roof bolts. At that time, West observed that Maggard's cap light had become quite dim. West exchanged lights with Maggard so that Maggard could continue roof bolting. West then was unable to find an extra cap light underground, so he went to the heading where Phipps and Kelly were installing roof bolts and asked that Kelly accompany him outside because West's light had become so dim by that time that he could not travel without the additional illumination provided by Kelly's light. For some reason not articulated in the record, West determined not to take the scoop out of the mine, and therefore Kelly and West walked out of the mine. If West had taken the scoop of the mine, he would have found on the scoop an extra cap light which was fully charged and usable (Tr. 597; 599; 616; 622; 640; 657; Dep. p. 11).

(4) It was about 5:55 a.m. when West and Kelly emerged from the mine. Kelly immediately went back into the mine to continue roof bolting and West told Dockery that Dockery could return to the mine office since the task of splicing the belt had been completed. West found himself without a usable cap light. Since it was about 6 a.m. when Dockery was allowed to return to the mine office and since it takes only about 20 minutes to walk to the mine office, West could have gone with Dockery to the mine office where he could have obtained a fresh cap light. He could then have returned to the portal by 6:40 a.m. If he had done so, he could have made final methane tests and could have performed a preshift examination preparatory for the day shift's entering the mine at 7 a.m. A period of only 5 minutes is required to walk from the portal to the places where the miners were installing roof bolts (Tr. 600; 631; 657; 661).

(5) At the time West told Dockery that Dockery could go to the mine office, West stated that he was going to get into Phipps' Jeep where it was warm. Phipps had parked his Jeep near the portal before he went into the mine to install roof bolts. West had given Phipps permission to leave early for personal reasons and West was expecting Phipps and Kelly to come out of the mine about 6:40 a.m. It was Kelly's practice to ride to and from work with Phipps. Therefore, Phipps' leaving early required that Kelly also leave early. As it turned out, Phipps and Kelly did not finish bolting the heading where they were working until nearly 7 a.m. Consequently, Phipps and Kelly did not come out of the mine until 6:50 a.m. They did not see West when they first came out of he mine, but when they reached Phipps' Jeep and started to open the doors, they found that West was asleep on the back seat of the Jeep with his feet stretched out between the two front bucket seats (Tr. 600; 617; 623; 625; 650; 658-659).

(6) Maggard and Houseright came out of the mine about 7 a.m. They do not now recall how they returned to the mine office on that particular morning (Tr. 647-650; Dep., p. 20). West went to the mine office, turned in his cap light, and filled out the preshift book (Tr. 95).

37. Donnie Short, the superintendent of the mine on September 27 and 28, 1978, was asked by Ridley Elkins to interview Phipps and Kelly and to make a recommendation as to what disciplinary action should be taken with respect to West's actions on the third shift which began at 11 p.m. on September 27, 1978. After Short had heard their accounts of what had happened on the third shift, he recommended that West be discharged because he said that West had failed to look after the health and safety of the miners since he had failed to go underground in order to make methane tests and had failed to perform a preshift examination. Short said that performance of the aforementioned duties is necessary to assure that the mine is in a safe condition. Short stated that if an emergency or an accident had occurred, West would have been in serious trouble for having stayed on the surface of the mine instead of doing his duties underground. Therefore, Short recommended to Ridley that West be discharged for being asleep and for having failed to perform his duties (Tr. 678-680).

38. On September 28, 1978, the day after he had been discharged for the second time, West went to the MSHA office in Norton, Virginia, and filed a second discrimination complaint against Elkins Energy (Exh. 3). The discrimination complaint stated that Ridley Elkins had discharged West for allegedly failing to perform his duties and for sleeping on the job. The complaint alleged that the discriminatory action was that West had been discharged on the basis of a frame-up deal because West had asked about vacation pay and extra pay for the weekends he had worked and because management could find no fault with the way he had performed his job after his reinstatement (Exh. 3). At the hearing, West claimed that his discharge was merely a culmination of the harrassment which he had received after his reinstatement (Tr. 102).

39. The discrimination complaint filed by West on September 29, 1978, requested a cash settlement without reinstatement. At the hearing, West stated that since Donnie Short had now become the superintendent of the No. 6 Mine, he would like to be reinstated in addition to receiving the salary he would have earned if he had not been unlawfully discharged. West stated that he was now asking for reinstatement because he felt that he could work with Short and be permitted to comply with the health and safety regulations, whereas he could not have done so if Doug Shelton had continued to be superintendent of the No. 6 Mine (Tr. 103). The complaint in this proceeding was amended at the hearing to conform with the evidence (Tr. 323-325).

Consideration of Parties' Arguments

West's Complaints About Safety

Respondent's brief (p. 2) argues one primary point, namely, that for complainant to prevail in this proceeding, the preponderance of the evidence must show that complainant was discharged because he made safety complaints. Respondent contends, however, that when complainant's testimony is read in light of the testimony of other witnesses, it will be seen that complainant did not carry his burden of proof because every major contention made by complainant is contradicted by the testimony of other witnesses. As I indicated in the paragraph preceding my 39 findings of fact, supra, many of the witnesses disagreed with each other with respect to various facts, but several witnesses supported West's claim that he had made complaints about safety (Finding Nos. 15-18, supra). Since respondent's brief relies almost exclusively on the witnesses' contradictions for its argument that complainant failed to prove that he was discharged for complaining about safety, I shall hereinafter consider each of the factual contradictions set forth in respondent's brief.

Smoking. Respondent's brief (p. 4) states that Patrick Sturgill, who was the third-shift section foreman when West was reinstated, testified that Doug Shelton, the mine superintendent, approved of Sturgill's searching the men for smokers' articles and that Doug told Sturgill not to allow the men to smoke. Respondent correctly cites the only transcript reference which shows that Doug approved of having men searched for smokers' articles. I have, however, found that Sturgill's testimony as to searches for smokers' articles is not necessarily in Doug's favor. It must be realized that Sturgill was not hired by Doug until after West had filed his first discrimination complaint. A copy of the discrimination complaint (Exh. 2) was served on Doug and Doug therefore knew that one of the safety issues West had raised in the complaint was the fact that West intended to stop the men from smoking in the mine. Doug's own testimony shows that he was opposed to searching the men for smokers' articles and that he deliberately failed to follow the law with respect to searching the men for smokers' articles (Tr. 424-425). Doug did, however, urge the men not to smoke in the mine (Tr. 415; 422).

The fact that Doug stated unequivocally in his own testimony that he did not approve of searching the miners for smokers' articles gives strong support to West's claim that Doug had instructed West not to make searches for smokers' articles (Finding No. 21, supra). Therefore, I find that it was not inconsistent for Doug to change his position with respect to searching the men for smokers' articles after West made that an issue in his discrimination complaint.

Inasmuch as three different witnesses supported West's claim that he complained about the miners' being allowed to smoke in the

mine, I find that West did complain to Doug about the fact that the miners were smoking in the mine (Findings Nos. 16 through 18, supra). I am aware that Doug denied that West had complained to him about smoking (Tr. 351). I conclude that Doug's testimony to that effect lacks credibility for several reasons. First, other men stated that smoking was being done in the mine and they agreed that West was opposed to it. Second, one of the miners stated that he had never seen anyone make a search for smokers' articles while he was working at the mine (Finding No. 21, supra). Third, Doug could hardly admit that West had complained about smoking to him because that was a violation which he said that he knowingly had committed. If he had admitted that West complained to him about smoking, Doug would have given West enough corroboration to prove one of the allegations in his discrimination complaint.

I do not think that transcript page 300, cited on page 4 of respondent's brief, supports respondent's claim that West "had been on probation at another time for allowing men to smoke." The testimony at page 300 of the transcript states that West disallowed smoking at another mine where he worked, but that the superintendent at that mine also had told him to let them smoke. The witness at page 300 specifically stated that West had told him that West could not "put up" with smoking in the mine (Tr. 300, line 4).

The reliance in respondent's brief (p. 4) on the testimony of Morrell Mullins is misplaced because Morrell Mullins must be given a very low credibility rating. As I have indicated in Finding Nos. 28 and 29, supra, Morrell Mullins is now working as mine foreman in a coal mine which is now owned by Doug. Morrell's testimony shows that his statements were intended to support Doug's testimony in every respect and Morrell's testimony is so full of exaggerations as to make it suspect on its face. For example, Morrell's claim that Doug was "onto him" nearly every morning about the miners' smoking is a great distortion of Doug's own testimony and is completely contrary to John Ed Mullins' testimony to the effect that Doug did not often talk to the miners about smoking and that no searches for smokers' articles were made (Tr. 167).

Auger holes. The preponderance of the evidence shows that West did complain about having driven into an auger hole (Finding Nos. 14 and 15, supra). Respondent's brief (p. 5) correctly notes that Doug and Morrell testified that there was a drill on the back of the scoop which could be used to drill in advance of mining to test for the existence of auger holes. Doug's testimony, however, shows that the drill was used for anchoring tailpieces and he said that they had to hunt for it every time they wanted it (Finding No. 25, supra). The fact that they had to hunt for the drill supports a finding that it was not used to drill in advance of mining with the regularity claimed by Morrell Mullins. Moreover, the fact that Doug received a notice of violation for failing to have the auger holes identified on the

mine map is another indication that the drill was not being used because there would have been no point in using it unless they had reason to believe that the auger holes were fairly close to the place where they were mining coal.

Here again, I find that Doug's denial of West's having mentioned the auger hole lacks credibility because Doug had been given a notice of violation for failure to show the auger holes on his mine map. If Doug had admitted that West discussed auger holes with him, he would have been providing a great deal of corroboration to West's claim that he had been discharged for complaining about safety.

Providing a Man on the Surface. The preponderance of the evidence supports the claim in respondent's brief (p. 5) that West went underground on at least one occasion without a person being on the surface who could have summoned help in an emergency situation. As Finding No. 4, supra, shows, West did tell Doug that a person should be on the surface when miners are underground, but West did not take that position until after he was injured by a rock falling on him on February 28, 1978. On that day, West and two other miners, John Ed Mullins and Morrell Mullins, had gone underground at a time when no one was on the surface. West claims that Doug was on the surface when he and the other two miners went underground on February 28, but Doug, Morrell, and John Ed all testified that Doug was still at home when they went underground on February 28.

I have detected nothing in John Ed Mullins' motivations which indicates that his testimony lacks credibility. Moreover, his testimony is consistent throughout. Therefore, I find that John Ed's, Morrell's, and Doug's testimony is more credible than West's for the fact that West did go underground on February 28, 1978, when there was no one on the surface (Tr. 159; 356; 568). West did not take a firm position about having a person on the surface until after he was injured (Tr. 49; 150). Since Doug agreed after West's accident that a person should be on the surface at all times when miners were underground (Tr. 390), I find that West did not make a complaint about safety with respect to having a person on the surface which was any different from management's position regarding the stationing of a person on the surface while men are underground. Finding 36(2), supra, for example, shows that it was management's practice to have a man on the surface when coal was being produced. The failure of management to have a man on the surface at the time West was injured occurred at a time when the mine was inoperative during the miners' strike (Finding No. 4, supra). After West's accident, management agreed that a man should thereafter be stationed on the surface when men were underground regardless of whether coal was being produced or not.

Ventilation. Respondent's brief (pp. 6-7) correctly argues that while West may have complained to Doug about the failure of the

miners to maintain ventilation curtains, West's shift was just as guilty of failing to maintain the curtains as the section foreman on the first shift was. There is ample support in the record for making the foregoing conclusion. Robert Hilton, who operated a roof-bolting machine on West's shift, stated that the ventilation curtains on West's shift were constantly knocked down by the shuttle cars and that the curtains were kept rolled up most of the time (Tr. 298). Doug stated that the day shift complained about the night shift knocking the curtains down and the night shift complained about the day shift knocking the curtains down (Tr. 415). Morrell, who was the day-shift foreman, agreed that the miners on his shift allowed the curtains to fall, but he also claimed that the miners on West's evening shift were just as bad about knocking the curtains down as the miners were on his day shift (Tr. 558; 571; 586). As I have previously indicated, I believe that Morrell Mullins' testimony should be given a very low credibility rating, but since Robert Hilton also testified that the miners on West's shift allowed the curtains to lie on the mine floor or rolled them up to the roof, there is corroboration in the record to support Morrell's statements as to the ventilation curtains.

Respondent's brief (p. 6), inappropriately cites John Ed Mullins' testimony to support a claim that Elkins Energy supplied fly curtains when West asked for them. I believe that John Ed answered the question about fly curtains at transcript page 159 in a generic sense because ventilation curtains were supplied in ample quantity, but fly curtains were never provided at all. Doug himself agreed that he had refused to provide fly curtains on two grounds, the first being that they were not needed, and the second being that their cost was excessive (Tr. 371). Robert Hilton testified that he heard West complain about the need for fly curtains, but he said that no fly curtains were ever provided (Tr. 298). Finally, West himself stated that fly curtains could be dispensed with so long as ordinary curtains were made available and were properly used (Tr. 25).

In addition to the testimony cited above, Hugh Stidham and John Ed Mullins testified that they had heard West complain to Doug about the lack of proper ventilation (Tr. 113; 148). Despite the evidence showing that West failed to provide proper ventilation on his own working shift, the fact remains that West did complain about the inadequate ventilation which constantly existed in the mine. The superintendent had been a former Federal inspector and knew that the miners were being exposed on a continual basis to respirable dust. He knew, or should have known, that constant exposure to respirable dust could cause the miners to contract pneumoconiosis, but he did nothing to correct the deplorable ventilation conditions which had been called to his attention. It is, therefore, not surprising that West did not succeed in restoring adequate ventilation on his own shift when the mine superintendent gave him no support in seeing that the miners maintained the curtains in proper position. Inasmuch as

Doug was indifferent about providing proper ventilation (Tr. 309), I conclude that he would have resented West's complaints about ventilation and would have wanted to free himself of a section foreman who kept discussing a subject which Doug did not want to hear about (Finding Nos. 14, 15, 17-20, 24, and 28, supra).

Failure to Install Temporary Supports. Respondent's brief (p. 7) correctly states that West failed to have temporary supports erected on his own shift. Even though West did discuss with Doug the failure of the miners on the first shift to install temporary supports, West failed to protect the miners from roof falls on his own shift because he did not require that temporary supports be erected on his shift. The most damaging testimony with respect to West's performance as a section foreman came from Robert Hilton who was a roof bolter on West's evening shift. He testified that temporary supports were supposed to be installed but that they did not practice following the law. Hilton said that they did not have timbers underground to use for roof support and that no timbers were brought in for that purpose. Hilton stated that the roof was never supported until such time as he entered a place to install roof bolts. Hilton testified that he had to install jacks in each place before he bolted (Tr. 301-302).

Since the roof-control plan for the No. 6 Mine required that temporary supports be installed within 5 minutes after the coal was removed, it was essential that temporary supports be installed rapidly (Finding No. 22, supra). Donnie Short, who replaced Doug as mine superintendent at the No. 6 Mine, stated that once the slate has separated from the roof, it is better to pry the slate down or let it fall than try to install temporary supports under the loose slate (Tr. 699). Therefore, the miners were unprotected day after day in the No. 6 Mine because no effort was being made to install temporary supports. Additionally, Earl Houseright, a miner on West's third shift after West's reinstatement, testified that no supports were installed in the working places until he placed temporary supports in the places just prior to installing roof bolts (Tr. 652). Houseright's testimony shows that the miners were continuing to ignore the requirement that temporary supports be installed.

Another serious shortcoming in the miners' failure to follow the provisions of the roof-control plan was that the mine superintendent and the section foremen were obligated to explain the provisions of the roof-control plan to the miners. Yet, West stated twice that he did not know whether six or eight temporary supports were required to be installed and Houseright stated that he did not know how many temporary supports were required (Tr. 39; 248; 652). It was Doug's duty as superintendent to know the provisions of the roof-control plan and to explain the plan to the section foremen and the miners so that the plan would be followed. Additionally, West claimed that he had to send outside the mine for a supply of timbers when he did want

to support the working places (Tr. 255). Section 75.202 provides that a supply of timbers shall be kept underground near the working faces and Doug should have insisted that timbers be kept underground at all times.

Despite West's shortcomings in following the provisions of the roof-control plan, Doug's own testimony shows that West did complain to him about the failure of the miners to install temporary supports (Finding No. 24, supra). Nothing exposed the miners to greater danger than the failure to set temporary supports, yet Doug took no action to see that the roof-control plan was complied with. It is not surprising that West failed to see that the provisions of the roof-control plan were complied with on his own shift when he found that the mine superintendent was indifferent about seeing that the provisions of the roof-control plan were enforced. In such circumstances, I conclude that Doug would have been motivated to free himself of a section foreman who kept reminding him that the roof-control plan was not being followed.

Hindrance to Production. Respondent's brief (p. 7) correctly argues that the evidence fails to support West's claim that he was discharged, in part, because his insistence on following safety regulations was a hindrance to production. West said that his following the safety regulations resulted in less coal production on his shift than was achieved on the day shift. Finding No. 19, supra, summarizes the evidence with respect to West's claim about his being a hindrance to production and shows that there is no merit to his claim that he was discharged because he was a hindrance to production.

Dune Buggy Episode. Respondent's brief does not discuss West's claim that he advised Doug that it was a violation of the safety standards for Doug to have ridden a gasoline-powered dune buggy into the mine (Finding Nos. 14, 17, 24, and 29, supra). I find that West must be given considerable credit for having had the courage to tell the mine superintendent that the superintendent was violating the law when he rode a dune buggy into the mine. Doug, John Ed Mullins, and Morrell Mullins all agreed that Doug had ridden the dune buggy into the mine. John Ed stated that he heard West tell Doug that he ought not to have ridden the dune buggy in the mine. Morrell personally did not say anything to Doug about having ridden the dune buggy in the mine. I find that West's criticism of the mine superintendent for riding the dune buggy in the mine may well have been the type of complaint which would have made the superintendent want to discharge a section foreman who had the audacity to suggest to the superintendent that his actions were unsafe.

The preponderance of the evidence supports the claim in MSHA's brief (pp. 3-4) that West made safety complaints to Doug, the mine superintendent. As the preceding discussion has shown, West complained about miners' smoking in the mine, about the failure of the

miners to drill in advance of mining operations so as to discover auger holes before the continuous-mining machine cut into them, about the miners' allowing the ventilation curtains to fall to the ground so that adequate ventilation was not provided at the working faces, about the miners' failure to install temporary supports after cuts of coal had been removed, and about the mine superintendent's having driven a gasoline-powered dune buggy into the mine. It should be noted, however, that MSHA's brief incorrectly states at the top of page 4 that West overruled other management personnel who wanted to cut around old auger holes (Tr. 301). The testimony at page 301 shows that West disagreed with other personnel about the timing of cutting a breakthrough. That incident had nothing to do with auger holes.

Reasons Given by Respondent for Laying Off West on April 4, 1978

Respondent's brief (p. 2) contends that West can prevail in this proceeding only if the preponderance of the evidence shows that West was fired because he complained about safety. Respondent also claims that West must succeed on the strength of his own case and cannot win upon any weaknesses in respondent's case. I have already found in the preceding discussion that West did complain about safety, but as respondent notes, West can win only if the evidence shows that West was laid off because he complained about safety. One is not likely to find a contested discrimination case in which the respondent agrees that it laid off or discharged an employee for engaging in an activity which is protected under the Act. Therefore, respondent is not entirely correct in arguing that West's ability to prove his case may not to some extent depend on the weakness of respondent's case.

In Finding Nos. 4 through 12, supra, I have given the reasons which were advanced by respondent for laying West off on April 4, 1978. Respondent first claimed that West was being discharged because Ridley Elkins had determined to lay off all the miners on the second shift, but when West reported to the mine to pick up his personal belongings, he found that all the miners who normally worked on the second shift were present at the mine and ready to work the second shift except for West and one repairman who had been laid off. West was then advised that only the men who had been hired to work on the third shift were being laid off. A few days later the repairman was reemployed as a belt man, but West was not offered a job in any substitute capacity. The reason given at the hearing for laying off West was that respondent had suffered financial losses and needed to cut expenses through discharging West and the repairman. Respondent did not demonstrate any savings through the discharge of the repairman because he was reemployed a few days later to work as a belt man. While the repairman was not reemployed in the same capacity, the saving to respondent was insignificant because the only saving from discharging the repairman and rehiring him was the small differential in pay which he received as a repairman as compared with the salary he received as a belt man.

The laying off of West saved respondent no money because Don Shelton, who was the mine superintendent's brother, was working as a helper for the operator of the continuous-mining machine. Don had obtained section foreman's papers on January 10, 1978, and Doug, the mine superintendent, promoted his brother to the position of section foreman to fill the section foreman's position which was left vacant when West was laid off. Of course, when Don Shelton was made section foreman, it was necessary to obtain another employee to take Don's place as helper for the operator of the continuous-mining machine. Therefore, the net saving to respondent from laying off West was zero because Don Shelton had to be paid the same salary West was receiving before West was discharged and the person who took Don's position as helper for the operator of the continuous-mining machine had to be paid the same salary which Don had been receiving in the helper's position.

Don Shelton ultimately resumed his job as helper to the operator of the continuous-mining machine and a section foreman had to be transferred from another of Elkins Energy's mines in order to fill the vacancy that had been created when Don returned to his former job. In view of the circumstances described above, respondent's claim that West was laid off because of a lack of work is simply not supported by the preponderance of the evidence in this proceeding.

There is support in the testimony of Robert Hilton for respondent's claim that West was hired for the third shift (Tr. 307) and I am willing to accept respondent's claim to that effect. The evidence shows, however, that respondent started the third shift within less than a month after West was laid off (Tr. 448). Although West had been advised when he was laid off, that he would be called if a vacancy occurred, he was not offered the position as section foreman on the third shift when that shift was begun. Doug explained that he did not offer the position to West because by that time West had made a number of statements about him that were untrue and he did not think that he and West would be able to work together harmoniously after those statements had been made (Tr. 397). Although Doug referred to West's complaints about having been paid only at half his regular salary during the strike and to West's attempts to get two other section foreman who worked during the strike to join him in a suit against respondent to collect the back wages allegedly due, the evidence shows that such activity by West had ceased at the time the strike ended (Tr. 490). Therefore, I conclude that the primary reason for Doug's failure to offer West a job as section foreman on the third shift was that West had filed a discrimination complaint against respondent on April 5, 1978, or the day after West was laid off (Tr. 404).

It is true that Doug claims to have offered West an alternative job at another mine owned by Elkins Energy, but West claims Doug only asked if West would consider taking another job and West claims that

he agreed to accept an alternative position, but West says that Doug never did follow up the inquiry with a specific job offer. As to the two different stories told by West and Doug with respect to a job offer, I find for two reasons that West's version is more credible than Doug's. First, at the time Doug called West with the alleged offer of another job, Doug also asked West if West had filed a discrimination complaint against him. An appropriate excuse for calling West would have been to ask if West would consider taking another job. It would not have been logical for Doug to have offered West a specific job at a time when Doug was ascertaining whether West had filed a discrimination complaint. Second, Doug claimed that West declined the job which Doug offered him and Doug testified that one of the reasons West gave for turning down the job offer was that West said there was no point in his accepting a substitute job as section foreman at a mine other than the No. 6 Mine when the conditions at the alternate mine were less desirable than they were at the place where West was then working (Tr. 370). West would have had no reason to decline an alternate position by saying that the alternate job was less desirable than the position he then had when West was then without any job at all as the phone call from Doug had occurred on April 5, 1978, or the day after West had been laid off by Doug.

There are other aspects of respondent's evidence which do not support respondent's claim that West was laid off on April 4, 1978, because of respondent's decision that a third shift would not be instituted at the No. 6 Mine until coal production after the strike increased to the quantity of coal which was being produced before the strike (Tr. 361; 430; 457). The evidence shows that respondent claims to have discharged West on April 4, 1978, because Ridley Elkins had decided that he would be unable to start a third shift because of the economic problems which faced him after the strike (Findings No. 11, supra). The facts show, however, that Ridley did institute a third shift on or about May 1, 1978, and that the third shift was begun long before production at the No. 6 Mine had regained the tonnage which had been maintained before the strike (Finding Nos. 1 and 9, supra).

Reasons for Concluding that West was Laid Off on April 4, 1978, Because of a Protected Activity

Section 105(c) of the Act provides that no person shall discharge or in any manner discriminate against a miner because such miner has made a complaint under or related to the Act to an operator or an operator's agent of an alleged danger or safety or health violation in a coal mine. As the findings of fact and the discussion above have shown, West did make complaints about safety with respect to the miners' smoking underground, with respect to respondent's failure to see that drilling was done in advance of mining to determine whether auger holes might constitute a hazard, and with respect to West's telling the mine superintendent that it was a violation of the law

for the superintendent to ride a dune buggy in the mine. The record shows that West also discussed with the mine superintendent the fact that ventilation curtains were not being used properly and that temporary supports were not being installed as required by the roof-control plan.

While I believe that Ridley Elkins knew that West was making safety complaints to the mine superintendent (Finding Nos. 26 and 27, supra) the Act does not require that West prove that he complained to the operator. Under the Act, West only has to prove that he complained to the operator's agent. Ridley personally testified that he expected the miners to make their complaints to his mine superintendent and that the superintendent was responsible for acting on the complaints (Tr. 444). Thus, there is no doubt but that West made safety complaints and made them to the person to whom complaints are required to be made under section 105(c).

If the reasons given by respondent for laying West off on April 4, 1978, had been supported by the facts, I would have had to have found that West was discharged for reasons which are not protected by section 105(c) of the Act. As I have demonstrated in the discussion above with respect to the reasons given by respondent for discharging West, those reasons will not stand close examination without revealing that the reasons given for laying West off are flimsy and unconvincing. In the absence of any convincing reasons for discharging West, I am required to scrutinize the evidence to determine if the real reason for discharging him resulted from his complaints about safety.

While it is true that West accomplished little in changing the mine superintendent's indifferent attitude with respect to ventilation and roof support, the fact remains that he did try to improve safety conditions at the No. 6 Mine at a time when Doug Shelton, the mine superintendent, was blatantly disregarding the mining laws. As has been shown above, Doug admitted that he violated the mining laws by failing to see that the miners were searched for smoking articles, by deliberately not coming to work on February 28, 1978, so as to be on the surface when he knew that miners had gone underground, and by deliberately driving a dune buggy in the mine when he knew that he was creating a hazard by doing so. The fact that Doug knew the ventilation curtains were not being used properly and knew that temporary supports were not being installed and did nothing about it is an additional reason to conclude that Doug was not upholding the mandatory health and safety standards in any way, except for his claim that he did tell the miners that they ought not to smoke underground.

Since the evidence shows that Doug was not following the mandatory health and safety standards, I conclude that Doug would resent having a mine foreman on the premises who kept reminding him of the fact that he was not carrying out his responsibilities. Since Doug had been a Federal inspector before he became superintendent at the

No. 6 Mine, it is reasonable to conclude that he was aware of the discriminatory provisions of the Act. Therefore, he knew that he would have to give justifiable reasons for discharging West. If he had been able to support his claim that West was laid off because of Ridley Elkins' decision to postpone instituting a third shift until production after the strike reached pre-strike levels, I would have been able to find that West was discharged for reasons other than West's having engaged in protected activities. Since the facts do not support the reasons given by Doug for discharging or laying West off on April 4, 1978, I must find and conclude that West was actually discharged because of his complaints about safety.

As my discussion above shows, I am in general agreement with the arguments set forth in MSHA's brief on pages 4 to 7, but the evidence does not support some of the factual allegations made in that portion of MSHA's brief. For example, West stated that Don Shelton worked as a helper for the operator of the continuous-mining machine (Tr. 20; 173)--not as the operator of the continuous-mining machine, as is stated on page 4 of MSHA's brief. It is doubtful that Don could have vacillated between the job of section foreman and his union job if he had been the operator of the continuous-mining machine because two skilled operators of the continuous-mining machine would not likely have been available at the mine, but it is quite likely that more than one miner could act as the helper to the operator of the continuous-mining machine.

MSHA's Claim that West was Not Reinstated to the Same Position

I disagree with the claim in MSHA's brief (p. 7) that West was not reinstated to the same position which he occupied prior to his being laid off on April 4, 1978. As I have demonstrated in my prior discussion, there is corroborating evidence that West was hired for the third shift. His being reinstated as a section foreman on the third shift was therefore in compliance with the order of reinstatement. Moreover, the order of reinstatement provided that West should be reinstated "to the position of section foreman at the rate of pay and the same or equivalent work duties" (Finding No. 31, supra). Although West was not at first given duties equivalent to those which he had prior to his discharge, that discrepancy in his reinstatement was eliminated after Patrick Sturgill, the section foreman on the third shift at the time West was reinstated, was laid off. Since West had originally been hired to work on the third shift and was reinstated as third-shift section foreman, I find that respondent complied with the provisions of the reinstatement order. It is certain that West was working as the sole section foreman on the third shift on September 28, 1978, when he was discharged for the second time.

The harassment which West claims to have experienced after he was reinstated as section foreman was the result of respondent's

having to utilize two section foreman on the same shift and I think respondent should be given some consideration for having to deal with a difficult situation without being unduly precipitous in laying off Sturgill so that West could be the sole section foreman working on the third shift.

Failure to Pay West for Working on Saturday

MSHA's brief (p. 8) correctly states that respondent paid its other section foremen when they worked on Saturdays, but did not pay West when he worked on Saturdays. Doug, the mine superintendent, admitted that he did not pay West for working on Saturday, but Doug endeavored to justify his failure to pay West by saying that Saturday pay was given only to miners who showed outstanding diligence. For example, Doug said that he paid John Ed Mullins for working on Saturday because John Ed was so devoted to seeing that the mine was in good condition that he would voluntarily come to the mine and work on Saturday and Sunday just to make sure that the equipment was in good condition (Tr. 436). John Ed was an electrician--not a foreman--and John Ed stopped working for respondent because he found a job that paid more money elsewhere (Tr. 163). Consequently, the loyalty attributed to John Ed may have been exaggerated by Doug. Although Doug stated that he had paid Morrell Mullins for working on Saturday, the record does not show what outstanding contribution Morrell made in return for the extra pay he received for working on Saturday (Tr. 413). Additionally, Patrick Sturgill testified that he received $100 for each Saturday he worked. Doug justified the extra pay in Sturgill's case by saying that Sturgill did a better job in completing all of the duties assigned for the third shift than any other section foreman he had ever had (Tr. 436). MSHA's brief (p. 9) correctly notes other evidence in the record showing that Doug was not particularly pleased with Sturgill's performance and that Doug threatened to lay off Sturgill and everyone on his third shift if the miners did not work more conscientiously than they had been (Tr. 279; 285).

Moreover, the testimony of Ridley Elkins shows that he had given Doug authority to determine when men should be paid for working on Saturday, whereas Doug claimed that Ridley made the determintions as to which men should be paid for working on Saturday (Tr. 19; 365; 458). It is true that not everyone who worked on a weekend received extra pay. For example, Doug himself did not receive extra pay for working on Saturday, and neither did Dale Meade, but neither of them was a section foremen and Meade was a part owner of the mine (Tr, 348; 413), so the fact that they were not paid for working on Saturday hardly explains why West was not paid for working on Saturday while other section foremen were paid for working on Saturday. If payment for working on Saturday had been based solely on merit, there would have been no reason for Doug to have asked Sturgill not to tell West that Sturgill was being paid extra to work on Saturday while West was not receiving extra pay for Saturday work (Tr. 276).

I conclude that respondent did not justify its failure to pay West for working on Saturday. Such failure to pay West for working on Saturday was part of the pattern of discrimination shown toward West and respondent will hereinafter be ordered to pay West for the Saturdays he worked during his temporary reinstatement.

Sufficient Grounds Were Shown for West's Discharge on September 28, 1978

MSHA's brief (pp. 9-10) argues that Elkins Energy had insufficient grounds for discharging West on September 28, 1978. West was discharged for sleeping on the surface of the mine and for failing to do his duties as section foreman on the third shift which ran from 11 p.m. on September 27 to 7 a.m. on September 28, 1978. MSHA's brief alleges that West was not allowed to tell his side of the events which occurred on that third shift, but West stated in his discrimination complaint that "I explained to Ridley Elkins in every detail the happenings of my shift" (Exh. 3 p. 2). West further stated in his discrimination complaint that after he had finished his explanation, Ridley asked him (1) why he did not get a replacement light, (2) why he did not take his outside man's light, and (3) whether he knew that someone on his shift was drinking beer (Exh. 3, pp. 4-5). Therefore, West's own admissions clearly show that West was not only permitted to tell "his side" of the events, but was asked questions about several aspects of his description of the events which occurred on September 27 and 28.

MSHA's brief (pp. 9-10) also contends that the testimony of the five men who worked on West's shift is so contradictory as to be almost meaningless. As examples of the contradictory testimony, MSHA's brief refers to the fact that Kelly was of the opinion that he and Phipps operated the only roof-bolting machine which was used that night, whereas two other miners (Maggard and Houseright) said that they were operating a second roof-bolting machine. Kelly testified that the continuous-mining machine has to be serviced each night. Men on the second shift usually work over into the third shift to take care of servicing the continuous-mining machine and they are generally assisted in that work by Houseright. After the servicing of the continuous-mining machine has been completed, which is around 2:30 a.m., Houseright does other work. Kelly's testimony clearly shows that he did not specifically recall what Maggard and Houseright did on the night of September 27 and that his statement about the use of only one roof-bolting machine on the night of September 27 was based on what the men normally did--not on his recollection of what they actually did on September 27 (Tr. 666-667).

Maggard was the only one of the five men on West's shift who corroborated West's claim that he went underground at all before 5 a.m. on the night of September 27 and morning of September 28. Although Maggard agreed that he saw West underground about twice

before 5 a.m., Maggard's testimony otherwise contradicts West's own account of what happened on the night of September 27. Whereas West and the four men on his shift stated that West and the entire crew worked outside the mine until about midnight (Tr. 82; 219; 597; 616; 620; 639; 656), Maggard testified that all the men went directly underground without doing any work on the surface (Dep., pp. 6-7). Whereas West said that Maggard and Houseright helped service the continuous-mining machine until about 2:30 a.m., and therefore would not have seen West make methane checks before 2:30 a.m. (Tr. 84; 224), Maggard and Houseright testified that they started roof bolting as soon as they went into the mine and Maggard said that he saw West about twice before lunch (or 3 a.m.) while he and Houseright were operating a roof-bolting machine (Tr. 639; Dep., p. 8). Moreover, while Maggard stated that he saw West about twice before lunch time, Maggard specifically stated that West did not make any methane checks in the heading where he and Houseright were roof bolting (Dep., p. 10).

Another example in MSHA's brief of the "meaningless" testimony of the men on West's shift is the claim that whereas Kelly testified that he came outside with West and did not recall any conversation on the surface, Dockery recalled that when West and Kelly came out of the mine, West told Dockery to return to the mine office and that Dockery said that West and Kelly were still standing at the portal when Dockery left to go to the mine office (MSHA's Br., p. 10).

In my opinion, Dockery's testimony rates extremely high in credibility. He specifically looked at his watch and knew when West went underground (Tr. 616). Dockery refused to discuss aspects of the events of West's discharge about which he had no direct knowledge (Tr. 604). Dockery specifically stated that he could not be certain that West told Kelly to go back into the mine, but he was certain that West told him to go to the mine office (Tr. 609). Moreover, Dockery's statement that West told him that he (West) was going to get up in Phipps' Jeep where it was warm (Tr. 617) was as detrimental to West's position as any testimony given about the events of September 27 and 28. Yet, Dockery did not make that detrimental statement until MSHA's counsel, during recross-examination, specifically asked Dockery what West said he personally was going to do after West had instructed Dockery to return to the mine office. If Dockery had set out in the beginning to testify adversely to West, it is fairly certain that he would have managed to use West's statement about getting into the Jeep where it was warm as a part of his direct testimony.

I have seriously and painstakingly considered West's claim in his discrimination complaint that he was the victim of a frame-up by management as to the events of September 27 and 28. My detailed examination of the testimony of all witnesses leads me to conclude that my finding No. 36, supra, correctly states what actually happened on the night of September 27, 1978. Among the factors which have caused me to reject the frame-up claim are the following:

(1) If Phipps, who was a son-in-law of one of the owners of the No. 6 Mine, had been told to look for a reason to discharge West, it is logical to assume that Phipps would have directly reported the matter of West's being asleep to his father-in-law rather than tell his father-in-law about finding West asleep only after his father-in-law, who was visiting in Phipps' home, had kidded Phipps about sleeping all the time (Tr. 625-626).

(2) If the men on West's shift had been persuaded to agree on a story to support West's discharge, there would not have been as many minor variations in their testimony as there were. The important aspects of the occurrences on the night of September 27 are generally supported by the testimony of all five men on West's crew. All but Maggard agreed that they worked on the surface until about midnight (Tr. 598; 620; 639; 656; Dep., p. 7). All but Maggard stated that West did not go into the mine until 5 a.m. (Tr. 597; 616; 621; 656). Three of the men who worked underground, including Maggard, unequivocally states that West made no methane checks at any time in the two headings where they were roof bolting (Tr. 622; 640; Dep., p. 18). None of the four men working underground ever saw West underground after 5:30 a.m. and therefore West could not have made a preshift examination before the day shift entered the mine (Tr. 623; 641; 657-658; Dep., p. 13). West's own testimony, of course, shows that he did not make a preshift examination, but he filled out the preshift book as if he had (Tr. 90-92; 95).

(3) West filed his second discrimination complaint on September 29, 1978, or 1 day after the events of September 27 and 28, 1978, which resulted in his discharge. That discrimination complaint was received in evidence as Exhibit No. 3 in this proceeding. Since West's account of the events of September 27 and 28 was written in Exhibit 3 while the facts were fresh in West's memory, they are likely to be more accurate in the complaint than the facts given in his testimony at the hearing which was held about 4 months after his discharge. West's testimony at the hearing conflicts in several respects with the facts set forth in Exhibit 3. The conflicts between the facts set forth in Exhibit 3 and the facts given in West's testimony are discussed below.

First, in his discrimination complaint, West explained that there were 11 places which needed roof bolting and that roof bolts from 6 to 10 feet long would be required. For that reason, West stated that he assigned all four men to installing bolts with use of both roof-bolting machines (Exh. 3, p. 3). At the hearing, however, West testified that he assigned Maggard and Houseright to assisting with servicing of the continuous-mining machine. Since servicing the continuous-mining machine was what Maggard and Houseright normally did, West testified at the hearing on the basis of what normally occurred and apparently forgot about the special aspects of roof bolting which needed attention on the night of September 27 as described in his discrimination

complaint. For that reason, Maggard probably recalled the facts correctly when he stated that he and Houseright went underground on September 27 and began roof bolting as soon as they got underground Maggard's testimony shows no mention of assisting with any servicing of the continuous-mining machine as was normally done (Dep., pp. 7-8).

Second, in his discrimination complaint West stated that Dockery was still outside the mine when West and Kelly came out at 5:55 a.m. (Exh. 3, p. 3), but in his testimony at the hearing, West stated that Dockery was gone when he and Kelly came out because he had given Dockery permission to return to the mine office before he (West) went underground at 5 a.m. (Tr. 88). Both Kelly and Dockery testified at the hearing that Dockery was still outside the mine portal when West and Kelly came out (Tr. 599; 617; 658). Furthermore, in the discrimination complaint West explained to Ridley at the discharge meeting on September 28 that West could not take Dockery's light because Dockery needed the light to see to walk down to the mine office in the dark (Exh. 3, pp. 4-5). If Dockery had already left, as West testified at the hearing, it would have been unnecessary for West to explain to Ridley why he did not use Dockery's light for use in going back inside the mine to make his preshift examination.

Third, in the discrimination complaint, West stated that he was sitting in Phipps' Jeep when Phipps and Kelly came out of the mine at 6:50 a.m. (Exh. 3, p. 4), but in his testimony at the hearing West stated that he just opened the door on Phipps' Jeep and stood there leaning against the Jeep with the door open so that the door would knock some of the cool air off of him (Tr. 91; 93). West's statement in the discrimination complaint that he was sitting in the Jeep is consistent with the testimony of Dockery who stated that West told him that he was going to get up in the Jeep where it was warm (Tr. 617). It is also reasonable to believe that a person who has been at the mine from 11 p.m. to about 6 a.m. may go to sleep once he has yielded to the temptation of getting into a Jeep "where it's warm."

Fourth, in the discrimination complaint, West stated that Phipps and Kelly came out of the mine at 6:50 a.m. (Exh. 3, p. 4), but at the hearing West testified that Phipps and Kelly came out at 6:40 a.m. (Tr. 89). West's statement in the discrimination complaint is consistent with Phipps' testimony because Phipps testified that he and Kelly came out of the mine at 6:50 a.m. Phipps explained that he had intended to leave earlier than 6:50 but that he could not leave before 6:50 because it took Kelly and him that long to finish bolting in the heading where they were working (Tr. 624-625). Phipps' reference to the difficulty he had in finishing bolting is consistent with West's statement in the discrimination complaint to the effect that there was an abnormally large amount of roof bolting to be done on the night of September 27 (Exh. 3, p. 3).

Fifth, in his discrimination complaint, West stated that Dane Meade, who was servicing the continuous-mining machine, came outside about 2:30 a.m. to get two cans of Coke or beer and in his testimony West stated that the two men who had been servicing the continuous-mining machine went home about 2:30 or 3:00 a.m. (Exh. 3, p. 5; Tr. 225). West's detailed knowledge about occurrences on the surface support Dockery's testimony that West remained on the surface with him until 5 a.m. without ever going underground (Tr. 597; 616).

The foregoing discussion shows why I have concluded that the testimony of the men on West's shift is more credible than West's testimony with respect to the events which occurred on West's shift on the night of September 27 and morning of September 28. Therefore, I must reject the claim in MSHA's brief that Elkins Energy did not have sufficient grounds for discharging West on September 28, 1978.

Relief Requested by MSHA's Brief

MSHA's brief (p. 10) asks that I find that West was unlawfully discriminated against and laid off and subsequently discharged by respondent for engaging in actions protected by section 105(c) of the Act. If that finding is made, MSHA's brief asks that certain payments for back pay, etc., be made. Then MSHA's brief states on page 11 that "[b]ecause there are two separate incidents in this case, it is recognized that a finding of discrimination in only one of them is possible." Then MSHA's brief (pp. 11-12) makes certain recommendations about respondent's being ordered to pay West for salary lost during the period he has not worked.

I do not understand why two findings as to discriminatory discharge could not be made if the evidence supported them. It is certain that West filed two discrimination complaints and MSHA, on West's behalf, amended the complaint in this proceeding so as to raise the issue of two unlawful discharges. I assume that MSHA is under the impression that when West was "laid off" on April 4, 1978, that we cannot refer to that as a discharge unless it is also found that respondent discriminated against West when it declined to rehire West when the third shift was begun about May 1, 1978, or less than a month after West was laid off.

I have hereinbefore found that respondent discriminated against West in laying him off on April 4, 1978. That is one finding of discrimination. If the evidence supported West's claim that he was unlawfully discharged on September 28, 1978, that would have been a basis for finding that respondent had for a second time discriminated against West. As Finding No. 34, supra, shows, West had continued to make complaints about safety after he was reinstated. Therefore, I do not understand why MSHA would claim that since there are two separate incidents, only one finding of discrimination is possible.

Additionally, I do not understand why MSHA's brief (p. 12) claims that the whole purpose of the Act will be frustrated if a respondent can discharge an employee who has been reinstated. All that would have been necessary to have put West back on respondent's payroll after West's second discharge would have been for the Secretary to make a finding under section 105(c) that West's second discrimination complaint was not frivolous. If such a finding had been made, I know of nothing that would have prevented a second order of temporary reinstatement from having been issued. Presumably, the Secretary did find that there had been a second act of discrimination or the Secretary would not have amended the complaint in this proceeding to allege a second unlawful discharge (Finding Nos. 31 and 39, supra).

Vacation Pay

West claimed that when he was hired, he was promised that he would be given 2 weeks of vacation pay. When he tried to collect the vacation pay at a later time, he was told that no section foreman was receiving any vacation pay (Tr. 77; 106). No one asked respondent's management to explain its policy with respect to vacation pay. There is nothing in the record to support a finding that West is entitled to vacation pay, but since he continued to claim that he was entitled to vacation pay (Tr. 106), I shall hereinafter order that West be paid 2 weeks of vacation pay with interest from the date that he should have received it if he had not been discharged on April 4, 1978. My order that West be given vacation pay is, however, subject to the following condition: If within 30 days after this decision is issued, Ridley Elkins files an affidavit under oath stating that no section foreman at the No. 6 Mine received vacation pay in 1977 and 1978, then respondent shall be excused from the requirement of giving West any vacation pay.

Ultimate Findings and Conclusions

(1) Respondent Elkins Energy Corporation discriminated against complainant Robert L. West and violated section 105(c)(1) of the Act by laying him off on April 4, 1978, without ever reemploying him when vacancies for section foreman subsequently became available at respondent's No. 6 Mine.

(2) Respondent did not discriminate against complainant when it discharged him on September 28, 1978, because sufficient reasons having no protection under section 105(c)(1) of Act were shown for such discharge.

(3) Respondent should be required to provide the affirmative relief provided for in section 105(c)(2) of the Act as hereinafter directed in paragraph (B) of the order accompanying this decision.

WHEREFORE, it is ordered:

(A) MSHA's amended discriminatory complaint filed in this proceeding is granted with respect to the claim of discriminatory discharge dated April 4, 1978, and denied with respect to the alleged discriminatory discharge dated September 28, 1978.

(B) Respondent shall provide the affirmative relief set forth below:

(1) Respondent shall reimburse complainant at the rate of $2,100 per month from April 4, 1978, to September 28, 1978, less any salary paid to complainant from the time he was temporarily reinstated on July 10, 1978, to the date of his discharge on September 28, 1978, together with interest at the rate of 8 percent per annum.

(2) Respondent shall pay complainant $100 for each Saturday complainant worked from July 10, 1978, to September 28, 1978, together with interest at the rate of 8 percent per annum.

(3) Respondent shall pay respondent the same amount of vacation pay which was given to any other section foreman at the No. 6 Mine in 1977 or 1978, together with interest at 8 percent; provided, however, that respondent is not required to provide complainant with vacation pay if Ridley Elkins submits within 30 days after issuance of this decision an affidavit stating that no section foreman at the No. 6 Mine was given any vacation pay in 1977 or 1978.

(4) Respondent shall include complainant under any fringe benefits to which he would have been entitled for the period from April 4, 1978, to September 28, 1978, to the same degree he would have been protected had he not been unlawfully discharged on April 4, 1978.

(5) Respondent shall expunge from complainant's employment records any references to his discharge of April 4, 1978.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

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

June 19, 1979

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. MORG 79-108
INDUSTRIAL CONTRACTING OF FAIRMONT, INC., Applicant	:	Order No. 0804505 February 6, 1979
v.	:	Loveridge Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
UNITED MINE WORKERS OF AMERICA, Respondent	:	

DECISION

Appearances: Edgar F. Heiskell III, Esq., Haden and Heiskell, Morgantown, West Virginia, for Applicants; Barbara K. Kaufmann, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent MSHA.

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 107(e) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company and Industrial Contracting of Fairmont, Inc., an independent contractor, to review an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 107(a) of the Act for imminent danger.

