

SEPTEMBER 1979

The following cases were Directed for Review during the month of September:

Secretary of Labor, MSHA v. Knox County Stone Co., Inc., DENV 79-359-PM;
(Judge Kennedy, July 23, 1979).

Victor McCoy v. Crescent Coal Company, PIKE 77-71; (Judge Lasher,
August 8, 1979) .

Climax Molybdenum Company v. Secretary of Labor, MSHA & Oil, Chemical and
Atomic Workers' International Union, Local 2-24410, DENV 79-102-M through
DENV 79-105-M; (Judge Michels, August 14, 1979).

Review was Denied in the following case during the month of September:

Magma Copper Company v. Secretary of Labor, MSHA, DENV 79-433-PM;
(Judge Merlin, August 9, 1979).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

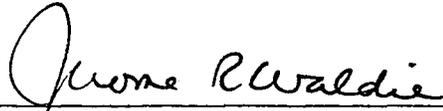
September 4, 1979

LOCAL UNION NO. 3453, DISTRICT 17, :
UNITED MINE WORKERS OF AMERICA : Docket No. HOPE 77-193
: :
v. : IBMA No. 78-7
: :
KANAWHA COAL COMPANY :

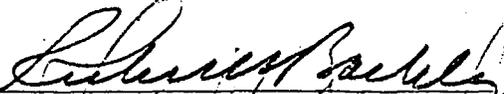
DECISION

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

The decision of Administrative Law Judge Stewart awarding compensation and interest in this proceeding under section 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §820(a) (1976) (amended 1977), is affirmed. See our decision in Youngstown Mines Corporation, No. HOPE 76-231 (August 15, 1979).



Jerome R. Waldie, Chairman



Richard V. Backley, Commissioner



Frank E. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 4, 1979

LOCAL UNION NO. 5429, UNITED MINE :
WORKERS OF AMERICA :
 :
v. : Docket No. MORG 79-13
 :
CONSOLIDATION COAL COMPANY :

DECISION

This compensation proceeding arises under section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1978) ["the Act"]. 1/ The United Mine Workers of America (UMWA) filed with the Commission on November 1, 1978, an application for compensation for work allegedly lost by two shifts of miners idled by a section 103(k) withdrawal order issued to Consolidation Coal Company (Consol) on August 14, 1978. 2/ On January 24, 1979, Administrative Law Judge Fauver granted Consol's motion to dismiss the application, finding that the applicant had failed to comply with the time limits set in Rule 29 of the Commission's Interim Procedural Rules, 3/ and had not shown a reasonable basis for the late filing of the compensation claim.

1/ §111 of the Act provides in pertinent part:

If a coal ... mine or area of such mine is closed by an order issued under section 103 ... all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift ... The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative....

2/ §103(k) of the Act provides in pertinent part:

In the event of any accident ... in a coal ... mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person....

3/ Interim Rule 29 provided:

An application for compensation shall be filed within 30 days after the commencement of the period the applicants are idled or would have been idled as a result of the order which gives rise to the claim.

On July 30, 1979, procedural rules replacing the interim rules became effective. Under the new rules the period for filing applications for compensation is increased to 90 days. 44 Fed. Reg. 38,230 (1979) (to be codified in 29 CFR §2700.35).

The Commission granted the UMWA's petition for discretionary review to determine whether the administrative law judge erred in granting Consol's motion to dismiss. For the reasons that follow, we conclude that the 30-day filing period set forth in Interim Rule 29 for filing applications for compensation under the 1977 Act may be extended in appropriate circumstances and that such circumstances are present in this case. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

On August 14, 1978, a Mine Safety and Health Administration (MSHA) inspector issued a section 103(k) withdrawal order at Consol's Arkwright Mine following a roof collapse that killed two miners. A. Neil Humphreys, a district safety inspector for the UMWA, was notified of the roof fall and inspected the area with federal, state, and company officials. Humphreys investigated the accident and determined, in his view, that certain miners had not been compensated pursuant to section 111 of the Act. Humphreys directed the union's health and safety committee to meet with management and request compensation; the committee's request was refused. On September 18, 1978, Humphreys and the health and safety committee met with management representatives. At this meeting the management representatives refused to pay the requested compensation or to provide Humphreys with a list of miners scheduled to work on the involved shifts. On September 28, 1978, management reiterated its position that no compensation was due under section 111.

In light of these events, Humphreys filed a discrimination complaint under section 105(c) of the Act, believing it to be the only course of action available to him. On October 2, 1978, an MSHA representative informed Humphreys that a compensation claim under section 111, rather than a discrimination complaint, was appropriate under the circumstances. He further informed Humphreys that there was a 30-day time limit on the filing of compensation claims. On November 1, 1978, the UMWA filed an application for compensation. ^{4/}

On review, the UMWA argues that the 30-day filing period in Interim Rule 29 can be extended in appropriate circumstances and that such circumstances exist in this case. Consol urges that the judge properly concluded that the facts do not reveal a reasonable basis for extending the 30-day period to permit the late filing of the application for compensation. Consol contends also that the failure to file within the time limits prescribed by the Commission's rule "bars the agency from exercising jurisdiction over the matter". In Consol's view, United Mine Workers of America v. Kleppe, 561 F.2d 1258 (7th Cir. 1977), controls the Commission's decision in this case. We reject Consol's arguments.

^{4/} The facts recited are largely derived from an affidavit by Humphreys that was attached to the UMWA's opposition to Consol's motion to dismiss.

In deciding whether a limitations period may be extended or tolled, the basic question "is one of legislative intent whether the right shall be enforceable ... after the prescribed time." Burnett v. N. Y. Central R. R., 380 U.S. 424, 426 (1965). Unlike other provisions of the Act, however, (e.g., sections 105(a), 105(c)(3), and 106(a)(1)), Congress did not provide a time period for filing compensation claims under section 111. The 30-day limit at issue appeared in the Commission's Interim Procedural Rules. On the question of whether the 30-day filing period provided for in the Commission's interim rules can be extended in appropriate circumstances, the rules themselves shed little light. For this reason, we will interpret the rule in a manner consistent with the purposes of the statute it seeks to implement. See Irvington Moore, Div. of U.S. Natural Resources v. O.S.H.R.C., 556 F.2d 431, 435 (9th Cir. 1977).

The Federal Mine Safety and Health Act of 1977 is a remedial statute, the "primary objective [of which] is to assure the maximum safety and health of miners." U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 634 (1978). Cf. Freeman Coal Mining Company v. IBMOA, 504 F.2d 741, 744 (7th Cir. 1974). The Senate Committee emphasized the remedial nature of the Act's compensation provision. The Committee stated:

This provision ... is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations.... It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law. This provision will also remove any possible inhibition on the inspector in the issuance of closure orders. Legislative History, supra, at 634-635.

In interpreting remedial safety and health legislation, "[i]t is so obvious as to be beyond dispute that ... narrow or limited construction is to be eschewed ... [L]iberal construction in light of the prime purpose of the legislation is to be employed." St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). We believe that a liberal construction of the 30-day filing period for compensation claims requires a conclusion that the period may be extended in appropriate circumstances. See, Dartt v. Shell, 539 F.2d 1256, 1260 (10th Cir. 1976), aff'd by equally divided court, 434 U.S. 99 (1977); Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978); Moses v. Falstaff Brewing Corporation, 525 F.2d 92 (8th Cir. 1975).

Furthermore, while section 111 of the 1977 Act does not specify a time limit for the filing of compensation claims, the Act's discrimination provisions contain analogous time limits. In explaining section 105(c)(2)'s requirement that a discrimination complaint be brought within 60 days of the alleged violation, the Senate committee stated:

The bill provides that a miner may, within 60 days after a violation occurs, file a complaint with the Secretary. While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60 day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. Legislative History, supra, at 624. 5/

The Senate committee also expressed a similar view as to the 30-day period provided for in section 105(c)(3) in which a miner can file a discrimination complaint on his own behalf if the Secretary determines that no violation has occurred: "[A]s mentioned above in connection with the time for filing complaints, this thirty-day limitation may be waived by the court in appropriate circumstances for excusable failure to meet the requirement." Legislative History, supra, at 625.

Thus, it is clear that Congress intended that the time periods for filing discrimination complaints under the 1977 Act can be extended in appropriate circumstances. Because section 105 and section 111 are both part of the same remedial legislation, they should be interpreted and applied in a consistent fashion. For this reason also, we conclude that the 30-day period provided in Interim Rule 29 for filing applications for compensation can be extended in appropriate circumstances.

5/ Baker v. North American Coal Company, 8 IBMA 164, 179-80 (1977), aff'd in part, rev. in part, Baker v. IBMOA, 595 F.2d 746 (1978); decided under the discrimination provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) ("1969 Act"), reached a similar conclusion.

We reject Consol's assertion that the Seventh Circuit's decision in UMWA v. Kleppe, supra, controls our decision in this case. First, Kleppe is distinguishable from the present case. Consol relies on the court's statement that the Secretary of Interior's regulation providing a 45-day period for the filing of compensation claims under section 110(a) of the 1969 Act, "is not a 'statute of limitations' designed to protect mine operators from stale claims, but simply a condition precedent to invocation of the agency's administrative jurisdiction..." 561 F.2d at 1261. ^{6/} The petitioner in Kleppe, however, had argued in the administrative proceedings below that the regulation setting a 45-day filing period was invalid; no argument was made before the agency that the time limit should have been tolled under the circumstances therein involved. Therefore, on appeal the court noted that, in view of the "vacuous record" in this regard, it could not determine what effect a refusal to toll the limitations period would have had on the regulation's validity. 561 F.2d at 1263.

Second, in Kleppe the court was faced with an interpretation by the Board of Mine Operations Appeals of a regulation promulgated by the Secretary of Interior under the 1969 Act. Here, the Commission is interpreting its own procedural rule under the 1977 Act.

Our next inquiry is whether the facts in the present case warrant an extension of the 30-day time limit. The primary purpose of a limitations period such as that contained in Interim Rule 29 is to assure fairness to the parties against whom claims are brought. Burnett v. N.Y. Central R.R., supra, 380 U.S. at 428. Limitations periods

'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right of be free of stale claims in time comes to prevail over the right to prosecute them.' Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights. Burnett, supra, 380 U.S. at 428.

^{6/} We note, however, that, despite this characterization, the court analogized the regulation to the time limits for the filing of pleadings under Fed. R. Civ. P. 12(a) and the taking of appeals from final judgments under Fed. R. App. P. 4, both of which can be extended for excusable neglect.

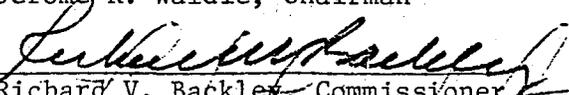
To be balanced against this policy of repose, however, are considerations of whether "the interests of justice require vindication of the plaintiff's rights" in a particular case. Id.

In the present case, the applicant did not sleep on its rights. Rather, from the time that it first discovered the potential claim it attempted to secure compensation for the idled miners. This was done first through a request for payment made by the health and safety committee, then through a meeting with management representatives, followed by an attempt to secure relief through the filing of a discrimination complaint, and, finally, filing an application for compensation within 30 days after being informed that this was the proper course to follow. Furthermore, Consol does not argue, and the record does not indicate, that it in any manner relied on the policy of repose embodied in Interim Rule 29's 30-day filing period or was otherwise prejudiced. In fact, as discussed above, it had notice of the claim to compensation soon after the events giving rise to the claim occurred. For these reasons, we conclude that the judge erred in finding that a reasonable basis was not shown for allowing the late filing of the application for compensation in this case.

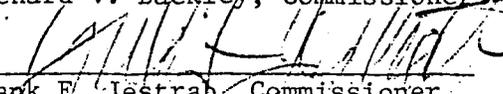
Accordingly, we reverse and remand for further proceedings consistent with this decision.



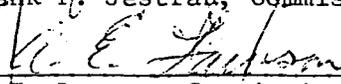
Jerome R. Waldie, Chairman



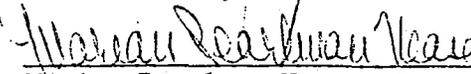
Richard V. Backley, Commissioner



Frank F. Jastrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 17, 1979

UNITED STATES STEEL	:	
CORPORATION,	:	Docket Nos. PITT 76-160-P
	:	PITT 76-162-P
v.	:	
	:	IBMA No. 77-33
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C. §961 (1978). The administrative law judge found two violations of 30 CFR §75.1714-2(a) 1/ and assessed a penalty of \$100 for each violation. U.S. Steel appealed the finding of violations and the amount of the penalties. We affirm the judge's decision.

On April 7, 1975, a MESA inspector issued a notice of violation of §75.1714-2(a) after observing an employee of U.S. Steel neither wearing nor carrying a self-rescue device in an underground section of Maple Creek No. 2 Mine. On May 9, 1975, a MESA inspector issued a notice of violation of §75.1714-2(a) after observing two men neither wearing nor carrying self-rescue devices while performing electrical work at the slope bottom of U.S. Steel's Robena No. 1 Mine.

U.S. Steel argues that 30 CFR §75.1714-2(a) places no obligation on the operator with respect to the wearing or carrying of self-rescue devices. The company asserts that it complied with the standard by establishing a program designed to assure that self-rescue devices are available to all employees, by training all employees in the use of the devices, and by enforcing its program with due diligence. U.S. Steel

1/ 30 CFR §75.1714-2(a) provides:

(a) Except as provided in paragraphs (b) and (c) of this section, self-rescue devices meeting the requirements of §75.1714 shall be worn or carried on the person of each miner.

also argues that the penalties are excessive in view of its good history, prompt abatement and lack of negligence.

It is well established that under the Federal Coal Mine Health and Safety Act of 1969 2/ an operator is liable for violations of mandatory health or safety standards without regard to fault. Valley Camp Coal Co., 1 IBMA 196 (1972); Webster County Coal Corp., 7 IBMA 264 (1977); Republic Steel Corp., 1 FMSHRC 5, 9-10 (1979). Thus, in the present case the issue is not whether the operator acted negligently, but whether it in fact complied with the mandatory language of 30 CFR §75.1714-2(a). Rushton Mining Co., 8 IBMA 255, 259-260 (1978). The cited standard requires that self-rescue devices "be worn or carried on the person of each miner." The administrative law judge found, and U.S. Steel does not dispute, that its employees were not wearing or carrying self-rescue devices. Therefore, we affirm the judge's finding of a violation. 3/U.S. Steel's safety program and its efforts to enforce it are irrelevant to the finding of a violation. Rather, these factors are appropriately considered in the assessment of a penalty. 4/

The judge's decision reflects that he considered the criteria set forth in section 109(a)(1) of the 1969 Act in assessing a penalty of \$100 for each violation. The penalties are appropriate and will not be disturbed.

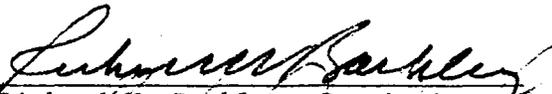
2/ 30 U.S.C. §801 et seq. (1976) (amended 1977).

3/ U.S. Steel's argument relying on North American Coal Corp., 3 IBMA 93 (1974), is not persuasive. The rationale of the Board's decision in North American has been limited to the language of the particular standard involved in that case, 30 CFR §75.1720. Webster County Coal Corp., supra. See also Rushton Mining Co., supra. The present case presents no occasion to determine whether we agree with the Board's interpretation of 30 CFR §75.1720.

4/ Section 109(a)(1) of the 1969 Act provided:

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. (Emphasis added.)

Accordingly, the judge's decision is affirmed.


Richard V. Backley, Commissioner


Frank E. Jestrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 21, 1979

CLIMAX MOLYBDENUM COMPANY	:	Docket No. DENV 79-3-M
a division of AMAX INC.	:	Docket No. DENV 79-4-M
	:	Docket No. DENV 79-5-M
	:	Docket No. DENV 79-6-M
v.	:	Docket No. DENV 79-7-M
	:	Docket No. DENV 79-8-M
SECRETARY OF LABOR,	:	Docket No. DENV 79-9-M
MINE SAFETY AND HEALTH	:	Docket No. DENV 79-10-M
ADMINISTRATION (MSHA)	:	Docket No. DENV 79-11-M
	:	Docket No. DENV 79-12-M
	:	Docket No. DENV 79-13-M

DECISION

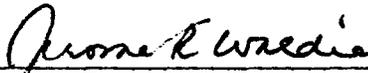
These proceedings arose from applications filed by Climax Molybdenum Company (Climax) for review of citations issued for alleged violations of 30 CFR 57.5-5, pertaining to dust exposure. On November 9, 1978, the administrative law judge issued an order to Climax to "provide information and clarification" concerning its applications for review. Climax was ordered to: (1) provide legible copies of the citations; (2) advise the judge whether the citations had been abated; and (3) inform the judge whether it was seeking relief by way of a review on the merits of abated citations. The order specified no date for reply.

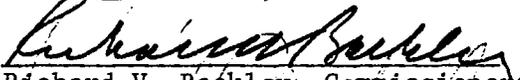
On January 10, 1979, the judge dismissed the applications for review for Climax's failure to comply with his November 9th order. As of that date, 62 days after the judge issued his order, Climax had not responded in any manner to the judge. On January 11, 1979, before learning of the judge's dismissal, Climax complied with the judge's order. In addition, Climax also filed a motion and brief requesting the judge to rule on the question of "immediate" review of unabated citations or to certify the issue for interlocutory review to the Commission. On February 21, the Commission granted Climax's petition for discretionary review of the judge's order of dismissal.

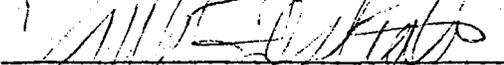
On review, Climax argues that the judge's dismissal of its applications for review was an abuse of discretion. Climax emphasizes the absence in the order of a time limit for response, that it did comply with the order (albeit one day after the judge's dismissal order), that its time for response was reasonable in light of the complex brief it also filed on the issue of immediate review, that dismissing the cases was a disproportionate reaction to the facts, and that the judge elevated the need for a prompt determination of the issues over the need for a just determination.

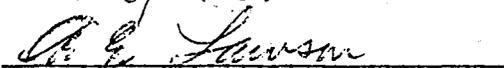
We are not impressed with Climax's assertions that its delay in response was, in part, necessitated by its efforts to brief the jurisdictional questions presented by its applications. The judge's order requested information and clarification; it did not request nor require an extensive brief.

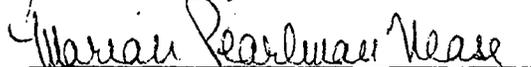
However, an order which lacks a date for response gives no guidance to its recipients for the timing of their compliance and it thereby promotes controversies such as the one before us. Because the lack of a date certain for compliance may have significantly contributed to Climax's lack of prompt response to the judge's order, we find that the dismissal of these applications for review in this instance was an unduly harsh sanction and therefore an abuse of the judge's discretion. 1/ Accordingly, the decision of the judge is reversed and the cases are remanded for further proceedings consistent with this decision.


Jerome R. Waldie, Chairman


Richard V. Backley, Commissioner


Frank F. Jestrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

1/ At the time in question, the Commission's interim procedural rules did not require the judge to issue a show cause order prior to dismissing a case seeking review of a citation or withdrawal order for failure to comply with a prehearing order of the judge. The Commission's permanent procedural rules do provide for a prior show cause proceeding. See 44 Fed. Reg. 38,232 (1979) (to be codified in 29 CFR §2700.63). Thus, in future cases, an opportunity for presentation and consideration of misunderstandings such as this one is available.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 21, 1979

SECRETARY OF LABOR,	:	Docket Nos.	PITT 78-127
MINE SAFETY AND HEALTH	:		PITT 78-128
ADMINISTRATION (MSHA),	:		PITT 78-301-P
	:		PITT 78-302-P
and	:		
	:		
UNITED MINE WORKERS OF AMERICA,	:		
(UMWA),	:		
	:		
v.	:		
	:		
CANTERBURY COAL COMPANY	:		

DECISION

These cases arise under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977). On January 2, 1979, the Commission granted petitions for discretionary review filed by the United Mine Workers of America (Union) and the Secretary of Labor. For the reasons that follow, we reverse the judge's decision and remand for a hearing de novo before a different administrative law judge.

In this proceeding petitions for assessment of civil penalty filed by the Secretary were consolidated with applications for review filed by Canterbury. Procedurally, all of these cases were affected by the judge's disposition of a notice of violation issued to Canterbury on September 23, 1977, under section 104(c) of the Act. 1/ This notice,

1/ Section 104(c) provides in pertinent part:

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

which concerns a "cutter" or a tear in the roof of an underground mine, provided the basis for the issuance of two subsequent section 104(c) withdrawal orders, 2/ concerning alleged violations related to pillar recovery and coal accumulations.

Canterbury filed a motion for summary disposition regarding the 104(c) withdrawal orders. In the motion Canterbury argued, among other things, that the underlying cutter notice was invalid. The administrative law judge denied the motion without prejudice to renew, and ordered the Secretary and Union to present their evidence regarding the underlying cutter notice. The Secretary and Union then presented that evidence at a hearing. At the conclusion of their presentation the judge granted a motion by Canterbury for dismissal of the cutter notice for failure to make a prima facie case. 3/ The judge's decision from the bench was reduced to writing on April 21, 1978.

The issues raised by the petitions for discretionary review focus almost exclusively on the judge's conduct of the hearing on the cutter notice. On review the Secretary and Union argue that they were denied a fair hearing on that issue because the judge "took the case away from counsel by the frequency and timing of his questions."

At the outset, we acknowledge the considerable leeway afforded administrative law judges in regulating the course of a hearing and in developing a complete and adequate record. The Manual for Administrative Law Judges, published by the Administrative Conference of the United States, states:

The Judge may question the witness initially if it is likely to forestall extensive examination by others. He should interrupt when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when for some other reason assistance is needed to assure orderly development of the subject matter. At the close of cross or direct, the Judge may question the witness to clarify any confusion or ambiguous testimony or to develop additional facts. 4/

fn. 1/ cont'd

to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, ... to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

2/ The cutter notice is the subject of PITT 78-301-P; the withdrawal orders are the subject of PITT 78-302-P, PITT 78-127 and 128.

3/ In addition, the alleged pillar recovery violation was dismissed on the ground that no triable issue of fact was shown to exist and that Canterbury was entitled to summary disposition as a matter of law.

4/ Ruhlen, Manual for Administrative Law Judges, at 35 (1974).

See also 2 Davis, Administrative Law §10.02, at 8-9 (1958). "But an examiner should avoid encroaching on the domain of counsel.... Excessive or improper participation of examiners may, of course, amount to denial of fair hearing." Id. at 9. See also Cupples Co. Mfrs. v. NLRB, 106 F.2d 100, 113 (8th Cir. 1939).

In the present case, the inherent authority of judges to participate in hearings is not in question. Rather, the Secretary and Union argue that the judge interjected himself into the cutter notice proceedings so often and so extensively that they were denied the opportunity to develop their case. We agree. A reading of the entire record establishes that the judge's questioning encroached on the domain of counsel; he did not permit the parties an opportunity to develop their evidence in their own way. By numerous interruptions and questions, the judge dominated the examination of every witness. See Modern Methods, Inc. 12 Ad.L. Dec.2d 57, 60 (FTC, 1962); Better Monkey Grip Co., 5 Ad.L. Dec. 2d 452 (NLRB, 1955).

The record reflects that the judge rarely waited until the close of direct or cross examination before he questioned witnesses. A clear example of the judge's overzealous participation took place during the Secretary's attempt to question his chief witness, Inspector McNece. The record reflects the following pattern of questioning:

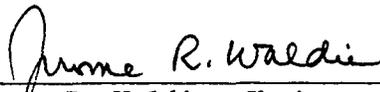
<u>QUESTIONER</u>	<u>NUMBER OF QUESTIONS</u>
Secretary.....	1
Court.....	5
Secretary.....	1
Court.....	1
Secretary.....	1
Court.....	125
Secretary.....	6
Court.....	20
Secretary.....	2
Court.....	64
Secretary.....	1
Court.....	16

(Tr. 181-234).

This pattern of unbalanced questioning continued throughout the entire hearing. It is also difficult to characterize the judge's questions as an effort to clarify the record. Rather, we find the judge attempted to develop the evidence on his own, and that his intrusive questioning hindered rather than advanced the development of a complete record. The extensive number of questions asked by the judge further reflects his undue interference in the proceedings. Although we do not profess to establish numerical guidelines, the record reflects that the judge asked 970 questions while the attorneys for the Secretary, Union, and Canterbury asked a combined total of only 334. The claim that the judge "took the case away from counsel" is amply demonstrated by the record.

For these reasons, we find that the judge's conduct during the course of the hearing on the cutter notice constituted an abuse of his discretion. In making this finding, we have relied on the entire record, which discloses a lack of proper judicial restraint by the administrative law judge. The effect was to substantially hinder the parties in the presentation of their evidence and deny them their right to a fair and impartial hearing. 5/ Accordingly, we vacate the decision of the judge and remand the case for assignment by the Chief Administrative Law Judge for a de novo hearing before a different administrative law judge. 6/

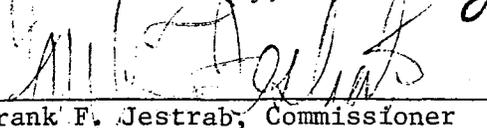
In vacating the decision of the judge, we have by necessity vacated all findings made by the judge, including those involving the credibility of witnesses, conduct of counsel, and the summary disposition of the alleged pillar recovery violation. As to the latter, we note that the record reflects that a genuine issue of material fact was raised in the affidavits concerning the mining sequence and its conformance to the roof control plan during the pillar recovery operations. Under these circumstances, summary disposition was not proper. United States v. Diebold, 369 U.S. 654, 655 (1962). 7/



Jerome R. Waldie, Chairman



Richard V. Backley, Commissioner



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

5/ See 5 U.S.C. §556(b) and (d).

6/ See Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979); Reserve Mining Co., v. Lord, 529 F.2d 181 (8th Cir. 1976); United States ex rel. Wilson v. Coughlin, 422 F.2d 100, 110 (7th Cir. 1973); and In re United States, 286 F.2d 556, 565 (1st Cir. 1961).

7/ In light of our disposition, it is unnecessary to reach the other issues and arguments raised by the parties.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 28, 1979

LOCAL UNION NO. 3453, DISTRICT 17, : Docket No. HOPE 77-193
UNITED MINE WORKERS OF AMERICA :
 : IBMA No. 78-7
v. :
 :
KANAWHA COAL COMPANY :

ORDER

On September 14, 1979, Kanawha Coal Company filed a petition for reconsideration of the Commission's decision issued on September 4. Kanawha seeks reconsideration of one issue raised in its appeal and purportedly not resolved properly by the Commission's decision. For the reasons that follow, we deny the petition.

Kanawha submits that the Commission's decision does not properly resolve whether the administrative law judge erred in finding that certain miners were idled by a withdrawal order issued to Kanawha and entitled to four hours compensation under section 110(a) 1/ of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977). Kanawha argues that the Commission erred in affirming the judge's decision because the involved miners were not idled by the withdrawal order, but by their refusal to accept Kanawha's offer of four hours alternative work during the first half of their shift.

The interpretation of section 110(a) by the Commission in Youngstown Mines Corp., No. HOPE 76-231 (August 15, 1979), requires the award of compensation in the circumstances here. In Youngstown, the Commission awarded four hours compensation to miners who accepted and performed four hours of alternative work during the first half of their shift and

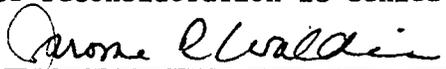
1/ Section 110(a) of the Act, in pertinent part, provided:

If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of the shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift....
[Emphasis added.]

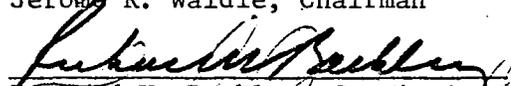
79-9-17

were then sent home. The Commission found that "[b]ut for the withdrawal order, the miners would have worked and received compensation for the final [four] hours of their shift". Here, even if the miners had accepted alternative work for the first four hours of their shift, alternative work was not available for the final four hours. Therefore, the miners were idled by the withdrawal order during the second half of their shift and are due compensation for this period under section 110(a). Youngstown Mines Corp. This case does not present the issue of whether miners who refuse an offer of eight hours of alternative work are entitled to compensation under section 110(a). Therefore, we need not embrace the judge's reasoning to the extent that his decision can be read to award compensation because miners were unable to perform their "regular duties" or "specific jobs".

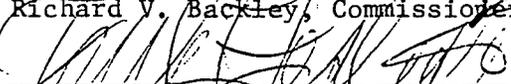
Accordingly, the petition for reconsideration is denied.



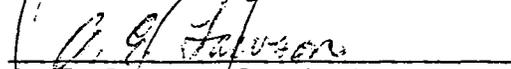
Jerome R. Waldie, Chairman



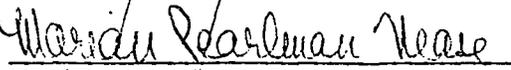
Richard V. Backley, Commissioner



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

Administrative Law Judge Decisions

September 1, 1979 - September 30, 1979

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

SEP 4 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-652-P
Petitioner : A.C. No. 01-00758-02023V
v. :
: No. 3 Mine
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Robert W. Pollard, Esq., Birmingham, Alabama, for
Respondent.

Before: Administrative Law Judge Michels

This is a civil penalty proceeding brought under section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition for assessment of civil penalty was filed by the Mine Safety and Health Administration (MSHA) on August 24, 1978, alleging a violation of 30 CFR 75.1403. Respondent answered on September 13, 1978, and denied that the alleged violation occurred. A hearing was held on May 3, 1979, in Birmingham, Alabama, at which both parties were represented by counsel. Posthearing briefs and proposed findings and conclusions have been filed. The proposed findings which have not been adopted herein are rejected as immaterial or not supported by fact. 1/

Statement of the Case

The facts in this proceeding are not in serious dispute. The principal issue is whether Respondent was properly charged under the "safeguard" provisions of the regulations. A safeguard notice is issued by an inspector where he believes a transportation hazard exists which is not covered by published standards. Thereafter, the safeguard becomes, in effect, a mandatory standard applicable only to

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

the mine cited. In this case, the mine was originally placed under a safeguard notice for the failure to have a derail or stop block "near" the mine shaft. The safeguard notice was issued and then was abated by the placement of a derail 71 feet from the collar at the top of the mine shaft. Two and one-half years later, another inspector observed a rail car between the derail, which was still in place, though inoperative, and the mine shaft. Thereupon, this second inspector cited Respondent for a violation of 30 CFR 75.1403 alleging that the safeguard notice was not complied with because a flat car was left unattended without a derail, stop block or dead man which would have prevented the car from falling into the shaft bottom.

