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

Secretary of Labor, MSHA v. Capitol Aggregates, Inc., DENV 79-163-PM, 240-PM. (Judge Moore, August 27, 1980)

Secretary of Labor, MSHA v. Cowin and Company, HOPE 76-210-P, etc. (Judge Broderick, September 8, 1980)

Secretary of Labor, MSHA v. Quarto Mining, NACCO Mining and North American Coal Corporation, LAKE 79-119, etc. (Judge Merlin, September 22, 1980)

Review was Denied in the following cases during the month of October:

Secretary of Labor, MSHA v. Allied Products Company, SE 79-46-PM. (Judge Fauver, September 4, 1980)

Secretary of Labor, MSHA v. Kaiser Steel Corporation, DENV 78-512-P. (Judge Broderick, September 8, 1980)

Secretary of Labor, MSHA v. U.S. Steel Corporation, WEST 80-12-M. (Judge Boltz, September 9, 1980)

Virginia Pocahontas Company v. Secretary of Labor, MSHA, VA 79-131-R, 79-137-R. (Judge Steffey, September 11, 1980)

Island Creek Coal Company v. Secretary of Labor, MSHA, VA 79-74-R, 80-9-R. (Judge Steffey, September 11, 1980)

National Mines Corporation v. Secretary of Labor, MSHA, KENT 80-130-R. (Judge Steffey, September 11, 1980)

Secretary of Labor on behalf of Larry Long v. Island Creek Coal Co., & Langley & Morgan Construction, VA 79-81-D. (Judge Fauver, September 18, 1980)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
October 7, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. PENN 79-70-M
BRADY'S BEND CORPORATION	:	

ORDER

On May 19, 1980, the administrative law judge issued a decision and order that constituted his final disposition of these proceedings. The judge approved the parties' proposed penalty settlements with respect to some of the involved citations. As to the remainder of the citations, he disapproved the proposed settlements and assessed higher penalties. In letters to the judge dated June 5th and June 23rd, the mine operator protested those assessments higher than the proposed settlement amounts and tendered further factual information as to those citations. On July 10th, the judge requested leave from the Commission under Rule 65(c), 29 CFR 2700.65(c), to issue a new decision approving the entire settlement originally proposed by the parties.

Commission Rule 65(c) permits the correction of "clerical mistakes and errors arising from oversight or omission in decisions, orders or other parts of the record." The judge's request does not identify any clerical mistake or error to be corrected and none appears from the record. Instead, the judge seeks leave to issue a new decision based upon his consideration of additional information. Commission Rule 65(c) was not intended for this purpose. Accordingly, the judge's request is denied.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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80-10-3

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 7, 1980

CLIMAX MOLYBDENUM COMPANY, a division of AMAX, INC.	:	
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. DENV 79-102-M through 79-105-M
and	:	
OIL, CHEMICAL, AND ATOMIC WORKERS' INTERNATIONAL UNION, LOCAL 2-24410	:	

DECISION

In this case, a mine operator filed notices of contest of citations issued by the Secretary of Labor. After substantial pre-hearing discovery by both parties, the Secretary concluded that he could not prove that violations occurred. He vacated the citations and moved that the operator's notices of contest be dismissed as moot. The Secretary took the position then, and restates it before us, that his vacation of a contested citation automatically deprived the judge and this Commission of jurisdiction. The operator and the union did not challenge the vacation of the citations, but the operator did resist the dismissal of its notices of contest. It now seeks a declaratory order interpreting the standard alleged by the citations to have been violated, or, in the alternative, a set-off of its litigation expenses against future civil penalties. We hold today that once an operator contests a citation, the Secretary cannot deprive the Commission of jurisdiction by vacating such citation. In this case, the Secretary's motion to dismiss the operator's notices of contest should have been granted only upon terms and conditions that the judge deemed proper. However, for the reasons set forth herein, we believe that the only appropriate relief which should have been granted by the judge in this case was to vacate the citations in question with prejudice. We deny the operator's requests for declaratory relief and set-off expenses.

I.

On October 31, 1978, an inspector of the Labor Department's Mine Safety and Health Administration (MSHA) issued to Climax Molybdenum Company, a division of AMAX, Inc., four citations under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978)["the Act"]. The citations alleged that, contrary to 30 CFR §57.5-5, there existed at the Climax mine in July of 1978, excessive concentrations of silica-bearing dust and that "[f]easible engineering and administrative controls were not being used to eliminate the need for respiratory protection [i.e., personal respirators]." 1/

Climax filed notices of contest of the citations under section 105(d) of the Act and asked that the citations be vacated and declared void. Climax denied that it violated the standard, alleging that feasible engineering and administrative controls were being used, and that officials of the Department of Labor had not indicated what other engineering or administrative controls they believed would be necessary to abate the alleged violations. Climax also alleged that the abatement periods set by the citations were too short, and requested, in the alternative, that the abatement period be extended. Climax did not comply with the abatement requirements of the citations.

1/ 30 CFR §57.5 reads in part as follows:

§57.5 Air quality, ventilation, radiation, and physical agents. Air Quality[.] General--Surface and Underground.

57.5-1 Mandatory. Except as permitted by §57.5-5: (a) ... [T]he exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygenists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. * * * Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

57.5-5 Mandatory. Control of employee exposure to harmful contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with air. However, where accepted engineering controls measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentration of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. * * *

On June 26, 1979, the administrative law judge scheduled a pre-hearing conference for July 9 and a hearing for July 10. On July 2, the Secretary moved to dismiss Climax's notices of contest. The motion stated that the Secretary had determined that he "cannot sustain the particular violations alleged" and would vacate the citations. 2/ At a hearing before the administrative law judge, the Secretary stated he had found "problems with our sampling procedures" and "problems with our evaluation of feasibility." On July 5, MSHA vacated the citations on the ground that the Secretary had "insufficient evidence to establish that Climax was in violation of [section] 57.5-5, on the date the sample was taken."

At a conference on July 9 and 10, Climax opposed dismissal of its notices of contest. Climax argued it needed an interpretation of the standard now because the Secretary contemplated future enforcement of the dust standard based on the Secretary's erroneous interpretation. Climax argued that section 105(d) of the Act empowered the Commission to accord "other appropriate relief" over and above the vacation of citations, and that the "affirmative rulings" it was requesting were appropriate. Climax specifically stated that it did not dispute the Secretary's vacation of the citations.

In his decision the judge granted the Secretary's motion to dismiss the notices of contest on the ground that the case is moot. He noted that the interpretation Climax seeks will not necessarily be incapable of resolution in future cases. Inasmuch as the Secretary had vacated the citations, the judge reasoned, Climax "had obtained ... all the relief it can reasonably expect to obtain." The judge also recommended to the Commission that Climax be granted a set-off of its expenses against future civil penalties. 3/ Climax petitioned for discretionary review, which we granted.

II.

We first reject the Secretary's argument that his vacation of a contested citation automatically deprives the Commission of jurisdiction. The rule urged by the Secretary would leave no room for the Commission to ensure that cases over which the Commission has jurisdiction are terminated on terms in accordance with the Act. We hold therefore that once an operator contests a citation before the Commission, the Secretary cannot by vacating the citation deprive the Commission of jurisdiction.

2/ Section 104(h) states:

> Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106.

3/ Before issuing his decision, the judge stated to the parties that if Climax submitted a statement of its expenses and a request for a set-off, he would recommend a set-off to the Commission. Climax later submitted a statement of its expenses and a request for a set-off; the expense claimed amounted to about $190,500.

We view the Secretary as a plaintiff in this matter and apply Fed. R. Civ. P. 41(a)(2). 4/ The Secretary's representation that he cannot prove that excess concentrations occurred and the Secretary's concession that there can be no violation of the engineering control requirement of section 57.5-5 if the dust levels are not proved to exceed those permitted by section 57.5-1, lead us to hold that the judge should have required the Secretary to vacate the citations with prejudice, or should have done so himself. It appears that Climax is in substantial agreement with the position of the Secretary that without a violation of section 57.5-1, the issue of whether the engineering control requirements of section 57.5-5 are met does not arise. Cf. Morgan v. Koch, 419 F.2d 993, 999 (7th Cir. 1979)(federal court may dismiss where clear from opening statement that plaintiff had no possibility of recovery); Levine v. Colgate-Palmolive Co., 283 F.2d 532 (2d Cir. 1960), cert. denied, 356 U.S. 821 (1961)(federal court procedure; disclosure at pre-trial conference showed that plaintiff had no claim). To erase any doubt as to whether these citations were dismissed with prejudice, we now enter an adjudication on the merits and vacate the citations with prejudice.

Climax seeks a declaratory order pursuant to the provisions of section 105(d) of the Act and section 5(d) of the Administrative Procedure Act ["the APA"], 5 U.S.C. §554(e), 5/ interpreting 30 CFR §57.5-5 and stating that in July, 1978, there were no feasible dust controls that

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4/ Commission Rule 1(b) states:

> Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. §§554 and 556), the Commission or any judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

Fed.R.Civ.P. 41(a)(2) states in part:

> (a) Voluntary Dismissal: Effect Thereof.
>
> * * *
>
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. ... Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

5/ Section 105(d) states in part:

> If ... an operator of a ... mine notifies the Secretary that he intends to contest the issuance of [a] ... citation ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with [5 U.S.C. §554] ...), and thereafter shall issue an order, based on findings of facts, affirming, modifying, or vacating the Secretary's citation ... or directing other appropriate relief ... [Emphasis added.]

The declaratory relief provision of the APA states that "[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainity."

should have been implemented other than those then in use at the Climax mine. Climax argues that the case is not moot because the vacated citations were short-term administrative orders, capable of repetition, yet evading review within the meaning of Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1910); this same controversy will arise again and there is a need for resolving the legal issues now for the guidance of Climax; and the mere cessation by the Secretary of his allegedly illegal conduct (e.g., the issuance of the citations without inquiring into feasibility) does not moot a case, citing United States v. Concentrated Phosphate Export Ass'n., 393 U.S. 199, 203 (1968). Climax also emphasizes the Secretary's unwillingness to concede that his interpretation of the standard is fundamentally wrong.

The Secretary's position is that his vacation of the citations rendered this case moot because there is no longer a live controversy between adverse parties as to whether Climax violated 30 CFR §57.5-5. He argues that, because he would have been unable to prove the necessary predicate that dust levels were excessive, the judge could not have properly issued a ruling on the contours of Climax's duty to use engineering controls where there had been over-exposure; such a ruling, he argues, "would have been nothing more than an advisory opinion based upon a hypothetical state of facts." The Secretary also states that the enforcement policy that caused MSHA to issue these citations no longer exists, but he does not describe the new policy that has replaced it. Finally, the Secretary argues that the "capable of repetition, yet evading review" exception to the federal courts' mootness doctrine does not apply here because the issue of the proper interpretation of the dust standard will not evade review once the Secretary cures whatever deficiency afflicted his sampling here.

We need not decide whether our vacation of the citations renders the Commission powerless to accord declaratory relief, or whether the declaratory relief aspects of this case are otherwise moot or not ripe for adjudication, for we conclude that we should not issue a declaratory order in any event.

We are not convinced that further proceedings in this case will serve the primary purpose of declaratory relief--to save parties from unnecessarily acting at their peril upon their own view of the law. Climax is not in the position of a party which must act at its peril if declaratory relief is denied, nor is it in the position of an operator that has obeyed a citation, contested it, sees it vacated, and seeks declaratory relief. Climax did not obey these citations, and, of equal importance, the Secretary did not attempt to enforce them by issuing a withdrawal order for failure to abate under section 104(b) or a notification of proposed assessment of penalty for failure to abate under sections 105(b) and 110(b). Climax has therefore not suffered abatement expenses, and there is little reason to believe that it will expend

monies on abatement or risk loss from failure-to-abate enforcement actions by MSHA before contests of any future citations are fully litigated. It appears that the Secretary's position on feasibility is now unsettled, or at least different from that which he took at the outset of this litigation. 9/ In short, we are not yet convinced that our early resolution of these issues is prudent. Declaratory relief is, accordingly, denied.

III.

Climax requests in the alternative that the Commission order that future civil penalties assessed against Climax be set off against the expenses Climax incurred in this litigation. We conclude that such a set-off is not appropriate relief and therefore deny the request.

Climax relies upon a decision of the Interior Department's Board of Mine Operations Appeals under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). In North American Coal Co., 3 IBMA 93, 1973-74 CCH OSHD ¶17,658 (1974), the Board recognized a limited right to a set-off of losses caused by later vacated withdrawal orders against the civil penalty for the associated violation. The Board's decision turned on its view that economic losses from withdrawal orders had "independent penalizing, deterrent effects" that should be considered when calculating the deterrent effect of a penalty for the associated violation. Climax argues that the principle established by the Board's North American decision is equally applicable here. We disagree.

The Board believed that the prospect of suffering economic loss from the disruption caused by a withdrawal order would deter an operator from violating the Act and would induce compliance. It therefore viewed the civil penalty as a supplementary deterrent and inducement to comply that could be assessed in light of the economic loss from a withdrawal order. That premise does not apply, however, if the condition that gave rise to the withdrawal order is not the same condition for which a civil penalty is assessed. Thus, if the economic loss from a withdrawal order were set off against a penalty for a later violation, the later violation will not have been sufficiently penalized. That is apparently why the Board insisted that the withdrawal order and the penalty must stem from the same violation.

9/ Cf. Mechling Barge Lines v. United States, supra note 17, 368 U.S. at 331 (discretion of federal courts to withhold declaratory relief where "ultimate form [of challenged administrative practice] cannot be confidently predicted"). We also note that the Secretary's brief in Hilo Coast Processing Co., No. DENV 79-50-M, took no clear position on the proper interpretation of the term "feasible" in this same 1977 Mine Act standard.

Therefore, in this case, the Board's rationale in North American does not apply. Climax wants penalties for future violations to be set off by its expenses for litigation over past conditions. Yet, the litigation expenses Climax has incurred in the present case will not necessarily have any deterrent effect against future violations.

Accordingly, the alternative requests for a declaratory order or for an order granting a set-off are denied. The citations are vacated with prejudice.

Richard V. Backley, Commissioner

Frank H. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 7, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PITT 76-108-P
CAMBRIA COAL COMPANY	:	IBMA No. 76-121

DECISION

This case involves a strip coal mining company against which penalties were assessed for alleged violations of the 1969 Coal Act. The assessments were made as a result of an inspection conducted in 1975 by the Mining Enforcement and Safety Administration (MESA) of the Department of Interior. The case was heard before an Administrative Law Judge in 1976, following which a written opinion was issued. An appeal was filed by the operator in late 1976 and it was pending before the Board of Mine Operations Appeals at the time that the 1977 Mine Act became effective. Consequently, the case was transferred to this Commission for disposition. 1/

The Administrative Law Judge assessed individual penalties for each of 12 violations. In making the assessments, he relied on the tonnage and number of employees of Gulf Resources and Chemical Company, of which the appellant is a wholly owned subsidiary, in considering the appropriateness of the penalties to the size of the business of the operator charged. 2/

1/ Section 301, Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. § 961 (1978).

2/ Section 109(a)(1) of the 1969 Coal Act provides in pertinent part that..."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 affect 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)

The operator's appeal raises three points:

1. Whether it was proper to consider the size of the parent company in determining penalties to be assessed against a subsidiary;

2. Whether the penalties assessed for Notices 5-2, 5-3, 5-5, 5-6, 5-9, 5-10, 5-12 and 5-15 were so excessive as to constitute an abuse of discretion; and

3. Whether the judge erred in finding the operator in violation of 30 C.F.R. 77.1000 3/ for failure to follow its approved ground control plan when the alleged violation was located on a highwall which the operator did not create.

I

Without determining the propriety of considering the size of the parent company, Gulf Resources and Chemical Company, in assessing the penalties herein, we have considered the size of appellant Cambria Coal Company alone 4/ and reviewed the record evidence in support of the remaining five criteria of § 109(a)(1). We find that the penalties assessed were proper in each instance of violation.

II

Based on our further review of the record we conclude that the finding of the Administrative Law Judge that the operator is responsible for the conditions on the highwall which gave rise to the violation of 30 C.F.R. 77.1000 is legally sound and that it is supported by the evidence of record. We find no reversible error.

3/ The regulation at 77.1000 provides:

Section 77.1000 Highwalls, pits and spoil banks; plans.

Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971 which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

4/ The evidence of record shows the tonnage of Cambria Coal Company for the years 1972-1975, as well as the number of employees for the same period. (Government Exhibit One).

Accordingly, the decision of the Administrative Law Judge is AFFIRMED in its entirety.

Richard V. Backley, Commissioner

Frank E. Westrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 8, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. SE 79-33
	:	SE 79-74
	:	SE 79-82
v.	:	SE 79-108
	:	SE 79-110
ALABAMA BY-PRODUCTS CORPORATION	:	SE 79-123
	:	BARB 79-215-P
	:	SE 80-8

DECISION

The question before us is whether the administrative law judge erred in holding that there is no presently enforceable respirable dust standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978) [the 1977 Mine Act]. We conclude that he did.

This controversy arose when the Mine Safety and Health Administration (MSHA) sought civil penalties under the 1977 Mine Act for thirteen alleged violations of 30 CFR §70.100(b). 1/ The facts are not in dispute. The parties stipulated as to the number of samples taken which resulted in each citation. They also agreed as to the average concentrations of dust per cubic meter of air revealed by the combined results of the samples. 2/ These average concentrations of respirable

1/ 30 CFR §70.100(b) states in pertinent part:

> [E]ach operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

That section restates section 202(b)(2) of the former Federal Coal Mine Health and Safety Act of 1969 [the 1969 Coal Act], 30 U.S.C. §842(b)(2) (1976), and section 202(b)(2) of the 1977 Mine Act, 30 U.S.C. §842 (b)(2)(Supp. II 1978).

2/ The average concentration is determined through sampling of the in-mine atmosphere with a device which collects respirable dust particles. The type of device most often used, and the one used in these matters, is the personal sampler. The Interior Board of Mine Operations Appeals [Board] described the sampling device and the procedures used for analyzing the samples it produces as follows:

dust exceeded the limit of 2.0 milligrams per cubic meter of air set forth in the standard. 3/ The parties also agreed as to the type of devices used to collect the samples and stipulated that the devices had been approved by the Secretary of the Interior and the Secretary of Health, Education and Welfare. 4/ The administrative law judge concluded, however, for reasons discussed below, that 30 CFR §70.100(b) is presently unenforceable. He therefore vacated the citations.

---

fn. 2/ cont.

