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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-145
Petitioner : A.C. No. 40-02755-03533
v. :
 : Docket No. SE 92-146
FAITH COAL COMPANY, : A.C. No. 40-02755-03534
Respondent :
 : Docket No. SE 92-252
 : A.C. No. 40-02755-03535
 :
 : No. 15 Mine

DECISIONS

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Lonnie Stockwell, Owner, Faith Coal Company,
Palmer, Tennessee, pro se, 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 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 of \$876, for twelve (12) alleged violations of certain mandatory safety and health standards found in Parts 48, 70, and 75, Title 30, Code of Federal Regulations.

The respondent filed answers denying most of the violations, and advancing certain mitigating circumstances with respect to the cited conditions or practices, including a claim that the financial condition of the company, which is a sole proprietorship owned and operated by Mr. Lonnie Stockwell, as well as Mr. Stockwell's personal financial situation, precludes the payment of any civil penalty assessments for the violations in question.

A consolidated hearing was convened in Chattanooga, Tennessee, and the parties appeared and participated fully therein. The parties waived the filing of posthearing briefs,

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and they were permitted to present arguments on the record in the course of the hearing in support of their respective positions. I have considered their arguments in the course of my adjudication of these matters.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801, et seq.
2. Sections 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Issues

The issues presented in these proceedings are (1) whether the cited conditions or practices constitute violations of the cited mandatory safety or health standards, (2) whether several of the alleged violations were "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. The one principal issue presented is whether or not the respondent has established that it is financially unable to pay any of the civil penalties assessed in these proceedings, and whether the payment of such penalties will affect its ability to continue in business.

Stipulations

The parties stipulated to the following (Tr. 4-6, 20):

1. The respondent and the No. 15 Mine are subject to the jurisdiction of the Act, and the presiding judge has jurisdiction to hear and decide these matters.
2. The respondent's annual coal production is approximately 11,691 production tons, and the No. 15 mine has an annual coal production of 8,016 tons.
3. The respondent is a small underground coal mine operator and presently operates only one mine, namely the No. 15 mine.
4. All of the citations issued in these proceedings were timely abated by the respondent in good faith either within or prior to the times fixed by the inspectors who issued them.

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Discussion

Docket No. SE 92-145

This case concerns two alleged violations issued by MSHA Inspector Archie L. Coburn, Jr., on November 19, 1991, and they are as follows:

Section 104(a) non-"S&S" Citation No. 3395619, cites an alleged violation of 30 C.F.R. 70.204(d)(1), and the cited condition or practice states as follows (Exhibit J-2):

Suitable examinations of the respirable dust pump are not being made by the certified person. A voltage meter is not available to test the battery of the respirable dust pump to assure that proper voltage is provided. This was learned through the interview with the operator during a CBE type inspection.

Section 104(a) non-"S&S" Citation No. 3395620, cites an alleged violation of 30 C.F.R. 75.1712-4, and the cited condition or practice states as follows (Exhibits J-3 and P-1):

The bathhouse waiver for this mine was not being complied with in that no sanitary toilet facilities were provided. As stipulated on cover sheet of bathhouse waiver.

Docket No. No. SE 92-146

This docket includes six (6) alleged violations issued by MSHA Inspector Archie L. Coburn, Jr., and they are as follows:

Section 104(a) "S&S" Citation No. 3395610, November 5, 1991, as modified, cites an alleged violation of 30 C.F.R. 75.1704-2(c)(2), and the cited condition or practice state as follows (Exhibit J-4):

The results of examinations of emergency escapeways and facilities fire doors and for smoking articles were not recorded in the approved book. Last entry 10-21-91.

Section 104(a) "S&S" Citation No. 3395611, November 5, 1991, cites an alleged violation of 30 C.F.R. 75.306, and the cited condition or practice states as follows (Exhibit J-5):

The results of weekly examinations for methane and hazardous conditions were not recorded in the approved book. Last entry 10-24-91.

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Section 104(a) "S&S" Citation No. 3395612, November 5, 1991, as modified, cites an alleged violation of 30 C.F.R. 75.512, and the cited condition or practice states as follows (Exhibit J-6):

The required record book for examination of electrical equipment was not available at the mine for inspection by an authorized representative of the Secretary and to the miners.

Section 104(a) "S&S" Citation No. 3395613, November 5, 1991, cites an alleged violation of 30 C.F.R. 70.210(b), and the cited condition or practice states as follows (Exhibit J-7):

The results of the last bi-monthly respirable dust survey run at the mine was not posted on the mine bulletin board.

Section 104(a) "S&S" Citation No. 3395617, November 18, 1991, cites an alleged violation of 30 C.F.R. 75.316, and the cited condition or practice states as follows (Exhibit J-8):

The No. 2 entry on the 001-0 section was advanced 20 feet in by the last open crosscut, and a deflector curtain was not provided as required by the approved ventilation methane and dust control plan.

Section 104(a) "S&S" Citation No. 3395618, November 18, 1991, cites an alleged violation of 30 C.F.R. 75.301, and the cited condition or practice states as follows (Exhibit J-9):

The required 3,000 CFM of air was not maintained in the No. 3 entry on the 001-0 section where coal was being loaded with a Elkhorn AR4 scoop, in that only 2,430 CFM could be measured.

MSHA Inspector Larry J. Anderson issued the following two violations.

Section 104(a) "S&S" Citation No. 3395347, December 2, 1991, cites an alleged violation of 30 C.F.R. 75.1704-2(c)(2), and the cited condition or practice states as follows (Exhibit J-10):

Dates, time and initials had not been placed at various locations in the 001 section immediate return escapeway which would indicate the area had been examined by a certified person.

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Section 104(a) "S&S" Citation No. 3395348, December 3, 1991, cites an alleged violation of 30 C.F.R. 75.523, and the cited condition or practice states as follows (Exhibit J-11):

The panic bar installed on the Elkhorn battery powered tractor S.N. 73-87 was not maintained in an operative condition in that the panic bar had been damaged and could not be depressed enough to deenergize the tram motor on the machine.