By notice of hearing dated April 6, 1979, this case was set for hearing on June 6, 1979, in Pittsburgh, Pennsylvania. The notice of hearing required the filing of preliminary statements on or before May 22, 1979. The applicants and MSHA filed preliminary statements, and the case was heard as scheduled. The applicants and MSHA appeared and presented evidence.

Applicable Statute

Section 107(a) of the Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Bench Decision

At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench. Upon consideration of all documentary evidence and testimony, and after listening to oral argument, I rendered the following decision from the bench:

> This case is an application filed by Consolidation Coal Company and Industrial Contracting of Fairmont, Inc. for review of an order of withdrawal issued by an inspector of the Mine Safety and Health Administration under section 107(a) of the Act for imminent danger.
>
> Section 3(j) of the Act defines imminent danger as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.
>
> The order in question recites that three people were observed working on steel structure catwalks and platforms approximately 80 feet above the ground without safety belts or other devices to prevent them from falling; that travelways and platforms were not being kept clear of stumbling and slipping hazards; that a safety device was not provided at the top of the ladder and on one side of the platform where men were

walking; and finally, that on the slurry construction where a person could fall through or over the edge, safety belts or lines were not being used where there was a danger of falling.

The evidence indicates that Industrial Contracting of Fairmont, Inc. was building a steel tower for Consolidation Coal Company. On the day in question, a platform was being constructed at the top of the tower, 80 feet from the ground.

The inspector described the platform at the top of the tower in detail. He described how the platform was reached by walking through the large slurry pipe and that at the end of the pipe he had to jump down approximately 3 feet on the platform (Point A on Respondent's Exhibit No. 2). On the floor of the platform where he jumped down there was some loose grating. He further described the floor of the platform as coated with frost or ice which he said was slippery. According to the inspector there was an area of the platform 52 inches long (Point B on Respondent's Exhibit No. 2), which had no handrail and another area of the platform 12 feet long (Point C on Respondent's Exhibit No. 2) which also had no handrail. The width of the walkways next to these areas were only 24 inches and 33 inches, respectively. Both the 52-inch span and the 12-foot span had cables strung across them, which the inspector did not believe would support a man's weight if he grabbed on to them while falling or if he fell on to them. The inspector's testimony is that the men working on the platform had to pass by these unguarded areas in order to reach their area of work (Point D on Respondent's Exhibit No. 2). The inspector also described a 60-foot area around the belt structure where only a handrail, 6 feet off the platform, existed. Finally, and perhaps most importantly, the inspector testified that the men he observed on the platform were not wearing safety belts.

The inspector's assertion that the men were not wearing safety belts is uncontradicted. His description of the areas which had no handrails, but only cables, also is undisputed as is his statement that the men had to pass by these areas to reach the area they were working. His statement regarding the handrail also was not challenged. The applicant's foreman admitted that there was some frost on some of the grating, but he expressed the view that it was not slippery. I find more persuasive the inspector's

testimony that the floor of the platform was slippery. I also accept the inspector's opinion that the cable strung across the 52-inch span and the cable strung across the 12-foot span would not be strong enough to hold a man if he slipped and fell. Otherwise, there would be no necessity to have handrails at all. I further accept the inspector's testimony that, with respect to the 60-foot area, a man could slip and fall beneath the high rail, which was the only handrail installed in that area.

Based upon the foregoing, I conclude an imminent danger existed. At any moment, one or more of the men could have slipped and fallen at any of the places on the high platform described by the inspector with death or serious injury as the certain result. Regardless of how inconvenient safety belts may have been under the particular circumstances, as the applicant's foreman testified they were, these belts should have been worn. As it was, the men were totally unprotected either by safety belts or by adequate handrails at a time when weather conditions were very bad.

Applicant's counsel has argued most diligently that the men working on the platform were experienced. I cannot, however, accept that as a defense to the order. The Act protects all who work in the mines. It is a sad but true fact of life that some of the worst fatalities have befallen the most experienced of miners.

I also recognize that as applicant's counsel has painstakingly pointed out, the platform was in the process of being constructed and the men were bringing their equipment out on to the platform. It is not for me to tell the applicant how to do its work. However, what I cannot do is countenance the applicant's discharge of its construction responsibilities in a manner which exposes its men, even though they may be experienced in their field, to imminent danger.

In light of the foregoing, I find and conclude that an imminent danger existed. The order is upheld and the application for review is dismissed.

I thank both counsel for a very helpful oral argument.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 0804505 be UPHELD and that the application for review be DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Issued: June 19 1979

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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

June 19, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. MORG 79-63-P
Petitioner	:	A.O. No. 46-01968-03011
	:	
v.	:	Docket No. MORG 79-72-P
	:	A.O. No. 46-01968-03009
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Docket No. MORG 79-86-P
	:	A.O. No. 46-01968-03017
	:	
	:	Docket No. MORG 79-92-P
	:	A.O. No. 46-01968-03018
	:	
	:	Docket No. MORG 79-97-P
	:	A.O. No. 46-01968-03004
	:	
	:	Docket No. MORG 79-98-P
	:	A.O. No. 46-01968-03006
	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. MORG 79-85-P
	:	A.O. No. 46-01867-03008
	:	
	:	Docket No. MORG 79-91-P
	:	A.O. No. 46-01867-03009
	:	
	:	Blacksville No. 1 Mine

DECISION AND ORDER APPROVING SETTLEMENT

The 32 violations charged in the captioned petitions carried proposed assessments totalling $8,011.00. By letter of June 12, 1979, respondent confirmed an oral motion to settle these matters by payment of a total penalty not to exceed $15,000.00 as individually assessed and allocated by the Presiding Judge for each violation alleged. The Secretary concurred in this proposal.

Based on my independent evaluation and de novo review of the circumstances involved as set forth in the parties prehearing submissions and statements, including the gravity and negligence indicated, as well as the other statutory criteria, I find the

amount proposed for settlement should be assessed and allocated as set forth in Exhibit A, Schedule of Penalties. The total amount, $9,626.00, is approximately 20% more than the amount originally assessed.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is further ordered that the operator pay the penalty assessed, $9,626.00 on or before Tuesday, July 3, 1979 and that, subject to payment, the captioned petitions be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Issued: June 19, 1979

Distribution:

Karl T. Skrypak, Esq., Consolidation Coal Company, Consol Plaza, Pittsburgh, PA 15241 (Certified Mail)

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

EXHIBIT A

SCHEDULE OF PENALTIES

DOCKET	CITATION	STANDARD	GRAVITY	NEGLIGENCE	AMOUNT
MDRG 79-63	018771	75.1725	non-serious	ordinary	$75
79-72	019886	77.208	serious	ordinary	$140
	019889	77.1915	serious	ordinary	$106
	019888	75.500	serious	ordinary	$195
79-85	013713	75.1722	serious	ordinary	$200
79-86	260101	75.1713	non-serious	ordinary	$75
	260109	77.205	non-serious	ordinary	$75
79-91	018706	75.200	serious	ordinary	$350
	018662	75.200	non-serious	ordinary	$250
79-92	019266	77.400	serious	ordinary	$295
	019268	77.701	serious	ordinary	$275

MORG

DOCKET	CITATION	STANDARD	GRAVITY	NEGLIGENCE	AMOUNT
79-92	019270	77.701	serious	ordinary	$195
	019272	77.512	serious	ordinary	$195
	019274	77.516	serious	ordinary	$255
	259846	77.904	serious	ordinary	$395
	259847	77.1907	extremely serious	gross	$1500
	259848	77.208(d)	non-serious	ordinary	$100
	014682	75.517	-	-	vacated
79-97	016054	75.701	serious	high degree of ordinary negligence	$600
	016055	75.1106-3	non-serious	ordinary	$100
	016077	75.1403	extremely serious	ordinary	$300
	016080	75.100(b)	non-serious	ordinary	$75
	019909	75.1722	non-serious	ordinary	$250
79-98	016057	75.503	serious	ordinary	$275
	016060	75.200	extremely serious	high degree of ordinary negligence	$1000
	016063	75.517	serious	ordinary	$500

DOCKET	CITATION	STANDARD	GRAVITY	NEGLIGENCE	AMOUNT
MORG 79-98	016066	75.604	serious	ordinary	$500
	016068	75.1107-4	serious	ordinary	$150
	016076	75.1403	serious	ordinary	$200
	019904	75.1003	non-serious	ordinary	$150
	019907	75.1403	extremely serious	high degree of ordinary negligence	$750
	019861	75.503	non-serious	ordinary	$100
				TOTAL	$9626

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

June 21, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. HOPE 78-607-P
	:	Assessment Control No. 46-01271-02023V
v.	:	
	:	Harris No. 1 Mine
EASTERN ASSOCIATED COAL CORP., Respondent	:	

DECISION

Appearances: Edward H. Fitch IV, Esq., Office of the Solicitor, Department of Labor, for Petitioner; Robert C. Brady, Legal Assistant, Pittsburgh, Pennsylvania, for Respondent.

Before: Administrative Law Judge Steffey

A hearing was convened in the above-entitled proceeding on December 5, 1978, in Charleston, West Virginia, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. At the hearing, petitioner's counsel and respondent's legal assistant moved that a settlement agreement with respect to an alleged violation of 30 CFR 75.603 be approved. Although MSHA's Petition for Assessment of Civil Penalty in Docket No. HOPE 78-607-P seeks assessment of civil penalties for two alleged violations, namely, a violation of 30 CFR 75.603 and a violation of 30 CFR 75.200, the parties asked that I approve a settlement only with respect to the alleged violation of section 75.603 because I had previously received evidence with respect to the alleged violation of section 75.200 in a proceeding involving an Application for Review filed by Eastern Associated Coal Corp. in Docket No. HOPE 78-109. In my decision issued May 30, 1978, in Docket No. HOPE 78-109, I stated that I would decide the civil penalty issues raised with respect to the alleged violation of section 75.200 when MSHA filed a Petition for Assessment of Civil Penalty with respect to the violation of section 75.200 alleged in the withdrawal order which was under review in Docket No. HOPE 78-109.

This decision will first consider the settlement agreement reached by the parties with respect to the alleged violation of section 75.603 and thereafter will dispose of the alleged violation of section 75.200 on the basis of the record heretofore made in Docket No. HOPE 78-109.

The Settled Penalty

Order No. 1 BRB (7-150) 9/14/77 § 75.603

The violation of section 75.603 involved in the parties' settlement agreement was alleged in Withdrawal Order No. 1 BRB (7-150) issued September 14, 1977, under section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. Order No. 1 BRB alleged that there were two temporary splices and one damaged place in the trailing cable to Joy Shuttle Car No. ET9864 and one temporary splice in the trailing cable to Joy Shuttle Car No. ET9366. It was further alleged that the insulation on the temporary splices was inadequate and that a bare wire showed in one of the splices. It was also alleged that the trailing cables were not properly secured by the strain clamp at the cable reels.

The Assessment Office proposed that a penalty of $10,000 be assessed for the alleged violation of section 75.603. That proposed maximum penalty was based on a waiver of the normal assessment formula provided for in 30 CFR 100.3 and the making of findings which stressed that the order had been issued under the unwarrantable failure provisions of the 1969 Act. MSHA's counsel agreed to accept respondent's offer of $5,000 on the basis of several considerations which indicate that, while a high degree of gravity was associated with existence of several inadequately insulated places in the trailing cables, the inadequate insulation did not expose the miners to a grave danger at the time the poor insulation was observed.

First, the likelihood of a shock or electrocution hazard was diminished by the fact that the poor insulation was observed during the maintenance shift at a time when the trailing cables were not energized. Second, the poor insulation was located at a point outby the working faces near the power center where it was not likely that miners would have to handle the cables. Third, there were no coal accumulations or other conditions which might have been likely to cause a fire or explosion if a spark had come from the exposed wire in the cable. Fourth, all of the wires in the splices had been connected, including the ground wire, so that it was improbable that a miner would have been exposed to a shock hazard if he had touched the frame of one of the shuttle cars at a time when its trailing cable was energized. Finally, since the poor insulation was discovered on a maintenance shift, there was at least a possibility that the poor insulation on the trailing cables would have been corrected before the shuttle cars were energized at the commencement of the next production shift.

The mitigating circumstances described above warrant a finding that the violation of section 75.603 was not so hazardous as to justify the assessment of the maximum penalty of $10,000 proposed by the Assessment Office. Therefore, I find that respondent's agreement to pay a penalty of $5,000 is reasonable and should be approved.

The Contested Penalty

Order No. 1 EW (7-183) 11/17/77 § 75.200

Issues. The issues raised by the Petition for Assessment of Civil Penalty in the contested portion of this proceeding are whether respondent violated 30 CFR 75.200 and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the 1977 Act or section 109 of the 1969 Act.

Occurrence of Violation. Section 75.200 requires each operator of a coal mine to prepare and file with MSHA a roof-control plan applicable to the conditions in his mine. After the plan has been approved by MSHA, the operator is required to follow its provisions. Respondent's roof-control plan requires that a total of four temporary supports shall be installed within 5 minutes after the loading machine is removed from the face of an entry. The placement of the temporary supports in accordance with respondent's roof-control plan requires that two supports shall be installed no more than 5 feet inby the last permanent supports with one temporary support located on the left side and the other on the right side of the entry. Two additional supports are required to be installed no more than 5 feet inby the first two temporary supports and in line with the first two supports (Drawing No. 2, Exh. 2; Tr. 19; 123. NOTE: All transcript and exhibit references are to the record in the Eastern Associated case in Docket No. HOPE 78-109.)

Respondent violated section 75.200 because the inspector observed the operator of the roof-bolting machine and his helper installing roof bolts near the face of the No. 3 entry. The miners were in violation of the roof-control plan because only one of the four required temporary supports had been installed and the operator of the roof-bolting machine had already placed two headers against the roof with only a single bolt inserted in the center of each of the two headers. Both headers were located inby the last permanent roof support.

Gravity. The installation of roof bolts with use of only one safety jack was a hazardous act, but there was no indication that the roof was in any immediate danger of falling because the inspector saw no visible cracks or breaks in the roof and he believed that respondent's Harris No. 1 Mine generally had fair roof conditions. Nevertheless, the inspector said that when miners work without using adequate supports, they are always exposed to a possible roof fall (Tr. 21-22). Therefore, I find that the violation was serious.

Negligence. The operator of the roof-bolting machine and his helper were experienced miners and they said that they knew better than to install roof bolts without using the required number of temporary supports (Tr. 23). The section foreman had had a great deal of difficulty in getting the roof bolter and his helper to follow orders. The section foreman had caught them violating the provisions of the roof-control plan from time to time despite the fact that the section foreman explained the provisions of the roof-control plan to the miners on his shift every Wednesday morning (Tr. 148-151; 153). Although the section foreman knew

that the roof bolter and his helper had a strong tendency to ignore the provisions of the roof-control plan, he had gone to check a sump pump in an adjacent entry at the time the inspector found the roof bolter and his helper violating the plan. The section foreman had seen the roof bolters ready to enter the No. 3 entry to begin roof bolting when he made his last inspection of the face areas, but he made a check of the pump instead of remaining in the vicinity of the roof bolters so as to assure that they would follow the provisions of the roof-control plan. Therefore, I find that respondent was negligent in failing to see that the provisions of the roof-control plan were followed.

Although my decision in Docket No. HOPE 78-109 affirmed the inspector's order as having been properly issued under section 104(c)(2) of the 1969 Act, the parties agreed that the issue of unwarrantable failure was to be determined under the former Board of Mine Operations Appeals' holding in Zeigler Coal Co., 7 IBMA 280, 295 (1977). In the Zeigler case, the Board held that a high degree of negligence does not have to exist to support the issuance of an unwarrantable failure order.

Size of Operator's Business. The evidence shows that in 1977, when Order No. 1 EW was issued, respondent employed 1,334 management persons and 5,731 contract laborers to produce 6.15 million tons of coal. The mine which is involved in this proceeding is respondent's Harris No. 1 Mine which, in 1977, produced 625,441 tons of coal and employed 71 management persons and 334 contract laborers (Exh. B). The Harris No. 1 Mine has eight working sections, three of which use conventional mining procedures, three of which produce coal with continuous-mining machines, and two of which use longwall methods to produce coal (Tr. 12).

On the basis of the foregoing information, I find that respondent operates a large coal business and that the penalty to be assessed in this proceeding should be in an upper range of magnitude to the extent that the penalty is based on the size of respondent's business.

Effect of Penalties on Operator's Ability To Continue in Business. Respondent's representative at the hearing in Docket No. HOPE 78-109 stated that payment of penalties would not cause respondent to discontinue in business (Tr. 172). Therefore, I find that the assessment of the penalty herein imposed will not cause respondent to discontinue in the coal business.

Good Faith Effort To Achieve Rapid Compliance. A period of only 12 minutes was required for respondent to achieve compliance with its roof-control plan after Order No. 1 EW was issued. Therefore, I find that respondent demonstrated a good faith effort to achieve rapid compliance and that mitigating factor is hereinafter taken into consideration in assessing the penalty.

Assessment of Penalty. As the above discussion of five of the six

criteria has shown, the violation of section 75.200 exposed the miners to a possible roof fall, but there were no visible signs to indicate that a roof fall was any more than a potential hazard in the circumstances observed by the inspector. Since it is always possible for an unsupported roof to fall without warning, the violation was still serious and warrants a substantial penalty from the standpoint of gravity. Although respondent was negligent in permitting the miners to install roof bolts without using the proper number of temporary supports, some consideration should be given in assessing a penalty to the fact that respondent was explaining the provisions of the roof-control plan to its miners on a weekly basis. Moreover, consideration should be given for the fact that the two miners concerned were recalcitrant and were difficult to supervise.

When the foregoing considerations are added to the fact that a large operator is involved and that respondent immediately achieved compliance, I conclude that a penalty of $2,000 is warranted in light of all the mitigating factors discussed above. The Assessment Office proposed that a penalty of $8,000 be assessed for this violation, but the Assessment Office reached that large amount primarily by placing an undue emphasis on the fact that the order was issued under the unwarrantable failure provisions of the Act.

History of Previous Violations. Exhibit 13 indicates that there have been 36 prior violations of section 75.200 at respondent's Harris No. 1 Mine. Three violations occured in 1971, 2 in 1972, 4 in 1973, 2 in 1974, 8 in 1975, 14 in 1976, and 3 in 1977 by July 13, 1977. The statistics show that an increasing number of violations of section 75.200 have occurred during the past few years. It is encouraging to note that only three violations of section 75.200 had occurred by July of 1977 which may indicate that respondent is beginning to achieve a reduction in the number of violations of section 75.200. Nevertheless, I believe that respondent's history of previous violations is sufficiently unfavorable to require that the penalty otherwise assessable of $2,000 be increased by $250 to $2,250 under the criterion of respondent's history of previous violations.

Summary of Assessments and Conclusions

(1) The parties' settlement agreement under which respondent has agreed to pay a civil penalty of $5,000 for the violation of section 75.603 cited in Order No. 1 BRB (7-150) dated September 14, 1977, should be approved and respondent will hereinafter be ordered to pay a penalty of $5,000 pursuant to the settlement agreement.

(2) On the basis of all the evidence of record in the proceeding in Docket No. HOPE 78-109, and the foregoing findings of fact, respondent is assessed a civil penalty of $2,250 with respect to the violation of section 75.200 cited in Order No. 1 EW (7-183) dated November 17, 1977.

(3) Respondent was the operator of the Harris No. 1 Mine at all pertinent times and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

WHEREFORE, it is ordered:

(A) The settlement agreement described in paragraph (1) above is approved.

(B) Respondent Eastern Associated Coal Corp. is assessed civil penalties totaling $7,250.00 for the violations described in paragraphs (1) and (2) above. The penalties shall be paid within 30 days from the date of this decision.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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

June 25, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 78-636-P
Petitioner	:	A.O. No. 15-02502-02023I
v.	:	
	:	No. 18 Mine
SHAMROCK COAL COMPANY,	:	
Respondent	:	

DECISION

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

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty 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 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 a civil penalty charging one violation of the Act as follows:

Order No.	Date	30 CFR Standard
1 ARH	8/30/77	75.200

Answer

On September 14, 1978, Respondent, Shamrock Coal Company, filed an answer thereto, which denied the allegation and requested a hearing thereon.

Tribunal

A hearing was held on Wednesday, February 14, 1979, in Knoxville, Tennessee. Both MSHA and Shamrock Coal Company (Shamrock) were represented by counsel (Tr. 3). Posthearing briefs were filed by both parties.

Evidence

1. Stipulations

The following stipulations were entered:

(a) The proceeding is governed by the 1969 Act and 1977 Act (Tr. 5).

(b) The Judge has jurisdiction (Tr. 5).

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

(c) Shamrock is the operator of the No. 18 Mine and is subject to the Acts' jurisdiction (Tr. 5).

(d) The No. 18 Mine currently employs 262 people (Tr. 5-6).

(e) The total production of Shamrock for 1977 was 1.3 million tons. The total production for the controlling interested party, Mr. B. Ray Thompson, was 1.4 million tons in 1977 and projected to be 1.5 million tons in 1978 (Tr. 6).

(f) The ability of Respondent to stay in business will not be affected by any civil penalty assessed in this matter (Tr. 6).

(g) The inspectors who issued the notices and orders herein at issue were duly authorized representatives of the Secretary (DAR) (Tr. 6-7).

(h) Copies of the notices and orders which are the subject of the hearing were properly served on a representative of the operator (Tr. 7).

(i) The No. 18 Mine's previous history of violations is as follows: January 1, 1970, through April 8, 1974, 113 violations, $6,623 penalty paid; January 1, 1970, through May 1, 1977, 249 violations, $17,117 penalty paid (Tr. 7).

2. Testimony

A. Albert R. Helton

MSHA initiated its case, exclusive of stipulations, through the testimony of Mr. Helton, the duly authorized representative (DAR) who issued the 104(b) notice herein at issue (Tr. 10-11; Govt. Exh. No. 182). The inspector spent 10 weeks in Charleston, West Virginia, receiving specialized training in roof control, ventilation, permissibility and respirable dust (Tr. 12). He had been a DAR for about 7 years, exclusive of a 6-month period when he worked as a certified mine foreman (Tr. 10-13). He testified that he had inspected the No. 18 Mine at least 10 times (Tr. 15-16).

On August 30, 1977, he was investigating an accident at the mine (Tr. 16) as ordered by his supervisor, Mr. Charlie Samples (Tr. 16). When he arrived, he received an accident report from the foreman, Mr. John Henry Sizemore, and the safety director, Mr. Gordon Couch (Tr. 17-18; Govt. Exh. No. 182A). The report was signed by the foreman who was on the shift when the accident occurred, Mr. Charles Gilbert (Tr. 19-20). The injury report indicated that a miner had a fractured skull and a pelvis fracture (Tr. 20-21). The witness stated that the report says in the 19th paragraph that injury was caused by a rock fall from the top knocking the subject into a shuttle

car which was waiting to be loaded (Tr. 21-22; Govt. Exh. No. 182A). The witness did not actually view the accident (Tr. 22). He estimated that the side of the shuttle car was 3 feet high (Tr. 23).

Page No. 1 of the memorandum report given the inspector by Mr. Gordon Couch stated:

> Cecil W. Hollen, had been operating the mine and had just returned to the area of the right crosscut when a piece of drawrock, five feet wide, six feet long and six inches in thickness, fell, striking him in the lower part of the back, forcing him into the shuttle car. The injured man was freed from the fallen rock immediately and brought to the surface. He was transported to Red Bird Hospital and later to St. Joseph Hospital in Lexington, Kentucky.

(Tr. 24; Govt. Exh. No. 182A).

The inspector went on to identify Government Exhibit No. 182, the section 104(b) notice at issue herein (Tr. 24-25). The inspector issued it because his supervisor told him to issue it (Tr. 25).

By Mr. O'Donnell:

> Q. Did you personally see any -- or did you personally find any evidence of a violation of 30 CFR 75.200?
>
> A. Nothing other than what was in the report.

(Tr. 26). He further concluded that the fault cited in the report constituted a violation of the roof control plan (Tr. 27; Govt. Exh. Nos. 183-184). The provision allegedly violated states: "No person shall proceed into an area where the space between roof support or between rib or face and support exceeds five feet for any purpose other than to set temporary support" (Tr. 28; Govt. Exh. Nos. 183-184).

The injury date was August 26, 1977 (Tr. 29). He examined the area on August 29, 1977 (Tr. 30). On August 29, 1977, he saw roof bolts (Tr. 30). The last page of the report says there was no roof support (Tr. 31).

The inspector concluded that the victim was hurt by being under unsupported roof.

> THE WITNESS: Well, I figure he [the victim] got into the crosscut to avoid the shuttle car.

THE COURT: What led you to that conclusion of, "figure." I don't know what you mean by, "figured." How did you --

THE WITNESS: There was shuttle cars [sic] coming up the entry, and he had to get out of the shuttle car's way.

(Tr. 32).

The entry was about 20 feet wide (Tr. 34). The crosscut was 17 feet 6 inches wide, the shuttle car was 8 or 10 feet wide (Tr. 35). The rock which fell was 5 feet by 6 feet wide, 0 to 6 inches thick (Tr. 36).

The inspector was unable to tell how far the victim went inby permanent support (Tr. 36-37). The witness described the sketch at issue (Tr. 41-43). The document did not show roof support (Tr. 43).

The condition described was considered serious because a man got injured (Tr. 44). The inspector terminated the notice because a safety meeting was held (Tr. 45; Govt. Exh. No. 185). Therein, the roof-control plan was explained (Tr. 46). The inspector believed that the operator showed good faith in abating the condition cited (Tr. 46-47).

The inspector became aware of the accident on August 29, not August 26 (Tr. 48). The report was given voluntarily by Shamrock (Tr. 49). The day after he made his visual investigation, he issued the notice (Tr. 50). He did not issue the violation on the 29th because he was under the impression that he could not issue one unless he saw one (Tr. 50). He did not know whether the shuttle car was moving when the rock fell (Tr. 50-51). The sketch on which the violation was based did not indicate that the shuttle car was moving when the rock fell (Tr. 52-53; Govt. Exh. No. 182A p. 3).

Item No. 4 recommended that bolts be installed as required (Tr. 56; Govt. Exh. No. 182A). The inspector understood the recommendation as being made to prevent similar accidents from happening (Tr. 56-57).

The sketch in Government Exhibit No. 182A indicates that the victim was not in the crosscut area (Tr. 57). The sketch does not attempt to show the location of roof bolting (Tr. 57). He had no reason to doubt that the main entry was roof bolted, No. 4 entry, I section (Tr. 57).

On redirect, he stated that he never gave a date to a notice other than the date actually served (Tr. 122).

B. Gordon Couch

Respondent initiated its case through the testimony of Gordon Couch, safety director for Shamrock (Tr. 59). It was stipulated that he was qualified and experienced as a foreman, for MSHA inspectors and as an inspector/supervisor (Tr. 60).

The first report of the injury was on August 27 (Tr. 60). It showed the injury occurring at 9:45 p.m. on August 26 (Tr. 60; Govt. Exh. No. 182A). When he arrived at the scene of he accident at 7 a.m. on August 27, no equipment or anything had been moved (Tr. 61-62).

The shuttle car had about 1,000 pounds of coal in the bucket (Tr. 62). It indicated to him that it had been unloading coal when it was shut down and thus stationary (Tr. 62-63). The sketch involved on page 4 of Government Exhibit No. 182A was his work (Tr. 64-65).

The roof control plan had been exceeded in that it called for bolts at 5-foot centers in a 20-foot entry and, in fact, they had been spaced 3 or 4 feet in an 18-foot entry (Tr. 66; Govt. Exh. Nos. 183, 184).

He testified that there was blood on the bumper of the shuttle car (Tr. 67). The blood was on the right bumper as observed looking toward the face of the No. 4 entry (Tr. 68).

From the row of roof bolts on the righthand side to the shuttle car was about 6 feet supported area (Tr. 69). He did not believe that Mr. Hollen was 6 feet tall (Tr. 70).

Mr. Couch stated that he spoke with Mr. Collett who was there at the time of the accident (Tr. 20). Mr. Hollen was in the process of trying to learn the continuous miner, having been there about 3 weeks (Tr. 70). The rock struck Mr. Hollen on the back and he was told that the rock was on his feet. His head had hit the shuttle car bumper (Tr. 70-71). His entire body wouldhave been under supported roof (Tr. 71-72). The roof rock fell from the left corner of the crosscut up to the edge of the roof bolt which remained intact (Tr. 74).

The report at issue (Govt. Exh. No. 182A), written by Mr. Couch, was written to Orville Smith, to recommend what is to be done in case of a man's getting hurt or killed (Tr. 77). With respect to suggested Item No. 3, he was trying to show the importance of 6 inches as they were 6 inches off, being 2 feet 6 inches from the right rib (Tr. 79). He concluded that the roof control plan had no bearing on this accident (Tr. 80).

The witness had an opportunity to interview the victim (Tr. 81). Mr. Hollen, the victim, stated that he was standing right around a roof bolt (Tr. 82). Mr. Hollen is still employed by Shamrock, but is laying carpet because his wife did not want him to go back into the mine (Tr. 83).

When the inspector came into the mine on August 29, the entry had been advanced nearly another full crosscut (Tr. 84-85). There was no known legal requirement to give the report to MSHA (Tr. 85).

On cross-examination, Mr. Couch testified that he knew everything was the same because the foreman, Mr. Gilbert, told him so (Tr. 86). The rock was moved aside after the accident and before Mr. Couch's investigation (Tr. 86-87). He conceded that the roof in the area was drummy and that was probably the reason that the bolts were placed more closely together (Tr. 87-88).

The witness testified that the rock striking Mr. Hollen's back must have forced his head into the shuttle car (Tr. 90).

The roof control plan required the bolts to be 2 feet from the rib when, in fact, the row of bolts was 2 feet 6 inches from the rib (Tr. 93). That was a violation of the plan (Tr. 93).

Based upon his knowledge and report, he concluded that Mr. Hollen was in a place where he was entitled to be according to law and regulation (Tr. 101). He did not actually know whether the shuttle car had been moved (Tr. 103). The sketch showed the rock about 2 feet further into the crosscut than it actually had been when it fell (Tr. 109).

His memory of the time sequence is that he called the accident in on Monday, inspectors arrived on Tuesday, and the notice was brought back on Wednesday (Tr. 114). Thus, though the notice was dated the 30th, it was received on the 31st (Tr. 114).

The rock cavity extended into the area of permissibility (Tr. 120).

Issues Presented

1. Whether the conditions cited in Notice No. 1 ARH, August 30, 1977, constituted a violation of 30 CFR 75.200?

2. What is the appropriate penalty to be imposed under the Act if a violation is established?

Discussion

30 CFR 75.200 states:

§ 75.200 Roof control programs and plans.

> 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 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.

The notice charges:

> Evidence indicated the approved roof control plan was not being followed in the crosscut turned right off No. 4 entry on I-section (009) in that the mining machine operator's helper was injured Friday, August 26, 1977, at 9:45 p.m. by a roof fall when he advanced inby permanent supports for reasons other than to install temporary support.

(Govt. Exh. No. 182).

The gravamen of this alleged offense is proof that Mr. Cecil W. Hollen advanced inby permanent support for an impermissible reason (Tr. 26, 28).

Demonstration of other violations of 30 CFR 75.200 would increase the overall degree of Respondent's culpability, but would not stand by themselves as violations here because they were not charged in the issued notice (Tr. 28; Govt. Exh. No. 182).

The notice here is based on a report signed by Mr. Charles Gilbert and drafted by Mr. Gordon Couch (Tr. 19-20, 50, 52-53; 64-65; Govt. Exh. No. 182A). The inspector saw nothing to indicate a violation other than what was in the report (Tr. 26). The alleged violation is contained in the last paragraph of the report which says there was no roof support (Tr. 37). The inspector did not see any violation (Tr. 50).

In a nontechnical sense, MSHA has not introduced the "best evidence" of the occurrence of a violation. It has not shown why, at a minimum, it did not call the only eyewitness, the victim, Mr. Hollen, to at least corroborate the alleged evidence of a violation found in the report (Govt. Exh. No. 182A). According to Mr. Couch, Mr. Hollen is still employed by Respondent (Tr. 83) and thus it would appear that he could be found. Therefore, as the violation is based on evidence which is not firsthand, its reliability is suspect.

Further, the report, according to its author, was intended to be a recommendation to Mr. Orville Smith as to what was to be done to avoid future accidents of this nature (Tr. 77). Using such a report as grounds for issuing a violation would appear to discourage honest appraisal of what should be done to provide further protection for the miner. Such a discouragement would fundamentally contradict the primary purpose of the Act, (section 2(d)), and would work against the operator's responsibility to prevent unsafe practices. (Section 2(e)).

For the above reasons, the report (Govt. Exh. No. 182A) should be construed in light of its intended purpose and <u>not</u> as an admission by a party opponent, to be construed against the admitting party.

The inspector's theory was that Mr. Hollen went into the crosscut to avoid an oncoming shuttle car (Tr. 32). He was not even able to speculate how far Mr. Hollen was supposed to have gone inby permanent support (Tr. 36-37).

Direct contradiction of this speculation is found in the sketch which showed Mr. Hollen was not in the crosscut area (Tr. 57; Govt. Exh. 182A). Mr. Couch observed that the shuttle car had about 1,000 pounds of coal in the bucket which led him to conclude that the shuttle car was unloading coal and thus stationary (Tr. 62-63). Further, as Mr. Hollen had a cut on his forehead and a fractured skull, and as there was blood on the right bumper of the shuttle car (Tr. 68), it is reasonable to conclude that Mr. Hollen hit his head on the shuttle car (Tr. 21-22). As Mr. Hollen is less than 6 feet tall (Tr. 70), the rock hit his back (Tr. 24), knocked him into the shuttle car (Tr. 21-22), and landed on his feet (Tr. 70-71), he could not have been in the crosscut at all because the shuttle car was 6 feet from a row of entry roof bolts on the righthand side of the shuttle car which was supported area (Tr. 69). Therefore,

Mr. Hollen's entire body was under supported roof (Tr. 71-72). Mr. Couch also testified that Mr. Hollen stated during an interview that he was standing right around a roof bolt (Tr. 82).

It is possible that the fact that the sketch made after the fall showed the rock was about 2 feet further into the crosscut (Tr. 109; Govt. Exh. No. 182A), misled the inspector in his conclusions related to locating Mr. Hollen. I therefore conclude that the inspector's theory, that Mr. Hollen was located inby permanent support in the crosscut, is untenable.

There is the admitted violation of the roof control plan in that the roof bolt line next to the rib was 6 inches out of line-being 2 feet 6 inches rather than 2 feet from the rib (Tr. 79). However, this specification is not spelled out in the charge.

Apparently, this fact played no part in the inspector's conclusion as to the cause of the accident. There was no testimony by the inspector that he saw such noncompliance (Tr. 50). Further, the inspector, when he visually investigated the accident scene, would have seen this roof bolt line (Tr. 30) because it would not have moved. Nor could the inspector have relied on the sketch contained in the exhibit as it did not reveal the specific locations of the roof bolts (Tr. 57; Govt. Exh. No. 182A). Therefore, the inspector could not have viewed this accident as being caused by a 6-inch deviation from the plan. This conclusion, by the inspector, is also supported by the expert (Tr. 60) conclusion of Mr. Couch who found the violation (Tr. 79, 93) and stated specifically that it had no bearing on the accident (Tr. 80).

As there is no affinity between the 6-inch bolt deviation and the accident which caused Mr. Hollen's injury, Notice No. 1 ARH, August 30, 1977, cannot be fairly construed as charging the violation. I therefore conclude that MSHA has failed to establish a violation of 30 CFR 75.200 in Notice No. 1 ARH, August 30, 1977, as alleged in that citation.

Findings of Fact

Upon consideration of the record as a whole, I find:

1. The Judge has jurisdiction over the subject matter and the parties in this proceeding.

2. An unintentional roof fall occurred on August 26, 1977, at the No. 4 entry of the I section of the No. 18 Mine (Govt. Exh. No. 182).

3. As a result of the fall, Mr. Cecil W. Hollen was injured (Tr. 24; Govt. Exh. No. 182).

4. The inspector did not actually see any violations of 30 CFR 75.200 during his investigation of August 29, 1977 (Tr. 26; 30; Govt. Exh. No. 182).

5. Mr. Hollen was not in the crosscut when he was injured (Tr. 57, 62-63, 69, 82; Govt. Exh. No. 182A).

6. Mr. Hollen was under "supported" roof when he was injured (Tr. 71-72, 82).

7. The evidence fails to establish the fact of violation of 30 CFR 75.200 as alleged in 1 ARH, August 30, 1977.

Conclusions of Law

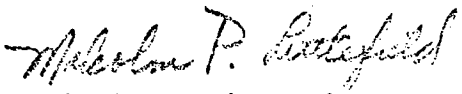
1. This case arises under the provisions of section 110(a) of the Federal Mine Safety and Health Act of 1977, P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, P.L. 91-173 (December 30, 1969).

2. The procedural provisions of the above-cited statute have been complied with.

3. Respondent has not violated the above-cited statute as charged in the notice.

ORDER

WHEREFORE IT IS ORDERED that the petition for civil penalty filed on August 17, 1978, be and hereby is, DISMISSED.



Malcolm P. Littlefield, Judge

Distribution:

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

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

June 25, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-146-PM
	:	A.O. No. 40-00056-05001
v.	:	
JEFFERSON COUNTY HWY. DEPT., Respondent	:	County Quarry & Mill

DECISION

Appearances: Darryl A. Stewart, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Telford E. Forgety, Jr., Esquire, Dandridge, Tennessee, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent on December 12, 1978, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, charging the respondent with one alleged violation of the provisions of 30 CFR 56.9-87, as set forth in Citation No. 108414 issued on May 3, 1978 by MSHA inspector William R. Tally. The citation reads as follows:

> The two EUCLID Pit haul trucks did not have audible reverse alarm warning devices that were operative. There was no observer to signal when it was safe to back up.

Respondent filed an answer to the petition on December 20, 1978, and a hearing was subsequently held in Knoxville, Tennessee on May 24, 1979, and the parties appeared and were represented by counsel. By agreement of the parties, I issued a bench decision in this matter, and pursuant to Commission rule 29 CFR 2700.54 that decision is herein reduced to writing and served on the parties.

Issues

The 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 violations based upon the criteria set forth in section 110(i) of the Act.

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 Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) *et seq*.

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

3. Part 2700, Title 29, Code of Federal Regulations, 43 Fed. Reg. 10320 et seq. (March 10, 1978), the applicable rules and procedures concerning mine health and safety hearings.

Stipulations

The parties stipulated and agreed that the respondent is subject to the jurisdiction of the Act, the Secretary of Labor, and the Commission and its Judges, that the failure of the respondent to provide operative audible back-up alarms on two of its pit haulage trucks constituted a violation of the cited safety standard in issue, that respondent's annual rock crushing quarry operation production is 18,871 tons, that the quarry employs 12 individuals, that the conditions cited were timely abated, that respondent has no prior history of violations, and that a reasonable penalty will not adversely affect the respondent's ability to remain in business (Tr. 4-13).

Testimony and Evidence Adduced by the Parties

Mr. J. C. Thomas, Superintendent of Roads, Jefferson County Highway Department, testified on behalf of the respondent. He explained the scope of the rock crushing quarry operations carried on by the respondent and confirmed the size and scope of that operation as stipulated to by the parties. He confirmed that the citation was issued against the two Euclid pit trucks operated at the quarry but could not recall whether he was present when the inspector cited the violation. He stated that neither he nor the foremen were aware of the inoperative back-up alarms prior to the time of the citation, that breakdowns do occur from time to time and they are repaired immediately. Respondent's policy is to inspect the trucks each morning and the driver is required to conduct the inspection and to report any defects to the pit foreman. The alarms which were installed on the trucks in question were fuse types, and upon the recommendation of the inspector, new devices were ordered and installed to abate the citation. The older alarms would occasionally blow a fuse, but no such problems have been experienced since the new alarms have been installed. Men do not normally work on foot at or near the tipple area where the trucks are loaded and he knew of no one working in the area on the day of the citation, but he conceded he was not there at the time of the inspection. The defective alarms were repaired and when the new ones arrived they were installed (Tr. 14-22).

Mr. Thomas described the crushing and loading operation and the routes that the trucks in question normally take during the day at the quarry. He indicated that the purpose of the alarm is to warn persons in the area that the truck is backing up, but in most cases the alarm in no louder than the vehicle being driven (Tr. 23-33).

MSHA Inspector William R. Talley confirmed that he issued the citation in question, and he indicated that he observed the trucks in operation after he cited them, and that they were operated in reverse and the alarms were inoperative. There was a problem with a relay and the parts were not readily available. He allowed the respondent two days to abate since that amount of time was required to obtain the necessary parts. The conditions were subsequently abated when he returned to the mine site, but did not know whether repairs were effected earlier or later on the day on which is issued the citation. He confirmed that there was a problem with the relays on the back-up alarms and the newer alarms have solved some of the problems which had been encountered within the industry at the time the citation issued (Tr. 33-39).

Inspector Talley testified that he saw no one around the trucks when they were in operation except for himself and the quarry foreman. However, the trucks were not backing up in their direction and they were out of the way. He described the loading operation and indicated that the trucks do not use the local highways but stay strictly on mine property (Tr. 40).

Arguments Presented by the Parties

At the close of the evidence and testimony, the parties were afforded an opportunity to make oral argument on the record with respect to the statutory criteria concerning civil penalty assessments as set forth in section 110(i) of the Act (Tr. 45-49). Upon consideration of the arguments presented and the evidence and testimony adduced on the record, findings and conclusions were rendered from the bench (Tr. 49-53) and they are as follows:

Fact of Violation

Petitioner has established a violation as cited in Citation No. 108414 and the respondent has so stipulated (Tr. 49).

Prior History of Violations

Respondent has no prior history of violations and that fact is reflected in the civil penalty assessed by me in this matter (Tr. 50).

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

Respondent conducts a small quarry operation and the penalty assessed will not adversely affect its ability to remain in business (Tr. 50).

Good Faith Compliance

The conditions cited were timely abated, the defective alarms were repaired prior to the time fixed for abatement, and new alarms were subsequently installed on the trucks in question (Tr.50).

Negligence

Respondent had a duty to at least insure that the truck drivers or quarry foreman inspect the trucks in question before allowing them to be operated without workable alarms. Such an inspection

may have detected that they were inoperable. Under the circumstances, I find that respondent failed to exercise reasonable care to prevent the citation and its failure in this regard amounts to ordinary negligence (Tr. 51).

Gravity

The lack of operable back-up alarms would normally be a serious matter. However, on the facts and evidence adduced in this case I cannot conclude that any of the quarry personnel were in fact exposed to any hazard. There is no credible evidence that anyone was on foot in the area where the trucks were operating at the time of the citation, nor was there any evidence that anyone was exposed to a danger of being run over. As a matter of fact, respondent indicated that the noise of the trucks during their normal operation usually precludes the alarms from being heard. In the circumstances here presented I cannot conclude that the citation was serious and my finding is that it was not (Tr. 52).

Order

In view of the foregoing findings and conclusions, respondent is ordered to pay a civil penalty in the amount of $35.00 for the violation cited in Citation No. 108414, issued on May 3, 1978, within thirty (30) days of the date of this decision. */

George A. Koutras
Administrative Law Judge

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*/ By letter dated June 15, 1978, a copy of which was filed with me, petitioner's counsel forwarded a check in the amount of $35.00 to MSHA's Collection Officer which was tendered by the respondent in full satisfaction of the civil penalty assessment made by me in this matter at the close of the hearing as part of my bench decision.

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

June 25, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-39-PM
Petitioner	:	A/O No. 05-03052-05001
v.	:	
	:	Last Chance #3
WILLIAMS INC.,	:	
and/or MR. W.R. WILLIAMS,	:	
Respondent	:	

DECISION

Appearances: James Abrams, Attorney, Office of the Solicitor, Department of Labor, Denver, Colorado, for Petitioner; Andrew Melechinsky, Enfield, Connecticut, for Respondent.

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty 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). 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.

Petition

On October 26, 1978, the Mine Safety and Health Administration (MSHA), 1/ through its attorney, filed a petition for an assesment of civil penalty charging one alleged violation of the Act.

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

Answer

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

Tribunal

A hearing was held in Denver, Colorado, on June 12, 1979. MSHA was represented by counsel. Williams, Inc., was represented by "its Contingency President," and entered a special appearance only.

Preliminary Motion

The representative of the Respondent at the Commencement of the hearing offered a written motion entitled "Special Appearance for Challenging Jurisdiction of this Court" on Constitutional grounds. The motion was opposed by the Petitioner and denied by the Judge.

There is a strong presumption in favor of constitutionality of an Act of Congress, Lockport v. Citizens for Community Action, 430 U.S. 259 (1977). An administrative agency, as a general proposition, does not have power to rule on constitutional challenges to the organic statute of the agency, Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361 (1974). Thereafter, Respondent's representative participated fully in the hearing.

Charge

Order of Withdrawal	Date	30 CFR Standard
00326611	4/4/78	57.6-107

"Miner was drilling rib at right drift within 5 feet of misfire."

30 CFR 57.6-107 provides as follows: "Mandatory. Holes shall not be drilled where there is danger of intersecting a charged or misfired hole."

Issues

(1) Has there been a violation of the standard?

(2) If so, what civil penalty should be assessed?

Evidence

MSHA presented the testimony of Porfy Tafoya, a Federal Mine Inspector for the U.S. Department of Labor.

Respondent offered no evidence.

Findings of Fact

(1) Inspector Tafoya inspected the Last Chance #3 mine of the respondent on April 4, 1978 (Tr. 21).

(2) He has held his present position of mine inspector for 3 years and during that time has conducted over 400 inspections (Tr. 20).

(3) He had 22 years mining experience prior to working for MSHA (Tr. 20).

(4) During the inspection he observed holes drilled on the right hand drift (Tr. 21).

(5) The holes that had been drilled were found to be loaded and charged (Tr. 22).

(6) He observed one hole that had not exploded from the previous round and it was still in the face (Tr. 22).

(7) This hole would be categorized as misfired (Tr. 22).

(8) The holes that were drilled were within 4-1/2 to 5 feet of the hole that was misfired (Tr. 23).

(9) The misfired hole and the hole being drilled were in an area that was regularly being worked (Tr. 24).

(10) The hazard presented would be one of explosion (Tr. 24).

(11) If an explosion did occur an accident or injury to employees ranging from serious to fatal could result (Tr. 25).

(12) Inspector Tafoya issued an Order of Withdrawal on April 4, 1978, citing therein Section 57.6-107.

Conclusions of Law

(1) The Judge has jurisdiciton over the subject matter and the parties in this proceeding.

(2) All procedural prerequisites established in the statutes and regulations cited above have been complied with.

(3) Respondent was the operator of a mine and is subject to the provisions of the Mine Safety and Health Act of 1977.

(4) An imminent danger existed at the Last Chance #3 mine on April 4, 1978.

(5) Williams, Inc., has violated 30 CFR 57.6-107 as charged.

Penalty Criteria

Assessment of a civil penalty, upon the finding of a violation, is mandatory (See section 110(i) of the Act).

There is neither evidence concerning the operator's history of previous violations nor the size of his business. As to gravity, I find the violation to be serious and the result of negligence on his part. He did effect rapid compliance to abate the cited conditions. Although the operator is now out of business a reasonable civil penalty would be in order.

Based on the testimony heard at the hearing, I conclude that a penalty of $225 is reasonable based upon the above criteria and particularly the fact that the operator is now out of business.