> *** [The] device is a unit which is purchased by an operator and worn by the individual miner. Each device is supposed to duplicate the behavior of the human respiratory system which draws in air, filters larger particulates, and allows others to reach the lungs. Air is drawn into a sampler by a pump and battery-driven motor. It passes through a nylon cyclone 10 mm. in diameter which is supposed to separate the respirable from the nonrespirable particulates. Theoretically, only the former reaches the filter where the particulates are captured. The filter is the analog of the lobes of a human lung.
>
> The manufacturer of the personal air sampler weighs each filter before sealing it in the device and records the weight on an attached data card. After the sample is collected, the sampler is forwarded to a MESA laboratory. ***
>
> At the laboratory, each sampler is opened and among other things the filter is weighed so that a comparison can be made with the weight recorded on the data card by the manufacturer. Theoretically, the result reflects the weight of the particulates which were being deposited on the lungs of the wearer of the sampler at the time the sample was taken. [Eastern Associated Coal Corporation, 7 IBMA 14, 30 (1976).]

3/ The average concentrations ranged from 2.1 milligrams to 2.95 milligrams of respirable dust per cubic meter or air.

4/ Section 202(e) of the 1969 Coal Act, 30 U.S.C. §842(e) (1976), provided:

> References to concentrations of respirable dust in this title means (sic) the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education and Welfare. As used in this title, the term "MRE instrument" means the gravametric dust sampler with four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England.

"Secretary" was defined by section 102 of the 1969 Coal Act to mean "the Secretary of the Interior or his delegate." 30 U.S.C. §802(a)(1976). The procedures for the approval of such devices are set forth in 30 CFR Part 74. Prior to March 8, 1978, the National Institute for Occupational Safety and Health (NIOSH) acted for the Secretary of Health Education and Welfare and the Mining Enforcement and Safety Administration (MESA) acted for the Secretary of the Interior in approving the devices. NIOSH was responsible for determining whether the sampler unit met the performance specifications set forth in 30 CFR §74.3 to ensure the units accurately reflected the concentration of respirable dust in the air at the time the samples were taken. MESA was responsible for determining whether the pump unit met the specifications for intrinsic safety set forth at 30 CFR §18.68 to ensure the units could not cause an explosion.

To begin our analysis, we look first to the 1969 Coal Act and the history of the respirable dust standard under that Act. One of the prime purposes of the Act was to protect miners from "black lung" or pneumoconiosis. Section 201(b) of the 1969 Coal Act stated:

> Among other things, it is the purpose of this title to provide, to the greatest extent possible, that the working conditions in each underground mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period. 5/

Thus, it is clear that one of the essential purposes of this legislation was to prevent miners from contracting pneumoconiosis as a result of inhaling respirable coal dust, and to require mine operators to maintain to the greatest extent possible an atmosphere free from such dust.

To achieve this goal, section 202(b)(2) of the 1969 Coal Act restricted the amount of respirable dust to which miners could be exposed to an average concentration during each shift no greater than 2.0 milligrams per cubic meter of air. (See note 1, supra.) Section 202(e) authorized the Secretaries of Interior and Health, Education, and Welfare to approve devices for collecting respirable dust samples in order to determine whether the statutory limits of exposure were exceeded. (See note 4, supra.) The 1969 Coal Act also defined "respirable dust" in section 318(k) as "only dust particulates 5 microns or less in size."

In Eastern Associated Coal Corporation, 7 IBMA 14 (September 30, 1976), and 7 IBMA 133 (Decmeber 20, 1976)(on reconsideration), the Board of Mine Operations Appeals considered a challenge to MESA's administration of the respirable dust program. The Board found a discrepancy between the definition of respirable dust in section 318(k) of the 1969 Coal Act and the definition of concentrations of respirable dust in section 202(e) of that Act. Section 202(e) defined concentrations of respirable dust as average concentrations if measured with an MRE instrument, or equivalent concentrations if measured with another device approved by the Secretaries. By contrast, section 318(k) defined respirable dust as particles 5 microns or less in size. However, the MRE and the approved sampling devices collected and treated as respirable dust particles in excess of 5 microns in size. The Board found that the inconsistency between the statutory definition of respirable dust and the size of dust actually collected by the devices then approved made the respirable dust standard unenforceable.

5/ Section 201(b) of the 1977 Mine Act provides the same.

Congress reacted swiftly to the Board's decision. On February 11, 1977, Senate Bill 717 was introduced. S.717, 95th Cong., 1st Sess. (1977). The bill was the latest in a series of legislative efforts to amend the 1969 Coal Act. The bill responded directly to the Eastern decision, repealing section 318(k) and the definition of respirable dust contained therein. Moreover, section 202(e) was amended to read: "References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare." The amended version eliminated any reference to the MRE or its equivalent as devices for determining concentrations of respirable dust. These amendments were to take effect on July 1, 1978. On March 31, 1977, in testimony before the Senate Committee on Human Resources, Arnold Miller, then president of the United Mine Workers of America, stated:

> While proposed section 202(e) goes a long way to eliminate the problems created by recent Interior Board misinterpretations of the respirable dust statutes and regulations, it would not take effect until July 1, 1978, and does not expressly repeal the parts of the regulations that have been misinterpreted. To solve the problem as soon as possible, proposed section 307 [effective date provision] ... should be amended by adding ... "and except that section 202(e) of the Act shall become effective immediately" and a section 202(e)(3) should be added ... as follows:
>
> > (3) sections 70.2(i) and 75.2(k) of title 30 of the Code of Federal Regulations are hereby repealed. 6/

Hearings before the Subcommittee on Labor of the Committee on Human Resources on S. 717, Senate; 95th Cong., 1st Sess. (1977) at 163. The Senate Committee adopted Miller's suggestion with respect to the effective date of section 202(e). 7/

The committee report described the changes made relative to respirable dust:

6/ These regulations defined respirable dust in terms of the statutory definition of the 1969 Coal Act--particulates only 5 microns or less in size.

7/ As amended, section 307 of S.717 read:

Effective Date. Sec. 307. Except as otherwise provided, this Act and the amendments made by this Act shall take effect on the first day of July 1978. *** The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective immediately upon enactment. [Emphasis supplied.]

Respirable Dust

> Section 318 of the Federal Coal Mine Health and Safety Act of 1969 is amended by deleting subsection (k) which defines respirable dust in terms of dust particulates 5 microns or less in size. The new definition in subsection (e) defines respirable dust in terms of average concentration, a method of determining the amount of dust in a mine atmosphere on the basis of weight. Since all devices approved by the Secretary and the Secretary of Health, Education and Welfare measure respirable dust on the basis of weight, rather than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling.

Legislative History of the Federal Mine Safety and Health Act of 1977, Subcommittee on Labor of the Committee on Human Resources, Senate, 95th Cong., 2nd Sess. (1978) [Legis. Hist.], at 639.

During the conference between the House and the Senate no change was made in the Senate Committee's provisions concerning respirable dust. 8/ Moreover, the Conference Committee retained the Senate provision making changes in the definition of respirable dust effective immediately upon enactment. 9/

8/ The Conference Report states:

> The Senate bill rewrote the reference to concentrations of respirable dust, to eliminate the reference to the MRE device contained in section 202(e) of the Coal Act, and eliminated a definition of respirable dust contained in section 318(k) of the Coal Act in order to eliminate apparently conflicting definitions of respirable dust which have threatened to interfere with the civil penalty enforcement of the dust sampling program established in section 202 of the Coal Act. The House amendment did not make these changes.
>
> The conference substitute conforms to the Senate bill. [Legis. Hist. at 1341-42.]

9/ The Conference Report states:

> The Senate bill provided that the changes in the definition of respirable dust made by section 202 are to become effective immediately. The House amendment did not make these changes in the definition of respirable dust.
>
> The conference substitute ... [provides] that the effective date of the act shall be 120 days after enactment ... and that the revised definition of respirable dust shall become effective upon enactment. [Legis. Hist. at 1346.]

The legislative history clearly indicates Congressional desire to reverse the affects of the Eastern decision by eliminating the 1969 Coal Act definition of respirable dust, and the allegedly conflicting reference to the MRE device or its approved equivalent. Section 202(e) of the 1977 Mine Act defines concentrations of respirable dust as that dust measured by a "device approved by the Secretary and the Secretary of Health, Education and Welfare."

The judge in this case, however, held that the standard is still unenforceable. In reaching his conclusion the judge emphasized testimony before Congress when it considered amending the 1969 Coal Act that catalogued the inadequacies of the procedures for measuring respirable dust and stated his belief that Congress could not have intended to perpetuate those inadequacies. Rather, he thought it sought to correct them under the 1977 Mine Act by repealing the definition of respirable dust contained in the 1969 Coal Act and by requiring the Secretary of Labor and the Secretary of Health, Education and Welfare to approve devices for the collection of respirable dust in order to redefine the nature of respirable dust.

The question before us is whether the words "device approved by the Secretary and the Secretary of Health, Education and Welfare" is intended to mean a device that has been or will be approved by the Secretary of the Interior or the Secretary of Labor and the Secretary of Health, Education and Welfare or a device to be approved in the future by the Secretary of Labor and the Secretary of Health, Education and Welfare. The judge stated that Congress intended "that the Secretary of Labor and the Secretary of Health, Education and Welfare come up with a new definition" through the approval of collection devices, which they concededly have not done. We disagree. Our review of the history of the 1977 amendments to the respirable dust provisions of the 1969 Coal Act, as set forth above, convinces us that Congress intended to remove the obstacles presented by the Eastern decision and to approve the Secretary's existing respirable dust program. It sought to accomplish this by sweeping away the impediment presented by section 318(k)--the 5 micron definition--and to define respirable dust through the collection devices which had already been approved by the Secretary of the Interior and the Secretary of Health, Education, and Welfare. 10/

Our view is supported by the Senate Report which describes the deletion of section 318(k) and the effect of the amended section 202(e), as follows: "Since all devices approved by the Secretary [of the Interior] and the Secretary of Health, Education, and Welfare measure respirable dust on the basis of weight, rather than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling." [Legis. Hist. at 639.] Thus, the desired effect, "to make the definition ... conform to the approved method of sampling", depends in the first instance upon devices which had already been approved at the time the amendment was enacted. This language strongly suggests that Congress did not anticipate that any additional approvals would be necessary before the "definition of respirable dust [would] conform to the approved method of sampling."

10/ This would not, of course, preclude the Secretary of Labor together with the Secretary of Health, Education and Welfare [now the Secretary of Health and Human Services], from in the future approving new collection devices or withdrawing approving of existing devices. Congress left that determination to the Secretaries.

Our view is further supported by section 301(c)(2) of the 1977 Amendments Act, 30 U.S.C. §961(c)(2) (Supp. II 1978), which provides that the existing orders, decisions, determinations, rules, regulations, etc., in effect on the effective date of the Act remain in effect until modified, terminated, superseded, set aside, revoked or repealed. 11/ We believe that section evinces Congressional intent to provide as much continuity to the enforcement of mine safety and health as possible, with no intention to create enforcement lapses. This provision, if applicable to the existing Secretarial approvals of the respirable dust collection devices, as we believe it is, assured effectuation of the Senate's desire that the definition immediately conform to the approved method of sampling then in effect.

Finally, we reject as unsound the argument that the word "Secretary", as used in section 202(e) of the 1977 Mine Act, means only the Secretary of Labor because section 3(a) defines Secretary as "Secretary of Labor or his delegate." The amendments in section 202 of the 1977 Mine Act were made effective immediately, while the change in definition of "Secretary" did not become effective until 120 days after enactment. Thus, for us to accept that "Secretary" means only "Secretary of Labor" is to find that Congress intended at least a 120 day lapse in enforcement of the respirable dust provisions. Given the emphasis placed upon those provisions in the Act and the speed with which Congress moved to correct what was viewed as a defect in the 1969 Coal Act, such a result would be untenable. 12/

Therefore, we conclude that Congress has defined respirable dust as that which is collected with a device approved by the Secretary of the Interior and the Secretary of Health, Education and Welfare before

---

11/ Section 301(c)(2) of the 1977 Amendments Act provides:

> All orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

12/ Moreover, the very fact that section 202(e) was made effective immediately upon enactment, while all other provisions took effect 120 days later, is also, in our view, indicative of Congressional desire to have a valid program immediately upon enactment without any additional action on the Secretary's part.

the effective date of section 202 of the 1977 Mine Act or by the Secretary of Labor and the Secretary of Health, Education and Welfare thereafter. 30 CFR §70.100(b) is a presently enforceable standard. 13/ The judge's decision to the contrary is reversed and the case is remanded for further proceedings consistent with this decision.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

13/ In reaching this conclusion we recognize that until April 8, 1980 the Secretary of Labor continued to use the five micron definition in his regulations. 30 CFR §75.2(k), repealed April 8, 1980, 45 F.R. 24000 (1980). However, that fact does not, in our view, invalidate samples collected before April 8, 1980 which may include particulates above 5 microns in size. The repeal of section 318(k) removed the statutory basis for 30 CFR §75.2(k), and that regulation became a dead letter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 8, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

OLGA COAL COMPANY

Docket No. HOPE 79-113-P

DECISION

The issue in this case is whether the administrative law judge erred by sua sponte vacating a citation and dismissing a penalty proceeding, without providing the Secretary an opportunity to be heard. We hold that the judge erred, reverse the order of dismissal, and remand the case for further proceedings consistent with this opinion.

On November 7, 1978, the Secretary of Labor filed a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §820(a)(Supp. II 1978). The petition alleged that Olga Coal Company violated the respirable dust regulation at 30 CFR §70.100(b). 1/ Olga filed a timely answer, stating in part that the petition failed to state a claim upon which relief can be granted. The parties thereafter conferred and agreed upon a proposed settlement. On June 5, 1979, the Secretary filed a motion to approve the proposed settlement and dismiss the proceeding. The judge rejected the settlement. Instead, without first seeking argument from the parties, he vacated the citation because of his view that the Act's respirable dust standard is currently unenforceable.

The Commission granted the Secretary's petition for discretionary review on August 7, 1979. The petition challenged the judge's decision on both procedural and substantive grounds: his dismissal sua sponte without providing an opportunity to be heard, and his conclusion that the respirable dust standard is unenforceable.

1/ 30 CFR §70.100(b) provides:

> [E]ach operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

We hold that an administrative law judge has the inherent authority to question whether, as a matter a law, a case before him presents a cause of action. 2/ Cf. Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973); 5 Wright & Miller, Federal Practice and Procedure: Civil, §1357, p. 593 (and cases cited at n.43 thereat). The judge erred, however, in issuing a final ruling on that question without first affording the Secretary an opportunity to present legal arguments supporting the enforceability of the standard. See Literature, Inc., supra. The Administrative Procedure Act requires that parties be afforded the opportunity to submit arguments when time, the nature of the proceedings, and the public interest permit. 5 U.S.C. §554(c). The judge did not comply with this requirement. He failed to advise the parties that he was prepared to dismiss the case on the ground that the respirable dust standard was unenforceable, and did not give the parties an opportunity to be heard on that question. 3/

When we find that the judge erred by failing to allow the parties the opportunity to present arguments, we would normally remand for argument. Events subsequent to the judge's decision have rendered his error harmless, however. In Alabama By-Products Corporation, Docket No. SE 79-110 (October 8, 1980), we held that the respirable dust standard involved here is enforceable. Thus, no purpose would now be served by remanding for argument before the judge on the legal question of whether 30 CFR §70.100(b) is presently enforceable. Accordingly, upon remand the parties and the judge may proceed with further settlement proceedings or adjudication of the merits of the citation and penalty assessment.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ The judge's authority is not altered merely because, as here, a motion to approve a settlement is filed before he raises the question.
3/ Under the Administrative Procedure Act, a party is not always entitled to an evidentiary hearing. The only "hearing" which was denied the Secretary here was an opportunity to file written argument with the judge. See Mezines, Stein, Gruff, Administrative Law, §33,02[1] (1980); Davis, Administrative Law, §10.9 (2d ed. 1978).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 9, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. PENN 80-56-R
	:	PENN 80-61-R
v.	:	
REPUBLIC STEEL CORPORATION	:	

DECISION

Republic Steel Corporation contested two withdrawal orders issued by the Secretary of Labor under section 104(b) of the Federal Mine Safety and Health Act of 1977. The administrative law judge issued orders to show cause why the cases should not be continued until either petitions for assessment of civil penalties are filed and consolidated with the withdrawal order contests, or Republic waives further proceedings under 30 CFR Part 100 and agrees to consolidation. Republic informed the judge that it had no objection to a continuance until associated penalty petitions were filed. The judge then issued an order dismissing the withdrawal order contests without prejudice to reinstatement at such time as penalty petitions are filed.

For the reasons expressed in our decision in Eastern Associated Coal Corporation, Docket No. WEVA 79-117-R (October 9, 1980), we hold that as a matter of Commission policy a continuance rather than a dismissal without prejudice is the proper procedural device for postponing adjudication of a contest of a withdrawal order when, as here, postponement is warranted.

Accordingly, the order of dismissal is vacated and the case is remanded for further proceedings consistent with this opinion.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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1730 K STREET NW, 6TH FLOOR
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October 9, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. WEVA 79-117-R
EASTERN ASSOCIATED COAL CORPORATION	:	

DECISION

The administrative law judge in this case dismissed without prejudice an operator's notice of contest of a withdrawal order, after having ordered the operator to show cause why the contest of the withdrawal order should not be stayed until an associated penalty contest arose. We granted discretionary review to determine (1) whether the judge erred in dismissing without prejudice when the show cause order mentioned only a stay as a possible consequence of failing to show cause; (2) whether the judge erred in his implicit holding that a dismissal without prejudice is a permissible substitute for a stay; and (3) whether the judge erred in holding that no immediate hearing was necessary because the operator had failed to show an "urgent need" for one before an associated penalty contest arose. We hold that the judge erred in all of these respects.

An inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) issued to Eastern Associated Coal Corporation a withdrawal order under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The withdrawal order, having been complied with, was terminated an hour later. Eastern Associated then filed a notice of contest under section 105(d) of the Act.

After responses were filed by both the Secretary of Labor and the United Mine Workers of America, the judge issued on his own motion to all parties an order to show cause why proceedings on the withdrawal order should not be "stayed" until either (1) a penalty contest concerning the same alleged violation that gave rise to this withdrawal

order under sections 105(a) and (d) was filed and could be consolidated with the contest of the withdrawal order; or (2) Eastern Associated waives further proceedings under 30 CFR Part 100 and agrees to consolidation. The order stated that its purpose was "to conserve scarce judicial resources, and to expedite the disposition in one proceeding of all claims pertaining to the conditions or practices giving rise to the contest of the violation charged in the [withdrawal order]". 1/

Eastern Associated's response to the show cause order objected to the proposed stay and stated that Eastern did not waive further proceedings under 30 CFR Part 100. Eastern Associated argued that it had a special interest in avoiding a stay because a stay "would subject [Eastern Associated] to potentially damaging closure orders based on the order and underlying citation involved in this case." The Secretary of Labor's response stated that he had no objection to a stay.