MSHA Inspector Clyde J. Layne issued Section 104(a) "S&S" citation No. 3395579, on December 2, 1991, citing an alleged violation of 30 C.F.R. 75.208, and the cited condition or practice states as follows (Exhibit J-12):

Safety precautions were not being maintained to prevent persons from traveling inby permanent supports in the first left place in the No. 1 entry. The cut of coal had been cleaned up and a visible warning or a physical barrier was not posted at the end of the permanent roof supports. The face of the place was approximately 9 feet inby the last permanent support.

Docket No. SE 92-252

Section 104(g)(1) Order No. 3395455, issued by MSHA Inspector Tommy D. Frizzell on September 26, 1991, cites an alleged violation of mandatory training standard 30 C.F.R.

48.28(a), and the cited condition or practice states as follows:

James Stockwell, observed performing duties at the surface area of the underground mine, has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Stockwell has not received the annual refresher training. In the absence of such training, James Stockwell is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

Testimony and Evidence. Docket No. SE 92-145

Citation No. 3395619. 30 C.F.R. 70.204(d)(1).

MSHA Inspector Archie Coburn testified about his experience, including ten years of private industry coal experience as an electrician and equipment operator. He confirmed that he was at the mine on November 19, 1991, to perform a respirable dust technical investigation, and during an interview with mine operator Lonnie Stockwell it was revealed that he did not have a voltmeter to check the battery voltage on the respirable dust

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sampling pumps as required by the regulation. The pumps are owned by the Tennessee Consolidated Coal Company, but Mr. Stockwell maintains them. The regulation requires that the pumps be maintained and calibrated by a certified person, and Mr. Stockwell is certified to take care of the pumps. The voltage meter serves to check the voltage on the pumps prior to and after a respirable dust survey is made. Mr. Coburn did not know how long the violation existed, and he stated that Mr. Stockwell admitted that he did not have the type of meter necessary to check the pumps (Tr. 13-15).

Mr. Coburn believed that Mr. Stockwell would be expected to know about a voltage meter because he is certified by MSHA to taken respirable dust samples, is a certified electrician, and has been trained to use and calibrate the pumps (Tr. 15). Mr. Coburn explained the importance of maintaining the pumps and insuring the proper voltage. He confirmed that different types of voltage meters are used at mines that could be equipped with a charging plug to check the pump voltage, but no such meter was available at the time the citation was issued (Tr. 16).

Mr. Coburn confirmed that there were no dust pumps at the mine at the time of the inspection because Mr. Stockwell had already submitted his bimonthly samples and returned the pumps to Tennessee Consolidated. He also confirmed that Mr. Stockwell had requested that company to examine the pump batteries from the last calibration date, but had not as yet received the examination records (Tr. 16-17). Mr. Coburn stated that he used a spare pump to check the pump calibration and Mr. Stockwell's ability to calibrate the pumps (Tr. 18).

Mr. Coburn confirmed that the violation was not significant and substantial, that it resulted from a moderate level of negligence, and that it was abated within an hour and fifteen minutes with a minimal amount of time and cost (Tr. 19).

On cross-examination, Mr. Coburn could not recall Mr. Stockwell advising him that he did not understand the question asked of him concerning the availability of a voltage meter. Mr. Coburn stated that Mr. Stockwell told him that he did not have a voltmeter capable or adapted to charge a dust pump, but that after he had written the citation Mr. Stockwell produced a voltmeter with a charging plug, and proceeded to test the pump to his satisfaction. Mr. Coburn then terminated the citation (Tr. 21-27).

Mine Operator Lonnie Stockwell testified that he keeps all of his electrical equipment, including test meters, at the "stove room building" at the mine site, and he contended that he misunderstood Mr. Coburn's inquiry about the availability of a voltmeter for testing the respirable dust pumps. Mr. Stockwell stated that after their initial conversation, Mr. Coburn left the

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mine office, which is in a separate building, and went to his truck. Mr. Stockwell stated that he then realized what Mr. Coburn had asked him and he proceeded to the electrical storage building, picked up a meter, and went to the truck and showed it to Mr. Coburn and demonstrated to him that it would work. Mr. Coburn described the meter as an inexpensive "radio shack item" which was in the shop (Tr. 33-35).

On cross-examination, Mr. Stockwell explained the different methods used to test the dust pumps, and he confirmed that he had to unplug one set of leads from the voltmeter he produced for Mr. Coburn and replace them with another set of leads, and he explained how that meter is used, and confirmed that Mr. Coburn may have given him suggestions as to how to adapt the voltmeter so that he could use it to test the dust pump voltage (Tr. 38-42).

Citation No. 3395620, 30 C.F.R. 75.1712-4.

Inspector Coburn stated that he issued the citation because sanitary toilet facilities were not provided at the mine as required by the bathhouse waiver granted to the respondent on October 15, 1990 (Exhibit P-1). He confirmed that the mine operates one shift per day and that six to ten people work on the shift (Tr. 44). He testified that the nearest sanitary toilet facility was located 300 to 400 yards off mine property at another adjacent mine site operate by the T&G Coal Company. He confirmed that pursuant to the waiver, the respondent was not required to have a full shower or bathhouse facility, but had to have a sanitary toilet facility consisting of a fully flush toilet or a chemical toilet known as a "Port-o-pot" (Tr. 46).

Mr. Coburn stated that there was no flush toilet facility at the mine, but he did observe a "Port-o-pot" chemical toilet that was still in the shipping box, and it was not in place or operational so that it could be used (Tr. 47). He observed that Mr. Stockwell had begun to install a partition in the trailer where the "stove room" was located in order to provide privacy when the toilet was set up, and Mr. Coburn confirmed that he terminated the citation when Mr. Stockwell began working on the partition. He confirmed that Mr. Stockwell now rents a sanitary toilet facility for the mine (Tr. 48).