The decision made from the BENCH at the hearing is hereby AFFIRMED (Tr. 44).

ORDER

WHEREFORE IT IS ORDERED that Williams, Inc., pay the above-assessed civil penalty in the amount of $225 within 30 days from the date of this decision.

Malcolm P. Littlefield
Administrative Law Judge

Distribution:

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Mr. W.R. Williams, P.O. Box 504, Marco Island, FL 33937 (Certified Mail)

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

PEABODY COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. VINC 78-386
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 274635 May 18, 1978
	:	Sunnyhill No. 9 South Underground Mine

DECISION

This case was remanded to me from the Commission on May 2, 1979. After reviewing the file I issued, on May 9, 1979, a notice to the parties, wherein each was required to attempt to stipulate the facts but if a stipulation could not be reached, to submit within 30 days, its contentions as to the facts and its argument concerning them.

Peabody Coal Company filed a timely statement of facts and argument, but MSHA has not responded. I will therefore accept the facts as they appear in the statement filed by the Applicant and as corroborated by the material previously filed in the case.

On October 17, 1977, an "accident" occurred at Applicant's mine. It was not the type of accident which the regulations in effect at that time required the operator to report to MSHA. 30 CFR 80.1(g) excludes injuries "requiring only first-aid treatment." The regulation which Applicant is accused of violating, 30 CFR 50.20 did not become effective until December 30, 1977, and the event which occurred 2 months earlier would have been reportable if it occurred after the effective date of 30 CFR 50-20. MSHA's issuance of the citation on May 18, 1978, was clearly an attempt to give ex post facto treatment to the new regulation and was for that reason invalid.

The citation is vacated and the case is dismissed.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Entered: June 26, 1979

Distribution:

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

JUN 26 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. DENV 78-527-P
	:	A.C. No. 42-00081-02014V
v.	:	
	:	Co-op Mine
BILL W. STODDARD, W. J. OWENS, ELLERY KINGSTON, ELDEN KINGSTON, GERALD HANSEN, AND JOHN GUSTAFSON, d/b/a CO-OP MINING COMPANY, Respondents 1/	:	

DECISION

Appearances: James L. Abrams, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondents.

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceeding was 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 a petition for the assessment of a civil penalty on July 31, 1978, alleging that Respondents committed a violation of 30 CFR 75.400. On January 16, 1979, Respondents filed their answer contesting the violation. A hearing was held in Salt Lake City, Utah, on May 18, 1979, at which the parties were represented by counsel.

1/ At the beginning of the hearing, Petitioner moved to amend the caption in this case, Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Co-Op Mining Company, to reflect that the business was a partnership. Respondents did not object to this proposed change and agreed to submit a letter which would provide the names of the partners (Tr. 4-6). This letter was filed on May 25, 1979, and the caption has been amended accordingly.

Evidence was received regarding Citation No. 7-0045 (December 12, 1977), which alleged a violation of 30 CFR 75.400. 2/ This regulation requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

On the basis of the evidence presented, and in light of the statutory criteria, a decision was made from the bench finding a violation and assessing a penalty of $100. The following is a summary of the findings made regarding the citation:

(a) A violation did occur (Tr. 86). The finding of the existence of the accumulations was based on the uncontradicted testimony of Inspector Lawrence Ganser (Tr. 16-17, 25, 76, 85-86). The inspector's estimate that the accumulations had existed over a shift or two was accepted (Tr. 20, 86).

(b) The operator is small to medium in size (Tr. 8, 87).

(c) There is a history of prior violations. Some of these are of 30 CFR 75.400, although not a significant number. Petitioner's Exhibit No. 1 shows that there have been three violations of this standard assessed for $106, $375, and $125. They were settled for $106,$110, and $67, respectively (Tr. 7, 90). This was not a bad history (Tr. 87).

(d) The penalty assessed will not affect the ability of the operators to continue in business (Tr. 87).

(e) Good faith efforts were made to achieve rapid compliance (Tr. 88).

(f) The violation was serious (Tr. 88).

(g) There was some negligence on the operators' part (Tr. 88).

Consideration has been given to the fact that the belt in this case was new and problems had occurred with its use (Tr. 40-42, 52-54, 87).

(h) Based on the circumstances which failed to show any exceptional factor requiring a more than normal penalty, the operator should be assessed $100 (Tr. 90-91).

2/ Lawrence J. Ganser, the inspector who issed the citation, testified as a witness for the Petitioner (Tr. 14-38, 77-81). Bill W. Stoddard (Tr. 39-64, 83-84) and Nathan Atwood (Tr. 65-79) testified for Respondents.

The decision made from the bench finding a violation of 30 CFR 75.400 and assessing a penalty of $100 is hereby AFFIRMED. It is ORDERED that Respondents, within 30 days of the date of this decision, pay the penalty of $100 assessed in this proceeding. 3/

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

Distribution:

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Carl E. Kingston, Esq., 53 West Angelo Avenue, Salt Lake City, UT 84115 (Certified Mail)

3/ A question was raised on the matter of scheduling the hearing (Tr. 92-98). Counsel for the Solicitor seemed to raise an issue on the matter of the number of times the hearing was rescheduled. This is all a matter of record and it remains a puzzle why counsel believed it should be further recorded in the transcript.

The hearing was first scheduled for May 16 in Salt Lake City, Utah. It was later changed to Price, Utah, still for May 16. Subsequently it was rescheduled for Salt Lake City, first for May 16, 1979, and later to May 18, a Friday.

Such a number of changes is not the ordinary practice of the presiding Judge and, in fact, I know of no other case where this has happened. It was necessitated by the changes which occurred with regard to the group of cases set for hearing at that time. Only a few days prior to the week of hearings, the presiding Judge learned that another scheduled case was to take a full two days, Tuesday and Wednesday, and possibly another day in the week. There was no way, therefore, that all the cases could be heard, unless this case was rescheduled for Friday afternoon of that week of hearings.

Counsel further complains that he was not orally notified of the change. My instructions to my law clerk have always been to notify the parties by telephone when a late change is made in scheduling, and I fully believed this had been done. If that was not done in this instance, it was a regrettable oversight, and I have taken steps to prevent such a happening in the future. In any event, the Solicitor was notified by certified mail by an order issued May 11, 1979, and received on May 15, 1979. This was a full three days prior to the hearing and a day prior to the previously scheduled date. Counsel has given no facts showing he was in any way prejudiced by the change in dates.

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

June 27, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PITT 78-420-P
Petitioner	:	A/O No. 36-00818-02013V
v.	:	
	:	Foster No. 65 Mine
LEECHBURG MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anna Wolgast, Esq., Office of the Solicitor, Department of Labor, for Petitioner; Henry McC. Ingram, Esq., R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, White & Hardesty, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

I. Procedural Background

On July 31, 1978, a petition was filed for assessment of civil penalty against Leechburg Mining Company for alleged violations of 30 CFR 75.200, 75.202, 75.400, and 75.403. This petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (a) (1977), hereinafter referred to as the Act. An answer was filed by the Respondent on August 18, 1978.

A notice of hearing was issued on August 22, 1978, setting the hearing date for October 31, 1978.

On October 18, 1978, a motion for continuance was filed by counsel for MSHA. An order granting the motion for continuance was issued on October 20, 1978, rescheduling the hearing for January 3, 1979. An amended notice of hearing was issued on October 31, 1978, changing the hearing date from January 3, 1979, to December 5, 1978.

On November 20, 1978, the Leechburg Mining Company filed a motion to remand. A response of the Secretary of Labor in opposition to the motion to remand was filed by MSHA on November 27, 1978. The motion to remand was denied by an order issued on December 1, 1978.

Leechburg and MSHA filed posthearing briefs on January 25, 1979, and January 26, 1979, respectively. Leechburg filed a reply brief on February 9, 1979. MSHA did not file a reply brief.

II. Violations Charged

Order No.	Date	CFR Section
7-0032 (1 GFM)	October 6, 1977	30 CFR 75.200
7-0033 (1 JAB)	October 3, 1977	30 CFR 75.403
7-0035 (1 JAB)	October 6, 1977	30 CFR 75.400
7-0036 (1 JAB)	October 11, 1977	30 CFR 75.400
7-0038 (1 JAB)	October 12, 1977	30 CFR 75.202
7-0047 (1 JAB)	November 30, 1977	30 CFR 75.200

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, counsel for both parties entered into stipulations which are set forth in the findings of fact, *infra*.

B. Witnesses

MSHA called as its witnesses Jesse A. Bates, an MSHA inspector, and Gerald F. Moody, Jr., an MSHA inspector.

Leechburg called as its witnesses Harold F. Dunmire, President of the Leechburg Mining Company; Donald A. Myers, a section boss employed by the Leechburg Mining Company; Joseph Arduino, a mine foreman employed by the Leechburg Mining Company; George E. Rittenberger, a mine superintendent employed by the Leechburg Mining Company; Walter Vakulick, an assistant mine foreman employed by the Leechburg Mining Company; and Joel C. Dunmire, the safety director employed by the Leechburg Mining Company.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

a. M-1 is a computer printout listing past violations at Leechburg's Foster No. 65 Mine.

b. M-2 is a computer printout providing the total production tonnage for 1976 through 1978.

c. M-3 is a copy of the roof control plan in effect at the time of the subject violations.

d. M-9 is a copy of Order 1 GFM, October 6, 1977, 30 CFR 75.200.

e. M-10 is a termination of M-9.

f. M-11 is a copy of the inspector's statement accompanying M-9.

g. M-12 is a copy of Order No. 1 JAB, October 3, 1977, 30 CFR 75.403.

h. M-13 is a termination of M-12.

i. M-14 is a dust analysis report.

j. M-15 is the inspector's statement accompanying M-12.

k. M-16 is a copy of Order No. 1 JAB, October 6, 1977, 30 CFR 75.400.

l. M-17 is a termination of M-16.

m. M-18 is the inspector's statement accompanying M-16.

n. M-19 is a copy of Order No. 1 JAB, October 11, 1977, 30 CFR 75.400.

o. M-20 is a termination of M-19.

p. M-21 is the inspector's statement accompanying M-19.

q. M-22 is a copy of Order No. 1 JAB, October 12, 1977, 30 CFR 75.202.

r. M-23 is a modification of M-22.

s. M-24 is a termination of M-22 and M-23.

t. M-25 is the inspector's statement accompanying M-22.

u. M-26 is a copy of Order No. 1 JAB, November 30, 1977, 30 CFR 75.200.

v. M-27 is a termination of M-26.

w. M-28 is the inspector's statement accompanying M-26.

x. M-29a is a drawing made by Inspector Moody in Arlington, Virginia.

y. M-29b is a drawing made by Inspector Moody.

z. M-30 is a sketch of the violation cited in M-26.

2. Leechburg introduced the following exhibits into evidence:

a. OX-1 is a map of Kittanning Coal, Foster Mine No. 65.

b. OX-2 is a copy of a MESA memorandum dated July 27, 1977.

c. OX-3 is a drawing representing the approximate face locations on October 6, 1977, in 6 right mains and 3 butt left.

d. OX-4 is a copy of the ventilation plan of the Foster No. 65 Mine, in effect at the time of the subject orders.

e. OX-5 is a map of a portion of the Foster No. 65 Mine.

f. OX-6 contains copies of mechanical loading reports.

g. OX-7 is a copy of a purchase order, dated October 20, 1977, confirming the order of a "Big Sam" Spray Applicator.

h. OX-8 is a summary of the cost of materials used in improving track haulage.

i. OX-9 is a copy of a 104(c)(1) notice admitted into evidence to correct exhibit M-1.

j. OX-10 is a letter from the Solicitor's Office of the Department of Labor enclosing a copy of the modification.

k. OX-12 is a drawing of the intersection cited in M-26.

l. OX-13 contains financial statements of the Leechburg Mining Company.

3. OX-11 is a document relating to the history of violations at the Foster No. 65 Mine. It was marked for identification at the hearing, and received into evidence by a posthearing order dated January 16, 1979.

4. OX-14 is an affidavit, mentioned at the hearing (Tr. 450-54), and received in the Office of Administrative Law Judges on December 12, 1978. The objection to its admission into evidence was sustained by an order dated January 16, 1979. The document has been ordered filed in a separate envelope and retained with the official file in this case in the event review is sought as to the decision in this case.

5. OX-15 is a copy of Leechburg's corporate income tax return for the year ending June 30, 1978. It was admitted into evidence by an order dated January 9, 1979.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requrires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion, Findings of Fact, and Conclusions of Law

A. Stipulations

The following stipulations were filed by the parties at 9:40 a.m. on December 5, 1978:

1. This proceeding is governed by the Federal Coal Mine Health and Safety Act of 1969, the Federal Mine Safety and Health Act of 1977, and the standards and regulations promulgated thereunder.

2. The Administrative Law Judge has jurisdiction over this proceeding.

3. Leechburg is the operator of the Foster No. 65 Mine and as such, is subject to the jurisdiction of the above-referenced Acts.

4. The MSHA inspectors who issued notices and orders which are the subject of this hearing were, at the time the notices and orders

were issued, duly authorized representatives of the Secretary of the Interior.

5. Copies of the notices and orders which are the subject of this hearing are authentic.

6. The computer printout listing past violations at Leechburg's Foster No. 65 Mine from January 1, 1970, to October 3, 1977, is an authentic copy of Office of Assessments' data contained in the computer at Denver, Colorado (Exh. M-1).

The computer printout providing the total production tonnage for 1976 through 1978 is an authentic copy of Office of Assessments data contained in the computer at Denver, Colorado (Exh. M-2).

The copy of the roof control plan is an authentic copy of the plan in effect at the time of the violations which are the subject of this case (Exh. M-3).

Respondent reserves the right to challenge the content of the three documents listed immediately above.

B. Occurrence of Violation, Gravity, Negligence and Good Faith

(1) Order No. 7-0032 (1 GFM), October 6, 1977, 30 CFR 75.200

(a) Occurrence of Violation

MSHA inspector Gerald F. Moody, Jr., arrived at Leechburg Mining Company's Foster No. 65 Mine at approximately 7:30 a.m. on October 6, 1977, to conduct a regular roof control inspection (Tr. 5, 6). He was accompanied on the inspection tour by Mr. Donald A. Myers, Leechburg's section boss. The inspector examined the face areas in No. 23 and No. 24 rooms in 1 Left off 6 Right section, where he observed the conditions cited in the subject withdrawal order. The condition was described by Inspector Moody as follows:

> The approved roof control plan was not being complied with in the face area of No. 23 room in 1 Left off 6 Right Section approximately 200 feet from survey station 12+35 in that the distance from the right rib to the adjacent row of temporary roof supports varied from six feet to six feet 10 inches for the entire length of the cut (20')

(Exh. M-9, Tr. 19).

The inspector also stated that:

> The approved roof control plan requires temporary roof supports to be installed not more than 5 feet from

the rib and to be installed within 30 minutes after the mining sequence is completed. This completed cut was mined on the 4 p.m. to 12 midnight shift on October 5, 1977, and evidence (time, date, initials and foot prints) indicated that this area was entered and examined by the preshift examiner at approximately 6:40 a.m. on October 6, 1977, the operator should have known the violation existed since a preshift examination was made in this section.

(Exh. M-19, Tr. 19).

After the section foreman had two workmen set additional posts on the righthand side of the working place to reduce the spacing, the inspector measured the distance between the right rib and the first row of temporary supports, and contemporaneously sketched the conditions (Tr. 23, 24, M-29b). The four temporary supports in question measured 6 feet 10 inches, 6 feet, 6 feet 6 inches and 6 feet 10 inches, respectively from the right rib (Exhs. M-29a, M-29b). The Respondent did not dispute the accuracy of the inspector's measurements.

Based on these observations, the inspector issued Withdrawal Order No. 1 GFM for a violation of the approved roof control plan and 30 CFR 75.200. 1/ Minimum safety requirements for installing roof supports in 20-foot-wide cuts are described in Drawing No. 1 of the roof control plan applicable on October 6, 1977 (Exh. M-3). According to the inspector, that plan provides for at least 12 temporary supports to be installed in a 20-foot cut so that no distance greater than 5 feet exists between any two supports or between a support and the mine rib (Tr. 19, 22, 45-47).

1/ Section 75.200 Roof control programs and plans:

"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 to 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."

Respondent contends that no violation of the roof control plan exists, arguing that the plan does not require the temporary supports in question to be within 5 feet of the right rib. The Respondent basis its argument on an analysis of the inspector's testimony, concluding that the portions of the roof control plan relied on by him do not support the 5-foot requirement.

First, the Respondent argues, the inspector's reliance on Safety Precaution 3(b) as a source of the 5-foot requirement is misplaced. Safety Precaution 3(b) states:

> Only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary supports are installed. Before any person proceeds inby permanently supported roof, a thorough visual examination of the unsupported roof and ribs shall be made. If the visual examination does not disclose any hazardous condition, persons proceeding inby permanent supports for the purpose of testing the roof by the sound and vibration method and installing supports shall do so with caution and shall be within 5 feet (less if indicated on drawings) of a temporary or permanent support. If hazardous conditions are detected, corrective action shall be taken to give adequate protection to the workmen in the area involved.

The subject matter of Safety Precaution No. 3(b) does not encompass the spacing of temporary supports. The 5-foot reference in it refers to a person's position with relation to a temporary support. I therefore agree with Respondent's contention that Safety Precaution No. 3(b) does not require the spacing of temporary supports to within 5 feet of the right rib.

Second, the Respondent argues that Drawing No. 1 of the plan (Exh. M-3) is not a source of the 5-foot requirement because it does not specifically require 5-foot centers for temporary supports. I disagree with the Respondent's argument.

The inspector testified that "the spacing on the temporary roof supports in the scale indicate that they will be within five feet of the rib" (Tr. 46). The inspector explained this by stating: "It is fairly obvious that the place being 20 feet wide, then three temporary roof supports set across the work place are evenly spaced at approximately five feet apart" (Tr. 47). I agree with this interpretation of Diagram No. 1 of the roof control plan (Exh. M-3). Although it can be argued that the plan is ambiguous, the ambiguity is resolved by the testimony of Respondent's own witness. Mr. Harold F. Dunmire, the president of the Leechburg Mining Company, testified that he was familiar with the roof control plan relative to the installation of

temporary roof supports. According to Mr. Dunmire, the minimum requirements require the installation of temporary supports on 5-foot centers, both laterally and inby (Tr. 72-73).

I therefore conclude that the roof control plan's minimum requirements mandated that the row of supports in question be not greater than 5 feet from the right rib. I also conclude that the temporary supports in question were placed from 6 feet to 6 feet 10 inches from the right rib, and that the requirements of the roof control plan (Exh. M-3) had not been fulfilled.

(b) Gravity

A sound vibration test revealed that the roof in the working place was not drummy (Tr. 11, 29). Sounding indicates the roof condition to a depth of approximately 4 feet (Tr. 54, 55, 388). There were no slips in the actual working place (Tr. 35, 43-44), although there were slips outby (Tr. 35, 36). Inspector Moody described the roof in the working place as "normal" (Tr. 35, 36), while the respondent's witnesses classified the roof conditions as ranging from "good" to "excellent" (Tr. 52, 55).

Mr. Dunmire and Mr. Myers testified that it was standard operating procedure to drill 6-foot test holes in the roof to determine whether the overlying strata was solid, or whether it contained any fissures or breaks (Tr. 56, 71). However, Mr. Myers admitted that test holes had not been drilled in the area between the right row of temporary supports and the right rib (Tr. 56). Test holes had been drilled in the general vicinity of the violation, and no slips were reported within 50 feet of the face of 23 room on October 6, 1977 (Tr. 58, 59). Additionally, the cut was less than 20 feet wide (Tr. 24).

Mr. Myers testified that he was responsible for instructing his crew to install temporary supports (Tr. 49), and that he had been instructed by the company with respect to the installation of temporary supports (Tr. 50). Mr. Myers also testified that the company had instructed him to install 16 temporary supports instead of the 12 posts required by the roof control plan (Tr. 51). He had been instructed to place the first row of posts 5 feet from the bolts, with the other rows of posts on 4-foot centers (Tr. 50). He had relayed these instructions to his crew (Tr. 51). He admitted that he had not counted the number of temporary supports in No. 23 room (Tr. 61-62). Inspector Moody's testimony indicates that only 12 posts were present (Tr. 23).

Mr. Myers testified that the presence of 16 temporary supports indicates added support (Tr. 59). However, both Mr. Myers and Mr. Moody testified that the spacing of the posts, not the number of posts, is the primary consideration in the roof support scheme envisioned by the roof control plan (Tr. 37, 60).

At least one worker, the preshift examiner, was exposed to the hazard (Tr. 21). Markings on the wall indicated that he had proceeded inby the permanent roof supports to examine the inadequately supported area at approximately 6:40 a.m. on October 6, 1977 (Tr. 15). Mr. Myers was aware that the preshift examiner had been in the area (Tr. 56, 57). The temporary supports had been installed prior to the preshift examiners entry into the area (Tr. 53).

Inspector Moody testified that he deemed the violation serious because all roof control violations are inherently serious (Tr. 16). He assumed that any resulting injury would be "disabling," not "permanently disabling" or "fatal" (Tr. 33-34).

Based on the foregoing, I find the violation to be a serious one.

(c) Negligence

It was Mr. Myers' responsibility to check the area to assure proper installation of the temporary supports (Tr. 53). He testified that he was able to ascertain how the right hand row of temporary supports had been improperly placed. The row of posts on the left hand side had been placed too close to the left rib (Tr. 63); i.e., approximately 3 feet from the left rib. The workers measured over from that line and placed the remaining rows on 4-foot centers, but they did not measure the distance between the righthand row and the right rib (Tr. 51-52). Thus, the improper spacing of the lefthand row of posts threw the last row out of line (Tr. 63).

Both Inspector Moody and Mr. Myers agreed that the condition was readily observable (Tr. 6, 54). This readily observable condition should have been observed by the preshift examiner and relayed to the operator (Tr. 15). The condition required only 12 minutes to correct (Tr. 12, 37, Exhs. M-9, M-10).

Based on the foregoing, I conclude that the operator demonstrated ordinary negligence.

(d) Abatement

The violation was abated in 12 minutes (Tr. 12, 17, 37). I find that the operator displayed good faith in achieving rapid abatement.

(2) Withdrawal Order No. 7-0033 (1 JAB), October 3, 1977, 30 CFR 75.403

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine at 7:25 a.m. on October 3, 1977, to conduct a regular inspection (Tr. 80). He was accompanied on the inspection by Mr. Joseph Arduino, the mine foreman (Tr. 80). The inspector traveled to the No. 27 room

off No. 1 entry 1 Left section off 6 Right Mains (Tr. 80-81, Exh. M-12). The inspector testified that he observed an area 40 feet long, extending from 40 feet outby the face of No. 27 room to 80 feet outby which was inadequately rock dusted (Tr. 80-81, 81-85, Exh. M-12). He subsequently issued the subject withdrawal order.

Mr. Bates testified that his initial determination of the extent of the inadequately rock dusted area was based on visual observation (Tr. 81-82). He stated that he observed the floor and the ribs, and that they were "dark" and "real dark," respectively (Tr. 81-82). Visual observation revealed very little rock dust on the floor and ribs (Tr. 82). The inspector testified that he caused samples to be taken from the floor and ribs, identified them, and sent them to the Dust Analysis Center in Mount Hope, West Virginia, to substantiate the violation (Tr. 82, 85-95). The result of the dust sample analysis revealed 38.3 percent incombustible material contained in the floor sample, and 27.1 percent incombustible material contained in the rib sample (Exh. M-14). The regulations require that all areas within 40 feet of all working faces be rock dusted so that the incombustible content of the combined coal dust, rock dust and other dust shall be not less than 65 percent. 30 CFR 75.402, 75.403. 2/

Inadequate rock dusting cannot be proven by visual observation alone; samples must be collected and subjected to laboratory analysis. Hall Coal Company, Inc., 1 IBMA 175, 178, 79 I.D. 668, 1971-1973 CCH-OSHD par. 15,380 (1972). Respondent questions the validity of the test results contained in Exhibit M-14 (Tr. 82-95, Respondent's Post-Trial Brief, pp. 9-10). According to the Respondent:

2/ 30 CFR 75.402 states:

"All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted."

30 CFR 75.403 states:

"Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the percentum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required."

> No evidence was produced to established a complete chain of custody. See, McCormick on Evidence § 212, pp. 527-8 (2d ed. 1972). A rather precarious method of identification was used in that, at the time of the Order, the samples were marked as being from the Foster 65 Mine, dated, and the inspector's name was attached (Tr. 86-8). The location within the mine was put on a card, which was not attached to the samples, and included in the package to the Mt. Hope Dust Anaylsis Laboratory (Tr. 88). No identifying serial number or any other clear identification was attached to the samples (Tr. 86). Only the results of the tests were returned to the inspector, not the samples (Tr. 89). The inspector was unable to testify as to the methods of testing employed and their probable accuracy (Tr. 90). There is no indication on M-14 as to who, if anyone, tested these particular samples. No one from the Dust Analysis Laboratory testified as to the testing procedures or their accuracy. •

After citing NLRB v. Remington, 94 F.2d 862, 873 (2d Cir. 1938), Respondent then stated that Exhibit M-14 should be given little, if any, weight (Respondent's Brief, pp. 9-10).

Respondent's counsel had stipulated to the authenticity of the document (Tr. 92).

The Respondent's criticisms of the dust analysis report can only be considered as challenges as to the probative weight of the evidence, not its admissibility. Co-op Mining Company, 3 IBMA 533, 81 I.D. 780, 1974-1975 CCH-OSHD par. 19,162 (1974). According to the Interior Board of Mine Operations Appeals:

> [W]hen admitted into evidence, if such a report shows that the percentage of incombustible content does not meet the required standard, it establishes a prima facie case of a violation. Of course, the operator may attack the accuracy and the reliability of the report itself, the regularity of the test procedure, and offer any other evidence it has in rebuttal. But where no such challenge is made, or where the Judge finds such challenge does not meet or overcome the presumption of verity which attaches to the report, the Judge is left with a prima facie showing that a violation did, in fact occur. 3 IBMA at 539. (Citations omitted.)

Under the above decision of the Board of Mine Operations Appeals, the dust analysis report (Exh. M-14) is sufficient to establish a prima facie case for a violation of 30 CFR 75.403 because the report shows that the percentage of incombustible content does not meet the required incombustible content standard. The Respondent offered no

evidence at the hearing attacking the accuracy and reliability of the test procedure, and offered no probative evidence to rebut the report's findings.

The Respondent cannot claim prejudice from the decision to admit the report, or from a decision to accord it weight. The Respondent clearly knew of the report's existence because a copy of it was attached to the petition for assessment of civil penalty, filed on July 31, 1978, and received by the Respondent on August 7, 1978. The Respondent did not pursue the matter with a degree of diligence indicative of prejudice resulting from the report's receipt into evidence. The Respondent did not attempt to ascertain the identify of the person who prepared the analysis and report, and did not attempt to subpoena him under 29 CFR 2700.47.

In light of the foregoing, I find that MSHA has established a prima facie case for a violation of 30 CFR 75.403, and that the violation has been established by a preponderance of the evidence. 29 CFR 2700.48. It should be noted that Respondent in its brief did state that from the evidence elicited at the hearing there appeared to have been a nonserious violation of section 75.403 (Respondent's Brief, p. 8).

(b) Gravity

Inspector Bates testified that the faces in rooms 21, 23, and 25 were the working faces during the mining cycle (Tr. 105). He stated tht he saw at least six people working in the area at the time of the inspection (Tr. 97, 123), and that mining was going on in No. 21, 23, and 25 rooms (Tr. 103). He stated that, to the best of his knowledge, no one was working in No. 27 room at the time he issued the order (Tr. 124).

The inspector identified trailing cables as a possible source of ignition (Tr. 98, 103, 123). These cables were located in the outby crosscuts, and lead to the power center (Tr. 103). The source of ignition was at least 50 feet from the condition observed in No. 27 room (Tr. 104, 106, 123). He stated that the cables were energized (Tr. 123). He stated that he knew there was electrical power in the section because they were running and operating the equipment (Tr. 104). He admitted, under cross-examination, that an absence of electrical power on the section, if proven, would greatly reduce the hazard of fire and explosion (Tr. 107-08).

Mr. Arduino stated that the mining equipment was located in Nos. 21, 22, 23, and 24 rooms because he had intended to mine in those rooms (Tr. 150). However, his testimony conflicted with the testimony of Inspector Bates. Mr. Arduino testified that no mining activity was being conducted on the section at the time Inspector Bates issued the order because the power was shut off (Tr. 149). According to

Mr. Arduino, the "load center was down," meaning that the power would not stay on to distribute the power to the mining machinery (Tr. 149, 155). The electrical power had been shut off to permit work on the mine load center (Tr. 149).

It appears that the inspector may have been mistaken about the question of energized equipment, 3/ however, this point is not significant for two reasons. First it would appear that the equipment would become energized just as soon as the power center was repaired. As a matter of fact it was as soon as the order was terminated at 1 p.m. (Tr. 152). Therefore, the potential power source was always possible during that shift. However, the second reason why the issue is not significant is that the energized cable, the potential source of ignition identified by the inspector, was 50 feet from the area cited in the order (Tr. 104, 106, 123). Electrically energized equipment was not operating in No. 27 room (Tr. 124). Due to the remoteness of the potential ignition source from the inadequately rock dusted area, I conclude that the violation was of slight gravity.

(c) Negligence

The inadequate rock dusting was readily observable by visual observation. The floor was "dark" and the ribs were "real dark," with very little rock dust visible on the floor or ribs (Tr. 81-82). The preshift examination dates indicated that the face area of No. 27 room had been examined at least 10 times prior to the date of the order (Tr. 96-97, 127, 131). Some of those dates were September 18, 1977, September 20, 1977, September 21, 1977, September 22, 1977, September 23, 1977, September 26, 1977, September 27, 1977, October 2, 1977, and October 3, 1977 (Tr. 127). The order was issued on October 3, 1977. Some of the dates had initials associated with them (Tr. 131). Some of the initials were legible (Tr. 131). All of these initials were inby the last open crosscut (Tr. 132).

The fact that the violation was readily observable, coupled with the presence of a preshift examiner in the area on the date of the order, indicates that the Respondent should have known of the inadequate rock dusting.

I therefore conclude that the Respondent was guilty of ordinary negligence.

3/ One factor which lends support to the statement that the power center was shut down is the circumstance under which the rock dust was hauled in to the site of the violation by hand instead of shuttle car because of the lack of power (Tr. 155). This added almost an hour to the time of abatement (Tr. 151) and required considerable extra work by the miners which could have been expended elsewhere.

(d) Good Faith

It took over 1 hour to abate the violation, even though the rock dust was kept approximately 150-200 feet away (Tr. 150-51, 155-156).

The Respondent's witnesses sought to explain why the abatement process required such an inordinate amount of time. According to the Respondent, the rock dust was stored at the feeder location, 150 to 200 feet away from No. 27 room (Tr. 155). The feeder is the place where the shuttle cars dump the coal into the belt (Tr. 155). Normally, rock dust is transported to a needed area by shuttle car (Tr. 155). According to the Respondent, the shuttle cars could not be employed to transport the rock dust because the electrical power was off (Tr. 155). This necessitated hand carrying 10 or 20 50-pound bags of rock dust through an area 4 feet high (Tr. 151, 157).

Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement.

(3) Withdrawal Order No. 7-0035 (1 JAB), October 6, 1977, 30 CFR 75.400

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine at approximately 7:25 a.m. on October 6 1977, to conduct a regular inspection (Tr. 163, 164). Mr. Joseph Arduino, the mine foreman, was the inspector escort (Tr. 163). Upon entering the 6 Right Mains section, they inspected the face areas and traveled outby to the return air course approximately 200 to 300 feet outby the loading point of 6 Right Mains section (Tr. 164). The inspector observed accumulations of loose coal and coal dust in No. 1 and No. 2 rooms off No. 1 entry of 6 Right Mains at station No. 23+70 (Tr. 164). He also observed accumulations of loose coal and coal dust in the No. 1 and No. 2 entries in the 3 Left section off of 6 Right Mains (Tr. 164).

The inspector measured these accumulations (Tr. 165). The accumulations in the No. 1 room measured approximately 1 to 24 inches in depth, 3 to 10 feet in width, and 20 feet in length (Tr. 164, Exh. M-16). The accumulations in the No. 2 room measured approximately 1 to 24 inches in depth, 4 feet in width, and 17 feet in length (Tr. 164-165, Exh. M-16). The accumulations in the No. 1 entry measured approximately 1 to 42 inches in depth, approximately 5 to 7 feet in width, and 19 feet in length (Tr. 165, Exh. M-16). The accumulations in the No. 2 entry measured approximately 1 to 42 inches in depth, 9 to 10 feet in width and 20 feet in length (Tr. 165, Exh. M-16). Inspector Bates then issued the subject order (Exh. M-16).

The inspector testified that the accumulations were not mixed with a visually observable amount of rock dust (Tr. 165). He did not take any samples 4/ (Tr. 166). The inspector testified that the area cited was in the return air course of the 6 Right section, which is connected with one of the designated escapeways (Tr. 166, 170-171, Exh. M-18). Mining in the area had ceased for five working days (Tr. 169, Exh. M-16). There was no activity in the area (Tr. 166). The accumulations were not located near any electrical equipment (Tr. 166). The inspector testified that he questioned the mine foreman to determine how long the accumulations had been stored in the subject areas (Tr. 166). The mine foreman estimated 3 to 5 days (Tr. 166). The inspector believed that the accumulations had been stored there for "at least five days" (Tr. 166). The mine foreman told the inspector that the accumulations had been put in the subject areas during the weekend (Tr. 167).

The subject order alleged a violation of 30 CFR 75.400. 30 CFR 75.400 states: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

"Active workings" means any place in a coal mine where miners are normally required to work or travel. 30 CFR 75.2(g)(4).

It is found that the four areas involved were "active workings" (Tr. 166, 171).

The elements of proof required to establish a prima facie case for a 30 CFR 75.400 violation are: (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings, of a coal mine; (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made. Old Ben Coal Company, 8 IBMA 98, 114-115, 84 I.D. 459, 1977-1978 CCH-OSHD par. 22,088 (1977). Proof of the mere presence or existence of an accumulation of combustible materials in active workings of the mine is not, by itself, sufficient to establish a violation. Old Ben Coal Company, 8 IBMA 98, 112, 84 I.D. 459, 1977-1978 CCH-OSHD par. 22,088 (1977). Proof of negligence on the part of the operator is not one of the elements of proof

4/ See, Coal Processing Corporation 2 IBMA 336, 345, 80 I.D. 748, 1973-1974 CCH-OSHD par. 16,978 (1973) (a violation of 30 CFR 75.400 may be based upon visual observation without need of measurements or samples).

of a violation of 30 CFR 75.400. The operator's negligence becomes involved only in determining, when necessary, the constructive knowledge of the operator as to the accumulation's existence. Old Ben Coal Company, 8 IBMA 196, 197-98, 1977-1978 CCH-OSHD par. 22,328 (1977).

Respondent contends that the issue presented is "whether the operator failed to clean up the accumulation, or failed to undertake to clean it up within a reasonable time after discovery" (Respondent's Post-Trial Brief, pp. 14-15). He does not contend that MSHA has failed to establish the first two elements of its prima facie case with respect to the subject violation. Therefore, the question which must be resolved before a violation of 30 CFR 75.400 can be found to have occurred is whether the Respondent failed to undertake clean up procedures within a reasonable time after discovering the accumulations.

Two Board decisions establish the standards by which "reasonable time" is measured. In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 459, 1977-1978 CCH-OSHD par. 22,088 (1977), the Board stated that:

> [W]hat constitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

8 IBMA at 115.

In promulgating this standard, the Board observed that:

> The longer the accumulation remains without cleanup, the greater the threat of a mine fire or explosion. Likewise, the greater the mass and extent of the accumulation, the greater the chance it may contribute to a disaster because of the increased surface area of combustible material exposed to possible ignition sources.

8 IBMA at 110.

Having stated the standard of "reasonableness," the Board set forth some general guidelines for determining whether the operator was in compliance. The key phrase is "maintenance of a regular cleanup program." The Board stated that:

> With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine, or normal mining operation, it is our view

that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shift, depending on the volume of production involved, might well satisfy the requirements of the standard.

8 IBMA at 111.

The Board gave a more elaborate statement of the cleanup duties imposed on operators by the Act in Old Ben Coal Company, 8 IBMA 196, 198, 1977-1978 CCH-OSHD par. 22,328 (1977) (on MSHA's motion for reconsideration of the Board's decision in Old Ben Coal Company, 8 IBMA 98), stating:

> A small accumulation is most probably suitable for elimination in the course of the operator's regular cleanup program. Proof of the absence of such a program, together with the presence of any accumulation might well alone support a citation for the violation of [30 CFR 75.400]. If the accumulation is of such size or combustibility as to present the possibility of a serious safety hazard, then, of course, the operator is required to take more urgent steps, other than the regular cleanup, in eliminating the hazard. (Emphasis added).

8 IBMA at 198.

The question presented is whether Leechburg's actions complied with the Board's criteria.

Inspector Bates testified that the accumulations involved were outby the loading point (Tr. 173, 178-81). However, Respondent's witnesses, Mr. George Rittenberger, Mr. Joseph Arduino, and Mr. Harold Dunmire, gave testimony indicating that the accumulations were inby the loading point, and thus within the ambit of the Respondent's cleanup program (Tr. 188-9, 195, 226-7, 240-3). This cleanup program is contained in the Respondent's ventilation plan (Exh. OX-4, at p. 5(a)), which states:

> Fine and loose coal is loaded by the continuous miner after each cut of coal is mined. The continuous miner is trammed along each rib to the face to load coal into shuttle car. Fine and loose coal that cannot be cleaned up by the continuous miner is shoveled or pushed to the face or toward the center of the working place after roof supports are provided. This coal is then loaded during the next mining cycle in the working place.

Respondent defines a "mining cycle" as the extraction of the coal, the installation of temporary and permanent supports, clean up

through the number of faces being developed, and the installation of crosscuts to establish the return air (Tr. 237). A "mining cycle" on one side of a section can consist of nine face areas wherever butt sections are being turned off main entries (Tr. 242-43).

Mr. Rittenberger testified that, at the time the subject order was written, mining was being conducted in entries 4, 5, and 6 of 6 Right Mains section (Tr. 198). Mining would have continued in those entries until the necessary crosscuts had been developed (Tr. 198) before moving back to the entries on the other side of the section. The development of each of these three entries required the operator to recycle through four "lifts of coal" in order to develop the crosscuts needed to establish the air for the intake (Tr. 228, 229). A "lift of coal" was defined by the Respondent as the extraction of coal from an entry for a distance of approximately 20 feet. In doing thus, the miner makes two passes at the coal, i.e., one on each side of the entry (Tr. 242).

After the establishment of the crosscuts, the feeder and the power center would have been moved up to advance the No. 3 and No. 4 entries of 3 Butt Left. After the advancement of the No. 3 and No. 4 entries of 3 Butt Left, the accumulations would have been removed from rock rooms No. 1 and No. 2, and the No. 1 and No. 2 entries of 3 Butt would have been advanced because the area would have been within reach of the cables (Tr. 198).

Mr. George Rittenberger illustrated the operation of the cleanup program in areas where entries are being developed (Tr. 202-203). After the completed advancement of the first three entries on a main (Nos. 1, 2, and 3) and the installation of crosscuts, the miner is moved to advance the remaining entries (Nos. 4, 5, and 6). While the miner is operating in Nos. 4, 5, and 6 entries, permanent roof supports are installed in the last recycled portions of Nos. 1, 2, and 3 entries (Tr. 202). The coal dust is then shoveled to the center of the entires (Tr. 202) and either lays in the last 20 or 30 feet of the center of the entry, or is pushed to the face by the scoop (Tr. 203). The accumulations are then removed by the miner during the next cycle of those entries (Tr. 202), which, according to Mr. Rittenberger, occurs not more than a week later (Tr. 201). However, he went on to state that it could, in a case such as this, be a maximum of a couple of weeks (Tr. 201).

Although the scoop can remove the accumulations instead of piling them at the face, the Respondent's normal cleanup procedure does not provide for removal in such a fashion (Tr. 203, 204). The Respondent contends that logistical considerations bar removal of accumulations with the scoop (Tr. 203-04), problems which would "slow down our coal production" (Tr. 204).

The turning off of butt sections from main entries adds a third part to the mining cycle as set up by the operator, extending the

amount of time required to complete one cycle (Tr. 206). The company president pointed out that you could have nine working faces on that side of the section (Tr. 243). This, of course, is in addition to faces in entries 4, 5, and 6 on the other side of the section.

A question then arises as to whether the cleanup program as contemplated in the ventilation plan was followed by the Respondent in the present case. The accumulations cited in the subject order were located in entries 1 and 2 of 3 Butt Left section off 6 Right Mains, and in the No. 1 and No. 2 rock rooms off No. 1 entry of 6 Right Mains at station 23+70. These locations are identified on Exhibits OX-3 and OX-5.

The pertinent language in the accumulations cleanup program (Exh. OX-4 at p. 5(a)), states that the fine and loose coal incapable of being cleaned up by the continuous miner is pushed to the face and "loaded during the next mining cycle in the working place." The program does not contemplate or authorize the prolonged storage of accumulations. It apparently refers to the "small, but inevitable aggregations of combustible materials that accompany the ordinary, routine, or normal mining operation." Old Ben Coal Company, 8 IBMA 98, 111, 84 I.D. 459, 1977-1978 CCH-OSHD par. 22,088 (1977). And further, it must necessarily contemplate a reasonable lapse of time for the return of the cleanup equipment to the area of accumulation.

It is apparent from all evidence presented that the time lapse between the date of development of the accumulation and the time it was expected to be removed was unreasonable.

There are actually two different premises for this conclusion. First, it appears that the mining cycle had actually been completed in all four accumulation areas and therefore should have been fully cleaned up when the last mining had been completed during the prior weekend or shortly thereafter. Second, even if mining had not been finished in such areas the lapse of time involved here caused by the unusually large number of faces being developed in two separate groups, would have been unreasonable.

As relates to the first premise a review of the evidence reveals that the combustible accumulations would not have been removed in the course of the next mining cycle because mining for all practical purposes had been terminated in the subject areas. The rock rooms had been advanced to the desired depth (Tr. 252, 258), a conclusion which is confirmed by two of the Respondent's exhibits. Exhibit OX-3 represents the development of the mine in the vicinity of the intersection of 6 Right Mains and 3 Butt Left on October 6, 1977 (Tr. 187), the date of the subject order. Exhibit OX-5 represents the development of the mine as of June 1978 (Tr. 191), approximately 8 months after the issuance of the subject order. The areas cited are circled

in green on Exhibit OX-5 (Tr. 172). A comparison of the two exhibits reveals that the two rock rooms were no farther advanced in June 1978, than they were on October 6, 1977.

The same conclusion applies to the development of the No. 1 and No. 2 entries of 3 Butt Left section. A comparison of the two exhibits reveals that they had not been advanced between October 6, 1977, and June 1978. Therefore, the mining cycle had terminated in the subject areas on the date of the order.

The combustible accumulations cleanup program in effect at the mine on the date of the order contemplated the removal of the accumulations during the next mining cycle (Tr. 202-04, 206). The termination of mining activity in an area takes that area out of the mining cycle, and thus outside the regular cleanup program's reach. Since the mining cycle had terminated in the subject areas, the accumulations cited in the order would not have been removed in the course of regular mining activity (Tr. 222). The loose coal and coal dust should have been removed upon the termination of the mining cycle in the subject areas, a feat which could have been accomplished with the scoop (Tr. 255). If the scoop was inoperable, as Respondent contends (Tr. 217), removal could have been accomplished with the continuous miner.

As relates to the second premise, even if mining had not been finished in such four areas, the lapse of time involved here was unreasonable. Testimony of Mr. Rittenberger, the mine superintendent, Mr. Arduino, the mine foreman, and Mr. Dunmire, the company president, particularly at pages 198, 201, 223, 237-240, 243-246, and 257-258 of the transcript, shows the unusual amount of time that would lapse in this case.

Part of the reason for the long lapse of time was the manner in which a group of three entries were advanced for some distance before moving back across the section to another group of entries which also involved many different faces.

One of the statements which showed the long period of time involved was that of the mine superintendent at page 198 of the transcript as follows:

> Q. So, it could have been a later mining cycle that it was actually cleaned up?
>
> A. It would have been completed in the mining cycle of that area, yes, which would have been within a couple of weeks, not a longer period than that.
>
> Q. But, you are saying that it was cleaned up within the next mining cycle?

A. It was cleaned up due to the order out of cycle.

Q. Could you explain that further for us?

A. When we were doing our mining, we were working in 4, 5 and 6. We would have continued those entries up until we made the necessary crosscuts and advanced them to the limit that we could reach with our cables.

At that point, we would have moved the feeder and the power center up, advanced No. 3 and No. 4 entry of 3 butt left, at which point in time we would have gone over to clean up rock rooms 1 and 2, and advance No. 1 entry and No. 2 entry further in for another crosscut, because then we could reach it with the cable.

At the point in time we were setting here, we could not reach any further. We could not advance those faces any further.

The fact that the circumstances of this case were not normal was evident in the testimony of the company president as follows: "[B]ut what you are looking at here is not the norm for Leechburg Mining. It is a series of events that took place. It was unfortunate, but they led into this" (Tr. 257).

The evidence thus establishes that the Respondent permitted large volumes of combustible material (Tr. 164-65, Exh. M-16) to accumulate in the active workings of the mine for approximately 5 days (Tr. 166). Even a review of the testimony in a light most favorable to the Respondent reveals that the combustible material might not have been removed for "a couple of weeks" (Tr. 198).

I therefore conclude that the Respondent did not undertake to clean up the accumulation within a reasonable time after discovery, and that MSHA has established a violation of 30 CFR 75.400 by a preponderance of the evidence.

(b) Gravity

Little, if any, rock dust could be visibly detected in the accumulations (Tr. 165). Part of the depth of coal was dry to damp, the remaining depth of coal was dry (Tr. 168). Inspector Bates testified that he did not observe any mining machinery in the area (Tr. 175).

Inspector Bates testified that accumulations of coal dust in a coal mine pose a hazard because its presence can intensify an explosion (Tr. 168). He classified the occurrence of an event as

"probable," and contemplated that the resulting injury would be "disabling" (Tr. 170, Exh. M-18). He was unable to determine whether the workers were exposed to the hazard (Tr. 170).

The area was connected to a designated escapeway (Tr. 171). The accumulations were not in close proximity to any electrical equipment (Tr. 166).

Therefore, I find the violation to be of moderate gravity.

(c) Negligence

The mine foreman told Inspector Bates that the accumulations had been present for about 3 to 5 days (Tr. 166). The inspector estimated that the accumulations had been present for at least 5 days (Tr. 166). The operator should have known of the presence of the accumulations because the mine foreman was aware of their presence (Tr. 167).

Therefore, I find the Respondent demonstrated gross negligence.

(d) Good Faith

Mr. Arduino testified that the accumulations were removed on October 6, 1977, the date of the order. Abatement was achieved in the No. 1 and No 2 entries of 3 Left, using the miner and the shuttle car. It was accomplished in the No. 1 and No. 2 rock rooms by hand shoveling the accumulations onto a shuttle car. The continuous miner was not brought into the No. 1 and No. 2 rock rooms because the number of curves which the miner would have had to negotiate would have destroyed the miner cable (Tr. 219). Mr. Arduino testified that the scoop was not used in the abatement process because it was not functioning (Tr. 217, 233).