1/ The full text of the order is as follows:

> Pursuant to Rule 14 of the Commission's Rules of Practice, to conserve scarce resources, and to expedite the disposition in one proceeding of all claims pertaining to the conditions or practices giving rise to the contest of the violation charged in the captioned review proceeding, it is ORDERED that on or before Wednesday, June 20, 1979, counsel for each party SHOW CAUSE why the captioned application for review should not be stayed until (1) a petition for the assessment of civil penalty is filed and consolidated with the review proceeding; or (2) applicant waives further proceedings under 30 CFR Part 100 and agrees to consolidation and determination in one proceeding of the issues of fact and law common to a disposition of the application for review and the amount of the penalty, if any, found warranted for the violation charged.

30 CFR Part 100 contains a series of MSHA regulations governing the MSHA Office of Assessments' procedures for issuing notifications of proposed assessment of penalty under section 105(a) and (b) of the Act. The regulations provide operators with an opportunity to review the Assessment Office's tentative penalty proposal (i.e., before it becomes a formal notification of proposed assessment of penalty). Operators may request a conference or may submit additional evidence pertaining to the penalty amount tentatively proposed by the Assessment Office. Thereafter, the Assessment Office, which may or may not change its tentative amount, issues a notification of proposed assessment of penalty under the statute. The operator may then pay the proposed assessment, or contest it before the Commission and obtain a de novo determination as to the fact of violation and assessment of a penalty.

Eastern Associated's concern with further withdrawal orders derives from the enforcement scheme set out in sections 104(d) and (e) of the Act. Section 104(d) of the Act permits an MSHA inspector to include in citations issued under section 104(a) "unwarrantable failure" and "significant and substantial" findings. If, within the 90-day period following the issuance of the citation, an inspector finds what he believes to be another violation of a standard, and finds that the second violation was also caused by an unwarrantable failure to comply, an order is issued requiring withdrawal of miners until the inspector finds that the violation has been abated. Thereafter, additional withdrawal orders must be issued if, prior to an inspection that discloses no similar violations, an inspector finds violative conditions similar to those that precipitated the first withdrawal order. Section 104(e) also permits the issuance of withdrawal orders if an operator has a "pattern" of "significant and substantial" violations, and, within 90 days after the issuance of a notice to that effect, another "significant and substantial" violation is found. Further withdrawal orders may be precipitated by subsequent "significant and substantial" findings.

Despite Eastern Associated's desire not to postpone adjudication of the withdrawal order, the judge issued the following order of "dismissal":

> Applicant having failed to show urgent need why the subject §104(d)(1) order should be immediately reviewed, it is hereby ORDERED that the captioned application for review be DISMISSED without prejudice to reinstatement at such time as petition for assessment of civil penalty is filed so that the matters may be consolidated for disposition. See Energy Fuels Corp., DENV 78-410, FMSHRC 79-5-1, at p. 10.

Eastern then filed a petition for discretionary review, which we granted.

We first examine whether the administrative law judge erred in dismissing Eastern Associated's notice of contest when the order to show cause mentioned only a stay. We conclude that the judge erred. The problem is essentially one of fair notice. Section 5(b) of the Administrative Procedure Act, 5 U.S.C. §554(c), required that the parties be afforded the opportunity for "the submission and consideration of facts [and] argument...." This opportunity was not afforded by the judge; the parties had no inkling that a dismissal might occur. Had the parties been fairly informed of the action the judge might take, they could have presented to him the arguments against the use of a dismissal without prejudice as a technique for staying a case that they have presented to us. Although the judge may have believed that there is little or no practical difference between a stay and a dismissal without prejudice, the parties had the right to at least try to convince him otherwise. Accordingly, we hold that the judge erred in dismissing the notice of contest when he had mentioned only a possible stay of proceedings.

Further, we hold as a matter of Commission policy that a stay, rather than a dismissal without prejudice, is the appropriate procedural device for postponing adjudication of a contest of a withdrawal order, when a postponement is otherwise warranted. 2/ As a practical matter, the difference between a dismissal without prejudice and a stay is merely one of convenience. A dismissal is convenient to the judge because it removes a case from his docket and inconvenient to the operator who must later refile his pleadings; a stay causes the operator no additional administrative inconvenience, but is "inconvenient" to the judge who must carry the case along on his docket. We believe a balancing of these conveniences and inconveniences requires the use of a stay, rather than a dismissal without prejudice, in a withdrawal order case. Additionally, use of a stay avoids any legal questions that might arise concerning the effect of a dismissal, even though labelled without prejudice, on the section 105(d) requirement that contests of withdrawal orders be made within thirty days of the issuance of the order.

Finally, we hold that even a stay would have been inappropriate in this case and that the judge erred in requiring the operator to show an "urgent need" in order to receive a prompt hearing on its notice of contest before an associated penalty proceeding arose. The final sentence of section 105(d) of the Act reads:

> The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

The reason for this provision is obvious. Not only is an operator subject to a continuing shutdown of all or a part of its mine in the case of an unterminated withdrawal order, but even in the case of a terminated order, as here, the operator remains subject to the sanctions of additional withdrawal orders under sections 104(d) and (e). The judge's requirement that there be a showing of urgent need is clearly inconsistent with the mandate of section 105(d). It was error to require the unwilling operator to wait until an associated penalty proceeding arose before providing an adjudication of its contest of the withdrawal order.

2/ Republic Steel Corporation, Docket No. PENN 80-56-R, etc. (decided this date), presented such a situation, where the operator consented to postponing adjudication of its withdrawal order contest.

Accordingly, we reverse and remand for further proceedings consistent with this opinion. 3/

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

3/ Our disposition makes it unnecessary to address the operator's arguments relating to waiver of 30 CFR Part 100 proceedings.

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1730 K STREET NW, 6TH FLOOR
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October 9, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. WEVA 80-40
	:	WEVA 80-78
v.	:	WEVA 80-83
KANAWHA COAL COMPANY	:	

DECISION

For the reasons stated in our decision in Alabama By-Products Corp., Docket No. SE 79-110 et al. (October 8, 1980), the decision of the administrative law judge is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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80-10-10

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October 9, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 80-150 WEVA 80-154
KANAWHA COAL COMPANY BECKLEY COAL MINING COMPANY	:	

DECISION

For the reasons stated in our decision in Alabama By-Products Corp., Docket No. SE 79-110 et al. (October 8, 1980), the decision of the administrative law judge is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

02782

80-10-11

KANAWHA COAL & BECKLEY MINING
Docket Nos. WEVA 80-150, 154

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October 9, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. LAKE 79-238, 239
	:	LAKE 79-251, 252
v.	:	LAKE 79-240, 241
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OLD BEN COAL COMPANY	:	LAKE 80-80
	:	
	:	LAKE 79-242
	:	LAKE 80-66
	:	LAKE 80-81
	:	
	:	LAKE 79-243, 244

DECISION

For the reasons stated in our decision in Alabama By-Products Corp., Docket No. SE 79-110 et al. (October 8, 1980), the decision of the administrative law judge is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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

October 14, 1980

SECRETARY OF LABOR	:	
on behalf of DAVID PASULA	:	Docket Nos. PITT 78-458
	:	PITT 79-35
v.	:	PITT 79-36
	:	
CONSOLIDATION COAL COMPANY	:	

DECISION

This case raises several questions under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978)["the 1977 Mine Act"]. These questions include in what circumstances a miner may refuse to work in conditions that he believes are unsafe or unhealthful, and whether a violation should be found when adverse action taken against a miner is motivated by both unlawful and lawful reasons.

I.

The Secretary of Labor filed this complaint alleging that Consolidation Coal Company ("Consol") violated section 105(c)(1) of the 1977 Mine Act by firing David Pasula for engaging in the allegedly protected activity of refusing to work "in unsafe and unhealth[ful] conditions." Consol's answer "specifically denie[d] that Pasula was engaged in activity protected by section 105(c) of the 1977 Act...." Consol alleged that Pasula was fired "because he was insubordinate, because he interfered with the company's right to manage the mine and also because he caused an unnecessary interruption in production." The administrative law judge, after an extensive hearing, issued a decision in Pasula's favor, ordering that he be reinstated. Consol filed a petition for discretionary review, which we granted in part. Consol, the Secretary, and the United Mine Workers of America (the UMWA) submitted briefs and orally argued.

David Pasula was employed by Consol as a continuous mining machine operator in its underground coal mine. At the beginning of the midnight shift on June 1, 1978, Pasula was assigned to operate such a machine that had recently been damaged in a roof fall. Mechanics repairing the machine had replaced some gears, but the new gears failed to mesh smoothly with the old gears, and as a result, the machine was noisier than usual.

Pasula operated the machine for about an hour and a half, but stopped the machine because the noise gave him an "extreme headache", made his ears hurt, and made him nervous. 1/ Immediately upon shutting down the machine, Pasula told Consol about the noise and physical problems, and requested that a noise level reading be taken by Consol or by federal inspectors before he operated the machine any more. The judge found that Consol declined to take a noise level reading because it thought it was not obligated to do so and further refused Pasula the use of a mine phone to call in MSHA inspectors. Consol instead followed procedures established under its collective bargaining agreement with the UMWA, and called in a member of the Mine Health and Safety Committee to listen to the machine. The safety committeeman took no noise level reading but, after listening to the machine, agreed with Consol that the machine was not too loud to operate. He listened to the machine at an intersection, rather than at the face, with fewer than all its motors running, and in Pasula's absence. When Pasula returned and learned of the safety committeeman's views, he became very upset and harsh words were spoken. Consol management asked Pasula to return to work and operate the machine. Pasula refused, and again demanded that a noise level reading be taken.

Consol management personnel then turned to Pasula's helper, with whom Pasula had alternated in making cuts, and either asked him or was about to ask him to operate the machine. Pasula hit the machine and said, "nobody's going to run it." Consol then had Pasula clock out. The judge found that whether the helper was asked to run the machine or not before Pasula made his statement, the helper would not have operated the machine anyway, for "it is a general longstanding mine custom that when one miner will not operate a piece of equipment, another one will not." The mine section was then shut down by Consol.

Later that day, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) was at the mine and was asked by the UMWA to measure the noise level on the machine. He did so, but found no noise violation. He took noise level readings for about 15 minutes and found that with the pump motor running alone and with the machine not cutting coal, the noise level was 93 decibels; with the pump motor running, the conveyor running, and the machine mining coal, the level was 103 decibels. 2/

1/ Pasula was not equipped with a personal hearing protector.

2/ The noise standard applicable to underground coal mines, 30 CFR §70.510, does not, at least in the absence of hearing protectors, permit miners to be exposed to 90 dbA for more than an eight hour period, or to 102 dbA for more than one and one-half hours.

The next day, June 2, 1978, Consol gave a letter to Pasula stating he was "being suspended with intent to discharge" because Consol had "concluded that your insubordination (refusal to perform assigned duties), interference with management of the mines and causing an unnecessary interruption in production and your past disciplinary record cannot be tolerated by Consolidation Coal Company." (Emphasis added.) Pasula was later fired. Robert J. FlorJancic, the Consol official who signed the letters and fired Pasula, explained the reasons further during the hearing. He stated that the safety committeeman and Consol management personnel had resolved the matter about which Pasula had complained, and that, despite the contractual provision that required Pasula to return to work once it was so resolved, Pasula refused to do so. FlorJancic also stated that in addition to refusing to work, Pasula also "refused to let anybody else work, too", and that this also was a factor in his decision to fire Pasula.

To fully understand FlorJancic's reasons for firing Pasula, it is necessary to briefly summarize the provisions of the collective bargaining agreement between Consol and the UMWA. The National Bituminous Coal Wage Agreement of 1978 reserves to miners a limited right to refuse to work. Article III, section (i), entitled "Preservation of Individual Safety Rights", states that "No employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." If the existence of such a condition is disputed by the operator, a safety committeeman "shall review such condition with mine management within four (4) hours to determine whether it exists. If there is agreement that the condition does not exist, the employee shall return to his regular job immediately." FlorJancic evidently believed that Pasula had violated this provision of the contract.

Pasula later challenged his discharge through the arbitration machinery established under the collective bargaining agreement. Arbitrator Beckman inquired into whether the condition described in article III, section (i)(1) of the contract existed, and found that it did not. He found that although the machine was making "an abnormal noise", the evidence "fails to support a conclusion that such noise was immediately dangerous and it also fails to support the conclusion that the noise could reasonably be expected to cause death or serious physical harm before abatement." He also found that Pasula "did not act in good faith." He therefore denied the grievance. The Arbitration Review Board denied discretionary review of Arbitrator Beckman's decision. This action was later filed before us under section 105(c) of the 1977 Mine Act.

II.

The Secretary's complaint alleges that Pasula was fired for refusing to work in unsafe and unhealthful conditions. The Secretary maintains that this refusal to work was, in these circumstances, protected by section 105(c)(1) of the 1977 Mine Act. Section 105(c)(1) reads in part as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

The activity alleged by the Secretary is arguably not clearly protected by the plain language of this provision. The complaint did not allege that Pasula was fired for filing or making a safety complaint, for instituting proceedings or testifying, nor did the complaint identify a provision of the 1977 Mine Act that expressly permits miners to refuse work. This does not end the matter, however. We must look to the entire statute, being mindful that the 1977 Mine Act is remedial legislation, and is therefore to be liberally construed.

In determining whether section 105(c)(1) protects Pasula's refusal to work, we consider it important that the 1977 Mine Act was drafted to encourage miners to assist in and participate in its enforcement. Section 103(g)(1) accords to miners and their representatives having reasonable grounds to believe that a violation or imminent danger exists the right to obtain an inspection of the mine by giving notice to the Secretary. Section 103(f) permits miners to accompany MSHA inspectors on all inspections and accords a limited right to pay for their participation. 3/

Section 103(c) requires the Secretary to adopt regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents, 4/ to have access to records of such monitoring

3/ See Magma Copper Corp., 1 FMSHRC 1948, 1 BNA MSHC 2227, 1979 CCH OSHD ¶23,075 (1979), pet. for rev. filed, No. 79-7535 (9th Cir., October 15, 1979); Helen Mining Co., 1 FMSHRC 1976, 1 BNA MSHC 2193, 1979 CCH OSHD ¶24,045 (1979), pets. for rev. filed, Nos. 79-2518, 79-2536 (D.C. Cir. December 19, 21, 1979); Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833, 1 BNA MSHC 2230, 1979 CCH OSHD ¶24,071 (1979), pets. for review filed, Nos. 79-2503, 79-2536 (D.C. Cir. December 17, 21, 1979).

4/ At least one standard applicable under the 1977 Mine Act identifies noise as a harmful physical agent. 30 CFR §57.5-50.

or measuring, and to have access to records of one's own exposure. The regulations must also require operators to promptly notify a miner that he has been excessively exposed, and of the corrective action being taken. See also section 103(d)(interested persons' access to accident reports), and, with respect to underground coal mines, sections 302(a) (miners' access to roof control plan), 303(d)(1), (f), (g), and (w) (interested persons' access to records of operator's safety and health examinations), 305(e)(miners' access to map of electrical system), 305(g)(miners' access to records of operator's electrical examinations), and 312(b) (miners' access to confidential mine map).

The 1977 Mine Act and the Commission's regulations also permit miners to initiate and participate in litigation before the Commission. For example, miners' representatives may challenge the Secretary's modification or termination of an imminent danger order of withdrawal (section 107(e)(1)), miners may challenge the modification or termination of all withdrawal orders issued under section 104, and may contest "the reasonableness of the length of time set for abatement by a citation or modification thereof." Section 105(d). The Commission's rules are also required to "provide affected miners ... an opportunity to participate as parties to hearings under this section [105]." Section 105(d). Our rules of procedure allow miners to intervene as of right before the start of hearings, and thereafter for good cause shown and upon just terms. In discrimination actions brought by the Secretary, the complaining miner may intervene and present evidence on his own behalf. 29 CFR §2700.4(b)(1) and (2). 5/

That Congress gave miners many valuable rights under the 1977 Mine Act clearly demonstrates the congressional view that their participation in the enforcement of the Act is essential to the achievement of safe and healthful mines. This is particularly true of the right to complain to the operator and to the Secretary of alleged dangers or violations. MSHA inspectors cannot be everywhere at once, nor can they be expected to be so familiar with every mine that they will become aware of every condition or practice in need of correction. The successful enforcement of the 1977 Mine Act is therefore particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction. The right to do so would be hollow indeed, however, if before the regular statutory enforcement mechanisms could at least be brought to bear, the condition complained of caused the very injury that the Act was intended to prevent. A holding that miners have some right to refuse work under the 1977 Mine Act therefore appears necessary to fully effectuate the congressional purpose.

5/ This description of miners' rights is not exhaustive.

Any doubts on the matter are resolved by the legislative history of the Act, which clearly indicates that Congress intended that section 105(c)(1) be construed to accord to miners a right to refuse work. 6/ The report of the Senate committee that largely drafted the 1977 Mine Act states:

> Protection of miners against discrimination
>
> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. The Committee is also aware that mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity.
>
> Section 10[5](c) ... prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current Coal Act. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends to include not only the filing of complaints seeking inspection under section [103(g)] or the participation in mine inspections under Section [103(f)], but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.
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> * * *
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> The listing of protected rights contained in section 10[5](c)(1) is intended to be illustrative and not exclusive. The wording of section 10[5](c) is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety

6/ It is well-settled that we may refer to legislative history even if a statute appears clear on superficial examination. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 9-10 (1976).

> and health standard promulgated under the law. The Committee intends to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provisions; See, e.g. Phillips v. IBMA, 500 F.2d 772; Munsey v. Morton, 507 F.2d 1202. The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions ... or the enforcement of those provisions....

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 & 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 & 624 (1978)["Leg. Hist."]. The matter was also discussed on the floor of the Senate:

> MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10[5](c), the discrimination clause.
>
> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
>
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
>
> MR. JAVITS. I think the chairman has succintly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.
>
> MR. CHURCH. I thank the floor managers for their clarification of this matter and for their outstanding work on this very necessary legislation.

Leg. Hist. at 1088-1089. Finally, Representative Perkins, the chief House conferee and chairman of the House committee that drafted a House bill, stated the following during the customary oral report to the House describing the bill agreed to by the conference committee:

> Mr. Speaker, this legislation also provides broader protection for miners who invoke their safety rights. If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example, Baker v. North American Coal Co., 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.

Leg. Hist. at 1356. 7/

III.

We do not in this early opinion definitively set all the contours of the right to refuse to work. This case does not require it. We also think it wiser to allow the Commission's judges, the Secretary, affected miners and their representatives, and mine operators to gain some practical experience with the implementation of this right, to reflect on how it should be shaped, and to communicate their considered views to us.