Mr. Coburn confirmed that the violation was not significant and substantial, and that it resulted from a moderate negligence level. He confirmed that when he asked to see the sanitary toilet facility, Mr. Stockwell showed him the "Port-o-pot" which was still in the box. The top was off the box, but the toilet was still wrapped in plastic and there were no chemicals to activate it. He confirmed that the partial walls and a roof were under construction to provide privacy for the men once the toilet was installed and made operational (Tr. 50).

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On cross-examination, Mr. Coburn stated that he did not see the toilet paper which Mr. Stockwell contended was on top of a refrigerator in the trailer (Tr. 52). In response to further questions, Mr. Coburn stated that he issued the citation because of the lack of toilet privacy and chemicals, and the fact that the portable facility was not in service and ready for use. He believed it had to be ready for use at any time, and not just when someone wished to use it. He confirmed that the portable toilet which he observed was still in the crate, and it was the only one he saw on the mine surface (Tr. 55).

Mr. Stockwell testified that a roll of toilet paper was on top of the refrigerator in the building where the portable toilet was located, and he stated that water was available for use with the toilet but that none was placed in it at the time because it was winter and the building is not heated at night and the water could freeze. He believed that privacy could be maintained by simply closing the door to the building, and that heat and soap and water are provided during the work shift. He stated that he knew of nothing else that he could do to be in compliance with the law (Tr. 56-57).

Mr. Stockwell denied that the portable toilet was still in the shipping crate as contended by the inspector. He stated that he purchased the toilet used and that it was not in a box. He had it wrapped in a "green garbage sack" as a convenient way to keep it clean and dust free, and when it needed to be used "you just pull the garbage sack away from the side of it and you got a clean facility to use" (Tr. 57). He described the toilet as a self-contained device that can be lifted by one person, and when it is used, water and a deodorizer are poured inside. He stated that no chemicals are used, and that after someone uses the toilet, the contents are taken out and disposed of, and it is washed out and made ready for use again. He confirmed that there is no running water available, but that a bucket of water is made available, and he is in the process of trying to obtain running water (Tr. 58-59).

On cross-examination, Mr. Stockwell explained his understanding of a "sanitary toilet facility", and he believed that the portable toilet in question satisfied the waiver requirements (Tr. 62-64). He reiterated that he purchased the toilet as a used device from another mine operator and that he took it home and cleaned it up and placed it in the garbage bag to keep it clean (Tr. 70-71).

Inspector Coburn was recalled by the presiding judge, and he did not dispute Mr. Stockwell's assertion that the toilet was in a green bag. Mr. Coburn confirmed that it was not in a wooden crate, and he saw no packing materials, but he reiterated that the toilet was not set up for use. He confirmed that the toilet could have been used if chemicals were provided (Tr. 73).

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Testimony and Evidence, Docket No. SE 92-146

Citation No. 3395612

Mr. Stockwell conceded that the electrical equipment examination record book in question was not at the mine at the time of Mr. Coburn's inspection on November 5, 1991. Mr. Stockwell asserted that he had taken the book home with him in order to make certain entries after completing a prior work shift and that he inadvertently forgot to bring it back to the mine with him when he returned to work. He further asserted that he told the inspector that he could drive home to obtain the record book and immediately return to the mine with the book but that the inspector took the position that since the book was not available at the mine the violation existed and a citation would have to be issued.

MSHA's counsel asserted that if called to testify the inspector would testify that he had no recollection that Mr. Stockwell offered to drive home to retrieve the record book in question and that since the book was not at the mine site for his review a violation occurred (Tr. 76-78).

After further discussions, the parties decided to settle this alleged violation, and the solicitor agreed that the citation should be further modified to reflect a non-"S&S" citation (as originally issued) and that the proposed \$54 penalty assessment would be reduced to \$20. Both parties agreed to this proposed disposition (Tr. 78).

Citation No. 3395613

Mr. Stockwell conceded that the results of the last bimonthly respirable dust survey were not posted on the mine bulletin board at the time of the inspection by Mr. Coburn on November 5, 1991. However, Mr. Stockwell asserted that the survey results were posted on the bulletin board prior to the inspection but that he removed the document in order to prepare a response and to communicate an error in the test results to MSHA's Birmingham, Alabama office. Mr. Stockwell further asserted that the document was in his vehicle parked outside the mine and that he informed the inspector of this but the inspector took the position that since the results were not posted on the bulletin board as required when he conducted his inspection the violation existed.

After further discussion and consultation by the parties, they informed me that they proposed to settle this citation and they agreed it should be modified to a non-"S&S" citation, and that the penalty should be reduced from \$54 to \$20 (Tr. 78-80).

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With regard to the remaining citations in this case, Mr. Stockwell stated that he did not wish to dispute the fact of violations, and he agreed that all of the conditions and practices described by the inspectors on the face of each of the citations accurately reflect the conditions cited by the inspectors as violations. Further, Mr. Stockwell waived the presentation of any evidence or testimony rebutting the inspector's findings concerning each citation, and he stated that he would accept them as written, and that he wished to rely on his contention that he is financially unable to pay any civil penalty assessments, and that the payment of said penalties will adversely affect his ability to continue in business (Tr. 80-82; 85-87; Exhibits J-4, J-5, J-8 through J-12, P-3).

Testimony and Evidence. Docket No. SE 92-252.

MSHA Inspector Tommy D. Frizzell testified as to his experience and training, and he confirmed that he issued the section 104(g)(1) order withdrawing James Stockwell from the mine until he received his required annual refresher training (Exhibit J-13; Tr. 189-90). He explained that on September 25, 1991, he observed Lonnie Stockwell's brother James performing mine duties that he had not been trained to do, and he confirmed that when he reviewed the training records at the mine he could not find a form verifying that James had received his annual refresher training. Mr. Frizzell stated that Lonnie Stockwell informed him of his belief that the training Forms 5023 were at his home and that he had a need for the forms in connection with some court litigation, and that he would bring them to the mine the next day. Mr. Frizzell was aware of the litigation and he gave Lonnie Stockwell an opportunity to produce the records the next day (Tr. 91-91).