ISSUES

The issues, as the Respondent has appropriately phrased them, are as follows:

1. Does 30 CFR 75.1403 have any application to the surface work areas of an underground mine?

2. If 30 CFR 75.1403 does apply to the surface work areas of an underground mine, does the fact that a loaded supply car parked between a derail, required by a previously-issued Notice to Provide Safeguards, and the collar of a mine shaft constitute a violation of the previously-issued Notice to Provide Safeguards, which only required that a derail be installed on the track leading to the mine shaft?

FINDINGS OF FACT

Respondent's No. 3 Mine is an underground coal mine located in Jefferson County, Alabama (Tr. 21). A supply yard is located on the surface of this underground facility. Within the confines of the supply yard and running for approximately 200 feet along the surface is a rail track (Tr. 76). This track travels through the yard up to the collar of the shaft. It goes over fairly level ground for the first 100 feet and then for the remainder of the stretch runs up a slight incline towards the shaft (Tr. 72-74, 77). Its purpose is to serve as a means upon which men and supplies can be transported in cars to the mine shaft for entry into the mine. A tow motor or forklift is used to move these supply cars along the entire length of the track to the shaft. A gate is located at the end of the track in front of the shaft which is equipped with certain protective devices (Tr. 84, 86-87). Upon the cars reaching this point, the gate is opened and they are then loaded into an elevator and taken from the surface down through the shaft into the mine (Tr. 9-10). The shaft is approximately 1,300 feet deep (Tr. 9, 48).

The following references to the testimony are virtually undisputed with some exceptions which are noted.

Petitioner's first witness, MSHA Inspector Harlan Blanton, testified that he issued the underlying safeguard notice while he was conducting a spot inspection at Respondent's No. 3 Mine on January 9, 1975 (Tr. 7-8). ^{2/} During this inspection, he observed a supply car located on the surface track just outby the manshaft where supplies and men are transported to the underground section of the mine (Tr. 8). Normally, these cars go the entire length of the track along the surface until they come to the collar (Tr. 21). Such cars are lowered into an elevator at the manshaft and then lowered into the mine or later hoisted out (Tr. 9-10). Cars go directly from the track into the shaft. Inspector Blanton estimated the shaft is approximately 1,300 feet deep (Tr. 9). Petitioner's second witness, Inspector Whalen, also stated the shaft was 1,300 feet deep (Tr. 48).

Inspector Blanton examined both the supply car and the track it was located upon and he testified that the car was located in the neighborhood of 50 to 100 feet from the collar of the mine shaft (Tr. 10). He thought it was a regular mine supply car, but he could not recall whether it was loaded or empty. He described the car as being "unattended" and he defined this term to mean not hooked or secured to some other machine, such as a locomotive (Tr. 22-23) (this is not consistent with Inspector Whalen's definition of the term referred to below). The inspector testified that when he observed the car, a Mr. Griffin, whom he identified as Respondent's safety director, and Mr. Wayne Kirtz, the chairman of the safety committee, were present. Inspector Blanton asked if there was a derail to keep the car from "accidentally being pushed into the mine or rolling into the mine" (Tr. 11). Thereupon, he and the other members of the group looked up and down the track, but their search did not uncover a derail. After determining that a derail was not present on this stretch of surface track and after concluding that such a safety device was necessary, the inspector issued Safeguard Notice No. 1 HEB pursuant to section 314(b) of the Federal Coal Mine Health and Safety Act of 1969.^{3/} This safeguard notice states: "The track on the surface to the manshaft was not provided with stop blocks or derails. Positive stop blocks or derails should be installed on the track near the manshaft. Served to J. M. Griffin, safety director at the mine office at 9:30 a.m. January 9, 1975" (Exh. G-1). The inspector claimed that he explained to the company's safety director and the chairman of the safety committee the need for such a safety device and they immediately began preparations to install a derail on the track. Inspector Blanton described what this derail was:

^{2/} Mr. Blanton has been an MSHA inspector since approximately 1970. He has approximately 16 years' experience in the industry and holds foreman papers issued by the State of Alabama.

^{3/} This section remains unchanged as section 314(b) of the Federal Mine Safety and Health Act of 1977.

In this case, they undone a joint in the track and put a piece of rail that would open up the track in case a car started to down the track it would derail the car and wouldn't let it proceed on the rail. It would throw it off the rail onto the ground. And that way, it wouldn't roll on down into the shaft.

(Tr. 11).

Inspector Blanton recalled that this derail was installed within 50 or 75 feet of the collar of the shaft. He did not tell the Respondent where to put this device; however, once it was installed, he did approve the derail and its location as he thought it was a sufficient distance from the collar to prevent a car from going into the shaft (Tr. 16-17, 22). He testified that this derail would be left open when cars were on the track and these cars would have to be located outby the derail if they were unattended (Tr. 12). The inspector indicated his belief that if cars were located inby the derail--towards the shaft--the derail was ineffective for its purpose of preventing cars from falling, accidentally or otherwise, into the shaft (Tr. 13).

On cross-examination, Inspector Blanton stated that he did not write on the safeguard notice anything about where or where not the Respondent was to park supply cars (Tr. 13-14). However, he did specifically testify that he told Mr. Griffin, the Respondent's safety director, that it would no longer be allowable for Respondent to park supply cars between or inby the derail and the shaft (Tr. 14-15). Respondent's witness, Mr. Burchfield, who is the maintenance superintendent at the No. 3 Mine, indicated he was aware of the purpose of the derail although he denied he knew that such parking of cars would be a violation.

Inspector Blanton emphasized that the purpose of this safety mechanism was to "throw the car off the track to keep it from going down the shaft" (Tr. 15, 21). He gave his opinion that parking a supply car between the derail and the shaft was in disregard of the derail altogether. He indicated his belief that cars located inby the derail could be accidentally bumped or knocked into the shaft by the tractors, trucks, and locomotives which were around it (Tr. 20). The inspector did not consider such an occurrence to be a remote possibility.

Inspector Blanton further testified that there was a gate at the end of the track in front of the shaft which was the entire width of the shaft (Tr. 17). He could not tell by observation that the track was on an uphill incline (Tr. 18). He testified that locomotives and diesel-powered tractors pushed the cars and he thought it possible that they could be pushed by manpower.

Petitioner's second witness, MSHA Inspector Clarence E. Whalen, testified that he issued the notice of violation while he was making a spot inspection on September 13, 1977, at the No. 3 Mine. ^{4/} He had been to the mine at different times before. When he issued this notice, he was in the company of Mr. Bobby Taylor, who he identified as the safety director at the No. 3 Mine (Tr. 28-29). Inspector Whalen was going to go underground to observe the perimeter of the shaft. For several minutes, he and Mr. Taylor waited for the return to the surface of the cage. While waiting, he looked across the shaft and observed the track and car in question (Tr. 29).

Inspector Whalen knew from his previous inspections at the No. 3 Mine that there was a derail on this track. Also, from observing the position of the flat car, he determined that the car was loaded with material and located inby the track (Tr. 29-30, 65). He did not measure the distance, but estimated that the loaded car was within 30 to 35 feet from the entrance to the shaft. After observing this condition, he issued a notice of violation to Respondent which describes the condition or practice which constitutes the alleged violation as follows:

The operator was not complying with a previously issued safeguard (No. 1, H.E.B. 75.1403, 1-9-75) at the entrance to the service shaft hoist way-east side -- in that a flat car loaded with material was left unattended, without a derail, stop block, or dead man that would have prevented such flat car from falling into the shaft bottom as the service shaft conveyance was in the bottom.

(Tr. 28, Exh. G-3).

Inspector Whalen told Mr. Taylor that the derail would have to be put back in operation. Thereupon, Mr. Taylor notified Mr. James Burchfield, Respondent's maintenance supervisor. Mr. Burchfield directed some workers to move the loaded car outby the derail. Over a 30- to 40-minute period, the workers proceeded with picks and shovels to make the derail operative (Tr. 31).

The inspector testified that the car was left unattended; there were no automatic brakes or braking devices on it (Tr. 32). He thought the condition was dangerous, stating:

A runaway car in addition to the car being unattended -- there was a road -- material road -- vehicles of the yard travelled between the derail and the entrance to the

^{4/} Mr. Whalen has been an MSHA inspector since October 1, 1971. He has State of Alabama mine foreman certification and had 16 years' of industry experience before joining MSHA.

shaft at this particular location there. They could have -- hypothetically speaking, anything movable could have come along and bumped it.

(Tr. 32).

Also, he stated that this service shaft is the only one way out of the mine and the substructure on top of the man conveyance would not withstand the impact of a falling car or object into it (Tr. 34-35).

Inspector Whalen testified that tow motors are used to move these supply cars on the track (Tr. 40). He stated that the car he had observed was heavy and substantially loaded. He thought that perhaps half a dozen men would be necessary to push the car. By looking at the track which runs toward the service shaft, he determined that it runs uphill to some degree (Tr. 41). However, the inspector discounted this by reiterating that with motor cars it could still be shoved over the hill.

Inspector Whalen further testified that he was aware of the existence of the safeguard notice issued by Inspector Blanton since the MSHA office has a posting board on which, among other things, are posted all safeguards which are outstanding at a mine (Tr. 41). Although he was aware of the existence of the safeguard notice and that the Respondent had been required to install a derail, he testified that he had never read the original safeguard notice before he wrote the notice of violation (Tr. 42).

On cross-examination, this inspector agreed that the derail was present, however, he determined that the Respondent was not complying with it since the derail was inoperative. He did not know, when he wrote the notice of violation, whether the safeguard notice contained wording which would prohibit the parking of cars at specific places along the track (Tr. 43).

Inspector Whalen did not issue a safeguard notice for the condition he had observed, as it was his view that a safeguard notice had already been issued for the same track (Tr. 46). Although Inspector Whalen observed that the derail was not in operating condition, he did not cite Respondent for this fact. Rather, he made a determination that the positioning of a car beyond the derail was in disregard of the purpose of that safety device. He thought that the sole purpose of the derail was to prevent runaway cars (Tr. 52-53). It was his opinion that if a car was placed in by the derail, there was no way that it could be effecting its purpose (Tr. 54).

Inspector Whalen testified that the car he saw did not have a braking system. It was stationary when he made his observation and he agreed that nothing was blocking the car. Also, this inspector

testified that the car was not spragged and was unattended. He defined "spragged" as the process of taking either a metal or wooden object and inserting it between the spokes of a moving car. The inserted object will then lock the wheel and slide it (Tr. 62). By "unattended," he meant that no workers were present at the time he made his observation (Tr. 62). This is a different definition than that of Mr. Blanton. This inspector thought it was important for a person to be present in order to sprag the car.

Respondent's first witness, Mark P. Hinton, a resident engineer at the No. 3 Mine, testified that he and one other person made a survey of the track leading from the supply yard to the service shaft. Mr. Hinton found the distance from the shaft to the derail to be 71 feet and 1 inch. The elevation drop between the shaft and the point of the derail was 88 feet. He stated that he measured a 1.23-percent downhill grade away from the shaft. Mr. Hinton thought this grade was significant in that cars would not roll up hill with ease. He did not consider this to be a steep grade (Tr. 72-74).

Respondent's second witness was James Burchfield. Mr. Burchfield was the maintenance superintendent at Respondent's No. 3 Mine when the notice of violation was issued. He testified that Bobby Taylor, the safety director, told him of the inspection which Inspector Whalen was undertaking and he joined the group when they were investigating the derail (Tr. 75).

Mr. Burchfield described how the derail was inoperative at the time of Mr. Whalen's inspection and he estimated that it took the men 10 to 15 minutes to make the switch operative. Mr. Burchfield said that tow motors are used to move the supply cars around. He stated that the first 100 feet of the supply yard is not level and there is an incline to the shaft. He did not think that there would be any runaway cars at this point (Tr. 77, 87). He said that there would have to be some sort of vehicle ramming. He explained this by saying that someone would have to be pushing another supply car with a tow motor before there could be a runaway car. He agreed that it takes tremendous force to move such a car, even when empty. Additionally, Mr. Burchfield testified that two employees are within 50 to 75 feet of the shaft at all times (Tr. 78).

He showed that they have now moved the derail closer to the shaft (Tr. 80). It has been placed 17 to 18 feet from the gate at the shaft entrance. The cage is 9 feet, 6 inches and the gate swings out roughly 14 feet over the track (Tr. 80). The derail is tied in automatically with the hoist by pneumatic air (Tr. 79(b)). 5/

5/ Because there are two page 79's in the transcript, one is designated 79(a) and the other 79(b).

Mr. Burchfield has testified that he was aware of the safeguard notice and its wording (Tr. 81). However, he claimed he did not have any idea that parking a car between the derail and the shaft would be a violation (Tr. 81). The car so parked was 13 inches high and approximately 19 feet long. It was loaded with cinder blocks and was clearly visible to those in the supply yard (Tr. 82). Mr. Burchfield thought any ramming would have to be deliberate. Tow motors will travel at 5 miles per hour. If such an act were to occur, Mr. Burchfield could only foresee danger to the cage and hoist; the miners would be inside the mine (Tr. 84). Mr. Burchfield was not unaware of the purpose of the derail (Tr. 85).

DISCUSSION AND CONCLUSIONS

I.

The first issue, as phrased above, is whether 30 CFR 75.1403 has any application to the surface work areas of an underground mine. Respondent argues that Part 75 of Title 30 CFR, which is entitled "Mandatory Safety Standards-Underground Coal Mines" is applicable only to conditions in the underground portion of underground mines. It argues that only in a few places do these regulations affect the surface operations and that in these it is plainly stated within the regulation that its application is to the surface area of the mine and that section 75.1403 makes no such statement. Finally, it contends that Part 77 of Title 30 CFR, which covers surface mines and surface work areas of underground mines, should properly govern this condition which the evidence shows occurred in a surface area.

MSHA contends that the scope of Part 75, as set forth in 30 CFR 75.1, is stated as including "some standards are also applicable to surface operations." MSHA makes no attempt to specify which of the standards are so applicable, how this is to be determined and, finally, whether the specific standard here involved, 30 CFR 75.1403, is one that is intended to be applicable to surface areas of underground mines.

A review of the mandatory standards set forth in Part 75 reveals that some are made specifically applicable to the surface areas of underground mines. For instance, 75.705 states specifically that it is applicable "both on the surface and underground." This also is a statutory provision. Other standards also mention activity which is to be conducted on the surface, such as 75.1200, which relates to the keeping of maps; 75.1708, which refers to the fire-proofing of surface structures and is also a statutory provision; and 75.1808, which relates to the maintenance of books and records on the surface. 6/

6/ Other sections in Part 75 which encompass surface areas include 75.300-2, 75.1702, 75.1712, 75.1600 and 75.1806.

Thus, it is clearly apparent that certain provisions in Part 75, even though it relates primarily to conditions within underground mines, also cover some surface conditions relating to underground mines. Furthermore, some of these are statutory provisions. These provisions are applicable to surface areas of underground mines even though Part 77 of the standards are specifically mandatory standards for surface coal mines and surface work areas of underground coal mines.

The sole remaining question, therefore, on this issue is whether 75.1403 and its subparts are applicable to the surface areas of underground mines. The test that I would apply is either (a) that the standard itself expressly states that it is applicable to surface areas, or (b) that it is clear from its language that it is applicable to both underground and aboveground. As to the former, examples are those cited above. The latter would be found mainly in subpart (O) which refers to hoisting and mantrips.

For example, 75.1400 in subpart (O) is a statutory provision covering hoisting equipment used to transport persons at a coal mine. Such hoists, especially when used to transport men into and out of the mines, will come to the surface or may even be controlled from the surface. Thus, even though the standard does not expressly refer to the surface, it is clear that the surface of the underground mine is involved. This also would be true with 75.1402, which relates to communications.

Section 75.1403, referring to "other safeguards," is likewise in such a category, at least as it has been interpreted in the subsection's designated criteria. The "other safeguards" are those which may be applied on a mine-by-mine basis "to minimize hazards with respect to transportation of men and materials." As specifically defined in the criteria, "other safeguards" may include and do include, conditions having to do with hoist-transporting materials, automatic elevators, belt conveyors, mantrips, and track haulage roads. Some of these may not and probably do not concern the surface areas of underground mines. Others, however, do concern such areas either specifically or because of their obvious application to the surface areas. An example of criteria applying to the surface, though not specifically so stating, would be 75.1403-11 covering safety gates for the entrances to shafts. Others have more express application to the surface, such as 75.1403-3(f), which requires that an attendant be on duty at the surface where men are being hoisted or lowered. Section 75.1403-8(e) which is closely related to the subject matter of this case is also in the explicit category. It is a criterion which states that "[p]ositive stop blocks or derails should be installed on all tracks near the top or at the landings of shafts, slopes, and surface inclines." Thus, the scope of safeguards, as indicated by the criteria, is sufficiently broad to cover stop blocks or derails in surface areas.

While I do not hold that 75.1403, which provides for safeguards with respect to the transportation of men and materials, can be read to mean that a safeguard may be written for any condition at the surface of an underground mine, I believe it is clear that it applies to at least some surface conditions and specifically, to the condition of installing derails or stop blocks at tracks near the top.

Accordingly, I hold as to this issue that 75.1403 does have application to surface work areas of an underground mine and, in particular, to the condition which is the subject of this proceeding.

II.

The second question is whether if 75.1403 applies to surface work areas, does the fact that a loaded supply car was parked between the derail and the collar of the mine shaft constitute a violation of the safeguard notice which requires only that a derail be installed on the track leading to the mine shaft?

This question was raised repeatedly in the proceeding, twice in motions for summary judgment, and once in a motion to dismiss at the close of MSHA's case-in-chief. These motions were all denied. Now having had the opportunity to study the issue in light of the full and complete record, I have reached the conclusion that Respondent's position is correct and that the notice of violation should be vacated and the petition for civil penalty be dismissed.

The safeguard notice, as previously noted, issued by Inspector Blanton on January 9, 1975, provided that positive stop blocks or derails should be installed on the track near the manshaft. Inspector Blanton appeared to be guided by the specific criteria, 30 CFR 75.1403-8(e), but he claimed that he had issued the notice on the authority of section 314(b) of the Federal Coal Mine Health and Safety Act of 1969. A derail was thereafter placed on the track approximately 70 feet from the collar of the shaft and this was approved by the inspector for abatement.

Subsequently, about 2-1/2 years later, another inspector, Clarence E. Whalen, inspected the same site and issued a notice of violation for failure to comply with the safeguard notice, specifically because a flat car was left unattended without a derail, stop block or dead man that would have prevented such car from falling into the shaft bottom.

Among the facts as disclosed and not in serious dispute are that the derail, which was originally installed to abate the safeguard notice, was still in place at the time of the second inspection, that it was inoperative because it was filled with dirt, and that the inspector did not cite the ineffective condition as a violation of the safeguard notice. The derail in question was 71 feet

from the collar of the shaft and was in the location which had been approved by the first inspector, Mr. Blanton. The latter had not only approved of the location, but he believed it to be correct on the theory that if the derail was too close to the shaft and a car was bumped, it would go down into the shaft (Tr. 16, 22). Mr. Whalen, the second inspector who issued the notice of violation, disagreed with Mr. Blanton on this matter of the distance. He testified that had he issued the safeguard notice, he would have required the operator to put the derail as close to the shaft as possible (Tr. 50).

This matter of disagreement over the location of the derail is an important consideration in the decision in this case. It shows, I believe, that Inspector Whalen was not particularly concerned with whether the derail, as originally required, was in place and maintained; rather, his concern was with an unattended car standing on the track without the protection of a derail between it and the shaft. As his testimony so clearly indicates, he believed the latter to be the purpose of the safeguard notice. The difficulty is, as I see it, that the safeguard notice does not cover the condition of an unattended car which is not protected from rolling by either stop blocks or derails. It does not in fact state the purpose which Inspector Whalen read into it. 7/

By way of background, it is helpful to consider that notices to provide safeguards under the Mine Act are procedurally unusual. I am not aware that the Board of Mine Operations Appeals or the Commission has dealt with this subject in any depth, if at all. Prior rulings by other administrative law judges appear to point out the uncertainties in this area leading to apparent inconsistent results. Compare the decision of Judge Richard Steffey in Oakwood Red Ash Coal Corporation, Docket No. NORT 75-261-P (January 26, 1976), with the decision of Judge George Koutras in Jim Walter Resources, Inc., Docket No. BARB 77-103-P (July 5, 1977).

The statutory provision has been promulgated into 30 CFR 75.1403. This provision permits an inspector to write what is in effect a mandatory standard with respect to transportation applicable only to a particular mine. Under section 75.1403-1, the general criteria for

7/ It appears to me that the inspector, rather than issuing a notice of violation of a prior safeguard notice, had other options. He could have either (a) issued another safeguard notice specifically covering the condition found to be a hazard, or (b) issued a notice of violation under 30 CFR 77.1605(p) which also appears to be applicable to this condition. Part 77 of the standards cover surface mines and surface areas of underground mines. Section 77.1605(p) provides that "[p]ositive-acting stop-blocks, derail devices, track skates, or other adequate means shall be installed wherever necessary to protect persons from runaway or moving railroad equipment."

safeguards are set forth in subsection (a). This subsection states that 75.1403-2 through 11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring safeguards and it also mentions that other safeguards may be required. Subsection (b) of 75.1403-1 details the procedure to be followed in enforcing this mandatory standard.

Because a safeguard notice, which for the particular mine in effect becomes a mandatory standard, it seems obvious that it should be written precisely and exactly so that there will be no question about the performance required by the operator. In this case, precision does not seem to be a problem except as the second inspector construed the notice. On its face, the notice clearly requires what the first inspector intended, that is, a derail or stop block be installed "near" the manshaft. "Near" is a relative term and the inspector by approving a derail at 71 feet, in effect, construed his own notice as requiring a derail at that distance. A derail was so installed. However, the second inspector now has interpreted the safeguard notice as encompassing a condition not expressly set forth in the terms of such notice, but included within what he deemed to be the purpose.

Part of the difficulty is that the first inspector apparently failed to take into account the possibility that a car could be placed between the derail and the shaft collar because of the large distance permitted between the derail and the shaft. It seems fairly clear that the purpose of the derail was to prevent a car from accidentally falling into the shaft and Respondent's maintenance superintendent recognized that to be the purpose. The safeguard notice, however, by its terms, does not apply to stop blocks or derails for cars. It applies only to a derail for the track, which derail was installed and approved and further was in place on the day the notice of violation was written. Inspector Blanton, had he so intended, could have originally written or have amended his notice to provide a safeguard not permitting a car between the derail and the shaft collar. The safeguard notice was not so written, however, and therefore lacks sufficient specificity to cover the condition which the subsequent inspector found to be a hazard. It is not enough, it seems to me that the purpose was violated if that purpose is not expressly stated in the notice. 8/

8/ This conclusion is not fully consistent with the determination made in my ruling on the second motion for summary judgment issued April 20, 1979. My final decision is made with the benefit of a full record. To the extent that the summary decision is inconsistent, it is hereby reversed.

Accordingly, I find that the Respondent was not in violation of the safeguard notice according to the specific terms of that notice and that the notice of violation should be vacated and this proceeding dismissed.

There is evidence that the derail was, in fact, not maintained in an operable condition, but that circumstance was not included within the charge in the notice of violation.

Finally, it should be noted that changes have been made to correct the condition so that the same hazard cannot occur in the future. The derail has been placed at the approval of the second inspector, Mr. Whalen, 17 to 18 feet from the shaft collar and it is tied in some automatic way with the hoist by pneumatic air. It is impossible now to get a car between the derail and the gate at the shaft collar (Tr. 79(b)).

ORDER

It is ORDERED that the notice of violation issued herein, No. 1 CEW, September 13, 1977, is hereby VACATED and this proceeding is hereby DISMISSED.



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

SEP 4 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 79-11
Petitioner	:	A/O No. 36-00966-03017
v.	:	
	:	Montour No. 4 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING WITHDRAWAL

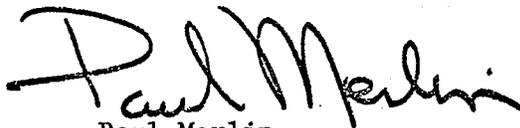
On July 16, 1979, the Solicitor filed a motion to approve a settlement of \$60 for the only citation in this petition. The citation, which was issued for failure to wear face shields or goggles, was originally assessed at \$140. In his motion, the Solicitor advised he would likely be unable to prove a violation since the operator has an enforced eye protection program. He then cited North American Coal Corporation, 3 IBMA 93.

On August 6, 1979, I disapproved the proposed settlement. Based upon the Solicitor's representations, I concluded a violation did not appear to exist and that the petition should be withdrawn. The parties were then ordered to submit additional statements on or before August 20, 1979.

The Solicitor has now filed a motion to withdraw the petition for assessment of a civil penalty. In his motion, the Solicitor advises the following:

A review of the evidence has revealed that Respondent has an enforced eye protection program at the mine which is aimed at insuring that its miners wear eye protection at all times as required by the Act. According to North American Coal Corporation, 3 IBMA 93, at 107, no violation of 30 CFR 75.1720(a) exists where an operator has established a safety system designed to assure that employees wear safety goggles on appropriate occasions and enforces the system with due diligence. If the failure to wear glasses is entirely the result of his or her own disobedience or negligence rather than the operator's failure to require that the glasses be worn, no violation has occurred.

The Solicitor's representations are well taken. Accordingly, the Solicitor's motion to withdraw the petition for assessment of a civil penalty is hereby APPROVED.



Paul Merlin
Assistant Chief 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

SEP 5 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-91-PM
Petitioner	:	A.O. No. 10-00088-05001
	:	
v.	:	Lucky Friday
	:	
HECLA MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the petitioner; Fred M. Gibler, Esquire, Kellogg, Idaho, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding was one of two docketed cases heard in Wallace, Idaho on July 12, 1979. The case was initiated by the petitioner on November 28, 1978, when it filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) seeking civil penalty assessments for five alleged violations of certain mandatory safety standards found in Part 57, Title 30, Code of Federal Regulations. Respondent filed a timely answer contesting the petition and the case was docketed for a hearing on the merits. However, when the docket was called the parties advised that they had reached certain stipulations and agreements and had reached a tentative settlement as to the civil penalties which they believe should be assessed in this proceeding. Petitioner was afforded an opportunity to present arguments in support of its proposed settlement for my consideration pursuant to Commission Rule 29 CFR 2700.30.

Discussion

The parties stipulated to the Commission's jurisdiction, and agreed that the respondent is a large mine operator, has no prior history

of assessed violations, and that the imposition of civil penalties would not impair its ability to remain in business (Tr. 3-4).

The petition for assessment of civil penalties filed in this case by the petitioner pertains to the following citations and proposed penalties:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
350613	3/28/78	57.3-22	\$255.00
348401	3/30/78	57.3-22	\$170.00
348402	4/5/78	57.16-3	\$180.00
350614	4/6/78	57.3-22	\$150.00
350615	4/11/78	57.6-5	\$370.00

During the hearing, petitioner's counsel indicated that the proposed assessments shown above which appeared in the petition filed on November 29, 1978, does not reflect the results of an assessment conference which took place prior to the filing of the petition but after the initial assessments (tr. 5). As a result of that conference the civil penalties reflected in the petition were reduced by the assessments office as follows:

<u>Citation No.</u>	<u>Adjusted Assessments</u>
350613	\$ 90.00
348401	\$106.00
348402	\$130.00
350614	\$ 98.00
350615	\$122.00

Petitioner argues that Citations 350613 and 350614 should be further reduced to \$45.00 and \$50.00 respectively. In support of this, counsel argues that his investigation indicates that the assessment office placed significant emphasis on the element of negligence in reaching the initial assessments, but that in fact the circumstances surrounding the citations in question indicates that the degree of knowledge on respondent's part at the time the citations issued was significantly lower than that assumed by the assessment office, and that the citations were timely abated (Tr. 6). With respect to Citations 348402 and 350615, counsel indicated that the adjusted assessments made after the conference are appropriate and that respondent had agreed to make payment in the full adjusted amounts (Tr. 6). As for citation 348401, counsel asserted that upon further investigation of the circumstances surrounding that citation petitioner cannot sustain its burden of proof and therefore moved for leave to dismiss the citation (Tr. 5-6).

Citations 350613 and 350614 both involve violations of the provisions of 30 CFR 57.3-22 which requires pre-shift and on-shift examinations of working places and ground conditions to insure that

adequate testing and ground control practices are followed and that loose ground be either removed or adequately supported. A review of the answer and arguments filed by the respondent in defense of these two citations reflects that the miners working in the areas where the conditions were cited were aware of the loose ground and were in the process of removing or bolting the areas cited so as to insure the safety of miners. The on-coming shifts had apparently conducted the required pre-shift examinations, discovered the conditions, and were in the process of taking corrective action. In the circumstances, I am convinced that these facts obviously influenced petitioner's counsel in his case preparation and evaluation of the circumstances which prevailed on the day in question, particularly with respect to the question of negligence. Accordingly, the proposed settlements were approved from the bench (tr. 7), and that approval is herein reaffirmed.

With regard to citations 348402 and 350615, the arguments presented on the record convinced me that the proposed settlements should be approved (Tr. 7), and that conclusion and finding on my part is also herein reaffirmed. As for the remaining citation 348401, petitioner's motion to dismiss was granted (Tr. 8). In effect, petitioner sought leave to withdraw its petition for assessment of civil penalty as to that citation, and the granting of the motion to dismiss is likewise reaffirmed.

In summary, after full and careful evaluation of all of the circumstances surrounding the citations at issue in these proceedings, including the criteria set forth in Section 110(i) of the Act, I am of the view that the settlements and disposition made in these proceedings pursuant to 29 CFR 2700.30 will effecuate the deterrent purpose of civil penalties for violations such as those alleged in the instant citations.

Order

Respondent is ordered to pay civil penalties totaling \$342.00 in satisfaction of the settled citations within thirty (30) days of the date of this decision and order. It is further ordered that citation 348401 be dismissed.


George A. Koutras
Administrative Law Judge

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

SEP 5 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-322-PM
Petitioner	:	A.O. No. 26-01452-05001
	:	
v.	:	Settlemeyer Pit
	:	
ROBERT L. HELMS CONSTRUCTION	:	
& DEVELOPMENT CO.,	:	
Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on February 8, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 19 alleged violations of the Act and implementing mine safety and health standards.

Respondent filed timely answers contesting the citations and alleged violations and by notice issued April 13, 1979, the matter was scheduled for hearing in Reno, Nevada, August 8, 1979. However, in view of a proposed settlement by the parties, the hearing was cancelled and by motion filed August 17, 1979, petitioner has presented arguments in support of the proposed settlement.