We hold that in this case the miner's refusal to work was protected under the 1977 Mine Act. Pasula refused to obey Consol's order to work because he believed the work conditions to be unhealthful. He contacted Consol management officials to obtain corrective action, but this was unavailing. He requested an MSHA inspection. His good faith belief was reasonable, and was directed to a hazard that we consider sufficiently severe whether or not the right to refuse work is limited to hazards of some severity. Pasula was not merely speculating that he might in the future suffer from the effects of loud noise, but he was already so suffering when he stopped the machine. He was not equipped with personal hearing protectors, he had already been or would have shortly been exposed to more noise than permitted by the applicable mine health standard, and he was also operating a machine that requires substantial attention to its operation. In view of his actual suffering, his view that he was exposed to unhealthful and excessive noise levels was reasonable and was supported by objective, ascertainable evidence. The duration of the work stoppage was permissible here because Pasula's work stoppage

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7/ The significance of the 1977 Mine Act's legislative history was noted by the Supreme Court during its consideration of a similar question under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. (1976). Whirlpool Corp. v. Marshall, 63 L.Ed.2d 154, 164 n. 18 (1980).

ended when management sent him home, before the MSHA inspector determined in his opinion that there was no violation of the noise standard. Whether the duration of the right to refuse work continues only until an MSHA inspector has inspected a complained of condition, or whether it is dependent upon the inspector's decision to issue or not to issue a citation, or withdrawal order, we need not now decide.

Consol maintains that any right to refuse to work under the 1977 Mine Act should be fashioned in the light of, and to give effect to, the contractual method for resolving safety disputes agreed to by Consol and the UMWA. Consol argues, in particular, that once the union safety committeeman agreed with Consol that a hazard of sufficient gravity under the contract to justify a work stoppage did not exist, Pasula should be held to have had no right to refuse work under the 1977 Mine Act.

Pasula's contractual right to refuse work, however, is limited to a narrow class of hazards: those that are "abnormally and immediately dangerous ... beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." As the arbitrator's and the safety committeeman's views indicate, this language does not appear to encompass the condition here. In our view, the statutory right to refuse work under the 1977 Mine Act is broader and does apply to the condition here. The contractual language permits refusals to work in only what might be called an "abnormal imminent danger". We do not construe the 1977 Mine Act to limit a miner's refusal to work only to such conditions. 8/

Consol also argues that the administrative law judge did not attach any weight to the arbitrator's factual findings that a sufficiently severe hazard was not present and that Mr. Pasula "did not act in good faith." Consol cites Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), for the proposition that the judge erred in not attaching more weight to the arbitrator's findings.

In Gardner-Denver, the Supreme Court held that an employee may obtain a trial de novo in federal district court of a claim of racial discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1976), even though that employee had already unsuccessfully sought relief through the arbitration machinery of a collective bargaining agreement. The Court went on to hold, however, that while the federal district court should consider the employee's claim de novo, "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 60. This textual statement was accompanied by the following footnote:

8/ Compare section 502 of the Labor-Management Relations Act, 29 U.S.C. §143, which may, unlike the 1977 Mine Act, limit refusals to work over safety, for purposes of that statute, to conditions of the gravity required by the collective bargaining agreement involved here. See Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974).

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

We adopt the Gardner-Denver approach to arbitral findings in discrimination proceedings under the Act. We believe that according weight to the findings of arbitrators may aid the Commission's judges in finding facts. A judge faced with a credibility problem may find the views of the arbitrator on labor practices in the mines, mine customs, or on the "common law of the shop" helpful.

This does not diminish the role of the Commission's judges. The hearing before the administrative law judge is still de novo and it is the responsibility of the judge to render a decision in accordance with his own view of the facts, not that of the arbitrator. Arbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling upon the judge.

As Gardner-Denver indicates, there are several factors that must be considered in determining the weight to be accorded to arbitral findings: the congruence of the statutory and contractual provisions; the degree of procedural fairness in the arbitral forum; the adequacy of the record; and the special competence of the particular arbitrator. Arbitral findings may be entitled to great weight if the arbitrator gave full consideration to the employee's statutory rights; the issue before the judge is solely one of fact; the issue was specifically addressed by the parties when the case was before the arbitrator; and the issue was decided by the arbitrator on the basis of an adequate record.

In this case, we hold that the judge did not err in according little or no weight to the arbitral findings. The problem here is primarily the congruence of the statutory and contractual rights. The factual issues raised by the statutory and contractual rights to refuse to work are not congruent. The contractual right to refuse work, and the concomitant arbitral findings, turn upon different criteria than the statutory right. The gravity element in the contractual right is indeed far narrower than the gravity element in the 1977 Mine Act. With

respect to the arbitrator's finding that Pasula did not act in good faith, we note that the arbitrator's finding is unexplained. It appears, however, that the arbitrator's finding was made because the arbitrator thought that Pasula had no basis for believing that a hazard of the severity required by the contract to permit a refusal to work existed, because Pasula failed to follow the contractual procedure by failing to return to work once the safety committeeman agreed with management, because he announced that the machine was shut down and that nobody else could operate it, and because he failed to alternate operation of the machine with his helper. See Arb. Dec. at 13-14. If any of these reasons are a basis for the arbitral finding, then we believe that it is entitled to little or no weight. Any good faith finding necessary to uphold a work stoppage under section 105(c)(1) of the 1977 Mine Act would concern the good faith of the miner's belief that there existed a hazard of at least the severity present here. The miner's good faith is not "lost" by his subsequent misconduct, and it is obviously not defeated by his refusal, in this case, to follow contractual procedures requiring a return to work that are inconsistent with the statutory right to refuse work. In short, we find no prejudicial error in the judge's approach.

IV.

Although we find that Pasula's firing was motivated at least in part by his engaging in a protected activity, this is not necessarily the end of the matter. Consol argues that when Pasula "refused to permit anyone else to operate" the machine, "he stepped outside of any protection ... afforded to him under the Act", and that Pasula could not, upon engaging in protected activity, do as he pleased.

We will assume that Pasula was fired also in part for engaging in the presumably unprotected activity of, in Consol's words, refusing "to permit anyone else to operate" the machine. There is insufficient evidence to find that Pasula would have been fired for engaging only in the unprotected activity. 9/ The question is, therefore, whether Pasula is entitled to a remedy under these circumstances. We hold that he is.

9/ See, e.g., Youngstown Osteopathic Hospital Assn., 224 NLRB 574, 575, 91 LRRM 1255 (1976)(in any part); Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977)(same); Pelton Casteel, Inc. v. NLRB, 105 LRRM 2124, 2128 (7th Cir. 1980); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979)("but for" test burden on employer); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979)(age discrimination)("but for" test, burden on plaintiff); Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977)(same), following Mt. Healthy City School District Bd. of Education v. Doyle, 429 U.S. 274,285-286 (1977)(constitutionally protected conduct)("but for" burden on employer); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978)("but for" burden on plaintiff).

The question raised here is similar to difficult anti-retaliation issues arising under other federal statutes. Part of the reason this question has been so vexing is that courts and agencies often have great reluctance to order the reinstatement of an employee who may deserve to be fired in any event. Various approaches have been suggested, the most common being the "in any part" test and the "but for" test. The "in any part" test can be simply stated as follows: If any part of the motivation for an employer's adverse action against an employee has been that employee's protected activity, the adverse action is unlawful. It matters not that the employee's unprotected activities were outrageous, would have alone justified adverse action, and did in fact partially motivate the adverse action. The partial illegality of the employer's motive irretrievably taints the adverse action. The "but for" test can be simply stated as follows: it is not enough to support relief to find that the protected activity played a part, however great, in the adverse action; the evidence must also show that the employer would not have acted against the employee but for the protected activity, i.e., that in the absence of the protected activity, no adverse action would have been taken.

These tests represent different balancings of many considerations. The "in any part" test has been criticized on various grounds: that it is so easy to satisfy that almost any employer can be caught up in it, for it is a rare employer who cannot resist feeling some resentment over an employee's protected activities; 10/ that it protects employees who would have been fired anyway for their unprotected activities; 11/ that it puts such employees in a better position than they would have been in had they never engaged in the protected activity; 12/ and that it

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10/ See, e.g., Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97 (2d Cir. 1978):

> If partial motivation were ... the [only factual issue], then its resolution would be simple. In all cases involving the discharge of a union activist, there is always sufficient evidence to pass such a test, and this case is no exception. It is unrealistic to expect management to ignore the fact that an employee is a union activist. When a union activist is discharged for cause, human nature is such that little employer disappointment can be expected. In such cases, more is required to support a finding of discrimination than an absence of remorse.

See also NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963)(concurring opinion).

11/ Waterbury Community Antenna, supra note 15, 587 F.2d at 97.

12/ Mt. Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 285-286 (1977). The test has been particularly criticized on this ground under the LMRA because the "in any part" test is so tilted to employees that the neutral posture of the LMRA would be upset by its application. Waterbury Community Antenna, 587 F.2d at 99 & n.6. This criticism of the test is not apposite under the 1977 Mine Act, however, for as the legislative history of the Act makes clear, and Consol concedes, Congress wanted miners to exercise their rights.

encourages employees to think that they can "get away with" outrageous disruptive behavior. 13/ The test also has merit. It is the rare employee who can prove more than that the protected activity played a part in his firing; the test reflects better the congressional policy under the 1977 Act of encouraging the free engagement by employees in protected activities; and puts the burden of an adverse decision upon the party better able to bear it--the employer.

The "but for" test has the advantage of placing employer and employee in the position they would have occupied had the adverse action not been partially tainted, but it also has drawbacks. It may chill the willingness of other employees to engage in protected activity. Miners may be skeptical of a finding that their fellow miner would have been fired anyway; they would be even more discouraged if their statutory rights can be exercised only if they could prove that they would not have been fired anyway. And, as we have said, problems of proof may be almost insurmountable for the employee.

The language of the 1977 Mine Act considered alone does not provide a complete answer to this problem. Section 105(c)(1) proscribes adverse action "because" a miner engages in a protected activity. The comparable provision of the 1969 Coal Act used the term "by reason of the fact that". The legislative history of section 105(c)(1) of the 1977 Mine Act briefly but significantly touches upon a possible reason for this change. The report of the Senate committee that drafted section 105(c)(1) states that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." S. Rep. at 36; Leg. Hist. at 624 (emphasis added).

We conclude that many of the drawbacks of the "in any part" and "but for" tests are presented not so much by the tests themselves, but in the allocation of burdens of persuasion and going forward that have accompanied their application. In Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), the Supreme Court dealt with the multiple motivation issue with respect to constitutionally protected speech. The Court held that a school teacher not rehired in part because of his protected activity met his burden of persuasion by showing that his protected conduct was a "motivating factor" in the decision not to rehire him. The Court also held that the school board that refused to re-employ the teacher may prove by a preponderance of the evidence "that it would have reached the same decision as to [Doyle's] re-employment even in the absence of the protected conduct." Id. at 274. The Court explained:

13/ NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963)(concurring opinion): NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968); Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1294 (1st Cir. 1977). See also Liberty Mutual Ins. Co. v. NLRB 592 F.2d 595, 606 (1st Cir. 1979) (concurring opinion).

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.
>
> This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.
>
> * * *
>
> [Other constitutional law cases] suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Id. at 285-287. See also Givhan v. Western Line Consolidated School District, 439 U.S. 410, 416-417 (1979); and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 n.21 (1977). Although Mt. Healthy dealt with constitutionally protected rights, and not with statutory rights granted by Congress, we find that Mt. Healthy is nevertheless instructive, particularly with respect to the need for flexibility in the allocation of burdens of persuasion, and is consistent with the 1977 Mine Act.

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by

a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action againt the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

By adopting this approach, we have adopted both the "in any part" and "but for" tests, but we have allocated differing burdens of persuasion to each party. The adoption of the "in any part" element is consistent with the congressional intent underlying the anti-retaliation provisions of the 1977 Mine Act, prevents the imposition upon the complainant of what may be an impossible burden to shoulder, and does not chill the exercise of miners' rights that may occur if the burden of persuasion were any heavier. On the other hand, the Commission recognizes that it would hardly further the statutory purpose to order the reinstatement of a miner who would have been discharged for lawful reasons alone. It would put a miner who has engaged in both protected and unprotected activities in a better position than he would have occupied had he done nothing. It would require reinstatement even though the record shows that the employer would have lawfully assessed the miner as unfit for further employment. We have placed the ultimate burden of persuasion upon the employer 14/ because it is the employer who is in the best position to prove what he would have done. 15/

14/ As to the allocation of the ultimate burden of persuasion upon the employer, see, in addition to Mt. Healthy, E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 81 (1956):

> Just as the courts have come to recognize that there is no a priori formula for fixing the burden of persuasion, so they should recognize that if there is a good reason for putting on one party or the other the burden of going forward with evidence ... it ought to be enough to control a finding when the mind of the trier is in equilibrium.

15/ While this opinion was in preparation, the National Labor Relations Board issued its decision in Wright Line, 251 NLRB No. 150 (1980), in which the Board adopted a test substantially the same as we adopt here and for many of the same reasons.

The employer has admitted, and the record in any event establishes, that at least part of the motive for Pasula's discharge was activity that was protected. Under our test, the issues are whether the employer has proven that (1) unprotected activities also partially motivated the discharge, and (2) Pasula would have been fired in any event for the unprotected activities alone.

The record fails to support Consol's claim that the evidence shows that Pasula's "misdeeds are so obvious that the employee would have in any event been disciplined." 16/ Indeed, part of the misconduct that Consol claims would have caused Pasula to be fired in any event (Consol Br. at 32, 34) is conduct that we have concluded is protected by the 1977 Mine Act--Pasula's refusal to work.

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

16/ Consol argues at length that the administrative law judge erred in his approach to evidence of past instances of misconduct by Pasula. Even if we were to agree with Consol's argument, the outcome here would be unaffected. As we note above, the record fails to show that Pasula would have been fired in any event for his past and present misconduct alone.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 23, 1980

TAYLOR ADKINS AND FRED HUNT, Applicants	:	
v.	:	Docket No. PIKE 76-66
DESKINS BRANCH COAL COMPANY Respondent	:	IBMA No. 77-13

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969. 1/ The issue is whether two miners, Taylor Adkins and Fred Hunt, were discharged by their employer, Deskins Branch Coal Company, in violation of section 110(b)(1) of the Act. 2/

Adkins and Hunt were discharged on September 26, 1975. They filed an application for review of the discharges under section 110(b) of the Act. A hearing was held before an administrative law judge. Conflicting testimony concerning the circumstances of the discharge was presented. The judge resolved the conflicting testimony, concluded that the discharges did not occur because the miners had made a safety complaint, and denied the application for review. Adkins and Hunt appealed. 3/ Oral argument was heard on July 16, 1980. We have carefully reviewed the record and the judge's decision and affirm his dismissal of the application for review.

We conclude that, if Adkins and Hunt had made a safety complaint to their foreman, this would have constituted notice to the Secretary for the purposes of section 110(b) of the Act. In a non-union mine without established procedures for reporting complaints, as was the situation here, a miner's notification to any mine official brings the miner within the protection of section 110(b). 4/ However, the record does

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

2/ Section 110(b) provides in part:

> (b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger...."

3/ The appeal was filed with the Interior Department's Board of Mine Operations Appeals. It is before the Commission pursuant to section 301 of the 1977 Act, 30 U.S.C. §901 (Supp. II 1978).

4/ Phillips v. IBMOA, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); Local Union No. 1110, UMWA and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979).

not establish that Adkins and Hunt made a safety complaint to their foreman. Adkins and Hunt did testify that they were troubled by the condition of the roof in the No. 3 heading as well as the hazards that exist when two pinning machines operate in the same heading. Both the foreman and the foreman's supervisor testified that neither Adkins nor Hunt made a safety complaint to them or otherwise indicated that their refusal to work in the No. 3 heading was based on their fear of unsafe conditions.

We interpret the judge's decision as making credibility findings, at least implicitly, that no complaint concerning unsafe conditions was made to the foreman and that the employees' refusal to perform their assigned tasks was not safety related. Based on our review of the record, we conclude that these findings are supported by the evidence and must be affirmed. 5/ Thus, Adkins and Hunt failed to invoke the protections of section 110(b) of the Act.

For these reasons, the decision of the administrative law judge denying the application for review is affirmed. 6/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

5/ During the oral argument before the Commission both parties agreed that a new hearing would not be fruitful because of the passage of time since the occurrence of the events at issue and the retirement of the judge who presided at the hearing.

6/ We further find, for the reasons stated by the judge, that no prejudicial error was committed by admitting the Company's exhibit 7 into evidence.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 24, 1980

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. VINC 75-180-P
ADMINISTRATION (MSHA)	:	VINC 75-181-P
	:	VINC 75-183-P
v.	:	VINC 75-185-P
	:	VINC 75-186-P
OLD BEN COAL COMPANY	:	IBMA 76-102

DECISION

This is a penalty proceeding arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977) [the 1969 Coal Act], in which the Mining Enforcement and Safety Administration (MESA) appealed portions of a June 10, 1976 administrative law judge decision. The appeal was pending before the Interior Department Board of Mine Operations Appeals on March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C. §961 (Supp. III 1979). The issues are: 1) whether the judge properly vacated two notices alleging violations of 30 CFR §75.400; and 2) whether the judge properly vacated four notices alleging violations of 30 CFR 75.403.

I.

We hold that it was error for the judge to vacate the notices alleging violations of 30 CFR §75.400. 1/

On January 15, 1974, and February 28, 1974, a MESA inspector issued notices to the Old Ben Coal Company for violations of 30 CFR §75.400. One notice alleged that loose coal and coal dust saturated with oil were allowed to accumulate on the pump motor and in the transmission compartment of a shuttle car; the other alleged that fine coal and coal dust saturated with oil and grease were allowed to accumulate on the controls, jacks and underneath the conveyor area of a continuous miner. The administrative law judge vacated both notices of violation, basing

1/ 30 CFR §75.400 provides:

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

The regulation is identical to section 304(a) of the 1969 Coal Act and to section 304(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)[the 1977 Mine Act].

his decision on the inspector's failure to measure either the depth or extent of the coal accumulations, and, in the case of the shuttle car, to even estimate the depth. The judge's decision was based upon the Board of Mine Operation Appeals decision in North American Coal Corp., 3 IBMA 93 (1974). 2/ In North American, the Board held that to establish a violation of 30 CFR §75.400, "[a]s a minimum evidence of depth and extent must appear in the record; otherwise, a finding of violation is unjustified." The Board found such evidence necessary for the judge to make an independent appraisal of whether the mass of combustible material was of such dangerous size as to constitute an "accumulation." North American, supra at 104. We believe the requirement of evidence of depth and extent as a prerequisite to finding a violation of 30 CFR §75.400 is erroneous. It is too restrictive and does not further congressional intent.