Mr. Frizzell stated that on September 26, 1991, he again asked Mr. Stockwell to produce the training records, and Mr. Stockwell informed him that he did not know what he had done with them. Mr. Frizzell stated that he called the state training office which trains miners for Mr. Stockwell and most of the other area mines, and he was told that there was no record that James Stockwell had received any training the prior year. Mr. Frizzell confirmed that James Stockwell would normally receive a training card and a copy of Form 5023, but he could not produce any evidence that he had received training. Mr. Frizzell further confirmed that he did not ask James Stockwell if he had been trained, but that another inspector who was with him did, and James stated that he had received no training for approximately two years (Tr. 94).

Mr. Frizzell stated that he observed James Stockwell operating a front end loader, and that he was also dumping coal cars and had to walk between them to uncouple them. He was also performing surface maintenance work. After informing Lonnie

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that James could not work until he received his training, James became upset and left the mine, and Lonnie stated that he could not work the mine without James on the surface. Lonnie offered to train James at his home, but Mr. Frizzell informed him that he would have to monitor the training because he did not know if Lonnie had the required training materials (Tr. 95-96).

Mr. Frizzell stated that Lonnie Stockwell has a training instructor's card, but does not have the training facilities or the necessary videos and materials, and he only does task training and newly employed miner training. Annual refresher training is done by the state (Tr. 97). Mr. Frizzell reiterated that Lonnie Stockwell could not produce any records verifying that James had received the required annual refresher training. He confirmed that the order was terminated on September 30, 1991, after Lonnie brought him a copy of the training forms from the state training department verifying that James had been trained (Tr. 98).

Mr. Frizzell stated that he based his "S&S" finding on his belief that without the required training, James would be a hazard to himself or someone else, and that if he continued working and an accident occurred, it would be serious because he performs hazardous surface work (Tr. 98). Mr. Frizzell confirmed that he based his "high negligence" finding on the fact that Lonnie Stockwell has known about the training requirements for several years, has trained his men, and had everyone else take annual refresher training except James. Mr. Frizzell believed that Lonnie knew or should have known that James had not been trained (Tr. 99).

In response to further questions, Mr. Frizzell stated that Mr. Lonnie Stockwell had training records at the mine for all of his other employees except for his brother James, and after initially telling him that he had the records at home, Lonnie could not produce them the next day (Tr. 102).

On cross-examination, Inspector Frizzell confirmed that Mr. Lonnie Stockwell was qualified to provide the full range of training for his employees, including retraining (Tr. 103). In the course of further cross-examination, Mr. Stockwell produced his mine training record books, and pointed out that when he moved to the No. 15 mine on May 14, 1990, from another mine, he was told that he would have to give the employees newly employed experienced miner training because they were working at a new site, and that this retraining would be good for one year. He produced a copy of an MSHA Certificate of Training From 5000-23, showing that James Stockwell received Newly Employed, Experienced Miner training on May 14, 1990, and another training certificate form showing the James Stockwell received annual refresher training on November 17, 1990, which would have been well within

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the 12-month period expiring on November 17, 1991, approximately two months after the order was issued by Mr. Frizzell. Mr. Stockwell confirmed that the copies he produced were made from the original training record books that he produced for examination by Mr. Frizzell and MSHA's counsel, as well as the presiding judge (Tr. 103-107; Exhibit R-1). Mr. Stockwell further explained his training record keeping procedures (Tr. 107-109).

Inspector Frizzell confirmed that he had not previously seen the training records produced by Mr. Stockwell in court, and he confirmed that had the records been produced by Mr. Stockwell at the time of the inspection, he would not have issued the violation in question because the respondent still had two months to go before the training certificate for James Stockwell expired (Tr. 111). Mr. Frizzell further confirmed that the violation would have been vacated during the conference stage had Mr. Stockwell produced his records at that time (Tr. 118).

Mr. Stockwell explained that he could not produce the training books in question at the time of the inspection because he was in the midst of litigation over a training grievance and the records were with his attorney at that time, rather than at his home as he had initially thought, and it took him some time to find the record books (Tr. 111). Mr. Stockwell described his brother James as "contrary" and "doesn't like people telling him what to do" (Tr. 112). From these reasons, he decided to train James himself to avoid problems, and he believed that he trained him adequately (Tr. 113).

Mr. Stockwell further explained his failure to produce his training records earlier in this litigation, including the time when he and the solicitor were in pretrial discussions, and he stated that he failed to do so because he had no confidence that he would be treated fairly, and his lack of trust in the "system" because he had previously been unsuccessful in pleading his case to the inspector's superiors on two occasions when he participated in MSHA conferences (Tr. 114-120). Mr. Stockwell reiterated that he could not find his training records at the time Inspector Frizzell issued the order, and in order to terminate the order so that he would not lose the crucial work performed by his brother James, his brother was again trained on September 30, 1991 (Tr. 121, Exhibit R-1).

After an opportunity to examine the training records produced in court by Mr. Stockwell, the Solicitor questioned Mr. Stockwell about his record keeping practices, the entries made on the training certificate forms kept in the books, the training that he administered to his employees at the mine, and the training they received from the state training office

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(Tr. 125-130). Mr. Stockwell conceded that he "was wrong" in not apprising the solicitor earlier that he had found the records (Tr. 130). Mr. Stockwell further explained as follow at (Tr. 131):

A. -- I didn't have any place -- I had never met you until this morning, I talked to you on the phone several occasions and your predecessor I talked to on the phone the same way, I shared a lot of information with, that come when we had the other hearing in court and it was -- I give my defense to the end, that's the way I looked at it, and so, I was afraid to give it to you. I guess the bottom line is I had already been through Mr. Frizzell's supervisor on two or three occasions and not got any help, and I had a bad experience with the Solicitor's Office and I guess I grouped you in with it and I apologize fore that, I shouldn't have done that, because I should have trusted you on your own merit and I didn't do it.