The citations, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
371721	4/13/78	56.26-1	\$26.00	\$23.00
371722	4/13/78	56.4-2	\$44.00	\$39.00
371723	4/13/78	56.14-1	\$72.00	\$64.00
371725	4/13/78	56.14-1	\$90.00	\$72.00
371726	4/13/78	56.14-1	\$90.00	\$72.00
371727	4/13/78	56.14-1	\$90.00	\$72.00
371728	4/13/78	56.14-1	\$66.00	\$52.00
371729	4/13/78	56.14-1	\$66.00	\$52.00
371730	4/13/78	56.14-1	\$90.00	\$72.00
371731	4/13/78	56.14-1	\$90.00	\$72.00
371732	4/13/78	56.14-1	\$66.00	\$52.00
371733	4/18/78	56.5-50A	\$52.00	\$46.00
371734	4/18/78	56.5-50B	\$48.00	\$43.00
371735	4/18/78	56.5-50A	\$52.00	\$46.00
371736	4/18/78	56.5-50B	\$66.00	\$52.00
371737	4/20/78	56.9-88	\$66.00	\$52.00
371738	5/4/78	56.9-88	\$32.00	\$28.00
371739	6/28/78	56.9-87	\$40.00	\$36.00

With respect to Citation No. 371724, April 13, 1978, citing a violation of 30 CFR 56.14-1, petitioner moves to dismiss without prejudice and in support of its motion asserts that the citation alleges a condition similar to that found in MSHA v. Massey Sand and Rock Company, Docket No. DENV 78-575-PM. Petitioner states it is appealing that decision and if it is affirmed by the Commission the citation will remain withdrawn. If not, petitioner proposes to reassess the civil penalty.

In support of its motion to approve the proposed settlement petitioner has submitted information concerning those factors required to be taken into account under section 110(i) of the Act. That information reflects that respondent operates a small-to-medium size metal and nonmetal mine, has no prior history of assessed violations, and that payment of the proposed civil penalties will not impair its ability to continue in business. Further, petitioner asserts that upon investigation it would appear that the evidence which would be produced at any hearing on the merits would establish less gravity and negligence than was assessed initially by the petitioner's assessments office, and that respondent exercised complete and prompt abatement of all of the conditions cited. Petitioner therefore believes that the proposed settlement does not shock the conscience, is within the bounds of reason, and will clearly effectuate the deterrent purpose of civil penalties for violations such as those alleged in the instant citations.

I have carefully reviewed all of the pleadings filed in this proceeding, including copies of the citations, abatements, inspector's statements, and upon consideration of the arguments presented by the petitioner in support of the proposed settlement and disposition of this matter I conclude and find that the motion should be granted. Accordingly, pursuant to Commission Rule 29 CFR 2700.30, settlement is approved.

Order

With regard to petitioner's motion to dismiss Citation No. 371724 without prejudice, I take note of the fact that on July 27, 1979, the Commission denied petitioner's petition for discretionary review of my decision in Massey Sand and Rock Company. Accordingly, petitioner's motion to dismiss the citation is granted and the citation is dismissed.

Respondent is ordered to pay civil penalties totaling \$945.00 in satisfaction of the cited violations within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

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

SEP 5 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. DENV 79-88-P
: A.O. No. 42-00089-03004
v. :
: Southern Utah Fuel Mine
COASTAL STATES ENERGY CO., :
Respondent :

DECISION AND ORDER APPROVING SETTLEMENT

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on November 29, 1978, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with an alleged violation of the provisions of 30 CFR 77.1301(c), cited in Citation No. 245262 on April 5, 1978, for which petitioner seeks a civil penalty assessment in the amount of \$305.00. Respondent filed an answer denying the fact of violation and contending that the proposed assessment was excessive. Respondent requested a hearing on the petition, and by notice of hearing issued April 13, 1979, the matter was docketed for hearing in Salt Lake City, Utah, July 20, 1979. Subsequently, on June 21, 1979, petitioner's counsel, James H. Barkley, telephonically advised my office that the parties had reached a tentative settlement of the matter, and as a result of that call the hearing was subsequently cancelled for the purpose of permitting the parties an opportunity to file the proposed settlement for my review and possible approval pursuant to Commission Rule 29 CFR 2700.27(d), now 29 CFR 2700.30. In addition, Counsel Barkley was afforded an opportunity at the same time to enter his appearance in the matter, and this was done on July 2, 1979.

On July 6, 1979, the parties filed a joint motion and stipulation for approval of a proposed settlement whereby respondent agrees to pay a civil penalty in the amount of \$157.50 for citation 245262. In support of the motion, the parties assert that the proposed settlement takes into account the following statutory factors set out in Section 110(i) of the Act:

History - In the previous 24 months respondent was inspected a total of 280 days and has received 224 assessed violations.

Size - Respondent operates a coal mine which mines approximately 5,000 tons of coal daily and employees [sic] approximately 146 employees.

Ability to continue in business - Payment of the proposed penalty will not impair the respondent's ability to continue in business.

Good faith, negligence and gravity - See the inspector's statement Exhibit A attached hereto, which reflects the testimony of the inspector if he were to testify. Additionally, the inspector would testify that the condition was corrected within the time specified for abatement.

Such amended proposed penalty also takes into account the uncertainties of litigation.

Discussion

Commission Rule 2700.30, 29 CFR 2700.30, concerns the manner in which proposed settlements are to be adjudicated, and the rule states in pertinent part:

(b) Contents of settlement. A proposal that the Commission approve a penalty settlement shall include the following information for each violation involved: (1) the amount of the penalty proposed by the Office of Assessments of the Mine Safety and Health Administration; (2) the amount of the penalty proposed by the parties to be approved; and (3) facts in support of the appropriateness of the penalty proposed by the parties.

(c) Order approving settlement. Any order by the Judge approving a proposed settlement shall be fully supported by the record. In this regard, due consideration, and discussion thereof, shall be given to the six statutory criteria set forth in section 110(i) of the Act. Such order shall become the final decision of the Commission 40 days after approval unless the Commission has directed that such approval be reviewed. (Emphasis added.)

After full review and consideration of the arguments advanced by the parties in support of their proposed settlement, including the pleadings filed in this case, I conclude and find that the motion should be granted and that the settlement should be approved. The condition cited indicates that a surface metal detonator magazine

was not constructed in accordance with the requirements of section 77.1301(c) in that several nails and bolts were exposed on the inside of the ungrounded detonator magazine in question and that screens were not provided over the ventilation openings. Among other things, subsection (c) requires that magazines other than box type be grounded and provided with screens. Abatement was achieved through the construction of a new detonator storage magazine. Although not specifically and fully articulated by the parties as part of their arguments in support of the proposed settlement, I take particular note of the fact that respondent's answer to the petition raises a viable defense to the alleged violation in that respondent asserts that mandatory standard 77.1301(c) set forth certain requirements for "magazines other than box type", whereas the explosives magazine described in the citation was a box type magazine. I assume that this defense advanced by the respondent is the basis for the "uncertainties of litigation" statement made by the parties as an additional reason for the proposed settlement. Coupled with the fact that the petitioner believes the condition cited was abated in good faith, I cannot conclude that the proposed settlement does not comport with the intent and purposes of the Act. Accordingly, pursuant to 29 CFR 2700.30, settlement is approved.

Order

Respondent is ordered to pay a civil penalty in the amount of \$157.50 in satisfaction of citation 245262 within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.


George A. Koutras
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

SEP 7 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PITT 79-191-P
Petitioner : A/O No. 36-06133-03008
v. :
CONSOLIDATION COAL COMPANY, : Westland No. 2 Mine
Respondent :

DECISION APPROVING SETTLEMENTS

ORDER TO PAY

On July 2, 1979, the Solicitor filed a motion to approve settlements for the three violations in this proceeding. Two of the citations were issued for inadequate roof support and were assessed at \$106 and \$122. The recommended settlements were for \$72 and \$98. The Solicitor advised the reductions were warranted by the operator's good faith abatement. The third citation was issued for failure to wear proper eye protection and was assessed at \$60. The recommended settlement was \$38. The Solicitor advised this reduction was warranted because the operator's negligence was like that found in North American Coal Corporation, 3 IBMA 93 (1974). The Solicitor further advised that the miner had received a disciplinary slip from the operator.

On August 6, 1979, I disapproved the proposed settlements. I noted then that the amounts originally assessed for the roof control violations were the minimum that could be assessed under the circumstances, and that rapid abatement could not justify any further reductions. In reference to the proposed settlement for the eye protection violation, I noted the Solicitor's citation of North American appeared inapposite, since the citation there was vacated. In view of these findings, I ordered the parties to submit additional statements on or before August 20, 1979.

The Solicitor has now filed another motion to approve settlements for these violations. 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 \$228.00. The original assessment for the alleged violations was \$288.00.

3. A reduction from the original assessment is warranted in light of the following circumstances.

The parties, pursuant to the Disapproval of Settlement of August 6, 1979, have again discussed the facts and circumstances surrounding these two violations and have concluded as follows:

a. Citation No. 231524 was issued for a violation of the operator's roof control plan (30 CFR 75.200). The posts were not installed on four foot centers and the width of this intersection was therefore not in compliance with the approved roof control plan. The originally assessed penalty of \$106 accurately reflects the operator's negligence and the gravity of this violation and should therefore be approved.

b. Citation No. 231525 was also issued when an inspector observed that the approved roof control plan was not being followed. Here, the total width of an intersection was 59 1/2 feet as opposed to the 58 foot distancing required by the roof control plan. The originally assessed penalty of \$122 accurately reflects the operator's negligence and the gravity of this violation of 30 CFR 75.200 and should therefore be approved.

c. Citation No. 231527 was issued when an inspector observed a miner travelling in an open type locomotive without wearing eye protection. This violation of 30 CFR 75.1720(a) was originally assessed at \$60.00.

Here, the miner involved was issued a disciplinary slip for failing to wear eye protection as required by the operator. These circumstances closely resemble those found in North American Coal Company, 3 IBMA 93 (1974) and therefore, no penalty should be assessed here.

I accept the Solicitor's representations. Accordingly, I conclude the recommended settlements are consistent with and will effectuate the purposes of the Act. The recommended settlements are therefore, approved.

ORDER

The operator, having already paid \$206, is ORDERED to pay an additional \$22 within 30 days from the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with the first name "Paul" being larger and more prominent than the last name "Merlin".

Paul Merlin

Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SEP 17 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 79-11
Petitioner : A/O No. 46-01968-03024
v. :
 : Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENTS

ORDER TO PAY

The Solicitor advises that he and the attorney for the operator have discussed the alleged violations in the above-captioned proceedings. Pursuant to such discussion, the Solicitor has filed a motion to approve settlements agreed to by the parties.

Citation No. 260067 was issued for failure to provide a fire extinguisher at a greasing station. This violation of 30 CFR 75.1100 was originally assessed at \$180. The recommended settlement is \$130. The Solicitor advises the reduction is warranted because the cited standard is not explicit in its requirement for locating fire extinguishers at greasing stations, and because the Respondent had no actual knowledge of such a requirement. The Solicitor further advises the Respondent believed adequate protection for the area was provided by the presence of two nearby fire extinguishers at a dumping station and at an oil breaker. I accept the Solicitor's representations. Accordingly, this recommended settlement is hereby approved.

Citation No. 261295 was issued for failure to support a power wire on well insulated J-hooks. The recommended settlement for this violation of 30 CFR 75.516-1 is for the assessed amount of \$160. The Solicitor simply advises the penalty for this citation is unaffected by the settlement motion. This does not provide a sufficient basis for approval of the recommended settlement, since proceedings before the Commission are de novo. Such a statement will not be acceptable in the future. Rather than disapprove this settlement however, I have reviewed the citation, the assessment sheet, and the attached inspector's statement. Based upon my own review of the violation, I conclude the recommended settlement is consistent with and will effectuate the purposes of the Act. The recommended settlement is therefore, approved.

ORDER

The operator is ORDERED to pay \$290 within 30 days from the date of this decision.

A handwritten signature in cursive script that reads "Paul Merlin".

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

David E. Street, Esq., Office of the Solicitor, U.S. Department of
Labor, Rm. 14480-Gateway Building, 3535 Market Street,
Philadelphia, PA 19104 (Certified Mail)

Karl T. Skrypak, Esq., Consolidation Coal Company, Consol Plaza,
1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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

SEP 17 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 79-10
Petitioner : A/O No. 36-03298-03006
v. :
 : Laurel Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

ORDER TO PAY

The Solicitor has filed motions to approve a settlement in the above-captioned proceeding.

The only violation in this petition was issued for failure to maintain average concentrations of respirable dust at or below 2 milligrams of respirable dust per cubic meter of air. This violation of 30 CFR 71.100 was originally assessed at \$325. The Solicitor initially filed a motion recommending a settlement of \$195. In a telephone conversation with counsel, I indicated the recommended settlement would not be acceptable. The Solicitor now has filed an amended motion recommending a settlement of \$225. The reasons for this reduction were set out in the initial motion to approve settlement. In the initial motion, the Solicitor advised the following:

A reduction from the original assessment is warranted under the circumstances of this case. The citation involves a violation of 30 CFR 71.100 for the operator's failure to provide respirable dust samples within the permissible limits. Thereafter, a 104(b) order was issued for the operator's failure to abate the citation within a reasonable amount of time. Further investigation into the factors underlying issuance of the citation and order disclosed that the operator's negligence was less than originally calculated in the proposed assessment. In addition, the operator demonstrated more good faith than originally allocated. Although it is true that the operator did not reduce the respirable dust in the atmosphere to permissible limits within the time specified in the original citation, the operator had taken steps to attempt to abate the condition. In particular, the operator had attempted to change the heating system and

had ordered new electric heaters in order to alleviate the problem. After the 104(b) order was issued, it was found that the heaters were not the source of the respirable dust problem but rather, the ventilation needed to be altered.

I accept the Solicitor's representations. Accordingly, I conclude the recommended settlement is consistent with and will effectuate the purposes of the Act. The recommended settlement is therefore, approved.

ORDER

The operator is ORDERED to pay \$225 within 30 days from the date of this decision.



Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Barbara K. Kaufmann, Esq., Office of the Regional Solicitor,
U.S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market
Street, Philadelphia, PA 19104 (Certified Mail)

Michel Nardi, Esq., Consolidation Coal Company, Consol Plaza,
1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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

SEP 17 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 79-2
Petitioner : A/O No. 36-00965-03024
v. :
: Westland Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENTS

ORDER TO PAY

On July 2, 1979, the Solicitor filed a motion to approve settlements in the above-captioned proceeding. In this motion, the Solicitor moved to vacate Citation No. 231502 which was issued for failure to maintain adequate roof support, relying upon the decision of the Interior Board of Mine Operations Appeals in Plateau Mining Company, 2 IBMA 303.

On August 13, 1979, I disapproved the recommended settlement, stating that no authority had extended the decision in Plateau Mining to other mandatory standards, particularly standards involving roofs which are the major cause of serious injury and death in the mines. In the absence of any such precedent and because inadequately supported roof could present a very real danger even when dangered off, I concluded approval could not be granted on the basis of a few brief representations in a motion to approve settlements. However, I did note that the factors described by the Solicitor could be considered as affecting gravity.

The Solicitor has now filed another motion to approve settlements. In her motion, the Solicitor advises the following:

A reduction from the original assessment is warranted for citation number 231502. As stated in the Solicitor's previously submitted motion, the citation alleges a violation of 30 CFR 75.200 in that eight bolts above a track haulage were broken or missing in a 100 foot expanse of roadway. Important to consider in reducing the penalty allocation is the fact that the area had been dangered off by management and was under repair when the citation was issued. In addition, this area was not regularly travelled and the roof was in good condition. This information effects the negligence and gravity

factors underlying the penalty assessment. The proposed assessment gave 12 negligence and 10 gravity points. Considering the above, imposition of only 9 negligence and 7 gravity points is reasonable. The revised penalty point total is 44. Application of the penalty conversion table results in a \$240.00 penalty assessment.

The Solicitor has also recommended settlements for the other two citations in this petition. In her original motion, she advised the following:

CITATION NO. 231882; 30 CFR 75.516-2(c): This citation was written as two telephone conductor wires were without additional insulation and were in contact with energized power wires and crossing under a high voltage cable. The \$180.00 assessment for this citation should be reduced to \$50.00. This reduction is warranted under the circumstances as further investigation has revealed that the telephone wires in question were not energized at the time. The wires were dead and not connected to any telephone. Therefore, no power was going through the telephone conductor wires and no fire hazard existed. This condition had been previously cited on October 18, 1978 and abated by disconnecting the power. Such abatement was approved. The date this citation was written October 30, 1978, the wires were still without power. Accordingly, such a reduction accurately reflects the negligence of the operator and the probability of an injury occurring under the circumstances.

CITATION NO. 231893; 30 CFR 75.1704: This citation alleges that a return escapeway was in an unsafe condition because a 25 foot roof fall had occurred and loose unsupported roof existed in the area. It is true that a violation exists in this case. However, this roof fall occurred after the weekly examination of the return escapeway had been made. In fact, on just the day previous to issuance of this citation, the area had been walked and no roof fall had occurred. Under the circumstances, the operator's negligence is minimal. Although a violation technically existed, the negligence factors greatly in the imposition of the \$195.00 assessment. \$150.00 is more appropriate.

In her supplemental motion, the Solicitor added the following:

The reasons given by the Secretary for reducing the penalty for citation number 231882 should be clarified as follows. In an inspection conducted prior to the one giving rise to the instant citation, a citation was issued because the same telephone wires involved in this citation were found not to be insulated. The abatement method approved in that case was deenergization of the telephone wires. In this case, another inspector seeing the uninsulated, deenergized wires, issued the citation involved herein. For these reasons, the operator's negligence is minimal. This criteria has been given considerable weight in reducing the proposed penalty amount from \$180.00 to \$50.00.

I accept the Solicitor's representations. Accordingly, I conclude the recommended settlements are consistent with and will effectuate the purposes of the Act. The recommended settlements are therefore, approved.

ORDER

The operator is ORDERED to pay \$440 within 30 days from the date of this decision.

A handwritten signature in cursive script that reads "Paul Merlin".

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michel Nardi, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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

SEP 18 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PIKE 78-348-P
Petitioner : Assessment Control
v. : No. 15-02940-Q2004
: No. 1 Mine
THACKER COAL COMPANY, :
Respondent :

DEFAULT DECISION

Appearances: Edward H. Fitch IV, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before : Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Pikeville, Kentucky, on July 26, 1979, pursuant to a written notice of hearing dated June 14, 1979, and served on respondent's representative on July 17, 1979, by a Federal coal-mine inspector, counsel for the Mine Safety and Health Administration entered his appearance, but no one appeared at the hearing to represent respondent. The Commission's Interim Procedural Rules which were then in effect provided (29 CFR 2700.26(c)):

(c) Where the respondent fails to appear at a hearing, the Judge shall have the authority to conclude that the respondent has waived its right to a hearing and contest of the proposed penalties and may find the respondent in default. Where the Judge determines to hold respondent in default, the Judge shall enter a summary order imposing the proposed penalties as final, and directing that such penalties be paid.

Counsel for petitioner moved at the hearing that respondent be held in default pursuant to Section 2700.26(c) and that the penalties proposed by the Assessment Office be imposed. Counsel for petitioner also stated that he had just finished discussing the Assessment Office's proposed penalties with the inspectors who wrote the notices of violation here involved and that the inspectors had advised him that the proposed penalties were in line with the company's size and the other five criteria which are required to be used in the assessment of penalties.

MSHA v. Thacker, Docket No. PIKE 78-348-P (Contd.)

Petitioner's motion is granted and I find respondent to be in default. I further find that respondent has waived its right to a hearing and that the penalties proposed by the Assessment Office should be imposed as hereinafter ordered.

WHEREFORE, it is ordered:

Thacker Coal Company, shall, within 30 days from the date of this decision, pay civil penalties totaling \$230.00 which are allocated to the respective violations as follows:

Notice No. 2 ALG (5/18) 12/11/75 § 75.1710-1	\$ 70.00
Notice No. 1 ALG (6-1) 1/12/76 § 75.1710-1	74.00
Notice No. 3 RDM (7-10) 7/13/77 § 75.1725	<u>86.00</u>
Total Penalties Assessed in This Proceeding	\$230.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Edward H. Fitch IV, Trial Attorney, Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Thacker Coal Company, Attention: Mr. Jim Childers, Route 1,
Box 909B, Pikeville, KY 41501 (Certified Mail)

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

SEP 18 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PIKE 79-15-P
Petitioner : Assessment Control
: No. 15-10998-03001
v. :
: Holt Tipple
ENERGY DEVELOPMENT CORPORATION, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Edward H. Fitch IV, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
Frederick L. Delp, Esq., Wood, Grimm & Delp,
Huntington, West Virginia, for Respondent in
settlement negotiations.

When the hearing in the above-entitled proceeding was convened on July 26, 1979, in Pikeville, Kentucky, counsel for the Mine Safety and Health Administration requested that a settlement agreement entered into by the parties be approved. Under the parties' settlement agreement, respondent would pay total penalties of \$200 in lieu of the total penalties of \$700 proposed by the Assessment Office. Counsel for MSHA stated that he had agreed to accept the reduction in payment of penalties on the basis of a letter from respondent's attorney which, in pertinent part, reads as follows:

* * * Pertaining to the above-captioned matter, it is our opinion that Energy Development Corporation is not responsible for the violations with which the above-captioned proceeding is concerned. Energy Development Corp. is not actively engaged in mining at the present time due to the depressed coal market and financial problems resulting therefrom.

As I related to you by phone, Energy Development Corp. was at one time interested in using the facility where the violations occurred and, as a result, had sent a Mr. Paul Washburn to the facility to make certain repairs to the facility. Energy Development Corp. did not at that time, nor has it ever, owned, operated, or leased the facility to my knowledge. Energy Development Corp. has no intentions of utilizing this facility in the future in any capacity whatsoever. In addition, it is my understanding and belief that the alleged violations occurred as a result of activities conducted at the facility by an entity or entities other than Energy Development Corp. and prior to the time that Energy Development Corp. sent its repairman to make repairs to the facility.

Although it is Energy Development Corporation's contention that it should not be responsible for these violations, it is willing to settle this matter for the sum of \$200 in order to avoid the time and expense involved in a hearing on the matter. If this settlement is acceptable, please advise and the sum of \$200 will be remitted forthwith.

I find that respondent has given adequate reasons for accepting a reduction of the proposed penalties from \$700 to \$200. In addition to the mitigating factors set forth in respondent's letter, the official file shows that respondent corrected all of the violations cited in the inspector's order. In doing so, respondent made repairs on a facility which it never owned, leased, or operated.

In other settlement offers which I have approved, I have made a detailed evaluation of the Assessment Office's findings with respect to the six criteria which are required to be considered in determining civil penalties. I do not believe that a discussion of the six criteria is necessary in this instance because the settlement is being approved in light of extremely unique considerations which rarely occur. The dangerous conditions found by the inspector at the Holt Tipple have been corrected and the tipple's safety has been greatly improved for the benefit of any company which may undertake to operate the tipple in the future. Since there is considerable merit to respondent's contention that it was wrongly cited for the violations in the first instance, I find that its willingness to settle the issues by the payment of \$200 has served the purposes of the Federal Mine Safety and Health Act of 1977.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the settlement agreement is approved.

(B) Energy Development Corporation, pursuant to the settlement agreement, shall, within 30 days from the date of this decision, pay civil penalties totaling \$200 which are allocated to the alleged violations as follows:

Order No. 1 PW (7-1) 10/28/77 § 77.700-1(a).....	\$ 30.00
Order No. 1 PW (7-1) 10/28/77 § 77.505.....	25.00
Order No. 1 PW (7-1) 10/28/77 § 77.505.....	25.00
Order No. 1 PW (7-1) 10/28/77 § 77.1607(cc).....	20.00
Order No. 1 PW (7-1) 10/28/77 § 77.400(a).....	20.00
Order No. 1 PW (7-1) 10/28/77 § 77.400(a).....	20.00
Order No. 1 PW (7-1) 10/28/77 § 77.511.....	20.00
Order No. 1 PW (7-1) 10/28/77 § 77.513.....	20.00
Order No. 1 PW (7-1) 10/28/77 § 77.1108.....	<u>20.00</u>
Total Settlement Penalties in This Proceeding.....	\$200.00

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

SEP 18 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PIKE 78-331-P
Petitioner : Assessment Control
: No. 05360-02001
v. :
: No. 1 Mine
M & E COAL COMPANY, :
Respondent :

DEFAULT DECISION

Appearances: Edward H. Fitch IV, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before : Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Pikeville, Kentucky on July 26, 1979, pursuant to a written notice of hearing dated June 14, 1979, and served on respondent's representative on July 13, 1979, by a Federal coal-mine inspector, counsel for the Mine Safety and Health Administration entered his appearance, but no one appeared at the hearing to represent respondent. The Commission's Interim Procedural Rules which were then in effect provided (29 CFR 2700.26(c)):

(c) Where the respondent fails to appear at a hearing, the Judge shall have the authority to conclude that the respondent has waived its right to a hearing and contest of the proposed penalties and may find the respondent in default. Where the Judge determines to hold respondent in default, the Judge shall enter a summary order imposing the proposed penalties as final, and directing that such penalties be paid.

Counsel for petitioner moved at the hearing that respondent be held in default pursuant to Section 2700.26(c) and that the penalties proposed by the Assessment Office be imposed.

Petitioner's motion is granted and I find respondent to be in default. I conclude that respondent has waived its right to a hearing by failing to appear at the hearing.

In this particular case, it should be noted that respondent's reply to the show-cause order issued in this proceeding on April 5, 1979, stated that respondent had filed a bankruptcy action in the United States District Court, Case No. 78-13, and that an amount of \$322.12 had been distributed to respondent's creditors on November 17, 1978.

Counsel for petitioner agreed at the hearing that any penalties which may be assessed in this proceeding may be uncollectible, but he concluded that the collectibility of the penalties could be determined after a decision in this case has been issued.

There is nothing in the official file to show that the penalties proposed by the Assessment Office were improperly determined under the six criteria set forth in Section 110(i) of the Act. Therefore, I shall direct that the proposed penalties be paid pursuant to Section 2700.26(c) quoted above.

WHEREFORE, it is ordered:

M & E Coal Company shall pay civil penalties totaling \$108.00 within 30 days from the date of this decision. The penalties are allocated to the respective violations as follows:

Notice No. 1 CAW (4-1) 10/22/74 § 75.512	\$ 24.00
Notice No. 1 DM (5-1) 2/13/75 § 75.200	38.00
Notice No. 2 DM (5-2) 2/13/75 § 75.523	<u>46.00</u>
Total Penalties Assessed in This Proceeding	\$ 108.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Edward H. Fitch IV, Trial Attorney, Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

M & E Coal Company, Attention: Stirl Eddie Harris, Partner, Box 119
Turkey Creek, KY 41570 (Certified Mail)

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

SEP 18 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. Assessment Control Nos.
Petitioner :
 :
v. : PIKE 78-404-P 15-10173-02007 V
 : PIKE 79-34-P 15-10173-03001
LAWSON COAL COMPANY, INC., :
Respondent : No. 32 Mine

DEFAULT DECISION

Appearances: Edward H. Fitch IV, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before : Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Pikeville, Kentucky, on July 26, 1979, pursuant to a written notice of hearing dated June 14, 1979, and received by respondent on June 18, 1979, counsel for the Mine Safety and Health Administration entered his appearance, but no one appeared at the hearing to represent respondent. The Commission's Interim Procedural Rules which were then in effect provided (29 CFR 2700.26(c)):

(c) Where the respondent fails to appear at a hearing, the Judge shall have the authority to conclude that the respondent has waived its right to a hearing and contest of the proposed penalties and may find the respondent in default. Where the Judge determines to hold respondent in default, the Judge shall enter a summary order imposing the proposed penalties as final, and directing that such penalties be paid.

Counsel for petitioner moved at the hearing that respondent be held in default pursuant to Section 2700.26(c) and that the penalties proposed by the Assessment Office be imposed. Counsel for petitioner also stated that he had just finished discussing the Assessment Office's proposed penalties with the inspectors who wrote the notices of violation and order involved and that the inspectors believed the penalties had appropriately been determined to be in an upper range of magnitude since the order involved in Docket No. PIKE 78-404-P had been issued under the unwarrantable-failure provisions of the Federal Coal Mine Health and Safety Act of 1969. Petitioner's counsel stated that the six violations

MSHA v. Lawson, Docket Nos. PIKE 78-404, et al. (Contd.)

alleged by MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-34-P were significant and warranted the relatively large penalties which had been proposed by the Assessment Office in that docket.

Petitioner's motion that respondent be found in default is granted and I find respondent to be in default. I conclude that respondent has waived its right to a hearing and that the penalties proposed by the Assessment Office should be imposed as hereinafter ordered. I note that some of the defenses set forth in respondent's reply to the show-cause order issued in this proceeding on April 5, 1979, might have been sufficient to justify some reduction in the penalties which were proposed by the Assessment Office, but in a default proceeding, it would be improper for me to take into consideration allegations made in respondent's reply to the show-cause order, particularly since Section 2700.26(c) specifically provides that when a judge determines to hold a respondent in default, "* * * the Judge shall enter a summary order imposing the proposed penalties as final, and directing that such penalties be paid" (Emphasis supplied). In short, respondent cannot have its evidence considered without availing itself of the opportunity of sending a representative to the hearing.

WHEREFORE, it is ordered:

Lawson Coal Company shall, within 30 days from the date of this decision, pay penalties totaling \$2,951.00 which are allocated to the respective violations as follows:

Docket No. PIKE 78-404-P

Order No. 2 RHH (7-2) 3/3/77 \$ 75.402	\$ 1,250.00
Total Penalties in Docket No. PIKE 78-404-P	\$ 1,250.00

Docket No. PIKE 79-34-P

Notice No. 2 FIJ (7-49) 6/16/77 \$ 75.313	\$ 370.00
Notice No. 7 FIJ (7-54) 6/16/77 \$ 77.1701	106.00
Notice No. 1 FIJ (7-57) 6/21/77 \$ 75.313	370.00
Notice No. 2 FIJ (7-58) 6/21/77 \$ 75.512	275.00
Notice No. 1 FIJ (7-60) 6/23/77 \$ 75.1710	305.00
Notice No. 1 FIJ (7-61) 6/27/77 \$ 77.400	275.00
Total Penalties in Docket No. PIKE 79-34-P	\$ 1,701.00
Total Penalties in This Proceeding	\$ 2,951.00

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

SEP 19 1979

SECRETARY OF LABOR, : Discrimination Complaint
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
ON BEHALF OF WALTER LAWSON, :
JR., : Docket No. HOPE 79-157
Applicant :
v. :
CONSOLIDATION COAL COMPANY, : Crane Creek No. 6 Mine
Respondent :

ORDER DISMISSING COMPLAINT

Statement of the Case

This is a discrimination complaint filed by the Secretary on behalf of Walter Lawson, Jr., pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. A review of the pleadings reflects that Mr. Lawson was employed by the respondent as a roofbolter and that he was discharged on October 25, 1978, after being observed asleep on the job during his work duty on a midnight shift. Sleeping on the job is contrary to company policy and a dischargeable offense. Mr. Lawson filed his initial complaint with the Secretary on November 2, 1978, asserting that he was wrongfully discharged because of his health and safety activities as a member of both the Mine Safety Committee and the United Mine Workers of America. Mr. Lawson denied that he was asleep on the job and asserted that many miners including the section foreman have been observed sleeping during the midnight shift and have not been fired, suspended or even reprimanded.