We have previously noted that section 304(a) of the 1969 Coal Act, which section 75.400 restates, is one of the mandatory standards aimed at the elimination of fuel sources for explosions and fires, 3/ and that through its requirements Congress hoped to achieve one of the prime purposes of the Act--the prevention of loss of life and serious injury arising from explosions and fires in mines. A requirement that evidence of depth and extent be a prerequisite in establishing the fact of violation does not further that purpose. It may often be dangerous or even impossible to obtain evidence of depth or extent or even to estimate it, 4/ but that in no way diminishes the danger of fire or explosion posed by the presence of dangerous quantities of combustible materials. Thus, we hold that in establishing the fact of violation, the absence of evidence of depth and extent of the combustible materials will not, in and of itself, be cause for vacating a citation alleging a violation of 30 CFR §75.400. 5/

2/ In his decision, the judge cited the Board's summary affirmance of K&L Coal Co., 6 IBMA 130 (1976). In the underlying K&L decision (HOPE 75-149-P, January 19, 1976), the judge, citing North American, had vacated a notice of violation of §75.400 because the notice failed to indicate the depth and extent of the alleged accumulations, and because other evidence of record also failed to indicate such.

3/ See our discussion of the genesis of the standard in Old Ben Coal Corp., 1 FMSHRC 1954 (1979).

4/ We note, for example, the inspector's undisputed testimony that measuring the alleged combustible materials on the shuttle car would involve putting his hand into a hot area and that measuring the alleged combustible materials under the conveyor area of the continuous miner would be dangerous unless the tail piece of the miner was properly blocked.

5/ We do not advocate an end to consideration of testimony as to the depth and extent of materials which allegedly violate the standard. In fact, the opposite is true, for such testimony may be highly relevant in determining the existence of combustible materials. We only seek to end the rule that evidence of depth and extent is a necessary prerequisite to establishing a violation of 30 CFR §75.400.

We have recognized that some spillage of combustible materials may be inevitable in mining operations. 6/ However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, 7/ it likely could cause or propagate a fire or explosion if an ignition source were present. 8/

Therefore, we reinstate the notices of violation of 30 CFR §75.400 vacated by the judge and remand for further proceedings consistent with the above discussion.

II.

We hold that the judge also erred in vacating the notices of violation of 30 CFR §75.403. 9/

Old Ben was issued four notices of violation of 30 CFR §75.403. All of the notices charged that Old Ben had failed to maintain sufficient incombustible content as required by the standard. The samples upon which the alleged violations were based were collected by the "band sample method." The judge noted that MESA's inspectors' manuals state

---

6/ Old Ben Coal Corp., 1 FMSHRC at 1958.

7/ The validity of that judgment is, of course, subject to challenge before the administrative law judge.

8/ The actual or probable presence of an ignition source is not, however, an element of the violation. As we have noted, in seeking to prevent mine fires and explosions, Congress sought to eliminate both accumulations of combustible materials (fuel) and ignition sources.

9/ 30 CFR §75.403 provides:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

The regulation is identical to section 304(d) of the 1969 Coal Act. Section 304(d) of the 1977 Mine Act is also identical to the regulation.

that the band sample method is not to be used when collecting samples of dust to substantiate a violation of 30 CFR §75.403. 10/ The judge vacated these notices of violation solely because the band sample method of collection was used. This was error. Not following directives contained in instructional manuals is not, on its own, a sufficient basis to vacate a notice of violation. Such instructions are not officially promulgated and do not prescribe rules of law binding upon an agency. Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 38 (3rd Cir. 1976); Brennan v. Ace Hardware Corp, 495 F.2d 368, 376 (8th Cir. 1974); FMC Corp., 5 OSHC 1707, 1977-78 OSHD ¶22,060 (1977). There is no evidence in the record to establish what effect, if any, use of the band sample method has on the reliability of the sample results. We do not know if the inspector's manuals proscribed that method because it could lead to results distorted unfairly against the operator, in favor of the operator, or for some other reason unrelated to sample reliability. The record simply contains no evidence on the matter. Thus, the judge erred in vacating the notices of violation solely because the band method of collecting samples was used. 11/ Therefore, we reinstate the notices of violation of 30 CFR §75.403 vacated by the judge.

10/ The judge stated:

> All of the inspector's manuals (these are not paginated so citations cannot be given) state that in collecting samples of the mixtures of rock dust and coal dust for the purpose of substantiating a violation of 30 CFR 75.403, the band or perimeter method of collecting the samples shall not be used. [Dec. 6-7.]

11/ The judge also vacated one of the four notices of violation of 30 CFR §75.403 because of the procedure used to store the collected samples. The judge questioned MESA's inspector concerning the storage procedures. His questions revealed the inspector had tied a knot around the bags containing the samples and had set them on his desk in an enclosed box. Thirty-two days after collecting the samples he sent them to the laboratory for analysis. The judge ruled that the "respondent, by the regulations is entitled to have any moisture in the mixture counted as part of the incombustible content. Merely tying a string around the cellophane bag in which the sample is collected without some further action such as sealing it or establishing that the analysis was made before any significant moisture could evaporate, does not assure a respondent of the benefit of the possible moisture content of the mixture. The notice of violation is accordingly vacated." Dec. 6-7. However, we find no testimony in the record as to the effect on the sample's moisture content of tying or knotting the sample bags and of retaining the bags for 32 days before sending them for analysis. The conclusion of the judge that these procedures do "not assure a respondent of the benefit of the possible moisture content of the mixture" is apparently based solely upon the judge's belief that the possibility of evaporation is sufficient to cast reasonable doubt on the sample results. We may share his doubts. However, since there is no testimony as to the effect of these procedures upon the moisture content, there is not substantial evidence in the record to support the judge's supposition. The vacation of the notice of violation on this basis was also error.

Accordingly, this case is remanded to the administrative law judge for further proceedings consistent with this decision. 12/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

12/ The judge dismissed without prejudice one alleged violation of 30 CFR §75.400, upon finding that the validity of the withdrawal order in which the alleged violation had been cited was pending on review before the Board. We find under the circumstances no error in the dismissal without prejudice.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1980

LOCAL UNION 1110, UNITED MINE WORKERS OF AMERICA (UMWA) ET AL.	:	
v.	:	Docket No. MORG 76X138
	:	IBMA No. 77-43
CONSOLIDATION COAL COMPANY	:	

DECISION

This discrimination case arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). Consolidation Coal Company ("Consol") appeals from the March 26, 1977, decision of former Administrative Law Judge Michels. Judge Michels, after holding an extensive evidentiary hearing, issued a detailed decision finding that Consol had withheld from miners ordinarily conferred benefits in retaliation for their engaging in protected activities. Consol's appeal was pending before the Interior Department's Board of Mine Operations Appeals on the effective date of 30 U.S.C. §961(c)(3) (Supp.III 1979), and is therefore pending before the Commission for disposition. 1/ We affirm.

Consol's arguments furnish no ground for reversal. Consol attacks the judge's finding that the miners notified the Secretary of the Interior, his authorized representative, or Consol of an alleged danger. The judge found that the miners communicated their fears over safety by both words and deeds, and, based on our review of the record, we agree. Consol also objects to the lack of evidence that each of the miners so

1/ This case presents no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp.III 1979).

complained. We adopt the judge's reasons for rejecting the argument. 2/ Finally, Consol argues that the miners were not entitled to compensation after the union safety committee declared the mine an imminent danger. This objection apparently refers to certain provisions of the collective bargaining agreement between Consol and the UMWA. As we read the judge's opinion, he rested his decision on his finding that benefits ordinarily conferred were withheld in retaliation for the miners' engaging in protected activity, not that the miners were entitled to compensation by their contract. The judge's finding is supported by the record.

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Gestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ The judge stated:

> I further recognize that only a few miners communicated any form of safety complaint to their supervisors. It cannot be concluded from this that the other men failed to make a complaint. They all wanted the safety committee brought in and management believed that the whole shift was involved in the action (Tr. 117, 289). In this kind of a situation in which, as the record shows, the word passes around on what has been done, it would be unrealistic to expect each man to make his own individual complaint to his supervisor. The group learns of and supports the action taken by the few. Terry Marvin testified that a majority rule prevails and that if most believe the elevator to be unsafe none will use it (Tr. 257). It may be inferred that the fears and concerns expressed by the applicants who testified were shared by many of the other applicants. Further, by refusing to use the elevator they communicated their agreement to call the safety committee and their belief that the elevator was unsafe. It is noted on this point the parties stipulated that some of the applicants requested the presence of their safety committee. However, the parties also stipulated that the testimony of applicants' witnesses "shall be used and considered on behalf of each individual applicant without the necessity of each individual applicant's testifying." (Stipulation of Facts Nos. 4 and 6).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1980

JACK W. PARKS	:	
	:	
v.	:	Docket No. NORT 75-377
	:	IBMA No. 77-65
L & M COAL CORPORATION	:	

DECISION

The question here is whether the L & M Coal Corporation discharged Jack W. Parks in violation of section 110(b)(1) of the Federal Coal Mine Health Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). 1/ The administrative law judge held that L & M had unlawfully discharged Parks for making a safety complaint to the Mining Enforcement and Safety Administration (MESA), and for refusing, in good faith, to work under mine roof that was unsafe, or believed by the miners to be unsafe. The judge ordered L & M to reinstate Parks. The judge also awarded Parks back pay, to be computed from the date of discharge to the date of reinstatement, 2/ together with interest at a rate of six percent per year, and litigation expenses that included reasonably incurred attorneys' fees. L & M appealed the judge's finding of a violation of section 110(b)(1), as well as the order of reinstatement and awards of back pay and attorneys' fees. L & M did not appeal the judge's award of interest. 3/

1/ Section 110(b)(1) provided:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

2/ The judge's order of relief allowed L & M to deduct from the back pay award all wages that Parks earned from other employment during the period covered by the order.

3/ The original decision in this case was appealed to the Interior Department's Board of Mine Operations Appeals in July, 1976. The Board did not decide the discriminatory discharge issue. Rather, it set aside the judge's decision on procedural grounds and remanded the case for reassignment and retrial. Subsequently, Administrative Law Judge Broderick decided this case on November 9, 1977. An appeal was filed with the Board and was pending on the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)("the 1977 Mine Act"). It is before the Commission pursuant to section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §961 (Supp. III 1979). This case, however, presents no issue under the 1977 Mine Act.

Upon careful examination of the record, we affirm the judge's holding that Parks was unlawfully discharged. We also affirm the judge's order of relief. Our discussion of the case follows. 4/

Parks was hired by L & M as a timber setter in April of 1974. Shortly thereafter, he was elected to the union position of mine safety committeeman at the mine. As a mine safety committeeman, Parks was active in bringing the safety concerns of the miners to the attention of L & M management personnel. In February of 1975, a fatal accident involving a roof fall occurred at L & M's mine. Although Parks was out of work on sick leave at the time, he participated in part of the MESA roof fall investigation in his capacity as a mine safety committeeman. As a result of that investigation, MESA required L & M to adopt a stricter roof control plan. The new roof control plan called for full roof bolting in place of the spot roof bolting (i.e., the timber setting method) that was being employed by L & M when the accident occurred. The new roof control plan increased L & M's cost of producing coal considerably.

The mine remained closed from the time of the February 1975 roof fall to mid-March of that year. From mid-March to early May of 1975, only maintenance work was performed at the mine. On Friday, May 2, 1975, at about the time that L & M resumed coal production, L & M's mine superintendent left a message at Parks' home informing him to report back to work on the following Monday.

Later that evening, on Friday, May 2nd, a walkout occurred at the mine. Several miners walked off the job claiming that W. L. Lanningham, a co-owner of L & M, did not intend to fully roof bolt in accordance with the newly approved roof control plan. Following that walkout, some of the miners involved reported the incident to Parks. On Monday, May 5th, Parks called L & M and informed management that he would not report for work until the roof control plan was followed. In addition, Parks may have also told management that he would not be reporting for work because he was sick. Later that day, Monday, May 5th, Parks and the miners who had walked off the job on the previous Friday met with W. L. Lanningham at the mine. During that meeting, Lanningham told Parks and the other miners that L & M would not follow its approved roof control plan because it was too costly to fully roof bolt and still make a profit. In response, Parks informed Lanningham that he would contact MESA if L & M did not comply with its approved roof control plan.

The next morning, Tuesday, May 6th, Parks called L & M and stated that he would not be reporting for work until L & M complied with its roof control plan by fully roof bolting. After Parks' call, at approximately 8:20 a.m. that morning, MESA and Virginia state mine inspectors arrived at the mine to conduct an inspection of the mine roof. The

4/ The facts recited were found by the judge. Our review of the record convinces us that his findings are supported by substantial evidence of record and should not be disturbed.

inspectors informed L & M management personnel that they were conducting the inspection in response to a phone call by a "representative of the miners" who alleged that L & M was not following its approved roof control plan. Although the inspectors found that L & M was at that time in compliance with its roof control plan, they issued several citations for unrelated violations. A copy of the MESA inspection report, dated May 8, 1975, was mailed to Parks and was received by him on May 12th.

In the meantime, on Wednesday, May 7th, two days after the meeting between W. L. Lanningham, Parks and the miners involved in the May 2nd walkout in which Lanningham informed the miners that L & M would not fully roof bolt, and one day after the MESA and Virginia state inspection of the mine roof, W. L. Lanningham drew up and signed Parks' notice of suspension. The notice of suspension read:

> Due to your refusal to perform your duties as a faceman ... and help in correcting any hazardous conditions which may occur but at the present time does not exist and due to your call on May 6, 1975, 7:30 a.m. informing the load operator that you would not work ... until the hazardous conditions were corrected but at the time of your call no hazardous conditions had been observed by federal and state inspection. [5/]
>
> Due to these facts a five day suspension is in effect and you may be subject to discharge pending an investigation of these facts.

On Friday, May 9th, Parks was given the notice of suspension and a layoff slip. As of that date, Parks had still not reported for work. Parks was discharged by L & M on May 19, 1975.

Parks instituted this proceeding claiming that his suspension and subsequent discharge were motivated by protected safety activity and, therefore, violated section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969. After an extensive evidentiary hearing, the judge found that "Parks' call to MESA and the inspection the following day are established as a motive for [L & M's] suspension and discharge of [Parks]", that Parks "had cause to believe, in good faith, that [L & M] did not intend to bolt every 12 feet in accordance with the plan" and that "these facts constituted sufficient justification for [Parks'] refusal to work during the week of May 5." The judge concluded that L & M's retaliatory action in suspending and eventually discharging Parks violated section 110(b). We agree. In light of the facts set

5/ Parks notified L & M that he would not be reporting for work before the inspectors conducted their inspection of the mine roof, not afterwards as the notice of suspension indicates.

out in this opinion, we hold that L & M violated section 110(b)(1) in suspending and discharging Parks. We further hold that reinstatement, back pay and attorneys' fees are proper remedies under section 110(b)(2) of the 1969 Coal Act, and that the judge's remedial order is appropriate in view of the facts of this case. 6/ Accordingly, the judge's decision is affirmed. 7/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

6/ Section 110(b)(2) in part provided:

> If [the Secretary] finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. [Emphasis added.]

7/ We also affirm the judge's holdings with respect to two procedural matters. First, the judge properly denied L & M's motion to dismiss the Secretary of the Interior's amicus curiae brief. L & M had alleged that a decision by another Commission judge that was attached to the brief and that involved a civil penalty proceeding stemming from the February 1975 roof fall at L & M's mine constituted extra-record evidence. In denying L & M's motion to dismiss, the judge here stated that with respect to the Secretary's brief, he was "not considering such matters as evidence." Furthermore, the facts established in this case clearly support the judge's finding of a discriminatory discharge. With respect to the second alleged procedural error, for the reasons stated by the judge, we hold that he did not err in refusing to receive into evidence certain portions of a transcript of an arbitration hearing.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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(703) 756-6210/11/12

19 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 80-197-M A.O. No. 48-00381-05004
v.	:	American Partners Mill
FEDERAL AMERICAN PARTNERS, Respondent	:	

DECISION AND ORDER

After the Assessment Office Conference found the amounts initially assessed for the nineteen violations charged were excessive and reduced them almost 50% from $1,046 to $536 the operator filed a notice of contest seeking leverage for a further discount based on the nuisance value of the litigation. This is known as "working the system" and usually results in a further substantial reduction at the Commission level. 1/

Here the conference notes disclose that all mitigating factors were properly considered in initially reducing the penalties. No further factors in mitigation have been offered. Furthermore, an independent evaluation and de novo review of the circumstances show no further reduction is warranted, and that because of the marginal and largely trivial nature

---

1/ Because the file that comes before the trial judge usually does not reflect the reduction effected at the conference level, most of these further reductions are routinely approved because even a 50% reduction is well within the Commission's established zone of reasonableness. In fact, in the Davis cases the Commission approved reductions of 90%. See, Davis Coal Co., 2 FMSHRC 619, 620 (1980).

of most of the violations cited 2/ a denial of the motion to approve settlement is not justified.

Because of the serious waste of scarce judicial resources and the misallocation of industrial effort involved in processing these de minimis cases, Congress, the Commission or the Secretary should move to establish a less expensive and time consuming procedure for finally adjudicating penalties that either singly or in the aggregate total less than $2,000. As we have learned, an adjudicative remedy that literally drowns in a sea of due process is a luxury this society cannot afford. See Mathews v. Eldridge, 424 U.S. 319, 343, 348 (1976). It is generally accepted that the cost to an operator of fully contesting a violation at the Commission level is $1,500 to $2,000. Since it is the policy of the Secretary not to enforce the safety standards against individual miners and penalties that average $200 or less have little deterrent effect on the operators, a cutoff of $2,000 seems reasonable in terms of the cost to the economy of affording adversary, trial-type hearings in these matters. A study made for the Administrative Conference of the United States has proposed that for cases involving penalties that range from $200 to $2,000 the adjudication be made on the record of the parties' written submissions supplemented if necessary by a conference or informational type hearing that would permit the proffering of witnesses but not the right to confront or cross-examine. See, Diver, Civil Money Penalties, 79 Col. L. Rev. 1436, 1500-1501 (1979).

For these reasons, I conclude the settlement proposed is fair and in accord with the purposes and policy of the Act. Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $536, on or before Friday, October 3, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

2/ Since many of the violations cited relate to no readily recognizable hazard, (e.g., exposed light bulbs) serious consideration should be given to deleteing those standards from the category for which the assessment of a penalty is required.

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 24 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 80-325-M A.O. No. 45-00730-05004
v.	:	Pasco Pit
CENTRAL PRE-MIX CONCRETE CO., Respondent	:	

DECISION AND ORDER

The parties move for approval of a settlement of four violations of the threshold limit values for silica dust in the amounts initially assessed, $56.00 each, and one failure to post violation of section 109(a) at $30.00. The total settlement proposed for the five violations charged is $254.00.