Inspector Bates was not notified of the abatement until October 11, 1977, 5 days after the issuance of the subject order (Tr. 219-220, Exh. M-17). Mr. Arduino testified that he was unable to explain the time lag between the abatement of the order and the notification of Inspector Bates (Tr. 219).

I find that the Respondent demonstrated good faith in achieving rapid abatement of the violation.

(4) Order No. 7-0036 (1 JAB), October 11, 1977, 30 CFR 75.400

(a) Occurrence of Violation

MSHA inspector Jesse Bates conducted a regular inspection at Leechburg's Foster No. 65 Mine on October 11, 1977 (Tr. 260, 261). He arrived at approximately 7:30 a.m. (Tr. 260). Mr. Joseph Arduino,

the mine foreman, accompanied the inspector during the inspection tour (Tr. 260). At approximately 12:15 p.m., he observed the continuous miner withdraw from the face area prior to the work crew's dinner break (Tr. 261). He observed accumulations of loose coal and oil soaked coal dust on the top and sides of the machine (Tr. 261, 262, 271, Exh. M-19). The area covered encompassed the conveyor reverse control switch and the left side of the electric motor (Tr. 261). The inspector made measurements (Tr. 264-5) showing that the accumulations of oil and coal dust covered a 54-square foot area on the machine's top, and 32 square feet on the sides (Exh. M-19, Tr. 264). It was impractical to measure the depth of the accumulation on top of the machine due to the low mining height (Tr. 261-62, 271).

The inspector estimated that the accumulations had existed for at least two shifts, based on the abnormal amount of accumulations on the machine (Tr. 262-63, 273). Mr. Arduino disagreed, stating that the accumulations were not an abnormal amount (Tr. 283-84).

Inspector Bates believed the normal cleaning procedure for the machine required the operator to clean it at the beginning of each shift (Tr. 276-77). Mr. George E. Rittenberger mentioned the existence of a continuous mining machine cleanup program (Tr. 292, 293), although the Respondent neither produced nor mentioned a writing embodying the plan. According to Mr. Rittenberger, the mechanics on the night shift are largely responsible for cleaning the equipment (Tr. 293). Section foremen are charged with supervising the removal of excessive accumulations (Tr. 293-94).

Mr. Arduino testified that the miner is normally cleaned once daily, on the 12 midnight to 8 a.m. shift (Tr. 284). It would have been clean at the beginning of the 8 a.m. shift if normal procedures had been followed (Tr. 285).

However, according to Mr. Arduino and Mr. Rittenberger, the continuous miner cited in the subject order had not been in operation prior to the order's issuance. They testified that the machine had been undergoing repairs (Tr. 282, 283, 285, 294-95, 296). According to Mr. Arduino, the midnight to 8 a.m. shift had not cleaned the machine because they were subjecting it to repair work (Tr. 295). Mr. Rittenberger testified that the maintenance crew had not washed the machine because their repair work required opening a permissible electrical box (Tr. 296). He further testified that his records revealed the machine was not returned to service until after 1 p.m. on the date of the order. However, the Respondent did not introduce those records into evidence to corroborate Mr. Rittenberger's claim. The mechanics who allegedly performed the repair work were not called as witnesses.

Inspector Bates' testimony reveals that the machine was in operation between the time he arrived on the section at 9 a.m. and the

time he issued the order at 12:15 p.m. (Tr. 261, 266, 267). He specifically testified that he saw the machine withdrawing from the face area at approximately 12:15 p.m. (Tr. 261). He specifically asked the operator when the machine had been washed, and got no response (Tr. 269, 270). He testified that no one was performing maintenance on it (Tr. 266, 268). No one told him that maintenance work had been performed on the reverse control switch during the morning (Tr. 270).

Having been afforded the opportunity at the hearing to assess the credibility of the witnesses, I conclude that Inspector Bates' testimony accurately reflects the events of October 11, 1977. I therefore find that the continuous mining machine cited in the order had been in operation between 9 a.m. and 12:15 p.m. on October 11, 1977, and that excessive accumulations of oil and coal dust had been permitted to accumulate on the machine.

The accumulations had been present on the machine for a long period of time while it was in operation. Mr. Arduino testified that his men had to scrape some of the oil from the machine (Tr. 283). Inspector Bates' testimony reveals that scraping is required only when the accumulations have been permitted to remain on the machine for such a prolonged period of time that the heat from the equipment has caused it to harden (Tr. 277-78).

MSHA's prima facie case consists of three elements. The elements for establishing a violation of 30 CFR 75.400 are: (1) the existence of an accumulation on electrical equipment in the active workings of a mine; (2) that the operator knew, or through the exercise of due diligence should have known, of their existence; and, (3) that the operator failed to clean up the accumulation within a reasonable time after discovery. Old Ben Coal Company, 8 IBMA 98, 114-15, 84 I.D. 459, 1977-78 CCH-OSHD par. 22,088 (1977).

The testimony of Inspector Bates and Exhibits M-19 and M-21 establish, by a preponderance of the evidence, the existence of accumulations on the continuous miner, a piece of electrical equipment in the active workings of the Foster No. 65 Mine. Loose coal and oil soaked coal dust had been permitted to accumulate on the machine (Tr. 261-62, 271, Exhs. M-19, M-21), covering 54 square feet on the top of the machine and 32 square feet on the sides (Tr. 264, Exh. M-19). Accumulations were present on both the conveyor reverse control switch and the left side of the electric motor (Tr. 261).

The Respondent should have known of the accumulations existence. Section foremen are charged with the duty of assuring the removal of excessive accumulations from electrical equipment (Tr. 293-94). The section foreman was on the section between 9 a.m. and 12:15 p.m. on October 11, 1977 (Tr. 262). In the exercise of his company imposed duty to inspect electrical equipment for accumulations, a duty of

which he should have been aware (Tr. 294), he should have known of the condition. The men had to scrape some of the oil and loose coal from the machine (Tr. 283), indicating that the accumulations had been present long enough for the heat from the machine to cause hardening (Tr. 277-78). Additionally, Mr. Arduino testified that the machine had probably last been cleaned on the 4-to-12 shift the previous day (Tr. 285-86). Therefore, the Respondent, through the exercise of due diligence, should have known of the existence of the accumulations on the miner.

The Respondent failed to remove the accumulations from the miner within a reasonable time after he should have known of their existence. "Reasonable time" is determined on a case-by-case evaluation of urgency in terms of the likelihood of the accumulation to contribute to a mine fire or an explosion. Mass, extent of combustibility and proximity to an ignition source are factors used to assess the "reasonable time" factor. Old Ben Coal Company, 8 IBMA 98, 115, 84 I.D. 459, 1977-78 CCH-OSHD par. 22,088 (1977). Accumulations were present around the conveyor reverse control switch and the electric motor on the left side of the machine (Tr. 261), potential sources of ignition (Tr. 263). A measurable depth of accumulations was present on the miner's top (Tr. 261-62). It covered 54 square feet on the top, and 32 square feet on the sides (Tr. 264, Exh. M-19).

The presence of these large accumulations, in close proximity to potential sources of ignition, on a machine operating in the face area (Tr. 261), coupled with the fact that the machine had not been cleaned for one and a half shifts (Tr. 262, 285-86), indicates a failure to remove the accumulations within a reasonable time after the operator should have known of their presence.

I therefore conclude that a violation of 30 CFR 75.400 was established by a preponderance of the evidence.

(b) Gravity

The inspector testified that the trailing cables and the motor could short circuit, causing the machine to catch fire (Tr. 263). Running over the cable can also produce a short circuit, resulting in a mine fire (Tr. 263). Six or more workers were exposed to the hazard, one of whom was the miner operator (Tr. 263-64, Exh. M-21). The miner was equipped with operable fire suppression sprays (Tr. 271).

I find the violation to be a serious one.

(c) Negligence

The Respondent demonstrated ordinary negligence in failing to comply with its unwritten program for cleaning accumulations from the

continuous miner. The machine was cleaned at least once daily under the plan, usually on the 12 midnight-to-8 a.m. shift (Tr. 284, 293). This responsibility was shared by the section foremen (Tr. 293-94).

The machine in question had been operating since at least 9 a.m. on October 11, 1977. It had not been cleaned by the midnight-to-8 a.m. shift, and had not been cleaned on the 8 a.m. shift as attested to by the abnormal amount of loose coal and oil-soaked coal dust on it at the time the order was written (Tr. 262, 285, 286). The extent of the accumulations exceeded the ordinary amount which would have been present had the plan been followed (Tr. 262).

I conclude that Respondent demonstrated ordinary negligence.

(d) Good Faith

The operator corrected the condition while the inspector was on the section (Tr. 272). Abatement was accomplished within about 30 minutes after the order's issuance (Tr. 273, Exhs. M-19, M-20).

I find that Respondent demonstrated good faith in securing rapid abatement of the violation.

(5) Order No. 7-0038 (1 JAB), October 12, 1977, 30 CFR 75.202

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine on October 12, 1977, between 7 a.m. and 7:30 a.m. to conduct a regular inspection (Tr. 299). He was accompanied on the inspection by Mr. Joel Dunmire, Leechburg's safety director (Tr. 299). He inspected the northeast mains track switch, the track haulage road and the roof above the track haulage road (Tr. 299). He observed loose, falling roof material between the previously installed roof bolts over the track haulage road from the northeast mains track switch to a point 200 feet inby the supply base (Tr. 300). In other words, rock had fallen from the roof onto the track haulage road (Tr. 300). The condition was present in a section of the track haulage road measuring a distance of approximately 3,500 feet (Tr. 300). The inspector, after administering a sounding test, noted that "the roof over the track haulage road in various locations needed to be scaled down from the northeast mains track switch to 200 feet inby the supply base at 5 Right, a total distance of approximately 3,500 feet" (Tr. 301, 305, 317-18, Exh. M-22).

The condition observed by the inspector was described as "spalling," which he defined as small "particles of roofing material becoming loose between the installed supports and falling loose or falling to the mine floor on the track haulage road" (Tr. 300, 319). Spalling is produced by thermal shock, or weathering, and occurs

when moisture laden warm air comes in contact with the cooler surfaces within the mine (Tr. 307, 308, 323). The Foster No. 65 Mine frequently experienced this problem during the hot summer months (Tr. 323).

Mr. George Rittenberger testified that the roof of the track haulage is comprised of dark shale over the Lower Kittanning coal seam, a material that often spalls during the hot summer months (Tr. 323). He testified that when spalling is observed, the affected area is scaled (Tr. 324), and that the day shift constantly examines the area for loose rock (Tr. 334). Experienced coal miners customarily check the roof, but scaling was noted only occasionally in reports filed prior to the order's issuance (Tr. 336-37, Exh. OX-6). Although he expressed the opinion that visual observation from an open track jeep was sufficient to determine the roof's status (Tr. 343), he pointed out a more regular inspection and removal procedure systematically conducted in some areas. He testified that more detailed inspections were carried out weekly or daily by the general foremen in areas of the track haulage where the danger of injury was greatest (Tr. 346-47). According to his testimony, the area of regular inspection extended from the mantrip unloading point to the supply station, a distance of approximately 600 feet encompassing none of the 3,500 feet cited by the inspector (Tr. 346-49). According to his testimony, there was no regular inspection procedure for the 3,500 feet cited in the order (Tr. 347, 348-49).

The inefficiency of scaling as a tool in spalling control was highlighted by Mr. Rittenberger's testimony. He stated that the problem would persist until full implemention of a new program could be completed (Tr. 345-46).

Mr. Joel Dunmire, Respondent's safety director, attempted to explain the absence of recorded references to spalling. He testified that since spalling is a normal condition, the fire boss would not have noted it in his book (Tr. 353-54). The fire boss usually makes notations in his book of roof conditions adversely affecting safety (Tr. 353).

Assistant mine foreman Walter Vakulick, testified that this crew scaled the track haulage on the 600-foot section running between the supply base and the end of the track (Tr. 357). This was done almost daily (Tr. 355). But the 600-foot stretch in question did not encompass the entire 3,500 feet cited in the subject order (Tr. 357, 346-49). The 3,500-foot section ran from the northeast mains track switch to a point 200 feet inby the supply base.

The testimony of Mr. Rittenberger and Mr. Vakulick reveals an ambiguity regarding how much, if any, of the 600-foot section, which was subject to regular inspection, was encompassed by the 3,500 feet cited in the order.

The history of spalling, and the attempts to alleviate it, at the Foster No. 65 Mine was recounted in the testimony of Mr. Harold Dunmire. Mr. Dunmire had served as mine superintendent of the Foster No. 65 Mine between June 5, 1975, and June 1, 1977. He became president of Leechburg on June 1, 1977. Mr. Dunmire testified that spalling was a problem at the mine when he arrived in 1975 (Tr. 362). His first attempts to control the condition involved removal of the loose material, an expensive procedure that was ultimately discarded in favor of resupporting the roof (Tr. 362). These methods also proved inefficient (Tr. 362-63).

In 1976, the Respondent learned of a guniting procedure. Guniting involves the high-pressure spray application of Fiber-crete, a mixture of cement and 1-inch steel fibers of minute size, to the spalling surfaces (Tr. 365). The Fiber-crete forms a seal insulating the roof from moist air (Tr. 365). According to Mr. Dunmire, the guniting procedure was not implemented by the Respondent in 1976 because "we were in no shape to enter into a program like that" (Tr. 363). The Respondent reconsidered purchasing guniting equipment in the summer of 1977, and ultimately purchased a machine on October 20, 1977 (Tr. 363, Exh. OX-7). Respondent uses the machine only on the track haulage (Tr. 365), and it has proved successful in combatting spalling (Tr. 367-68).

The question presented is whether the above facts establish a violation of 30 CFR 75.202, which reads in pertinent part: "Loose roof and overhanging or loose faces and ribs shall be taken down or supported."

The Respondent argues that this language is similar to the language of 30 CFR 75.400 which requires that the condition has existed and that the operator has failed to correct it in a reasonable time before a violation can be found. Thus, the Respondent argues, the crux of a violation under 30 CFR 75.202 is the failure to promptly take down or support, or undertake to take down or support, loose roof which is already in existence. The Respondent casts the critical issue as whether remedial action was taken promptly when the operator knew or should have known of the violation (Respondent's Post-Trial Brief, pp. 25-26).

Even assuming the accuracy of the Respondent's theory, I find the evidence sufficient to establish a violation of 30 CFR 75.202. The evidence establishes (1) the existence of loose roof material in various locations in the 3,500 feet of track haulage, (2) reason to know of the condition's existence, and (3) failure to take prompt and appropriate remedial measures within a reasonable time after the Respondent should have known of the existence of loose roof material.

The Respondent does not dispute the existence of loose roof material in various locations along the 3,500 feet of track haulage

cited in the subject order. The Respondent contends that remedial action was taken promptly after he knew or should have known of the conditions existence. The evidence does not support such contention.

The testimony establishes the presence of loose roof material in the track haulage area for a considerable time period prior to the order's issuance (Tr. 315). A preshift examination of the area had been made (Tr. 303).

The Foster No. 65 Mine had a history of spalling (Tr. 323, 362), with the safety director classifying it as "normal" (Tr. 353-54). Yet, in spite of a known history of spalling conditions at the mine, none of the employees charged with making inspections were required to note the condition in their reports. The fire boss was charged with the duty of conducting daily roof inspections (Tr. 353-54), but he was not required to note spalling in his record book (Tr. 353-54). In general, mine employees were not required to note spalling in their daily reports, although they occasionally noted the condition (Tr. 334, 336-37, Exh. OX-6).

The Respondent was aware of possible injuries resulting from falling roof material, but formulated and implemented a specific loose roof material inspection and removal procedure for only that portion of the track haulage presenting, in the Respondent's judgment, the greatest possibility of injury (Tr. 346-47, 348-49). A 600-foot stretch running from the supply base to the mantrip unloading point was regularly inspected (Tr. 346-49, 357). Conditions in the 600-foot section were so bad that scaling was required almost daily (Tr. 355). Yet in spite of this knowledge of the problem's extent, no regular spalling inspection and removal procedure was provided for the remaining portion of the track area cited in the order, except visual observations from open equipment traveling the track, even though the area served as the means of ingress for workers riding to the workplace in uncovered personnel carriers (Tr. 302-03).

Based on the Respondent's knowledge of both the history and extent of spalling problems at the Foster No. 65 Mine, and the Respondent's knowledge of the possibility of resulting injury from falling roof material, it cannot be said that the limited inspection and removal procedures employed at the mine were adequate.

The evidence also establishes the use of spalling control measures whose inadequacy was known to the Respondent (Tr. 345-46, 362-63) for at least 28 months prior to the order's issuance (Tr. 362). The inadequacy of scaling was known in 1975 (Tr. 362), yet it was still used in 1977. The Respondent learned of a potentially more efficient means of spalling control in 1976, but did not take serious steps to procure the more efficient system until the summer of 1977 (Tr. 363). The equipment had not been purchased on October 12, 1977 (Exh. OX-7), the date of the subject order. Therefore, the record

establishes the Respondent's knowing use of an inefficient spalling control procedures when a more efficient means was in existence.

I therefore conclude that the Respondent failed to take prompt and effective remedial action after he should have known of the spalling roof conditions in the 3,500 feet of track haulage.

(b) Gravity

Inspector Bates was unable to determine, at the time of the order's issuance, the precise number of workers exposed to the hazard of loose, spalling rock falling between the supports in the 3,500 feet of the track haulage area (Tr. 312, Exh. M-25). However, he estimated that at least two full crews per shift passed through the area (Tr. 303). Normally, there would be eight workmen per crew, making a total of 16 workers per shift who were exposed to the hazard (Tr. 303). Although these workers would normally travel in covered personnel carriers, the Respondent also used several open-type personnel carriers (Tr. 302-03). The passengers in the open equipment would have been exposed to loose roof material spalling between the supports (Tr. 303).

The inspector's personal knowledge of the mining industry led him to conclude that the condition was serious because he had known of several people receiving eye injuries from falling roof material in haulage areas (Tr. 304, 311). He was not referring to specific injuries at the Foster No. 65 Mine (Tr. 311).

I conclude that the violation was serious because workers could have received eye injuries from falling roof material while riding in open personnel carriers. I therefore find the violation to be of considerable gravity.

(c) Negligence

Mr. Rittenberger testified that workers had scaled the haulage area during the week previous to the order's issuance, but he had no written record of it (Tr. 331). He also testified that the day shift workers constantly scan the area for loose rock (Tr. 334), and that the area was checked more regularly than usual in high humidity (Tr. 335). This was done generally in open equipment traveling the track.

Inspector Bates testified that a preshift examination of the area had been made (Tr. 303). He expressed the opinion that the condition had developed over a period of time based on the amount of loose roof material that had fallen through the supports along the 3,500 feet of haulage road (Tr. 315). The inspector saw no one scaling prior to the order's issuance (Tr. 320).

Therefore, the Respondent demonstrated ordinary negligence in failing to discover and correct the loose roof material at various subject order.

(d) Good Faith

MSHA's exhibits establish that 1,300 feet of the cited track haulage area had been scaled within 24 hours of the order's issuance (Exhs. M-22, M-23). The order was terminated at 12:45 p.m. on October 17, 1977, after an inspection disclosed full abatement (Tr. M-24). The testimony of Mr. Rittenberger establishes that abatement was completed on Monday, October 17, 1977 (Tr. 339-40). He was unable to determine the precise number of manhours required to abate the order because much of the work performed between October 12 and October 17, 1977, went for the abatement of a notice written for clearance (Tr. 343-44). In addition to scaling, the Respondent installed approximately 200 additional roof bolts in the subject area (Tr. 344).

I therefore conclude that the Respondent demonstrated good faith in rapidly abating the violation.

Additionally, since the issuance of the order, the Respondent has purchased new spalling control equipment and is currently implementing a new spalling control plan (Exhs. OX-7, OX-8, Tr. 345-46, 364-68). A "Big Sam" Spray Applicator was purchased for $14,060.70 on October 20, 1977 (Exh. OX-7). The machine is used to apply Fiber-crete to roof surfaces, sealing out moisture (Tr. 365). Between November 3, 1977, and August 3, 1978, the Respondent purchased 324,500 pounds of Fiber-crete at a total cost of $16,937,26 (Tr. 366, Exh. OX-8). The application of Fiber-crete has proved successful in spalling control efforts in the track haulage areas of the Foster No. 65 Mine (Tr. 366-68).

(6) Order No. 7-0047 (1 JAB), November 30, 1977, 30 CFR 75.200

(a) Occurrence of Violation

MSHA inspector Jesse Bates arrived at Leechburg's Foster No. 65 Mine at approximately 7:30 a.m. on November 30, 1977, to conduct a spot health and safety inspection (Tr. 372). Mr. Joel Dunmire, Leechburg's safety director, and Mr. George Rittenberger, the mine superintendent, accompanied the inspector on his investigation (Tr. 372). The inspector issued the subject order, alleging a violation of 30 CFR 75.200.

The order was issued for the alleged failure to comply with Drawing No. 1 of the approved roof control plan (Exh. M-3) in an intersection in No. 4 entry, 1 Right section off 6 Right Mains in

that one diagonal of the intersection measured 37.5 feet and additional roof support had not been installed (Tr. 372-73, Exh. M-26, Exh. M-30).

The inspector testified that one diagonal measured 37.5 feet and the other measured 25.5 feet (Tr. 372-73). The intersection was in a 20-foot-wide place (Tr. 373-74). Drawing No. 1 of the approved roof control plan requires both diagonals of an intersection in a 20-foot wide-place to measure 32 feet or less (Exh. M-3). If either diagonal exceeds 32 feet, the approved roof control plan requires the installation of additional support in the form of either posts or cribs (Exh. M-3).

The Respondent offered no evidence negating the existence of a violaton, and concedes in his post-trial brief that a violation occurred (Respondent's Post-Trial Brief, pp. 31, 32).

I therefore find that a preponderance of the evidence establishes the Respondent's failure to install posts or cribs to reduce the diagonal length of a 20-foot-wide place to 32 feet in accordance with the approved roof control plan, and that such failure constitutes a violation of 30 CFR 75.200.

(b) Gravity

The inspector's visual observation and sounding of the roof revealed no defects. The roof did not sound drummy and there were no visual slips in the intersection (Tr. 381). The absence of visual slips and the sounding test indicated that the roof was satisfactory for at least 4 feet (Tr. 388). The inspector did not observe signs of stress on the roof or ribs, and observed no signs that the ribs were taking any weight (Tr. 383). Although he testified that he found no indications of possible roof fall developing (Tr. 383), he elected to classify the violation as serious (Tr. 380). Inspector Bates views all roof control violations as serious (Tr. 380, 384), but he admits to varying degrees of seriousness (Tr. 384-85).

The inspector did not test the torque of the roof bolts in the intersection because he did not deem it necessary (Tr. 386-87). The intersection in question was slightly staggered (Tr. 385-86). Although staggering often indicates poor mining practices (Tr. 386, 428), slight staggering can improve the roof's strength or stability (Tr. 385-86).

Mr. Rittenberger classified the roof conditions as "good" (Tr. 430). Inspector Bates refused to classify the roof conditions as "good" at the hearing, but he did so term it in his response to Interrogatory No. 83 (Tr. 381).

At least seven men were working on the section (Tr. 380, Exh. M-28).

The inspector testified that the 32-foot requirement in Diagram No. 1 of the approved roof control plan represents the maximum safe diagonal length, taking into account the stress of the overlying strata (Tr. 376).

Mr. George Rittenberger, the mine superintendent and a mining engineer (Tr. 185-86), testified that the intersection was as safe as one in full compliance with the roof control plan (Tr. 420). He testified that according to his calculations, embodied in Exhibit OX-12, the area of the cited intersection was less than the area of an intersection which fully complied with the roof control plan (Tr. 420-22). According to Mr. Rittenberger, the critical figure in roof support is the area to be supported (Tr. 420). Mr. Rittenberger calculated the area of the cited intersection as 956.25 square feet (Exh. OX-12, Tr. 420). He calculated that an intersection in full compliance would cover an area of 1,024 square feet (Exh. OX-12, Tr. 421). He testified that a comparison of the two figures revealed no perceptible difference in the area to be supported (Tr. 421-22).

I therefore conclude that the violation was of slight gravity.

(c) Negligence

Inspector Bates testified that the violation could be detected by visual observation (Tr. 383). The preshift examiner's dated initials were observed in the face areas of each working place in the section (Tr. 377). The inspector testified that he thought a current date was present on the face closest to the violation (Tr. 377).

The inspector estimated that the condition cited in the order had existed for at least one shift, and possibly longer (Tr. 377). Mr. George Rittenberger, the mine superintendent, testified that the violation probably occurred between 8 p.m., November 29, 1977, and 9:30 a.m., November 30, 1977 (Tr. 430-31). (See also, Exh. M-26). It was not a normal mine procedure to measure the diagonal distance at the intersections encompassed by Drawing No. 1 of the approved roof control plan (Tr. 427, Exh. M-3). Mr. Rittenberger stated that, to his knowledge, no one had measured the diagonal lengths at the intersection (Tr. 429). Temporary supports had not been placed on the previous shift to correct the condition because no one suspected that the diagonal length exceeded 32 feet (Tr. 429).

I find that the Respondent should have known of the violation existing in the intersection of No. 4 entry, 1 Right section off 6 Right Mains. The Respondent demonstrated ordinary negligence.

(d) Good Faith

The operator took immediate steps to abate the violation (Tr. 379, Exh. M-28). Three posts were installed to reduce the diagonal

width to 32 feet. It required approximately 5 minutes to correct (Tr. 387, 429).

I find that the Respondent demonstrated good faith in securing a rapid abatement of the violation.

C. History of Previous Violations

The history of violations at Respondent's Foster No. 65 Mine during the 2-year period preceding the issuance of the subject orders is summarized as follows (Exhs. M-1, OX-9, OX-10):

Violations	Year 1 10/29/75-10/30/76	Year 2 10/31/76-10/31/77	Totals
All Sections	62	45	107
Section 75.200	7	6	13
Section 75.202	2	1	3
Section 75.400	6	4	10
Section 75.403	5	10	15

(Note: All figures are approximations.)

The history reviewed below relates only to those violations for which a penalty has been paid.

One hundred seven violations of all sections were cited during the 2-year period prior to October 31, 1977, with 62 cited in year 1 and 45 cited in year 2. Thirteen violations of 30 CFR 75.200 were cited during the 2-year period preceding November 13, 1977, with seven cited in year 1 and six cited in year 2. Three violations of 30 CFR 75.202 were cited during the 2-year period preceding October 31, 1977, with two cited in year 1 and one cited in year 2. Ten violations of 30 CFR 75.400 were cited during the 2-year period preceding October 31, 1977, with six cited in year 1 and four cited in year 2. Fifteen violations of 30 CFR 75.403 were cited during the 2-year period preceding October 31, 1977, with five violations cited in year 1 and 10 cited in year 2.

D. Size of Operator's Business

The Leechburg Mining Company operates only one mine, the Foster No. 65 Mine (Tr. 440). Leechburg produced 255,758 tons of coal in 1975, 169,761 tons in 1977, and 142,140 tons in 1978 (Exh. M-2, Stipulation No. 6).

E. Effect of the Assessment of a Civil Penalty on the Operator's Ability to Continue in Business

The Respondent is subject to a maximum aggregate penalty assessment of $60,000 for the six subject violations. The Respondent,

through the testimony of company president Harold Dunmire, contends that a $60,000 penalty would jeoparize the Respondent's survival, considering the Respondents other financial obligations (Tr. 435-36). The Respondent anticipates difficulty in raising $60,000 within 30 days because the company's current financial posture renders doubtful the provision of the requisite monies by a lending institution (Tr. 445-46).

In addition to the testimony of company president Harold Dunmire, the Respondent offered a copy of the Respondent's tax return for the year ending June 30, 1978, and financial statements for the year ending June 30, 1978, in support of its position. The Respondent did not call an expert witness to assist in interpreting the tax return and the financial statements. Bearing in mind the limitations imposed by the lack of expert testimony, the following picture of the Respondent's financial condition was established by the evidence.

Leechburg Mining Company is owned by a small group of shareholders and is not part of a larger business entity (Tr. 437, 440). Eighty-two percent of the company's stock is held by the Mellon Bank on behalf of the Hick's estate (Tr. 438). The Bank administers the trust for the estate (Tr. 439). The beneficial interest in the trust is held by Lewis and Harry Hicks, the heirs of the Hick's estate (Tr. 438-39).

The company has approximately 80 employees (Tr. 432). It operates only one mine, the Foster No. 65 Mine (Tr. 440). The mine has two sections operating (Tr. 432). The company's coal production was lower during the year ending June 30, 1978 than during the year ending June 30, 1977, because of the United Mine Worker's strike in 1978 (Tr. 432-33). The company produces approximaely 900 to 1,000 tons of coal per day (Tr. 441). It is sold to Penelec at a price of $26.60 per ton, F.O.B. (Tr. 433, 441). The contract with Penelec expires on April 22, 1979. The company anticipates receiving a reduced price per ton after April 22 because the current prevailing market rate for coal is $22 to $25 per ton (Tr. 441).

The company has large obligations based on a settlement agreement with the Pennsylvania Department of Environmental Resources for reclamation of 130 acres of refuse area (Tr. 434). This reclamation is proceeding at the present time (Tr. 434). It costs $20,000 to $25,000 per month, and is projected to cost $1.3 million upon completion in 1981 (Tr. 435, 441-3, Exh. OX-13). According to Mr. Dunmire, the company lacks sufficient assets to fund this liability and must pay for it on a day-to-day, month-to-month basis out of net operating revenues (Tr. 434-35).

At a recent board of directors meeting, one director proposed closing the company, primarily in consideration of the obligations

to the Pennsylvania Department of Environmental Resources (Tr. 436). It was decided at that time to continue in business as long as sufficient revenue could be generated (Tr. 436).

Leechburg's U.S. Corporation Income Tax Return for the year ending June 30, 1978, shows a $257,236 loss for tax purposes (Exh. OX-15). The $257,236 loss was computed as follows:

Gross Income	
Gross receipts or Gross Sales	$3,883,699
Less: Cost of Goods Sold	3,534,850
Gross Profit	348,849
Interest	55,735
Gross Rents	5,810
Gross Royalties	5,082
Other Income	4,086
Total Income	419,562
Deductions	
Compensation to Officers	79,605
Salaries & wages (not deducted elsewhere)	9,901
Rents	690
Taxes	157,349
Interest	2,785
Depreciation	241,857
Depletion	662
Pension, Profit Sharing, etc. plans	73,107
Other Deductions	110,842
Total Deductions	676,798
Taxable Income	(257,236)
Tax	
Refunded	25,714

The financial statement for the year ending June 30, 1978 (Exh. OX-13), reveals the following information:

Balance Sheet

Assets	June 30, 1978	June 30, 1977
Total current assets	1,760,592	2,002,797
Mortgage Receivable	10,932	12,777
Annuity Contract	72,000	72,000
Fixed Asset-At Cost	1,948,592	1,762,846
	3,792,116	3,850,420

Liabilities

Total Current Liabilities	649,903	446,694
Deferred Compensation	72,000	72,000
Committments and Contingencies (note c)	--	--
Stockholders Equity		
Capital stock par value $5 per share- 20,000 shares authorized & issued	100,000	100,000
Capital contributed in excess of par value	38,675	38,675
Retained Earnings	2,931,538	3,193,051
	3,070,213	3,331,726
	3,792,116	3,850,420

Statement of Earnings and Retained Earnings	1978	1977
Revenues	3,954,413	5,484,939
Costs and Expenses	4,217,634	4,790,494
(Loss) earnings before income taxes	(263,221)	694,445
Income Taxes	(1,708)	88,243
(Loss) Earnings for Year	(261,513)	606,202
Retained earnings-beginning of year	3,193,051	2,686,849
Cash dividends paid	--	(100,000)
Retained earnings-end of year	2,931,538	3,193,051
(Loss) Earnings per share	($13.08)	$30.31

Statement of Changes in Financial Position	1978	1977
Working capital at beginning of year	1,556,103	971,440
Working capital at end of year	1,110,689	1,556,103
(Decrease) Increase in working capital	(445,414)	584,663

Cost of Operations (Years ended June 30)	1978	1977
	3,737,349	4,335,249

Fixed Assets & Accumulated Depletion & Depreciation

	Balance July 1, 1977	Additions	Deductions	Balance June 30, 1978
Fixed Assets	4,659,000	433,546	24,263	5,068,283
Accumulated Depletion & Depreciation	2,896,154	246,365	22,828	3,119,691

The land reclamation expenses are not covered in the financial statements (Tr. 443). Reclamation expenses currently run between $20,000 to $25,000 per month (Tr. 435). This translates into yearly expenses ranging between $240,000 and $300,000.

The financial statement (Exh. OX-13) reveals assets valued at $3,792,116 for the year ending June 30, 1978, a $58,308 decline from the $3,850,420 figure for the year ending June 30, 1977. Total current liabilities increased from $446,694 to $649,903 during the same time period, while retained earnings declined from $3,331,726 to $3,070,213 (Exh. OX-13).

Revenues declined from $5,484,939 in the year ending June 30, 1977 to $3,954,413 in the year ending June 30, 1978 (Exh. OX-13), while costs and expenses failed to decline at the same rate (Exh. OX-13). This resulted in a $261,513 loss for the year ending June 30, 1978, as opposed to the $606,202 profit for the year ending June 30, 1977.

It is impossible to determine, on the basis of the information supplied, whether the loss experienced in the year ending June 30, 1978, is attributable to such unforeseen and nonrecurring activities as the 1978 United Mine Workers' strike (Tr. 432-3), or whether it indicates long term financial problems. The Respondent offered no evidence, other than the deleterious effects of the strike, which would have explained the decline in revenues reflected in the financial statements, a decline responsible for the loss experienced during the year ending June 30, 1978. It appears, however, that the Respondent's financial posture, when viewed in light of total assets and retained earnings, is sufficiently secure to withstand the assessment of moderately appropriate civil penalties.

F. Conclusions of Law

1. The Leechburg Mining Company and its Foster No. 65 Mine have been subject to the provisions of the 1969 and 1977 Acts during the respective periods involved in this proceeding.

2. Under the Acts, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to this proceeding.

3. The violations charged in the six subject orders are found to have occurred as alleged.

4. All of the conclusions of law set forth in Part V, A through E of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

Both MSHA and Leechburg submitted posthearing briefs. Leechburg also submitted a reply brief. Such briefs insofar as they can be

considered to have contained proposed findings and conclusions have been considered fully, and expect to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Order No.	Date	30 CFR Standard	Assessment
7-0032 (1 GFM)	10/06/77	75.200	$ 600.00
7-0033 (1 JAB)	10/03/77	75.403	400.00
7-0035 (1 JAB)	10/06/77	75.400	850.00
7-0036 (1 JAB)	10/11/77	75.400	500.00
7-0038 (1 JAB)	10/12/77	75.202	700.00
7-0047 (1 JAB)	10/30/77	75.200	300.00
			$3,350.00

ORDER

The Respondent is ordered to pay the penalty assessed in the amount of $3,350.00 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Issued: June 27, 1979

Distribution:

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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

June 27, 1979

C F & I STEEL CORPORATION, Applicant	:	Application for Review
v.	:	Docket No. DENV 78-417
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Maxwell Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. DENV 79-127-P A/C No. 05-02820-03001
v.	:	
C F & I STEEL CORPORATION, Respondent	:	

DECISION

Appearances: Richard L. Fanyo, Esq., Welborn, Dufford, Cook and Brown, Denver, Colorado, for Applicant/Respondent; Robert A. Cohen, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, for Respondent/Petitioner.

Before: Judge Littlefield

Introduction

This is a combined application for review and proceeding for assessment of civil penalty which is governed by sections 107(e)(1) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (1977 Act). Section 107(e)(1) provides in relevant part:

> Any operator notified of an order under this section or any representative of miners notified of the issuance,

modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

Section 110(a) provides:

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.

Alleged Violation

On May 8, 1978, Applicant/Respondent, C F & I Steel Corporation (CF&I), filed for review of Order of Withdrawal No. 387928 dated April 26, 1978. On January 8, 1979, the Mine Safety and Health Administration (MSHA), through its attorney, filed a petition for assessment of a civil penalty charging one violation of the Act. Said were consolidated for hearing.

Tribunal

Hearings were held in Denver, Colorado, on February 28, 1979, at which both MSHA and CF&I were represented by counsel. Thereinafter, posthearing briefs were submitted.

Evidence

1. Stipulations: Testimony

A. The Maxwell Mine is subject to the 1977 Act (Tr. 3).

B. The Judge has jurisdiction to hear this matter (Tr. 3-4).

C. The mine employed between 25 and 28 miners (Tr. 9).

D. Daily production was about 300 tons (Tr. 9).

E. Payment of a reasonable penalty would not put the company out of business (Tr. 9).

F. There was a good faith abatement of the cited conditions (Tr. 9).

2. Stipulations: Exhibits

A. Government Exhibit No. 1, a copy of Order of Withdrawal No. 387928, issued April 26, 1978, at 1:40 p.m. and terminated at 3:20 p.m. (Tr. 7; Govt. Exh. No. 1).

B. Government Exhibit No. 2, a copy of a map of the Maxwell Mine, dated January 4, 1979, received by MESA 1/ at the Denver Office on February 8, 1979 (Tr. 7; Govt. Exh. No. 2).

C. Government Exhibit No. 3, a copy of a dust sampling report, received from the MESA lab from a sample taken at the time the order was issued (Tr. 7; Govt. Exh. No. 3).

D. Government Exhibit No. 4, a computer printout from the Office of Assessments, showing the operator, the mine and the previous history of violations for the 24-month period prior to the issued order (Tr. 7; Govt. Exh. No. 4).

E. CF&I Exhibit No. 1, a map showing the area which is subject to the withdrawal order (Tr. 7; CFI Exh. No. 1).

3. Exhibits on Testimony

A. Government Exhibit No. 5, the inspector's statement (Tr. 98-99; Govt. Exh. No. 5).

B. CF&I Exhibit No. 2, a report from graveyard foreman of duties and reply by Mr. George Argurello identified by Mr. Massarotti (Tr. 163-170; CF&I Exh. No. 2).

4. Testimony

A. Inspector Lawrence Rivera

Exclusive of stipulations, the Government initiated its case through the testimony of inspector Lawrence Rivera, a duly authorized representative of the Secretary (DAR) for 7-1/2 years (Tr. 10).

1/ Statutory predecessor-in-interest to MSHA.

Therein, he testified, in relevant part, that he was on a regular health and safety inspection at the Maxwell Mine (Tr. 11-12). He stated that he had completed an investigation of the face area at Unit No. 1, approximately 3,000 feet from the portal (Tr. 14). He determined to return along the belt entry. Approximately 300 feet from the coal pocket, a point which transfers coal from one belt to another (Tr. 14-16), he encountered a substantial amount of float coal dust (Tr. 17-18). After proceeding approximately 50 more feet, he concluded that he would not go on (Tr. 17-18). The area had gotten darker and darker, such that he was unable to see more than 4 or 5 feet ahead (Tr. 18). There was some dust sticking to the roof and ribs and some on top of the water in the entry (Tr. 19). He was unable to tell whether the area had been rock dusted as it was too dark to see (Tr. 19).

After he asked a CF&I employee to shut the belt off so that he could determine what action was appropriate (Tr. 19-20), he waited about 15 minutes before proceeding to the pocket area (Tr. 20).

He described the belt pocket conditions as consisting of a 12-foot accumulation at the end of the tail of the belt. The material measured 24 inches in depth, approximately uniform for the 12-foot distance (Tr. 21). The roof and ribs were black. There was a little float coal dust in suspension (Tr. 21).

The belt rollers were running in the fine coal dust and the belt was warm to the touch and, in fact, the belt was starting to get hot (Tr. 22).

The inspector did not observe any water sprays at the coal pocket (Tr. 22-23). The belt was in good shape (Tr. 23). The only thing that he was told about how the problem was started was that the accumulation had started to build up 3 hours prior to the incident (Tr. 23).

The inspector took a sample from under the belt because he felt it was creating the float coal dust (Tr. 24). Government Exhibit No. 3 was identified as a report on the above-noted sample (Tr. 24-27; Govt. Exh. No. 3).

There was water in the coal pocket, but not where the coal dust was accumulating (Tr. 27). The condition of the material was dry and black (Tr. 28). The mine regularly emits methane (Tr. 28).

Sources of ignition included the rollers and the possibility of flaws in the electrical cables (Tr. 29). He issued the order because he was concerned for a possible explosion (Tr. 29). With any little spark or hot roller or belt roller with float coal dust in the area, an explosion could have occurred which would have gone to the face area (Tr. 29). There were men who regularly worked in the face area (Tr. 30).

A Mr. Pugnetti told Inspector Rivera that he had known of the condition for about 3 hours, but that he did not realize that it had built up so fast (Tr. 31).

He characterized the float coal dust as the worst he had seen (Tr. 32). He believed that adequate dust to constitute an imminent danger, existed when he could not walk through and see with his light (Tr. 32).

Though he considered the conditions collectively prior to issuance of the order (Tr. 34), he did not know whether the operator had a cleanup program, nor whether rock dusting was regularly done (Tr. 34).

He was told that the operator intended to take care of this at the beginning of the afternoon shift, but the inspector believed that an imminent danger already existed (Tr. 35). He characterized the condition cited as very serious (Tr. 35). The operator knew of the condition based on the statements made.

There was no evidence that the operator had done any cleanup in that particular area (Tr. 37).

With respect to abatement, there was the following colloquy:

(By Inspector Rivera):

A. They immediately started some men on it to clean up the area, and when the day shift went out, they brought the day shift in and they immediately took steps towards correcting the condition.

(By MSHA counsel, Mr. Cohen):

Q. How did they abate the condition of spillage along the belt?

A. They removed all the fine coal dust from under the belt and put it on one side, and they rock dusted the area approximately 300 feet, and then loaded the fine coal dust on the belt after it was removed from under the belt.

Q. How many men did it take?

A. They took two men immediately, and after that, I counted four there at all times, and at times I believe there was more there because they were all trying to work together.

Q. How about along the main belt entry inby from the coal pocket, what did they do to abate the conditions in that area?

A. They applied some additional rock dust on to it.

Q. Did your observe them doing this?

A. Yes.

(Tr. 38).

Q. (By Mr. Cohen) Just tell us what the operator did to abate the condition in the main belt outby from the coal hopper or inby from the coal hopper?

A. Like I said, they removed all the fine coal and coal dust from under the belt and moved it over to a site, because they asked me if they could use a belt and load directly into the belt, and I said no. They would have to remove it over to the side and then they could load it onto the belt.

Q. And this was in the belt entry itself?

A. Under the pocket. That is where the condition existed for the fine coal and coal dust.

(Tr. 39).

Q. But the float coal dust was in the belt entry?

A. Yes.

Q. And in that area, I think you previously said they basically rock dusted?

A. Rock dusted the whole area.

Q. After they went through this abatement procedure, did you walk through the entire area?

A. That's right.

Q. Did you decide the conditions were abated?

A. Yes.

(Tr. 40).

Inspector Rivera further testified on cross-examination that he did order the belt shut off, but did not issue the withdrawal order at issue at that time (Tr. 47).

The inspector reiterated his conclusion, that some time had passed, because the coal had been pulverized (Tr. 55, 57). He made no checks of the electrical equipment in the pocket to see if there were faults (Tr. 59). He was aware of instances where there have been friction-caused explosions (Tr. 61). The area was not wet next to the belt, despite sloping of the floor (Tr. 62). There was no methane present when the inspector did his methane check (Tr. 66).

The inspector was unsure whether he was going to issue an order or notice when he told the company to turn off the belt (Tr. 70). He reiterated that he went into the pocket to see what was creating the dust (Tr. 71).

At the point when he ordered the belts stopped, he was aware that there were electrical sources in the pocket, including a pump (Tr. 71-72). The inspector did not believe that his original order to turn off the belt was the imminent danger order herein at issue (Tr. 73).

During the cleanup, which took about 55 minutes (Tr. 75-80), he was in the general vicinity of the pocket (Tr. 80).

The inspector further testified that a ventilation door was closed rather than opened, thus affecting the flow of air (Tr. 84-85). Had the door been open, the explosion would have taken the shortest way, out of the exhaust shaft, and thus not encountered any people (Tr. 87).

The inspector believed that the dust had only traveled 300 feet because there is less ventilation on the belt than in the intake entries (Tr. 91).

The inspector again testified on redirect examination that his imminent danger order was not issued until he had gathered further information from the pocket (Tr. 97). He asked management to shut off the belt so that he could see what he was doing (Tr. 98). He believed that the alleged violation was significant and substantial and marked it as such on Exhibit No. 1 (Tr. 103; Govt. Exh. No. 1).

B. Robert D. Vigil

MSHA's second witness was Robert David Vigil, a coal miner who worked at he Maxwell Mine and served as a safety and pit committee representative (Tr. 104). He testified that the belt area had to be ventilated and bled to prevent a methane buildup (Tr. 107). The company did not have a man assigne to be just a belt cleaner (Tr. 109).

He also previously observed float coal dust during the time in question (Tr. 109-110). The color of the area was black (Tr. 110). He observed between four and six people working on the cleanup (Tr. 110). He had previously observed black entry conditions and brought them to management's attention (Tr. 111-112).

When he arrived at the pocket 10 or 15 minutes after 3 o'clock, he did not observe float coal dust in the atmosphere (Tr. 113). The operator hauled a lot of rock dust to pursue the abatement (Tr. 115). He did not know whether the door in question was open or shut (Tr. 117-118).

C. Frank Perko

CF&I initiated its case through the testimony of Mr. Frank Perko, who served as a mine safety inspector at the CF&I mine (Tr. 121). He had served in that capacity for 1-1/2 years with 7 years prior to that as an engineer's helper (Tr. 121).

He provided detailed testimony as to the nature of the belt system in the mine (Tr. 122-126). At the pocket in question at about 10:30-11 o'clock (Tr. 126), he found coal spillage, two piles at the tail of the roller, approximately a foot in diameter by 6 inches deep (Tr. 127). Otherwise, every thing looked all right in the pocket area (Tr. 127-128). He informed the general mine foreman of the stated condition (Tr. 128). Apparently, nothing was done to remedy the condition (Tr. 127-128).

He attended Mr. Rivera at the pocket where he observed another pile of coal which was not previously there. It appeared to have been caused by a side rubber becoming unfastened (Tr. 130).

He did not see any dust in the atmosphere (Tr. 132). He observed water generally flowing under the belt with a slight slope in the concrete floor toward the pump in the pocket (Tr. 132-133).

The cleanup was initiated through the use of a 1-inch hose and shoveling (Tr. 135-136). As it was mixed with water, he was unable to tell how much coal there was when they finished piling it up (Tr. 136).

On cross-examination, Mr. Perko conceded that the absence of water sprays in the pocket could create a dust control problem if it was not watched by the fire boss (Tr. 143). He conceded as well that there had been a change in the color of the roof and ribs from a grayish color when he had been through in the morning (Tr. 145-146).

The coal that was on the rollers was a fine coal (Tr. 149-150). He was not present when rock dusting was done (Tr. 153).