Mr. Lawson's discharge was arbitrated on November 6, 1978, pursuant to the 1978 Bituminous Coal Wage Agreement, and an award made on November 20, 1978, reduced the discharge to a 90 day suspension which apparently ended on or about January 25, 1979. Thereafter, on December 28, 1978, the Secretary filed with the Commission his initial finding that Mr. Lawson's complaint was not frivolously brought and the Secretary requested an order from the Commission for Mr. Lawson's immediate temporary reinstatement pending a final order on the merits. By notice of hearing issued on January 15, 1979, Chief Judge Broderick scheduled a hearing on the Secretary's application for Mr. Lawson's temporary reinstatement for January 19, 1979. However, on January 18, 1979, the Secretary, on behalf of Mr. Lawson, withdrew his application for temporary reinstatement on the ground that respondent had given the Secretary assurance that Mr. Lawson would be reinstated to his former position on the midnight shift commencing January 24, 1979, and the hearing was apparently cancelled.

On January 29, 1979, the Secretary filed his discrimination complaint in Mr. Lawson's behalf pursuant to Section 105(c)(2) of the Act. Respondent filed an answer, and after the completion of rather extensive discovery, the matter was scheduled for a hearing on the merits in Charleston, West Virginia, September 25, 1979.

On September 17, 1979, the Secretary filed a motion to withdraw his complaint of discrimination, and in support thereof states as follows:

1. Following the issuance of the complaint in this matter further investigation was conducted by the Mine Safety and Health Administration (MSHA).
2. MSHA's investigation disclosed that Mr. Lawson was, in fact, found sleeping in the mine on October 25, 1978 and that sleeping is a dischargeable offense. Mr. Lawson had previously asserted that he was not asleep.
3. Notwithstanding the above, during the course of the investigation, the Operator and the Secretary negotiated a settlement which the Secretary believes would have justly provided Mr. Lawson with the statutory remedies to which he claimed entitlement. Mr. Lawson refused to accept the settlement agreement.
4. The Secretary then undertook further investigation to determine whether disparate treatment existed in this case. That investigation disclosed no evidence of such disparate treatment.
5. Accordingly, the Secretary now believes that no illegal discrimination occurred as to Mr. Lawson and that withdrawal from this matter is appropriate.
6. This withdrawal is requested without prejudice to the right of Mr. Lawson to file a complaint on his own behalf pursuant to the Act.

Discussion

The complaint of alleged discrimination in this case was filed by the Secretary on behalf of Mr. Lawson. Thus, it is clear that the Secretary is the moving party and that he initially sought a determination and order by the Commission pursuant to Section 105(c)(2) that respondent

unlawfully discriminated against Mr. Lawson by discharging him because of his engaging in certain mine safety and health activities protected by Section 105(c)(1). Upon further investigation the Secretary now believes that Mr. Lawson's discharge was justified and that no illegal discrimination under the Act occurred in connection with that discharge. Under the circumstances, I conclude that the motion should be granted, subject to any rights which Mr. Lawson may have to pursue this matter further on his own behalf pursuant to Section 105(c)(3) of the Act.

Order

The Secretary's motion is granted and this matter is DISMISSED without prejudice to Mr. Lawson's right to file a complaint on his own behalf within thirty (30) days of the date he was notified of the Secretary's determination that his rights under the Act were not violated. The hearing scheduled for September 25, 1979, is cancelled.


George W. Koutras
Administrative Law Judge

Distribution:

Michel Nardi, Esq., Consolidation Coal Company, 1800 Washington Road,
Pittsburgh, PA 15241 (Certified Mail)

Barbara Krause Kaufmann, Trial Attorney, U.S. Department of Labor,
Office of the Solicitor, 14480 Gateway Building, 3535 Market
Street, Philadelphia, PA 19104 (Certified Mail)

Walter Lawson, Jr., Route 2, Box 69D-1, Rock, WV 24747 (Certified Mail)

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

SEP 19 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-160-PM
Petitioner : A/O No. 41-00007-05002
v. :
: Bridgeport Quarry and Plant
TEXAS INDUSTRIES, INC., :
Respondent :

DECISION APPROVING SETTLEMENT

On March 26, 1979, Petitioner filed what was, in effect, a motion for approval of settlement. This motion was denied in view of the substantial reduction in proposed penalties and the absence of sufficient explanation in the record for this reduction.

On July 2, 1979, Petitioner filed a second motion for approval of settlement, as well as the inspector's statement for each citation. As grounds for the reduction in penalties and the settlement achieved by the parties, counsel for Petitioner asserted the following:

- (1) The operator has no history of previous violations,
- (2) The size of the operator's business is between 200,000 and 300,000 annual hours worked by employees of the operator at the mine, and between 900,000 and 3,000,000 annual hours worked by all employees of the operator.
- (3) With respect to Citation No. 154249, the amount of the assessment for the alleged violation was \$78 and the amount of the settlement is \$18. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:
 - (a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,
 - (b) The occurrence of the event against which the standard is directed was not likely to happen,
 - (c) No lost workdays likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(4) With respect to Citation No. 154250, the amount of the assessment for the alleged violation was \$78 and the amount of the settlement is \$52. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator failed to exercise reasonable care either to prevent or to correct the condition or practice which caused the violation and which was known or should have been known to exist.

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Lost workdays or restricted duty likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(5) With respect to Citation No. 154251, the amount of the assessment for the alleged violation was \$98 and the amount of the settlement is \$52. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator failed to exercise reasonable care either to prevent or to correct the condition or practice which caused the violation and which was known or should have been known to exist.

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Lost workdays or restricted duty likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(6) With respect to Citation No. 154252, the amount of the assessment for the alleged violation was \$78 and the amount of settlement is \$18. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) No lost workdays likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(7) With respect to Citation No. 154253, the amount of the assessment for the alleged violation was \$106 and the amount of the settlement is \$28. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Lost workdays or restricted duties likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(8) With respect to Citation No. 154254, the amount of the assessment for the alleged violation was \$170 and the amount of the settlement is \$98. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator failed to exercise reasonable care either to prevent or to correct the condition or practice which caused the violation and which was known or should have been known to exist,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Fatal injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(9) With respect to Citation No. 154255, the amount of the assessment for the alleged violation was \$122 and the amount of the settlement is \$22. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonably precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Lost workdays or restricted duty likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(10) With respect to Citation No. 154256, the amount of the assessment for the alleged violation was \$106 and the amount of the settlement is \$28. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation.

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Lost workdays or restricted duty likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(11) With respect to Citation No. 154258, the amount of the assessment for the alleged violation was \$114 and the amount of the settlement is \$38. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Permanent disabling injuries likely would have happened if the event had occurred, and

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(12) With respect to Citation No. 154259, the amount of the assessment for the alleged violation was \$140 and the amount of the settlement is \$44. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Fatal injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(13) With respect to Citation No. 154260, the amount of the assessment for the alleged violation was \$140 and the amount of the settlement is \$48. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Fatal injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(14) With respect to Citation No. 154261, the amount of the assessment for the alleged violation was \$122 and the amount of the settlement is \$34. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Permanent disabling injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(15) With respect to Citation No. 154262, the amount of the assessment for the alleged violation was \$122 and the amount of the settlement is \$40. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Permanent disabling likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator abated the violation within the time given for abatement.

(16) With respect to Citation No. 154263, the amount of the assessment for the alleged violation was \$106 and the amount of the settlement is \$40. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Permanent disabling injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator abated the violation within the time given for abatement.

(17) With respect to Citation No. 154264, the amount of the assessment for the alleged violation was \$106 and the amount of the settlement is \$36. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was not likely to happen,

(c) Permanent disabling injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(18) With respect to Citation No. 154265, the amount of the assessment for the alleged violation was \$150 and the amount of the settlement is \$98. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator failed to exercise reasonable care either to prevent or to correct the condition or practice which caused the violation and which was known or should have been known to exist,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Fatal injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(19) With respect to Citation No. 154266, the amount of the assessment for the alleged violation was \$106 and the amount of the settlement is \$60. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator failed to exercise reasonable care either to prevent or to correct the condition or practice which caused the violation and which was known or should have been known to exist.

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Lost workdays or restricted duties likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(20) With respect to Citation No. 154267, the amount of the assessment for the alleged violation was \$98 and the amount of the settlement is \$32. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Lost workdays or restricted duty likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator abated the violation within the time given for abatement.

(21) With respect to Citation No. 154268, the amount of the assessment for the alleged violation was \$150 and the amount of the settlement is \$38. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonable precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Only one person would have been affected if the event had occurred, and

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

(22) With respect to Citation No. 154269, the amount of the assessment for the alleged violation was \$170 and the amount of the settlement is \$48. Petitioner believes that this settlement will effectuate the purposes of the Act and should be approved because:

(a) The operator reasonably could not have known of the violation and under the circumstances the operator had taken reasonably precautions to prevent the violation,

(b) The occurrence of the event against which the standard is directed was likely to happen,

(c) Fatal injuries likely would have happened if the event had occurred,

(d) Only one person would have been affected if the event had occurred, and

(e) The operator made special efforts to insure abatement of the violation within the time given for abatement.

In view of the above, Petitioner's motion is granted.

ORDER

It is ORDERED that the settlement reached by Petitioner and Respondent in the above-captioned proceeding is hereby APPROVED.

It is further ORDERED that Respondent pay the sum of \$872 within 30 days of the date of this decision.



Forrest E. Stewart
Administrative Law Judge

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

SEP 19 1979

UNITED STATES STEEL CORPORATION, : Application for Review
Applicant :
v. : Docket No. HOPE 79-152
: :
SECRETARY OF LABOR, : Order No. 253998
MINE SAFETY AND HEALTH : November 22, 1978
ADMINISTRATION (MSHA), :
Respondent : Gary No. 14-3 Seam Portal
:
UNITED MINE WORKERS OF AMERICA, :
Respondent :

DECISION

Appearances: Billy M. Tennant, Esq., United States Steel Corporation,
Pittsburgh, Pennsylvania, for Applicant;
David F. Barbour, Esq., Office of the Solicitor, MSHA,
U.S. Department of Labor, for Respondent.

Before: Administrative Law Judge Stewart

FINDINGS OF FACT AND CONCLUSIONS OF LAW

United States Steel Corporation (Applicant) filed a timely application pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 801 et seq., requesting review of Order No. 253998, dated November 22, 1978.

ORDER NO. 253998

Order No. 253998 was issued on November 22, 1978, by inspector Joseph Barnett under section 104(d) of the Act. The inspector cited an alleged violation of 30 CFR 75.200. The condition or practice at issue was described as follows:

The approved roof control plan was not being followed in that the No. 5 chain pillar split was driven up to 22 feet wide and the right wing had cut through to gob and the place was driven 2 cuts inby. Turn timbers had not been set at mouth of place to meet requirements of the approved roof control plan.

The order contains a finding that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

The order was terminated 2 hours later. The attempt to recover the No. 5 chain pillar was abandoned and it was timbered off.

Order No. 253998 was issued in the course of a regular inspection of the Gary No. 14-3 Seam Portal. The inspector proceeded to the 2 Right Pump Heading Section, in the company of Delbert Parks, mine inspector for Respondent, and Lloyd Kruger, a member of the UMWA Safety Commission.

The inspector observed what he believed to be two conditions or practices in violation of Respondent's roof control plan at the No. 5 Train Post Split. The first three cuts of the retreat mining sequence had been made. The inspector testified that the second cut in this sequence had been made to a width of 22 feet and that the wing had been cut through into the adjacent gob area. He also testified that the third cut had been taken before the required turn posts had been set.

Applicant submitted Proposed Findings of Fact which are set forth in substance as follows as additional findings of fact in this proceeding:

Inspector Barnett, a duly authorized representative of the Secretary, conducted an inspection of Gary No. 14 mine on November 22, 1978. Barnett, accompanied by Parks and Kruger, a UMWA representative, entered the mine at 8:30 a.m. and travelled to the 2 Right Pump Heading section. Although the section crew had preceded Barnett into the mine by 30 minutes, no mining had begun in the section when Barnett arrived at 8:45 a.m.

Barnett testified that a cut was driven in No. 5 chain pillar split to a width of 22 feet and the wing had been cut through into the gob; in fact, the cut was 20 feet wide but, because of a bump, a hole 3 feet long and 4 inches high had developed near the roof and had slid down to increase the width to 21 feet 5 inches.

Barnett testified that (a) the hole into the gob was 8 feet wide and from the bottom to the top of the coal seam, i.e., 6 feet, and (b) that the hole was circular, beginning about 2 feet from the bottom and having a diameter of 3 feet; in fact, the hole was 3 feet long and 4 inches high.

Barnett testified that no timbers had been installed along the rib where the hole into the gob was located; in fact, two or three timbers had been set there.

Barnett testified that there were bit marks to indicate that the miner had cut into the gob; in fact, there were no such bit marks. The hole into the gob could not have been cut by a continuous miner because of the location and dimensions of the hole.

Barnett testified that (a) breaker timbers had been installed but that no turn timbers had been installed; and (b) that no timbers were installed; in fact, both breaker timbers and turn timbers had been installed.

Barnett testified that the line brattice was installed on the right side and that no timbers were installed on the left side; in fact, the line brattice was hung on timbers installed along the left side and a check curtain was hung on timbers installed on the right side.

Barnett testified that he issued the unwarrantable failure order because the company did not seem very interested in correcting the condition and that he would have issued only a citation if the condition had been corrected within a reasonable period of time.

Parks told section foreman Hyatt to install crib blocks, which were delivered from the surface to the section and installed to breaker off the area later in the day. Barnett testified that he discussed the matter with Christian underground; in fact, Christian did not work that week and did not talk to Barnett that day because he was at a hospital with his mother.

Respondent's roof control plan contains the requirement that four turn posts be set after completion of the second cut. The inspector's testimony that these timbers had not been set was effectively refuted by that of Delbert Parks and David Hyatt, the foreman in charge of the section on the morning in question. Both testified that they observed four turn posts set as required. It is possible that the turn posts were obscured from view by the line brattice or by the check curtain which were hung on the timbers installed in the area.

Respondent's roof control plan requires that breaker posts be set in the area of the third sequential cut before starting wing extraction. The testimony of Respondent's witnesses established that the hole in the wing leading to the gob was caused by a "bump" or sudden bursting of the pillar wall. The hole had not been cut by the Respondent. The inspector's assertion that it was a circular hole approximately 3 feet in diameter and that it began 1-1/2 feet above the floor is rejected. The hole was approximately 3 feet long by 4 inches wide. Respondent did not attempt wing extraction out of sequence.

Respondent did not violate its roof control plan or section 75.200 as alleged in Order No. 253998.

Underlying Citation

Citation No. 253245 was issued by inspector Joseph Barnett on September 5, 1978, during the course of a regular mine inspection. The inspection party included a representative of the UMWA and two members of Respondent's safety department, Delbert Parks and Richard Wooten. This group arrived at the 18 Left Section at approximately 8:45 a.m. At that time, the entire crew on the section was setting timbers. The inspection party proceeded up the shuttle car roadway to the working place, which was located in the 13 pillar space. There, the inspector noted what he believed to be a violation of 30 CFR 75.200. He alleged that the following condition or practice existed:

The approved roof control plan was not being followed in that the roadway leading to the No. 13 and 14 pillar splits was not timbered down to meet the requirement of the plan (16 to 20 feet wide and no additional roof supports were added) in the 18 Left Section.

The inspector issued a citation pursuant to section 104(d)(1) of the Act, thereby indicating a finding that the alleged violation was caused by an unwarrantable failure of Applicant to comply with the cited safety standard. He also found that the violation was significant and substantial.

Respondent's roof control plan requires that roadways outby pillars which are being mined be limited to a width no greater than 18 feet. If the roadway exceeds 18 feet, at least one row of posts are required to be installed so as to limit the width to 16 feet. The widths of two specific areas of roadway are at issue here: the first of these is that portion of the roadway which extended for one pillar outby No. 13 pillar (hereinafter, the roadway between pillars B and C), and the second is that portion which was immediately adjacent to pillar No. 13 (hereinafter, the roadway between pillar No. 13 and pillar C). The inspector issued Citation No. 253245 after taking several measurements in these two areas of roadway. At one point, the inspector testified that he took a total of six to nine measurements. Under cross-examination, he admitted that he had no specific recollection of the exact number of measurements taken.

The inspector testified that the roadway between pillars B and C was up to 20 feet in width. Delbert Parks took a total of some 15 measurements in this area and achieved different results. He found that the width of the roadway varied for the most part from 16 to 17-1/2 feet. At its widest, the roadway was only 18-1/2 feet. At that point, the continuous miner had taken a 4- to 6-foot long "nick" out of the rib.

The inspector also testified that the roadway between pillar No. 13 and pillar C was up to 19 feet in width. Respondent's section foreman testified that this section of the roadway was within the 18-foot maximum.

The inspector testified that he examined the preshift-onshift examination record book for September 5, 1978, before he went underground that morning, and he observed therein an entry which noted the need to post a pillar split on the 18 Left Section. The inspector claimed to have made a notation on that particular page. Under cross-examination, he was confronted with a copy of the page. It contained neither the notation he claimed to have made nor any indication of a need to post the pillar split.

United States Steel Corporation submitted Proposed Findings of Fact to the effect that:

Inspector Barnett, the duly authorized representative of the Secretary, who conducted the inspection of Gary No. 14 mine on September 5, 1978, testified (1) that he examined the preshift book before going underground and that the fireboss had recorded therein that No. 13 pillar split in 18 Left section needed safety posts; when in fact, there was no such entry in the fireboss book (2) that Gary No. 14 Mine operated three production shifts daily; when in fact, the mine operated two production shifts and one construction shift daily (3) that Delbert Parks and Richard Wooten, members of the company safety department, and Buchanan, a UMWA safety committeeman, accompanied him underground; when in fact, Buchanan was not there but a UMWA representative named Walters was in the group.

The mine did not operate between August 30 and September 5, 1978, because of a shortage of railroad cars and the Labor Day holiday. The night shift was a construction shift so the day shift on September 5 was the first production shift since August 30. The production crew assigned to 18 Left section entered the mine about 30 minutes before Barnett entered the mine. On arrival at the section, Foreman White examined the working places prior to energizing equipment. White discovered that, at the remaining push block at No. 13 pillar where he planned to begin mining, the bottom was wet and muddy and several timbers were laying in the mud. It appeared likely that the continuous miner had knocked the timbers out as it backed out of the working place because the area was steeply sloped, the timbers were skinned as though they had been struck and there were prints on the roof caused by the timbers when they were installed and later dislodged. Mine foreman Christian instructed White to clean the area of

the mud, water and coal before replacing the timbers. The crew was hauling the mud and coal away in a shuttle car as Barnett arrived at about 8:45 a.m., and had already begun to reset the timbers. No mining had yet taken place on the shift. Barnett said that the area at the push block and the roadway outby the block were too wide; Parks and White disagreed. Barnett had made no comment about the roadway width as he traveled along it to No. 13 pillar and took no measurements then; White, Christian, and Parks traveled along the roadway and observed nothing unusual about its width or the condition of the roof. The roof support plan provides for roadways 18 feet wide, but requires that if said width is exceeded, a row of posts must be installed to limit the width of the roadway to 16 feet. Parks and Wooten took between 12 and 15 measurements along the roadway. All measurements were less than 18 feet except at one location where a nick in one rib resulted in a width of 18-1/2 feet. Barnett testified that he and Buchanan took six measurements along the roadway and found a width up to 20 feet; in fact, Buchanan was not there and Barnett took no measurements. Parks drew a yellow chalk line designating a width of 16 feet along the roadway. After a row of timbers was installed along the chalk line, it was not possible to walk between the rib and the row of timbers. The ribs were fairly straight. Generally the mine has good roof conditions; particularly, in 18 Left section the ribs were not sloughing and the rib rolls did not present a hazard there.

These proposed findings are accepted as additional findings of fact with the exception of Applicant's assertion that Inspector Barnett took no measurements. There is no evidence that the inspector did not testify truthfully and accurately to the best of his recollection in this proceeding. The inspector could have been mistaken in his belief that the mine operated three production shifts daily and, considering the large number of mines inspected, there was obviously room for honest error in attempting to recollect the names of persons accompanying the inspector and in attempting to reconstruct all of the notations that had been made in fireboss books. The difficulty in making measurements across the roadway accurate to within a few inches with no means to ascertain that the tape was perpendicular to the ribs was also obvious. In addition to the possibility that the measurements were not made in a manner to record the shortest distance across the roadway, there was the possibility that the measurements were made in the area of small nicks or even from nicks on each side. Although the ribs were fairly straight the record indicates that there was at least one large nick.

Some of the uncertainty as to the measurements and the method by which they were taken might have been eliminated if the conditions alleged by the inspector had been pointed out to the operator's

representative at the time the inspector took his measurements. The results could have thereby been verified and any differences as to places and methods of taking measurements might have been reconciled by discussions between the parties.

The inspector's testimony with respect to the distance between pillar No. 13 and pillar C is suspect. The only measurement of width discussed by him in any detail was 16 feet. He did not identify the location of the 19-foot width. Moreover, his recollection of the extent to which pillar No. 13 had been mined was in error. He testified that only the first cut had been taken from the pillar. In fact, the pillar had been split and its wing extracted. Only the push remained.

The inspector's conclusion that this part of the roadway was too wide is further undermined when note is taken of the efforts required for abatement. Delbert Parks testified that posts were set only in the roadway between pillars B and C. The testimony of Respondent's witnesses is persuasive. The roadway in question exceeded the 18-foot maximum width requirement only in the area of the "nick."

The inspector's conclusion that unwarrantable failure existed on the part of Respondent had two bases, both of which are rejected here. He testified that the condition was visually obvious and, therefore, should have been observed by the section foreman. As noted above, the roadway was no more than 6 inches too wide for a distance of 4 to 6 feet. The amount by which the width exceeded the 18-foot requirement and the distance for which it did so will not support an inference that the condition was visually obvious.

The inspector had concluded that the operator had actual knowledge of the condition as evidenced by an entry in the preshift-onshift examination record book to the effect that further posting was needed on the section. As noted above, no such entry had been made.

The inspector also noted that the condition was abated by 11 a.m. that same morning and that Respondent took extraordinary steps to gain compliance by assigning the entire crew to correct the situation.

The record will not support a finding of unwarrantable failure on the part of Respondent. Citation No. 253245 was not properly issued under section 104(d) of the Act.

ORDER

The application for review is GRANTED and Order No. 253998,
issued November 22, 1978, is hereby VACATED.

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

SEP 20 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 79-31
Petitioner : A.O. No. 46-01478-03014
: :
v. : Sewell Underground Mine
: No. 1 Mine
SEWELL COAL COMPANY, :
Respondent :

DECISION AND ORDER DISMISSING PENALTY PETITION

On January 15, 1976, the operator was cited for failure to provide a canopy on a Galis 300 roof bolting machine in use in the 012 section of the Sewell No. 1 Mine. Due to the pendency of a petition for waiver of the requirement, the time for abatement was repeatedly extended until the section was abandoned on September 28, 1978.

On January 11, 1979, a proposed order of assessment issued assessing a penalty of \$295.00 for the violation of 30 C.F.R. 75.1710-1(a) alleged. On April 28, 1979, the petition for waiver of the canopy requirement was granted on the ground that the minimum mining height of 48 inches in the 012 section was inadequate to permit use of a canopy on the Galis roof bolter without diminishing the safety of the miners. Sewell Coal Company v. MSHA, Docket No. M 76-131, 44 F.R. 48383, August 17, 1979.

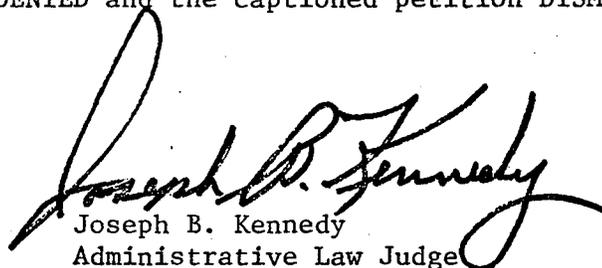
On April 26, 1979, the operator was cited for failure to provide a canopy on a Joy 16SC shuttle car in use in the 014 section of the Sewell No. 1 Mine. The citation notes that the "minimum height of the coal seam was 43 inches." The notice of abatement states that on September 19, 1978, the Joy shuttle car was replaced with another shuttle car "which had a proper canopy."

On January 11, 1979, a proposed order of assessment issued assessing a penalty of \$305.00 for the violation of 30 C.F.R. 75.1710-1(a) alleged. On April 28, 1979, a petition for waiver of the canopy requirement on all Joy 16SC shuttle cars in use in the Sewell No. 1 Mine was granted wherever the minimum mining height did not exceed 48 inches. Sewell Coal Company v. MSHA, supra.

On April 5, 1979, the Secretary through his Regional Solicitor in Philadelphia, Pennsylvania filed a petition for assessment of civil penalties for the two canopy violations charged. Thereafter the matters were assigned to Judge Littlefield who retired on July 1, 1979. After reassignment the presiding judge issued a notice of hearing and pretrial order. In response, the parties' filed a motion to approve settlement on August 24, 1979 in the amount of \$25.00 each and a total of \$50.00 for the two canopy violations charged. The motion made no reference to the decision of April 28, 1979 on the petition for waiver of the canopy requirement but did state "the use of canopies on Galis drills had caused injuries to employees performing tramming operations." It was further represented that "At the time of the inspection, no cab or canopy was commercially available for Respondent's use on a shuttle car working in 43 inch high coal."

Based on the undisputed facts of record, I find that on the dates the aforesaid notice and citation issued compliance with the "improved" mandatory safety standard set forth in 30 C.F.R. 75.1710-1(a) was impossible without diminishing the safety of the miners and depriving them of the protection afforded by section 318(i) of the mandatory safety standards, 30 U.S.C. § 878(i). I further find that for the reasons set forth in the attached Memorandum Opinion the Secretary's failure to comply with the mandatory safety standard set forth in section 318(i), 30 U.S.C. § 878(i) of the Mine Safety Act has deprived the miners of the protection afforded by that standard and thereby rendered null, void and unenforceable the "improved" mandatory safety standard set forth in 30 C.F.R. 75.1710-1(a).

Accordingly, it is ORDERED that the parties' motion to approve settlement be, and hereby is, DENIED and the captioned petition DISMISSED.


Joseph B. Kennedy
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

SEP 20 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 79-31
Petitioner : A.C. No. 46-01478-03014
v. :
: Sewell No. 1 Underground Mine
SEWELL COAL COMPANY, : Sol. No. 5672 Mine
Respondent :

MEMORANDUM OPINION

This opinion is filed to set forth the Presiding Judge's views with respect to his dismissal of the captioned petition on the ground that the improved mandatory safety standard (30 CFR 75.1710-1(a)) relating to the use of canopies on electric face equipment is null, void and unenforceable. Since invalidity of a standard deprives the Secretary and the Commission of subject matter jurisdiction, the Presiding Judge may, sua sponte, take notice of the jurisdictional defect.

I

The overriding purpose of the Mine Safety and Health Act, 30 U.S.C. § 801 et seq., as amended, is to reduce and redistribute

the human costs incident to producing coal to fire the engine of the modern American industrial machine. As Orwell noted:

Our civilisation * * * is founded on coal, more completely than one realises until one stops to think about it. The machines that keep us alive, and the machines that make the machines, are all directly or indirectly dependent upon coal. In the metabolism of the Western world the coal-miner is second in importance only to the man who ploughs the soil. He is a sort of grimy caryatid upon whose shoulders nearly everything that is not grimy is supported. For this reason the actual process by which coal is extracted is well worth watching, if you get the chance and are willing to take the trouble. [Emphasis in original.]

G. Orwell, The Road to Wigan Pier, 31 (Berkeley-Medallion, 1963, first published in England in 1937).

Having finally taken the trouble, Congress in 1969 passed the Federal Coal Mine Health and Safety Act and under Titles I and III thereof established certain minimum mandatory safety standards, "to protect the health and safety of coal miners, and to combat the steady toll of life, limb, and lung, which terrorizes so many unfortunate families." H. Rep. No. 91-563, 91st Cong., 1 Sess. 2, reprinted in [1969], U.S. Code Cong. & Admin. News 2503. 1/

1/ "Yet despite this considerable Congressional attention, our nation still experiences deaths and serious injuries in our mines at a rate which casts shame on an advanced, industrialized society. Every working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries in our nation's mines." S. Rep. 95-181, 95th Cong., 1 Sess. 4 (1977).

Coal mining has never been a safe occupation, nor is it safe today. Statistics show 91,662 coal miners were killed between 1906 and 1976. If coal mining is considered a means of waging industrial war, it would rank third in the number of dead behind World War I and World War II.

Between 1930 and 1976, coal miners sustained more nonfatal disabling injuries than have all of America's soldiers in all of America's principal wars between the Revolution and Vietnam.

See United Mine Workers v. Kleppe, 532 F.2d 1403, 1405-06 (D.C. Cir. 1976), cert. denied, 429 U.S. 858 (1976).

As the same court later noted:

The part of the Act aimed at assuring the maintenance within mines of appropriate health and safety conditions is built around the concept of the mandatory standard. The legislative history reveals two competing concerns in the minds of persons affected by the legislation, and the mandatory standard concept was adopted as a way of reconciling the apparent inconsistency. On the one hand, Congress' inability to respond rapidly to changing conditions of knowledge and technology made it desirable to create a power of amendment at the agency level. On the other hand, strong fears were voiced by representatives of both industry and labor that a freely exercised power of amendment might result in an unpredictable and capricious administration of the statute, which would redound to the benefit of no one. [Emphasis in original.]