A review of the respirable dust violations shows the concentrations exceeded the threshold limit values (TLV) by 200% to 400%. Despite this the only evaluation of gravity (made by the inspector) notes that the time weighted average was more than 20% of the TLV. It seems obvious, therefore, that MSHA, at least for the purposes of this motion, has chosen not to furnish a meaningful evaluation of the impact of long-term exposure to the concentrations alleged on the health of the miners involved. For these reasons I can only conclude that the miners involved were not subject to a significant risk of material health impairment. Compare, Industrial Union Dept. v. American Petrol. Inst. ___ U.S. ___, No. 78-911, decided July 2, 1980, Slip op. 41-49.

The premises considered, and after considering the other criteria applicable, I find that in view of the de minimis nature of the violations charged the settlement proposed is acceptable.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $254.00, on or before Friday, October 10, 1980 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

02825

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29 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 80-55 A.O. No. 44-02841-1004
v.	:	Pocahontas Prep. Plant
POCAHONTAS FUEL CO., Respondent	:	
PATSY TRUCKING CO., Third-Party Respondent	:	

DECISION AND ORDER

This case involves charges that an independent contractor was responsible for operating three coal trucks at the site of the operator's Pocahontas Preparation Plant without fire extinguishers and, in the case of one truck, without an operative back-up alarm. The violations occurred in June 1975 and thereafter became entoiled in the long standing dispute over the liability of independent contractors for violations of the Mine Safety Law. In this case, the gordian knot was cut with a simple motion to implead. 1/ See, Secretary v. Morton Salt Division and Frontier-Kemper Contractors, CENT 80-59-M 2 FMSHRC ___, (August 8, 1980).

The penalties initially proposed were $106 for the missing fire extinguishers and $94 for the inoperative back-up alarm. Based on an independent evaluation and de novo review of the circumstances,

1/ Impleading the independent contractor mooted the operator's motion to dismiss for failure of the Secretary to file a timely proposal for penalty. Rule 27(a). In Arch Mineral and Mulzer Crushed Stone the judges, in the absence of a showing of prejudice, denied similar motions. See, Secretary v. Mulzer Crushed Stone Company, LAKE 80-255-M, (September 25, 1980). An interlocutory appeal from the judge's decision in Arch Mineral was denied by the Commission without resolving the issue. Arch Mineral Corporation, WEST 79-58, 2 FMSHRC 277 (Feb. 1980).

the trial judge advised the parties he would approve a settlement in the amount of $300. One hundred dollars was to be allocated to the fire extinguishers and $200 to the back-up alarm violation. When the independent contractor agreed, the Secretary moved for approval and dismissal.

The premises considered, it is ORDERED that the motion to approve settlement as to the independent contractor and dismissal as to the operator be, and hereby is, GRANTED. It is FURTHER ORDERED that the independent contractor having paid the settlement agreed upon, $300, the captioned matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 3 1980

MARTIN COUNTY COAL CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. KENT 80-212-R
	:	Citation No. 706431
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	March 5, 1980
	:	and
Respondent	:	
and	:	Contest of Order
	:	
COUNCIL OF THE SOUTHERN MOUNTAINS, INC.,	:	Docket No. KENT 80-213-R
	:	Order No. 706432
Respondent	:	March 18, 1980
	:	
	:	
COUNCIL OF THE SOUTHERN MOUNTAINS, INC.,	:	Complaint of Discharge, Discrimination, or Interference
Complainant	:	
v.	:	Docket No. KENT 80-222-D
	:	
MARTIN COUNTY COAL CORPORATION,	:	No. 1-S Mine
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-264
Petitioner	:	Assessment Control
v.	:	No. 15-04194-03008
	:	
MARTIN COUNTY COAL CORPORATION,	:	No. 1-S Mine
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-354
Petitioner	:	
v.	:	No. 1-S Mine
	:	
MARTIN COUNTY COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Jack W. Burtch, Jr., Esq., and James F. Stutts, Esq., McSweeney, Stutts & Burtch, Richmond, Virginia, for Martin County Coal Corporation;
L. Thomas Galloway, Esq., and Richard L. Webb, Esq., Washington, D.C., for Council of the Southern Mountains, Inc.;
Edward H. Fitch IV, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor and Mine Safety and Health Administration.

Before: Administrative Law Judge Steffey

Pursuant to an order issued May 30, 1980, as amended July 2, 1980, and August 12, 1980, a hearing in the above-entitled proceeding was held on August 21, 1980, in Pikeville, Kentucky, under sections 105(d) and 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 39-59):

> This proceeding involves two Notices of Contest, one Complaint of Discharge, Discrimination, or Interference, and one Petition for Assessment of Civil Penalty. The two Notices of Contest were filed on March 31, 1980, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, by Martin County Coal Corporation in Docket Nos. KENT 80-212-R and KENT 80-213-R challenging the validity of Citation No. 706431 and Order of Withdrawal No. 706432, respectively. Citation No. 706431 was issued under section 104(a) of the Act on March 5, 1980, alleging a violation of 30 C.F.R. § 48.3 by Martin County Coal Corporation and Order No. 706432 was issued under section 104(b) of the Act because of Martin County Coal Corporation's failure to abate the alleged violation of section 48.3 within the time provided for in Citation No. 706431.
>
> The Complaint of Discharge, Discrimination, or Interference was filed on April 10, 1980, in Docket No. KENT 80-222-D by the Council of the Southern Mountains, Inc., pursuant to section 105(c)(3) of the Act alleging that Martin County Coal Corporation violated section 105(c)(1) of the Act when the corporation denied access of the Council to the corporation's mine site on October 25, 1979, and March 18, 1980, so that the Council could monitor training classes being held at those times. The Council filed its Complaint under section 105(c)(3) of the Act because the Secretary of Labor had advised the Council by letter dated March 12, 1980, that the corporation's refusal to allow the Council to monitor training classes was not a violation of section 105(c)(1) of the Act.

The Petition for Assessment of Civil Penalty was filed on June 18, 1980, in Docket No. KENT 80-264 by the Secretary of Labor seeking to have a civil penalty assessed for the violation of 30 C.F.R. § 48.3 alleged in Citation No. 706431 whose validity is being challenged by the Notice of Contest filed in Docket No. KENT 80-212-R. Additionally, my order issued May 30, 1980, in this proceeding consolidated for hearing all civil penalty issues which may be raised when and if the Secretary of Labor should hereafter file a Petition for Assessment of Civil Penalty for the violation of section 105(c)(1) of the Act alleged by the Council's Complaint filed in Docket No. KENT 80-222-D. 1/

Although there are several exhibits in the record upon which I rely in my decision, the primary facts which are necessary to a decision in this case are set forth in a stipulation of facts the parties submitted to me on July 18, 1980. I shall make those stipulations at this point a part of my decision.

(1) The Council of the Southern Mountains, Inc. (Council), at least since October 24, 1979, has been an authorized representative of miners within the meaning of the Federal Mine Safety and Health Act of 1977 (Act), and 30 C.F.R. Part 40.

(2) The Council has never been decertified by the Mine Safety and Health Administration (MSHA), pursuant to 30 C.F.R. Part 40.

(3) On March 8, 1979, Martin County Coal Corporation (Martin County) denied non-employee Council representatives access to the mine site for purposes of monitoring training classes. The Council filed a discrimination complaint regarding this incident which, pursuant to a settlement agreement, subsequently was withdrawn.

1/ Counsel for the Secretary of Labor filed on September 12, 1980, in Docket No. KENT 80-354 a Petition for Assessment of Civil Penalty seeking assessment of a civil penalty for the violation of section 105(c)(1) which was found to have occurred in the bench decision which is issued in final form as a part of this decision. A copy of the Petition for Assessment of Civil Penalty in Docket No. KENT 80-354 was served by mail on September 10, 1980, on counsel for respondent Martin County Coal Corporation and respondent has a period of 30 days under 29 C.F.R. § 2700.28 from date of service within which to file an answer to the Petition. Since I promised the parties to this proceeding that I would issue my final decision by October 3, 1980, I shall defer assessing a civil penalty for the violation of section 105(c)(1) until the time for filing an answer has expired.

(4) On October 25, 1979, Martin County denied non-employee Council representatives access to the mine site for purposes of monitoring training classes.

(5) On March 18, 1980, Martin County denied non-employee Council representatives access to the mine site for purposes of monitoring training classes.

(6) On March 5, 1980, Martin County was duly served with Citation No. 706431 and on March 18, 1980, Martin County was duly served with Withdrawal Order No. 706432, both of which Martin County timely contested.

(7) MSHA has determined that Martin County's refusal to allow non-employee representatives of the Council access to the mine site for purposes of monitoring training classes on October 25, 1979, and March 18, 1980, did not violate section 105(c) of the Act.

(8) The information in the MSHA Proposed Civil Penalty Assessment dated May 30, 1980, regarding size of operator and history of previous violations is as set forth in Exhibits 1 and 4.

(9) Martin County has not abated the alleged violations which are the subject of this proceeding for the reasons stated by Martin County in the various pleadings of this proceeding.

(10) The assessment of a civil penalty under the Act will not adversely affect Martin County's ability to continue in business.

DOCKET NO. KENT 80-212-R

Contestant contends that Citation No. 706431 issued March 5, 1980, alleging a violation of 30 C.F.R. § 48.3 because of contestant's refusal to allow a non-employee representative of miners the right to attend on-site training sessions is invalid. Contestant supports that claim by arguing that the right for a non-employee representative to attend training classes is not to be found in the Act or any regulation promulgated under the Act. Moreover, contestant says that no such right can fairly be implied from the language used in the Act or regulations.

There is considerable merit in the arguments made by contestant in support of its claims that Citation No. 706431 is invalid for failure to cite a violation of a mandatory health or safety standard. The citation was issued under section

104(a) of the Act which requires the inspector to describe with particularity the nature of the violation and to cite the provisions of the Act, standard, rule, regulation, or order alleged to be violated. Citation No. 706431 flawlessly describes the violation by stating that "[o]n October 25, 1979, Raymond Bradbury, President of Martin County Coal Corporation, advised the representative of the miners, Dan Hendrickson of the Council of Southern Mountains, Inc., that he would not be permitted to observe the training class to be held that day. This refusal to permit observation of the training class constitutes a violation of 30 C.F.R. § 48.3."

The inspector's difficulty in finding a specific regulation to cite as having been violated is readily apparent when one turns to section 48.3 to find the language which requires an operator to allow a non-employee representative of miners to monitor or observe training classes. Section 48.3 is composed of subsections "(a)" through "(n)" and extends through three pages of regulations. The Secretary of Labor promulgated Part 48 in response to section 115 of the 1977 Act which requires each operator of a coal mine to have a health and safety training program approved by the Secretary. Section 48.3 specifically sets forth the steps to be followed by the operator for filing his training program and getting it approved by the Secretary.

Section 48.3 does not refer to the miners' representative until subparagraph (d) which requires the operator to furnish the miners' representative with a copy of the proposed training program 2 weeks before it is submitted to the Chief of MSHA's Training Center which approves or disapproves such plans on behalf of the Secretary. Subparagraph (d) gives the miners' representative the right to file comments with the operator or directly with the Chief of the Training Center. Any comments received by the operator from the miners' representative must be submitted to the Chief of the Training Center.

Subparagraph (e) does not refer to the miners' representative, but subparagraph (f) specifically requires the operator to make available at the mine site a copy of the MSHA approved plan for examination by the miners and their representatives.

The miners' representative is not mentioned in section 48.3 again until subparagraph (j) which requires the Chief of MSHA's Training Center to notify the miners' representative in writing within 60 days after the training plan is filed of the approval or status of approval of the training program. Subparagraph (j) also requires the Chief to give the miners'

representative a copy of any required revisions and affords the miners' representative the right to discuss the revisions or propose alternate revisions or changes, including the right to participate in a conference with the operator and the Chief of the Training Center before the training program is finally approved.

The next time section 48.3 refers to the miners' representative is in subparagraph (l) which requires the operator to notify the Chief of the Training Center and the miners' representative of any changes or modifications which the operator may wish to make in his training program. The operator must obtain the approval of the Chief of the Training Center for the proposed modifications.

Subparagraph (m) requires the Chief of the Training Center to notify the operator and the miners' representative of any disapproval of proposed modifications or of any changes which the Chief wishes to make in an operator's training plan.

Subparagraph (n) is the final part of section 48.3 and it requires the operator to post on the mine bulletin board and provide to the miners' representative a copy of all revisions and decisions made by the Chief of the Training Center with respect to an operator's training program.

My scrutiny of section 48.3 has left me empty-handed in being able to specify an exact subparagraph in that section which requires an operator to allow a non-employee representative of miners the right to observe or monitor actual training classes. MSHA's counsel takes the position in his pretrial brief that "a passive monitoring right is implied in the scope of the training regulations and that 30 C.F.R. § 48.3 is violated when an operator refuses to allow a representative of the miners to passively monitor a training session."

Contestant argues in its pretrial brief, pages 11 through 12, that there is no provision in the Act or regulation which implies that a non-employee miners' representative has a right to monitor training classes. Contestant points out that only section 103(f) pertaining to walkaround rights of a miners' representative provides for a non-employee representative to have access to the mine site. I believe that contestant may have overlooked section 103(c) which would permit a non-employee miners' representative to enter a mine site to monitor the measuring of miners' exposure to toxic materials and to examine records made of such exposures.

Contestant also argues, at page 14 of its pretrial brief, that an operator has to comply with thousands of individual

regulations and is not free to read rights "in" or "out" of the regulations as it sees fit. Contestant further contends that such implied standards as are urged by the Council and MSHA would cause the regulations to lose their meaning.

The Council's pretrial brief, pages 15 and 16, contends, on the other hand, that failure to find an implied right for the miners' representative to monitor training classes would undercut the rights granted to the miners' representative in the regulations and would nullify the regulations. In support of that claim, the Council argues that the miners' representative cannot determine the substance of the training plans and intelligently evaluate the training without attending the training sessions. The Council claims that the miners' representative cannot evaluate the performance of an instructor, nor seek his decertification under section 48.3(i), nor evaluate the use of training aids, without attending the training classes. The Council further argues that a miners' representative cannot determine whether training plans are being implemented as written and approved without attending the classes. The Council emphasizes the seriousness of failure of an operator to provide proper training for new miners by reference to section 104(g) of the Act which provides for withdrawal of miners without proper training from the mine as a hazard to themselves and others. The Council contends that the miners' representative cannot recommend modification of a training plan unless he has access to the mine site to monitor classes because there is no way to determine whether modifications are needed unless the classes are monitored.

The difficulty with the Council's and MSHA's arguments about the implied right of a miners' representative to monitor training classes is that section 48.3 was written so as to reserve exclusively to the Chief of MSHA's Training Center the right to evaluate the effectiveness of the operator's instructors in teaching the substance of the operator's training program as set forth in subparagraph (e) of section 48.3; the Chief of the Training Center also has exclusive power to monitor the operator's instructors to determine whether the instructors should be approved by MSHA as set forth in subparagraph (h)(3); the Chief of the Training Center also has exclusive power to revoke MSHA's approval of instructors for good cause shown, as set forth in subparagraph (i). The miners' representative is not mentioned at all in any of the subparagraphs which have to do with the actual teaching or implementation of the training programs.

There must be some reason for the failure of section 48.3 to give the miners' representative any right of participation

in helping to assure that training programs are properly implemented in the classroom. A probable reason for that omission is referred to in footnote 2 on page 12 of contestant's pretrial brief where contestant states that employee miners' representatives, as distinguished from non-employee miners' representatives, have free access to the mine site by virtue of their being employees. One possible reason that section 48.3 does not specifically provide for the miners' representative to attend training classes or assist in evaluating instructors is that nearly everyone assumes that the miners' representative will be an employee as well as a miner's representative. In the 8 years that I have been holding hearings under the 1969 and 1977 Acts, this is the first dispute I've had where the miners' representative was other than someone affiliated with the United Mine Workers of America. In the cases involving the United Mine Workers of America, there was a safety committeeman who was both an employee and a miners' representative. In those cases, when a miner wanted to report a safety hazard, he generally reported it to the safety committeeman who would pass on the complaint to a non-employee miners' representative who was paid solely by UMWA.

When complaints about health and safety are relayed by the miners' representative to MSHA for the purpose of requesting a special investigation, section 103(g)(1) of the Act provides that the name of the miner who made the initial complaint shall not be revealed to the operator. Thus, the reason that section 48.3 contains no specific language providing for the miners' representative to monitor the training classes is that the Secretary, in my opinion, assumed when drafting section 48.3 that the miners' representative would monitor the classes as an employee miners' representative because each miner is given retraining each year and one or more employee miners' representatives will be in a position to evaluate the quality and substance of the training classes as well as the competence of the instructors who teach the classes, or new miners will pass on comments about the training classes and instructors to an employee miners' representative.

In this proceeding, there is no employee miners' representative. Even if the miners at contestant's mine report to their non-employee representative that they believe their training classes are inadequate, it is not possible for their representative to check on the accuracy of their complaints because, as a non-employee, contestant will not admit the miners' representative to the mine site to monitor the classes.

The evidence in this case shows that the miners' representative was denied the opportunity of accompanying MSHA's

training specialist in Pike County on a trip to monitor a training class held on October 25, 1979. Even though the Chief of MSHA's Training Center arranged for his training specialist to go to the mine and even though the Council hired an experienced mine foreman to be the miners' representative on that occasion, contestant's president advised the Chief of the Training Center and the miners' representative that the miners' representative would not be permitted access to the mine site for the purpose of monitoring the class. Since MSHA has authority under section 48.3(e) of the regulations to determine the effectiveness of the training program, the training specialist who had requested that the miners' representative accompany him, was entitled to have access to mine property to observe the training class, and the miners' representative would have had the right to do so under section 103(f) if the training specialist had asked the miners' representative to accompany him for the purpose of monitoring the class.

Mr. Fitch has indicated in the argument that he made this morning that the Secretary of Labor does not want the miners' representative to be tied to visits by MSHA's inspectors for the purpose of monitoring training classes and he says that this proceeding could have been brought up under a factual situation under which the miners' representative would have been accompanying an inspector, but MSHA does not want section 103(f) used as a vehicle to assure that a miners' representative has a right to monitor training classes. Mr. Fitch's position on behalf of the Secretary is that the Act in general has an implied right for the miners' representative to monitor training classes and that, therefore, the Secretary did not, for the purpose of this hearing, set up a factual situation whereby this case would have arisen under an alleged violation of section 103(f) of the Act instead of an alleged violation of section 48.3 of the regulations.