A discussion ensued between counsel on the admissibility of testimony with reference to the extent of the area of belts shut down (Tr. 156-158). The Judge ruled that testimony with respect to the entire belt was admissible (Tr. 158), considering that it was all shut down (Tr. 157) and the fact that there was an imminent danger order issued (Tr. 158).

D. Florie Massarotti

CF&I's final witness was Florie Massarotti, general mine foreman at the Maxwell Mine (Tr. 163). He had previously served as dust mine inspector for CF&I for 3 years (Tr. 163-164). He testified as to the contents of Respondent's Exhibit No. 2 (Tr. 164-170), which was admitted (Tr. 170; CF&I Exh. No. 2). 2/

On the day in question, the witness was called by Mr. Richard Oxford, who was the person who was conducting the preshift examination for the second shift which was due at 3 o'clock (Tr. 171). Mr. Oxford stated on the phone to Mr. Massarotti that Mr. Rivera wanted the belt turned off. Mr. Rivera spoke to the witness and stated that coal had spilled into the pocket (Tr. 171).

The witness stated that he believed, based on the spacing of phone calls, that it took two men 7-1/2 minutes to shovel all the spilled coal onto the belt (Tr. 175-176).

With reference to the door being opened, he stated that the door must have been open because there were no accumulations of methane which there would have been had the door been closed (Tr. 177-179).

On cross-examination, the witness admitted that there were times when loose coal or float coal or dust did accumulate on the framework of the belt, but such was washed off (Tr. 181-182).

He was not sure whether they had water sprays at the pocket because they had only been in operation 30 days (Tr. 183). He believed the first shift foreman would have begun the cleanup, however, he was not sure. If he intended to clean it up, he would have been there at the time the inspector wrote the order (Tr. 184).

Mr. Oxford mentioned to the witness that the dust in the atmosphere was not bad enough to require a belt shut down (Tr. 187).

2/ Said exhibit purports to show in relevant part that the area in question was rock dusted on the graveyard shift the night before the order (Tr. 165).

Issues Presented

1. Whether the conditions observed and known by Inspector Rivera on April 26, 1978, at the Maxwell Mine were such as to support the issuance of a section 107(a) withdrawal order.

2. Whether the aforementioned conditions constitute a violation of 30 CFR 75.400.

3. Assuming a violation of 30 CFR 75.400 is established, what is the appropriate civil penalty?

Discussion

A. Imminent Danger; Time and Place

Section 107(a) of the 1977 Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The cognate provision of the Federal Coal Mine Health and Safety Act of 1969, P.L. 91-173 (December 30, 1969) (1969 Act), section 104(a), provides:

> If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

There are no substantive distinctions in the causes for issuance of orders on the face of the two statutory sections, nor are there

differences in the definitions of "imminent danger" provided by the two Acts. Compare section 3(j) (1969 Act), with section 3(j) (1977 Act). Therefore, previous judicial construction of the concept of imminent danger under the 1969 Act controls the construction of the same concept under the 1977 Act, exclusive of the carry-over provision, section 301, of the 1977 Act.

The purpose of the imminent danger withdrawal order is to assure that miners will not carry on routine mining operations in the face of imminent danger. Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974). Imminent danger also requires that the condition or practice observed could reasonably be expected to cause death or serious physical injury. Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974). However, the term is not confined to situations of immediate danger. Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975). Finally, it has been held that situations involving accumulations may rise to the level of an imminent danger justifying a withdrawal order. Id.; Freeman, supra.

In assessing the existence of such a danger, it is also noted that Respondent must prove the absence of an "imminent danger." Old Ben, supra.

One aspect of Respondent's attack on the order, is alleged confusion on the part of the inspector as to when the 107(a) order was issued (Brief of CF&I at 5-6). As asserted by CF&I, the inspector allegedly concedes that he did issue his order when he initially required that the belt be stopped (Tr. 46-47).

I conclude that the evidence does not support the assertion. The inspector stated specifically that he did not issue his "withdrawal order" at the time of the belt stoppage (Tr. 47, 97), and that he was not sure what enforcement action was warranted, if any, at the time of the stoppage (Tr. 70-71). The alleged ambiguity found by CF&I (Brief of CF&I at 5), is purely linguistic, not conceptual, and substantially reflects the clever phrasing of the question on cross-examination (Tr. 46-47).

Lurking behind CF&I's argument is the theory that every instructional action of the inspector is an enforcement action cognizable under the Act, 3/ at least when an order follows. Thus, the focus on propriety would be limited to what the inspector knew at the time

3/ It is doubtful that CF&I would really like to see such a construction as civil penalties are mandatory for violations of any provision of the Act and mandatory safety or health standard. Section 110(a), supra.

of the belt stoppage. Such an analysis would tie the inspector's hands as he were caught between Scylla and Charybdis--the rock and the hard place. He would either issue the order too soon and lack supporting evidence, or wait too long until he could be sure of factual and legal foundations, running the risk of injury to himself or others.

Undoubtedly, there has to be some authority on the part of the inspector to order reasonable actions which are not enforcement actions. Such an area of discretionary power is the rough equivalent of a "Terry stop." See Terry v. Ohio, 392 U.S. 1 (1968). Such residual authority to issue a fundamentally nonrestrictive request/order must be an implied authority of the inspector for him to perform his inspection function. Clearly, an inspector has the inherent authority to request/order an operator to turn off the power on a cutting machine to inspect a trailing cable, pursuant to 30 CFR 75.600 et seq., or to check other electrical equipment. 30 CFR 75.500 et seq. In the instant case, the inspector had to request that the belt be turned off so that he could contrive to inspect it (Tr. 17-20, 98). Certainly, CF&I would not expect the inspector to check the temperature of the belt rollers when the belt was running.

That it took 15 more minutes for the inspector to continue his inspection is indicative of the seriousness of the dust problem. It does not change the point of issuance of the withdrawal order.

I conclude that the request/order to stop the belt was an order based on the residual power of the inspector to issue orders pursuant to the many necessary steps in the conducting of his investigation. See Terry, supra. I further conclude the proper factual focus is the cumulation of information which the inspector had prior to the issuance of the withdrawal order.

B. Adequacy of the Notice Provided by the Order

CF&I also argues that the evidence of dust down entry No. 8 (belt No. 2) must be disregarded as such was not referred to on the face of the order (Brief of CF&I at 3-4). The essence of the argument is that CF&I lacks adequate notice of the conditions charged and that other interested parties, miners' representatives, state officials, and others, were also deprived of that notice (Tr. 38-40; Govt. Exh. No. 1).

In support of its argument, on the required notice, CF&I cites Armco Steel Corporation, 8 IBMA 88 (1977) (Armco I). I conclude that Armco I is factually distinguished in that the order cited therein provided no description of the conditions or practices constituting imminent danger. Id. at 96. Here, we have such a description, "coal, coal dust, and float coal dust were present at the hopper * * * Such a description notifies both CF&I and others

interested, that float coal dust is involved. One of the characteristics of "float" coal dust is that it floats with the direction of the ventilation. As the intent of Armco I and II was to give notice of the generalized problem to miners' representatives, state officials and others, and as float coal dust is not static, the order is reasonably construed as giving adequate notice of the general extent of the problem to third parties.

Further, CF&I states that there is a due process notice problem in the order and that such problem was the concern of Armco I (Brief of CF&I at 4). Assuming, arguendo, that CF&I was right in that it really did not know that the order which shut down the whole main belt would involve consideration of dust on the whole main belt (Tr. 156-158; Govt. Exh. No. 1), CF&I still has not demonstrated a due process problem with the notice received. The order is not a pleading in the case, it was not drafted for the purpose of defining the full and complete extent of MSHA's case at a hearing. As CF&I has argued, supra, that the order was issued when the belt was first stopped, it is clearly on actual notice of the presence of dust in the No. 8 entry (belt No. 2). If CF&I had a question as to the extent of the issues to be addressed by its application in this case, it had only to file for a bill of particulars or pursue discovery. Failure to so act constitutes a waiver of its argument on lack of notice. See Mathies Coal Company, PITT 77-39-P (May 5, 1978) at 8-10.

C. Factual Support for the Order

Prior to the issuance of the order, the inspector knew that 300 feet or so from the belt pocket there was a sufficient accumulation of float coal dust to lower vision to 4 or 5 feet (Tr. 14-18). There was dust sticking to the roof and ribs and some on top of water in the entry (Tr. 19). The belt pocket revealed a 12-foot long accumulation of coal at the end of the tailpiece approximately 24 inches deep (Tr. 21). The roof and ribs were black and there was a little float coal dust in suspension (Tr. 21). The belt rollers were running in fine coal dust and the belt was warm to the touch and, in fact, getting hot (Tr. 22). There were no water sprayers in the pocket (Tr. 22-23).

The inspector believed ignition was possible from the roller belts or flaws in the electrical cables (Tr. 29). The inspector was aware of men regularly working in the face area (Tr. 30).

The inspector was told by Mr. Pugnetti that Mr. Pugnetti had been aware of the condition for about 3 hours, but did not realize it had built up so fast (Tr. 31). The inspector was not aware of any defects in the electrical equipment nor was methane found to be present (Tr. 59, 66).

He was also aware that a ventilation door was closed which would have prevented an explosion from taking the shortest way out of the mine, which way would have avoided the men at the face (Tr. 84-85, 87). Mr. Vigil supported the inspector's testimony as to the black color of the area (Tr. 110).

Mr. Perko stated that he was aware of the coal spillage between 10:30 and 11 o'clock (Tr. 127), thus supporting the inspector's testimony as to knowledge of the operator. He did not, however, see dust in the atmosphere (Tr. 132). He did see a blacker area than when he had passed through in the morning (Tr. 145-146) and also saw fine dust on the rollers (Tr. 149-150).

Mr. Massarotti indirectly supported the inspector's testimony as to atmospheric dust when he related Mr. Oxford's conclusion that there was not enough dust in the atmosphere to warrant a shut down (Tr. 187).

The only testimony of the inspector which was controverted by eyewitness accounts, is his statement that there was float coal dust in the pocket. Mr. Perko did not see dust (Tr. 132). However, the fact that the color of the area was black proves that there had been float coal dust. I conclude that the weight of the evidence establishes the presence of float coal dust in the atmosphere when the order was issued. Had the belt been turned on before cleanup, more would have been added. As there was accmulated coal 24 inches deep for 12 feet, and as the belt was hot and would have gotten hotter if the belt were reactivated prior to cleanup, there was a substantial potential for an explosion. Zeigler Coal Company, 6 IBMA 132, 136 (1976). I further conclude that the existence of apparently permissible electrical equipment (Tr. 59) was not a source of potential ignition.

I conclude that the likely direction of an explosion was toward the face area, due to the ventilation door being closed. I conclude that the door was closed due to the uncontradicted, positive testimony of the inspector. The inspector's testimony was corroborated by the drifting of float coal dust 300 feet up toward the face area from the pocket. The contrary, fully rational, speculation of Mr. Massarotti is not persuasive (Tr. 177-179) in light of the above.

As explosions can cause death or serious physical injury and as there was a reasonable possibility that an explosion could have occurred due to the presence of loose coal, dust and a hot belt, I conclude that CF&I has failed to prove the absence of an imminent danger. The order is upheld.

D. Existence of a Violation of 30 CFR 75.400

The violation charged, 30 CFR 75.400, provides:

§ 75.400 Accumulation of combustible materials.

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

Under section 301 of the 1977 Act, the interpretation of the regulation is controlled by Old Ben Coal Company, 8 IBMA 98 (1977). As noted by MSHA, the case is currently being addressed by the Federal Mine Safty and Health Review Commission (Brief of MSHA at 5).

At a minimum, there must be an accumulation of coal to warrant a finding of a violation. Such has been found. See, supra.

Further, it is argued that MSHA must show notice of the accumulation. Mr. Perko testified that he had seen two piles of coal at the pocket, each 1 foot in diameter, and 6 inches deep (Tr. 127). While such might not be substantial enough to be considered an imminent danger, it still constitutes an accumulation of which CF&I had notice for purposes of the mandatory standard (Brief of CF&I at 10). As this inspection by Mr. Perko revealed the presence of an accumulation, CF&I had actual knowledge of its existence for 2-1/2 to 3 hours (Tr. 127-128). As Old Ben, supra, requires an effective cleanup program, it is difficult to see how CF&I can demonstrate that effectiveness with the passage of time involved here and the knowledge available.

Further, CF&I shows knowledge of the limitations of its cleanup system when Mr. Perko conceded that absence of water sprays could create a dust control problem if the area was not watched by the fire boss (Tr. 143).

As accumulations are more dangerous when they are fine and dry, and as CF&I knew that these small piles existed, CF&I had a higher standard of care for cleaning up small piles of dust than it would have if it was providing a sprayer.

The requirement of a more immediate response to even small accumulations is further supported by the fact that no one was assigned as a designated belt cleaner who would have had the specific job to look for accumulations (Tr. 109). The weakness of the cleanup system is shown by the failure to respond to an identified accumulation which later rose to the level of an imminent danger.

I conclude that MSHA has demonstrated CF&I's failure to conform with 30 CFR 75.400 as construed by Old Ben, supra. 4/

E. Penalty Criteria

Assessment of a civil penalty, upon the finding of a violation, is mandatory. Section 110(i) of the Act provides the following criteria for de novo 5/ review:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission 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 person charged in attempting to achieve rapid compliance after notification of a violation.

1. History of Previous Violations

Respondent has been shown to have violated 30 CFR 75.400 only once in the 2 years preceding the order (Govt. Exh. No. 4). However, such violation also involved an imminent danger withdrawal order. The relative seriousness of such an order, combined with the 124 total violations for the period (Govt. Exh. No. 4), leads me to conclude that CF&I does have a history of violations sufficient to increase the size of a penalty.

2. Size of Business

The mine employed between 25 and 28 workers and produced approximately 300 tons daily (Tr. 9). I conclude, therefrom, that the mine was medium in size.

3. Ability to Stay in Business

A stipulation was entered that a reasonable penalty would not put the operator out of business (Tr. 9). As the operator introduced nothing to demonstrate that the imposition of a maximum penalty for a single violation would affect the operator's ability to stay in business, and as the mine is of medium size, I conclude that

4/ Pursuant to this conclusión, it is not necessary to address the issue of whether a penalty could be imposed for a violation of section 107(a) absent a finding of a violation of 30 CFR 75.400.
5/ See Shamrock Coal Company, Docket No. BARB 78-82-P et seq. (FMSHRC, June 7, 1979).

a maximum penalty is a reasonable penalty and would not affect the operator's ability to continue in business. See Hall Coal Company, 1 IBMA 175, 179-182 (1972).

4. Good Faith

It was also stipulated that the operator acted in good faith in abating the cited conditions (Tr. 9). Such is accepted (Tr. 38-40).

5. Gravity

By virtue of the affirmance of the order charging imminent danger, the condition cited must be and is construed as inherently grave.

Further significant in terms of gravity, is the very real likelihood of an explosion. The inspector testified that the belt was running in fine coal dust and was warm and starting to get hot (Tr. 22). It appears that the inspector misspoke himself. As the belt had been off for 15 minutes or more prior to his touching the roller and belt (Tr. 20), they both had had that amount of time to dissipate heat. Thus, the condition was even more serious than the inspector stated because the belt and rollers would have been hot, thus increasing dramatically the likelihood of a spark which could have created an explosion. As the float coal dust in the atmosphere was extremely heavy as far as 300 feet down the belt (Tr. 18, 32), and the coal in which the belt was running was dry (Tr. 22-23, 28), and black (Tr. 28), and fine (Tr. 22, 149-150), the likelihood of an actual explosion was much greater than in the normal accumulation situation where relatively large chunks of damp coal might be found.

I conclude that the situation would have been extremely grave, due to the nature of the threat (explosion), the possible victims (men at the face), and the likelihood of occurrence (dry fine coal dust in suspension accumulated for 12 feet, 2 feet deep exposed to a hot belt).

6. Negligence

The problem of negligence is first addressed in terms of the knowledge of the two small accmulation piles (Tr. 127). The fire boss' knowledge is clearly imputed to the operator. Pocahontas Fuel Company, 8 IBMA 136 (1977), aff'd sub nom. Pocahontas Fuel Company v. Andrus, 77-2239 (4th Cir., filed January 8, 1979). Further, this problem was known to the general mine foreman for 2-1/2 to 3 hours (Tr. 127-128). Mr. Massoratti testified that if the shift foreman had intended to clean up the accumulation, he would have been in the pocket when the inspector arrived (Tr. 189).

There is no evidence that the shift foreman was there when Inspector Rivera arrived. Therefore, it is not possible to infer that the accumulations would have been discovered if there were no Federal inspection. Given the fact that dust had accumulated slowly down 300 feet of the belt way, the belt and/or rollers must have been running in coal sometime. The operator knew of the dry coal conditions (Tr. 143), knew of two piles of coal being formed (see, supra), had 3 hours to act on the piles (Tr. 127), failed to find or act upon 300 feet of heavy, suspended coal dust during the period when such conditions developed, which must have taken some time, perhaps almost 3 hours, as the coal was pulverized (Tr. 91), and failed to find or act upon the accumulation which caused the coal dust during that same time (Tr. 21). The conditions of which the operator was specifically aware, dry coal and two small piles of loose coal, should have put it on inquiry notice to at least pass through the area within the 3 hours and keep a check on the accumulations. I therefore find that the operator was grossly negligent, even though it was not aware of the alleged specific cause of the spilling coal, to wit, a side rubber unfastening (Tr. 130).

Findings of Fact

Upon consideration of the entire record, I find:

1. The Judge has jurisdiction over the subject matter and parties in this proceeding;

2. The preponderance of the evidence establishes the fact of violation of 30 CFR 75.400;

3. CF&I has failed to rebut the inspector's finding of imminent danger. Therefore, an imminent danger existed on April 26, 1978, at CF&I's Maxwell Mine as cited in Order No. 387928;

4. CF&I has once previously violated 30 CFR 75.400 and had 123 other previous violations (Govt. Exh. No. 4);

5. CF&I is a medium-sized operator (Tr. 9);

6. The penalty imposed will not affect the operator's ability to remain in business;

7. The operator showed good faith in remedying the cited violation (Tr. 9);

8. The violation was extremely serious;

9. The operator was grossly negligent in allowing the cited condition to continue to develop for the time period in question.

Conclusions of Law

1. This case arose under sections 107(e)(1) and 110(a) of the Federal Mine Safety and Health Act of 1977, P.L. 95-164 (November 9, 1977);

2. All procedural prerequisites established by the above-cited statute have been complied with;

3. An imminent danger existed at the Maxwell Mine on April 26, 1978;

4. CF&I has violated 30 CFR 75.400, a mandatory health and safety provision of the above-cited statute.

5. A civil penalty must be assessed in accordance with the provisions of the above-cited statute.

Application of Penalty

All evidence in the record bearing on the criteria and mitigating and aggravating circumstances have been considered fully.

Accordingly, Respondent is assessed the following civil penalty:

Order No.	Date	Section	Penalty
387928	4/26/78	30 CFR 75.400	$2,000

ORDER

WHEREFORE IT IS ORDERED that CF&I Steel Corporation pay the above-assessed civil penalty in the amount of $2,000 within 30 days from the date of this decision.

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
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June 27, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. HOPE 78-679-P 1/ (Assessment Control No. 46-03467-02069V)
SEWELL COAL COMPANY, Respondent	:	Meadow River No. 1 Mine

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, Department of Labor, for Petitioner; Robert C. Kota, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

The Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P seeks assessment of civil penalties for 11 alleged violations of the mandatory health and safety standards. Three of the 11 alleged violations pertain to three withdrawal orders which were the subject of Applications for Review filed in Docket Nos. HOPE 78-44, HOPE 78-71, and HOPE 78-73. When the hearing in the consolidated review proceeding in Docket Nos. HOPE 78-44, et al., was held, evidence was received with respect to any civil penalty issues which thereafter might be raised if MSHA should subsequently file a petition for assessment of civil penalty with respect to the violations alleged in the three orders which were the subject of the review proceeding. A decision with respect to the issues raised by the Applications for Review in Docket Nos. HOPE 78-44, et al., was issued on March 30, 1978. That decision deferred all rulings on the civil penalty issues until such time as a petition for assessment of civil penalty might be filed by MSHA requesting that civil penalties be assessed for the violations alleged in the three withdrawal orders which were under review in Docket Nos. HOPE 78-44, et al.

The Petition for Assessment of Civil Penalty in Docket No. HOPE 78-679-P asks that civil penalties be assessed with respect to the violations alleged in the three withdrawal orders involved in the

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1/ The civil penalty issues in this decision have been decided on the basis of the record previously made in Docket Nos. HOPE 78-44, et al.

review cases in Docket Nos. HOPE 78-44, et al. This decision, therefore, will dispose of the civil penalty issues which were deferred at the time my decision in Docket Nos. HOPE 78-44, et al., was issued. This decision will, of course, be based on the record made in Docket Nos. HOPE 78-44, et al.

The order accompanying this decision will sever from the Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P all civil penalty issues with respect to the three withdrawal orders which were involved in the proceeding in Docket Nos. HOPE 78-44, et al., so that a hearing can hereafter be scheduled for the purpose of making a record to resolve the issues which remain to be decided with respect to the violations alleged in the other eight withdrawal orders which are the subject of MSHA's Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P.

Issues

The issues to be considered with respect to each of the three orders are whether a violation of a mandatory health or safety standard occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

General Considerations

Section 110(i) of the Act provides that civil penalties shall be assessed after giving consideration to the six criteria. Four of those six factors may usually be given a general evaluation, while the remaining two, namely, the gravity of the violation and whether the operator was negligent, should be considered specifically in reviewing the evidence introduced with respect to each violation. The criteria which may be given a general review will be evaluated first.

History of Previous Violations

Exhibit 13 is a computer printout of 26 pages which was introduced by counsel for MSHA for the purpose of showing respondent's history of previous violations. Exhibit 13 shows that respondent has previously violated the three mandatory safety standards here under consideration. Therefore, when penalties are hereinafter assessed, I shall give specific consideration to respondent's history of previous violations and the penalty otherwise assessable under the other five criteria will be increased if the facts warrant an increase under the criterion of respondent's history of previous violations.

Appropriateness of Penalty to Size of Operator's Business

Respondent operates five underground mines and four preparation plants. The mine which is involved in this proceeding is the Meadow

River No. 1 Mine which employs 191 men underground and 38 on the surface to produce 750 tons of coal per day. The mine has six sections or units which utilize continuous-mining machines. All six units are operated on two shifts per day and two units are additionally operated on the midnight-to-8 a.m. shift. The Meadow River No. 1 Mine is entered by means of two shafts and one slope. Part of the coal produced from the mine is shipped overseas and part of it is used for blending with other coal. Respondent is a Division of the Pittston Company.

On the basis of the facts given above, I find that respondent operates a large coal business and that any penalties which are hereinafter assessed should be in the upper range of magnitude to the extent that the penalties are based on the size of respondent's business.

Effect of Penalties on Operator's Ability to Continue in Business

Counsel for respondent in the proceedings in Docket Nos. HOPE 78-44, et al., stated that payment of penalties would not cause respondent to discontinue in business (Tr. 256). On the basis of counsel's statement, I find that payment of penalties will not cause respondent to discontinue in the coal business.

Good Faith Effort to Achieve Rapid Compliance

As to Order No. 3 HSG issued October 17, 1977, it will hereinafter be necessary for me to discuss the criterion of good faith effort to achieve rapid compliance in the part of this decision which assesses a penalty for the violation of section 75.316 because the circumstances surrounding that violation require a specific explanation to show why the criterion of respondent's good faith effort to achieve rapid compliance is not applicable to Order No. 3 HSG.

The inspector testified that respondent demonstrated a good faith effort to achieve rapid compliance with respect to the violation of section 75.200 alleged in Order No. 1 HSG issued October 26, 1977 (Tr. 177). Respondent will hereinafter be given full credit for having shown a normal effort to achieve rapid compliance when a penalty is assessed for the violation of section 75.200.

The inspector said that respondent's cleaning up the loose coal and coal dust accumulations cited in Order No. 1 HSG issued October 27, 1977, by 10:10 a.m. of the following day was so rapid that it surprised him. Therefore, he rated respondent's abatement of Order No. 1 HSG as being better than average (Tr. 201). It is rare for me to find that an operator has abated a given violation with greater speed than an inspector had anticipated. Therefore, when a

penalty is hereinafter assessed with respect to the violation of section 75.400 alleged in Order No. 1 HSG, I shall reduce the penalty by 10 percent because of the operator's unusual effort to achieve rapid compliance.

Consideration of Remaining Factors

As indicated above, two of the six criteria set forth in section 110(i) of the Act, that is, gravity of the violations and whether the operator was negligent, must be specifically considered in reviewing the evidence presented by MSHA and respondent with respect to each violation. When violations are hereinafter found to have occurred, findings as to gravity and negligence will be made and penalties will be assessed accordingly.

Order No. 3 HSG (7-499) 10/17/77 § 75.316

Findings. Section 75.316 requires that each operator of a coal mine shall file with MSHA and adopt an approved ventilation system and methane and dust control plan. Respondent violated section 75.316 because it failed to comply with paragraph 13 on page 3 of its ventilation plan which requires that a crosscut shall be provided at the face of each entry or room before the place is abandoned. 2/ The crosscuts in the No. 2 Unit at the face between Nos. 2 and 3 and 5 and 6 entries had been developed for a distance of approximately 40 feet without completing them. All equipment had been removed from the No. 2 Unit in order to start development of a left panel.

The violation was serious. Respondent intended to return to the No. 2 Unit within a period of about 2 months. The evidence showed that respondent was not properly ventilating the abandoned unit during the interim period. The inspector had never found anything other than a zero quantity of methane in the mine when he tested for methane at a distance of 12 inches from the face or rib, or when an air sample was taken in the returns or at the fan (Tr. 23-25). Nevertheless, the inspector believed that failure to complete the crosscuts was hazardous. He said that a buildup of methane could have occurred in the "dead-ended" areas because respondent's mine is below the water table and the No. 2 Unit is 2,500 feet from the intake air shaft (Tr. 57; 69-70).

2/ There are some technical aspects as to whether respondent had actually abandoned the No. 2 Unit. Those matters are considered in my decision in Docket No. HOPE 78-44 on pages 5 to 9 and need not be reconsidered here. As explained in that decision, respondent had violated section 75.316 by failing to complete the crosscuts as alleged in Order No. 3 HSG.

Respondent was negligent in failing to complete the crosscuts because respondent is required to know the provisions of its ventilation plan and the mine foreman agreed with the inspector that the crosscut should have been completed before equipment was moved from the No. 2 Unit to the left panel (Tr. 62).

Assessment of Penalty. I find that the criterion of good faith effort to achieve rapid compliance is not applicable in assessing a penalty in this instance. The reason for that conclusion is that inspectors normally base their evaluation of good faith abatement on the question of whether respondent corrected the condition cited in the notice of violation within the period of time given by the inspector for abatement. In this instance, a withdrawal order was issued after the equipment had been removed from the No. 2 Unit. Under respondent's mining method, its equipment would normally have been moved back to the No. 2 Unit and the crosscut would have been completed before the hearing in the review proceeding was held, but a major strike by UMWA occurred on December 6, 1977, and did not end until March 26, 1978. Therefore, respondent had not abated the violation at the time the hearing was held in January 1978, because the strike was still in progress. If normal operations had been in effect, the crosscuts would have been completed by approximately December 14, 1977 (Tr. 84-85).

It has already been found that respondent is a large operator and that assessment of penalties will not cause respondent to discontinue in business. The violation of section 75.316 was serious because respondent was not ventilating the No. 2 Unit properly at the time the order was written. The inspector returned to the No. 2 Unit on January 19, 1978, or about 6 days before the hearing was held, and found that respondent had installed a line curtain, but the required check curtains were still missing. Respondent's failure to ventilate the No. 2 Unit properly increased the possibility of a dangerous methane accumulation in the "dead-ended" crosscuts between the time that equipment was removed and the time that mining was reinstated in the No. 2 Unit.

There was some merit for respondent's claim that it had not actually abandoned the No. 2 Unit in the dictionary sense of the word, as compared with the technical definition of "abandoned areas" contained in 30 CFR 75.2(h). Therefore, in assessing a penalty for the violation of section 75.316, I do not believe that a large amount should be attributed to the criterion of negligence.

In view of the mitigating circumstances discussed above, I conclude that a penalty of $2,000 is warranted. The Assessment Office based its proposed penalty of $10,000 on a waiver of the assessment formula provided for in 30 CFR 100.3 and on giving an excessive amount of weight to the fact that the order was issued under the unwarrantable failure provisions of the 1969 Act. The Assessment

Office did not have the benefit of the extensive testimony presented by the parties in Docket No. HOPE 78-44. That testimony does not show the magnitude of seriousness and the degree of negligence which I think are necessary to justify assessment of a maximum penalty of $10,000.

Exhibit 13 indicates that there have been 34 prior violations of section 75.316 at respondent's Meadow River No. 1 Mine. One violation occurred in 1974, 7 occurred in 1975, 17 occurred in 1976, and 9 had occurred in 1977 by June 14, 1977. The statistics show, therefore, that respondent is continuing to violate section 75.316 to an increasing extent each year. In such circumstances, the penalty of $2,000 will be increased by $500 to $2,500 because of respondent's unfavorable history of previous violations.

Order No. 1 HSG (7-527) 10/26/77 § 75.200

Findings and Conclusions. Section 75.200 requires each operator of a coal mine to prepare and file with MSHA a roof-control plan applicable to the conditions in his mine. After the plan has been approved by MSHA, the operator is required to follow its provisions. Respondent's roof-control plan requires that temporary supports be installed on 5-foot maximum centers to within 5 feet of the ribs and the face or the nearest permanent support. The plan also requires that the temporary supports be installed within 1 hour after the completion of the mining cyle and prior to roof bolting (Tr. 104-105). Respondent violated section 75.200 because the distance from the permanent supports to temporary supports was 8 feet (Exh. 7; Tr. 103).

The violation was serious for several reasons. The Meadow River No. 1 Mine has hazardous roof conditions, especially in the No. 4 Unit where the violation occurred. The longer that a roof is allowed to remain in an unsupported condition, the more fragile and adverse it will become. Several falls of rock 3 or 4 feet thick have occurred in the No. 4 Unit. Additionally, with no supports in the No. 4 entry of the No. 4 Unit, no miner could lawfully go inby the 8 feet of unsupported roof for the purpose of installing line curtains used for controlling ventilation at the face of the No. 4 entry (Tr. 106; 110).

Respondent was negligent in permitting the violation to occur because the hazardous condition had been reported in the preshift examiner's record book. The section foreman on the day shift had read the preshift report before going to the No. 4 Unit to work, but he assigned other work to the men on his section without giving priority to installation of the required temporary supports (Tr. 133-134; 172).

Assessment of Penalty. Although the violation was serious and respondent was negligent in failing to install the required temporary supports, the facts show that several mitigating factors were

associated with the occurrence of the violation. Respondent's section foreman on the 4 p.m.-to-midnight shift on October 25, 1977, had had temporary supports properly installed, but the continuous-mining machine had become inoperable on his shift. A maintenance crew came to the No. 4 Unit and repaired the machine on the midnight-to-8 a.m. shift. After they had completed their repairs, they pulled the machine away from the face, and in doing so, knocked down some temporary supports. When the preshift examiner saw the timbers lying on the mine floor, he posted a danger board outby the unsupported area and reported the existence of the unsupported roof to the oncoming section foreman for entry in the preshift book. Therefore, the unsupported roof existed for a period of from 4-1/2 to 5 hours before the temporary supports were replaced (Tr. 184).

Respondent correctly claimed that the preshift examiner could not have been expected to replace the temporary supports which had been knocked down by the maintenance crew. There was some merit to respondent's claim that the young men on the maintenance crew could not have been expected to replace the temporary supports since they are not trained in that type of work, but I cannot condone the maintenance crew's failure to report to the mine foreman or some other responsible person the fact that they had knocked down the supports and had not replaced them.

The primary hazard which resulted from the failure to reset the temporary supports immediately lay in the fact that respondent's roof-control plan requires the supports to be installed within 1 hour after the coal is removed. The posting of a danger board by the preshift examiner, while very helpful, did not assure that a miner would not go inby the board and be injured or killed by a roof fall.

Even though there were several mitigating factors which contributed to the occurrence of the violation, the fact remains that only one area of unsupported roof is needed for a fatality to occur. Therefore, I believe that a substantial penalty is required in order that respondent will be encouraged to insist that maintenance crews report any occurrence which might decrease safety to their superiors so that corrective action may be taken immediately. For the foregoing reason, a penalty of $4,000 will be assessed for this violation of section 75.200. I believe the Assessment Office's proposed penalty of $8,000 was excessive because of its undue emphasis on the fact that the violation was cited in an order issued under the unwarrantable failure provisions of the 1969 Act. Additionally, the Assessment Office did not have the extensive testimony showing the mitigating factors discussed above when it proposed a penalty of $8,000.

Exhibit 13 indicates that there have been 110 prior violations of section 75.200 at respondent's Meadow River No. 1 Mine. Nine violations occurred in 1974, 27 in 1975, 54 in 1976, and 20 had

occurred in 1977 by June 15, 1977. Violations of section 75.200 are increasing to a substantial degree each year. I believe that the criterion of history of previous violations is intended to act as a deterrent for operators who do not appear to be making a sufficient effort to reduce repetitious violations. Therefore, the penalty of $4,000 will be increased by $2,000 to $6,000 because of respondent's extremely unfavorable history of previous violations.

Order No. 1 HSG (7-539) 10/27/77 § 75.400

Findings and Conclusions. Section 75.400 requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustibles be cleaned up and not be permitted to accumulate in active workings or on electrical equipment. Respondent violated section 75.400 because it had permitted two different and distinct accumulations to occur. The first one was located beneath the conveyor belt drive and extended 65 feet inby under the belt conveyor. It ranged from 0 to 15 inches in depth. The shallowest accumulation was at the belt drive and the accumulations had become sufficiently compacted in places to force the bottom of the conveyor belt up off the rollers so that the bottom belt moved across the accumulations. About 50 percent of the coal was very wet, but the wet coal was located at the belt drive and the belt was dragging at the place where the coal was dry (Tr. 190; 218-219). The second accumulation was along and under the No. 4 crossbelt from the dumping point inby for a distance of 25 feet to the tail pulley of the No. 4 crossbelt. The accumulation was from 8 to 10 feet wide and from 0 to 7 inches in depth. Spillage at the dumping point caused the bottom belt to carry the coal back so as to be ground between the tail pulley and the belt. The majority of the second accumulation was made up of float coal dust and was all dry (Tr. 193-194; 218).

The accumulations were serious because they exposed the miners to the possibility of a mine fire as there was a source of ignition in the form of friction of the belt running in dry coal dust and there were electrical wires carrying from 440 to 550 volts and some of the wires were not suspended on insulators. If the float coal dust had been thrown into suspension at the time of an ignition, it would have exposed the miners to the possibility of an explosion as the float coal dust was very dry. The loose coal and coal dust accumulations were located within 50 to 75 feet of each other (Tr. 194-195; 214-215).

In my decision in Docket No. HOPE 78-73 (pp. 21-24), I explained in detail why I believed that MSHA had proven a violation of section 75.400 under the criteria set forth by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977). I do not think it is necessary for me to repeat in this decision the extensive

discussion which is available in that decision. I upheld the inspector's citation of a violation of section 75.400 in the prior decision primarily on the inspector's belief that respondent knew, or should have known, that the accumulations existed because the loose coal and coal dust had been permitted to accumulate for 2 or 3 weeks. He based his conclusion as to the length of time that the accumulations had been allowed to form on the fact that the coal dust had become very compacted to the point that it caused the belt to be pushed up off the rollers so as to ride on the coal accumulation. He also based his opinion as to the length of time of accrual of the accumulation on the fact that a large amount of rust had formed around some of the rollers (Tr. 192; 202-203; 248). If the loose coal accumulation had been cleaned up during a recent period prior to the inspection, the rust would, of course, have been removed along with the loose coal.

Respondent was negligent in permitting the violation to occur because its belt examiner checked the belts daily and should have made certain that the accumulations were cleaned up. One of the primary reasons for the belt cleaners' failure to remove the loose coal and coal dust from under the belt was attributable to the fact that when the belt conveyor was installed, its frame was placed on a 2-inch support, instead of a preferable 6-to-8-inch support, so that it was difficult to clean under the belt. In fact, it was dangerous to clean under the belt drive while it was moving and the coal was removed after being cited in the inspector's order by washing the accumulation away with a water hose (Tr. 213; 237).

Assessment of Penalty. The inspector stated that he issued an unwarrantable failure order instead of an imminent danger order because a part of one of the accumulations was so wet that water could have been squeezed from the coal (Tr. 215; 218). Coal with that much water in it would be noncombustible. The second accumulation, however, was dry and consisted largely of float coal dust. The accumulations were not in suspension and no methane existed along the beltline, but there were high voltage wires in the area and some were not on insulators. Respondent had several kinds of firefighting equipment in the vicinity of the accumulations, including a fire extinguisher, a water hose, and a water line. Additionally, there were water sprays at the belt feeder. Of course, no type of firefighting equipment can prevent an explosion of float coal dust if the dust should become suspended at a time when an ignition occurs (Tr. 208; 222-223; 228). The fact that the belt was running in dry coal and the existence of the wires without insulators support a conclusion that the violation was serious. It should be borne in mind that the wires without insulators had no bare places on them which would have been a serious ignition hazard.

In addition to the negligence involved in respondent's having constructed the belt in such a manner as to make it difficult to clean under the belt, respondent was using only three miners to clean along nine sections of belt conveyor. The assistant mine superintendent did

not realize, until the inspector's order was written, that respondent was using only three belt cleaners (Tr. 198; 203). Respondent's safety director stated that additional workers were assigned to cleaning along the belt if any special problems arose (Tr. 226-227; 244-247). Regardless of respondent's intention about use of additional miners to clean along the belt, the fact remains that the accumulations occurred. Consequently, either the three cleaners were not able to keep up with the rate of spillage from the belts, or respondent had failed to assign additional men to assist in belt cleaning at the time the order was written.

When all the facts surrounding the violation are considered, I believe that a penalty of $2,500 is warranted. As indicated, supra, under the heading of "Good Faith Effort to Achieve Rapid Compliance", the penalty of $2,500 will be reduced by 10 percent, or $250, to. $2,250 because of respondent's unusually rapid achievement of compliance.

I believe that the penalty of $7,500 proposed by the Assessment Office was based on an excessive reliance on the fact that the order was issued under the unwarrantable failure provisions of the Act. The coal accumulations were not serious enough and respondent's negligence was not great enough to justify assessment of a penalty of $7,500.

Exhibit 13 indicates that there have been 157 prior violations of section 75.400 at respondent's Meadow River No. 1 Mine. One violation occurred in 1974, 33 in 1975, 77 in 1976, and 46 had occurred in 1977 by June 15, 1977. The statistics here again show an alarming annual increase in the number of violations of section 75.400. Therefore, the penalty of $2,250 will be increased by $2,500 to $4,750 because of respondent's extremely unfavorable history of previous violations.

Summary of Assessments and Conclusions

(1) On the basis of the evidence of record in the consolidated proceeding in Docket Nos. HOPE 78-44, HOPE 78-71, and HOPE 78-73, respondent is assessed the following civil penalties:

Order No. 3 HSG (7-499) 10/17/77 § 75.316	$ 2,500.00
Order No. 1 HSG (7-527) 10/26/77 § 75.200	6,000.00
Order No. 1 HSG (7-539) 10/27/77 § 75.400	4,750.00
Total Assessments in This Severed Proceeding	$13,250.00

(2) Respondent was the operator of the Meadow River No. 1 Mine at all pertinent times and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

(3) The orders listed in paragraph (1) above should be severed from the proceeding in Docket No. HOPE 78-679-P so that the remaining eight violations alleged by MSHA's Petition for Assessment of Civil Penalty may be disposed of on the basis of a hearing to be scheduled in the near future.

WHEREFORE, it is ordered:

(A) Sewell Coal Company is assessed civil penalties totaling $13,250.00 which it shall pay within 30 days from the date of this decision.

(B) The orders listed in paragraph (1) above are severed from further consideration with respect to MSHA's Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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

June 28, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-60-PM
Petitioner	:	A.C. No. 21-00620-05001
v.	:	
	:	
STANDARD BUILDING MATERIAL CO.,	:	Sand & Gravel Mine
Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Roger N. Knutson, Esq., Grannis & Grannis, St. Paul, Minnesota, for Respondent.

Before: Judge Moore

The above case came on for hearing in Minneapolis, Minnesota, on June 7, 1979. The evidence shows that while the company was substantial, employing 45 to 80 workers, only eight or nine usually worked in the mining part of the company's operation. The inspector testified that all of the five citations involved in this case were abated promptly and in good faith. No prior history of violations of the 1977 Act was introduced and I will assume in the absence of evidence to the contrary that no penalty assessed by me would affect Respondent's ability to continue in business.

Citation No. 289403 charges that a berm was not provided on the outer edge of the elevated sand pile where the front-end loader was moving materials away from the discharge conveyor. Although it was not mentioned in the testimony, there is a notation on the bottom of Government Exhibit No. 1 (the citation) stating "--was working to put berms." I cannot read the first word of the notation, but the testimony indicates that the sand and gravel operation had just been working for 2-1/2 weeks after an all-winter shut down and that the front-end loader had just been sent on to the sand pile to move the higher portions of the sand away from the discharge conveyor mechanism. He was moving sand off of the edge of the pile and building berms, but at the time the inspector observed the operation there were areas where there were no berms and where the front-end loader was backing.

The evidence adduced did not present a clear picture of the operation being conducted. I am satisified that there were no berms in a particular hazardous area at the time the inspector issued the citation, but what was not made clear was exactly when, in the type of operation being conducted, berms should be constructed. There was testimony that there were berms in some areas and worn down or weathered berms in others and that berms are constantly changing. There was uncontradicted evidence that the berms had to be made of the same material as the stockpile in order to avoid contaminating the pile and obviously you would have to construct some kind of flat area before you can put berms around it. It may be that the sequence followed by the front-end loader operator was erroneous and that he should have spent more of his effort in building berms rather than flattening out any area to put the berms around. But I am not sufficiently convinced of that to find that as a fact. I therefore find that MSHA has failed to carry its burden of proof with respect to this violation and the citation is accordingly VACATED. 1/

Citation No. 289404 alleges a guard was not provided on the drive shaft on the pan feeder. Inasmuch as the standard 30 CFR 56.14-1 only requires a guard where a drive shaft of this type might cause injury, the inspector stated that the existence of a proper stop cord would have so minimized the possibility of injury as to eliminate the violation. This same inspector had previously approved the emergency stop cord at this particular location. The inspector was perfectly candid about the fact that he simply changed his mind about the safety of the arrangement. At the time of the hearing, he did not think the stop cord was close enough to the area where the miner might get caught in the drive shaft. In my opinion, an inspector has a right to change his mind concerning a hazardous situation. But, in the absence of imminent danger, I do not think MSHA has a right to issue a citation for which a penalty must be sought without first informing the respondent or operator that there has been a change of opinion. This is not a matter of estoppel. The Government is not estopped from changing its mind and forcing a new policy, but issuing a citation

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1/ In approximately 7 years, of hearing cases under both the 1969 and 1977 Mine Acts, I have never heard a case involving the lack of berms at a surface coal mine or in the surface area of any underground coal mine even though the surface coal mine standard is identical to the metal/nonmetal standard. And in all of the cases where modification of the berm standard was sought by a coal mine operator, modification was granted so that berms were not required as long as certain conditions were met. These modifications were all with the consent of MESA, the predecessor of MSHA. With one exception, however, every noncoal mine case that I have heard has involved an alleged violation of the berm standard.

and seeking a penalty for a condition which the Government has caused by its advice approaches harassment and that is not what the Act was designed to do. The citation is VACATED.

Citation No. 289405 alleges that the compressed gas cylinders were standing in the shop area unsecured in violation of 30 CFR 56.16-5. There is no question but what the inspector found the acetylene and oxygen cylinders standing unsecured in an area where they were normally stored and where securing devices were readily available. I can readily see how it was a clear violation in his eyes. The fact of the matter, however, is Mr. Leaf, the watch plant operator foreman, was responsible for securing oxygen and acetylene tanks when they were delivered by a private seller. The tanks were delivered to the appropriate place by the seller and in ordinary circumstances Mr. Leaf would have secured them immediately. In this case, however, Mr. Leaf was a part of the inspection team at the time of the delivery and was with the inspector. As stated before, there are only a few miners in this operation and as soon as the inspection party reached the area of the unsecured cylinders, they were secured by Mr. Leaf. The testimony did not disclose whether or not the inspector was informed of the circumstances, but in my opinion, if he had known all the facts and still issued the citation, he would have been acting in an arbitrary manner. The citation is VACATED.

Citation No. 289406 alleges "the handrailing on the stairway to the grizzly does not project 3 feet above the landing for safe access." The standard alleged to have been violated, 30 CFR 56.11-6, states: Mandatory. Fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings." Inasmuch as the standard requires that the ladder itself project above the landing or that handholds be provided, the citation which charges that the handrailing did not project 3 feet above the landing does not allege a violation of the standard. I think the standard was intended for vertical ladders where, unless they project above the landing surface, it is very difficult to get off at the landing surface, but it is even more difficult to get back on the ladder going down. The ladder in this case was more like a stairway and it did have a handrailing which could be held on to when the climber was on the top rung of the steps. From the best description I could get after lengthy questions by both the attorneys and me, I conclude that a violation did not exist when the citation was issued. The citation is accordingly VACATED.

Citation No. 289407 alleges that haul truck No. 208 was backing under the bins and was not provided with an audible reverse signal alarm. The inspector noticed the truck backing into the area numerous times while he was at the mine and stated there was

no helper guiding the driver and that there was no audible backup alarm. It may well have been, as suggested by Respondent, that the backup alarm went out immediately before the inspection. And I accept the testimony that the drivers were required and instructed to report malfunctions such as a nonworking backup alarm. But when the inspector observed that the backup alarm was not working and issued a citation, it was somebody's duty to inquire as to how long that backup alarm had been malfunctioning. In my opinion, it was the duty of the operator to obtain that evidence if he intended to rely on the fact that the alarm had just broken prior to the inspection. The Respondent did establish that it could have been that the malfunction occurred just prior to the inspection, but he had no positive evidence to offer that it, in fact, did occur at that time. In the absence of such evidence, I think the inspector was perfectly justified in issuing the citation. Also, in the absence of such evidence, I think I can assume negligence because unless it occurred just prior to the inspection, Respondent should have known of the condition of the backup alarm. The gravity is moderate and I consider that a penalty of $120 is appropriate.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days of the entry of this decision, a civil penalty in the amount of $120.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Issued: June 28, 1979

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Administrative for Metal and Non-Metal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

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

JUN 29 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 78-537-P
Petitioner	:	A/O No. 41-01900-02007 V
v.	:	
	:	Docket No. DENV 78-82-P
TEXAS UTILITIES GENERATING CO.,	:	A/O No. 41-01900-02009 F
Respondent	:	
	:	Monticello Fuel Facilities Strip Mine
	:	
	:	Docket No. DENV 79-80-P
	:	A/O No. 41-02632-02004 V
	:	
	:	Docket No. DENV 79-81-P
	:	A/O No. 41-02632-03001
	:	
	:	Martin Lake Strip Mine

DECISION

Appearances: Eloise Vellucci, Esq., and Douglas White, Esq., U.S. Department of Labor, for Petitioner;
Richard L. Adams, Esq., Worsham, Forsythe & Sampels, for Respondent.