And, at (Tr. 186):

MR. STOCKWELL: Again I apologize for the way I mishandled the last citation, not trusting the system and I guess that's really what it boils down to and I apologize to you and I will apologize to Mr. Frizzell. I am sorry I handled it so crudely and I hope you will accept my apology.

Mr. Stockwell further explained his failure to produce his training records earlier, and he denied that he withheld the records until the day of the trial in this case "to get even" with MSHA (Tr. 136-140). The solicitor asserted that she had no reason to believe that the training records and documents produced by Mr. Stockwell for the first time in court were not legitimate, and she had no reason to believe that they had been falsified (Tr. 135-136). However, counsel pointed out that Mr. Stockwell chose not to share these records with her or the inspector prior to the hearing, and that if he had done so, the order would have been vacated and she would not have expended trial preparation time in prosecuting the case. Under the circumstances, counsel requested that Mr. Stockwell be assessed costs for the time she spent in litigating the contested order (Tr. 135).

Findings and Conclusions

Docket No. SE 92-145

Fact of Violation. Citation No. 3395619.

The respondent is charged with a failure to make suitable examinations of its respirable dust pumps in that it failed to provide a voltage meter for the testing of the pump batteries to

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assure that proper voltage was provided. The cited mandatory standard, section 70.204(d)(1), requires the testing of the respirable dust testing device (pump) battery while under actual load to assure that the battery is fully charged. Since Mr. Stockwell could not initially produce a voltage meter capable of testing the pump batteries at the time the inspector inquired about the availability of the meter, and apparently indicated to the inspector that he did not have one, the inspector assumed that a meter was not available for use in testing the pumps during the required testing cycle, and that the pump batteries were not being testing as required by the standard. Under these circumstances, the inspector proceeded to issue the citation.

The inspector confirmed that Mr. Stockwell showed him a voltage meter after the citation was written, but he indicated that the meter was a normal production ohm meter used for testing circuits, and that following his suggestions, Mr. Stockwell had to make certain modifications to render the meter capable of testing a dust pump battery. After satisfying himself that Mr. Stockwell was capable of testing a pump battery with the modified voltage meter, the inspector accepted this as abatement and terminated the violation before leaving the mine. The inspector confirmed that the meter was not in its modified form when he issued the citation (Tr. 27).

Mr. Stockwell admitted that he told the inspector that he did not have a voltage meter capable of testing a dust pump battery available at the mine, but he claimed that he misunderstood the inspector's inquiry. He stated that after he realized what the inspector was looking for, he obtained a voltage meter from his electrical supply building, and after equipping it with a charging plug suitable for testing a pump battery, he took it to the inspector and showed it to him. Mr. Stockwell admitted that he had to modify the meter by changing the test leads and wires and rotating the meter dial to the proper voltage and current, and he did not deny that the modifications were made at the suggestion of the inspector (Tr. 39-40).

After careful consideration of all of the evidence and testimony, I conclude and find that the petitioner has established a violation. I cannot conclude that the inspector acted unreasonably in issuing the citation after Mr. Stockwell informed him that he did not have a voltage meter capable of testing a dust pump battery. Although I do not totally disbelieve Mr. Stockwell's testimony that he was confused about the question asked of him by the inspector, as a qualified electrician and an MSHA approved qualified person to make the tests, I am not convinced that Mr. Stockwell was totally oblivious to what was required under the law. Further, since the available voltage meter which was produced by Mr. Stockwell had to be modified to render it capable of testing the voltage on the

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dust pump batteries, and since it was not in its modified state ready for use for that purpose at the time the inspector proceeded to issue the citation, I conclude and find that a violation has been established. Accordingly, the contested citation IS AFFIRMED.

Citation No. 3395620

The respondent here is charged with a violation of mandatory standard section 75.1712-4, for failing to provide a sanitary toilet facility in accordance with a previously obtained bathhouse waiver for the mine. Section 75.1712-4, provides for the waiver of any or all of the bath house and toilet facilities standards found in sections 75.1712-1 through 75.1712-3, and it states as follows:

The Coal Mine Safety District Manager for the district in which the mine is located may, upon written application by the operator, waive any or all of the requirements of 75.1712-1 through 75.1712-3 if he determines that the operator of the mine cannot or need not meet any part or all of such requirements, and, upon issuance of such waiver, he shall set forth the facilities which will not be required and the specific reason or reasons for such waiver.

The respondent was granted a waiver pursuant to section 75.1712-4, on October 15, 1990 (Exhibit P-1). The waiver was granted because (1) the development of a private water supply and sanitary waste disposal program was not practical, (2) it was not practical to construct a central bathhouse and change room, (3) all employees signed a statement agreeing that the waiver should be granted, (4) facilities were not available through a third party, and (5) adequate drainage facilities were not available or practical to provide. However, the waiver was subject to the following stipulation which appears in a Note under Item #8, and it states as follows:

This waiver is issued because it is impracticable for the operator to construct the necessary facilities now. This waiver is issued with the stipulation that sanitary toilet facilities approved under Section 71.500(a), 30 C.F.R. 71, will be provided at each surface worksite.

Section 71.500(a), requires a mine operator to provide and install at least one sanitary toilet, together with an adequate supply of toilet tissue, in a location convenient to each surface work site. During oral argument, petitioner's counsel took the position that the portable toilet was still in its packing box and was not available or installed and ready for use. In support

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of this position, counsel asserted that the toilet was still in its packing crate with plastic packing around it and styrofoam packing material on top of it, and that it was sealed as if ready for shipping. Counsel also pointed out that the inspector found no toilet paper available, that privacy was not provided for anyone using the toilet, and the toilet was not provided with chemicals to treat the sewage (Tr. 64-70).