I believe that the detailed provisions in section 48.3 providing for the miners' representative to participate at every stage of the operator's formulation of training plans, and all modifications of such plans, the fact that the operator is required to furnish the miners' representative with a copy of the plans before they are submitted to the Chief of MSHA's Training Center, and the fact that the plans must be made available for inspection at the mine site by the miners' representative even though the miners' representative must be furnished with all proposed plans and modifications to such plans, in addition to being given the right to discuss the plans with the operator and the Chief of the Training Center, provide a strong indication that section 48.3 was

intended to contain an implied right for the miners' representative to monitor the training classes. In fact, Mr. Fitch says that it was the assumption of the Secretary that the miners' representative was given that power, an implied power, of monitoring classes under those provisions that I have just mentioned.

The difficulty of finding a violation of section 48.3 is that the right to monitor training classes must be found, insofar as upholding Citation No. 706431 is concerned, within the provisions of section 48.3, but as I have previously pointed out, that section reserves to the Chief of MSHA's Training Center the right of determining the quality of training and the competence of instructors without any mention of the right of the miners' representative to participate in those activities. If, as Mr. Fitch says, the Secretary drafted section 48.3 so as to allow the miners' representative to have an implied right under that section to monitor training classes, the Secretary narrowed the scope of section 48.3 so much that I cannot find a violation of section 48.3 in contestant's refusal to allow the miners' representative to have access to the mine site for monitoring classes.

Initially, it was pointed out by contestant in its pretrial brief that it has to abide with thousands of specific regulations and that it cannot arbitrarily read into those regulations any generalized obligations which are not spelled out by the Secretary in the beginning when they are drafted. Additionally, if an implied right of monitoring is to be found in section 48.3, then I must find that the operator or contestant has violated that section; if I do that then I am required to assess a civil penalty based on an ambiguous argument that section 48.3 contains a specific provision allowing a non-employee miners' representative to monitor training classes. I don't think that I can in good conscience make that finding. Therefore, I find further that Citation No. 706431 failed to show a violation of section 48.3 and that the citation should be vacated and the Notice of Contest in Docket No. KENT 80-212-R should be granted.

DOCKET NO. KENT 80-213-R

The Notice of Contest in Docket No. KENT 80-213-R requests that Order No. 706432 be vacated. Order No. 706432 was issued on March 18, 1980, when contestant refused to allow the Council's non-employee miners' representative access to the mine site to monitor training classes. The order did not actually withdraw anyone from the mine, but it was issued because the inspector found that the time for compliance with the inspector's version of section 48.3 should not be extended.

Since I have found in dealing with the Notice of Contest in Docket No. KENT 80-212-R that a violation of section 48.3 did not occur, the order of withdrawal should be vacated and the Notice of Contest in Docket No. KENT 80-213-R should be granted because there is no need to extend the time for compliance with a regulation which has not been violated.

DOCKET NO. KENT 80-222-D

The Complaint in Docket No. KENT 80-222-D claims that Martin County Coal Corporation violated section 105(c)(1) of the Act by interfering with the implied right of the non-employee miners' representative to come on mine property for the purpose of monitoring the training classes. In its motion for consolidation filed on May 9, 1980, and which was granted by my order issued May 30, 1980, in this proceeding, the Council asked that its Complaint in Docket No. KENT 80-222-D be consolidated with the Notices of Contest in Docket Nos. KENT 80-212-R and KENT 80-213-R because the issue of Martin County Coal Corporation's refusal to allow monitoring is involved in the Complaint as well as in the Notices of Contest.

The Council's Complaint will have to be denied to the extent that it claims an implied right to monitor classes under section 48.3 because I have already found that no such implied right exists under that section of the regulations. The Complaint, however, is based on much broader allegations than implied rights under section 48.3. As shown in paragraph 9 on page 9 of the Complaint and in the prayer for relief on pages 9 and 10, the Complaint generally alleges illegal acts of interference.

The implied right to monitor training classes must be found as a part of the purposes of the Act and its provisions in general. One of the arguments made by the Council in this proceeding in contending that an implied right to monitor exists under the Act has been based on its reference to Franklin Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938, in which the court found that a miner may refuse to work in an area he thinks is unsafe until such time as the safety matter is resolved. The Council argues that the right not to work in an unsafe area is an implied right gleaned from the general provisions of the Act and is not a right which is specifically spelled out in the Act.

Many people rely on the general preamble to the 1969 Act, which, as far as I know, has not been rescinded by the 1977 amendments. In paragraph (e) of that preamble, the statement appears to the effect that the operators, with the

assistance of the miners, have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices in the mines.

Mr. Fitch impressed me with his argument today that once a miners' representative is chosen, he has a right to act for the miners whether he's an employee or non-employee and that miners are doing their part to enforce the safety and health provisions of the Act by electing representatives to help them see that improvements in safety and health conditions in mines are made. One way for the miners to enhance safety is to have their representatives attend training classes to assure that the operators' training program is being carried out in the classrooms.

Mr. Galloway on behalf of the Council also impressed me with an argument this morning in which he said that if it's conceded, as I think I must concede, that the Secretary could have drafted section 48.3 so as to permit a miners' representative to participate in monitoring training classes, then it must also be conceded that the Act contains within its purview an implied right for a miners' representative to monitor training classes. If the Act does contain an implied right to monitor training classes, then, of course, that is all that's required to sustain the Council's argument that it does have such an implied right under the Act.

Section 115 of the Act deals with training programs and has been codified in the Federal Regulations under Part 43. The first part of section 115, that is, subparagraph (a)(1), is noteworthy in this proceeding because, under that subparagraph, the training plan which the operator must submit to MSHA for approval shall include instruction in the statutory rights of miners and their representatives. The provision that instruction be given as to the statutory rights of the miners' representative is a strong indication that the miners' representative should be present when that instruction is given. I believe that subparagraph (a)(1) provides strong support for finding that miners' representatives are intended to be given the right to see what's being taught under the training program. Another provision that I think is significant in considering this implied right is in section 115(b), which indicates that training might be given in some location other than the mine site. I would assume that if training is given at some place other than the mine site, that the operator would have difficulty in objecting to a non-employee miners' representative coming to that site to monitor the training classes.

Additionally, section 115(c) refers to the fact that miners will be given certificates to show that they have

completed certain kinds of instructions and those certificates are supposed to be available for inspection at the mine site. There again, I would think that the miners' representatives, if employees or otherwise, should have the right to examine those certificates of instruction upon completion of instruction.

The Commission itself has taken a liberal view about interpreting the Act and the regulations. For example, in Old Ben Coal Co., 1 FMSHRC 1954 (1979), the Commission interpreted section 75.400 to require the prevention of accumulation of combustible materials, as opposed to the former Board's interpretation that section 75.400 only required that accumulation of combustible materials be cleaned up within a reasonable time after they had accumulated. In that case, the Commission quoted UMWA v. Kleppe, 562 F.2d 1260 (D.C. Cir. 1977), at page 1265, where the court stated that "[s]hould a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred."

In Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974), the court upheld the former Board's opinion that existence of 7,200 feet of coal dust constituted an imminent danger. The court noted that the 1969 Act, which has been strengthened by the 1977 Act, is a remedial statute which should be liberally construed. That language was cited with approval by the court in Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), in which the court ruled that a mine whose coal was sold only in intrastate commerce for domestic consumption was subject to the 1977 Act because of its effect on interstate commerce.

My discussion above leads me to find that non-employee miners' representatives do have an implied right under the Act to monitor training classes.

As to the alleged violation of section 105(c)(1), the pertinent part of that section provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because * * * of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory rights afforded by this Act.

One of the cases which I think supports a finding of a violation of section 105(c)(1) in this proceeding is a case entitled Local Union No. 1110, UMWA, and Robert L. Carney v. Consolidation Coal Co., 1 FMSHRC 338 (1979). In that case, Carney was given three letters of reprimand and placed on probation for 1 year because of his union activities. He had left his continuous-mining machine and had gone to complain to other union officers and MSHA because he was asked to operate a continuous-mining machine pending receipt of a known mixture of methane for checking the methane monitor on the continuous-mining machine. Carney was told that he could only make such complaints and leave the section when management approved. Carney continued doing union work, because he was a safety committeeman, without getting permission to do so and that resulted in other letters of reprimand.

The Commission in that case affirmed an administrative law judge's holding that this restrictive policy was a violation of Carney's rights. The Commission stated that health and safety of miners made it necessary for the union committeeman to do his work even though it might interfere with Consolidation's ability to control production as it might prefer on a given occasion. The Commission said that Consolidation's policy would impede a miner's ability to contact the Secretary when safety violations or dangers arise.

In this case, I think it is clear that when Martin County Coal Corporation prevented the non-employee miners' representative from coming on the premises to monitor the training classes, it was doing exactly what the Commission said couldn't be done in the Carney case because Carney was trying to report violations to the proper authorities at various times when it didn't suit management for him to do so. The Commission said that the importance of maintaining health and safety in the mines requires that the operator not interfere with the miners' representative when he is trying to accomplish something which will enhance safety. In this case, as I have already indicated in the first part of my decision, when the Council's representative tries to go on the premises to monitor the classes and make sure that the training program is being conducted properly so as really to teach the miners the things that are required, he is simply trying to carry out his obligations as the miners' representative in seeing that the training program is competent and is accomplishing its purposes.

I am aware of Martin County's argument in this case to the effect that there must be an additional effort to bring the alleged violation of section 105(c)(1) within the purview

of a violation, but I think that when a miners' representative seeks to exercise even an implied statutory right that he is automatically brought within the purview of section 105(c)(1) when the company takes an action which specifically interferes with the miners' representative in his effort to do an act that he should be allowed to do in order to make sure that health and safety in the mines are going to be carried out in fact as well as placed in a training program. For the reasons I have indicated, I find that a violation of section 105(c)(1) did occur and that the Council is entitled to the relief sought under section 105(c)(3) of the Act.

DOCKET NO. KENT 80-264

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-264 seeks to have a civil penalty assessed for the violation of section 48.3 alleged in Citation No. 706431. Since I have already found in this decision that no violation of section 48.3 occurred, the order accompanying this decision will dismiss the Petition for Assessment of Civil Penalty in Docket No. KENT 80-264.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed on March 31, 1980, by Martin County Coal Corporation in Docket No. KENT 80-212-R is granted and Citation No. 706431 dated March 5, 1980, is vacated for failure to show that a violation of 30 C.F.R. § 48.3 occurred.

(B) The Notice of Contest filed on March 31, 1980, by Martin County Coal Corporation in Docket No. KENT 80-213-R is granted and Order of Withdrawal No. 706432 dated March 18, 1980, is vacated because no question as to the reasonableness of time to be given for compliance existed in this instance in view of the fact that underlying Citation No. 706431 failed to show a violation of a mandatory health or safety standard.

(C) The Complaint of Discharge, Discrimination, or Interference filed on April 10, 1980, in Docket No. KENT 80-222-D by the Council of the Southern Mountains, Inc., is granted because a violation of section 105(c)(1) of the Act existed. Therefore, Martin County Coal Corporation is ordered:

(1) To cease and desist from further acts of discrimination and intereference with the Council in its efforts to represent the miners at the Corporation's mines, including, but not limited to, interference with the Council's sending representatives to monitor training classes given at the Corporation's mine site or elsewhere.

(2) To notify the Council, at least 2 days in advance, when actual training classes are to be given, including providing the Council

with the time and place where the classes will be held and specifying the length of time which the classes are expected to last.

(3) To reimburse the Council for all attorneys' fees and other expenses incurred in connection with the filing and prosecution of the Complaint in Docket No. KENT 80-222-D or otherwise incurred as a direct result of Martin County Coal Corporation's refusal to allow the Council's representative to monitor training classes.

(D) The Petition for Assessment of Civil Penalty filed June 18, 1980, in Docket No. KENT 80-264 by the Secretary of Labor seeking assessment of a civil penalty for an alleged violation of 30 C.F.R. § 48.3, is dismissed because no violation of section 48.3 has been proven.

(E) The civil penalty issues raised by the Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-354, seeking assessment of a civil penalty for the violation of section 105(c)(1) by Martin County Coal Corporation, are severed from this consolidated proceeding and a decision regarding those issues is deferred until such time as Martin County has filed an answer to the Petition pursuant to 29 C.F.R. § 2700.28.

(F) In order to evaluate the criterion of whether respondent demonstrates a good faith effort to achieve rapid compliance with respect to the civil penalty issues referred to in paragraph (E) above, counsel for Martin County is requested to provide me with a statement by October 10, 1980, as to whether Martin County allowed the Council's representative access to the mine site for the purpose of monitoring the training classes which are scheduled to begin on October 5, 1980.

SUPPLEMENTAL DECISION

Foreword. In some preliminary discussions with counsel for the parties in this proceeding, I stated that I expected to render a bench decision at the conclusion of the presentation of evidence. Counsel thereupon requested that they be permitted to file prehearing briefs. Such briefs were filed by the parties on August 15, 1980.

After I had indicated at the hearing that my bench decision, supra, would rule in the Council's favor with respect to the complaint filed in Docket No. KENT 80-222-D, counsel for Martin County Coal Corporation asked that he be permitted to file a posthearing brief between the time that I received the transcript of the hearing containing my bench decision and the time of issuance of the bench decision in final written form. I granted that request at the hearing (Tr. 29) and provided that such posthearing briefs should be submitted to me by September 25, 1980. Posthearing briefs were timely filed by the Council and Martin County Coal Corporation. Counsel for MSHA did not file a posthearing brief.

It should be noted that I agreed to issue my decision by October 3, 1980, because new training classes are scheduled to be held by Martin County

beginning with the first shift which reports for work at midnight on Sunday, October 5, 1980, and the Council wanted a ruling by me as to whether the Council's representative would be entitled under my decision to send a representative to monitor the training classes which are scheduled to commence on October 5, 1980.

Consideration of Arguments in Council's Posthearing Brief

The Council's brief states that it still believes that section 48.3 contains an implied right for the Council's representative to monitor classes on behalf of the miners, but its brief is devoted primarily to supporting the aspects of my bench decision which found that the Council has a right under the Act to monitor training classes. Inasmuch as the Council's brief primarily supports the holdings which are contained in my decision, it is unnecessary for me to consider the arguments contained in the Council's posthearing brief except for one issue which is discussed below.

Award of Damages under Section 105(c)(3) of the Act. At page 10 of the Council's brief, it is correctly stated that I said at the hearing that I would not order Martin County Coal Corporation to pay any damages to the Council unless the Council could cite some legal support for its request for damages (Tr. 59). After reading the Council's arguments in support of its request for damages, it is obvious that I misunderstood what the Council meant in its complaint when it asked for damages. I understood the prayer for damages to be a request that I order Martin County to pay punitive damages because, in other cases, I have had miners in discrimination cases to ask for up to $1,000,000 in damages because of an alleged unlawful discharge. The Council's brief shows that the Council meant by damages that it wants to be reimbursed for approximately $500 in expenses (phone calls, travel, etc.,) which the Council incurred as a direct result of Martin County's refusal to allow its representative access to the mine site for the purpose of monitoring training classes.

I have always considered that a complainant in a discrimination or interference case has a right to be compensated for all direct costs associated with the act of discrimination or interference. For example, in my decision in Bernard Lyle Cline v. Itmann Coal Co., Docket No. HOPE 76-364, issued December 21, 1977, I ordered the company to reimburse Cline for expenses such as phone calls, preparation of employment applications, etc., in addition to reimbursement for back pay and legal fees. With respect to the relief to be provided under section 105(c), Senate Report No. 95-181, 95th Cong., 1st Sess., May 16, 1977, stated as follows (p. 37):

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The

specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

Paragraph (C)(3), page 16, supra, of the order accompanying my bench decision is intended to grant recovery of the type of expenses for which the Council seeks reimbursement in its references to "damages" on pages 10 through 12 of its posthearing brief.

Consideration of Arguments in Martin County's Posthearing Brief

None of the arguments in Martin County's posthearing brief persuades me that I ought to change my findings or rulings made in the bench decision which has been reproduced on pages 2 to 16, supra. My reasons for rejecting Martin County's supplemental arguments are set forth below.

The Right of a Non-Employee Miners' Representative To Monitor Training Classes. Pages 5 to 13 of Martin County's posthearing brief are devoted to arguing that the Act contains no specific provision that a non-employee miners' representative has the right to monitor training classes and that such a right cannot be fairly implied.

The first contention under the above argument is that the Act provides for miners' representatives to have three categories of rights. Those rights are said to be given in sections 101(c), 103(f), and 111 of the Act which provide, in general, (1) that the miners' representative may inform the appropriate authorities about conditions affecting health and safety of the miners, (2) that the miners' representative has a right to health and safety information, such as mine maps and records, which are deemed necessary for enforcement purposes and prevention of work-related accidents, and (3) that the miners' representative is entitled to accompany a Federal inspector when he is conducting an inspection. Martin County follows up the foregoing recitation of the rights given to the miners' representative by the Act with the claim that under the doctrine of ejusdem generis only those rights of the same kind, class, or nature as those specifically within a statute's coverage are to be implicitly included. Martin County then concludes that the right of a miners' representative to attend training classes cannot be considered to be of the same nature as access to records and descriptions of mines.

I cannot agree with Martin County's conclusion that the right of a miners' representative to attend training classes is of a different category or type of right from the ones which Martin County has described as being inherent in sections 101, 103, and 111 of the Act. Determining whether a company's training classes are teaching the contents of the training program is specifically related to assuring that the miners are trained properly in the health and safety precautions which they should follow in the course of their employment.

There is almost no difference between a miners' representative being allowed to observe a training class and requiring that he be allowed to accompany an inspector who is conducting a health and safety inspection. The primary difference between accompanying an inspector under the provisions of section 103(f) and attending a training class is that a miners' representative is more likely to be able to compare the adequacy of a company's instructors to carry out the provisons of a training program than a miners' representative may be competent to obtain rock dust samples or take air measurements or determine whether a ground wire complies with the mandatory safety standards. Since I believe that the right of a non-employee miners' representative to monitor training classes is of the same category as other rights specifically granted by the Act, I find that there is no merit to Martin County's first contention to the effect that the Act does not give the miners' representative the right to monitor training classes.

The second argument made by Martin County's posthearing brief is a claim that the finding in my bench decision that the miners' representative has an implied right to monitor classes is invalid because I made a rule of general applicability by the adjudicative process rather than through the rulemaking provisions of the Act. Martin County's brief (p. 9) concedes that the Supreme Court held in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), that the Administrative Procedure Act does not preclude enunciation and enforcement of a retroactive standard by an adjudicative rather than a rulemaking proceeding, but argues that the Supreme Court's holding in the Aerospace case that the NLRB could do so was based on that Board's historic reliance on adjudicative proceedings to establish new principles. Also Martin County observes that the Supreme Court said that there might be situations where the NLRB's reliance on adjudication would be an abuse of discretion or a violation of the Act there involved (Brief, p. 10). Martin County completes its rulemaking argument by pointing out that the rulemaking provisions of the 1977 Act are very rigorous and require preliminary procedures which are much more demanding than those prescribed by the Administrative Procedure Act, citing a long passage from Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 402-403 (D.C. Cir. 1976), which describes the procedures which the Secretary of Labor is required to follow in rulemaking proceedings.