Before: Judge Forrest E. Stewart

PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant either to section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819 (1970), or to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977).

On August 9, 1978, Petitioner filed with the Federal Mine Safety and Health Review Commission a petition for assessment of a civil penalty for the violation included under Docket No. DENV 78-153-P. Respondent filed its answer to this petition on January 3, 1979. Petitions for assessment of civil penalty in Docket Nos. DENV

78-80-P, DENV 78-81-P and DENV 78-82-P, were filed on November 22, 1978. Respondent's answers were filed on January 2, 1979. The hearing in these matters was held on February 21, 1979, in Dallas, Texas. Posthearing briefs were filed by the parties on April 9, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the hearing, the parties stipulated to the following:

(a) The computer printouts of Respondent's prior violation history at the Martin Lake Strip Mine and the Monticello Fuel Facilities Strip Mine offered in evidence at the hearing were authentic and admissible.

(b) Respondent's company had produced 16,653,961 tons of coal in 1978.

(c) Respondent produced 3,072,199 tons of coal in 1978 at its Martin Lake Strip Mine.

(d) Respondent produced 6,278,289 tons of coal in 1978 at its Monticello Fuel Facilities Strip Mine.

There is no indication on the record that any penalty assessed in these proceedings would have an adverse effect on Respondent's ability to remain in business.

DOCKET NO. DENV 78-537-P

A single violation was alleged within Docket No. DENV 78-537-P. On June 22, 1977, Inspector Maloney cited a violation of 30 CFR 77.410 at Respondent's Monticello Fuel Facility Strip Mine. At the hearing, Respondent admitted the existence of the violation, contesting only the amount of the proposed penalty.

Inspector Maloney discovered that a troubleshooter's truck was not equipped with the required operative automatic backup alarm. The truck was equipped with a toggle switch which had to be tripped manually whenever the vehicle was placed in reverse. This warning system was not automatic and at the time, it was inoperative.

The inspector did not know how long the toggle switch had been in use or whether the condition was known to supervisory personnel. He was of the opinion that a supervisor should examine the cab of the truck at least once a shift. Albert Schwarzer, one of Respondent's fuel superintendents, testified that the operator of each vehicle had been designated as the party responsible for inspection of his vehicle during each shift. He asserted that there was not enough time for supervisory personnel to inspect daily each of the 100 vehicles used at the mine on a preshift basis.

From zero to seven employees usually work in the area. Visibility behind the truck was obstructed, but the area was not noisy.

An automatic backup alarm was installed on the truck within an hour.

DOCKET NO. DENV 78-80-P

A single violation was alleged within Docket No. DENV 78-80-P. Inspector Maloney issued Notice of Violation No. 3-LGM on February 15, 1978, at Respondent's Martin Lake Strip Mine. He cited a violation of 30 CFR 77.1401 after observing that a crane which was not provided with overspeed and overwind devides was being used to hoist personnel. Two men were suspended 35 to 40 feet above the ground in a cage. This condition was in violation of section 77.1401.

The condition or practice was known to mine management. Inspector Maloney had informed them of the requirement in October of the previous year. A member of mine management admitted knowledge of the crane's use at the time the notice was issued.

It is improbable that the condition would result in an accident. The capacity of the crane was 200 tons. The inspector testified that it was safe to use the crane to hoist men and that a modification would have been granted Respondent if it had applied for one.

The violation was abated by the posting of signs prohibiting use of the machine for hoisting men.

DOCKET NO. DENV 79-81-P

Nine violations were alleged within Docket No. DENV 79-81-P. These alleged violations are discussed below in the order in which the corresponding citations were issued.

1. Citation No. 00391705

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391705, citing a violation of section 103(f) of the Act. Section 103(f) reads in pertinent part as follows:

> 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 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.

Inspector Maloney, his immediate supervisor, and a trainee inspector arrived at the mine office at approximately 7:30 a.m. The shift change at Martin Lake Strip Mine occurs at 8 a.m. Just prior to the shift change, the inspectors chose Thomas Hopkins, a union steward on the day shift, to accompany them during the course of the inspection as the authorized miner representative. Inspector Maloney testified that permission for Mr. Hopkins to accompany the inspectors was given by an assistant maintenance foreman on the midnight shift.

At approximately 8:15 a.m., Mr. Hopkins was approached by his immediate supervisor, Fred Overton, who ordered Mr. Hopkins back to work. Thereafter, the opportunity for Mr. Hopkins to accompany the inspectors was also refused by Mr. Reedy, Respondent's fuel superintendent. Mr. Hopkins was permitted to continue with the party of inspectors only after a citation was issued. The failure to give Mr. Hopkins an opportunity to accompany the inspectors was in violation of section 103(f) of the Act.

The inspector did not find that the violation was significant and substantial and there is no indication that it could have led to an accident or injury. Immediately after the citation was issued, mine management permitted Mr. Hopkins to accompany the inspectors.

2. Citation No. 00391708

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391708, citing a violation of 30 CFR 77.208(e). He observed three oxygen cylinders and four acetylene cylinders stored in two racks at the dragline erection site. The valves on these cylinders were not provided with protective covers. The inspector was of the opinion that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. Because the cylinders could easily be seen, the condition should have been known to the operator. The condition was corrected 10 minutes after the citation was issued.

At the hearing, the parties proposed a settlement of this case for $150, the amount originally proposed by MSHA's Office of Assessments. The Administrative Law Judge approved the settlement at that time, and this approval is affirmed here.

3. Citation No. 00391709

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391709, citing a violation of 30 CFR 77.208(a). He observed that

a cable sheave which was stored at the dragline erection site was not blocked to prevent it from being accidentally tipped over. In addition, the gantry sheave was resting on a center shaft approximately 20 inches in diameter and the bottom circumference of the sheave was approximately 10 inches above the ground. The inspector found that this condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. The condition was abated 25 minutes after the citation was issued.

At the hearing, the parties proposed a settlement of this case for $210, the amount assessed by MSHA's Office of Assessments. The Administrative Law Judge approved the settlement at that time. This approval is affirmed here.

4. Citation No. 00391711

On March 21, 1978, Inspector Maloney issued section 104(a) Citation No. 00391711, citing a violation of 30 CFR 77.408. Section 77.408 requires that welding operations shall be shielded. At the dragline construction site, the inspector observed three welding operations which did not have the required shielding. The operator quickly abated this condition by placing portable canvas shields around each welding operation.

The operator was negligent in its failure to shield the welding operations. The failure to shield was visually obvious. The inspector was of the opinion that the welding had been ongoing at least from the beginning of the shift.

The hazard presented by this condition was flashburn. If such an accident were to occur, the probable result would be lost workdays or restricted duty.

There were approximately eight people in the area. Two of the welders were within 20 feet of each other. Leroy Churchill, Respondent's technical engineer who was in charge of the welding operations at issue, testified that the welders might operate as close as 4 or 5 feet to one another. Each of the welders was experienced and each wore a personal shield. Although the normal path of the construction workers was approximately 100 to 150 away, the area was not fenced off to prevent someone from approaching. Given the nature of the hazard and the number of people subjected to it, the occurrence of an accident was probable.

The operator made a good faith effort to abate the condition once the citation was issued. Portable shields were immediately placed around the welding operators.

5. Citation No. 00391712

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391712, citing a violation of 30 CFR 77.208(d). The inspector observed that an oxygen cylinder and an acetylene cylinder in a tool room area for the dragline erection site were not secured in a safe manner. A rope had been tied around the cylinders and their wooden frame supports, but it had slipped down to within 6 inches of the base of the cylinders. The inspector found it improbable that an accident would occur. He remained of the opinion that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. However, he also found that the condition either could not have been known or predicted, or occurred due to circumstances beyond the operator's control. The condition was abated 10 minutes after the citation was issued.

At the hearing, the parties proposed a settlement of this case for $122, the amount assessed by MSHA's Office of Assessments. The settlement was approved by the Administrative Law Judge at that time. This approval is affirmed here.

6. Citation Nos. 391719 and 391720

Inspector Maloney issued 104(a) Citation Nos. 391719 and 391720 on March 23, 1978, after observing a badly burned front-end loader which was parked on the access road to the main office. Upon investigation, it was determined that the vehicle had caught fire and burned for 1-1/2 to 2 hours. Thereafter, it had been removed from the accident site to the mine office. The operator of the vehicle suffered second degree burns and a broken nose in the incident. Respondent did not report the fire to MSHA officials.

An accident is defined in 30 CFR 50.2(h) as being "an unplanned mine fire not extinguished within 30 minutes of discovery." Because this fire may be characterized as an accident, the failure to report it to MSHA was in violation of section 50.10 and removal of the vehicle from the site of the fire was in violation of section 50.12.

Mine management was unaware of the requirement to notify MSHA immediately of the accident. It is improbable that these violations of 50.12 and 50.10 would result in an accident. The injury to the employee was reported promptly, and an effort had been made to preserve the equipment to help determine the cause of the fire.

7. Citation No. 00391724

Inspector Maloney issued Citation No. 00391724 on March 27, 1978, citing a violation of 30 CFR 77.1605(b). Section 77.1605(b)

requires that all trucks be equipped with parking brakes. The inspector observed an Ardco "Kando" vehicle with an inoperative parking brake. This vehicle had four-wheel drive and five seats, as well as a bed used to transport tools, supplies and other materials. It may be characterized as a truck within the meaning of section 77.1605(b). The absence of an operative parking brake on the Kando vehicle was in violation of that section.

The inspector did not know if the employees who were using the vehicle knew that the parking brake was inoperative, and there is no indication that mine management was aware of the fact.

At the time the citation was issued, the vehicle was parked on level ground and it was unoccupied. It had been left in gear to prevent it from rolling. The inspector testified that there was no real danger unless the vehicle was left out of gear on an incline. Repair efforts were undertaken immediately and the condition was corrected within the time set by the inspector for abatement.

8. Citation No. 00391726

On March 28, 1978, Inspector Maloney issued 104(a) Citation No. 00391726, citing a violation of 30 CFR 77.404(a). He observed that the passenger-side door on one of Respondent's boom trucks was badly bent and would not latch. A nylon rope and rubber strap were used to tie the door shut. The inspector found that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. The condition could have interferred with emergency escape from the vehicle. Alternatively, the door could open unexpectedly. The defect should have been known to the operator because it was visually obvious. A replacement was found in a local town and the condition was corrected within the time set for abatement.

At the hearing, the parties proposed a settlement of the case for $305, the amount assessed by MSHA's Office of Assessments. The settlement was approved at that time by the Administrative Law Judge and the approval is affirmed here.

DOCKET NO. DENV 78-82-P

The single violation alleged within Docket No. DENV 78-82-P arose out of an incident which occurred at Respondent's Monticello Fuel Facilities Strip Mine on the morning of December 31, 1977. A fatal injury was sustained by one of Respondent's employees after he fell into a coal hopper.

The hopper in question was being used as a dump site for bottom dump trucks. There were two openings in the hopper about 4-1/2 feet wide. Tracks had been placed across the opening to allow trucks to

drive over the hopper and dump coal into it. During the shift on which the accident occurred, trucks had been dumping coal into the northernmost opening. A bulldozer was being used to push a stockpiled coal into the second opening. At the time of the accident, the northernmost of these two openings was covered by a large coal hauling truck. The building which housed the dump station operators was adjacent to this side of the dump site

On the morning of December 31, 1977, Charles White, a pumper operator, was working in the control room at the coal crusher at the Monticello Fuel Facilities Strip Mine of Respondent. At approximately 4 or 5 o'clock that morning, one of Respondent's foremen called the control room and asked that a certain coal hauling truck be stopped and the operator told to bring the truck to the shop for maintenance. White failed to stop the coal hauler before it reached the dump site. He then apparently walked around behind the control room building to meet the hauler. He entered the dump site, walked up beside the left front wheel of the coal hauling truck and began to speak to the driver of the truck. White then took a step backward and fell into the open coal dump.

Notice of Violation No. 1-JDC, January 1, 1978, was issued in the course of the ensuing accident investigation. The inspector cited a violation of 30 CFR 77.204 and alleged that "openings in the haulage truck dumping facilities * * * were not protected by railings, barriers, covers, or other protective devices."

Section 77.204, in pertinent part, provides the following: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices."

There were no permanent protective or warning devices in the area other than a low concrete wall which ran between the hopper and the control room building, and which extended 3 feet beyond each side of the hopper, and two unilluminated signs located on each end of the wall which stated "Danger Open Pit". A barrier was placed across the roadway when the hopper was not being used. This comprised approximately 15 percent of the time during which the mine was operating. The barrier was not in place when the accident occurred.

The absence of protection over or around the opening at the time of the accident was in violation of section 77.204.

The operator evinced a small degree of negligence in its failure to protect the hopper opening. A barrier was erected when the site was not in use. It was in fact, the pumper's responsibililty to erect this barrier. In addition, signs had been posted warning against the danger presented by the open hopper. Respondent's safety

manual prohibits entry into the area when the dump site is in use. Two of Respondent's witnesses testified that they had never seen a person in the dump site area other than for maintenance purposes. Finally, 22 inspections had been conducted by MSHA at Respondent's Monticello Mine prior to the accident. The condition in question was not found by MSHA inspectors to be a violation in the course of any of these inspections. Even so, the hazard presented by the open pit was obvious and should have been known to the operator.

Respondent demonstrated good faith in rapidly complying with section 77.204 and indicates its continued good faith in attempting to find the most workable and affective means of protection.

ASSESSMENTS

In consideration of the findings of fact and conclusions of law in this decision based on stipulations and evidence of record, the following assessments are appropriate:

DOCKET NO. DENV 78-537-P

Notice of Violation No. 1-LGM (June 22, 1977) $500

DOCKET NO. DENV 79-80-P

Notice of Violation No. 3-LGM (February 15, 1978) $300

DOCKET NO. DENV 79-81-P

Citation No. 00391705	$ 200
Citation No. 00381708	150
Citation No. 00391709	210
Citation No. 00391711	195
Citation No. 00391712	122
Citation No. 00391719	130
Citation No. 00391720	130
Citation No. 00391724	200
Citation No. 00391726	305

DOCKET NO. DENV 79-82-P

Notice of Violation No. 1-JDC (January 1, 1978) $800

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

ORDER

It is ORDERED that the settlement negotiated between Petitioner and Respondent with respect to Citation Nos. 00391708 (March 21, 1978), 00391709 (March 21, 1978), 00391712 (March 21, 1978), and 00391726 (March 28, 1978), is hereby APPROVED.

It is further ORDERED that the Respondent pay the sum of $3,242 within 30 days of the date of this decision.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

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

June 29, 1979

PEABODY COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. DENV 78-557
	:	Order No. 390240; 8-1-78
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Seneca Surface Mine
and	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. DENV 79-286-P
	:	A/O No. 05-00304-03001
v.	:	
	:	Seneca Strip Mine
SENECA COALS LIMITED, Respondent	:	

DECISION

Appearances: Thomas F. Linn, Esq., Peabody Coal Co., Denver, Colorado, for Applicant/Respondent;
Robert A. Cohen Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent/Petitioner.

Before: Judge Chares C. Moore, Jr.

The two above-captioned cases involve, one order of withdrawal and a review thereof, plus a penalty case involving the same order. The fact that the names of the operator's of the mines in the two cases are different is a technicality which is unimportant to this decision. It was agreed at the hearing that Peabody Coal Company is the operator and is therefore both the applicant in the review case and the respondent in the penalty case.

On August 1, 1978, Inspector Padgett issued order of withdrawal No. 390240 because a bulldozer was observed building a road in the middle of a blasting area on the high wall within 3 to 5 feet of charged holes. The order was issued under 107(a) of the Act as an imminent danger, but also charged a violation of 30 CFR 77.1303(g). The inspector later modified his order at the instructions of his superior to state that the blasting holes were, "loaded holes" rather than "charged holes" as he had stated in the original order.

Government's Exhibit No. 2 is a sketch of the area involved in the violation. The exhibit shows the blasting pattern and indicates each hole that was included in that pattern as well as which holes were completely packed with explosives, which holes had booster type primers stored near them and which had merely been drilled but not further prepared for blasting. The exhibit shows and the testimony supports the fact that the bulldozer operator did build a road between rows of holes and that there were nine loaded holes on his right-hand side and three loaded holes on his left-hand side. At this point in this decision, I am using the term "loaded hole" to describe a hole in which detonating cord (Primacord) has been secured to a booster primer and lowered to the bottom of the hole, ammonium nitrate slurry or ANFO has been added on top of the primer, the hole has been tamped and a short length of the primacord is sticking out of the top of the hole.

In view of the fact that the columns of holes where 25 feet apart and the bulldozer blade was approximately 14 feet across, if the dozer operator stayed exactly in the middle, his blade would have been within 5-1/2 feet of the loaded holes on each side of the blade. When the order was issued, the bulldozer operator was backing between the loaded holes towards 2 cases of primacord that he had not noticed when he came into the area but boxes which he might or might have not seen if he had continued to back out between the loaded blasting holes. The question is whether or not this situation constituted an imminent danger and whether or not it involved a violation of 30 CFR 77.1303(g).

The regulation alleged to have been violated states: "Areas in which charged holes are awaiting firing shall be guarded, or barricaded and posted, or flagged against unauthorized entry." While there is a dispute about whether holes which have been loaded with explosives but not fitted with a detonating device are charged holes awaiting firing, there's no question but that this particular area was posted and flagged against unauthorized entry. The inspector and the other witnesses so testified. The posting against unauthorized entry, regardless of whether an unauthorized vehicle actually enters, prohibits the finding of a violation of this section. The section requires posting and the area was posted. It was the inspector's position that a violation occurred because the bulldozer operator was unauthorized to enter the area, but he was in fact clearly authorized and ordered to enter the area by an assistant supervisor at the mine. Whether he should have been authorized is another question but there is no doubt but that he was in fact authorized.

I am furthermore convinced that a charged hole awaiting firing is a hole which has not only been loaded with explosives but is also equipped with some sort of firing device, meaning either a blasting cap or a similar device with a time delay mechanism contained therein. This view is supported by the recommended decision of Judge Switzer promulgated on November 16, 1977, involving proposed amendments to

rules for metal and nonmetal mining encompassed in 30 CFR 55, 56, and 57. It is also supported by the memorandum of September 9, 1974, from the Assistant Administrator of Coal Mine Health and Safety which contains the following paragraph: "For the present, we will define a "loaded hole" as one that contains explosives or blasting agents with a primer and that it does not become a "charged hole" until a detonator is introduced into the system." (See p. 2 of Petitioner's Exhibit No. 1). That same exhibit states that public hearings were scheduled in November 1974, for the purpose of amending 30 CFR 77.1300 to include a definition of "charged hole" to mean any hole containing explosives or blasting agents with a primer. If the rule had been promulgated, as proposed, it would be clear that MSHA was correct and that a hole with everything but the detonator could be considered a charged hole. The rule was not amended, however.

MSHA did place in its inspector's manual published March 9, 1978, (Govt. Exh. 3) on page 321, the following sentence: "Holes containing explosives or blasting agents, tamped and ready for firing are defined as charged holes." Obviously inspector Padgett was following the manual when he deemed the holes as charged, and insofar as MSHA is concerned he was correct in his decision. But MSHA cannot change the law by adding words to its manual. 1/ It had the opportunity to change the code of Federal regulations and did not do so. I find the holes were not "charged" and I think it is equally obvious that until the blasting cap is added they are not "ready for firing." The civil penalty portion of the above action is accordingly decided in Peabody's favor and the complaint is dismissed.

This leaves the question of whether or not there was an imminent danger. Obviously the inspector who appeared to be a dedicated and sincere law enforcement official believed there was an imminent danger, or he would not have issued the order. He had been taught at the Bureau of Mines school in Beckley that primacord could be detonated by being run over by a bulldozer. Although he thought the chance of the bulldozer operator detonating any of the pieces of primacord sticking out of the blasting holes was rather remote, he thought there was a definite possibility of an explosion should the bulldozer run over the 2 cases of coiled primacord. He had been taught at Beckley that a coil of primacord would explode if crushed. The operator of the bulldozer, Mr. Cobb was equally concerned about his own safety and was very nervous about operating between loaded blasting holes. He said "no powder is safe."

Despite the sincerity of the inspector, and the operator of the bulldozer, however, the other testimony in the case convinces me that primacord and cast primers are extremely safe explosives. The main explosive used in the mine, ANFO (meaning ammonium nitrate and

1/ The letter from MSHA's attorney dated June 11, 1979, indicates that MSHA no longer supports the statement in the manual.

fuel oil) and ammonium nitrate slurry are extremely insensitive explosives. 2/ They cannot be exploded with a blasting cap except under unusual circumstances and an efficient explosion cannot be obtained with primacord alone. For an efficient explosion, the primacord must be attached to the cast primer or booster before either the slurry or the ANFO can be efficiently detonated. But in the entire explosive train, the least sensitive element is the primacord. Mr. Hynes a professional engineer with a degree in mining gave convincing testimony as to the safety of primacord. If it is placed against a steel wall and impacted with the army equivalent of the french 75 cannon, detonation can occur. Short of that, however, and nothing in the mine even approaches that degree of heat and pressure, primacord or detonating cord will not explode. While it will burn, the burning will not cause detonation. It takes a blasting cap, another explosion such as a dynamite explosion next to it or the impact of a French 75 to set it off. I cannot find that there was an imminent danger because of the possibility of the bulldozer running over the primacord. I make a similar finding regarding the cast primers but point out that there was no evidence that the bulldozer operator operated near those charges.

I find that no imminent danger existed and accordingly vacate Order of Withdrawal 390240.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Issued: June 29, 1979

Distribution:

Thomas F. Linn, Esq., Peabody Coal Company, Suite 600, 12015 East 46th Avenue, Denver, CO 80239 (Certified Mail)

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

Standard Distribution

2/ It was, however, ammonium nitrate fertilizer mixed with diesel fuel oil which blew up Texas city in 1947.

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

June 29, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. HOPE 78-330-P
Petitioner	:	A.C. No. 46-03467-02057-V
v.	:	
	:	Meadow River No. 1 Mine
SEWELL COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gary W. Callahan, Esq., The Pittston Company Coal Group, Lebanon, Virginia, for Respondent.

Before: Judge Cook

I. Procedural Background

On April 18, 1978, a petition for assessment of civil penalties was filed by the Mine Safety and Health Administration (MSHA) against Sewell Coal Company for alleged violations of various sections of the Code of Federal Regulations. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977 Mine Act). An answer was filed on May 4, 1978.

A notice of hearing was issued on May 17, 1978, setting the hearing for September 19, 1978. An amended notice of hearing was issued on July 21, 1978, changing the hearing date to August 29, 1978. On August 3, 1978, the Respondent moved to change the hearing date to October 24, 1978. The motion was granted by an order issued August 14, 1978. The hearings commenced on October 24, 1978, in Charleston, West Virginia, and began with the taking of testimony in a companion case.

The hearing in the present case commenced on October 26, 1978, at which time the parties proposed settlements relating to Order Nos. 7-0012 (1 HRB), January 27, 1977, 30 CFR 75.400, and 7-0024 (1 SEV), January 28, 1977, 30 CFR 75.400. Testimony was taken respecting

Order Nos. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3, 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3, and 7-0140 (1 HRB), February 15, 1977, 30 CFR 75.200. At the conclusion of the proceedings on October 26, 1978, the hearing was continued pending a telephone conference between counsel for the parties and the Administrative Law Judge to determine the date for the conclusion of the hearing. As a result of an agreement reached during the telephone conference, the proceeding was continued until November 20, 1978.

At the commencement of the proceedings on November 20, 1978, counsel for the parties proposed settlements pertaining to two of the remaining three orders. Testimony was taken respecting the remaining contested order.

The decision approving the settlements is included in this decision.

During the hearings on October 26, 1978, and November 20, 1978, counsel for the Respondent made various oral motions. Rulings on these motions are contained herein.

A briefing schedule was arranged at the conclusion of the proceedings on November 20, 1978. Briefs were due on or before February 1, 1979, and reply briefs were due on or before February 15, 1979. MSHA filed a posthearing brief on February 1, 1979. The transcript of the first portion of the case was filed on January 30, 1979, such delay having been due to the illness of the reporter. Consequently, a motion for late filing of briefs was filed on February 1, 1979, which motion was granted. Respondent filed its posthearing brief on February 26, 1979. On March 22, 1979, MSHA filed its second posthearing brief and a response to the proposed findings of fact and conclusions of law contained in the Respondent's posthearing brief.

II. Violations Charged

Order No.	Date	30 CFR Standard
7-0012 (1 HRB)	January 27, 1977	75.400
7-0024 (1 SEV)	January 28, 1977	75.400
7-0041 (1 SEV)	February 1, 1977	75.1100-3
7-0042 (2 SEV)	February 1, 1977	75.1100-3
7-0045 (2 HRB)	February 1, 1977	75.400
7-0140 (1 HRB)	February 15, 1977	75.200
7-0187 (1 HRB)	February 17, 1977	75.400
7-0209 (1 FLD)	March 7, 1977	75.400

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing and in their posthearing submissions, the parties entered into stipulations and reached agreement

on proposed findings of fact and conclusions of law which are set forth in the findings of fact, infra.

B. Witnesses

MSHA called as its witnesses Sidney E. Valentine and Henry R. Baker, MSHA inspectors.

Sewell called as its witnesses Sidney E. Valentine, the above-mentioned MSHA inspector; Fred D. Copen, the maintenance superintendent at the Respondent's Meadow River No. 1 Mine; Randolph R. Skaggs, a miner operator at the Respondent's Meadow River No. 1 Mine on the date of the order and currently the dispatcher at the mine; Darrell Pomeroy, the union conveyor belt examiner for Sewell Coal Company; and, Terry Casto, Sewell's safety inspector.

C. Exhibits

1) MSHA introduced the following exhibits into evidence:

a) M-1 is a computer printout of the history of violations for which penalties have been paid for the Respondent's Meadow River No. 1 Mine for the period beginning January 1, 1970, and ending February 17, 1977.

b) M-2 is a a copy of Order No. 7-0012 (1 HRB), January 27, 1977, 30 CFR 75.400.

c) M-3 is a termination of M-2.

d) M-3A is a special assessment information sheet.

e) M-4 is a copy of Order No. 7-0024 (1 SEV), January 28, 1977, 30 CFR 75.400.

f) M-5 is a termination of M-4.

g) M-5A is the inspector's statement relating to M-2.

h) M-5B is the inspector's statement relating to M-4.

i) M-6 is a copy of Order No. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3.

j) M-7 is a termination of M-6.

k) M-8 is a copy of Order No. 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3.

l) M-9 is a termination of M-8.

m) M-10 is a copy of Order No. 7-0045 (2 HRB), February 1, 1977, 30 CFR 75.400.

n) M-10A is a copy of the inspector's statement accompanying M-10.

o) M-11 is a termination of M-10.

p) M-12 is a copy of Order No. 7-0140 (1 HRB), February 15, 1977, 30 CFR 75.200.

q) M-13 is the roof control plan for the Respondent's Meadow River No. 1 Mine, in effect on February 15, 1977.

r) M-13A is a termination of M-12.

s) M-14 is a copy of Order No. 7-0187 (1 HRB), February 17, 1977, 30 CFR 75.400.

t) M-15 is a termination of M-14.

u) M-16 is a copy of Order No. 7-0209 (1 FLD), March 7, 1977, 30 CFR 75.400.

v) M-16A is a form filled out by the Pittston Company.

w) M-16B is an inspector's statement accompanying M-16.

x) M-17 is a termination of M-16.

2) The Respondent introduced the following exhibits into evidence:

a) O-1 is a statement prepared by the Pittston Company outlining their defense for Order No. 7-0045 (2 HRB), and submitted in conjunction with the proposed settlement of that order.

b) O-2 is a statement, similar to O-1, submitted in conjunction with the proposed settlement of Order No. 7-0209 (1 FLD).

c) O-3 is a copy of the cleanup program at the Respondent's Meadow River No. 1 Mine.

d) O-4 is a copy of a form filled out by a belt examiner at the conclusion of a shift.

e) O-4A is a copy of a form filled out by a belt examiner at the end of a shift.

f) O-4B is a copy of a form filled out by a belt examiner at the end of a shift.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation. 1/

V. Opinion and Findings of Fact

A. Stipulations

1) At the commencement of the hearing, the parties entered into the following stipulations:

a) The Pittston Company produces approximately 12,036,974 tons of coal per year (Tr. 14).

1/ On February 26, 1979, the Respondent filed a posthearing brief as to the violations alleged in Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV). In its posthearing brief, the Respondent phrases the issue in this civil penalty proceeding as: whether the issuance of the orders of withdrawal was valid. Specifically, the Respondent contends that the orders are invalid in that the violations were not caused by an "unwarrantable failure" to comply with the mandatory safety standard embodied in 30 CFR 75.1100-3, as required by section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Coal Act). An order issued under section 104(c)(2) of the 1969 Act must be based on the criteria set forth in section 104(c)(1) of the 1969 Act.

However, the decisions of the Interior Board of Mine Operations Appeals establish that the propriety of the issuance of a withdrawal order is not an issue in a civil penalty proceeding. Jewell Ridge Coal Corp., 3 IBMA 376, 81 I.D. 624, 1974-1975 OSHD par. 18,901 (1974); Coal Processing Corporation, 2 IBMA 336, 342 80 I.D. 748, 1973-1974 OSHD par. 17,978 (1973); Eastern Associated Coal Corp., 1 IBMA 233, 236, 79 I.D. 723, 1972-1973 OSHD par. 15,388 (1972). However, evidence bearing upon whether the violation was caused by an "unwarrantable failure" to comply with the mandatory safety standard is also material to the negligence issue which must be addressed in a civil penalty proceeding. See Zeigler Coal Company, 7 IBMA 280, 84.I.D. 127, 1977-1978 OSHD par. 21,676 (1977).

b) The Meadow River No. 1 Mine produces approximately 154,797 tons of coal per year (Tr. 14).

c) At the Meadow River No. 1 Mine, there are approximately 181 miners underground and approximately 20 on the surface (Tr. 15).

2) In the posthearing brief filed on February 26, 1979, the Respondent submitted 24 proposed findings of fact. In a response to the proposed findings filed by MSHA on March 22, 1979, MSHA stated that it had no objection to 16 of the 24 proposed findings of fact. The 16 proposed findings of fact to which MSHA had no objection are as follows:

a) The Meadow River No. 1 Mine is operated by Sewell Coal Company.

b) The Meadow River No. 1 Mine is subject to the provisions of the 1969 Act under which the hearing was held.

c) The Administrative Law Judge has jurisdiction over this proceeding.

d) That Sidney E. Valentine was a duly authorized representative of the Secretary at all times relevant to the issuance of Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV). True and correct copies of the orders were served on Sewell Coal Company.

e) The following proposed findings of fact, to which MSHA had no objection, relate to Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV):

i) The water supply line that froze supplied water to both sprinkler systems in the form of a "T" unit (Tr. 41-42).

ii) The main line was 6-8 inches in diameter (Tr. 46).

iii) The temperature was -25 degrees Fahrenheit on the day of the violation (Tr. 69).

iv) On the day of the violation, about 50 percent of the mines in the area were closed because of cold weather (Tr. 73).

v) The water supply line had a drip valve to help prevent freezing (Tr. 72-73).

vi) On the day of the order, no mining was being performed in the mine (Tr. 35-36).

vii) No coal was being transported on the conveyor belt (Tr. 36, 70, 77).

viii) It is company policy not to mine coal when there is no water supply in the mine (Tr. 75).

ix) The violation was abated as quickly as possible (Tr. 29).

x) The inspector's concern centered on his perceived problem of a possible fire at the belt head (Tr. 38, 48-49).

xi) The belts had slippage rollers (Tr. 44-45, 67).

xii) The belts were not running continuously (Tr. 70).

B. Order No. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3; Order No. 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3

1) Motions to Dismiss

During the course of the hearings, counsel for the Respondent made two oral motions to dismiss. First, the Respondent argued that the case should be dismissed because the inspector cited the wrong mandatory safety standard (Tr. 55-60). The Respondent contends that since the conveyor belt drive units were equipped with sprinklers pursuant to 30 CFR 75.1101-6, the violation, if any, would have to be for failure to comply with 30 CFR 75.1101-7 through 75.1101-11. According to the Respondent's theory, the inspector erred in citing 30 CFR 75.1100-3 because sections 75.1100-3 and 75.1101-6 are mutually exclusive (Tr. 55). I disagree with the Respondent's theory. The pertinent language in 30 CFR 75.1100-3 states that: "All firefighting equipment shall be maintained in a usable and operative condition." (Emphasis added.) The all-encompassing phrase "All firefighting equipment" identifies the section as a general provision applicable to all firefighting equipment, including the sprinkler system at issue in the present case. Sections 75.1101-7 through 75.1101-11 are not incompatible with section 75.1100-3. Although those sections set forth particularized requirements for the installation and maintenance of water sprinkler systems, the requirements merely supplement, not supplant, the general requirement of section 75.1100-3 that all systems be maintained in a usable and operative condition. The Respondent's motion to dismiss for failure to cite the appropriate standard in the Code of Federal Regulations is, therefore, DENIED.

In his second oral motion, counsel for Respondent sought dismissal of one of the orders because, according to the Respondent, only one violation existed (Tr. 63). In support of this motion, the Respondent argues that the frozen water pipe is the sole alleged violation. I disagree. The two withdrawal orders allege separate violations. The alleged violation is not the mere existence of the frozen water pipe, but operating two separate belt drives in the absence of workable automatic fire suppression devices at each drive unit. The

motion is, therefore, DENIED. The fact that the frozen water pipe was related to both alleged violations will be considered in the assessment of an appropriate civil penalty if the violations are found to have occurred as alleged. Additionally, the validity of the order of withdrawal is not at issue in this civil penalty proceeding. See Jewell Ridge Coal Corp., 3 IBMA 376, 81 I.D. 624, 1974-1975 OSHD par. 18,901 (1974); Eastern Associated Coal Corp., 1 IBMA 233, 79 I.D. 723, 1972 OSHD par. 15,388 (1972).

2) Occurrence of Violations

On February 1, 1977, MSHA inspector Sidney E. Valentine conducted an inspection at the Respondent's Meadow River No. 1 Mine. He issued two 104(c)(2) orders citing violations of 30 CFR 75.1100-3 as to inoperable water sprinkler systems for the No. 1 and No. 2 belt drives 2/ (Exhs. M-6, M-8). The orders stated that the water sprinkler system, installed as automatic firefighting equipment, for the two belt drive units were "not maintained in operating condition in that, the main water supply for the mine was frozen and water was not provided for the system" (Exhs. M-6, M-8). The orders also stated that "Mine management knew this condition existed and was trying to thaw the water supply," but continued to operate the belt conveyors in spite of the lack of water for the automatic firefighting equipment (Exhs. M-6, M-8).

The water supply line, a 6- to 8-inch diameter pipe (Tr. 46), was frozen where the pipe enters the mine (Tr. 27). The frozen line supplied water to both sprinkler systems in the form of a "T" unit (Tr. 41, 42). Although the supply line was equipped with a drip valve to help prevent freezing (Tr. 72, 73), it was unable to prevent freezing on February 1, 1977, as the temperature was -25 degrees Fahrenheit. On the day of the orders, approximately 50 percent of the mines in the vicinity were closed due to cold weather (Tr. 73).

The belt conveyor drives for the No. 1 and No. 2 belts are approximately 3 to 6 feet apart (Tr. 30). Two orders were issued because: 1) each belt drive is a separate piece of equipment, even though both sprinkler systems were rendered inoperable by the same frozen pipe (Tr. 30, 31, 41), and, 2) both belts were moving (Tr. 26, 36). Coal had not been mined that day, and coal was not being transported on the conveyor belts (Tr. 35, 36, 74).

The No. 1 and No. 2 conveyor belts dump onto a third belt, known as the slope belt (Tr. 79). All three belts operate on an automatic sequence start system (Tr. 70). Engaging the slope belt automatically starts a sequence, thereby starting the No. 1 and No. 2 conveyor belts

2/ 30 CFR 75.1100-3 states in pertinent part: "All firefighting equipment shall be maintained in usable and operative condition."

(Tr. 70). At the time the orders were written, the system was not equipped with either a switch or other device that would have enabled the operator to use the slope belt without activating the No. 1 and No. 2 conveyor belts (Tr. 80). The operator was using the slope belt at intermittent intervals to transport ice chips from inside the mine (Tr. 70). The transported ice had been chipped from frozen waterlines in order to provide the necessary access to the lines to thaw them out (Tr. 70).

The evidence in the record establishes that the No. 1 belt drive unit and the No. 2 belt drive unit were separate pieces of equipment (Tr. 29-30). Both pieces of equipment were operating at a time when the automatic fire suppression devices were inoperable (Tr. 34). I therefore conclude that the violations alleged in Order Nos. 7-0041 (1 SEV) and 7-0042 (2 SEV) have been established by a preponderance of the evidence. 29 CFR 2700.48.

3. Gravity of the Violations

The inspector testified that if a fire occurred while the fire suppression equipment was inoperable, the miners would have been subjected to a smoke inhalation hazard (Tr. 26). The area was on intake air, but he did not know whether the air went to the face area (Tr. 26). He classified death or injury as "probable" (Tr. 28). At first, he estimated that approximately 30 miners were exposed to the hazard (Tr. 28). However, he admitted under cross-examination that he did not count them, and that the number could have been much lower than 30 (Tr. 42-43).

However, the inspector's testimony reveals that a fire hazard would have been present only if coal had been transported on the belt conveyors (Tr. 38). He stated that no fire hazard was present when the orders were issued (Tr. 38).

The evidence in the record confirms the inspector's opinion that no hazard was present. Coal was not being mined when the orders were issued, and coal was not being transported on the conveyor belts (Tr. 35, 36, 74).

According to the inspector, the problem was not something along the belt catching fire, but something at the belt drive catching fire due to friction (Tr. 37). Friction could have ignited both coal on the belt and any accumulations that happened to be present near the belt heads (Tr. 37-38). Although no coal was on the belts when the orders were issued, there was some coal beneath the belt drives (Tr. 37). It was not touching the belt drive (Tr. 37). However, the probability of friction was minimized by the presence of operable slippage rollers (Tr. 44, 69), devices which prevent ignition by preventing friction (Tr. 69). In addition, the belts were made of flame-resistant material (Tr. 51). The inspector found no problem

with the motor or with the wires leading to the motor (Tr. 50). Two fire extinguishers and 10 packs of rock dust were located at the belt heads (Tr. 71, 72). The fire extinguishers were operable (Tr. 46-47).

Based on the foregoing, I conclude that no gravity was associated with the two violations.

4. Negligence of the Operator

The No. 1 and No. 2 conveyor belts automatically engaged when the slope belt was activated (Tr. 70). The only way to stop the two subject belts while the slope belt was working was to unhook some wires (Tr. 80). The slope belt was used only intermittently on February 1, 1977, and only to transport ice out of the mine (Tr. 70, 79).

The assistant mine foreman knew that water was not available for fire protection at the belt head (Tr. 24, 28, 31). The belts should not have been operated while the waterline was frozen (Tr. 28). The operator should have known of the condition's existence because the mine foreman knew the waterline was frozen and that the belts were operating (Tr. 24-26).

Additionally, the fact that the operator was using the belts only to remove ice from the mine on an abnormally cold day, and the fact that the abnormally cold weather rendered the automatic fire suppression system inoperable, indicates a low degree of negligence. This is so because such conditions were not experienced routinely in the ordinary course of the operator's mining activity.

Based on the foregoing, I conclude that Respondent demonstrated ordinary negligence.

5. Good Faith in Securing Rapid Abatement

Order No. 7-0041 (1 SEV) (Exh. M-6) was issued at 9:15 a.m. and terminated at 4:05 p.m. (Exh. M-7). Order No. 7-0042 (2 SEV) (Exh. M-8) was issued at 9:20 a.m. and terminated at 4 p.m. (Exh. M-9). The inspector testified that the operator abated the violation as quickly as possible (Tr. 29).

Mr. Fred Copen, the Respondent's maintenance superintendent at the mine, testified that his men were working on the condition when the inspector arrived (Tr. 74). After they had chipped through the ice and reached the waterline, they used electric heaters to thaw the pipes (Tr. 74, 78).

I therefore conclude that the Respondent demonstrated the utmost good faith in securing a rapid abatement of the violation.

C. Order No. 7-0140 (1 HRB), February 15, 1977, 30 CFR 75.200

On February 15, 1977, MSHA inspector Henry R. Baker inspected the Respondent's Meadow River No. 1 Mine. At 9:25 a.m., he issued the subject withdrawal order for an alleged violation of the mandatory safety standard embodied in 30 CFR 75.200 3/ (Tr. 97, Exh. M-12). The Petitioner contends that the approved roof control plan for the Respondent's Meadow River No. 1 Mine (Exh. M-13), in effect on February 15, 1977, was not being observed in that the temporary roof supports had not been installed properly. The Respondent's affirmative defense asserts that installation of the temporary supports, spaced according to Diagram No. 1 of the roof control plan, would have required the Respondent to violate that provision of the plan which requires all posts to be installed on solid footing, 4/ and, since the area had been "dangered off," no violation can be found. The question presented is whether the parties have met their respective burdens of proof under the rule set forth by the Interior Board of Mine Operations Appeals in Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975). According to the Board:

> [S]ince [MSHA] has the burden of proof where the violation of a mandatory health or safety standard is in issue, it

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3/ 30 CFR 75.200 states:

"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."

4/ Safety Precaution No. 10 of the approved roof control plan (Exh. M-13 at p. 8), states: "All posts shall be installed tight and on solid footing and not more than two wooden wedges shall be used to install a post." (Emphasis added.)

> must not only establish a prima facie case under [Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d)] in a penalty proceeding, but under the regulation, it must also preponderate over any rebutting evidence adduced by the operator in order to prevail.

4 IBMA at 101, 102. 5/

In a footnote to the above-quoted passage, the Board further stated:

> In penalty cases, the Government's statutory obligation to establish a prima facie case is limited only to establishing the existence of a violation. Such obligation does not relate to affirmative defenses, especially as they concern claims of mitigation based upon the criteria for assessing a penalty once it is determined that a violation occurred.

4 IBMA at 102, n. 4.

5/ Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d), states, in pertinent part: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative, and substantial evidence."

According to the Board, a withdrawal order issued or penalty assessed is a governmental action imposing a sanction of a kind contemplated by the above-quoted language. The Board interpreted the above-quoted language as requiring MSHA to establish a prima facie case in a proceeding involving a withdrawal order or a violation of a mandatory health or safety standard for which a civil penalty is sought to be assessed. Zeigler Coal Company, 4 IBMA 88, 99-100, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975).

The Board noted that the duty of establishing a prima facie case is not the same as bearing the burden of proof. Zeigler Coal Company, 4 IBMA 88, 100, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975). Burden of proof is governed by Rule 48 of the Interim Procedural Rules, 29 CFR 2700.48, which states:

"In proceedings brought under these rules, the applicant, petitioner or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence: Provided, That, whenever the violation of a mandatory health or safety standard is at issue, the Secretary shall have the burden of proving the violation by a preponderance of the evidence."

The evidence adduced at the hearing, to which the above-quoted standards must be applied, reveals the following: Inspector Baker testified that in the northwest mains section, the second open crosscut right outby the face off No. 6 entry had been holed into the No. 7 entry (Tr. 90-91, Exh. M-12). The inspector stated that the approved roof control plan (Exh. M-13) was not being complied with in that the first temporary roof supports, which had been installed after the completion of the continuous miner runs (Exh. M-12), were located 12 feet inby the last permanent roof support (Tr. 90-91, 94, 99, Exh. M-12). According to the inspector, this did not comply with Drawing No. 1 of the approved roof control plan, which indicates that the first temporary support should be installed not greater than 5 feet inby the last permanent support (Tr. 91, 92, Exh. M-13). The source of the spacing and timing requirements is paragraph No. 2, located adjacent to the scale drawing (Tr. 92), which states, in pertinent part:

> Temporary supports in row (A) shall be installed after the first run is completed and prior to the commencement of the second run. Temporary supports in rows (B) and (C) shall be installed within one hour after completion of the run and prior to bolting. Temporary supports shall be installed, on 5-foot maximum centers, to within five feet of the ribs and face or the nearest permanent support.

See also (Tr. 92, 93-94). The 12 feet was measured from the small blocks in the drawing, which indicate permanent supports, to the circles, which indicate the first row of temporary supports (Tr. 95, Exh. M-13, Drawing No. 1). The inspector obtained an accurate measurement of the distance by tying his cloth measuring tape to a hammer, and throwing the hammer into the first temporary support (Tr. 143-144).

The inspector noticed a slope in the floor of the No. 7 entry adjacent to the area where it had been cut through from the crosscut. He characterized this slope as a "slight offset," i.e., there was an offset from a high point in the No. 7 entry to a low point in the crosscut (Tr. 132, 148).

Although no one explained to the inspector why the temporary supports had not been installed (Tr. 95), he speculated that the presence of water in the subject area might have been the reason (Tr. 95). The water was located in the crosscut near the area where it had been holed through into the No. 7 entry (Tr. 96). Additional water was not running into the area at the time the violation was observed, but the inspector admitted that additional water could have been seeping in from the bottom of the mine (Tr. 135). He did not know the source of the water (Tr. 96). The inspector did not know the depth of the water (Tr. 96), as he had no way of accurately measuring the depth (Tr. 133). He further testified that the area had not been "dangered off"

(Tr. 95), but admitted that he could have missed the danger sign (Tr. 152).

According to the inspector, the presence of water would have had no bearing on the installation of temporary supports except that the person installing them would have had to wade into the water (Tr. 96). However, he admitted under cross-examination, that gob could have been present at the bottom of the slope underneath the water, and that such gob would be very loose (Tr. 133). A man wading into the water, not knowing either whether gob was present or the precipitousness of the slope, could have been exposed to danger (Tr. 134). Of major significance to the Respondent is the inspector's testimony, under cross-examination, that gob is not solid footing (Tr. 134). According to the inspector, the roof control plan requires posts to be set on solid footing. Attempting to place the temporary supports above anything other than solid footing would have violated the roof control plan (Tr. 134). The gob would have to be cleaned out before setting the posts into place (Tr. 134).

Mr. Randolph R. Skaggs testified as the Respondent's defense witness. Mr. Skaggs was the continuous miner operator who had holed through the crosscut from the No. 6 entry into the No. 7 entry (Tr. 154-155). However, he did not recall whether he had made the cut on the day the order of withdrawal was issued (Tr. 166-167). The continuous miner operator, on the shift previous to Mr. Skaggs' cut, had cut approximately 3 feet below the coal seam into the floor of the crosscut (Tr. 154, 170). A stream of water was coming from the face of the No. 6 entry. The water flowed into the subject crosscut, collecting in the depression in the mine floor caused by the operator on the previous shift (Tr. 170). The water prevented a person from seeing the bottom of the depression (Tr. 155).

According to Mr. Skaggs, he made one run, establishing a cut for air purposes (Tr. 155). He described the cut as 10-1/2 feet wide and approximately 13 feet deep (Tr. 155, 161-162, 169). 6/ He thereupon backed the miner out of the crosscut, bringing it to rest in

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6/ The testimony of both Inspector Baker and Mr. Skaggs reveal sharp differences as to the width of the cut in the inadequately supported area. Mr. Skaggs' statement that the cut was 10-1/2 feet wide is based on his assertion that he made only one run (Tr. 155). The continuous miner, a 120-L Jeffrey, makes a 10-1/2-foot cut (Tr. 154).