The mandatory standard concept evolved to deal with this dilemma combines a comprehensive set of "interim" mandatory standards, promulgated by Congress, with elaborate consultative procedures for the formulation of additional "improved" mandatory standards. These Section 101 procedures, which may never be used to decrease the level of protection afforded miners under an existing standard, prescribe the precise manner in which the Secretary is to promulgate the new mandatory standards. [Footnotes omitted.]

Zeigler Coal Company v. Kleppe, 536 F.2d 398, 402-03 (D.C. Cir. 1976).

Returning to the theme of a Congressionally-mandated, irreducible, minimum of protection, the court again emphasized that:

Recognizing also the need for conditions to improve with scientific and technological advancement [Congress] established procedures by which existing standards could be changed, but were careful to provide that the levels of protection afforded miners may not be reduced below standards operative prior to amendment [citing Sec. 101(b), 30 U.S.C. Sec. 811 (b) (1969); Sec. 101(a)(9) of the 1977 Amendments].

Id. at 408.

Accordingly, I conclude that since the statute prohibits the Secretary from promulgating under the guise of an "improved" standard one that decreases the level of protection afforded miners, any action by the Secretary which results in such a diminution of protection is null, void and unenforceable. 5 U.S.C. § 706(2)(C).

Indeed, as long ago as May 1977, the Interior Secretary's delegate, the Board of Mine Operations Appeals, forecast a decision invalidating the "improved" standard in question. Thus, in upholding a judge's decision finding that contrary to the intent of Congress, enforcement of the "improved" standard diminished the safety of the miners, the Secretary's delegate noted that:

(The record supports SOCCO's allegations of the following elements of diminution of safety: excessive [equipment] operator fatigue; the dangerous practice of operating equipment from outside the operator's compartment; operators injuring their heads and other parts of their bodies when they lean out of the equipment to see; running into other miners who could not be seen; difficulties in stepping out of operators' compartments creating the danger of being trapped in case of fire; jarring of operators' heads against canopies lowered to provide clearance; and many others.) The problem which we foresee, however, is that excessive litigation will result from this decision. That problem is minor though compared to the fact that the regulation involved will not do justice to the apparent intent of the statute the chief aim of which is to protect miners in circumstances where protection is needed. We are using the device of this Preface to express our hope that rule-making or some other administrative vehicle can be used to eliminate the dual spectre of unnecessary and costly litigation and the prospective ineffectiveness of this regulation.

Southern Ohio Coal Company, 7 IBMA 331, 355-356 (1977).

Despite these well-founded qualms, the Board, as a creature of the Secretary, shrank from the responsibility of declaring the "improved" standard invalid. With the advent of the new and independent Federal Mine Safety and Health Review Commission on March 9, 1978, however, it is clear that the Presiding Judge has such jurisdiction and authority. 2/ Congress clearly did not intend the Commission to rubber-stamp violations of invalid standards.

It is true that under section 101(d), 30 U.S.C. § 101(d) of the amended Act, Congress has authorized direct review in courts of appeals of improved standards "promulgated under" the new section 101. Furthermore, the period for filing such a review is limited to 60 days after promulgation. Here, the "improved" standard was issued on October 3, 1972, at a time when the limited, pre-enforcement direct review of section 101(d) did not exist. Thus, unless section 101(d), together with its exclusivity provision is given retroactive effect, it is clear that under established law the Presiding Judge has authority to pass on the validity of the "improved" standard in question. 3/

2/ Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541, 548-551 (3d Cir. 1976); Matter of Restland Memorial Park, 540 F.2d 626, 627-628 (3d Cir. 1976); National Industrial Contractors v. OSHRC, 583 F.2d 1048, 1052 (8th Cir. 1978); Bituminous Coal Operators' Association v. Marshall, 82 F.R.D. 350, 353-354 (D.D.C. 1979).

3/ See Secretary of Labor v. Penn Allegh Coal Company, PITT 78-97-P (April 7, 1978), appeal pending. The legislative history states only that the the validity of standards promulgated after March 9, 1978, shall not be subject to collateral attack before the Commission. S. Rep. 95-181, 95th Cong., 1st Sess. 20 (1977).

It seems obvious, however, that for all of the policy reasons advanced by the United States Court of Appeals for the Third Circuit in Atlantic & Gulf Stevedores, supra, section 101(d) does not control the question of the Commission's authority to consider the validity of the "improved" standard in question in this case. As noted, section 101(d) is inapplicable to this case since it is limited to improved standards issued under the new section 101, effective March 9, 1978, whereas the "improved" standard in question was promulgated on October 3, 1972, 37 FR 20690, under the provisions of section 101 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 811 (1969). It is also worth noting that section 101(d) requires only persons "who may be adversely affected" to resort to its provisions. Thus, mine operators who were not in business during the 60-day period or who had no reason to believe they were adversely affected, may eventually be faced with enforcement proceedings in which they find it necessary to challenge the validity of "improved" standards issued before 1978. Section 10(b) of the APA, 5 U.S.C. § 703 provides that "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." This provision, passed in response to the Court's decision in Yakus v. United States, 321 U.S. 414 (1944), requires the courts to determine in each case whether Congress, by establishing a special review procedure, intended to preclude or to permit judicial review of agency action in enforcement proceedings. Attorney General's Manual on the APA, 100-101 (1947).

More recently, the Supreme Court held that an exclusivity provision does not preclude the courts from determining whether a particular administrative regulation was properly designated as a standard falling within that provision. As the court noted, in an enforcement proceeding the Government has the burden of showing that a standard claimed to be subject to a preclusion and exclusivity provision is the type of standard Congress intended to exclude from judicial review. Adamo Wrecking Co. v. United States, 434 U.S. 275, 282-285 (1978). Consequently, if the effect of 30 CFR 75.1710-1(a) is to reduce the protection afforded the miners by the mandatory safety standard set forth in section 318(i) of the Mine Safety Act, 30 U.S.C. § 878(i), it follows that the canopy requirement is not properly designated an "improved standard." It seems likely, therefore, that the courts will strictly construe the exclusivity provision so as to avoid invalidation on constitutional grounds. 4/

4/ As the court in Atlantic & Gulf Stevedores, supra, noted an exclusivity provision--in effect a binding 60-day statute of limitations--may be unconstitutional since it would subject citizens to fines, penalties, and imprisonment for violations of standards that would otherwise be declared invalid and unenforceable. Id. at 550.

Furthermore, because the prohibition is largely unqualified, it may be unconstitutional on its face. As Mr. Justice Rutledge noted in his dissent in Yakus v. United States:

"Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do.

"* * * The idea is entirely novel that regulations may have a greater immunity to judicial scrutiny than statutes have, with respect to the power of Congress to require the courts to enforce them without regard to constitutional requirements. At a time when administrative action assumes more and more of the law-making function, it would seem the balance of advantage, if any, should be the other way.

"* * * Clearly Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation." 321 U.S. 414, 468-469 (1944).

Constitutional questions aside, to the extent the exclusivity provision precludes administrative oversight of the Secretary's law-making function by an independent commission, it may be politically unwise if not downright pernicious. He is no friend of the administrative process who would immunize the vast and powerful lawmaking authority of an administrative bureaucracy such as the Labor Department from close scrutiny by both the administrative judiciary and ultimately the Article III courts. If the rule of law is to be upheld and is to be made meaningful, the citizen must be afforded the fundamental right to challenge lawless action at any time enforcement threatens to deprive him of his life, liberty or property.

II

Section 318(i) of the mandatory safety standards, 5/ 30 U.S.C. § 878(i) (1969), requires that all features of electrically-operated equipment taken into or used in by the last open crosscut must be designed, constructed and installed, in accordance with the specifications of the Secretary (1) to assure that such equipment will not cause a mine fire or explosion, and (2) to prevent to the greatest

5/ Section 301(a) of the Act, 30 U.S.C. § 861(a) (1969), states:

"[t]he provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act * * *."

The Act provides the Secretary no exemption from compliance with mandatory standards.

extent possible other accidents in the use of such equipment. In addition, the standard provides that:

The regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirement of investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary * * *.

Pursuant to this authority, the Secretary continued in effect regulations relating to the construction, design and installation of the electrical features of face equipment, including electric motor-driven or self-propelled mine equipment and accessories, 30 CFR 18.20 through 18.52, 6/ but never issued regulations relating to the design, construction or installation of cabs or canopies.

Instead, the Secretary invoked the section 101 procedures to issue an "improved" standard 30 CFR 75.1710-1(a) under section 217(j) of the mandatory standards, 30 CFR 75.1710, 30 U.S.C. § 877(j) (1969). Section 317(j) provides:

An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that electric face equipment, including shuttle cars, be provided with substantially constructed canopies or cabs to protect the miners operating such equipment from roof falls and from rib and face rolls.

6/ These regulations require that the electrical features of self-propelled electric face equipment consist of "intrinsically safe circuits" and that such equipment be "safe for its intended use."

Ignoring the requirements of section 318(i), the Secretary promulgated 30 CFR 75.1710-1(a) under the guise of an "improved" standard. This regulation delegated to mine operators and equipment manufacturers responsibility for the design, fabrication and installation of canopies on their existing oversized electric face equipment. 37 FR 20689-90. At no time, has the Secretary promulgated specifications for the design, construction and installation of cabs and canopies which require the canopies provide for the safety and comfort of the equipment operators. 7/ At no time, has the Secretary required manufacturers of mining equipment to design, construct and install canopies "with the safety of the [equipment] operator as the prime requisite." 8/ At no time, has the Secretary required operators to purchase equipment of a size compatible with the safe use of canopies. In fact, it is the position of the Solicitor that the existing "improved" standard does not require an operator to replace his existing oversized equipment with lower profile equipment compatible with the safe use of canopies. 9/

7/ See Southern Ohio Coal Company, 8 IBMA 55, 57 (1977), reconsideration denied. As to Secretarial findings regarding the availability of canopy technology, the Board stated:

"The Secretary did not find that practical technology is available to design and construct a canopy for installation on self-propelled electric face equipment such as would result in no diminution of safety in any mine, and logically he could not. * * * [A] Secretarial finding that technology exists to install substantially constructed canopies to protect miners from nonmassive roof falls is of no value where the question is whether technology exists for the installation of canopies which do not otherwise diminish safety in that mine." (Emphasis in original.) Id. at 57.

8/ Robert E. Barrett (former Administrator, MESA), Special Study on Cabs and Canopies, 5 (August 15, 1975).

9/ See Florence Mining Company, et al. v. MESA, M 76-115, et al. 56-62 (October 31, 1977). This decision became final for the Department of the Interior when the Solicitor withdrew MESA's appeal to the Board of Mine Operations Appeals on December 13, 1977.

While the Secretary argues that he is at liberty to "ignore" the requirements of section 318(i) and to "choose" to delegate his responsibility for the design, construction and installation of safe canopies to the mine operators, I can find no warrant for this construction in the Act or its legislative history. Instead, I find that as applied to this operator and others similarly situated, the "improved" standard promulgated as 30 CFR 75.1710-1(a) diminishes the safety of the miners below that contemplated by the mandatory standard set forth in section 318(i). On this showing it follows that the "improved" standard, both on its face and as applied, is invalid under section 101(a)(9) of the Act, as amended. 10/

In June 1976, after 4 years of experience with the "improved" standard, the Secretary extended the timetable for installation "in order to permit development of additional technology on cab or canopy design in conjunction with accomplishing equipment design changes to adapt cabs or canopies * * *" in mining heights under 42 inches. 41 FR 23199 (June 9, 1976). In July 1977, a year later, the canopy program was indefinitely suspended in mining heights under 42 inches due, in part, to the admitted and persistent lack of feasible solutions to the human engineering problems encountered when mine operators attempted to retrofit canopies on both new and existing equipment. 42 FR 34876-77 (July 7, 1977).

10/ Section 101(b) (now section 101(a)(9)) provides:

"No improved mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners below that provided by any mandatory health or safety standard."

III

The Secretary's abdication of his statutory responsibility has resulted in the development of an ad hoc research and development program which harasses coal operators and makes guinea pigs out of miners who are forced to work under canopies which are untested. 11/

Nevertheless, the Secretary has attempted to justify abdication of his responsibility by claiming that because the mine safety laws are to be construed as "technology forcing," the mine operators may

11/ Testimony in modification cases as to the burdens placed upon the operators and the hazards to which miners are exposed is voluminous. See Florence Mining Company, et al. v. MESA, M 76-115 et al. (October 31, 1977); Bishop Coal Company, et al. v. MESA, M 76-13, et al. (December 16, 1977), appeal pending; Penn Allegh Coal Company v. MESA, M 76-27 (June 15, 1977), appeal pending; Southeast Coal Company v. MESA, M 76-33 (May 4, 1977), appeal pending; Southern Ohio Coal Company v. MESA, M 76-349 (October 29, 1977), affirmed as modified, 7 IBMA 331 (May 23, 1977), reconsideration denied, 8 IBMA 55 (June 30, 1977). A description of the ad hoc compliance procedure is contained in Robert E. Barrett, Special Study on Cabs and Canopies (August 15, 1975), and in a memorandum from the Deputy Assistant Administrator, dated July 11, 1977, which establishes guidelines for the granting of extensions of any 104(b) notices (104(a) citations under the 1977 Act) if the coal operators demonstrate good faith attempts to install canopies on some pieces of equipment on some sections of some mines.

be forced to bear the burden of research, experimentation, design, fabrication, construction, and installation of canopies. 12/

Accepting as true that the Act is intended to be technology forcing, the cases previously cited by the Secretary do not support his argument. 13/

12/ Neither former Administrator Barrett nor the Secretary is unaware of the meaning and force of section 318(i). In his Special Study on Cabs and Canopies, page 9, Mr. Barrett recommended that all equipment manufacturers should be put on notice that MESA will strictly enforce section 318(i). In the most recent suspension of the canopy requirements, the Secretary observed:

"[M]ine operators have been forced to attempt to retrofit new equipment, which in many cases involves major changes and alterations in the design of the operator's compartment and the machine to resolve human engineering problems. To meet and correct this situation, MESA is developing specifications for cab and canopy compartment configurations for new mining equipment pursuant to section 318(i) of the [1977 Act]." 42 FR 34877 (July 7, 1977).

I take this to mean that equipment manufacturers eventually will be required to construct equipment according to human engineering specifications established by the Secretary; that this equipment will bear a plate certifying that it is "permissible"; and that operators will not be permitted to use equipment not bearing a permissible plate. It is to be hoped that the Secretary will also specify on the permissible plate the minimum mining height in which the particular piece of equipment plus canopy may be used with safety.

13/ See Chrysler Corporation v. Department of Transportation, 472 F.2d 659, 675, 678 (6th Cir. 1972) (agency required to provide objective criteria for testing newly-developed technology as well as objectively defined performance criteria for automobile manufacturers required to develop and install "airbags"); Society of the Plastic Industry v. OSHA, cert. denied, 421 U.S. 992 (1975), 509 F.2d 1301, 1309-1310 (2d Cir. 1975) (small numbers of vinyl chloride and polyvinyl chloride manufacturers required to utilize existing innovative technologies to reduce exposure to carcinogens). Both AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975), and HUD v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), held that the Occupational Safety and Health Act is technology forcing. But neither states that a regulation promulgated in the guise of forcing technology is valid per se.

If the Secretary had heretofore imposed on mine equipment manufacturers the responsibility for developing, designing and constructing canopies under section 318(i), the regulatory scheme might well be deemed technology forcing. However, delegating the research and development responsibility to each coal operator is analogous to the Secretary of Transportation requiring car dealers, not manufacturers, to develop, design and install airbags. Car dealers would not--and coal operators do not--have the requisite research and development resources.

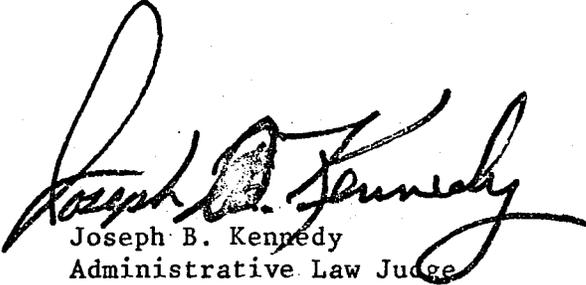
The ultimate poverty of the Secretary's "technology-forcing" argument is revealed in a recent holding of the Third Circuit. In American Iron and Steel Institute et al. v. OSHA, 577 F.2d 825 (3d Cir. 1978) (Petition for Certiorari filed December 9, 1978), the steel industry claimed, inter alia, that a regulation requiring employers to "research, develop and implement any other engineering and work practice controls necessary to reduce exposure" to coke oven emissions, was unauthorized by the Occupational Safety and Health Act. Over the Secretary's argument that the requirement was valid as "technology forcing," the court held:

29 U.S.C. §665(b)(5) grants authority to the Secretary to develop and promulgate standards dealing with toxic materials or harmful agents "based upon research, demonstrations, experiments, and such other information as may be appropriate." Under the same statutory provision the Secretary is directed to consider the latest scientific data in the field. As we have construed the statute, the Secretary can impose a standard which requires an employer to implement technology "looming on today's horizon," and is not limited to issuing a standard solely based upon technology that is fully developed today. Nevertheless, the statute does not permit the Secretary to place an affirmative duty on each employer to research and develop new technology. Moreover, the speculative nature of the research and development provisions renders any assessment of feasibility practically impossible. In holding that the Secretary lacks statutory authorization to promulgate the research and development provision, we note in passing that we need not reach petitioners' challenge to the provision as fatally vague. Accordingly, we hold the research and development provision of the standard to be invalid and unenforceable. [Emphasis supplied.]

Id., 577 F.2d at 838. 14/

14/ The Secretary of Labor did not seek review of this holding. The pertinent language of 29 U.S.C. § 665(b)(5) tracks the language of section 101(c) of the 1969 Act; section 101(a)(6)(A) of the 1977 Act.

As I have stated above, the Federal Coal Mine Health and Safety Act of 1969 and its successor place an affirmative obligation on the Secretary to conduct the research necessary to ensure that the standards he promulgates enhance, rather than decrease, the level of protection afforded the miners. Like the Occupational Safety and Health Act, the 1969 and 1977 Mine Safety Acts do not permit the Secretary to place an affirmative duty on each operator to research and develop new technology. The Secretary recognizes that workable and safe canopy technology looms on some future horizon, not today's. ^{15/} Thus, the regulation at issue which requires each operator to conduct such research and development--and thereby places miners at risk--is beyond the authority of the Secretary to promulgate and must be deemed invalid and unenforceable.


Joseph B. Kennedy
Administrative Law Judge

^{15/} See 42 FR 34876 (suspension of canopy requirements); Southern Ohio Coal Company, 7 IBMA 331, 355-356, reconsideration denied, 8 IBMA 55, 57 (1977).

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

SEP 21 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-152-P
Petitioner : A.C. No. 40-01172-03001
v. :
: No. 1 Strip Mine
SEQUATCHIE VALLEY COAL CORP., :
Respondent :

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
William C. Myers, Esq., Stophel, Caldwell & Heggie,
Chattanooga, Tennessee, for Respondent.

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 civil penalties on December 12, 1978, alleging that Respondent committed violations of 30 CFR 77.403(a), 77.1605(a), 77.1109(c)(1), and two separate violations of 77.410. On January 24, 1979, Respondent filed its answer contesting the violations. A hearing was held on June 21, 1979, in Chattanooga, Tennessee, at which both parties were represented by counsel.

Citation No. 7-0002, February 8, 1977

Evidence was first received regarding Citation No. 7-0002 (February 8, 1977), which alleged a violation of 30 CFR 77.403(a). The condition or practice cited by the inspector is as follows: "Roll protection structure was not provided for the Caterpillar 992 endloader, 1971 Model, SN 25K 542, at this mine." The regulation, 77.403(a), provides in pertinent part that: "[a]ll rubber-tired or crawler-mounted self-propelled scrapers, front-end loaders, dozers, graders, loaders, and tractors, with or without attachments, that are used in surface coal mines or the surface work areas of underground coal mines shall be provided with rollover protective structures * * * "

On the basis of the evidence presented, and in light of the statutory criteria, a decision was made from the bench finding a violation of the standard and assessing a penalty of \$25. This decision from pages 61-64 of the transcript, with some minor corrections, is set forth below:

In a case like this, I believe that I would be derelict in my duties and obligations if I should find that there was no violation, the principle reason being that the law does place the burden upon the operator to know and comply with the regulations. I believe that this was the intention of Congress; and it would be my obligation to follow that. Of course, my further obligation would be to take into account the circumstances and try to alleviate, if required, any undue hardships that might possibly develop.

It is possible, of course, that the inspector had seen this condition before when he had previously inspected this mine. I believe his testimony was to the effect that he didn't remember exactly the times that he had been there before, and it's possible that other inspectors had been there; but I believe the rule would be that the inspector would not be held bound if he should miss a violation on any particular occasion. Also, his explanation that he became aware of this for the first time when he submitted the number of the machine to determine the year seems plausible to me; so I would accept that explanation. Accordingly, I find that the failure as charged to have the roll-over protection did violate 77.403(a).

Taking into account, then, the criteria as required by law; and of which there will be at least three that will apply not only to this alleged violation, but to others as well, if they are found to be violations; and the first would be the history of prior violations. My ruling would be that there is not a significant history of past violations.

Another applicable item: criteria as to the size of the operator. My belief is that this is a small operator, based on the tonnage mentioned, and I would so find.

And I believe it is also clear not only from the circumstances, but from the testimony, that the size of the penalties here indicated would not affect the operator's ability to continue in business.

As to this particular violation, I find that the operator achieved a rapid compliance in good faith in light of the type of violation charged.

So far as gravity is concerned, this can be a serious violation under some circumstances because of the hazard in a machine turning over. However, the inspector did testify here that he saw no imminent danger, and further believed it to be nondisabling due to the location. And, at least, as I understand the testimony, there was not a strong probability at this point of an injury. So, in summary, I would find that it would be a small amount of gravity or seriousness.

Negligence. Certainly, in a technical sense, the operator is held to knowledge of the requirements; and in this case, however, I would take into account the fact that Mr. Studer did testify that he was not aware of these 1974 amendments and I believe, therefore, that this would be a mitigating circumstance.

The assessment of the penalty was \$38.00, and the Secretary has indicated that he believes, because of the seriousness, it should be a higher penalty even than that. From my ordinary experiences, this does not seem to be a very high penalty to me; however, I have already indicated that I believe the gravity here is small in this particular circumstance, and I have taken into account that -- the smaller degree of negligence.

Furthermore, in this matter the notice was issued more than two years ago. It's my view that it's not so much the idea of a penalty that's involved here as it is to change the practice which might lead to the hazard; and that was done, and this is all past history. And in these circumstances, I conclude and find that a penalty of \$25.00 would be adequate. That would be my assessment for this violation.

The above bench decision and assessment are hereby AFFIRMED.

Citation No. 140056, April 13, 1978

Thereafter, the parties agreed to stipulate as to the fact of the violation set forth in Citation No. 140056 (April 13, 1978), and the correctness of the assessment if a violation should be found. The condition asserted was that "[t]he front windshield was shattered on the Fiat Allis Model 745-4B Company # L2 being used at this mine." The citation alleges a violation of 30 CFR 77.1605(a) which provides that: "[c]ab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

Although stipulating to the fact of the violation, Respondent raised a defense as to the validity of the inspection in which the

citation was issued. This inspection was undertaken by the landing of a helicopter at the mine site and Respondent contended that the place of landing was unsafe because of its proximity to blasting operations. The record is fully developed on the helicopter landing and the activities which were in progress at that time (Tr. 69-116). The evidence showed that blasting was not actually taking place at the moment of landing, so there was not an imminent danger. However, had blasting been taking place, it could have put the helicopter in danger (Tr. 116). Since both Petitioner and Respondent were concerned with the safety aspects of the inspectors' helicopter landings, the parties were directed to try to reach an understanding on such landings for future inspections at this particular mine. Respondent was willing to drop its contention of unsafe inspection practices by MSHA if it would be allowed to designate an area in which helicopter landings could be made safely and unannounced (Tr. 120). The inspector, Jerry McDaniel, testified that in the circumstances such a designation would not affect the element of surprise. The area designated would not change so that inspectors would not have to call in advance to determine its location for landing. Because of the novelty of the proposal, the Solicitor agreed to submit the matter to MSHA for its consideration. Counsel was directed to report to the court within 30 days. On July 2, 1979, Respondent filed a copy of its letter to Petitioner wherein it designated specific areas for helicopter landings. It claimed that "the designated areas will not prejudice the surprise factor in such inspection." Thereafter, on August 2, 1979, Petitioner MSHA advised the court and Respondent that in the future it will land its helicopters within the areas designated by the Respondent. Thus, this particular contention was resolved by mutual agreement. 1/

A bench decision was issued at the hearing on the merits of the violation, subject to reconsideration should an agreement not be reached on the landing area. Such reconsideration has been rendered unnecessary in light of the agreement referred to above. The following decision appears on page 124 of the transcript:

In view of the stipulations, my finding is that there is a violation, and the penalty assessed is that which was assessed by the Office of Assessments, namely, \$18.00.

Since the parties have resolved the helicopter landing issue, I hereby AFFIRM the above decision and assessment.

Citation Nos. 140377-140379, April 13, 1978

Following this decision, Petitioner and Respondent introduced evidence on Citation No. 140377 (April 13, 1978), which alleges a

1/ I want to take this occasion to commend the parties and their counsel for the amicable resolution of a sticky problem.

violation of 30 CFR 77.410 stating that: "[t]he automatic reverse alarm installed on the front-end loader SN 25 K 542 was not in operating condition." That regulation requires that: "[m]obile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse." Evidence was also presented on Citation No. 140378 (April 13, 1978), which similarly alleges a violation of 30 CFR 77.410 for failure to have a reverse alarm on a grader. Finally considered was Citation No. 140379 (April 13, 1978), which charges a violation of 30 CFR 77.1109(c)(1) for the same machine, the grader, for failure to provide a fire extinguisher. Section 30 CFR 77.1109(c)(1) provides: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

On the basis of the evidence presented, and in light of the statutory criteria, a decision on these three remaining citations was issued from the bench. That decision, with some corrections, is as follows:

In the violation regarding the loader, the charge was that it did not have a backup alarm. The inspector testified that the men were not working at the time, but all the evidence was, in his mind, that it had been working previously and that there was some kind of interruption in the work. From all appearances, that machine was to go back into operation. The miner who operated the machine gave no indication whatsoever that the machine was being taken out of service for repair or was out of service. The indications were that it was to go back into operation.

I realize that Mr. Studer did testify that the machine was out of service -- he understood or thought, at least, for some kind of service repair. But I believe that, as I view the situation, the circumstances suggest that it was there in operation; it was an operational machine.

Now, it's true, I think that that alarm possibly could have gone inoperational when it was sitting there, but that seems to me unlikely. The machine operator was not aware of when it was or was not operating or working. It seems likely to me that it was not working previously while that machine was functioning. So accordingly, I would find a violation here of 30 CFR 77.410 on this loader.

I do that fully cognizant of the various comments and arguments Respondent made that these [alarms] are somewhat unreliable and that they can go out at any time, and I recognize that in some circumstances this could be a very

harsh rule. I would take into account any indication that it had been recognized that this was out of order and something was being done about it. I don't see that kind of circumstance here in this one instance; so accordingly, I would find a violation and will consider it in the criteria. We have already taken into account certain other criteria previously, and so I have to consider here only the three. The matter was abated in good faith rapidly, so I'll take that into consideration.

Now, as far as the gravity is concerned, there were other men working there. These backup alarms, it seems to me, are extremely important to safety because they are the alarm to anybody in back of the machine, and quite clearly, its failure to operate could result in a serious injury. As far as negligence is concerned, I will take into account the various references to the fact that these alarms are sometimes unreliable. I would take that fully into account. So I find that -- in this particular case, at least, small negligence; although there is some necessarily.

In light of that fact, I would reduce that penalty to \$30.00. So accordingly, that would be my finding as to the assessment.

The other two violations as alleged are another 77.410, which involves the lack of a backup alarm, and also a violation of 77.1109(c)(1), which is the alleged lack of a fire extinguisher, also on the same grader. Now, on these two violations, I'm going to bunch them together. I have a difficulty here. It's not that I don't think that the inspector could issue such notices and they should be sustained if there is evidence -- it's not only his belief, of course; but I think that the evidence should sustain his belief that the machine was operational.

Now, this machine, I suppose, in one sense, is operational; but as I understand the testimony, the machine was only used infrequently, perhaps once a month. In light of the fact that it would be normal to inspect the machine used so infrequently for the safety devices, it seems probable to me that before it was put into operation, that any such deficiencies might be corrected. This is not to take away from what the inspector did. I think he probably acted reasonably and he acted on information which, as he understood it, was given to him by Mr. Studer. The only way I can reconcile this is that there was a misunderstanding between the two men as to what was said and as to what Mr. Studer really intended to say. Mr. Studer testified here today that the machine did have a backup alarm; that

it was not operational; however, that the machine was not in operation at the time and that the policy was that the alarm would be made operational. I don't know that this is quite so clear with the fire extinguisher. [The inspector testified that Mr. Studer, the machine operator, said there was not a fire extinguisher provided on it (Tr. 155.)].

I have to agree that the testimony is somewhat in conflict. It depends on precisely what Mr. Studer said there. I would think -- we have no testimony on it; but I would think if the machine had the brackets, it would be clear that when it was put into operation the fire extinguishers would be put on it. But as I indicated, I don't see the testimony being that clear; I just simply can't resolve it that easily.

In the circumstances, since this was only an occasionally used machine, I'm just going to give the benefit of the doubt in this instance to the Respondent. As I say, in so ruling, I am not in any way indicating that I believe that the inspector was wrong. He called it as he saw it, and I am simply deciding on the basis of the record, the testimony, and the evidence on both sides as we now have it. And that would be my judgment, then, as to both of those citations, that I would rule that the evidence does not sustain the violations, and that accordingly, they should be dismissed; and I do hereby dismiss them.

The decision above assessing a penalty of \$30 in Citation No. 140377 and dismissing the petition as to Citation Nos. 140378 and 140379 is hereby AFFIRMED. Further, Citation Nos. 140378 and 140379 are hereby VACATED.

In summary, a finding of violation has been made regarding Citation No. 7-0002 and a penalty of \$25 assessed; violations found in Citation Nos. 140056 and 140377 and penalties assessed of \$18 and \$30, respectively; and the petitions for Citation Nos. 140378 and 140379 were dismissed and the citations vacated.

ORDER

It is ORDERED that Respondent pay total penalties of \$73 within 30 days of the date of this decision.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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

SEP 25 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. NORT 79-18-P
Petitioner	:	A/O No. 44-04823-03001
v.	:	
	:	No. 2 Mine
BETH ANN COAL CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: John H. O'Donnell, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
John R. Lark, Secretary-Treasurer, Beth Ann Coal
Corporation, Big Rock, Virginia, for Respondent.