Inspector Coburn initially testified that when Mr. Stockwell showed him the portable toilet, it was still in the shipping box, but the box was not sealed and the top was off, and the toilet was wrapped in plastic (Tr. 47, 49). Mr. Coburn also testified that he observed no toilet paper in the trailer where the toilet was located, there were no chemicals added to the toilet, and there was no place to use the toilet in private. Under these circumstances, the inspector did not believe that the toilet was in service and ready for use at any time, and he concluded that it did not constitute an installed sanitary toilet facility pursuant to section 71.500(a), as provided in the waiver.

I find nothing in section 71.500, that defines or explains what constitutes an installed sanitary toilet facility, nor do I find any regulatory requirement that such a facility must be installed to afford privacy, or that chemicals must be provided to treat any toilet waste. Although the "Note" found in section 71.500, states that sanitary toilet facilities for surface work areas of underground mines are subject to the provisions of section 75.1712-3, those requirements are included in the waiver granted the respondent. In any event, section 75.1712-3, only requires that a sanitary toilet facility be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and that it be maintained in a clean and sanitary condition.

Inspector Coburn defined a "sanitary toilet facility" as either a "fully flush toilet or a chemical toilet facility" commonly known as a "Port-o-Pot" (Tr. 46). In response to a question as to what needed to be done to install such a toilet for use, he explained that chemicals needed to be added, and a place had to be provided for its use "because the building that Mr. Stockwell is referring to is a van trailer where men stay in the morning to try and stay warm" (Tr. 72). Petitioner's counsel stated that "If it was in a green bag for toting in and out then perhaps it was installed, but if it was still in the packing crate with the original packing materials and stabilizing material for shipping it then it is our position it wasn't installed" (Tr. 70). Mr. Coburn confirmed that he terminated the citation after Mr. Stockwell started construction of a wall to provide privacy for the use of the toilet, and provided water and chemicals to be used with the toilet (Tr. 74).

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Mr. Stockwell testified that a roll of toilet paper was available in the trailer where the toilet was located, and he confirmed that the toilet was the same kind that he had available underground and on the surface for at least two years prior to the inspection by Mr. Coburn, and that it was the kind of toilet that "has been accepted for years at every mine around there" (Tr. 63). He further testified that water was available for the toilet when it was used, and that he provided soap and water for hand washing, and that the trailer had heat and light, and that privacy could be provided by simply shutting trailer the door (Tr. 56). Mr. Stockwell denied that the toilet was still in a shipping crate, and he explained that he purchased it in a "used" condition and cleaned it up and placed it in a plastic garbage bag to keep it clean and dust-free. He also explained that it was not a chemical toilet as such, and that in order to use it, water and a deodorizer would be poured into the self-contained toilet, which could be lifted by one person, and after it was used, it would be emptied and washed out and made ready to be used again (Tr. 58).

Inspector Coburn admitted that the portable toilet was not packed in a shipping box or crate (Tr. 72), and he did not rebut Mr. Stockwell's contention that he had purchased the toilet as a used unit and that he cleaned it up and placed it in a garbage bag to keep it clean and dust-free. Although Mr. Coburn testified that he did not see any toilet paper available, I find Mr. Stockwell's testimony to the contrary to be more credible and believable.

As noted earlier, the respondent is charged with a violation of section 75.1712-4. However, I find nothing in that regulation which imposes any mandatory duties or obligations on a mine operator with respect to a sanitary toilet facility. The regulation simply authorizes MSHA's district manager, upon application by the mine operator, to grant a waiver, and if he does, the manager is required to identify the facilities which are not required and the reasons for the waiver.

The cited condition or practice alleges that the respondent failed to comply with the waiver granted by the district manager by not providing a sanitary toilet facility as stipulated on the cover sheet of the waiver. The waiver signed by the district manager, MSHA Form 2000-88, contains a stipulation indicating that the waiver was issued on the condition that the respondent would provide a sanitary toilet facility approved under section 71.500(a). Although the respondent has not been charged with a violation of section 71.500(a), I assume that the theory of the petitioner's case is that the alleged failure by the respondent to provide a sanitary toilet facility which meets the requirements of section 71.500(a), constitutes a violation of the waiver which was conditioned on compliance with that regulation, as well as a violation of that regulation itself.

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The mandatory language found in the first sentence of section 71.500(a), requires an operator to provide and install an approved sanitary toilet, together with an adequate supply of toilet tissue, in a location convenient to each surface work site. On the facts of this case, I find no evidence to establish that the portable toilet or "Port-o-pot" in question, was not an approved piece of equipment. I conclude and find that the credible testimony of the respondent establishes that the portable toilet was provided, and that it was located in a convenient surface work site location, and that an adequate supply of toilet tissue was provided. However, absent any credible evidence of any MSHA guidelines or regulatory requirements dealing with the installation of a sanitary toilet, I cannot conclude that the petitioner has carried its burden of proof and has established a violation of the waiver granted the respondent. In short, I am not convinced by the petitioner's evidence that the portable toilet in question was not installed as required by the waiver which incorporates section 71.500(a), by reference. Under the circumstances, the citation IS VACATED.

Docket No. SE 92-146

Fact of Violation. Citation No. 3395612.

Mr. Stockwell did not rebut the fact that the required electrical inspection book was not at the mine and available for the inspector's review as required by the cited section 75.512. I conclude and find that the petitioner has established a violation and the citation IS AFFIRMED.

The parties agreed to a proposed settlement of this violation, and they agreed that the citation should be modified to a non-"S&S" citation, and that the initial proposed civil penalty assessment of \$54 should be reduced to \$20 (Tr. 78). The proposed settlement IS APPROVED, and the citation is modified as a non-S&S citation.