Inspector Baker testified that the entry could not have been a single run in width, instead characterizing it as two runs in width (Tr. 137, 146-147). At one point, he stated that he did not know the width of the cut (Tr. 137), and that he did not measure the width of the cut (Tr. 142). However, he approximated its width as 18 to 20 feet at one point in his testimony (Tr. 142), while at another point, he admitted that the width could have measured 15 feet (Tr. 146).

the No. 6 entry (Tr. 155, 170). The depth of the water prevented him from proceeding inby the last permanent support to install the temporary supports (Tr. 155-156) for the following reasons: The miner acts as a dam causing the water to collect at the lefthand rear portion of the machine (Tr. 155). While backing the miner out of the area, water flowing downhill will rush to the face area (Tr. 155). As the muddy water prevents one from seeing the bottom, it would have been dangerous to attempt installation of the temporary supports (Tr. 156). The muddy water prevents one from determining the condition of the bottom, i.e., whether it is uneven or whether loose material is present (Tr. 156).

He testified that after backing the miner out of the crosscut (Tr. 155), he dangered off the area. This was accomplished by using a piece of chalk to write the word "Danger" on a half-header and subsequently propping it at the mouth of the place using a rock (Tr. 157-159). A half-header measures approximately 18 inches by 7 inches (Tr. 158). This makeshift sign was intended as a temporary measure. However, Inspector Baker testified that he did not think that the makeshift danger sign could not have been in the location described by Mr. Skaggs without the inspector seeing it (Tr. 179-180). Mr. Skaggs had testified previously that the sign could have been removed by someone (Tr. 161). Additionally, the inspector read the preshift report before entering the mine, and did not see anything about the dangered-off area. He stated that it was possible that he could have overlooked it (Tr. 138).

According to Mr. Skaggs, the area could not have been timbered because the timbers could not have been placed on a firm foundation--there was too much gob in the face (Tr. 156-157). Mr. Skaggs did not know when the condition was abated (Tr. 165). However, when he returned to the area during his next working shift, the water had been pumped out, the area had been cleaned, and temporary supports had been installed (Tr. 165).

After having backed the continuous miner out of the crosscut and into the No. 6 entry, Mr. Skaggs and his helper proceeded to the No. 7 entry where the helper placed temporary supports at the mouth of the crosscut (Tr. 171-175). It is the Respondent's contention that these supports were the ones mentioned by Inspector Baker in

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fn. 6 (continued)

In this instance of conflict in the testimony, I conclude that the testimony of the Respondent's witness is more credible and entitled to acceptance. This conclusion is warranted for two reasons: First, the inspector neither measured the width of the cut nor affirmatively ascertained that more than one run had been made. Secondly, Mr. Skaggs had an objective reference point for his statement, i.e., that one run had been made and that the miner made a 10-1/2-foot cut on each run.

his order of withdrawal. The inspector had testified that the temporary supports could have been set from the No. 7 entry side of the crosscut (Tr. 132).

The foregoing evidence reveals that the Petitioner has not established a violation of the roof control plan in accordance with the description in the subject order of withdrawal and thus has not met the burden of proof rule set forth in the above-quoted passages from Zeigler Coal Company, supra.

The order of withdrawal essentially alleges that the roof control plan was not followed in that the crosscut had been holed into the No. 7 entry and the temporary roof supports had been installed 12 feet inby permanent roof supports (Exh. M-12). Thus, the order indicates that the alleged violation relates to the location of the temporary supports rather than to the lapse of time since the area had been last cut. The order, on its face, seems to infer that the person setting the temporary supports may have gone more than 5 feet out from under the permanent supports to set the temporary supports, which would have been a violation of the plan (Exh. M-13, p. 7, par. 5). The evidence presented by the miner operator clearly showed that such was not the case since those supports were set from the other end of the crosscut from a permanently supported area in the No. 7 entry.

After presentation of all of the evidence, it appeared that the only violation that could have occurred related to the question as to whether there was too much time that elapsed between the last cut of coal, and the time the inspector arrived at the area, without supports.

However, such an alleged violation was not described in the order. This order was written under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970). Section 104(e) of that Act required, inter alia, that orders shall contain a detailed description of the condition or practice which constituted a violation of any mandatory safety standard. The detailed description is particularly important so that the operator will know what the actual violation is and what must be done to correct the problem and not repeat the violation again. The actual wording of the order would not inform the operator that the time lapse was the actual alleged violation.

Since the evidence now shows that there was no violation as relates to the position of the temporary supports, it must be held that a violation of 30 CFR 75.200 has not been proved under this order.

Even if it were argued that the order can be interpreted to allege a violation of some time requirement as to the installation of temporary supports, it cannot be held that a violation has been proved.

As to the time requirements, Drawing No. 1 of the roof control plan requires, in pertinent part, that:

> Temporary supports in row (A) shall be installed after the first run is completed and prior to the commencement of the second run. Temporary supports in rows (B) and (C) shall be installed within one hour after completion of the run prior to bolting. Temporary supports shall be installed on 5-foot maximum centers, to within 5 feet of the ribs and face or the nearest permanent support. [Emphasis added.]

The above-quoted passage states that the temporary supports in row (A) must be installed after the completion of the first run and prior to commencing the second run. It is arguable that this language can be interpreted as excusing the installation of temporary supports after the completion of the first run as long as those supports are installed prior to beginning the second run. As only one run had been completed in the present case, it could be argued that the temporary supports did not have to be installed immediately following the completion of the first run as long as they were installed prior to the commencement of the second run, regardless of the amount of time elapsing between runs. However, this interpretation is contrary to the tenor of 30 CFR 75.200, which seeks to protect persons from roof and rib falls.

An interpretation of the roof control plan would require the installation of temporary supports, under the facts presented herein, within a reasonable time after completion of the run. The above-quoted passage from Drawing No. 1 reveals that the plan's minimum requirements envision the normal mining sequence in entries, rooms or crosscuts as consisting of two runs. In the course of normal mining operations, the temporary supports in row (A) would be installed immediately after completion of the first run so that the second run could be commenced as quickly as possible. Under such circumstances, it is readily apparent why the requirement that temporary supports be installed within 1 hour after completion of the run, is mentioned only in connection with the installation of temporary supports in rows (B) and (C). This warrants the conclusion that, where only one run is made, the row of temporary supports must be installed within a reasonable time after its completion.

The key question, for purposes of the present case, is what constitutes a reasonable time. Inferences drawn from the testimony of the witnesses reveal that the conditions existed at 4 p.m., February 14, 1977, 17 hours and 25 minutes prior to issuance of the order of withdrawal. Mr. Skaggs' testimony establishes that he made the subject run in the crosscut and had installed the temporary supports (Tr. 154, 156, 171-175), but he could not recall the day on which he made the run (Tr. 166-167). He could not recall whether he made the run in the morning or during the afternoon (Tr. 167-168).

He was working straight day shift around February 15, 1977 (Tr. 166), beginning work at 8 a.m. (Tr. 167). Inspector Baker testified that the area in question had not been cut on the morning of February 15, 1977, because it would have required 45 minutes to 1 hour to make the cut (Tr. 136). He had followed the day crew into the mine, and they "certainly didn't have time to make this particular mine site" (Tr. 136). Since the run could not have been made on the February 15, 1977, day shift, and since the miner operator who had made the run was working straight day shift, it can be inferred that the condition had existed for at least 17 hours and 25 minutes prior to the issuance of the order.

Whether it was unreasonable to permit the condition to exist for 17 hours and 25 minutes cannot be determined from the record. The plan does not specifically set forth a time within which the first row of temporary supports is required to be installed, and considering the general provisions of 30 CFR 75.200, there is no evidence to show that the conditions of the roof here indicated any particular time limit within which the temporary supports needed to be installed. The alleged inadequately supported area was 10-1/2 feet wide and approximately 13 feet deep (Tr. 155, 161), yielding an area of approximately 136.5 square feet. The record contains no evidence as to roof conditions in the crosscut. The record does show that the condition of the bottom of the area where the temporary supports had to be installed presented a precarious situation for any miners to make the required installation. It is clear that the water had to be removed first and the gob in the bottom had to be cleaned so that firm footing would result. Faced with this problem, the miner operator did place a danger sign in the area when the run was completed. This danger sign may have disappeared subsequently. In view of the fact that the roof control plan had no specific time limit for the installation of the supports in question, since we must apply a test of reasonableness of time, all of these surrounding circumstances must be considered. Under all of these circumstances, it cannot be inferred that the area remained without temporary supports for an unreasonable time after completion of the first run.

Therefore, I conclude that MSHA has failed to establish a violation of 30 CFR 75.200 by a preponderance of the evidence.

D. Order No. 7-0187 (1 HRB), February 17, 1977, 30 CFR 75.400

1. Motion to Dismiss

At the conclusion of MSHA's case-in-chief, the Respondent moved to dismiss on the grounds that MSHA had failed to establish a prima facie case for a violation of 30 CFR 75.400 within the meaning of Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977). A ruling will be made based upon the evidence in the record at the time the motion was made.

The Commission's Interim Procedural Rules do not set forth standards governing the disposition of motions to dismiss. However, standards are set forth in Rule 41(b) of the Federal Rules of Civil Procedure. Although Rule 41(b) is not applicable specifically to administrative proceedings, it provides a useful reference point in ruling upon the Respondent's motion. The rule reflects the most recent statement of the courts' collective experience in deciding such motions.

The Respondent contends that on the facts and the law, the Petitioner has not established a claim for relief. See generally, 5 J. Moore, Federal Practice, par. 41.13[1] at 41-170, 41-171 (1978). The motion must be denied if, upon the facts and the law in the record at that time, the existence of a violation is shown. See generally, 5 J. Moore, Federal Practice, par. 41.13[1] at 41-172, 41-173 (1978). In light of the remedial purposes of the Act, the motion should be granted only in "unusually clear" cases. See generally, Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 793, n. 19 (5th Cir. 1975); White v. Rimrock Tidelands, Inc., 414 F.2d 1336, 1340 (5th Cir. 1969).

The evidence in the record at the conclusion of the Petitioner's case-in-chief reveals the following: On February 17, 1977, MSHA inspector Henry R. Baker conducted an inspection at the Respondent's Meadow River No. 1 Mine. He observed accumulations of float coal dust (Tr. 318-319, 369, Exh. M-14), and thereupon issued Order of Withdrawal No. 7-0187 (1 HRB) for a violation of the mandatory safety standard embodied in 30 CFR 75.400 (Exh. M-14). He ascertained the substance was float coal dust by its texture and color (Tr. 320). He ran his hammer through the substance and observed that it was powdery (Tr. 320). The float coal dust was located primarily along the No. 1 belt conveyor and around the belt drive (Tr. 324). There was no problem along the No. 2 conveyor belt.

The No. 1 belt conveyor was on the left side of the mine slope bottom, and the No. 3 belt conveyor was at a right angle to the No. 1 belt conveyor and dumped coal onto the No. 1 belt conveyor. Both the No. 1 belt conveyor and the No. 2 belt conveyor dumped coal into a surge bin (Tr. 341). The No. 1 belt was on the left side of the bin, and the No. 2 belt was on the right side of the bin (Tr. 323). The bin was approximately 30 feet deep (Tr. 323). A feeder, located at the bottom of the bin, relayed the coal to the slope belt for transportation to the preparation plant on the surface (Tr. 319, 321-322). The coal on the No. 1 and No. 2 conveyor belts dropped vertically into the bin (Tr. 323). At least part of the float coal dust arose as coal falling into the bin struck the coal already stored there (Tr. 324). The inspector testified that Mr. Dennis Kyle, a mine foreman, mentioned during the inspection tour that due to the high velocity air currents coming up through the surge bin, a float coal dust problem existed in the subject area of the mine (Tr. 333). This conversation took place after the order was issued,

but before it was terminated, i.e., between 11 a.m. and 1:30 p.m. (Tr. 330-331). The inspector did not observe float coal dust rising from the bin (Tr. 326). He conducted no air velocity tests (Tr. 333). The mine was producing coal and the No. 1 belt drive was operating when the inspector observed the condition (Tr. 325-326).

Directly adjacent to the bin around the No. 1 belt drive, the float coal dust was 3 inches deep, and the farther away one went from the bin, the less in depth the float coal dust became until it was too shallow to measure (Tr. 319, 325-326, 333). It ran the entire length of the No. 1 belt and extended as far as the No. 3 belt conveyor drive, a distance of 300 feet (Tr. 325, Exh. M-14). It was under the belt and along the sides (Tr. 325). Accumulations were present also on the water pipes installed around the surge bin belt drive, and on the frame of the bin (Tr. 319). He did not measure the width of the accumulations, but they extended from rib to rib in places. He stated that with regard to the type of mining used, the entry is approximately 20 feet wide (Tr. 333-334). The area had been rock dusted at some point in time, but the float coal dust accumulations were atop the rock dust (Tr. 319-320, 337, 368). The condition was readily observable (Tr. 335). The accumulations were at least 1,000 feet from the face (Tr. 337).

A certain amount of float coal dust would accumulate during normal operations (Tr. 320, 326, 374-375). However, the accumulations were described by the inspector as abnormal (Tr. 374-375). According to the inspector, the condition should have been known to the operator because it could not have developed during one shift (Tr. 338, 342-343). The primary factor was the depth (Tr. 338-339). He expressed the view that it would have required two shifts for the condition to develop (Tr. 371). It should have been observed during the required examinations (Tr. 342-343), but it was not noted on the preshift examiner's report (Tr. 339).

The inspector identified the belt drive and the mine track system's trolley wire as potential ignition sources (Tr. 334, 339, 380-381). The mine track was described as a potential source of ignition at the surge bin (Tr. 339). Although the track system was relatively close to the No. 1 belt conveyor, it did not run parallel to it (Tr. 380). It ran in the opposite direction (Tr. 380). He stated that the trolley wire came to within approximately 35 to 50 feet of the No. 1 belt drive (Tr. 381). He stated that a remote possibility existed that arcing could have an effect upon the float coal dust at the No. 1 belt drive, even though it was 35 to 50 feet away from the possible ignition source (Tr. 381).

An explosion could have affected the entire mine. If an explosion had blown out the permanent stoppings, the ventilation system could have been interrupted, causing smoke and flames which could have scattered (Tr. 358-360). The mine did not have a history of

methane liberation (Tr. 335). The inspector did not detect any methane (Tr. 367). Float coal dust would have to be suspended in the air before an explosion could have occurred (Tr. 367). There was not a high quantity of dust in the air, a fact attributable to the ventilation (Tr. 367-368). A 10-pound fire extinguisher and a sprinkler-type fire suppression system were located at the belt head (Tr. 372). Part of it was operable and part of it was not (Tr. 372). There was at least one fire hose outlet present in this area (Tr. 377).

The inspector did not remember whether the coal falling into the surge bin was wet (Tr. 324). To the best of his recollection, the area in which the accumulations were observed was not wet in any places (Tr. 366).

The area had been rock dusted at some point in time (Tr. 319-320, 339). Float dust or coal dust was atop the rock dust (Tr. 319-320, 368). Based on the depth and extent of the float coal dust, the inspector expressed the opinion that no rock dusting had been done in the area during the day shift prior to his arrival on the scene (Tr. 379, 382). However, he had no personal, firsthand knowledge as to whether cleaning or rock dusting had occurred (Tr. 382). He did not know how often the belt areas were rock dusted at the Meadow River No. 1 Mine (Tr. 379).

The inspector did not recall any written procedure in effect at the mine for dealing with float coal dust (Tr. 378-379). He testified that the operator's cleanup program pertains to cleanup and rock dusting primarily on the section. The only written cleanup program he had seen pertained to the face area. He thought the belts were cleaned as needed (Tr. 339-340). He was certain that beltmen were assigned to maintain the belt areas, a duty which included cleanup as necessary (Tr. 340).

In his opinion, the belt area was an active working place in the mine. People worked in the area examining the belts and making repairs (Tr. 336).

The foregoing is a summary of the testimony in the record when the Respondent moved to dismiss.

30 CFR 75.400 states: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

The term "active workings" is defined as "any place in a coal mine where miners are normally required to work or travel." 30 CFR 75.2(g)(4).

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board of Mine Operations Appeals held that the mere presence of a deposit or accumulation of coal dust or other combustible materials in active workings of a coal mine is not, by itself, a violation.

The elements of MSHA's prima facie case, as set forth in Old Ben, are:

> (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;
>
> (2) that the coal mine operator was aware, or by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
>
> (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

The Respondent argues that Old Ben imposes upon Federal coal mine inspectors a specific duty to make inquiries as to the cleanup program in effect at the mine, and a duty to determine when the regular cleanup would occur (Tr. 384). The Respondent further contends that inspectors must determine that the accumulation is unusual, that the operator willfully failed to record the accumulations in the preshift books, that the mine operator has been negligent in failing to clean up the area, and must establish that the lack of cleanup is unusual (Tr. 384). I disagree.

The key elements for establishing a prima facie case are that the operator failed to undertake cleanup operations within a reasonable time after he either knew or should have known of the accumulations' existence. According to the Board:

> Application of this time factor necessarily imposes a responsibility upon the coal mine inspectors to ascertain, before issuing a citation under 30 CFR 75.400, the time when the operator or its agents discovered, actually or constructively, the existence of the accumulation of combustibles. This may be done by the use of logical conclusions drawn from the circumstantial evidence. An easier method might be, however, simply asking the miners and foremen familiar with the mining operations in the

active workings when and how the accumulation occurred and when and how, if at all, it was discovered. It is, of course, also important that the inspectors further ascertain what was done by the operator, if anything, after discovery of the accumulation. Did the operator immediately undertake to clean up the accumulation? Was it ignored completely? Was the operator aware of the accumulation, but, rightly or wrongly, decided that it should be handled routinely through the regular cleanup program? All of these questions need due consideration and resolution before deciding to issue a citation charging a violation of the subject standard. If the inspector does decide to issue such a citation, his determinations with regard to time of discovery and time of inauguration of cleanup by the operator, it seems to us, are key elements of, and should be included in, the factual description of the conditions and practices which are alleged to constitute a violation. In making these detailed factual evaluations, the inspectors, hopefully, will not lose sight of the controlling inquiry under section 304(a) of the Act - whether the operator is making every reasonable effort to minimizing the accumulations of combustible material.

8 IBMA at 113-114.

A cursory reading of this passage from the Board's decision in Old Ben could lead to the conclusion that it imposes upon the inspector the unqualified duty to direct specific inquiries to mine employees as to these areas before issuing a "citation." 7/ This question was resolved subsequently by the Board. On September 23, 1977, MSHA filed a motion for reconsideration of the Board's decision in Old Ben. In the course of its memorandum opinion denying the motion, the Board stated:

> [W]e refer counsel to our decision (8 IBMA 113-14) which sets out in very elementary terms the manner in which an inspector might go about collecting his evidence. We do not feel that this direction to the inspectors is unreasonable or that it will render the inspectors' job impossible. On the contrary, we strongly feel that this

7/ The use of the term "citation" in Old Ben can be misleading. Old Ben was decided under the Federal Coal Mine Health and Safety Act of 1969. The term "citation" had no specific meaning, as the 1969 Act referred to "notices" and "orders." However, under section 104 of the Federal Mine Safety and Health Act of 1977, the term "citation" is used to describe what had been referred to previously as a "notice."

> simply provides a useful guideline for the MESA [MSHA] inspector and, if properly utilized, would go a long way toward making the mines safer and the operators more aware of their obligations under the standard set forth in Section 304(a) of the Act. [Emphasis added.]

8 IBMA at 199.

The underlined portions of this passage indicate that the statements made at 8 IBMA 113-114 were merely suggested guidelines, not commands. Additionally, the Board had stated that inspectors could base their determinations of the operator's actual or constructive knowledge of the presence of combustible accumulations in active workings on logical conclusions drawn from circumstantial evidence. The evidence set forth above reveals a logical basis for the inspector's conclusion that the operator had constructive knowledge of the accumulations' presence. The evidence also reveals that the inspector gave an opinion as an expert that the accumulations, which were extensive, had existed for more than one shift. Based upon this, it appeared at that stage of the case that the operator had failed to clean up the accumulations within a reasonable time after it should have known of them.

Accordingly, on the facts and the law as set forth herein, the motion to dismiss is DENIED.

2. Occurrence of Violation

At the conclusion of Inspector Baker's testimony, which is set forth in Part V(D)(1), supra, Mr. Darrell Pomeroy, the union conveyor belt examiner for Sewell Coal Company, appeared as a witness for the Respondent. Although Mr. Pomeroy was not charged by the Respondent with the duty of removing accumulations, he was required to conduct examinations and report problems.

Mr. Pomeroy had examined the preshift books on the surface to determine whether any areas needed checking (Tr. 395, 405). He examined the belt examiner's report filled out by the belt examiner on duty during the prior shift (Tr. 395, Exh. O-4A). It noted spillage at the No. 2 tailpiece and noted the need for rock dusting at the No. 3 belt head (Tr. 405, Exh. O-4A). The report did not note any problems in the areas cited by the order of withdrawal. The belt examiner's report filed at the conclusion of the 4 p.m.-12 midnight shift, February 16, 1977 (Exh. O-4 also indicates the absence of problems in the area in question).

He viewed the area in question at approximately 8:10 a.m. on February 17, 1977 (Tr. 390-391). The slope bottom was well rock dusted (Tr. 391). The pipes in the area had been sprayed with water, but had not been rock dusted (Tr. 391). He testified that

the area adjacent to the surge bin was dry, but that the area was wet from 40 feet behind belt drive No. 1 "on up" (Tr. 392).

Mr. Pomeroy testified that the accumulations cited by the inspector had to have occurred between 8 and 11 a.m. because they were not present when he examined the area at 8:10 a.m. (Tr. 391, 407).

According to Mr. Pomeroy, the Respondent had a cleanup program in effect on February 17, 1977 (Exh. O-3). The cleanup program stated, in pertinent part, as follows:

> 2. Program for cleaning mine belts:
>
> On day shift we will have one man examining belts, three men will clean belts where needed now. After we get the belts fairly cleaned throughout the mine we will assign certain belts to certain belt cleaners each day.
>
> 1 belt examiner on evening shift
>
> 2 belt cleaners on evening shift
>
> 2 belt cleaners on owl shift
>
> Same prodedure [sic] will be followed on the evening and owl shift as is being done on the day shift.

According to Mr. Pomeroy, float coal dust is handled according to the severity of the problem. If the accumulation was such as to pose an immediate danger, either the safety director or the mine foreman would be contacted and the problem would be corrected as quickly as possible. If the problem did not pose an immediate danger, it would be noted in the belt book and alleviated during the next shift (Tr. 406-407). In short, the area was cleaned as often as conditions warranted (Tr. 415).

The cleanup man assigned to the area automatically carried out the cleanup procedure (Tr. 416). The area for which he was responsible covered the slope bottom, the area around the surge bin, the No. 1 and No. 2 belt heads, the area adjacent to the No. 1 and No. 2 belts, and the point at which the No. 3 belt dumped onto the No. 1 belt. The entire area encompasses not greater than 300 feet (Tr. 416). Rock dusting was used to handle float coal dust along the conveyor belt (Tr. 417-418).

The elements of MSHA's prima facie case have been set forth previously in this decision. In brief, Old Ben Coal Co, 8 IBMA 98, 84 I.D. 495, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), held that the mere presence of a deposit or accumulation of coal dust or

other combustible materials in active workings of a mine is not, by itself, a violation. MSHA must also establish that the operator knew or should have known of the presence of the accumulation, and that the operator failed to clean up, or undertake to clean up, the accumulation within a reasonable time after discovery was or should have been made.

There can be no doubt as to the presence of an accumulation of combustible material in the active workings as described in the testimony of Inspector Baker.

A question is presented as to whether the Respondent can be charged with knowledge of the accumulations' presence. The belt examiner's reports filed at the conclusion of the two previous shifts indicated an absence of problems in the subject area. The area was free of accumulations when it was inspected by the union belt examiner at 8:10 a.m. on February 17, 1977, pursuant to the cleanup plan.

However, there can be no doubt that a substantial accumulation of float coal dust developed in the subject area between 8:10 a.m. and 11 a.m., an accumulation sufficient in both depth and extent for the inspector to opine that it had existed for approximately two shifts (Tr. 371).

The testimony of both Inspector Baker and Mr. Pomeroy reveals that the bin area posed problems as to float coal dust (Tr. 333, 410). During the course of his conversation with mine foreman Dennis Kyle, the inspector learned that the high velocity air coming up through the bin itself was presenting a problem in the subject area (Tr. 333, 338). The air came from a leakage in the airlock doors between the bin and the entrance to the slope (Tr. 338). There was a high velocity of air in the subject area during the course of the inspector's examination (Tr. 368).

The testimony reveals that Respondent had been experiencing ongoing problems with float coal dust accumulations in the subject area of the mine as a direct consequence of high velocity air currents moving through the bin. Excessive float coal dust accumulations were a foreseeable consequence of this problem, and, as such, the Respondent must be charged with constructive knowledge of the presence of the float coal dust accumulation cited by the inspector in the subject order of withdrawal. This conclusion results partly from the fact that the extent and depth of the float coal dust was extreme and since the management personnel knew that an unusual problem existed at this place, it should have employed unusual methods to combat the problem.

As to the issue of reasonable time, the Board stated:

> As mentioned in our discussion of the responsibilities imposed upon the coal mine operators, what constitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

8 IBMA at 115.

The Board further stated:

> With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation, it is our view that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shift, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the-ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the unusual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the Act upon a coal mine operator to protect the safety of the miners.

8 IBMA at 111.

In a subsequent opinion, Old Ben Coal Company, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977) (denying Government's motion for reconsideration), the Board stated:

> A small accumulation is most probably suitable for elimination in the course of the operator's regular cleanup program. Proof of the absence of such a program, together with the presence of any accumulation might well alone support a citation for violation of Section 304(a). If the accumulation is of such size or combustibility as to present the possibility of a serious safety hazard, then, of course, the operator is required to take more urgent steps, other than by regular cleanup, in eliminating the hazard. [Emphasis in original.]

8 IBMA at 198.

The foreseeability of the problem, coupled with the testimony describing the operation of the cleanup plan, reveal that the cleanup plan in effect on February 17, 1977, was inadequate to deal with float coal dust accumulations in the subject area of the mine. The fact that a cleanup man had been assigned to a territory which encompassed the subject area does not, by itself, indicate that the plan was adequate (Tr. 416). In fact, the testimony of Mr. Pomeroy reveals that the cleanup man's activities were not adequately supervised. According to Mr. Pomeroy:

> Q. And who is it that does the cleanup on your shift?
>
> A. John McClung. He's a belt cleaner.
>
> Q. And the foreman directs him to do this?
>
> A. He don't have to direct him. It's just our procedure. He knows what he's supposed to do. That's his area.

(Tr. 415-416).

The inadequacy of the cleanup plan, the depth and extent of the accumulation, the explosive potential of float coal dust, and the proximity of the accumulation to potential sources of ignition, all indicate that the float coal dust accumulation cited by the inspector was present for more than a reasonable time.

Accordingly, it is found that the occurrence of the violation described in Order No. 7-0187 (1 HRB), has been established by a preponderance of the evidence. 29 CFR 2700.48.

3. Gravity of the Violation

During the course of the hearing, official notice was taken of the fact that float coal dust in underground coal mines is recognized as a serious problem because of the potential for explosions (Tr. 357). The evidence reveals that the accumulations were heaviest near the bin, tapering to a virtually unmeasurable depth the farther one proceeded from the bin. The area was dry up to a point 40 feet from the bin, the remainder of the area cited in the order of withdrawal was wet (Tr. 392). The accumulations were sitting atop rock-dusted surfaces (Tr. 319-320, 337, 368). It was at least 1,000 feet to the nearest working face (Tr. 337). The belt conveyor drive was identified as a possible ignition source (Tr. 334). The track trolley wire also was identified as a possible ignition source (Tr. 339, 380-381), but it was 35 to 50 feet away from the accumulations (Tr. 381). The inspector classified the probability of ignition from the trolley wire as remote (Tr. 381). There was not a great quantity of float

coal dust in the air, a fact attributable to the ventilation (Tr. 367-368). The mine did not have a history of methane liberation (Tr. 335), and the inspector did not detect any methane (Tr. 367). A 10-pound fire extinguisher and a sprinkler-type fire suppression system were located at the belt head (Tr. 372). Part of it was operable and part of it was not (Tr. 372). There was at least one fire hose outlet present in the area (Tr. 377).

The belt was in operation when the inspection was made (Tr. 326), and coal production was underway (Tr. 326). The inspector could not recall whether any miners were working in the general area (Tr. 335). However, he stated that an explosion would have endangered anyone in the immediate area (Tr. 343).

According to the inspector, a serious mine explosion could have affected the entire mine. The stoppings could have been blown out thus interrupting the ventilation. A major interruption of the ventilation system is very serious because it can scatter both smoke and flames (Tr. 358, 360).

On the basis of the foregoing, it is found that the violation was serious.

4. Negligence of the Operator

It is found, as set forth in Part V(D)(2), supra, that the Respondent had constructive knowledge of the accumulations' presence. This fact, coupled with the inadequacy of the cleanup plan, and the fact that management knew that the area in question posed a real problem, but obviously didn't use sufficient means to solve the problem quickly enough, reveals that the Respondent demonstrated considerably more than ordinary negligence.

5. Good Faith in Securing Rapid Abatement

The order of withdrawal was issued at 11 a.m. and terminated at 1:30 p.m. on November 17, 1977 (Exhs. M-14, M-15, Tr. 331). The Respondent commenced abatement procedures immediately, and assigned two section crews to the task (Tr. 365).

Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

VI. Size of Operator's Business

The Pittston Company produces approximately 12,036,974 tons of coal per year (Tr. 14). The Meadow River No. 1 Mine produces approximately 154,797 tons of coal per year (Tr. 14). The Meadow River No. 1 Mine is operated by the Sewell Coal Company (Part (V)(A)(2)(a)), a member of the Pittston group.

VII. Effect on Operator's Ability to Continue in Business

The Respondent introduced no evidence indicating that an assessment in this case would adversely affect the Respondent's ability to continue in business. The Interior Board of Mine Operations Appeals has held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find, therefore, that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VIII. History of Previous Violations

30 CFR Standard	Year 1 2/17/75 - 2/16/76	Year 2 2/17/76 - 2/17/77	Total
All sections	411	628	1,039
75.200	41	49	90
75.400	44	101	145
75.1100-3	7	11	18

(Note: All figures are approximations.)

As relates to the Meadow River No. 1 Mine, the operator had paid assessments for approximately 1,039 violations of regulations in the 24 months preceding February 17, 1977. Approximately 411 of these paid assessments were for violations cited between February 17, 1975, and February 16, 1976. Approximately 628 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

The operator paid assessments for approximately 90 violations of 30 CFR 75.200 in the 24 months preceding February 17, 1977. Approximately 41 of these paid assessments were for violations cited between February 17, 1975, and February 16, 1976. Approximately 49 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

The operator paid assessments for approximately 145 violations of 30 CFR 75.400 in the 24 months preceding February 17, 1977. Approximately 44 of these paid assessments were for violations cited between February 17, 1975, and February 16, 1976. Approximately 101 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

The operator paid assessments for approximately 18 violations of 30 CFR 75.1100-3 during the 24 months preceding February 17, 1977. Approximately seven of these paid assessments were for violations cited

between February 17, 1975, and February 16, 1976. Approximately 11 of these paid assessments were for violations cited between February 17, 1976, and February 17, 1977.

In accordance with the ruling in Peggs Run Coal Company, 5 IBMA 144, 150, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975), no consideration will be given to any violations occurring subsequent to the respective dates of violations involved in this case.

IX. Conclusions of Law

1. Sewell Coal Company and its Meadow River No. 1 Mine have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act during the respective periods involved in this proceeding.

2. Under the Acts, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspectors Sidney E. Valentine and Henry R. Baker were duly authorized representatives of the Secretary of Labor at all times relevant to the issuance of the orders of withdrawal which are the subject matter of this proceeding.

4. The violations charged in Order No. 7-0041 (1 SEV), February 1, 1977, 30 CFR 75.1100-3, Order No. 7-0042 (2 SEV), February 1, 1977, 30 CFR 75.1100-3 and Order No. 7-0187 (1 HRB), February 17, 1977, 30 CFR 75.400 are found to have occurred.

5. Petitioner has failed to establish a violation of 30 CFR 75.200 as relates to Order No. 7-0140 (1 HRB), February 15, 1977.

6. The oral motions made by the Respondent during the course of the hearing are denied as contrary to the law or the facts.

7. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

X. Proposed Findings of Fact and Conclusions of Law

MSHA and Sewell submitted posthearing briefs. MSHA submitted a response to the proposed findings of fact and conclusions of law advanced by Sewell in its posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

XI. Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of penalties is warranted as follows:

Order No.	Date	30 CFR Standard	Penalty
7-0041 (1 SEV)	02/01/77	75.1100-3	$ 300
7-0042 (2 SEV)	02/01/77	75.1100-3	300
7-0187 (1 HRB)	02/17/77	75.400	5,000
			$5,600

XII. Approval of Settlement

As mentioned in Part I, supra, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding in April of 1978. Subsequent thereto, the proceeding was set for hearing. At the time of the hearing, counsel for both parties proposed settlements as to penalty assessments to be paid by Respondent as to the four alleged violations involved.

During the hearing, stipulations were entered into as to the annual tonnage of the Respondent and the individual mine. These stipulations are contained in the transcript. Exhibit No. M-1 contains a history of violations for which the Respondent had paid penalty assessments relating to the Meadow River No. 1 Mine.

Exhibit Nos. M-2, M-3, M-3A, M-4, M-5, M-5A, M-5B, M-10, M-10A, M-11, M-16, M-16A, M-16B, M-7, O-1, and O-2, were filed in the case file in conjunction with the proposed settlements. These documents include orders issued by inspectors and Office of Assessments' narrative statements describing the alleged violations and the reasons given by that office for the special assessments recommended in each case. In addition, these exhibits contain statements by the inspectors as to the negligence of the operator, the gravity of the alleged violations, and the good faith of the Respondent relating to abatement of the alleged violations. These exhibits also contain a form filled out by the Pittston Company, similar to an inspector's statement, and two statements outlining the Respondent's defenses with respect to two of the orders.

During the course of the hearing, counsel for both parties set forth reasons on the record as to why the penalty assessments should be in the amounts agreed to rather than the amounts set forth originally by the Office of Assessments. Each individual order of withdrawal will be set forth separately below.

Order No. 7-0012 (1 HRB), January 27, 1977, 30 CFR 75.400

Proposed assessment: $6,000. Proposed settlement: $4,500.

Of significant consideration to a settlement, are the following statements of counsel made at the hearing:

> MR. O'DONNELL: All right. The first one is Section 104(c)(2) Order of Withdrawal No. 1 HRB, which has been given by the Assessments Office the number of 7-12 and issued January 27, 1977. It cites 30 CFR 75.400. The Office of Assessments proposed a penalty for this of six thousand dollars. The primary reason that the Office of the Solicitor is recommending that the penalty be reduced or a penalty be accepted of four thousand five hundred dollars is because we consider the six thousand dollar penalty to be excessive for the facts.
>
> Pittston has also suggested and would offer testimony, if there were a hearing, that the accumulations resulted from normal operations and that the thirty inches of accumulations were mostly in isolated locations and that there was a scoop that would go down on charge from continuous running and as a result it could not be used in the clean-up program as planned.
>
> We would point out that the ventilation was good and that the area was provided with operable fire suppression devices. There was a water hose and there were fire extinguishers and rock dust present. There were no permissible violations found by the inspector on that day and the section does provide two smokefree escapeways. The accumulations were mostly loose coal rather than float coal dust and no analysis was taken by the inspector and we are of the opinion that the four thousand five hundred dollars is a reasonable penalty for this alleged violation.

(Tr. 4-5).

Also of significant consideration to a settlement, are the following statements contained in MSHA's second posthearing brief, filed March 22, 1979:

> § 104(c)(2) Order of Withdrawal No. 1 HRB (7-12) which issued on January 27, 1977, citing 30 CFR 75.400 (Government Exhibit No. M-2), the parties agreed to settle, subject to the approval of the Administrative Law Judge ("Judge") for a civil penalty in the amount of $4,500.00 (Tr. 4-1). The Assessment Office had proposed a civil penalty of $6,000.00,

which the Office of the Solicitor deems excessive considering that the ventilation was adequate and the area was provided with operable fire suppression devices and a water hose, fire extinguishers and rock dust. There were no permissible violations found by the issuing Inspector, who was in the hearing room when the settlement offer was submitted by both counsels to the Judge. The Mine Operator would, if a hearing were held, offer sworn testimony that the accumulation was the result of normal mining operations, and much of it was in isolated areas of the mine. The accumulation resulted when the battery on a mine scoop discharged after continuous operation, so the scoop could not then be used in the manner provided by the clean-up program. The accumulation was loose coal and not float coal dust. Government Exhibit No. M-1 was offered and received in evidence and it is a computer printout showing paid violations issued against the Meadow River No. 1 Mine from January 1, 1970, until February 17, 1977. The document shows 1,134 violations during that period, including at pages 12 through 15 thereof a total of 148 violations of 30 CFR 75.400. The Office of the Solicitor considers the violation serious, the result of normal negligence, that the Mine Operator is a large company and can afford to pay the penalty without having its business adversely affected, that there were a substantial number of prior similar violations, and abatement was done with a normal degree of good faith. The Office of the Solicitor deems a $4,500.00 civil penalty to be an adequate and reasonable penalty under the facts shown.

Order No. 7-0024 (1 SEV), January 28, 1977, 30 CFR 75.400

Proposed assessment: $7,500. Proposed settlement: $4,500.

Of significant consideration to a settlement, are the following statements by counsel:

MR. O'DONNELL: The original assessment in that proceeding, Your Honor, was seven thousand five hundred dollars and Mr. Callahan and I have agreed to settle this for four thousand five hundred dollars. My primary reason in that one is the same as before, that I consider seven thousand five hundred dollars to be excessively high concerning the facts that there were no injuries whatsoever and so on.

Pittston has offered this information which they consider to be mitigating circumstances, that the fourteen inches of accumulation was mostly in isolated places along the coal ribs, whereas the roadways were not excessively dirty. The roadways had been scooped and processed, but the coal hadn't built up along the ribs.

The entry would have been cleaned up on cycle, but the loader had been mechanically down prior to this time.

The section is relatively new in development and was clean. The clean-up is done mostly with a loader and with a shovel. However, the scoop was removed from the No. 3 and No. 1 units for clean-up when that scoop was operable. The section again provides two smokefree escapeways. The roadways and ribs are rock dusted and a water hose and other fire fighting equipment are provided. All the equipment except the loader was provided with operable fire suppression devices and they are of the opinion that the loose coal consisted mostly of material which was pushed into the face of the No. 3 entry. We would agree about the fire fighting equipment, and when I say "we" I mean MSHA, of course.

So we are of the opinion that four thousand five hundred dollars is a substantial penalty and that it is a reasonable penalty for this violation.

JUDGE COOK: is there anything you wish to add, Mr. Callahan?

MR. CALLAHAN: No, Your Honor.

JUDGE COOK: I notice, Mr. O'Donnell, just as a matter of information, on the second sheet of Exhibit M-4 there's mention of some hydraulic oil.

MR. O'DONNELL: Yes, there was an accumulation of hydraulic oil from a mechanical failure and repairs were made on the equipment. The hydraulic oil had been deposited on the mine bottom a short time prior to the issuance of the order of withdrawal.

MR. CALLAHAN: Your Honor, if I may add to that. There was a breakdown of a piece of equipment at that precise point and that's what had happened. It lost some hydraulic oil due to the breakdown.

JUDGE COOK: All right. So considering all these facts, Mr. O'Donnell, you feel that a penalty of forty-five hundred dollars is proper in this case?

MR. O'DONNELL: I do, Your Honor.

(Tr. 12-14).

Order No. 7-0045 (2 HRB), February 1, 1977, 30 CFR 75.400

Proposed assessment: $8,000. Proposed settlement: $5,000.

Of significant consideration to a settlement, are the following statements by counsel:

> MR. O'DONNELL: This would be the same day, February 1, 1977. And at this time Inspector Baker observed loose coal and coal dust ranging in the depths indicated in this Order of Withdrawal -- and he is here in the hearing room today, I might add, prepared to testify -- and the gravity would be lessened because of the lack of production in the mine. However, there were miners in the mine at that time.

(Tr. 305).

* * * * * * *

> MR. O'DONNELL: It is often the Solicitor's primary position in entering into this settlement that the eight thousand dollars proposed by the office of assessments is excessive, and we have agreed to accept five thousand dollars as the proposed assessment for this.
>
> We do consider it to be a serious violation, but we do feel that the fact the mine was not producing is important. And we recognize that there was, from a negligence point of view, a problem. They had these pipes and the men were working on them and they had this excessively cold weather. I believe the testimony was it was way, way below zero on this day. In fact, colder than I realized West Virginia got. And this, of course, caused them a problem as to manpower and on the whole, for these reasons, we feel five thousand dollars would be a reasonable settlement.
>
> JUDGE COOK: All right.
>
> Mr. Callahan, what is your position?
>
> MR. CALLAHAN: Your Honor, we have discussed this thoroughly with the Solicitor, and we have come to the agreement that that would be a fair and acceptable settlement for this violation.
>
> JUDGE COOK: Very well.

(Tr. 307-308).

Order No. 7-0209 (1 FLD), March 7, 1977, 30 CFR 75.400

Proposed assessment: $5,000. Proposed settlement: $3,000.

Of significant consideration to a settlement, are the following statements by counsel:

> MR. O'DONNELL: Now, concerning this alleged violation, the assessment office suggested a civil penalty of five thousand dollars for it.
>
> Pittston would show that it does a section cleanup on a regular basis, the loose coal being pushed into the face area and loaded out on cycle. If the face areas are not permanently supported with roof bolts, the cleanup cannot be done until the areas are supported. And that is their position in this case, that they had done all that they could until the roof was supported.
>
> It will be Mr. Dickerson's position they did not need to push it into the face. They could have cleaned it up without doing that. Pittston has offered a suggested penalty of three thousand dollars for that in lieu of the five thousand dollars suggested by the assessment office.
>
> Our primary position -- when I say our, I mean the Office of the Solicitor -- is that three thousand dollars is a reasonable penalty for that considering the quantity of coal involved and the fact that there was no, what we would consider to be a serious violation. And we feel, as we say, the chief difference I believe in the testimony between Pittston and ourselves would be in the manner of cleanup there; did they have to push it into the face or could they clean it up previously.

(Tr. 311).

* * * * * * *

> JUDGE COOK: All right. Now, Mr. Callahan, did you have anything else to offer, or do you have anything to say concerning this proposed settlement?
>
> MR. CALLAHAN: No, Your Honor, I have nothing further. I believe the record is fairly complete on this matter.
>
> JUDGE COOK: What is your position as to the settlement?

MR. CALLAHAN: As I stated, with both settlements, Your Honor, we believe the Solicitor and I have arrived at a fair and reasonable settlement.

We both agree the original proposed penalties were excessive due to the nature of the violation and that, although there may be conflict as to whether the violation occurred and as to the seriousness of the violation, given the amount we have agreed upon, we believe it is a fair and reasonable settlement.

(Tr. 316).

This information set forth in the record, along with the information provided as to the statutory criteria contained in section 110 of the 1977 Act, has provided a full disclosure of the nature of the settlements and the basis for the original determinations. Thus, the parties have complied with the intent of the law that settlements be a matter of public record.

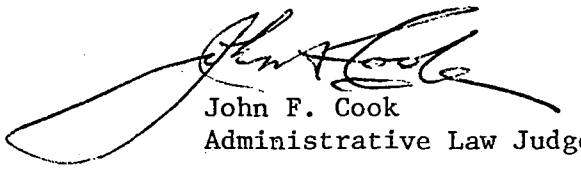
In view of the reasons given above by counsel for the proposed settlements, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlements will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the settlement, as outlined in Part XII of this decision, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent pay the penalties assessed in the amount of $22,600, within 30 days of the date of this decision, which figure represents the sume of the agreed-upon penalty of $17,000 assessed pursuant to the settlement agreement, and the $5,600 penalty assessed in the contested portion of this proceeding.

IT IS FURTHER ORDERED that the petition herein is DISMISSED as it relates to an alleged violation of 30 CFR 75.200, Order No. 7-0140 (1 HRB), February 15, 1977.



John F. Cook
Administrative Law Judge

Issued: June 29, 1979

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

June 29, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 78-525-P
Petitioenr	:	A.O. No. 42-00121-02042V
v.	:	
	:	Deer Creek Mine
AMERICAN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley and Phyllis K. Caldwell, Trial Attorneys, Regional Office of the Solicitor, Department of Labor, for Petitioner; Patrick Garver and James B. Lee, Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty 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 consititute 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 2, 1978, the Mine Safety and Health Administration (MSHA), 1/ through its attorney, filed petitions for assessment of civil penalties charging 2 violations of the Act.

Response

On August 17, 1978, Respondent filed a detailed answer denying the allegations and requesting hearing thereon.

Tribunal

Hearings were held in Salt Lake City, Utah, on April 11, 1979. Both Petitioner and Respondent were represented by counsel (Tr. 3). Posthearing briefs were submitted by both counsel. 2/

Issues Presented

1. Whether the conditions observed in Respondent's Deer Creek Mine on August 31, 1977, and October 27, 1977, constituted violations of 30 CFR 75.200.

2. Assuming a violation of 30 CFR 75.200 is established in either or both notices, what is the appropriate penalty to be imposed?

1/ Statutory successor-in-interest to the Mining Enforcement and Safety Administration (MESA).
2/ The briefs of Petitioner and Respondent are sufficiently well detailed and specific in transcript citation support to preclude the necessity of a general presentation of evidence here. It should be noted that Respondent actually filed two separate briefs one on each violation.

Discussion

A. 1 LJG, August 31, 1979

The first notice charges a violation of the roof control plan in that:

> The approved roof control plan was not being complied with in the right entry in the 4 East Section in that temporary supports were not installed to within 5 feet of the face to provide protection to the miners making required tests. The roof bolting machine was present in the working place and roof bolting had been performed.

The roof control plan is incorporated as a mandatory standard through 30 CFR 75.200 which 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 to 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.

The relevant portion of the plan is Exhibit D (Govt. Exh. G-1; Brief of MSHA at 1). The thrust of Petitioner's argument is that a man must have entered inby permanent support to make required methane tests (Brief of MSHA at 2-3). MSHA has no eyewitnesses who testified that anyone went inby support. Instead MSHA draws an inference that because methane testing is required, before electrical equipment is energized, that the tester must have entered inby permanent support to make the test. (Brief of MSHA at 3).

The provision which MSHA believed required testing in an area that was unsupported is 30 CFR 75.307-1 which states:

> Methane examination at face. An examination for methane shall be made at the face of each working place during each shift and immediately prior to the entry of such electrical equipment into any working place. Until December 31, 1970, a permissible flame safety lamp may be used to make tests for methane required by the regulations in this part. On and after December 31, 1970, a methane detector approved by the Secretary shall be used for such tests and a permissible flame safety lamp may be used as a supplementary testing device.