Before: Judge Cook

A petition for assessment of civil penalty was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. An answer was filed and a prehearing order was issued. Notices of hearing were issued setting the above-captioned proceeding for hearing on the merits beginning at 2 p.m., June 27, 1979, in Abingdon, Virginia.

At the hearing counsel for the Petitioner appeared, however, no one appeared for the Respondent. During the course of a recess the Administrative Law Judge conducted a telephone conference with counsel for the Petitioner and Mr. Lark, who represented the Respondent. Both parties then conferred and reached a settlement agreement. Thereafter, at the hearing, counsel for MSHA informed the Judge that a motion requesting approval of settlement would be filed. On July 6, 1979, MSHA filed a motion requesting approval of settlement wherein it requested that the Respondent be granted 90 days from the date of approval in which to pay the agreedupon settlement figure. A complete transcript of the hearing was filed on September 13, 1979.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

An agreed settlement has been reached between the parties in the amount of \$590. The assessment for the alleged violations was \$682.

The alleged violations and the settlement are identified as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>	<u>Settlement</u>
323139	04/26/78	75.313	\$ 84	\$ 84
323140	04/26/78	75.523	122	87
323141	04/26/78	75.516-2	60	25
323142	04/26/78	75.703	90	90
323143	04/26/78	75.604	90	90
323144	04/26/78	75.1107	122	100
322390	05/25/78	75.604	114	114

As grounds for the proposed settlement, MSHA states, in part, as follows:

1. As shown by the Inspection Report (Appendix A), the No. 2 Mine was operated by the Beth Ann Coal Corporation near Big Rock in Buchanan County, Virginia. The mine had a daily production of approximately 200 tons of marketable coal, one production shift, one employee on the surface and six employees underground. The front side of the Proposed Assessment (Appendix B) prepared by the MSHA's Office of Assessments shows MSHA records had the corporation producing 50,878 tons of coal in 1978, of which the mine produced a total of 12,500 tons of coal that year. The mine and operator should be classified as small for purposes of assessing a civil penalty.

2. During the telephone conversation on June 28, 1979, Mr. Lark explained * * * that the coal in the ground is owned or leased by one United Coal Company (formerly Wellmore Coal Company), and the Beth Ann Coal Corporation had contracted with United Coal Company to mine the coal at a rate of so much money a ton. The Beth Ann Coal Corporation is presently insolvent and has no cash flow. The only means of obtaining money to pay the corporation debtors is to have United Coal Corporation or one of its

lessees operate the mine and reimburse Beth Ann for its equipment. However, the anticipated equipment sale has been delayed because there have been unforeseen delays in preparing the mine so it can again produce coal. Based substantially on the foregoing information, the Office of the Solicitor agreed to reduce the civil penalties to the amounts indicated above because larger penalties could adversely affect the ability of the operator to remain in business. * * *

3. The Office of Assessments reports there is no history in that office of prior paid violations concerning this mine.

* * * * *

5. Citation No. 323139 issued citing 30 CFR 75.313 because the methane monitor was inoperable on a cutting machine.

Gravity: Both former inspector Roby R. Fuller and present inspector Larry F. Clevinger appeared in the courtroom and were interviewed by the undersigned attorney concerning the issues posed by this proceeding. Both inspectors agree that the mine has no history of liberating methane. See also the issuing inspector's statement, Appendix C, concerning this violation. Consequently, the gravity by reason of the inoperable methane detector would be that some mines not known to liberate methane have had methane ignitions. Both inspectors agree that the chance of methane building to the 5% to 15% explosive range in this Eagle coal seam is unlikely. The violation is nonserious.

Negligence: Appendix C (the inspector's statement) shows the condition had been recorded in the book of weekly examinations so the Respondent had information that the violation existed and continued to mine coal. The violation is intentional or the same as gross negligence.

Abatement: The condition was abated within the time provided by the inspector which demonstrates a normal degree of good faith.

Penalty: The Office of Assessments proposed a civil penalty of \$84.00 (appendix B), and because the violation is intentional the Office of the Solicitor would be unwilling to reduce the amount of the penalty.

6. Citation No. 323140 issued citing 30 CFR 75.523 because the panic bar on the roof bolt machine was inoperable.

Gravity: A panic bar has saved lives. Nevertheless, an emergency of some sort must occur before the panic bar switch is needed. Furthermore, a roof bolting machine does not travel fast or have much mobility. In fact, some roof bolting machine models are not equipped with brakes because such vehicles travel at such low speed. The need for a panic bar is less on a roof bolter than on a shuttle car or other faster, more mobile equipment. The violation is serious since death or injury is possible as a result of the condition. See the Inspector's statement concerning this violation, Appendix D.

Negligence: The Inspector's statement, Appendix D, notes that the roof bolt machine operator has some supervisory responsibilities. However, the operator of the machine may not have had occasion to depress the panic bar and he still would then not know it was not operable.

Abatement: The condition was abated within the time provided by the Inspector which demonstrates a normal degree of good faith.

Penalty: The Office of Assessments proposed a civil penalty of \$122.00 (appendix B), which the Office of the Solicitor has agreed to reduce to \$87.00 because the negligence is not well established and because of the financial condition of the operator.

7. Citation No. 323141 issued citing 30 CFR 75.516-2 because the telephone wire was not hung on insulated hangers in two places.

Gravity: The two inspectors are both electrical inspectors and both agreed that a telephone wire never has over 24 volts and usually has only six to nine volts. Thus, although the mine is very wet there is no shock hazard because of the low current. Since the mine does not liberate methane there is only a remote danger from that source by reason of the wire on the mine floor. The violation is nonserious.

Negligence: Inspector Roby cannot remember whether an insulated hanger had been provided for the wire and the wire had been knocked off or whether there never had been a hook provided for the wire. Both inspectors agree that the wire could have been knocked down suddenly without being observed.

Although the negligence would be gross negligence if no hanger had been provided, MSHA cannot prove that there was any negligence involved in the violation.

Abatement: The violation was corrected within the time provided which demonstrates a normal degree of good faith.

Penalty: The Office of Assessment proposed a civil penalty of \$60.00. The inspector's statement, Appendix E, concerning this violation merely stated that the mine operator, Buford Hackney (a former MSHA inspector also), supervises some of the work--apparently the presumption would be that if Mr. Hackney saw the wire after it fell there would be an intentional violation. However, at a hearing MSHA could not prove negligence since we do not know if hooks were provided or when or what caused the wire to fall. Thus, the Office of the Solicitor (considering the financial problems of the operator, the nonserious nature of the violation, and the inability to prove negligence) will settle for a civil penalty of \$25.00.

8. Citation No. 323142 issued citing 30 CFR 75.703 because the roof bolting machine was no longer frame grounded since the wire had broken.

Gravity: For there to be an electric shock some component in the roof bolting machine must first malfunction because the frame ground wire is a backup protection. However, as noted in the inspector's statement, Appendix F, there is a possibility that a miner could receive a shock as a result of this condition--especially since the mine is wet.

Negligence: The condition would not be discovered until the weekly electrical examination was made.

Abatement: The condition was abated when the inspector next returned, so the condition was abated with a normal degree of good faith.

Penalty: The Office of Assessments proposed a civil penalty of \$90.00 (appendix B). The Office of the Solicitor considers the proposed civil penalty to be reasonable, and recommends that it be approved.

9. Citation No. 323143 issued citing 30 CFR 75.604 because one or more permanent splicings on the trailing cable to the cutting machine were not insulated until moisture was excluded.

Gravity: As noted in the inspector's statement, Appendix G, the mine is wet so moisture could have entered the openings and caused an arc, resulting in an electric shock or burn.

Negligence: Although Appendix G notes that the mine operator is foreman of the mine also, there is no showing that he or anyone knew or should have known of the condition. The cable must be examined at the beginning of the shift, but the break may have occurred after that examination.

Abatement: The violation had been abated when the inspector returned, so a normal degree of good faith was demonstrated.

Penalty: The Office of Assessments proposed a civil penalty of \$90.00 (Appendix B), and the Office of the Solicitor deems the proposed civil penalty reasonable and recommends that it be approved.

10. Citation No. 323144 issued citing 30 CFR 75.1107 because the cutting machine was not provided with fire resistant hydraulic fluid, nor did it have the fire suppression device which can be used as an alternative requirement.

Gravity: The Inspector's statement, Appendix H, shows the Inspector had no opinion about gravity or negligence. The reason being that the mine is so wet that fire in the cutting machine is remote.

Negligence: The person installing the hydraulic fluid may not have noticed the color which is the means of identifying fire retardant fluid, so the violation is the result of a normal degree of negligence, and not gross negligence as deemed by the Office of Assessments.

Penalty: As shown by Appendix B, the Office of Assessments recommended a civil penalty of \$122.00. The Office of the Solicitor will agree to settle for a civil penalty of \$100.00 because no gross negligence can be proven.

11. Citation No. 322390 issued citing 30 CFR 75.604 because Inspector Clevinger observed three permanent splices in the trailing cable to a roof bolting machine which had not been effectively insulated against water.

Gravity: The mine is wet so an arc could have occurred or a shock or burn resulted to a miner. See the inspector's statement, Appendix I.

Negligence: The Mine Operator was in the mine that shift so he should have seen smoke rising from each of the three breaks in the cable. The violation was intentional.

Abatement: The condition was abated within the time provided which demonstrates a normal degree of good faith.

Penalty: The Office of Assessments recommended a civil penalty of \$114.00 and the Office of the Solicitor would not be willing to reduce this proposed civil penalty in view of the intentional nature of the violation.

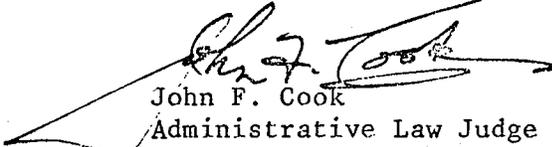
In view of the reasons given above by counsel for MSHA for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

In view of the fact that the transcript in this case was not received until more than 30 days after it normally should have been received, it appears that payment of the penalty within 60 days after the date of this decision will comply with the settlement agreement.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 60 days of the date of this decision, pay the agreed-upon penalty of \$590 assessed in this proceeding.


John F. Cook

Administrative Law Judge

Distribution:

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

John R. Lark, Secretary-Treasurer, Beth Ann Coal Corporation, Drawer NN, Big Rock, VA 24603 (Certified Mail)

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

Standard Distribution

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

SEP 26 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PIKE 79-29-P
Petitioner	:	Assessment Control
	:	No. 15-10331-03001
v.	:	
	:	No. 6 Surface Mine
FLAT TOP MINING, INC.,	:	
Respondent	:	

DEFAULT DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before : Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Pikeville, Kentucky, on August 10, 1979, pursuant to a written notice of hearing dated June 19, 1979, and received by respondent on June 29, 1979, counsel for the Mine Safety and Health Administration entered his appearance, but no one appeared at the hearing to represent respondent.

Section 2700.63(a) of the Commission's Rules of Procedure which became effective on July 30, 1979, provides that when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on August 14, 1979, pursuant to 29 CFR 2700.63(a). Respondent filed on August 30, 1979, a reply to the show-cause order stating that it had overlooked the hearing date because of some personnel changes. Respondent concluded that it was at fault in failing to appear at the hearing and submitted a check in the amount of \$1,465.00 which was the total of the civil penalties proposed by the Assessment Office for the seven violations alleged in MSHA's Petition for Assessment of Civil Penalty.

At the hearing, the inspector who wrote the citations which support MSHA's Petition for Assessment of Civil Penalty testified that Citation No. 72833 which he issued on March 15, 1978, alleging a violation of 30 CFR 77.1302(a) had been issued in error. At the time Citation No. 72833 was issued, it was MSHA's policy to cite a violation of Section 77.1302(a) if a vehicle used to haul blasting agents lacked a non-sparking lining inside the space used to haul blasting agents. The inspector stated that subsequent to March 15, 1978, MSHA changed its interpretation of Section 77.1302(a) to permit the transportation of

blasting agents, as opposed to actual explosives, in an unlined compartment. The inspector stated that he believed Citation No. 72833 should be vacated because it had alleged a violation of Section 77.1302(a) under a factual situation which is no longer considered to be a violation of Section 77.1302(a) (Tr. 8-10).

The inspector's vacation of Citation No. 72833 had the effect of making it unnecessary for respondent to pay the penalty of \$345.00 which had been proposed by the Assessment Office for the violation of Section 77.1302(a). I have discussed respondent's overpayment with an employee who works in the Assessment Office and he has indicated that respondent's payment of \$345.00 with respect to Citation No. 72833 will be refunded. Therefore, the order accompanying this decision will dismiss MSHA's Petition to the extent that it seeks assessment of a penalty for an alleged violation of Section 77.1302(a) with respect to Citation No. 72833. The order will also recognize that penalties totaling \$1,120.00 proposed by the Assessment Office for the remaining six violations have already been paid by respondent.

I find respondent to be in default for failure to appear at the hearing held on August 10, 1979. Section 2700.63(b) of the Commission's Rules of Procedure provides that if a judge finds a respondent to be in default, he shall enter a summary order assessing the proposed penalties as final.

WHEREFORE, it is ordered:

(A) For the reasons given above, MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-29-P is dismissed to the extent that it seeks assessment of a civil penalty for a violation of 30 CFR 77.1302(a) with respect to Citation No. 72833.

(B) If the penalty of \$345.00 proposed by the Assessment Office for the violation of Section 77.1302(a) referred to in paragraph (A) above, has not already been refunded to respondent, that amount should be refunded within 30 days from the date of this decision.

(C) Respondent's obligation to pay civil penalties totaling \$1,120.00 has already been satisfied by its submission on August 20, 1979, of Check No. 4604 dated August 28, 1979, in the amount of \$1,465.00, of which \$345.00 has been or will be refunded.

MSHA v. Flat Top, Docket No. PIKE 79-29-P

The penalties totaling \$1,120.00 which respondent has already paid are allocated to the respective violations as follows:

Citation No. 72821 3/13/78 § 77.1606(c)	\$ 160.00
Citation No. 72824 3/13/78 § 77.1605(a)	140.00
Citation No. 72825 3/13/78 § 77.1110	140.00
Citation No. 72829 3/13/78 § 77.1302(f)	305.00
Citation No. 72831 3/15/78 § 77.1301(b)	195.00
Citation No. 72832 3/15/78 § 77.1301(c) (9)	<u>180.00</u>
Total Penalties in This Proceeding	\$1,120.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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

Flat Top Mining, Inc., Attention: Lowell Pennington, Secretary/
Treasurer, 2230 Idle Hour Building, Room 206, Lexington, KY
40502 (Certified Mail)

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

SEP 26 1979

DISCIPLINARY PROCEEDING : No. D-79-2

DECISION

Before: Judge Merlin

The above-captioned matter came on for consideration as scheduled on September 19, 1979. After hearing from those involved, I rendered the following bench decision:

This case is a disciplinary proceeding which is being heard pursuant to the Commission's order dated August 20, 1979. This matter was referred to the Commission on July 27, 1979, by Administrative Law Judge George A. Koutras, for possible disciplinary proceedings due to the failure of counsel to appear at a hearing in two penalty cases styled Secretary of Labor v. CO-OP Mining Company, DENV 79-128-P and DENV 79-129-P. The parties through their counsel did not appear because counsel had agreed between themselves to settle these cases. However, they did not advise the administrative law judge sufficiently in advance of the hearing so that his approval of the proposed settlement could be obtained. The operator's counsel eventually entered an appearance at the hearing after being personally contacted at least twice by Judge Koutras, once after the hearing was scheduled to begin. The Solicitor entered no appearance.

By letter dated August 24, 1979, addressed to Judge Koutras, the Associate Regional Solicitor accepted full responsibility for what had occurred and extended a full apology. In addition, the attorney in the Solicitor's office, who had failed to appear in the two penalty cases, wrote to Judge Koutras on August 24, 1979, apologizing for his conduct.

On September 10, 1979, the Regional Solicitor filed a motion for summary disposition of these proceedings stating that both the Associate Regional Solicitor and the particular attorney involved had been personally

reprimanded by the Regional Solicitor and by the Solicitor. The Associate Regional Solicitor attached to his motion a copy of a memorandum to all regional solicitors from the Solicitor dated September 10, 1979, stating, inter alia, that failure or refusal by an attorney in the Solicitor's Office to appear at a hearing before an adjudicative officer, such as an administrative law judge of any tribunal before which the Solicitor practices, or any other conduct disrespectful to such officer, is a fundamental violation of Solicitor-office policy, which will not be tolerated. The Solicitor's memorandum further sets forth that she considers this a very serious matter and that failure to adhere to stated policy could result in an attorney's dismissal. On September 10, I denied the motion for summary disposition.

At the hearing this morning, the Regional Solicitor, the Associate Regional Solicitor, and the attorney involved, again apologized. In addition, counsel for the operator also has apologized. I accept these apologies.

Counsel for the operator has supported the Solicitor's representations that the Solicitor did not exercise any coercion upon him with respect to his conduct. I accept these representations, and I find there was no coercion.

I also take note of the Solicitor's memorandum dated September 10, 1979. However, I do not believe this occasion should pass without a statement from me on behalf of the Commission with respect to what has transpired and what is involved in this situation.

The Commission and its judges have been charged by Congress with the responsibility of hearing and deciding cases under the Federal Mine Safety and Health Act of 1977. As the Solicitor's memorandum of September 10 now recognizes, the Solicitor's attorneys have an obligation to comply with orders of the Commission and its judges. In particular, there is no excuse for defying an administrative law judge by failing to comply with a specific order to appear at a hearing. The absolute necessity for the Solicitor and the operator's counsel to comply with notices of hearing and other orders issued by administrative law judges of the Commission is rendered even more urgent by the stringent circumstances under which the Commission and its judges operate. The Commission has, at present, only 15 judges who are located in Arlington, Virginia. The Commission soon will have two more administrative law judges located in Denver.

In order to dispose of the growing number of cases which come on for hearing under the Act, the judges of the Commission, who are so few in number, must travel widely and establish precise hearing schedules well in advance.

The schedule of Judge Koutras, an individual of undoubted diligence, during the weeks in question graphically illustrates the point. On July 10, he heard a case in Spokane, Washington. On July 11 and 12, he heard cases in Wallace, Idaho. On July 17, he heard a case in Helena, Montana. The subject penalty cases were scheduled for hearing in Salt Lake City on July 19 and the notices of hearing for them were issued 3 months in advance. Only with such planning and only with such schedules can the Commission, through its judges, discharge its statutory responsibilities of hearing and deciding all the cases that come on for hearing. Obviously, neither the Solicitor nor any operators' counsel can be allowed to frustrate or thwart the Commission's fulfillment of its statutorily-imposed obligations by conduct such as occurred in this case. Nothing less than the efficient enforcement of the Mine Safety and Health Act is at stake.

There is an additional matter involved which must be discussed. The failure of counsel to appear at the hearing and otherwise comply with Judge Koutras' orders were due to the fact that they did not understand the crucial role which the 1977 Act gives administrative law judges in settlement cases. Under the 1977 Act, it is not enough for the parties themselves to agree upon a settlement. Section 110(k) specifically provides that no proposed penalty shall be compromised, mitigated, or settled, except with the approval of the Commission. Accordingly, administrative law judges must approve any settlement. Without the judge's approval, there is no settlement. Indeed, without the judge's approval, there is nothing. Therefore, not only was it improper as a matter of attorney conduct and courtesy for counsel not to appear before Judge Koutras as he had ordered; but, in addition, because he had not given his approval to the proposed settlement, there was no settlement, and, therefore, counsel should have been prepared to go to hearing on the designated date. The legislative history of the 1977 Act makes clear that Congress was dissatisfied with the performance of the Department of Interior in settlement cases under the prior 1969 Act. Under that statute, approval by administrative law judges was not necessary for settlements. The judges of the independent Commission were injected four-square into the settlement process by the 1977 Act in order, in

the words of the Senate Report, to assure that abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations be avoided and that the public interest be adequately protected before approval of any reduction in penalties. Senate Report No. 95-181, p. 45.

Conduct of counsel in this case, as well as the statements of the operator's counsel at the hearing before Judge Koutras, demonstrate an unfortunate lack of understanding of the judge's role in settlement cases under the 1977 Act. There was also a failure to appreciate that last-minute settlement agreements reached only between the parties are insufficient where the judge is not afforded adequate time in advance of the hearing to review the matter and determine if his approval is warranted. In this respect, counsel have to be aware of the long and difficult hearing schedules followed by the judges. Counsel have to be aware of the logistics as well as the legalities of the process. I hope that in addition to instructing her attorneys that they must appear in accordance with orders from administrative law judges, the Solicitor also will instruct her attorneys as to how settlements must be handled under the law.

It is disturbing that at the hearing before Judge Koutras, the operator's counsel did not understand that the Commission is a wholly separate and independent entity from the Department of Labor. However, some of the Solicitor's own attorneys appear at times to operate under the same misapprehension. It should not be necessary at this late date to tell attorneys who practice under the Act that the House version of the 1977 Act gave all enforcement responsibility, including hearings, to the Secretary of Labor, whereas the Senate bill established an independent Commission with five Commissioners appointed by the President. Having been given the choice, Congress enacted the Senate version which became the law and is now the 1977 Act. Accordingly, the Commission is entirely separate from the Secretary of Labor and from the Solicitor of Labor. The enforcement and adjudicatory functions in mine safety and health have been separated. The Commission is answerable to Congress, not to the Secretary of Labor. It should not be necessary at this late date to set forth such fundamentals to attorneys who practice under the Act, but I do so now because it is apparent that ignorance of such basics still exists.

It is my hope that the conduct of the Solicitor's attorney and operator's counsel in this case will never

occur again. I recognize, as do all the judges of the Commission, that the Solicitor has delegated much authority to her regional solicitors. The internal organization of the Solicitor's office is solely a matter for her determination. However, attorneys in all the Solicitor's regional offices should understand that they are bound to follow orders of the administrative law judges of the independent Commission and they should understand how the settlement process is designed to operate under the 1977 Act. Conduct such as has occurred in this case cannot be tolerated by the Commission and if repeated will inevitably result in disciplinary proceedings and disciplinary sanctions against the individual attorneys involved with all the adverse consequences such proceedings and actions may entail.

Finally, this case demonstrates the wisdom of having a regulation authorizing a judge to exercise disciplinary authority in appropriate instances. Because of this regulation, the administrative law judge in this case was not left powerless to deal with the situation which made discharge of his statutory duty difficult, if not impossible. The Commission in considering the matter and then referring it to the Chief Judge or his designee, in accordance with section 2700.80 of the regulations, demonstrated its awareness and sensitivity to the problems encountered by the judge in this instance. Moreover, under the regulation, the time lapse involved in referring this matter to the Commission, then referring it back to the Chief Judge, and lastly in setting a hearing, although only a short period of time, afforded those involved, and, most particularly, the Solicitor herself, the opportunity to consider the matter and take appropriate action including, as set forth above, her personal reprimand of the attorneys involved and the memorandum to all attorneys as well as the written apologies to Judge Koutras. Accordingly, under the procedures set forth in the regulations, the problem has been recognized while at the same time precipitate action by the Commission against the individuals involved has been rendered unnecessary.

Hopefully, because of the action already taken by the Solicitor and in light of the comments I have made here today, the matter has been completely resolved with better enforcement of the Act as the result. As previously stated, I accept the apologies, both written and oral, of all counsel involved. In addition, as already stated, I take note of the Solicitor's memorandum dated September 10, 1979.

In view of the complete nature of the apologies, in light of the Solicitor's memorandum, and since this is the first time such a situation has arisen, I determine that no disciplinary proceedings are warranted. Therefore, it is hereby ordered that no action whatsoever be taken and that these proceedings be and are hereby dissolved.

The bench decision is hereby AFFIRMED.



Paul Merlin
Assistant Chief 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

SEP 26 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 79-25
Petitioner : A/O No. 46-02208-03005
v. :
 : Marie No. 1 Mine
DAVIS COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Paul E. Pinson, Esq., Williamson, West Virginia, for
Respondent.

Before: Judge Cook

A petition for assessment of civil penalty was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. An answer was filed and a prehearing order was issued. Subsequent thereto, Petitioner filed a motion requesting approval of settlement and for dismissal of the proceeding.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

An agreed settlement has been reached between the parties in the amount of \$326.30. The assessment for the alleged violations was \$3,263.

The alleged violations and the settlement are identified as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>	<u>Settlement</u>
7-0044	7/18/77	70.508	\$180	\$18.00
23226	4/21/78	77.1107	240	24.00
9910140	7/19/78	70.508	106	10.60
9910248	8/28/78	70.212	84	8.40
26321	10/5/78	75.200	470	47.00
26028	10/12/78	75.603	160	16.00
26252	10/25/78	77.410	150	15.00
26253	10/25/78	77.400(c)	210	21.00
26254	10/25/78	77.202	130	13.00
26255	10/25/78	77.504	84	8.40
26256	10/25/78	77.505	98	9.80
26257	10/25/78	77.410	170	17.00
26258	10/25/78	77.701	150	15.00
26259	10/25/78	77.506	150	15.00
26260	10/25/78	77.505	98	9.80
26881	10/25/78	77.502	84	8.40
26882	10/25/78	77.800-2	106	10.60
26884	10/25/78	77.410	395	39.50
26885	10/25/78	77.1109(c) (1)	84	8.40
26886	10/25/78	77.1104	114	11.40

The Petitioner makes the following representations as relates to the statutory criteria of negligence, gravity and good faith:

<u>Citation No.</u>	<u>30 CFR Standard</u>	<u>Gravity</u>	<u>Negligence</u>	<u>Good Faith</u>
7-0044	70.508	nonserious	ordinary	normal
23226	77.1107	serious	ordinary	normal
9910140	70.508	serious	ordinary	normal
9910248	70.212	serious	ordinary	normal
26321	75.200	serious	ordinary	normal
26028	75.603	serious	ordinary	normal
26252	77.410	serious	ordinary	normal
26253	77.400	serious	ordinary	normal
26254	77.202	serious	ordinary	normal
26255	77.504	serious	ordinary	normal
26256	77.505	serious	ordinary	normal
26258	77.701	serious	ordinary	normal
26259	77.506	serious	ordinary	normal
26260	77.505	serious	ordinary	normal
26881	77.502	nonserious	ordinary	normal
26882	77.800-2	serious	ordinary	normal
26884	77.410	serious	ordinary	normal
26885	77.110-01[sic]	serious	ordinary	normal
26886	77.1104	serious	ordinary	normal

As relates to Citation No. 26257, information submitted by the Petitioner reveals that the alleged violation was caused by ordinary negligence, that it was of moderate gravity, and that the Respondent demonstrated good faith in attempting rapid abatement.

Information submitted by the Petitioner also reveals that the Respondent's size is rated at 111,516 tons of coal per year. The Respondent's history of previous violations is rated at five assessed violation points for each citation, and eleven inspection day points as relates to all citations except Nos. 7-0044 and 9910140, which are rated at twelve inspection day points each.

The Petitioner advances the following justifications in support of the proposed settlement:

* * * * *

3. A reduction from the original assessment is warranted in view of the detriment on the operator's ability to continue in business which would result from payment of a greater penalty amount.

Respondent's financial condition is precarious. From 1972 through 1975, Davis suffered losses which it was able to carry forward to 1976. By doing this it was able to reduce the amount of tax payable on its 1976 profit of \$190,008 (see Exhibit A). That, however, was the last profit made by Davis.

In 1977 Davis was closed for approximately eight months due to floods and strikes. It lost \$332,548 (see Exhibit B). In 1978 Davis was closed for six months due to strikes at the Norfolk and Western Railroad and by the United Mine Workers of America. The Respondent's unofficial corporate balance sheet, dated September 30, 1978, shows an operating loss of \$848,860.57, (See Exhibit C, page 3). The balance sheet dated May 31, 1979, shows an operating loss, in the first five months of the year of \$271,903.04 (See Exhibit D).

Davis has been able to stay in business only through the recent acquisition of a long term loan from Pikeville National Bank and Trust. It has used the money from the loan to pay its immediate obligations and thus, prevent default on the loans for its mining equipment. Davis is now operating solely on borrowed capital. Additional liabilities in the form of the proposed civil penalties will have an adverse effect on Davis's ability to meet its short term obligations and operating expenses and thus to stay in business.

Respondent is currently in the process of applying to FHA (through Pikeville National Bank and Trust Company of Pikeville, Kentucky,) for a loan with which to pay its current obligations. The owners of Davis are pledging to the government as collateral for this loan all the corporate stock in Davis and in its sister corporation, Burning Springs, Collieries Company, Inc., as well as all equipment and interest in real estate held by both corporation [sic]. As Davis' financial condition approaches bankruptcy at this time, this loan is necessary to the continued existence of the mining operation.

The Board of Mine Operations Appeals discussed the penalty criteria of the Coal Act which were identical to that of the Mine Act and concluded as follows:

. . . the intent of Congress was to give the Secretary great latitude in the assessment of monetary penalties so as to permit him to weigh the equities and render justice on a case-by-case basis . . . We believe Congress intended a balanced consideration of all statutory factors, including the size of the mine and the ability to [remain] in business to permit assessments which would be equitable and just in all situations . . . Robert G. Lawson Coal Company,
1 IBMA 115, 118 (1972).

Thus, penalties set under the Act may be tailored to the financial circumstances of each violator. This is not to say that financial difficulties automatically require major reduction in proposed penalties. All of the statutory criteria must be considered. Should a violation pose grave risks of clear and reckless negligence, reduction based upon financial hardship would be difficult to justify. However, the Secretary believes that the circumstances under which Davis found itself were dire enough to warrant the proposed settlement and the record revealed no extraordinary culpability or gravity of the violations which would have precluded the operator from receiving full consideration of his financial difficulties.

All citations involved in this matter except 7-0044 were issued under Section 104(a) of the Act. No. 7-0044 is a 104(b) Notice issued under the 1969 Act. Copies of the inspector's statements and the proposed assessment are attached hereto.

* * * * *

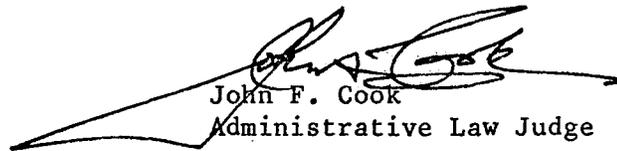
The Secretary contends that the proposed settlement amount of \$326.30 is sufficient under the circumstances to induce not only compliance with the Act, but also to allow Davis to continue mining. The proposed settlement properly balances the public interest which underlies the mandatory penalty provisions, the penalty criteria, and the settlement approval provisions of the Mine Act.

In view of the reasons given above by counsel for the Petitioner for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$326.30 assessed in this proceeding.