Citation No. 3395613.

Mr. Stockwell conceded that the results of the last bimonthly respirable dust survey were not posted on the mine bulletin board at the time of the inspection. The cited section 70.210(b), requires the posting of the results of the survey upon receipt by the operator, and for a period of 31 days. Since they were not posted, I conclude and find that a violation has been established, and the violation IS AFFIRMED.

The parties agreed to a proposed settlement of this violation, and they agreed that the citation should be modified to a non-S&S citation, and that the proposed penalty assessment of \$54 should be reduced to \$20. The proposed settlement IS APPROVED, and the citation is modified to a non-S&S citation.

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Citation Nos. 3395610, 3395611, 3395617, 3395618, 3395347, 3395348, and 3395579.

As noted earlier, the respondent waived its right to present any evidence or testimony to rebut the findings of the inspectors with respect to these citations. Mr. Stockwell stated that he accepts the citations as written and issued by the inspectors, and that he does not dispute the violations and agreed that all of the conditions and practices noted by the inspectors accurately reflect the prevailing conditions or practices at the time of the inspections. Under the circumstances, all of these citations and violations ARE AFFIRMED.

Docket No. SE 92-252

Fact of Violation. Order No. 3395455.

In this case, the respondent is charged with a violation of the training requirements found in 30 C.F.R. 48.28(a) because of its alleged failure to retrain James Stockwell. The cited standard requires each miner to receive a minimum of 8 hours of annual refresher training, and the burden of proof lies with the petitioner. I conclude and find that the credible evidence presented by the respondent at the hearing establishes that James Stockwell did in fact receive the requisite training and that the respondent has rebutted the petitioner's allegations to the contrary. Accordingly, the contested order IS VACATED, and the petitioner's proposal for assessment of civil penalty IS DENIED and DISMISSED.

After further consideration of the petitioner's request for an assessment of costs against the respondent because it waited until the day of the hearing to disclose the training records which the petitioner's counsel agreed would have exonerated the respondent earlier, IS DENIED. I take note of the fact that Mr. Stockwell apologized to the petitioner's counsel and the presiding judge in open court and expressed his regrets for not advancing his defense in a more timely manner. Further, considering the fact that Mr. Stockwell is not represented by counsel, and taking into account his reasons for waiting until the hearing to put on his evidence, I cannot conclude that Mr. Stockwell's actions were particularly egregious. See: Francis A. Marin v. Asarco, Inc., 14 FMSHRC 1269 (August 1992).

History of Prior Violations

The respondent's history of prior violations is shown in a computer printout submitted by the petitioner (Joint Exhibit 1). The information submitted reflects that for the period November 19, 1989, through November 18, 1991, the respondent was assessed \$9,423 for seventy-one (71), violations, and that it paid \$477, for eleven (11) of these violations. The petitioner

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issued delinquency letters for thirty-three (33) of the violations which the respondent has not paid. Under the circumstances, and for an operation of its size, I cannot conclude that the respondent has a particularly good compliance record. However, the respondent's financial condition may account for his failure to pay the prior civil penalty assessments, and this would be a matter within the petitioner's enforcement jurisdiction.

Negligence

I concur with the inspector's findings that all of the violations which have been affirmed in these proceedings resulted from a moderate degree of negligence on the part of the respondent, and I adopt these findings as my findings and conclusions with respect to each of the violations.

Gravity

Except for Citation Nos. 3395612, 3395613, and 3395619, which have been affirmed as non-"S&S" violations, I conclude and find that all of the other citations which have been affirmed as significant and substantial violations in these proceedings were serious violations.

Good Faith Abatement

The parties stipulated that all of the citations in these proceedings were timely abated by the respondent either within or before the time fixed by the inspectors for abatement. I adopt this stipulation as my finding and conclusion on this issue and have taken it into consideration in assessing the civil penalty assessments for the violations which have been affirmed.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The parties have stipulated that the respondent operates one active small underground mine with an annual production of 8,016 tons, and Mr. Stockwell testified that his mining operation is a family operation which includes his father, and two of his brothers (Tr. 32). Inspector Coburn testified that the respondent is a "contract operator" for the Tennessee Consolidation Coal Company, and the mine operates one shift a day and employs six to ten people (Tr. 19, 44). Under all of these circumstances, I conclude and find that the respondent is a small mine operator.

In a contested civil penalty case the presiding judge is not bound by the penalty assessment regulations and practices followed by MSHA's Office of Assessments in arriving at initial

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proposed penalty assessments. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. 820(i), and the information relevant thereto developed in the course of the adjudicative hearing. Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersburg Stone Company, 5 FMSHRC 287, 292 (March 1983).

As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). Conversely, the size and documented financial condition of a mine operator is required to be considered in any determination as to whether or not the payment of civil penalties will adversely impact on a mine operator's ability to continue in business.

In several early decisions pursuant to the 1969 Coal Act, the former Interior Board of Mine Operations Appeals held that Congress intended a balancing process in arriving at an appropriate civil penalty assessment in any given case, including consideration of the size of the mine and the ability of a mine operator to stay in business. See: Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (May 1972), 1 MSHC 1024; Newsome Brothers, Inc., 1 IBMA 190 (September 1972), 1 MSHC 1041 1041; Hall Coal Company, 1 IBMA 175 (August 1972), 1 MSHC 1037.

In several cases adjudicated by me pursuant to the 1977 Mine Act, I followed and applied the Robert G. Lawson Coal Company, line of decisions, supra, and concluded that the reduction of the initial penalty assessments were justified because the mine operators were small and in serious financial difficulties, and that the initial assessments in the aggregate would effectively put the operators out of business. See: Fire Creek Coal Company of Tennessee, 1 FMSHRC 149 (April 1979), 1 MSHC 2078; Fire Creek Coal Company of Tennessee, 2 FMSHRC 3333 (November 1980); Davis Coal Company, 4 FMSHRC 1168, 1192-1196 (June 1982); G & M Coal Company, 2 FMSHRC 3327 (November 1980) and 3 FMSHRC 889 (April 1981). See also: Davis Coal Company, 2 FMSHRC 619 (March 1980), where the Commission reviewed and affirmed several settlement decisions approving proposed civil penalty reductions based on the detrimental effect that assessment of the originally proposed penalties would have had on the mine operators ability to remain in business.