Respondent introduced Respondent's exhibit No. 3 a policy directive received by the Price Office of MESA on December 10, 1976, and received by the Respondent on October 7, 1974 (Tr. 151-152). There was no evidence that such directive was not in force at the mine. The directive provides:

> Tests for methane in working places shall be made as near the face as possible, but without exposing the examiner beyond permanent roof support or temporary roof support that was set for another purpose. If it is determined that the potential for face ignitions or explosions in a mine require that such tests be made closer to the face than described above, the gas testing procedure will be described in the approved ventilation plan, and the roof control plan will provide for special support to protect the examiner. [Emphasis supplied.]

(Respondent's Exh. 3).

As the directive states that the methane tester is not required to go inby support, no inference will be drawn that he did go inby support. Therefore, MSHA must show that what would appear to a reasonable tester to be supported roof was in fact unsupported roof.

The question, in effect, is whether the hydraulic system of support is or was approved by MSHA (Brief of Respondent 8-10). The initial question is what type of approval was given the Lee-Norse bolter (see Brief of Respondent at 12). The issue with reference to this approval assumed by Petitioner, is whether each individual roof bolter, ATS, (Automated Temporary Support System) must be approved for the purposes of being used for temporary roof support and/or whether it must show such approval on an attached plate. (Brief of Respondent at 12-15).

MSHA asserts that the machine was not approved (Brief of Petitioner 3-4). In its brief MSHA quotes Mr. Winder, the former

inspector supervisor, as saying that he would not question as policy a requirement that a plate or label had to be attached to the machine (Tr. 120). However, he specifically stated that it was not necessary on this machine (Tr. 121).

MSHA's brief argues the wrong point. The question is not whether MSHA had a policy of requiring stamps or plates marking ATS approval. The issue is whether the roof control plan, approved by MSHA, required such individual plated approvals. See 30 CFR 75.200-7 through 75.200-14 (Brief of Respondent at 3-14). The answer to this question is specifically contained in letter of September 12, 1975. It states in relevant part:

> We also request permission to change our procedure of installing temporary supports before the roof bolt cycle is started, and to include the hydraulic safety booms of the bolters as a means of temporary support. It is understood that if the hydraulic boom is not used that a timber or jack would have to be installed. Your assistant in the approval of this supplement is greatly appreciated.

(Respondent Exh. No. 1).

On January 9, 1976, after a period of review which ran 4 months, MSHA approved the requested change in the following letter:

> Dear Mr. Crawford:
>
> Your requests to change the procedure of installing temporary supports and to install resin bolts have been reviewed and are approved. Both procedures are appended to the approved roof control plan for the mine. [Emphasis added.]

(Respondent's Exh. No. 2).

If MSHA had wished to require Respondent to get approval for each machine, it had only to tell Respondent in the above letter.

The above discussion of hydraulic safety booms makes no mention of individual machine approval. As MSHA specifically approved the proposed change (Respondent's Exh. No. 2), and as it could only be implemented by using a bolter machine, and as there was no reference to plate approval, it can not be concluded that such a plate was necessary. In fact the opposite anaylsis is requisite. As the only way the hydraulic temporary support system could be implemented was by using a machine, and as no machine has been demonstated as approved pursuant to the MSHA theory of ATS plates on individual bolters (but see, Tr. 71-72), the District Manager, Mr. Barton, would have been in

the ridiculous position of approving a nullity. Therefore, as of January 9, 1976, the bolter system was generally approved. As MSHA has not shown any other policy decision made subsequent to that date to have been communicated to Respondent and made a part of its roof control plan, the policy directives within MSHA can not be made binding on the operator. Thus the presence or absence of a MSHA policy of individual bolter approval is not relevant.

MSHA's argument that the bolters needed to be approved as stated in Government Exhibit G-2 is of little momment. On its face the exhibit is merely on internal memorandum between Mr. Winder and the District Manager. It is not part of the roof control plan and it does not even appear to have been transmitted to Respondent (Govt. Exh. G-2; But see, Brief of MSHA at 3-4). Thus it is not binding. Further, the approval letter of January 9, 1976 (Respondent's Exh. No. 3), can easily be viewed as over-ruling an internal objection of Mr. Winder. Finally, the exhibit does not specify the type of approval envisioned (Govt. Exh. G-2). Therefore, even if the letter were viewed as modifying the approval, a view which I specifically reject, MSHA has still not demonstrated a requirement of placing the plates on the bolter.

As there is no evidence that the methane tester advanced beyond the area supported by the hydraulic system of temporary support (See supra), and as that system was approved MESA (see Respondent's Exh. No. 3), I conclude that MSHA has failed to demonstrate a violation of the roof control plan on August 31, 1977. Therefore, that part of the petition regarding 1 LJG, August 31, 1977, is hereby DISMISSED.

B. 6 JODL, October 27, 1977

The 104(c)(1) notice herein at issue, alleges a violation of 30 CFR 75.200 in that:

> The approved roof control plan was not being complied within the 4th East section in the belt and track entry from the feeder breaker into the face in that, approximately 13 timber were missing at spot locations on the right side of the entry looking in the direction of the face. The entry width averaged approximately 24 feet. There were 2 timbers out between crosscut No. 12 and 13, and there were 5 timbers out between crosscut No. 13 and No. 14, 4 timbers out between crosscut No. 14 and No. 15, and 2 timbers out between crosscut No. 15 and the face. The approved roof control plan calls for timbers to be set 4 foot from the rib and on 5 foot centers in a combination belt and track entry that has a 24 feet entry width in order to bring the entry width into the recommended 20 foot width roadway.

(Govt. Exh. G-3).

Initially respondent argues that the roof control plan (Govt. Exh. G-1) is not in evidence. (See Brief of Respondent note at 10-11). 3/ As the above alleged violations are charged in a single petition, Respondent's argument is without merit and rejected.

The issue presented is whether Respondent complied with the roof control plan, not whether a safer system might arguably exist. Respondent's argument, that the roof control plan does not logically require replacement of knocked out support, (Brief of Respondent at 13) is not supported. Under Respondent's theory, there would be no way that the mine could be inspected to determine whether the plan had been complied with. Further, under Respondent's theory, a roof control plan would never constitute a standard by which control of the roof could be evaluated. It is rejected. Therefore, if the plan required timbers, and such were not maintained, a violation is established.

For purposes of compliance with the roof control plan, the most important factor is whether the entry was cut 24 feet or 20 feet wide. It is conceded by Respondent's witness Mr. Johnson that the area may have measured 24 feet (Tr. 230). However, such width is asserted to have been the result of permissible sloughage (Tr. 230; Brief of Respondent at 12).

There is testimony as to the width of an entry being cut 24 feet, found in the following colloquy:

> BY MS. CALDWELL:
>
> Q. Mr. Lemon, with regard to the cut that we are referring to in the August 31 notice, how wide was that cut?
>
> A. The cut was 24 feet wide, and I measured the cuts from the bit marks in the top, and it was not rib sloughage. Your Honor, the measurement from the bit marks on the left rib in the top to the bit marks on the right side was 24 feet wide, and I measured this entry in four places up to the place that was cut 20 feet wide, which was inby the last open cross-cut in the face of this entry. That's where they starting narrowing this entry down to, and this had been heave [sic] sloughed to 24 feet wide.

(Tr. 242).

(See Brief of MSHA at 6).

3/ As referred at note 2, supra, references here are to brief of Respondent on October 27, 1977, notice of violation.

In a letter dated June 20, 1979, counsel for MSHA states that she misspoke herself by referring to the August 31, 1977, notice, in the above quoted colloquy. 4/

MSHA counsel refers to a letter of May 30, 1979, written by counsel for Respondent, which pointed out that no "cut to cut" reference was made on the page cited in her brief. There in counsel for MSHA attacks counsel for Respondent, for a failure to have "* * * understood the intent of that testimony." As counsel for MSHA failed to cite the proper transcript page, Tr. 167 vs. Tr. 242, it is not surprising that counsel for Respondent did not understand the intent of the testimony.

As this testimony is the only cited testimony on the issue of a measured "bit mark to bit mark" width, the issue of whether it applies to the August 31 or October 27 notice must be resolved.

Supporting a determination that it applies to the August 31, notice, are the facts, that: (1) MSHA counsel refers to the August 31 notice in the question (Tr. 242); and that (2) there followed, in order, a general evidential summary for both notices (Tr. 242-et seq.).

Supporting the conclusion that it applied to the October 27 notice are the facts that (1) the August 31, notice did not involve entry width directly; (2) the testimony came at the end of the testimonial evidence on the October 27 notice and (3) the witness referred to a specific narrowing down of entry width inby the measured area. I conclude that the above-referenced testimony referred to the October 27 notice.

Therefore, Respondent needed to meet the requirements of Exhibits G, figures 1-3, not merely the requirement of Exhibit B (Govt. Exh. G-1).

The unrebutted evidence establishes that timbers which should have been in place pursuant to Exhibit G were not in place (Tr. 163, 195). It follows that Respondent violated the roof control plan and 30 CFR 75.200 (see, supra). That part of the petition pertaining to notice 6 JODL, October 27, 1977, and asserting a violation is hereby upheld. 5/

4/ Counsel's above-reference letter also refers to an "October 31 citation." No such citation is at issue.

5/ As there is no evidence that Respondent filed an Application for Review, the due process issue is moot, cf. Energy Fuels Corp., FMSHRC No. DENV 78-410 (May 1, 1979).

C. Penalty Criteria

Subsection 110(i) provides, in relevant part:

> In assessing civil penalties, the Commission 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 person charged in attempting to achieve rapid compliance after notification of a violation.

The primary criteria issues argued by Respondent are gravity, negligence, and prior history. (Brief of Respondent at 13-16).

1. Size of Business

Deer Creek mine produced about 1,205,576 tons annually and American Coal Company, about 1,521,238 tons annually (Tr. 246). I conclude that the company is medium to large.

2. Ability to Stay in Business

A penalty will not affect the operators ability to remain in business (Tr. 246).

3. Good Faith

The operator abated the condition with in about 45 minutes to an hour (Tr. 225). The operator demonstrated exceptional good faith by unnecessarily shutting down production to remedy the violation (Tr. 223-224).

4. Negligence

Both Mr. Lemon and Mr. O'Brien stated that the foreman knew of the problem (Tr. 170; 223-224). However, as the entire theory of Respondent was that it did not believe that it was required to maintain the timbering in the entry (see supra.),and as this argument appears, on its face, to be made in good faith, the operator can not be found to have been negligent.

5. Gravity

The gravity of the violation is reduced by the following factors: extra roof bolts had been installed (Tr. 228) and the entry averaged 24 feet (Tr. 166-167). The fact that the entry averaged 24 feet indicates that even without timbering and extra roof bolts the entry

was very close to meeting the requirements of the plan as no significant sloughage appears to have occurred (Govt. Exh. G-1, Exh. B). The MSHA arguments on significant gravity are unpersuasive (see Brief of MSHA at 7).

I conclude that the violation was nonserious.

6. History of Prior Violations

The mine has a substantial history of prior violations including 10 prior violations of this section. (See Submission of MSHA, May 7, 1979). This history aggravates the size of the penalty to be assessed.

Findings of fact

All proposed findings of fact not adopted herein are specifically rejected. Upon consideration of the record as a whole, I find:

1. The Judge has jurisdiction over the subject matter and the parties in this proceeding;

2. A system of temporary hydraulic support using a hydraulic boom was approved pursuant to the roof control plan of the mine for use prior to August 31, 1977. (Respondent Exh. No. 1 and No. 2);

3. The evidence does not show that methane testing was done under unsupported roof (Respondent's Exh. No. 3);

4. MSHA failed to establish the fact a violation of 30 CFR 75.200 with respect to Notice No. 1 LJG, August 31, 1977;

5. A preponderance of the evidence does establish the fact of a violation of 30 CFR 75.200 with respect to notice No. 6 JODL, October 27, 1977;

6. Respondent has a substantial history of previous violations;

7. The mine in medium to large in size;

8. Respondent was not negligent;

9. A penalty will not affect Respondent's ability to continue in business;

10. The violation found was nonserious.

11. Respondent exercised exceptional good faith in abating the condition.

Conclusions of Law

All proposed conclusions of law not adopted herein are specifically rejected.

1. This case arises under the provisions of section 110(a) of the 1977 Act and 109(a)(1) of the 1969 Act.

2. All procedural prerequisites established in the statutes cited above have been complied with.

3. Respondent has violated the provisions of the statute noted above.

4. A civil penalty must be assessed in accordance with the provisions of the statutes cited above.

Application of Penalty

Assessment of a penalty in accordance with the criteria shown in section 110(a) of the Act is mandatory. That section of the law as well as all the evidence in the record bearing on the criteria and mitigating circumstances have been considered fully.

Accordingly, Respondent is assessed the following penalty:

Notice No.	Date	Section	Penalty
6 JODL	10/27/77	30 CFR 75.200	$ 250
		Total	$ 250

ORDER

WHEREFORE IT IS ORDERED that Respondent pay the above-assessed civil penalty in the amount of $250 within 30 days from the date of this decision.

WHEREFORE IT IS FURTHER ORDERED that Notice No. 1 LJG, August 31, 1977, be and hereby is, DISMISSED.

Malcolm P. Littlefield

Malcolm P. Littlefield
Administrative Law Judge

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

JUN 29 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 79-122-P
Petitioner	:	A/O No. 15-03746-02037V
v.	:	
	:	Upper Taggart Mine
SCOTIA COAL COMPANY,	:	
Respondent	:	

DECISION AND ORDER APPROVING
SETTLEMENT OF CIVIL PENALTY PROCEEDING

On May 1, 1979, Petitioner filed a motion to approve settlement in the above-captioned proceeding. Attached to and made part of this motion were the order of assessment, the inspector's comment sheets and the Assessed Violations History Report. The 14 violations alleged in this case were originally assessed a penalty of $94,500. The petitions for assessment of civil penalty for two of these violations were withdrawn due to the fact that no violation existed. As to the remaining 12 violation the parties proposed to settle for the sum of $42,000. The violations and proposed penalties are as follows:

Number	Date	Assessment	Settlement
1-RDS (6-0201)	04/14/76	$ 5,000	$ 1,000
2-RDS (6-0202)	04/14/76	5,000	1,000
3-RDS (6-0203)	04/14/76	5,000	0
4-RDS (6-0204)	04/14/76	5,000	1,000
2-RDS (6-0224)	05/04/76	5,000	0
1-JRC (6-0271)	05/05/76	10,000	8,000
1-RDS (6-0282)	05/10/76	7,500	5,000
1-RDS (6-0295)	05/25/76	5,000	1,200
2-RDS (6-0297)	05/25/76	5,000	1,200
1-RDS (6-0298)	05/26/76	10,000	5,500
2-RDS (6-0299)	05/26/76	7,000	4,100
1-LG (6-0339)	07/30/76	5,000	1,500
1-LG (6-0364)	08/27/76	10,000	6,000
1-LG (6-0399)	10/07/76	10,000	6,500

There were eight alleged violations of 30 CFR 75.1403-6 cited in this case. In each instance, an inspector found that a vehicle used for transportation of personnel had inoperative sanding devices. Section 75.1403-6(b)(3) requires that each track-mounted self-propelled personnel carrier be equipped with properly installed and well-maintained sanding devices. Petitioner moved to withdraw two of the alleged violations from this petition. In support of this motion,

Petitioner asserted that Order No. 3-RDS (April 14, 1976) and Order No. 2-RDS (May 4, 1976), involved vehicles which had been removed from service. The sanding devices on these vehicles would have been repaired before they were placed back in service. Accordingly, no violation of section 75.1403-6 can be found with respect to these two vehicles. The remaining six violation as as follows: Order Nos. 1-RDS (April 14, 1976), No. 2-RDS (April 14, 1976), No. 4-RDS (April 14, 1976), No. 1-RDS (May 25 1976), No. 2-RDS (May 25, 1976), and No. 1-LG (August 30, 1976." The inspectors found that these condition should have been known to the operator because each was under the direct observation of management. In addition, a safeguard notice was issued at Upper Taggart on February 12, 1976, which noted the need for operative and well-maintained sanding devices. The Upper Taggart Mine has a record of collision between carriers resulting in injury to employees. The occurrence of the event against which the cited standard is directed was probable and the injury contemplated by the occurrence of the event was disabling. Between 18 and 36 workers most probably would have been injured if a collision were to occur. The conditions were corrected after the closure orders issued. Management took extraordinary steps to gain compliance by assigning extra men in most instances to correct the condition.

In support of the contention that the amount of the proposed assessment should be reduced with regards to these violations, counsel for Petitioner asserted the following:

> It should be noted that this is a very wet mine and it is extremely difficult to keep these sanding devices operative. Each alleged violation was cited while the vehicles were on the surface and it is the Respondent's contention that the devices would have been made operative before returning underground. Respondent has paid penalties for six other violations of this standard between 1970 and the dates of these violations. The payments have ranged from $70 to $140. The settlements in this case range from $1,000 to $1,500. Increases were made for violations cited at each later date.

Four of the alleged violations contained herein cited a violation of 30 CFR 75.400. That section requires that combustible materials not be permitted to accumulate in active workings.

Order of Withdrawal No. 1-RDS (May 10, 1976), was issued after the inspector observed excessive amounts of float coal dust in the Nos. 5, 6 and 7 entries and connecting crosscuts. This condition was the result of a failure to act on the part of mine personnel and should have been known to the operator. It was improbable that the event against which section 75.400 is directed would happen because

the coal dust was wet and the mine had no history of methane liberation. Twenty-two workers were exposed to the hazard. Management took extraordinary steps to gain compliance by assigning extra men to correct the condition.

Order of Withdrawal No. 1-RDS (May 26, 1976), was issued because an excessive amount of float coal dust and coal was present the entire length of the No. 1 outside belt and the connecting crosscuts beginning at the portal and extending a distance of 1,500 feet to the No. 2 belt drive. The condition cited resulted from the act or failure to act of mine personnel and occurred under the direct observation of management. The occurrence of the event against which section 75.400 is directed was probable. However, the mine does not have a history of methane liberation. The expected result of the occurrence of this event was disabling injury. Four miners most likely would have been injured were the event to occur. Management took extraordinary steps to gain compliance by assigning extra men to correct the condition.

Order No. 1-LG (August 27, 1976), was issued because float coal dust had been deposited on rock dusted surface along the No. 3 belt a distance of 2,000 feet and 2 to 3 tons of loose coal had accumulated at two separate places which at one time had been loading points. The condition cited had been recorded prior to the shift during which it was cited and should have been known to the operator. The occurrence of the event against which section 75.400 is directed was probable. The injuries contemplated by the occurrence of the event ranged from disabling to death. Twenty-four workers were exposed to the hazard. Management took extraordinary steps to gain compliance by assigning extra men to rock dust and clean up the accumulations.

Order No. 1-LG (October 7, 1976), was issued because float coal dust had been deposited on rock-dusted surfaces in the belt entry and crosscuts extending a distance of 2,400 feet and loose coal had accumulated at various places throughout the area. The condition should have been known to the operator. The occurrence of the event against which section 75.400 is directed was probable. Fourteen men were exposed to a hazard which might have caused disabling injury or death. The operator took extraordinary steps to gain compliance by assigning extra men to correct the condition.

In support of the reductions made in the proposed penalties for these four violations of section 75.400, counsel for Petitioner asserted the following:

> Respondent has paid penalties for 75 other violations of this standard between 1970 and the dates of these alleged violations. The payments have ranged from $75 to $625. The settlements in this case range

from $5,000 to $6,500. Increases were made for violations cited at each later date. The gravity and negligence in the Proposed Assessment were too high in view of the criteria set down in Old Ben Coal Co., 8 IBMA 98 (1977).

Order No. 1-JRC (May 5, 1976), was issued because a major ventilation change was made while men were working underground. On May 4, 1976, the No. 4 entry of 1 East off 2 South was covered with loose dust and mud which was pushed from the highwall above the entry. After being cleared, the entry was blasted and again blocked. Approximately 40,000 cfm of air were being taken in through this entry. The covering of this entry was a violation of 30 CFR 75.322. The condition should have been known to the operator. It was the result of an act or failure to act on the part of management personnel. It was improbable that the event against which section 75.322 is directed would occur. Seventy five workers were exposed to the hazard. The condition was corrected after the closure order was issued.

In support of the proposed reduction in penalty for this violation, counsel for Petitioner asserted the following: "The history of previous violations reveals no other violations of this standard. This was a serious violation. The negligence was ordinary. There was an effect on mine ventilation. However, air reaching the men underground was never dangerously low."

Order No. 2-RDS (May 26, 1976), was issued because the structure on the No. 1 belt was not being maintained. Rollers were allowed to deteriorate, were stuck and were being cut by the belt in various locations. This condition was in violation of 30 CFR 75.1725. This condition resulted from the act or failure to act of mine personnel and occurred under the direct observation of management. The order was issued at the same time as Order No. 1-RDS, discussed above. It is probable that the event against which section 75.1725 is directed would occur. Thirty five workers were exposed to the hazard. This condition was corrected after the closure order was issued. Management took extraordinary steps to gain compliance by assigning extra men to correct the condition.

In support of the proposed reduction in penalty for this violation, counsel for Petitioner asserted the following: "Respondent has paid penalties for twelve other violations of this standard between 1970 and the date of this violation. The payments have ranged from $94 to $180. The settlement in this case was $4,100. This was a serious violation and the negligence was ordinary."

Respondent is a large operator and there is no indication on the record that the penalties assessed herein will have an adverse affect on Respondent's ability to remain in business.

In view of the above, Petitioner's motion is granted.

It is ORDERED that the settlement negotiated between MSHA and the Respondent is hereby APPROVED.

It is further ORDERED that Respondent pay the sum of $42,000 within 30 days of the date of this decision.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Issued:

Distribution:

Joseph M. Walsh, Attorney for Mine Safety and Health Administration, U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203

Richard C. Ward, Esq., Craft, Barret, Haynes & Ward, Post Office Box 1017, Hazard, KY 41701 (Certified Mail)

THE FOLLOWING DECISION DATED APRIL 30, 1979 WAS OMITTED FROM OUR APRIL VOLUME OF DECISIONS.

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

April 30, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), 1/	:	Docket No. HOPE 78-77-P
Petitioner	:	A/O No. 46-04500-02007V
v.	:	
	:	Wharton No. 11 Mine
EASTERN ASSOCIATED COAL	:	
CORPORATION,	:	Docket No. HOPE 78-76-P
Respondent	:	A/O No. 46-04332-02009V
	:	
	:	Docket No. HOPE 78-75-P
	:	A/O No. 46-04332-02008V
	:	
	:	Lightfoot No. 1 Mine

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

I. Procedural Background

On November 16, 1977, petitions were filed in the above-captioned proceedings for assessment of civil penalties against Eastern Associated Coal Corporation for alleged violations of various provisions of the Code of Federal Regulations. These petitions were filed pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970), hereinafter referred to as "the 1969 Coal Act." 2/ Answers were filed on December 19, 1977.

1/ The Secretary of Labor, Mine Safety and Health Administration (MSHA), has been substituted as the petitioner in lieu of the Mining Enforcement and Safety Administration of the Department of the Interior (MESA) as a result of the enactment of the Federal Mine Safety and Health Amendments Act of 1977, P.L. 95-164, November 9, 1977.

2/ On March 9, 1978, most provisions of the Federal Mine Safety and Health Amendments Act of 1977 became effective. That Act provides for

A notice of hearing was issued on December 29, 1977. Motions were made by the Petitioner for approval of settlements in each of the cases. All of the dockets were continued pending determination as to the various motions to approve settlements. The motions in each of these dockets were denied and the cases reset for hearing. A hearing was held commencing October 10, 1978.

Both parties filed posthearing briefs on November 30, 1978. The parties were given until December 15, 1978, to file reply briefs, but none were filed.

II. Violations Charged

Docket No. HOPE 78-77-P

Notice No. 3 AJK, January 11, 1977, 30 CFR 75.316.

Docket No. HOPE 78-76-P

Notice No. 6 BJW, January 12, 1977, 30 CFR 75.400.

Docket No. HOPE 78-75-P

Order No. 1 BJW, January 14, 1977, 30 CFR 75.1306.

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fn. 2 (continued)
a different effective date as to certain specifically named provisions not pertinent to this proceeding. The Amendments Act of 1977 changed the title of the 1969 Act, as amended, to read "Federal Mine Safety and Health Act of 1977." That Act will be referred to in this decision as "the 1977 Mine Act." Section 301(a) of the Amendments Act provides that:

"Except with respect to the functions assigned to the Secretary of the Interior pursuant to section 501 of the Federal Coal Mine Health and Safety Act of 1969, the functions of the Secretary of the Interior under the Federal Coal Mine Health and Safety Act of 1969, as amended, and the Federal Metal and Nonmetallic Mine Safety Act are transferred to the Secretary of Labor except those which are expressly transferred to the Commission by this Act."

With respect to this transfer of functions, section 301 of the Act of 1977 continues in subsection (c)(3), in part as follows:

"The provisions of this section shall not affect any proceedings pending at the time this section takes effect before any department, agency, or component thereof, functions of which are transferred by this section, except that such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Secretary of Labor or the Federal Mine Safety and Health Review Commission."

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, counsel for both parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

Petitioner called as its witnesses Henry J. Keith and Billy Joe Workman, who are employed as inspectors by the Mine Safety and Health Administration of the Department of Labor.

Respondent called as its witnesses Jerry Edward Lewis, who at the time of the citations was general mine foreman at the Wharton No. 11 Mine of the Respondent; Gary Gallaher, who was underground project engineer at the Lightfoot No. 1 Mine of the Respondent at the time of the citations; Larry Belcher, who at the time of the citations was a company mine inspector for the Respondent; and D. Aguilar, who at the time of the citations was assistant general foreman and acting mine foreman, at the Lightfoot No. 1 Mine.

C. Exhibits

(1) Petitioner introduced the following exhibits into evidence:

GX-1 is Notice No. 3 HJK, January 11, 1977, 30 CFR 75.316.

GX-2 is the termination of Exhibit GX-1.

GX-3 is the ventilation plan for the Wharton No. 11 Mine.

GX-4 is the history of violations of the Respondent. 3/

GX-5 is a diagram of the face area of the Wharton No. 11 Mine.

GX-6 is Notice No. 6 BJW, January 12, 1977, 30 CFR 75.400.

GX-7 is the termination of Exhibit GX-6.

GX-8 is Order No. 1 BJW, January 14, 1977, 30 CFR 75.1306.

3/ The history of violations was marked for identification as Exhibit GX-4. The Respondent was then given 14 days after the close of the hearing on October 11, 1978, to file objections to the document (Tr. 250). No objections were filed as to such document. Therefore, the document marked as Exhibit GX-4 for identification is received in evidence.

GX-9 is the termination of Exhibit GX-8.

(2) Respondent introduced the following exhibits into evidence:

OX-1 is a copy of the ventilation and methane map for the Wharton No. 11 Mine.

OX-2 is a copy of the Lightfoot No. 1 cleanup program.

OX-3 is a copy of a cleanup plan used at the Lightfoot No. 1 Mine.

OX-4 is a map showing part of the Lightfoot No. 1 Mine.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of a civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

Docket No. HOPE 78-77-P

Inspector Keith visited the Eastern Associated Coal Corporation Wharton No. 11 Mine on January 11, 1977 (Tr. 35). He entered the No. 2 Butt left Section off the 1 East Mains from the direction of the No. 5 entry and proceeded to the No. 3 entry near the face. There, he noticed that the line curtain terminated at the outby corner of the last crosscut (Tr. 37-38). This last crosscut right had been undercut, drilled and shot with three cuts, but the coal had not been loaded out of the last cut at that time (Tr. 39, Exh. GX-5). Each cut was about 7-9 feet long (Tr. 39, 85). The No. 3 entry face area had been cleaned and there were indications that three cuts had been made (Tr. 39). It was agreed that this practice, called double heading, which entails mining the face and the crosscut at the same time is not a good practice (Tr. 44, 78). The inspector indicated that it makes it very hard to ventilate the face because the curtain across the crosscut has machinery running through it which would short circuit the air (Tr. 44). The inspector then noted that there were no line curtains to within 10 feet of the deepest penetration of the face area and in the crosscut (Tr. 39). In fact, the curtain was 47 feet

from the furthest penetration in the entry (Tr. 65). At this time a roof bolting machine was located outby the corner of the crosscut right and the two men who operate the machine were there (Tr. 42).

The inspector then went through the crosscut to the No. 2 entry (Tr. 40). In the crosscut to the right of the No. 2 entry, four cuts had been taken out and five cuts had been taken out of the face (Tr. 40-41). The crosscut had been cleaned, but the face of the No. 2 entry had one cut of coal remaining in it that had been shot down (Tr. 41). There was no machinery in either the crosscut or the face (Tr. 41), but there was one man on the left side of the No. 2 entry who was shoveling coal and coal dust towards the center of the entry (Tr. 41). The curtain terminated at the right corner outby the crosscut right (Tr. 42), which was 55 feet from the face (Tr. 70).

The inspector then proceeded through the crosscut between No. 1 and No. 2 entries and went to the face of the No. 1 entry (Tr. 42). He testified that the curtain terminated at the corner outby the crosscut right (Tr. 42). Four cuts had been made from both the face and the crosscut right (Tr. 43).

The inspector cited a violation of 75.316 for a violation of the approved ventilation plan (Tr. 48). In particular, the inspector referred to an addendum to the ventilation plan which it is found was in effect on the day in question. This is found at the second last page of Exhibit GX-3 and provides, in part, as follows:

> In addition to the mandatory provisions of Section 75.316-1, 30 CFR 75, the following provisions are designated applicable to the subject mine. Henceforth these provisions are mandatory requirements of the ventilation system and methane control plan for this mine:
>
> * * * * * * *
>
> 2. Section 75.302-1(a) - Properly installed and adequately maintained line brattice or other approved devices shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face in all working places has been advanced, unless otherwise specified by written permit.

Mr. Lewis agreed that the curtains had been taken down in most of the areas beyond the last crosscut at the time of the alleged violation (Tr. 79-80). He said that they had encountered a streak of rock in the coal which meant that the coal had to be shot extremely hard. The result was that coal was blown back 40-50 feet from the face. The miners then removed the curtain to clean the ribs, but neglected to get the curtain back up (Tr. 80). Mr. Lewis testified

that at the time of his examination when he first went to the face, there was not enough curtain in the No. 1 entry to reach the face, so they took the curtain from the right crosscut to have enough to reach the face. This left the crosscut right without a curtain (Tr. 80). He then went on to state: "But the curtain was to the face of No. 1. Although in the No. 2 entry, the curtain was still down. In No. 3 entry the curtain was still down. But the curtain was piled upon the outby rib of the crosscut" (Tr. 80).

Thus, Mr. Lewis agreed with the statements of the inspector as to the location of the line curtains except that he stated that a curtain was in the No. 1 entry, although it was not up in the crosscut right in that entry (Tr. 89-90, 93). He indicated that the line brattices in the Nos. 2 and 3 entries were up reasonably within 10 feet of the face when he was on the section earlier on the morning of the inspection (Tr. 100), and although the crosscut right of the No. 3 entry had a curtain, he did not know if it was within 10 feet of the face, though he did know that it was not hung in a good manner (Tr. 101). He testified, however, that when the inspector arrived in entry Nos. 2 and 3 as well as the crosscuts right, the brattice was not up, but was piled up outby the last open crosscut (Tr. 102).

Based on the above, it is found that a violation of the roof control plan did exist, thus constituting a violation of 30 CFR 75.316.

The operator should have known of the violation. The shift had been working about 3 hours before the inspector arrived (Tr. 45-46). The section foreman should have noticed the violation during the shift. Mr. Lewis, the general mine foreman, indicated that while he understood that the regulations do not permit the curtains to be taken down, and while he never gave his permission to take them down, the miners under him do and did take the curtains down (Tr. 97). He indicated that it was normal procedure for the miners to take the curtains down to clean the entries (Tr. 102). He testified that while he realized that it was management's responsibility to see that the curtains were up, if management were not there for a while, the curtains would not be put up (Tr. 102). The general mine foreman had also particularly commented about having warned the miners "time and again not to double-head these places" (Tr. 44). This poor mining practice, described above, was part of the cause of the problem and should have been controlled better by management.

Accordingly, it is found that Eastern's degree of negligence is more than ordinary since it knew of the conditions in the area and the continuing nature of the actions of the miners, but it is somewhat less than gross negligence.

The No. 11 Mine at the time of this violation was not a gassy mine. The inspector testified that while the depth of the entries

inby the line curtains was such that they could not have been driven on one shift, at least the last cuts in each of the affected areas were made during the shift on which the inspection was being made (Tr. 66-67).

The inspector testified that at the time of the inspection, he did not consider the problem of methane to be extremely hazardous because the mine had not progressed too far underground (Tr. 46, 57). He indicated, however, that he thought that the method of mining employed in this mine put dust into suspension which could be injurious to the people inhaling it (Tr. 46, 57). Mr. Lewis, the general mine foreman at this mine at the time of the alleged violation, also testified that this was not a gassy mine (Tr. 77). Mr. Lewis testified that dust from the cutting was not a problem because the cutting machine cuts into the fire clay under the coal seam rather than in the coal, so there is no dust (Tr. 103). He testified that the only dust problem is when you shoot the coal, and he indicated that went out with the smoke (Tr. 103). However, any impurities that were in the area might have been added to by this lack of ventilation (Tr. 47). In addition, there could be a fire hazard raised by having dust in suspension (Tr. 47).

There were approximately eight men working on this section that could have been affected by the absence of proper ventilation (Tr. 45).

Based on the above, it is found that this violation was serious.

With regard to the abatement of the violation, Mr. Lewis testified that it took approximately 45 minutes to abate (Tr. 77). The inspector testified that Eastern complied with what was asked of them in abating the violation. Accordingly, it is found that Eastern demonstrated good faith in abating the violation after notification of it.

Docket No. HOPE 78-76-P

Inspector Workman visited the Lightfoot No. 1 Mine on January 12, 1977. He examined the preshift examiner's books and determined that the 005 2 Butt Right Section had been dangered off for loose coal and coal dust (Tr. 118). When the inspector arrived on the section at about 10:30 a.m., the miners were engaged in coal production (Tr. 119). The mining machine and shuttle cars were in the No. 1 entry and the bolting machine was in either the No. 2 or No. 3 entry (Tr. 126-127). He noticed that lying on the ribs were half-headers, short boards approximately 18 inches by 6 or 8 inches, that had "Dangered off" written on them (Tr. 119-120). He found accumulations of coal in the Nos. 1, 2 and 3 entries ranging from 1 to 18 inches (Tr. 118-119). The inspector established that "approximately" all of the accumulation was 18 inches in depth, that is, approximately 90 percent (Tr. 120). He indicated that he had taken six measurements in

the three entries (Tr. 128-129). The extent of the accumulations ran from the face to a point approximately 85 feet outby in each entry (Tr. 120). Of this accumulation, approximately 90 percent was loose coal, the remainder was coal dust and float coal dust (Tr. 121).

From the conditions the inspector observed, he estimated that mining had continued for at least two shifts, since it had last been cleaned, because of the range of the accumulations (Tr. 122-123). He also testified that when he arrived on the section, at least one cut of coal had been made in the No. 1 entry since the shift started (Tr. 122, 126). A cut of coal is about 18 feet in length (Tr. 147-148).

Mr. Gallaher, who at the time of the notice, was underground project engineer for the Respondent, testified that the previous shift, the third shift, was not a production shift (Tr. 140). He further testified that on the second shift, "[t]hey did lose a drive shaft on the scoop used on that section for cleanup" (Tr. 140). The scoop was repaired sometime during the third shift and brought outside to carry supplies to the section (Tr. 140-141). Mr. Gallaher testified that the scoop was required on cleanup, but that if the scoop were not available, one would take a shovel and turn the coal out for the miner to pick it up (Tr. 144, 154). That was how the citation was eventually abated, the loose coal and coal dust was thrown out in the middle of the roadway where it could be picked up by the miner when it got back on cycle (Tr. 125). It took about 2 hours to abate the violation (Tr. 143). The cleanup program for the mine was set forth in Exhibit OX-2 as follows:

LIGHTFOOT NO. 1 EACC
CLEAN-UP PROGRAM

1. Each place is bolted first to insure safety of workers.

2. Loose material along the ribs is shoveled into the roadway as necessary.

3. This material is then pushed into the face area by the scoop or loaded by the miner as miner advances to next cut.

4. Rock dust is maintained to at least forty feet from the working face.

The working cycle at this mine is from right to left.

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,087 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board of Mine Operations Appeals (Board) held that the presence of a deposit or accumulation of coal dust or other combustible materials in active workings of a mine is not, by itself, a violation.

In that case, the Board held that MSHA must be able to prove:

> (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;
>
> (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
>
> (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

There can be no doubt that there was an accumulation of combustible material in the active workings as described above. Further, in view of both the fact that the area had been written up in the preshift examiner's report and dangered off, and in view of the extent of the accumulation, there is no doubt that the coal mine operator was aware, or should have been aware of the existence of the accumulation. The section foreman certainly should have observed the condition during the 3 hours that expired on the shift before the notice was issued. The fact that the danger boards had been set aside and that the miners had been at work in actual coal production during the first shift after the danger boards were removed and while the accumulation still remained, further bolsters this finding. The question that remains is whether Eastern failed to clean up the accumulation within a reasonable time after discovery was or should have been made.

As to the issue of "reasonable time," the Board stated:

> As mentioned in our discussion of the responsibilities imposed upon the coal mine operators, what constitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

8 IBMA at 115.

The Board further stated:

> With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation, it is our view that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shifts, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the unusual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the Act upon a coal mine operator to protect the safety of the miners.

8 IBMA at 111.

The extent of this accumulation and the opinion of the inspector, coupled with the testimony regarding the usual cleanup procedure for the mine, and the fact that the scoop was not operable at a stage during the prior second shift, all indicate that the accumulation was present for longer than was reasonable. The additional opinion given by the preshift examiner in dangering off the area of the accumulations followed by the setting aside of the danger signs and the commencement of coal production is further indication of this.

The Respondent's underground project engineer recognized that the regular cleanup cycle had not been followed prior to the issuance of the notice (Tr. 142). An effort to clean up the area should have been undertaken before coal production was commenced on the shift in question.

In view of the facts set forth above, it is found that MSHA has proved all elements necessary to establish a violation of 30 CFR 75.400.

The inspector testified that when you have loose coal and coal dust in areas where there is travel, there is a danger of fire (Tr. 123). He did not recall any bad cables in the area, however (Tr. 123), and Mr. Gallaher testified that he was not aware of any problems with cables on that section at that time (Tr. 140). The inspector also indicated that the mine was damp and there were spots on the roadway where there was water, but that it was not damp in the face area (Tr. 121). Mr. Gallaher attested to the dampness and indicated that there were 8 or 9 inches of water in places (Tr. 135). However, the inspector established the fact that there was no standing water in the 85-foot area where the accumulations were located in this case

(Tr. 132). The inspector, Mr. Gallaher, and Mr. Belcher, the company mining inspector, testified that there was no methane present at the time the citation was issued (Tr. 124, 131, 135, 163). The potential sources of ignition on the section were the energized electric face equipment, oil on the machinery and the welder kept for repairs on the section (Tr. 123-124). However, the welder would have been near the belt tailpiece which was at least 300 feet from the working face (Tr. 140, 142). Mr. Gallaher was not aware of any mechanical problem at that time that would have necessitated its use (Tr. 140). Based on all of the above factors, particularly the potential sources of ignition, such as the energized electric face equipment, and the extent of the accumulation, it is found that the violation was serious.

It is found as shown above, that the operator knew or should have known of the violation. In view of the fact that the area had been dangered off and the operator proceeded to mine without regard to that fact, it is found that the violation was the result of gross negligence. The alleged inexperience of the preshift examiner (Tr. 146) did not justify the failure to heed the danger signs.

It is further found that once notified of the violation, the operator demonstrated good faith in abating the violation (Tr. 125).

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On January 14, 1977, Inspector Workman visited the Lightfoot No. 1 Mine to make a regular safety inspection (Tr. 167). During the course of that visit, he entered the 004 Mains Section and proceeded up the belt entry (Tr. 168). Following the inspection of the face area, he went up the No. 3 entry, which is a fresh air intake and primary escapeway, and found approximately four cases of explosives and detonators stored within 12-1/2 feet of the 7,200 high-voltage cable and approximately 15 feet from the travelway (Tr. 168, 184, Exh. GX-8) in an area 600 or 700 feet outby the working area (Tr. 169, 217). The explosives and detonators were stored in a wooden container with a lid on it (Tr. 168-169). The container was located in a crosscut about 12-1/2 feet from the mouth of the crosscut. The high-voltage cable was hung across the mouth of the crosscut (Tr. 187). The other end of the crosscut was blocked by a permanent stopping (Tr. 170, 185).

There was no dispute as to the location of the explosives and detonators. Accordingly, it is found that a violation existed in that 30 CFR 75.1306 requires that explosives and detonators be located "at least 25 feet from roadways and power wires, * * *."

The inspector indicated that one of the hazards inherent in the placement of the powder box was the 7,200-volt cable that ran past it. The detonating caps stored in the box are set off by an electrical charge (Tr. 171, 209). This detonation could be activated by stray

current from a power cable (Tr. 171). However, in order for there to be a stray current, there would have to be a break in the cable (Tr. 255). The cable in question was a new cable that had been installed about a month before this incident (Tr. 207). This cable has a metal shield which is covered by a rubber coating. A person can touch it and not receive a shock (Tr. 189). In addition, there is a ground-checking system which continuously monitors the system. If a hole was made in the armor shielding, the system is designed to deenergize itself (Tr. 171, 189, 207-208). There was no reason to believe that this system was hooked up improperly (Tr. 256). In addition, stray current would have to have a path of conductivity to set off the detonators (Tr. 255). The powder box is constructed out of wood which is a nonconducting material (Tr. 209, 224), and the detonators were separated from the powder by a 4 inch wooden divider (Tr. 206). The section where the powder box was located was dry and rock dusted and there was no water present on the box itself (Tr. 207, 259-260). Further, the detonators can not be set off if the wires are shunted on them (Tr. 214). All detonator wires that come from the factory are shunted by a small lead fitting holding the wires together on each dotonator (Tr. 214-215). There was no testimony that any of these shunting devices was missing from any of the detonators. There were no loose detonators lying around in the powder box (Tr. 221-222, 261).

In addition to the cable, the inspector indicated that there was a potential hazard, because of the proximity to a travelway of a scoop with its batteries coming in direct contact with the powder box (Tr. 172). It was pointed out that the crosscut had a stopping at one end which would cut down on traffic (Tr. 185-186). No one would have any reason to go into the crosscut other than to get explosives (Tr. 186, 193). However, as pointed out by the inspector, equipment failure could cause a person to lose control of the machinery (Tr. 184). If this were to happen, however, certain safety devices, such as a panic bar designed to deenergize the machine in the event of a problem, would serve to lessen, though not eliminate this danger (Tr. 188, 217, 225).

The Administrative Law Judge also took judicial notice of a West Virginia Statute, section 22-2-32, relating to underground storage, which requires that explosives must be stored at least 15 feet from roadways and power wires, rather than the 25 feet required by Federal law (Tr. 199-200).

Accordingly, it is found that this violation was only moderately serious.

Mr. Aguilar, the acting mine foreman at the time of the incident, testified that on the day prior to the issuance of the order, he had the explosives' box moved from another location to the crosscut where it was at the time of the inspection (Tr. 204, Exh. 0-4). The last

time he saw it, it was at least 25 feet from the roadway and up against the stopping at the rear of the crosscut (Tr. 205). Subsequently, however, and prior to the shift on which the inspection was conducted, it was brought out of the mine to be refilled (Tr. 206). There is no clear showing that Eastern management knew that the box had been placed too near the roadway or the power cable, however, since the violation was not cited until about 4 hours after the shift began, it should have been seen by management personnel. Accordingly, this violation is found to be the result of ordinary negligence.

The inspector testified that the time for the abatement was one-half hour. This included withdrawing the men from the area and moving the powder box further into the crosscut. This latter action took approximately 3 minutes (Tr. 180). It is found that Eastern demonstrated good faith in abating the violation.

Appropriateness of Penalty to Size of Operator's Business

Eastern is a large coal company (Tr. 20). It was stipulated that the company's coal production for 1976 was 8 million tons (Tr. 20).

Effect on Operator's Ability to Continue in Business

Counsel for Eastern stated that he was willing to stipulate that the company would be able to continue in business even if there were an assessment in this case (Tr. 20). Furthermore, the Interior Board of Mine Operations Appeals (Board) has held that evidence relating to whether a penalty will affect the ability of the operator to stay in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find therefore, that penalties otherwise properly assessed in this proceeding would not impair the operator's ability to continue in business.

History of Previous Violations

As relates to the Wharton No. 11 Mine, the operator had paid assessments for approximately 82 violations of regulations in the 24 months preceding the violation of January 11, 1977. Of these, five were violations of 30 CFR 75.316, the violation cited in these proceedings. As relates to all mines of the operator, during the year 1975, it paid assessments relating to approximately 58 violations of 30 CFR 75.316; as relates to the year 1976, the number was approximately 88 violations of 30 CFR 75.316.

As relates to the Lightfoot No. 1 Mine, the operator had paid assessments for approximately 157 violations of regulations in the 24 months preceding the violation of January 12, 1977. Of these, 22 were violations of 30 CFR 75.400. There is no history shown in

this mine for violations of 30 CFR 75.1306. As relates to all mines of the operator, during the year 1975, it paid assessments relating to approximately 276 violations of 30 CFR 75.400; as relates to the year 1976, the number was approximately 346 violations of 30 CFR 75.400. As relates to all mines of the operator during the year 1975, it paid assessments relating to approximately 14 violations of 30 CFR 75.1306; as relates to the year 1976, the number was approximately 19 violations of 30 CFR 75.1306. In accordance with the ruling in Peggs Run Coal Company, 5 IBMA 144, 150, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975), no consideration will be given to any violations occurring subsequent to the respective dates of violations involved in this case.

VI. Conclusions of Law

1. Eastern Associated Coal Corporation and its Wharton No. 11 Mine and Lightfoot No. 1 Mine have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act during the respective periods involved in these proceedings.

2. Under the Acts, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to these proceedings.

3. The violations charged in Notice No. 3 AJK, January 11, 1977 (30 CFR 75.316), Notice No. 6 BJW, January 12, 1977 (30 CFR 75.400), and Order No. 1 BJW, January 14, 1977 (30 CFR 75.1306), are found to have occurred.

4. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

MSHA and Eastern submitted posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

Docket No. HOPE 78-77-P

Notice No. 3 AJK	January 11, 1977	30 CFR 75.316	$1,350.00

Docket No. HOPE 78-76-P

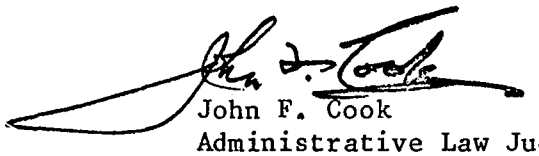
Notice No. 6 BJW	January 12, 1977	30 CFR 75.400	$1,500.00

Docket No. HOPE 78-75-P

Order No. 1 BJW	January 14, 1977	30 CFR 75.1306	$ 900.00

ORDER

Respondent is directed to pay the penalties assessed in the amount of $3,750.00 within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

Issued: April 30, 1979

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