John F. Cook
Administrative Law Judge

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Standard Distribution

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SEP 26 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-220-PM
Petitioner : A.O. No. 45-00593-05001
v. :
: Fort Wright Pit Mine
CENTRAL PRE-MIX CONCRETE :
COMPANY, : Docket No. DENV 79-221-PM
Respondent : A.O. No. 45-00594-05001
:
: Yardley Pit Mine

DECISIONS

Appearances: Marshall P. Salzman, Trial Attorney, U.S. Department of Labor, Office of the Regional Solicitor, San Francisco, California, for the petitioner; Richard M. Rawlings, Spokane, Washington, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent on January 18, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with a total of five alleged mine safety violations issued pursuant to the Act and implementing safety standards. Respondent filed timely answers in the proceedings and requested a hearing regarding the proposed civil penalties initially assessed for the alleged violations. A hearing was held in Spokane, Washington, on July 10, 1979. The parties waived the filing of posthearing briefs, and the arguments presented on the record at the hearing have been considered by me in the course of these decisions.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties,

and, if so, (2) the appropriate civil penalties that should be assessed for each proven citation, based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are discussed in the course of these decisions.

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

Applicable Statutory and Regulatory Provisions

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

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

3. The Commission's rules and procedures concerning mine health and safety hearings, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated as to the Commission's jurisdiction and the fact that the citations in both dockets were in fact issued on the dates indicated and that they were duly served on the respondent. Further, the parties stipulated that the respondent is a small-to-medium-sized sand and gravel operator, has no prior history of violations under the Act, and that the imposition of civil penalties will not impair its ability to remain in business (Tr. 5-6).

DISCUSSION

Docket No. DENV 79-221

The proposal for assessment of civil penalty filed in this docket pertains to two citations issued by MSHA inspector James Arnoldi on August 9, 1978, citing the respondent with violations of the provisions 30 CFR 56.14-1. Citation No. 347026 charges that the tail pulley of the conveyor from the culvert-lined tunnel was not guarded. Citation No. 347027 charges that the tail pulley at the concrete-lined tunnel was also not guarded.

Petitioner's Testimony and Evidence

MSHA inspector James Arnoldi testified that the Yardley Pit Mine is a sand and gravel operation where material is mined by a stationary

dragline and transported by conveyor belts to the crusher and screening areas and from there to the stockpile. He confirmed that he inspected the tail pulley of the belt conveyor from the culvert-lined tunnel, which is a covered, corrugated metal short tunnel. The tail pulley itself was a movable machine part and it was not guarded. He believed a person could possibly come in contact with the unguarded tail pulley, and that that person would be someone who would be there for cleanup or maintenance. The dragline operator would not, however, leave his machine. The inspector indicated that if someone were caught in the unguarded pulley, he could lose an arm or leg or be mangled. The pulley was about 18 inches or 2 feet off the ground and a walkway was alongside the conveyor. The unguarded pulley was in plain sight and the operator should have known about the condition. Employees were not working in the area when he observed the condition. The condition was abated within the time permitted (Tr. 7-11).

On cross-examination, Inspector Arnoldi indicated that the operator does instruct employees not to enter the tunnel area while the belts are in operation (Tr. 12). In response to bench questions concerning the abatement, petitioner's counsel stipulated that the citation was terminated within the time specified (Tr. 13). Inspector Arnoldi stated that while the operator does not permit his employees to work in or around unguarded pulley areas, the fact is that employees do not always heed these instructions and are constantly getting caught in unguarded pulleys, and MSHA accident reports bear this out (Tr. 14).

Inspector Arnoldi testified that he considers an unguarded pulley to be a hazard if there is access to it and a person can reach into it or get caught in it, even though an operator has lock-out procedures and instructs employees not to go near the equipment while it is in operation. The inspector stated that the location of the tail pulley in question was at a place where employees would not normally pass by on a regular basis, that it was located in an isolated place, and that the area in question was part of the material transportation system. Furthermore, no one is stationed there at all times to maintain the belt. He was influenced to issue the citation because he is obligated to enforce the standard and the fact that MSHA's accident reports indicate that people are being caught in pulleys. The location of the pulley would dictate when he would cite a violation of section 56.14-1 (Tr. 14-16). Based on his observation of the tail pulley and his experience, if an employee were in the area he might come in contact with the unguarded tail pulley and be injured (Tr. 16).

Regarding the unguarded tail pulley at the concrete-lined tunnel, Inspector Arnoldi confirmed that it was unguarded and that employees normally do not work in the area. Cleanup and maintenance employees could possibly come in contact with the unguarded tail pulley. This pulley was also 18 inches to 2 feet off the ground and presented the

same hazard as the other citation. The likelihood of an accident was very small, but the result would be the same as the other citation, and the condition was in plain view (Tr. 17-18). Although the inspector agreed that the tunnel was in a remote area, the shift foreman or personnel in that area should have been aware of the unguarded pulley (Tr. 20).

In response to bench questions, Inspector Arnoldi indicated that while the mine had been previously inspected by MESA, his inspection was his first time at the mine under MSHA. Although Mr. Arnoldi indicated that his inspector's statement must have been based on his looking at previous inspection reports indicating previous citations of the same safety standard, he has never cited the same standard since this was his first inspection of the mine. He cited the violations because at some time someone would go to the location of the exposed pulleys and possibly get caught in them (Tr. 22). The pinch points would be some 6 inches inside the belt frames, and while the frames provided some protection, they were inadequate for this purpose (Tr. 23).

Respondent's Testimony and Evidence

Richard M. Rawlings, safety director, testified that he accompanied Inspector Arnoldi during his inspection, and he discussed the citations and the pulleys with Mr. Arnoldi. With regard to the culvert-lined tunnel, Mr. Rawlings indicated that the entrance was protected with a chain and a "Do Not Enter" sign, and employees were instructed not to enter the tunnel while the belt was in operation. He indicated that this was satisfactory to other MESA inspectors during prior inspections. As for the second tunnel, there was no chain or sign at that location, but he could not recall discussing this location with Mr. Arnold (Tr. 25-27).

On cross-examination, Mr. Rawlings indicated that if someone were standing right next to the pulleys, he could see that they were not guarded. A foreman is in charge of the tunnel facility and management personnel, including himself, would be responsible for inspecting the equipment to see that pulleys are guarded. He did not believe the conditions cited were dangerous, and indicated that the company had previously been cited for violations of the same standard at other facilities. If an employee disregarded instructions and performed maintenance or other work while the pulley was moving, he could get hurt (Tr. 27-29).

In response to bench questions, Mr. Rawlings stated that some pulley locations at the Yardley Pit Mine location are guarded and the circumstances of their location, including whether there is a lot of foot traffic nearby, dictate whether guards should be installed and he makes these determinations himself. The factors he considers include how often employees are required to be in the area and

whether chains or signs are posted (Tr. 30). Wire mesh guards were fabricated and installed to abate the citations. The tail pulleys are greased once a week, and once every month or two material is cleaned out of the pulleys. Employees are not in the area when the belts are running. Greasing is done before the belts are started and cleanup is done while the belts are off. There is no standard procedure or lock-out system when this work is done. If someone were cleaning the belt while it was running, they could be in violation of company rules, and he did not know whether greasing is done while the belt is running (Tr. 31-33). The pulleys at the other end of the belt are 20 feet high where the material dumps off the end of the belt; there is no walkway there, and they are not guarded (Tr. 31).

Petitioner's Arguments

Petitioner argued that the pulleys cited were in fact not guarded, and contrary to the ones at the other end of the belts, they could be contacted by persons in the area. Although the chances of someone contacting them may be remote, the standard speaks in terms of "may be contacted," and in the circumstances presented here, the chances are not so remote that the term "may be contacted" loses its meaning (Tr. 34).

Respondent's Argument

Respondent argues that the culvert-lined tunnel was guarded by a chain and sign and that employees are instructed not to enter the area. Furthermore, the inspector stated that the chances of an accident occurring at this location were remote or improbable. As for the concrete-lined tunnel, while there was no chain or sign, two boards were blocking the entrance. Although one person does go to the tunnel once a week to grease the pulleys, no one is there when the belt is running (Tr. 35-36). Respondent indicated that guards would have been provided if the inspector had pointed out the need for them, but respondent simply did not feel that guards were required because of the locations of the pulleys (Tr. 42).

Docket No. DENV 79-220

Petitioner moved to dismiss Citation No. 347030, August 16, 1978, 30 CFR 56.14-1, on the ground that it could not sustain its burden of proof as to the fact of violation. The motion was granted and the petition for assessment of civil penalty as to that alleged violation is dismissed (Tr. 44).

The two remaining citations are as follows:

Citation No. 347209, August 16, 1978, 30 CFR 56.14-1, charges that "the guard on the 'V' belt drive at the raw crusher was not adequate. It did not extend low enough to protect personnel from the pinch point."

Citation No. 347031, August 16, 1978, 30 CFR 56.12-32, charges that "the electric motor inside the long concrete lined conveyor tunnel did not have a cover plate."

Petitioner's Testimony and Evidence

Inspector Arnoldi confirmed that he inspected the Fort Wright facility in August 1978, and he described the operation as a sand and gravel pit where materials were loaded with end loaders, transported to a hopper, and then fed on a conveyor for transportation to a crusher where it is sized and transported by belts to various stockpiles. The V-belt raw crusher was not adequately guarded because it did not come down low enough to cover the drive pinch point. The belt and pulley was a movable machine part. The crusher operator worked in the area and he would be in danger of getting caught in the pinch point. A walkway was alongside the pulley within a few inches from the unguarded moving machine part. Although he could not recall how high off the ground the pinch point was located, he would estimate it was 2 or 3 feet and not overhead. The respondent should have known the pulley was unguarded because supervisors were in the area and the area was in the open at the main crusher. The citation was abated within the allotted time and if someone were caught in the pinch point, they could get their arm or leg mangled or torn off (Tr. 44-47). The pull wheel for the V-belt drive was guarded, but the bottom of the drive wheel, where the pinch point was located, was not (Tr. 48).

In response to bench questions, Inspector Arnoldi indicated that an 8- to 10-inch area was unguarded and that the crusher operator would be traveling back and forth in the area several times during a shift, and the walkway was alongside the pulley just inches away. He observed the crusher operator there at the time the citation issued and the crusher was running. Abatement was achieved by installing a screen over the exposed pulley area (Tr. 49-51).

Regarding the missing cover plate citation, Inspector Arnoldi confirmed that the motor in question did not have a cover plate. The motor was some 2 feet long and 18 inches high. The motor junction box cover was missing and someone could possibly have gotten into it and this posed a shock hazard in the event of poor splicing. The uncovered area was 4 inches by 4 inches, and the wires inside the box were spliced, insulated, and wrapped. The insulation would not wear out and there was no danger to exposed insulated wires. The danger presented was the possibility of someone working around the exposed box and getting a hand tool in the open box and breaking the splices or contacting the conductor. The box was in plain view, supervisors were in the area, and the condition should have been observed. He saw no one working in the area, but somebody would have occasion to work there cleaning, greasing, or performing maintenance using a shovel,

grease gun, or water to wash out the tunnel and this would add to the shock hazard. A cover was put on the box within the time fixed for abatement (Tr. 57-55).

Respondent's Testimony and Evidence

Respondent presented pictures of the location and equipment which were cited (Exhs. R-1 and R-2; Tr. 58). Mr. Rawlings stated that he believed the guard which was installed on the V-belt was adequate. Although someone could get their pants' legs caught in the bottom pulley, they would have to be on their knees to get an arm or hand caught. The violation was abated the same afternoon that it was issued and the area in question was not an area where people walked through (Tr. 60).

As for the cover plate, Mr. Rawlings stated it too was abated the same afternoon and that employees were not exposed to any hazard since they would have to break the insulation on the splices to be exposed to any hazard (Tr. 60-61).

Findings and Conclusions

Docket No. DENV 79-221-PM

Fact of Violation--Citation Nos. 347026 and 347027, 30 CFR 56.14-1

Respondent is charged with two violations of the provisions of 30 CFR 56.14-1, 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."

As I previously stated in a recent decision concerning the guarding requirements of section 56.14-1, Massey Sand and Rock Company, Docket No. DENV 78-575-PM (June 18, 1979), petition for discretionary review denied, July 27, 1979, I believe that when an inspector cites a violation of this section of the mandatory standards, it is incumbent on him to ascertain all of the pertinent factors which led him to conclude that in the normal course of his work duties at or near such exposed machine parts, an employee is likely to come into contact with such exposed parts and be injured if such parts are not guarded. Here, it seems obvious to me from the inspector's testimony in support of the citations, that he relied chiefly on the fact that a person coming in contact with such unguarded machine parts could possibly be injured, and that conclusion was based on certain MSHA accident reports which apparently reflect that employees who are caught in unguarded pulleys are in fact injured. While I accept the general proposition that a person who becomes entangled in an unguarded machine part is likely to be injured, this conclusion simply begs the

question as to whether a specific pulley location in a mine is required to be guarded pursuant to the requirements of section 56.14-1. In this regard, petitioner conceded on oral argument that the key words of the regulatory language, "may be contacted," is critical to any determination as to whether the standard has been violated. As I construe that language, it means that on a case-by-case basis, petitioner must establish that the unguarded area in question, by its location and proximity to the comings and goings of mine personnel, exposes them to the hazard or danger of being caught in the unguarded pulley. In my view, this question can only be determined by consideration of the prevailing circumstances at the time the citation issued.

With regard to the unguarded tail pulley at the culvert-lined tunnel (Citation No. 347026), the inspector testified that the equipment was part of the material transportation system and that it was located in an isolated area where employees would not normally pass by on a regular basis. The respondent's defense is that the tunnel was protected by a chain and a "Do Not Enter" sign, and that employees are instructed not to enter the tunnel while the belt is moving. Respondent also pointed out that the unguarded pulleys at the other end of the belts are located some 20 feet high where material dumps off the end of the belt, and since there is no walkway there, they are apparently "guarded by location" and no guards are required. As for the unguarded tail pulley in the concrete-lined tunnel, respondent conceded that it was not protected by a chain or a sign.

The inspector indicated that the exposed unguarded pulley pinch point areas were some 18 inches to 2 feet off the ground, adjacent to walkways, and some 6 inches inside the belt frames. Although the inspector conceded that no one is stationed at the unguarded tail pulley locations on a regular basis, Safety Director Rawlings candidly admitted that the tail pulleys are greased once a week by employees and that materials are cleaned out of the pulleys on a monthly basis. Although Mr. Rawlings alluded to the fact that the cleaning and greasing of the belts is supposed to be done when the belts are not running and before they are started up, he could not state whether greasing was ever accomplished while the belts were running. Furthermore, although he confirmed that employees were instructed not to be in the area while the belts were running, he admitted that there is no standard operating procedure or lock-out system when work is being performed on the belts and that employees who disregarded instructions and performed maintenance or other work on the pulley while it was moving could be injured. Under these circumstances, I conclude and find that the unguarded pulleys, adjacent to a walkway where men obviously passed while performing work on the belts and pulleys on a weekly and monthly basis, presented a hazard to those men and were required to be guarded. Since they were not, I conclude and find that the petitioner has established the violations, and the citations are **AFFIRMED**.

Gravity

I believe that the question of gravity must be determined on the basis of the conditions or practices which existed at the time the citations in question issued. General or speculative conclusions as to the hazards involved with respect to unguarded pulley locations simply are not sufficient to justify a finding that the conditions cited presented a grave threat to the safety of mine personnel. On the facts presented here, the inspector saw no one in the area of the unguarded pulleys, indicated that no one is stationed there on a regular basis, and conceded that the tunnel areas were somewhat remote and that employees did not pass through there on a regular basis. He also indicated that the chances of an accident were "very small." Respondent's un rebutted testimony is that one of the tunnels was chained off and a "Do Not Enter" sign was posted, and while the other one was not chained or posted, several boards blocked the entrance. Under the circumstances presented with respect to the citations, I cannot conclude that the conditions cited were serious, and I find that they were not.

Negligence

Both the inspector and Safety Director Rawlings were of the view that the location of the unguarded pulleys would dictate whether they were required to be guarded pursuant to section 56.14-1. Mr. Rawlings indicated that some pulley locations are in fact guarded and that he is the person who decides whether a particular location should be guarded and his decision in this regard is dictated by the circumstances presented, including consideration of whether there is a lot of foot traffic in the area and how often employees are required to be at any given location. As an example of areas not required to be guarded, he cited elevated pulley areas where there are no walkways. On the facts presented in this case, I find that Mr. Rawlings knew or should have known that greasing and cleanup were being performed in the unguarded pulley areas adjacent to walkways, and while employees may not be required to go to those areas frequently, the fact is that those employees working in and around unguarded pulleys were exposed to a potential hazard, and I conclude that Mr. Rawlings should have been aware of these circumstances. Consequently, I conclude and find that the failure to guard the locations cited resulted from a failure by the respondent to exercise reasonable care and that this constitutes ordinary negligence.

Good Faith Compliance

Abatement was achieved through the fabrication and installation of wire mesh guards, and petitioner stipulated that the citations were abated within the time fixed by the inspector (Tr. 13).

Findings and Conclusions

Docket No. DENV 79-220-PM

Fact of Violation--Citation No. 347029, 30 CFR 56.14-1

Respondent is charged with a violation of the provision of 30 CFR 56.14-1, 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."

The inspector issued this citation because he believed that the guard which had been installed on the raw crusher V-belt drive was inadequate. He believed it was inadequate because the existing guard did not extend low enough to cover the pinch point at the pulley drive where an area approximately 8 to 10 inches remained unguarded. Exhibit R-1 is a picture of the V-belt drive in question and it clearly shows the area of the existing guards and the location which was not guarded. The existing guards are a combination of a wire mesh screen and what appears to be a piece of metal sheeting located over and adjacent to the pulley apparatus. The guard which was installed to abate the citation is a piece of wire mesh screen which covers the entire belt drive and pulley mechanism.

Section 56.14-1 requires, among other things, that belt drive, head, tail, and takeup pulleys, and "similar exposed moving machine parts which may be contacted by persons, and which may cause injury" be guarded. Based on the evidence and testimony adduced in these proceedings, I find and conclude that the V-belt drive location cited was in fact a pulley of the type described by and within the meaning of the standard and was required to be guarded to preclude persons from coming in contact with it and possibly being injured.

On the facts presented here, the inspector testified that there was a danger of someone getting caught in the unguarded portion of the pulley in question. A walkway was located some inches away from the unguarded pulley and the crusher operator would have occasion to walk along the walkway several times during the course of the shift, and at the time of the citation, he observed such an operator on duty in the area and the crusher was operating. Respondent's defense is based on the fact that the operator believed that the existing guard was adequate. However, respondent's witness, Mr. Rawlings, conceded that someone could get their pants' legs caught in the exposed pulley which was not guarded. The fact that one would have to be on his knees for this to occur is not controlling, and while it may indicate that the chances of an accident happening is somewhat remote, it may not serve as an absolute defense to the asserted violation. Since the pulley area was in

fact guarded to some extent, I can only assume that the existing guards were installed by the respondent out of recognition of the fact that the pulley area did present a hazard, and that there was a possibility of someone walking along the adjacent walkway could become entangled in the exposed pulley which was not guarded. In the circumstances, I conclude and find that the pulley area cited was in fact not adequately guarded and that petitioner has established a violation. Accordingly, the citation is AFFIRMED.

Gravity

I find that the circumstances presented establishes that the violation was serious. The walkway was inches from the exposed unguarded pulley area and the crusher operator has occasion to walk up and down that walkway during the course of the shift, and respondent candidly admitted that had he caught a pant's leg in the pulley, he could have been injured.

Negligence

The inspector's testimony that the unguarded pulley area was unguarded and in plain sight to supervisors who may have been there remains un rebutted. Furthermore, since portions of the pulley were guarded to some extent, I find tht the respondent was on notice that the pulley presented a hazard since it seems obvious that the existing guards were installed out of recognition of that fact. I further conclude that the respondent should have been aware of the fact that the unguarded pulley area adjacent and next to the walkway presented a hazard and that respondent's failure to install a guard in that area resulted in its failure to exercise reasonable care and that this constitutes ordinary negligence due to the respondent's failure to correct an unsafe condition which it knew or should have known existed.

Good Faith Compliance

The citation issued on August 16, 1978, and the inspector fixed the time for abatement as August 21, 1978. Respondent's testimony reflects that the guard was installed on the afternoon of the day the citation issued. I find that this indicates that the respondent exercised rapid abatement in correcting the condition and this fact has been considered by me in assessing a civil penalty for this citation.

Fact of Violation--Citation No. 347021, 30 CFR 56.12-32

Section 56.12-32 provides: "Mandatory. Inspector and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

I find that the preponderance of the evidence adduced with respect to this citation supports a finding of a violation of section 56.12-32. Respondent did not dispute the fact that the required cover plate was in fact not in place and its testimony did not rebut the findings made by the inspector in this regard. The citation is AFFIRMED.

Gravity

From the testimony and evidence presented, I cannot conclude that the violation was serious. The inspector testified that the uncovered area was some 4 inches by 4 inches, and his concern was that someone working around the uncovered motor plate cleaning with a shovel or greasing equipment with a grease gun or other hand tools would somehow place such tools in the uncovered plate area, thereby breaking the insulation on the wires or contacting the conductors. He saw no one in the area on the day of his inspection and the evidence establishes that the area is somewhat remote and not regularly traveled. He also testified that the wires inside the junction box were spliced, wrapped, and insulated and there is no indication that the splicing or insulation were in other than good condition. Furthermore, he indicated that there was no danger to any of the exposed insulated wires and that the insulation was not likely to wear out in the normal course of events.

I conclude that the possibility of someone placing a shovel, grease gun, or other tool into the small, exposed area of the cover plate was highly unlikely. Furthermore, although the tunnel area is washed out from time to time with water, there is no evidence that this was the case on the day in question, and based on the totality of the conditions which prevailed on the day in question, I find that the condition cited was nonserious.

Negligence

The inspector testified that the uncovered plate in question was in plain view and should have been observed by supervisors who were in the area. This testimony is un rebutted and I find that the respondent should have been aware of the fact that the cover plate was not in place, and its failure to exercise reasonable care in the circumstances constitutes ordinary negligence.

Good Faith Compliance

The citation issued on August 16, 1978, and the inspector fixed August 21, 1978, as the abatement time. Respondent's testimony indicates that the cover plate was replaced the afternoon of August 16, and I find that the respondent achieved rapid compliance once the citation issued, and this is reflected in the penalty assessed by me for the violation.

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

In both of these dockets, the parties stipulated that respondent is a small-to-medium-sized sand and gravel operator, and that the imposition of civil penalties will not impair its ability to remain in business.

History of Prior Violations

In both of these dockets, the parties stipulated that the respondent has no previous history of violations, and this fact has been considered by me in assessing the civil penalties.

Conclusion

On the basis of the foregoing findings and conclusions, the following citations are AFFIRMED, and civil penalties are assessed as follows:

Docket No. DENV 79-221-PM

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
347026	8/9/78	56.14-1	\$25
347027	8/9/78	56.14-1	25

Docket No. DENV 79-220-PM

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
347029	8/16/78	56.14-1	\$50
347031	8/16/78	56.12-32	25

ORDER

The respondent is ORDERED to pay the civil penalties assessed in these proceedings, as indicated above, in the total amount of \$125 within thirty (30) days of the date of these decisions. Citation No. 347030 (DENV 79-220) is DISMISSED.


George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 26 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-675-P
Petitioner : Assessment Control
 : No. 40-02190-02004
v. :
 : No. 1 Surface Mine
DUNLAP COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Leo J. McGinn, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before : Administrative Law Judge Steffey

When the hearing was convened on August 22, 1979, in the above-entitled proceeding, counsel for the Mine Safety and Health Administration requested that I approve a settlement agreement which had been entered into by the parties. Under the settlement agreement, respondent would pay a civil penalty of \$9.00 for an alleged violation of 30 CFR 71.101 instead of the penalty of \$46.00 proposed by the Assessment Office.

Counsel for MSHA stated that he had agreed to the reduction in the proposed penalty because the alleged violation of Section 71.101 was cited prior to the amendments contained in the Federal Mine Safety and Health Act of 1977 which removed the cloud cast upon alleged violations of the respirable-dust standards by the opinions of the former Board of Mine Operations Appeals in Eastern Associated Coal Corp., 7 IBMA 14 (1976), aff'd on reconsideration, Eastern Associated Coal Corp., 7 IBMA 133 (1976). Large numbers of cases which arose during the period when the Board's Eastern Associated opinions were in effect were subsequently settled on a basis which amounted to an average payment by the coal operators of \$9.00 per alleged respirable-dust violation. See, e.g., Judge Joseph B. Kennedy's Order Approving Consent Settlement and To Pay Civil Penalties issued May 10, 1978, in Secretary of Labor (MSHA) v. Consolidation Coal Company, et al., Docket Nos. VINC 76-76, et al. I believe that fairness to other operators justifies allowance of the settlement figure of \$9.00 for all civil-penalty cases involving alleged respirable-dust violations occurring prior to the amendment of the definition of "respirable dust" in the 1977 Act.

MSHA v. Dunlap, Docket No. BARB 78-675-P (Contd.)

In addition to the equitable reasons given above for accepting a settlement of \$9.00, the official file shows that respondent operated an extremely small business employing only two miners who produced an average of approximately 22 tons of coal per day (Tr. 4). Moreover, respondent's answer to MSHA's Petition for Assessment of Civil Penalty shows that respondent had taken the required dust samples, but the samples had been returned to respondent because of respondent's lack of understanding about the color of card which should have been used at the time the samples were mailed to MSHA's Pittsburgh laboratory. At the present time, respondent is not engaged in producing coal (Tr. 4).

Since a very small operator is involved and since there was a good faith effort to comply with the respirable-dust standards, I find that strong reasons exist to approve the settlement agreement in this instance.

WHEREFORE, it is ordered:

(A) The settlement agreement submitted at the hearing by counsel for MSHA is approved.

(B) Pursuant to the settlement agreement, Dunlap Coal Company shall, within 30 days from the date of this decision, pay a civil penalty of \$9.00 for the violation of 30 CFR 71.101 alleged in MSHA's Petition for Assessment of Civil Penalty filed in Docket No. BARB 78-675-P.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Leo J. McGinn, Trial Attorney, Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Dunlap Coal Company, Attention: Mr. Stanley Ray Hitchcock, Star
Route, Box 79-A, Dunlap, TN 37327 (Certified Mail)

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

SEP 26 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	<u>Docket Nos.</u> <u>Assessment Control Nos.</u>
Petitioner	:	
	:	PIKE 79-27-P 15-09779-03001
v.	:	PIKE 79-28-P 15-09779-03002
	:	
BLUE RIDGE COAL CORPORATION,	:	No. 4 Mine
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: John H. O'Donnell, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
Mr. Edward S. Pinson, Phelps, Kentucky for
Respondent.

Before : Administrative Law Judge Steffey

When the hearing was convened on August 7, 1979, in the above-entitled proceeding, counsel for petitioner and respondent's representative made statements in which it was explained that respondent is contesting neither the occurrence of the violations alleged in MSHA's Petitions for Assessment of Civil Penalty nor the amounts of the civil penalties proposed by the Assessment Office for those alleged violations. The only reason that respondent did not pay the proposed penalties when respondent was notified of them by the Assessment Office was that respondent had suffered a loss of about a quarter of a million dollars and has had a serious cash flow problem which prevented it from being able to pay the proposed civil penalties in a timely fashion.

Respondent has been gradually improving its financial condition in recent months and it was stated at the hearing that respondent believed it could now pay the penalties proposed in this proceeding if it were given a period of 30 days within which to pay the penalties proposed in Docket No. PIKE 79-27-P and a period of 60 days within which to pay the penalties proposed in Docket No. PIKE 79-28-P.

Respondent's request for a period of 30 and 60 days, respectively, to pay the total penalties proposed by the Assessment Office is reasonable in the circumstances and will hereinafter be granted.

The record shows that respondent's No. 4 Mine was producing between 250 and 300 tons per day at the time the citations involved in this proceeding were written. Respondent has obtained some additional equipment

and hopes to increase production to about 400 tons per day. Respondent currently employs eight miners (Tr. 6). On the basis of the foregoing information, I find that respondent is a small operator and that penalties should be in a low range of magnitude insofar as they are based on the criterion of the size of respondent's business. Respondent's president indicated that if his business continued to improve, he would be able to pay the proposed penalties and continue in business (Tr. 4).

The inspectors' citation sheets and subsequent action sheets show that respondent demonstrated a normal good faith effort to achieve rapid compliance. With respect to Citation Nos. 64031, 64033, 64034, and 64035, respondent demonstrated an outstanding effort to achieve rapid compliance and the penalty points were accordingly reduced by the Assessment Office in determining the penalties proposed for those four alleged violations.

For all of the alleged violations, the Assessment Office determined that respondent had a relatively adverse history of previous violations because from 30 to 40 percent of the points used to derive penalties are attributed by the Assessment Office to respondent's history of previous violations.

The Assessment Office attributed about 33 to 40 percent of its points for assessing penalties to the criterion of negligence and from 10 to 30 percent of its points for assessing penalties to the criterion of gravity.

The two lowest penalties proposed by the Assessment Office were \$122 each. One of those was appropriately low because it related to an alleged violation of Section 75.212 for failure to keep proper records. That violation would not have been a serious threat to a miner's safety. The other low penalty of \$122 related to an alleged violation of Section 75.1714 for failure to provide a self-rescue device for each miner underground. Without some testimony from the inspector to show otherwise, I would have been inclined to assess a larger penalty than \$122 for that violation. On the other hand, Exhibit 1 does not show that respondent has previously violated that section of the mandatory safety standards. In the absence of testimony, I cannot find that a penalty of \$122 for the alleged violation of Section 75.1714 is unreasonably low.

The other alleged violations are all moderately serious and involve ordinary negligence except for the violations of Section 77.506 alleged in Citation Nos. 64157 and 64158 which state that respondent had bridged over some fuses with solid wire. I generally consider it to be gross negligence for an operator to bridge over fuses and thereby destroy overload and short-circuit protection. In each instance, the Assessment Office determined the proposed penalties of \$295 and \$255 for the alleged

violations of Section 77.506 by assigning within one or two points the maximum number of points permissible under 30 CFR 100.3 for ordinary negligence. Inasmuch as the bridged fuses were on the surface of the mine where the seriousness of fire or smoke would have been less dangerous than such hazards would have been underground, I cannot conclude that the penalties are necessarily unreasonably low.

My review of the remaining violations alleged by MSHA's Petitions for Assessment of Civil Penalty filed in this proceeding shows that they were reasonably evaluated under the six criteria and I find that respondent's agreement to pay the proposed penalties as hereinafter ordered should be approved.