Mr. Stockwell submitted the following documentation concerning his financial condition (Exhibits ALJ-1):

1. A 1991 Federal joint income tax return reflecting a net operating loss of \$270,779, including a loss of \$26,499, for

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the Faith Coal Company, a \$280 loss in rental income from a home, and a \$21,017, loss from the operation of a hay/corn farm.

2. A 1990 Federal joint income tax return reflecting a net operating loss of \$109,969, including a loss of \$83,669, for the Faith Coal Company, a \$3,720, loss from a rental home, a \$24,803, loss from the operation of a farm, and a casualty loss of \$145,533, as the result of an uninsured home fire.

3. An itemized list of outstanding 1991 and 1992 accounts payable by the Faith Coal Company to twenty-eight (28) creditors, totalling \$36,667.55.

4. A copy of a June 15, 1992, letter from the First National Bank, Tracy City, Tennessee, to Mr. and Mrs. Stockwell, informing them of their failure to make a payment due on a promissory note in the amount of \$160,495.45, and advising them that they were in default, and making a formal demand for payment in full for the balance of the indebtedness, plus interest, attorney's fees, and costs incurred in collecting the debt.

5. A copy of a July 28, 1992, letter from the U.S. Department of Agriculture, Farmers Home Administration, to Mr. and Mrs. Stockwell informing them that they were three months delinquent in their loan payments and informing them of their options and possible loan foreclosure.

6. Copies of past due 1992 tax notices from local county and city tax officials, Dunlap, Tennessee, advising Mr. and Mrs. Stockwell of past due taxes owed on their farm and two residences, in amounts totalling \$541.94.

7. A copy of a note executed by the Faith Coal Company and Mr. and Mrs. Stockwell with the First National Bank, Shelbyville, Tennessee, in the amount of \$160,495.45. The listed security for this note includes all of the coal mining equipment and machinery of the Faith Coal Company, and the maturity date of the note is shown as June 6, 1996 (posthearing letter and attachment dated October 17, 1992).

Mr. Stockwell testified and explained the documentary evidence he submitted with respect to his personal financial condition as well as that of his mining company, and the Secretary's trial counsel conducted a most thorough and detailed questioning of Mr. Stockwell regarding all of his financial affairs, assets, a farming operation, checking accounts, rental income, accounts payable and receivable, company and personal debts, mining expenses and sales, etc. In addition,

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Mr. Stockwell's wife Christine, who was present in the courtroom, was called to testify regarding the financial condition of the family, including their joint assets and liabilities (Tr. 143-179).

With regard to the current viability of his mining operation, and his financial condition, Mr. Stockwell stated as follows at (Tr. 179-180):

Q. Do you have miners working most days?

A. We try to work five days a week, occasionally on Saturday, I can't afford the overtime.

Q. So is it your statement that you're making enough money with the mine to keep the doors opened and keep things running?

A. I have been up until just -- I'm gradually getting further -- a little further behind. I kept hoping for better days for better than a year and they have not come yet. I keep hoping tomorrow is going to be better, the potential is out there for it to be better, but we're just having one difficulty after another that has kept us from doing it.

MS. STOCKWELL: If we don't make some profit by December we will have to end it.

A. I am about ready to give it -- there is an old saying give it to the end because I just -- I hate to think about going -- I know that everything I got is mortgaged, the house, she put the house we're living up as security on the \$160,000 loan, if we have to default we have got to find a place to live and that's serious.

After careful consideration of all of the evidence adduced in these proceedings concerning the respondent's financial condition, which I find credible and unrebutted, I conclude and find that the imposition of the full amount of the initial civil penalty assessments proposed by the Secretary in these cases would have an adverse impact on the respondent's ability to continue the operation of the mine. Considering the fact the respondent is a small operator and appears to be in serious financial difficulties, I find that the imposition of the full amount of the proposed penalties would, in the aggregate, jeopardize the respondent's ability to remain in business.

Penalty Assessments

In view of the foregoing findings and conclusions, and taking into account the civil penalty criteria found in

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section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and fair, and that the respondent can afford to pay them.

Docket No. SE 92-145

Citation No.	Date	30 C.F.R. Section	Assessment
3395619	11/19/91	70.204(d)(1)	\$10

Docket No. SE 92-146

Citation No.	Date	30 C.F.R. Section	Assessment
3395610	11/5/91	70.204(d)(1)	\$10
3395611	11/5/91	75.306	\$20
3395612	11/5/91	75.512	\$20
3395613	11/5/91	70.210(b)	\$20
3395617	11/18/91	75.316	\$20
3395618	11/18/91	75.301	\$20
3395347	12/2/91	75.1704-2(c)(2)	\$15
3395348	12/3/91	75.523	\$20
3395579	12/2/91	75.208	\$25

ORDER

The respondent IS ORDERED to pay the aforesaid civil penalty assessments within thirty (30) days of these decisions and Order. Payment is to be made to MSHA, and upon receipt of payment, these matters are dismissed.

Section 104(a) non"S&S" Citation No. 3395620, November 19, 1991, 30 C.F.R. 75.1712-4, issued in Docket No. SE 92-145, IS VACATED, and the proposed civil penalty assessment is DENIED AND DISMISSED.

Section 104(g)(1) Order No. 3395455, September 26, 1991, 30 C.F.R. 48.28(a), issued in Docket No. SE 92-252, IS VACATED, and the proposed civil penalty assessment IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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