WHEREFORE, it is ordered:

(A) Respondent's agreement to pay the full penalties proposed by the Assessment Office is approved as hereinafter ordered in paragraphs (B) and (C).

(B) Pursuant to respondent's agreement at the hearing with respect to MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-27-P, Blue Ridge Coal Company shall pay, within 30 days from the date of this decision, civil penalties totaling \$4,350.00 which are allocated to the respective alleged violations as follows:

Citation No. 64031	3/20/78	§ 75.503	.....	\$	140.00
Citation No. 64032	3/20/78	§ 75.400	.....		255.00
Citation No. 64033	3/20/78	§ 75.517	.....		170.00
Citation No. 64034	3/20/78	§ 75.517	.....		170.00
Citation No. 64035	3/20/78	§ 75.1710	.....		160.00
Citation No. 64036	3/20/78	§ 75.313	.....		210.00
Citation No. 64037	3/20/78	§ 75.1100-3	.....		225.00
Citation No. 63369	5/15/78	§ 75.400	.....		195.00
Citation No. 63370	5/15/78	§ 75.503	.....		210.00
Citation No. 63371	5/15/78	§ 75.313	.....		225.00
Citation No. 63372	5/15/78	§ 75.313	.....		225.00
Citation No. 63373	5/15/78	§ 75.1710	.....		180.00
Citation No. 63374	5/15/78	§ 75.1722	.....		325.00
Citation No. 63375	5/15/78	§ 75.326	.....		395.00
Citation No. 63376	5/15/78	§ 75.523-2	.....		275.00
Citation No. 63377	5/15/78	§ 75.1100-3	.....		160.00
Citation No. 63378	5/15/78	§ 75.503	.....		170.00
Citation No. 63241	5/16/78	§ 75.518	.....		240.00
Citation No. 63242	5/16/78	§ 75.701	.....		225.00
Citation No. 63243	5/16/78	§ 75.512	.....		195.00
Total Penalties in Docket No. PIKE 79-27-P.....					\$4,350.00

MSHA v. Blue Ridge, Docket Nos. PIKE 79-27-P, et al. (Contd.)

(C) Pursuant to respondent's agreement at the hearing with respect to MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-28-P, Blue Ridge Coal Company shall pay, within 60 days from the date of this decision, civil penalties totaling \$2,399.00 which are allocated to the respective alleged violations as follows:

Citation No. 63244 5/16/78 § 75.523	\$	210.00
Citation No. 63380 5/16/78 § 75.503		160.00
Citation No. 63501 5/16/78 § 75.1101-7		210.00
Citation No. 63502 5/16/78 § 75.1714		122.00
Citation No. 64153 5/16/78 § 77.504		210.00
Citation No. 64154 5/16/78 § 77.512		160.00
Citation No. 64155 5/16/78 § 75.512		122.00
Citation No. 64156 5/16/78 § 77.504		240.00
Citation No. 64157 5/16/78 § 77.506		295.00
Citation No. 64158 5/16/78 § 77.506		255.00
Citation No. 64159 5/16/78 § 77.505		160.00
Citation No. 64160 5/16/78 § 75.517		255.00
Total Penalties in Docket No. PIKE 79-28-P	\$	<u>2,399.00</u>

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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

Blue Ridge Coal Corporation, Attention: Edward S. Pinson, President,
Phelps, KY 41553 (Certified Mail)

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

SEP 26 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 79-94-PM
Petitioner	:	Assessment Control
	:	No. 40-00008-05001
v.	:	
	:	County Quarry & Mill
BRADLEY COUNTY HIGHWAY	:	
DEPARTMENT,	:	
Respondent	:	

DEFAULT DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before: Administrative Law Judge Steffey

A hearing in the above-entitled proceeding was convened in Chattanooga, Tennessee, on August 22, 1979, pursuant to a written notice of hearing dated July 2, 1979. The notice of hearing was received by respondent on or about July 5, 1979. Counsel for the Mine Safety and Health Administration entered his appearance at the hearing, but no one appeared at the hearing to represent respondent.

Section 2700.63(a) of the Commission's Rules of Procedure which became effective on July 30, 1979, provides that when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to counsel for respondent on August 23, 1979, pursuant to 29 CFR 2700.63(a). A return receipt shows that the show-cause order was received by respondent on August 27, 1979. The order required respondent to show cause, within 15 days after receipt of the order, why it should not be found to be in default for failure to appear at the hearing convened on August 22, 1979. A period of over 20 days has elapsed since the show-cause order was received, but respondent has not submitted a reply to the order. Therefore, I find that the show-cause order has not been satisfied and I find respondent to be in default for failure to appear at the hearing. Section 2700.63(b) of the Commission's Rules of Procedure provides that when a judge finds a respondent to be in default in a civil-penalty proceeding, he shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, respondent shall pay civil penalties totaling \$320.00 which are allocated to the respective

MSHA v. Bradley County, Docket No. BARB 79-94-PM (Contd.)

alleged violations as follows:

Citation No. 106802 5/9/78 § 56.9-87	\$ 90.00
Citation No. 106803 5/9/78 § 56.9-87	90.00
Citation No. 106804 5/9/78 § 56.14-6	84.00
Citation No. 106805 5/9/78 § 56.9-54	<u>56.00</u>
Total Civil Penalties in This Proceeding	\$320.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Leo J. McGinn, Trial Attorney, Office of the Solicitor, U.S.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

SEP 27 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 78-618-P
Petitioner	:	A/O No. 15-02269-80
v.	:	
	:	No. 1 Mine
OSBORNE COAL COMPANY,	:	
Respondent	:	

DEFAULT DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Randall K. Osborne, Osborne Coal Company, Pennington Gap, Virginia, for Respondent.

Before: Judge Cook

On August 14, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty against Osborne Coal Company (Respondent) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977. Since an answer had not been filed by the Respondent as of November 16, 1978, then Acting Chief Administrative Law Judge Broderick issued an order requiring the Respondent to show cause both as to why it should not be deemed to have waived its right to an evidentiary hearing and as to why the case should not be disposed of summarily pursuant to 29 CFR 2700.26(b) (1978). On December 1, 1979, the Respondent timely filed its response to the order to show cause. Subsequent thereto, the case was assigned to the undersigned Administrative Law Judge.

Notices of hearing were issued on March 8, 1979, May 9, 1979, and May 30, 1979. Copies of the notices were sent by certified mail to the Respondent. The return mail receipts disclose that they were received by the Respondent on March 19, 1979, May 16, 1979, and June 6, 1979, respectively. A hearing was held, following which, a transcript with exhibits was received by the Office of Administrative Law Judges of the Federal Mine Safety and Health Review Commission on September 13, 1979.

The hearing commenced at 9:45 a.m., June 27, 1979, at the designated place, i.e., Abingdon, Virginia. Counsel for MSHA appeared. No one appeared to represent the Respondent (Tr. 4).

Following this determination, the Respondent was found in default pursuant to 29 CFR 2700.26(c) (1978) (Tr. 5). It was thereupon noted that 29 CFR 2700.26(c) (1978), provides that "[w]here the Judge determines to hold the Respondent in default, the Judge shall enter a summary order imposing the proposed penalties as final, and directing that such penalties be paid" (Tr. 5).

Counsel for MSHA then introduced the following exhibits into evidence:

M-1 is a copy of a computer printout compiled by the Office of Assessments listing the history of previous violations for which the Respondent had paid assessments beginning October 15, 1971, and ending October 15, 1973.

M-2 is a copy of Notice No. 1 LR, 30 CFR 75.200, October 15, 1973.

M-3 is an extension of M-2.

M-4 is a termination of M-2.

M-5 is a copy of Notice No. 2 LR, 30 CFR 75.1704, October 15, 1973.

M-6 is a termination of M-5.

M-7 is a copy of Notice No. 3 LR, 30 CFR 75.503, October 15, 1973.

M-8 is a termination of M-7.

M-9 is a document containing the Office of Assessment's narrative findings of fact and proposed penalties with respect to the subject notices.

Exhibit M-9 identifies the notices and the proposed penalties as follows:

<u>Notice No.</u>	<u>Proposed Penalty</u>
1 LR	\$56
2 LR	84
3 LR	35

Following the receipt into evidence of MSHA's exhibits, a summary order was entered imposing the proposed penalties and directing that the penalties be paid (Tr. 11).

ORDER

Accordingly, the order is REAFFIRMED and the Respondent is directed to pay the penalty assessed in the amount of \$175 within 30 days of the date of this decision.


John F. Cook
Administrative Law Judge

Distribution:

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

Randall K. Osborne, Osborne Coal Company, Route 1, Box 237-A, Pennington, Gap, VA 27277 (Certified Mail)

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

SEP 27 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. HOPE 79-145-P
Petitioner	:	A.O. No. 46-01616-03003
	:	
v.	:	Mine No. 2A
	:	
PEERLESS EAGLE COAL COMPANY,	:	
Respondent	:	

DECISION AND ORDER ASSESSING DEFAULT PENALTY

After the retirement of Judge Littlefield and reassignment of the captioned matter to the presiding judge, 1/ a notice of hearing and pretrial order issued on August 7, 1979. Pursuant to Rule 25 of the Interim Rules of Procedure (Rule 28 of the Revised Rules) the operator was required to file on or before Friday, September 7, 1979, a plain and concise statement of the reasons it was contesting each violation and/or the amount of each penalty, together with a statement as to whether the operator claimed the payment of a maximum penalty for each violation charged would impair its ability to continue in business. The order further stated that "except for good cause shown in advance thereof, any failure to comply in full and on time with the provisions of this order shall be deemed cause for the issuance of an order of dismissal or default." Respondent failed to comply with any of the terms of the pretrial order.

Pursuant to Rule 63 of the Revised Rules an order to show cause why respondent should not be held in default and a summary order entered assessing the proposed penalties as final issued on September 12, 1979, returnable on or before Friday, September 21, 1979. The show cause order was receipted for by respondent's attorney on Friday, September 14, 1979.

Based on an independent evaluation and de novo review of the circumstances as set forth in the Secretary's response to the pretrial order, and more particularly the statements of the inspector and his supervisor, I find that the amount of the penalties warranted for the violations charged are as follows:

1/ Judge Littlefield had denied a motion to remand the matter to the Assessment Office and had issued a pretrial order which was superseded by the order of August 7, 1979.

Citation No. 044225 - 30 CFR 75.1105

The supervisor's statement and a consideration of the circumstances persuades me that the violation of the requirement that the air current ventilating a permanent dewatering pump be directly coursed into a return airway created only a remote hazard of smoke inhalation for miners working in by the intake airway. I conclude that the violation was nonserious and resulted from a low degree of ordinary negligence. I find therefore that the penalty warranted is \$300.00.

Citation No. 044226 - 30 CFR 75.200

The statements of the inspector and supervisor and a consideration of the circumstances persuades me that the failure to scale down loose roof in an area measuring 15 by 15 feet which was travelled only once a week by a certified preshift examiner or fire boss created only a remote roof fall hazard for one miner, namely the examiner who should have reported the condition for correction. I find therefore that it was a knowing violation attributable to a high degree of negligence on the part of the examiner and imputable to the operator, but that the improbability of a fatal or disabling injury requires a finding that the violation was not serious. For these reasons, I conclude that the penalty warranted is \$300.00.

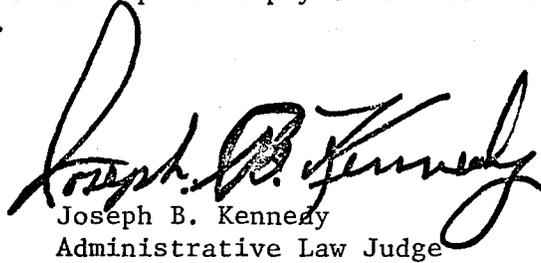
I take note of the fact that Rule 63(b) apparently contemplates the presiding judge "shall" issue an order of default "assessing the proposed penalties as final." Here the penalties proposed by the Assessment Office were \$620.00 for the ventilation violation and \$470.00 for the roof violation. Rule 29(b) and section 110(i) of the Act, however, require that "in determining the amount of penalty neither the Judge nor the Commission shall be bound by a penalty recommended by the Secretary or by any offer of settlement made by any party."

I construe Rule 29(b) and section 110(i) to require the Judge and the Commission to make an independent evaluation and de novo review of proposed penalties based on the evidence relating to the nature of the violation and the six statutory criteria. Since I find Rule 29(b) and section 110(i) govern the assessment of default as well as adjudicated penalties, I conclude the mandatory language of Rule 63(b) must be considered as inadvertent and the rule read in harmony with the governing terms of the statute. In this regard, I note that both the Commission and the Occupational Safety and Health Review Commission have construed the cognate penalty provisions of the two statutes 2/ as

2/ The language of the applicable provisions of the Occupational Safety and Health Act, 29 U.S.C. 666(i), tracks that of section 110(i) of the Mine Act.

permitting the judges and the Commissions to determine whether a contested penalty should be more or less than that proposed by the Secretary. Secretary v. Shamrock Coal Co., BARB 78-82-P, FMSHRC 79-6-5, 1 FMSHRC Decisions 469 (June 7, 1979); Long Manufacturing Co. v. Brennan, 554 F.2d 903, 908 (8th Cir. 1977); Brennan v. OSHRC, 487 F.2d 438, 441-442 (8th Cir. 1974).

Accordingly, it is ORDERED that respondent be, and hereby is, declared in DEFAULT. It is FURTHER ORDERED that a penalty of \$600.00 be, and hereby is, assessed and that respondent pay this amount on or before Monday, October 15, 1979.


Joseph B. Kennedy
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

SEP 27 1979

SECRETARY OF LABOR, : Application for Review
MINE SAFETY AND HEALTH : of Discrimination
ADMINISTRATION (MSHA), :
On behalf of: : Docket No. WEVA 79-148-D
ARNOLD J. SPARKS, JR., : Shannon Branch Coal Mine
Applicant :
v. :
ALLIED CHEMICAL CORPORATION, :
Respondent :

DECISION AND ORDER

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Applicant;
Marshall C. Spradling, Esq., Spilman, Thomas, Battle
& Klostermeyer, Charleston, West Virginia, for
Respondent.

Before: Judge Kennedy

This is a discrimination complaint brought pursuant to section
105(c)(2) of the Federal Mine Safety and Health Act, as amended,
30 U.S.C. § 815(c)(2), on behalf of Arnold J. Sparks, Jr., a miner
employed at Allied Chemical Corporation's Shannon Branch Coal Mine.

On March 28, 1978, MSHA inspector Cloy Blankenship performed a
"spot" ventilation inspection of respondent's mine pursuant to sec-
tion 103(i) of the Act. Before making his inspection, the inspector

informed William P. Lusk, an assistant mine foreman, that Arnold J. Sparks, Jr., was going to accompany him on the inspection as a representative of the miners. Mr. Lusk told Mr. Sparks that he would not be paid by Allied for his participation in the inspection. Mr. Sparks did participate in the inspection, and Allied refused to pay him for that participation. 1/

On May 23, 1979, the Secretary of Labor filed this complaint alleging respondent interfered with the exercise of the statutory rights of Mr. Sparks as a representative of the miners in violation of section 105(c)(1) of the Act. Applicant prays that Allied be ordered to cease and desist from refusing to pay representatives of miners for participating in inspections; that Allied be ordered to pay Mr. Sparks for his participation in the inspection on March 28, 1978, with interest at 9 percent; and that Allied be assessed an appropriate civil penalty for its interference with the exercise of rights protected by section 105(c) of the Act. On August 30, 1979, respondent filed a motion for summary decision and brief in support thereof pursuant to 29 CFR 2700.64 on the grounds that the statutory language, legislative history and case law interpreting the relevant sections of the Act demonstrate that as a matter of law Allied is not required to pay Mr. Sparks for his participation in a "spot" inspection made pursuant

1/ These are the material facts as disclosed in applicant's complaint and in respondent's motion for summary disposition. Paragraphs 4 and 5 of the complaint allege that the inspection at issue was a "spot" inspection. The Secretary neither admits nor denies that the inspection was made pursuant to section 103(i).

to section 103(i) of the Act. On September 10, 1979, the Secretary filed his opposition along with supporting briefs. There being no genuine issue as to the material facts, the matter stands ready for summary decision of the question of statutory construction presented.

At issue in this litigation is the extent of miners' walkaround rights, i.e., the right to accompany an inspector and to receive normal compensation while doing so. This right is recognized in section 103(f), 30 U.S.C. § 813(f), of the Act, which provides that a representative of the miners shall be given an opportunity to accompany an inspector for the purpose of aiding in the "inspection of any coal or other mine made pursuant to [section 103(a)]." 2/ Any such representative of the miners who is also an employee of the operator "shall suffer no loss of pay during the period of his participation in the

2/ Section 103(f), 30 U.S.C. § 813(f), of the Act provides:

"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. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with the subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

inspection." Respondent contends that there are certain types of inspections to which the right to compensation does not attach, in particular, spot inspections for extrahazardous conditions pursuant to the mandate of section 103(i).

The scope of the Secretary's mine inspection authority is delimited by section 103(a), 3/ which directs "frequent" inspection of all mines for four purposes: (1) to obtain information relating to health and safety conditions and the causes of accidents; (2) to gather information relating to mandatory standards; (3) to determine whether imminent dangers exist; and, (4) to determine compliance with mandatory standards, citations, orders, or decisions. With respect to imminent dangers and compliance, the Secretary is directed to inspect

3/ Section 103(a), 30 U.S.C. § 813(a), of the Act reads in pertinent part:

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

each mine "in its entirety at least" four times per year for underground mines and two times per year for surface mines. In addition to this minimum requirement for complete inspections, the Secretary is directed to establish guidelines for additional inspections based on his experience under the Mine Act "and other health and safety laws."

Thus, it is apparent that the substantive authority for carrying out inspections for the purposes of obtaining information and insuring compliance is to be found in section 103(a). The regular compliance inspections are to be carried out frequently, but, in no event less than two or four times yearly.

In addition to the minimum requirements for compliance inspections, two other subsections establish special procedures for triggering inspections for compliance and information. Section 103(g)(1) 4/ provides that at the request of a representative of the miners who has reasonable grounds to believe that a violation or imminent danger exists an immediate special inspection may be had. Section 103(i) 5/ provides for "spot" inspections for methane accumulations in gassy mines and for "other especially hazardous conditions" on an accelerated schedule.

4/ Section 103(g)(1), 30 U.S.C. § 813(g)(1), of the Act reads in pertinent part:

"Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

5/ Section 103(i), 30 U.S.C. § 813(i), of the Act reads:

"Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its

Respondent takes the position that the compensation right under section 103(f) extends only to the minimum of four mandatory inspections "of the mine in its entirety," and that any other or additional inspections are without the coverage of the section. Maintaining that these "regular" inspections are the "only inspections made pursuant to Section 103(a)" (Brief, p. 5), respondent asserts that only a representative of miners participating in such a "regular" inspection is entitled to be paid. Respondent claims that since the inspection giving rise to the instant complaint was made pursuant to section 103(i), and since "there is no requirement in Section 103(i) that the operator pay a representative of miners for participation in such a spot inspection" (id.), the miner Sparks is not entitled to compensation.

The Secretary, on the other hand, takes the position that the language of the compensation provision of section 103(f) clearly and unambiguously encompasses all inspections carried out for the

fn. 5 (continued)

operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, 'liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals."

purposes enumerated in the four clauses of the first sentence of section 103(a). Relying on the Interpretative Bulletin of April 25, 1978, 43 F.R. 17546, the Secretary maintains that the "inclusion of a statutory minimum number of inspections at each mine is no more than an additional requirement, clearly directed at the Secretary, which does not affect the participation right." 43 F.R. at 17547. Therefore, the Secretary concludes that because they are carried out for the purpose of obtaining information or determining whether imminent dangers, violations or especially hazardous conditions exist, the inspections triggered by sections 103(i) and (g)(1) "are clearly conducted 'pursuant to' section 103(a)." Id.

In support of its position, respondent cites two previous decisions by administrative law judges which concluded that operators are not required to pay employees who accompany MSHA inspectors on other than the "regular", i.e., entire mine inspections. Kentland-Elkhorn Coal Corporation v. Secretary of Labor, PIKE 78-339 (March 8, 1979), appeal pending; Secretary of Labor v. Helen Mining Company, PITT 79-11-P (April 11, 1979), appeal pending.

In Kentland-Elkhorn, an MSHA electrical specialist conducted an inspection of the operator's preparation plant. At the time of this inspection, another inspector was in the process of carrying out one of the "regular" inspections of the mine in its entirety. That

inspector was accompanied by a miner who was paid. The electrical specialist was also accompanied by a representative of the miners, and upon the operator's refusal to pay that miner, a citation and subsequently a withdrawal order issued. In a review proceeding, the operator contended that section 103(f) only grants miner representatives the right to participate in an inspection without suffering loss of pay during a "regular" inspection of the entire mine and since the inspection at issue was a spot electrical inspection, it had properly refused to pay the miner. The administrative law judge agreed with these contentions and held that the right to participate without loss of pay is limited to "regular" inspections of the entire mine.

A similar conclusion was reached in Helen Mining Company, supra, with respect to a spot inspection required by section 103(i). Since the mine involved in that case was particularly gassy, it had to be frequently inspected for possible accumulations of methane. The inspector involved had been in the process of making one of the "regular" inspections of the mine in its entirety during the previous 3 days, but he interrupted this inspection so that he could investigate areas where accumulations of methane might exist in order to determine whether those areas were adequately ventilated. The inspector was informed that the representative of the miners who accompanied him on the methane inspection would not be paid, whereupon a citation and subsequently a withdrawal order issued. At the hearing, the operator contended that section 103(f) only requires that the miner representative who participates in an inspection of the entire mine

must be paid. 6/ Again, the administrative law judge agreed with these contentions and vacated the citation and order.

Both these cases turned on the authority ascribed to certain remarks made by Congressman Perkins, Chairman of the Committee on Education and Labor. These remarks were made after the Conference Committee had made its final report and 21 days after the Senate had passed the bill. 7/ In attempting to clarify what he considered to be an ambiguity in this aspect of the Conference Report, he stated that:

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

6/ The operator's argument proves too much, because if accepted it would lead to the conclusion that the miner initially requested must accompany the inspector during the whole of the entire mine inspection. Recognizing that in many cases such complete inspections take a considerable amount of time, even weeks or months, it is unrealistic to assume that one particular miner would be assigned to accompany the inspector exclusively, especially considering that no one miner possesses the expertise to assist the inspector in investigating all the areas of a large and complex mine. 7/ The Conference Committee voted to accept the Conference Report on October 3, 1977 (Leg. Hist. at 1279), the Senate voted to accept the Conference Report on October 6, 1977 (Leg. Hist. at 1347), and a Concurrent Resolution to effect corrections was agreed to on October 17, 1979 (Leg. Hist. at 1351). It was not until October 27, 1977, that Congressman Perkins made his remarks to the House. (Leg. Hist. at 1354). There is no evidence that Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate.

Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess (July 1978) at 1357 (hereinafter cited as Leg. Hist.)

This seemingly unequivocal statement concerning the intended scope of section 103(f) was, however, followed by a comparison of the cognate provisions of the 1969 Act which indicates some possible confusion on Congressman Perkins' part. He recognized that section 103(a) of the 1969 Act did not include the provision directing the Secretary to "develop guidelines for additional inspections of mines based on criteria including, but not limited to, * * * his experience under this act and other health and safety laws." (Emphasis added.) He then correctly pointed out that the participation right section of the 1969 Act, section 103(h), provided that a representative of the miners may accompany an inspector on "any" inspection, but that the 1969 Act did not have a compensation provision. He then went on to state:

Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 act, but rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the Act. [Emphasis added.]

Leg. Hist. at 1358.

Thus, a fair reading of the whole of Congressman Perkins' statement concerning the seeming ambiguity found in section 103(f) indicates that his real concern was that the right to pay for exercise of

the walkaround right not be extended to the "additional inspections" permitted under the new section 103(a), but would be limited to the "frequent inspections" authorized and required by the first sentence of that section. Thus, it appears that when Congress limited the right to pay to inspections "pursuant to subsection (a)," it may have intended to exclude from that right inspections made under guidelines issued by the Secretary calling for "additional inspections," i.e., inspections other than those mandated by the statute. In other words, there are two categories of inspections, statutory section 103(a) inspections and nonstatutory Secretarial inspections. Congress may well have wished to protect the operators from an unlimited expansion of the right to pay based on "additional inspections" authorized only by the Secretary and particularly where they were for the purpose of aiding in the exercise of his responsibilities under "other health and safety laws."

Indeed, the greater weight of the legislative history supports this interpretation. First, it should be noted that the provision at issue was included in the Senate version of the bill and the Joint Explanatory Statement of the Conference Committee clearly indicates that "to encourage miner participation * * * one such representative of miners, who is also an employee of the operator, [shall] be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions. The conference substitute conforms to the Senate bill." Leg. Hist. at 1323. It is significant to note that nowhere in the Conference

Committee statement is the purported limitation on the compensation right advanced by Congressman Perkins discussed or alluded to.

In the Senate's consideration of the 1977 Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits, one of the managers of the bill, explained the critical importance of the walkaround right as part of a comprehensive scheme to improve both safety and productivity in the mines:

First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.

In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.

In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property go around with

an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

Leg. Hist. at 1054-1055.

Senator Williams, Chairman of the Committee on Human Resources, also discussed the importance of the walkaround right in the context of improving safety consciousness on the part of both miners and management:

It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

Leg. Hist. at 616-617.

In light of the broad policy expressed in the Act of protecting miners and making inspections more effective, it is difficult to understand why the isolated remarks of Congressman Perkins have been accorded so much weight. In contrast, similar remarks by other members of the House and Senate are conspicuous by their absence. It would seem that if Congress had intended by section 103(f) to create two separate categories of statutory walkaround rights, one compensable and one non-compensable, there would have been at least some debate on this departure from the general scheme of the Act.

Otherwise, there exists an arguably invidious discrimination.

In any event, it is questionable whether resort to legislative history has a place in the application of the statutory language in question. T.V.A. v. Hill, 437 U.S. 153, 184 n. 29 (1978). On its face, section 103(f) is clear and unambiguous, and therefore reliance on the explanatory comments of a single Congressman appears unnecessary. Schiaffo v. Helstoski, 492 F.2d 413, 428 (3rd Cir. 1974).

It has been consistently held that as a matter of statutory construction it is error to place undue emphasis on a portion of the legislative history where to do so sacrifices the object of the legislation. "Not even formal reports - much less the language of a member of a committee - can be resorted to for the purposes of construing a statute contrary to its plain terms." Committee for Humane Legislation v. Richardson, 414 F. Supp. 297, 308 (D.D.C. 1976), modified 540 F.2d 1141 (D.C. Cir. 1976); citing Pennsylvania Railroad Company v. International Coal Mine Company, 230 U.S. 184, 199 (1912); F.T.C. v. Manager, Retail Credit Company, 515 F.2d 988, 995 (D.C. Cir. 1975). It must be remembered that the proper function of legislative history is to resolve ambiguity, not to create it. United States v. Missouri Pacific Railroad Company, 278 U.S. 269, 278 (1929); Montgomery Charter Service v. W.M.A.T.A., 325 F.2d 230, 233 (D.C. Cir. 1963); Elm City Broadcasting Corporation v. United States, 235 F.2d 811, 816 (D.C. Cir. 1956).

It should be noted that these sections of the Mine Safety Act serve a broad remedial purpose, and as such should be given a liberal construction, and any asserted exceptions to those provisions should be given a strict, narrow interpretation. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 430 U.S. 938 (1975). Finally, when a statutory interpretation that promotes safety conflicts with one that serves another purpose, the first must be preferred. District 6, UMWA v. IBMA, 562 F.2d 1260, 1265 (D.C. Cir. 1977).

Accordingly, whether based on an analysis of the relevant legislative history or through application of accepted canons of statutory construction, I find that the reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of that subsection, and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of that subsection.

Conclusions of Law

1. Section 105(c)(1), the discrimination provision of the Act, which prohibits any form of interference with the exercise of the statutory rights of a miner or representative of miners is a proper vehicle for review of an operator's refusal to compensate a representative of miners pursuant to section 103(f).

2. The reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of section 103(a), irrespective of whether the particular inspection may have been triggered by section 103(i), and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of section 103(a).

3. Since the inspection at issue in this proceeding was made for the purpose of "obtaining information relating to health and safety conditions" including "especially hazardous" conditions authorized by both sections 103(a) and (i) of the Act, Mr. Sparks' participation was compensable under section 103(f).

4. Taking into consideration the six criteria for the assessment of civil monetary penalties, I find that a penalty for violation of section 103(f) of \$100 is consistent with the purposes and policy of the Act.

ORDER

WHEREFORE, IT IS ORDERED that:

1. Respondent CEASE AND DESIST from refusing to pay representatives of miners for participating in inspections made for the purposes of obtaining information relating to extrahazardous conditions under section 103(i) of the Act.

2. On or before Wednesday, October 31, 1979, respondent shall pay the civil penalty assessed in the amount of \$100.

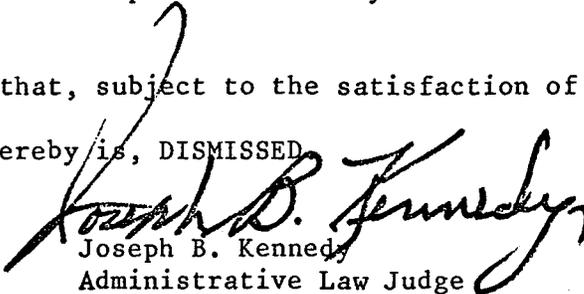
3. On or before Wednesday, October 31, 1979, respondent shall pay to Applicant, Arnold J. Sparks, Jr., back pay based on his regular hourly rate for the period of time involved in the inspection of March 28, 1978, with retroactive interest thereon of 9 percent (9%) from March 28, 1978, until the date of payment.

4. Counsel for the parties shall stipulate the dollar amount due under paragraph 3 of this order. If they are unable to stipulate such amounts within 15 days of this order, counsel may file herein proposed amounts due and, if necessary, a hearing shall be held on any issues relating to such proposals.

5. Within 10 days of payment of the amount due under paragraph 3 of this order, counsel for Applicant shall file herein a Satisfaction of Order reciting the amount paid.

6. Respondent shall, within 15 days of the date of this order, post a copy of this decision and order on a bulletin board at the Shannon Branch Coal Mine, where notices to miners are normally placed, and shall keep it posted there, unobstructed and protected from the weather, for a consecutive period of 60 days.

Finally, it is ORDERED that, subject to the satisfaction of the above, this matter be, and hereby is, DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