Martin County's arguments based on the rulemaking provisions of the Act are misapplied. Those rulemaking provisons apply to the Secretary of Labor rather than to the Federal Mine Safety and Health Review Commission. The Commission pointed out in Old Ben Coal Co., 1 FMSHRC 1480 (1979), that its powers in proceedings under the Act are broad in scope and that the Commission has an obligation to set a policy for enforcement of the Act. Therefore, Martin County's argument that the NLRB can proceed by adjudication, whereas the Commission cannot, is incorrect and must be rejected.

Another argument raised by Martin County's brief (pp. 13-16) in support of its claim that the Act contains no language from which it can be implied that a non-employee miners' representative can come on Martin County's mine property to monitor training classes is an involved claim that Martin

County's property is so sacred that a non-employee can come on the property only if the reason for his coming on the property can be satisfied by no other means. Martin County argues that the non-employee miner's representative can find out fom talking to Martin County's employees whether the training classes are faithfully carrying out the provisions of the training program. The representative, it is said, can make complaints to MSHA on the reports received from the miners who attend the classes.

The Council's pretrial brief provided excellent reasons, as set forth in my bench decision at page 7, supra, for the need for the non-employee miners' representative to come on Martin County's property to monitor the training classes. Moreover, as I pointed out on page 8 of my bench decision, supra, the non-employee miners' representative should be allowed on the mine property to check the reports of the miners so that any reports given to the representative by the miners can be verified by the representative before complaints are made to MSHA. Verification of miners' complaints before reporting them to MSHA is beneficial to Martin County because idle, false, or incorrect reports would be eliminated.

The Award to the Council of Attorney's Fees. Martin County's post-hearing brief (pp. 16-19) argues that neither courts nor administrative agencies are free to require losing litigants to pay the attorney's fees of successful litigants in the absence of express statutory authorization. Martin County cites authorities in support of the foregoing argument and then faces up to the fact that my statement at the hearing that my order in this case would award attorney's fees to the Council is based on a statute which does authorize the Commission and its judges to award attorney's fees to persons who have proved their cases under section 105(c)(3) of the Act. Martin County then states that even though section 105(c)(3) does provide for an award of attorney's fees, that special circumstances may exist which would make an award of attorney's fees unjust. Martin County contends that such special circumstances are present in this case because this is a case of first impression where Martin County proceeded under a course of action which was based on a reasonable interpretation of the Act. Martin County says that my finding that a non-employee miners' representative has a right to monitor training classes is concededly based on an implied right under the Act. Martin County argues that it was reasonably led by the Secretary's Interpretative Bulletin, 43 Fed. Reg. 17546, published April 25, 1978, to believe that its conduct was consistent with the Act and the regulations. Martin County completes its argument on the above point as follows (Brief, p. 19):

> Normally where an award of attorney's fees is assessed by statute, the party against whom it is assessed has violated some objective, concrete provision of which he has notice of the consequences of violation. Here, the Company's reliance on the Department's own published statements and the apparent language of the statute itself was reasonable. In these circumstances to assess an award of attorney's fees against the Company would be to impose an unjust penalty where no penalty at all is warranted.

There are a number of exhibits in this proceeding which show that Martin County has been extremely recalcitrant in complying with any of the provisions of the Act or the regulations insofar as they pertain to allowing the miners' representative to participate in the formulation of training plans. Exhibit B shows that Martin County did not send a copy of its training program to the miners' representatve in compliance with section 48.3. Exhibit C shows that the Council tried to use the regulations as an excuse to ignore the miners' representative altogether and Exhibit D shows that Martin County failed to read the preamble to the training regulations which clearly showed that MSHA had not refused to continue recognizing the Council as the miners' representative at Martin County's mine. Exhibit E contains a painstaking recitation of the uncooperative series of acts on the part of Martin County's managerial staff in its obstinate and continual refusal to allow the Council to perform the duties which were clearly within its right as the miners' representative at Martin County's mine.

Martin County's brief deals with my finding of an implied right of a non-employee miners' representative to monitor training classes as if it were a finding of a tremendously burdensome and demanding requirement which it could not possibly have thought could happen. The right to monitor training classes has no adverse impact on Martin County because it has to do almost nothing in response to the right. Martin County already had the obligation under section 48.3 to prepare and file with MSHA a training program for MSHA's approval. Under section 48.3, a copy of the proposed training program has to be filed with the Council which is the miners' non-employee representative. The Council had a right to participate in discussions regarding the training program under section 48.3. The Council is entitled under section 48.3 to be notified if the training program is modified by either Martin County or MSHA. Martin County is required to teach the material which is described in its training program. Martin County must provide a room in which the classes can be taught and must ventilate and provide illumination in such room. The instructors must be competent and must be approved by MSHA. The requirement that Martin County allow a non-employee miners' representative to monitor the class requires Martin County to do nothing which it was not already obligated to do by section 48.3 other than to send the Council notification of the time and place where the classes will be held.

While it may cost Martin County 15 cents in postage to notify the Council when training classes are to be held, Martin County, in exchange for honoring that right, will be able to discontinue the practice of posting a guard at its mine in order to prevent the Council's representative from having access to mine property for the purpose of monitoring the classes. Moreover, Martin County will no longer have to be plagued with numerous phone calls from the Council's representative and the Chief of MSHA's Training Center as they try to persuade Martin County's officials to allow the non-employee miners' representative access to mine property to monitor training classes.

In view of the facts recited above, I find that there is no merit to Martin County's claim that it reasonably refused to allow the miners' representative to monitor its training classes. The Act was written to improve health

and safety in the mines. The likelihood that the Act would be interpreted so as to deny a non-employee miners' representative the right to monitor training classes was remote and Martin County's officials deliberately and knowingly took a calculated risk that they would be found to have violated section 105(c)(1) when they continually and defiantly refused to allow the Council's representative to monitor the training classes. Therefore, Martin County should be required to reimburse the Council for all attorney's fees and all other expenses incurred by the Council with respect to its efforts to be given access to mine property for the purpose of monitoring training classes.

The ordering paragraphs at the end of my bench decision, commencing on page 15, supra, are affirmed.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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6 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-201-M A.O. No. 12-01423-05002
v.	:	Derby UG Quarry
MULZER CRUSHED STONE CO., Respondent	:	

DECISION ON REMAND

On September 29, 1980, the Commission remanded this case to me for the purpose of reconsidering my prior decision of September 3, 1980, affirming one citation and assessing a civil penalty in the amount of $75. The case was remanded after a finding by the Commission that the respondent was improperly denied an opportunity to submit a post-hearing brief prior to the issuance of my decision.

The Commission and the respondent are correct in their assertions that my decision of September 3, 1980, issued prior to the filing of respondent's written brief on September 11, 1980. This was an oversight on my part, and after now reviewing and considering the arguments advanced in writing by the respondent in support of its case, I conclude and find that my prior decision should be re-affirmed. Accordingly, my findings and conclusions made in this case on September 3, 1980, including the decision affirming the citation and imposing a civil penalty of $75 stands as my final decision in this case.

It seems clear to me from the record in this case that the arguments advanced by the respondent in its brief of September 11th are the same as those made on the record during the course of the hearing (Tr. 143-158). Further, my findings and conclusions concerning a violation of 30 CFR 57.6-177, include a discussion of the position taken by the parties with respect to that violation, and clearly indicate my consideration of the arguments advanced by the respondent in support of its case (pgs. 6-10, decision of September 3, 1980). After reviewing respondent's written arguments in its brief, I cannot conclude that respondent has advanced any additional arguments which would warrant any change in my prior findings and conclusions concerning the factual and legal arguments

advanced by the respondent in support of its case. As noted by me several times during the hearing, respondent's arguments, for the most part, go to questions of gravity and negligence rather than to an absolute defense of the citation issued in this case. As for the factors of gravity and negligence, they were given due consideration by me in the course of my decision and are reflected by the civil penalty assessed by me in this case.

In view of the foregoing, I cannot conclude that respondent has been prejudiced by my hasty issuance of the decision in advance of the actual filing of respondent's brief. Respondent's position and arguments made at the hearing, as reflected in the transcript, were carefully considered by me in the course of the decision , and as noted therein, were considered by me in the course of my findings and conclusions, both as to the facts developed and the legal interpretations and applications of the cited mandatory safety standard which was in issue.

ORDER

My previous decision of September 3, 1980, as well as my order directing payment of a civil penalty of $75 are re-affirmed as my final decision in this case.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

6 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WILK 79-103-PM
Petitioner	:	A.O. No. 37-00065-05002W
v.	:	
	:	J. Santoro Pit & Plant
J. SANTORO, INC.,	:	
Respondent	:	

DECISION

Appearances: Paul J. Katz, Attorney, U.S. Department of Labor, Boston, Massachusetts, for the Petitioner;
Dennis H. Esposito, Esquire, Providence, Rhode Island, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding filed by the petitioner against the respondent proposing civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 for two alleged violations of section 104(b) of the Act. The alleged violations were served on the respondent by MSHA inspector George W. Sargent on May 17, 1978, when he issued Citation Nos. 216486 and 216487 charging the respondent with violations of 30 C.F.R. §§ 56.14-1 and 56.9-88. The citations resulted from the respondent's failure to abate the same conditions which were the subject of two section 104(b) orders, and they were issued after the inspector found that the equipment cited continued to be used by the respondent at the mine in violation of the withdrawal orders.

ISSUES

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

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (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, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

DISCUSSION

This is the second proceeding brought by the petitioner against the respondent seeking civil penalties for citations issued to the respondent for violations of section 104(b) of the Act. The first proceeding was brought against Mr. Joseph Santoro pursuant to section 110(c) of the Act in his individual capacity as president of the respondent corporation for allegedly knowingly authorizing, ordering, or carrying out the corporate operator's violations of three 104(b) orders issued by Inspector Sargent on May 17, 1978. The case was heard by Judge Stewart on April 6, 1979, but after the testimony of one witness, the parties proposed a settlement in the full amount of $1,500 as initially assessed by MSHA's Office of Assessments. Judge Stewart approved the settlement by his decision and order dated May 31, 1979, Docket No. WILK 79-46-PM, and respondent's payment of the penalties finally disposed of that case.

This proceeding was initiated by the petitioner against the corporate operator pursuant to section 110(a) of the Act, and the charges are based on two of the orders which were disposed of by the settlement in Judge Stewart's proceeding. The case was docketed for hearing at Providence, Rhode Island on August 21, 1980, and after a prehearing conference prior to the taking of any testimony, the parties proposed a settlement of the case whereby the respondent agreed to pay the full proposed assessment of $350 for each of the two violations. The parties submitted their proposal on the record, and the petitioner presented oral arguments in support of the proposed settlement for my consideration and approval (Tr. 3-6).

In support of the proposed settlement, petitioner asserted that aside from the violations which were at issue in Judge Stewart's proceeding and in this case, respondent has no other applicable history of prior paid violations. In addition, the record reflects that respondent is a small family owned sand and gravel operator employing five to 10 employees, that the

violations issued shortly after the effective date of the Act, and that abatement was utlimately achieved in good faith by providing the cited front-end loader with roll-over protection, and by installing a guard on the V-belt drive on the cited secondary crusher. In addition, the parties agreed that the payment of the penalties in question will not adversely affect respondent's ablity to remain in business (Tr. 7-9).

In addition to the foregoing arguments, petitioner asserted that it has agreed to a settlement of the case because of the uncertainty concerning a substantial legal issue raised by the fact the initial underlying citations which preceded the section 104(b) withdrawal orders were issued on April 27, 1977, pursuant to the now repealed Metal and Nonmetallic Mine Safety Act, and that the orders issued pursuant to the present 1977 Act were issued in accordance with an MSHA policy directive whereby inspectors were instructed to issue section 104(b) orders of withdrawal when they determined that citations previously issued under the Metal and Nonmetallic-Metal Mine Act were not timely abated. Petitioner asserted that this policy presents a substantial question of law of uncertain legal precedent and validity, and that it has been discussed and taken into account by the parties in their joint proposal for the settlement disposition of this matter (Tr. 9-15).

CONCLUSION

Upon consideration of the arguments presented by the parties in support of the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to Commission Rule 29 C.F.R. § 2700.30, settlement is approved for the following two citations which are the subject of this proceeding:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
216486	5/17/78	56.14-1	$ 350	$ 350
216487	5/17/78	56.9-88	350	350
			$ 700	$ 700

ORDER

Respondent IS ORDERED to pay civil penalties in the amount of $700 in satisfaction of the aforesaid citations within thirty (30) days of the date of this decision. Upon receipt of payment by MSHA, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

6 OCT 1980

TOLBERT WHITT, CHARLIE ROSS, JOHN WALL, JOHN McGRAW, ROSS BUCKLAND and WILLIE JOHNSON, Complainants	:	Complaints of Discrimination
	:	Docket No. WEVA 80-321-D
	:	Itmann No. 1 Mine
v.	:	
ITMANN COAL COMPANY, Respondent	:	

DECISION AND ORDER

In response to the order to show cause issued September 19, 1980, counsel for complainants Wall, Rose and McGraw contend that because it was "the clear intent of the stipulation of settlement to secure the status quo, the subject complainants are obviously due an amount from respondent equal to the amount" of unemployment compensation denied them by the state of West Virginia. For the reasons set forth in the order to show cause, I do not agree.

Counsel also claims that the finding that employment benefits "is not a payment normally paid by respondent" is erroneous because the normal procedure is for respondent to pay such benefits "through the mechanism of rates paid to the unemployment compensation fund." I do not agree that because the normal procedure for funding payments is through the mechanism of premiums paid to the state unemployment compensation department liability for the payment of such claims falls on the employer as a normal or expected incident of a change in an employee's status from that of discharged to that of laid-off after a state's denial of such claims. This Commission obviously has no jurisdiction to reopen and set aside the state's determination. As counsel for Itmann points out "The issue of whether certain of the complainants are entitled to unemployment benefits is, under West Virginia law, an issue between the Workmen's Compensation Commission and those complainants claiming such benefits. If the Workmen's Compensation Commission determines that unemployment compensation benefits are due, such benefits will be paid by the Workmen's Compensation Fund, not Itmann. Alternatively, if the Commission determines that unemployment benefits should not be paid, complainants have the legal right to appeal such determination under West Virginia law." But unless and until the state's determination is set aside by a court of competent jurisdiction, that determination is res judicata as between the parties and entitled to full faith and credit by the Commission.

Finally, on September 11, 1980, Mr. Brown Payne, counsel for complainants, admitted there was "no negotiation" during the settlement discussions over his present claim. This was confirmed by counsel for Itmann. Despite this, counsel for complainants stoutly maintain that while they pursue their claim against the state they want this judge to reform the stipulation of settlement to include a liability on Itmann's part never bargained for.

In other words, it is counsel's position that whether or not the stipulation of settlement either expressly or by fair implication includes a claim for unemployment compensation against Itmann, it should nevertheless be so interpreted. While I have no doubt that it was counsel's secret intent to provide for such liability, I cannot in good conscience find that counsel for Itmann was privy to that intent. It may be that counsel for complainants made a bad bargain. But under the jurisdiction reserved to the Commission by the stipulation of settlement, I am not in a position to rectify it.

Accordingly, it is ORDERED that as supplemented by this opinion the interpretation of the stipulation of settlement as set forth in the order of September 19, 1980, be, and hereby is, CONFIRMED and ADOPTED as the trial judge's final disposition in this matter.

It is FURTHER ORDERED that subject to counsel's compliance with the terms of paragraph 3 of the stipulation of settlement the captioned matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 6, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-152-M
	:	A.C. No. 20-2253-5002
v.	:	
	:	Bretschneider Pit & Mill
AGGREGATE MATERIALS CORPORATION, Respondent	:	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor of Labor, Detroit, Michigan, for Petitioner; William L. LaBre, Esq., Edwardsburg, Michigan, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above matter was heard on August 13, 1980, in Cassopolis, Michigan. At the conclusion of the hearing, the parties waived their rights to file written proposed findings of fact and conclusions of law and I issued a decision from the bench as follows:

> THE COURT: Pursuant to notice, the matter was heard before me today, August 13, 1980, in the Probate Courtroom, Cassopolis, Michigan. Appearing on behalf of the petitioner, Secretary of Labor, was Mr. Gerald Hudson, of the Office of the Solicitor of Labor, Detroit, Michigan. Appearing on behalf of respondent was Mr. William LaBre of Edwardsburg, Michigan.
>
> Mr. Thomas G. Wasley, a federal mine inspector, testified on behalf of the petitioner; Mr. Robert Bretschneider, President of respondent-corporation, testified on behalf of respondent. Three exhibits were introduced by petitioner; six were introduced by respondent.

Based upon the evidence presented this morning, and on the contentions of the parties, I make the following findings of fact and conclusions of law:

One, respondent is and was on August 1st of 1979, the operator of a sand and gravel mine in Cass County, Michigan.

Two, respondent is and was on August 1st, 1979, subject to the Federal Mine Safety and Health Act of 1977 in the operation of that mine.

Three, respondent is a relatively small operator and does not have a significant history of prior violations.

Number four, on August 1st, 1979, respondent's facility, respondent's mine, was inspected by Mr. Thomas Wasley, a federal mine inspector, and an authorized representative of the Secretary of Labor.

Five, on August 1st, 1979, a cover was not in place on a box variously described as a junction box and a fuse box outside the electrical distribution building in respondent's facility; there was a dispute in the testimony between Mr. Wasley and Mr. Bretschneider as to whether this was the box covered by the citation. I accept the testimony of Mr. Wasley that his citation was describing a junction box or fuse box outside of the electrical distribution building in the facility.

Six, the absence of the cover on the junction box was in violation of the mandatory standard contained in 30 Code of Federal Regulations, 56.12-32.

Number seven, the condition was evident and should have been known to respondent. Therefore, the violation was by respondent's negligence.

Number eight, the condition was only moderately serious; there were no bare wires in the box; the box was five to five and a half feet high off the ground; and the possibility of an employee receiving a shock by touching the box or wires, was relatively remote; the wires would have to somehow become bared or water introduced into the box in order to cause this hazard; however, if a shock occurred, if a employee did touch a wire that was bared or there was sufficient moisture in the box to have produced an electrical shock, an injury could have been serious.

Number nine, the condition was promptly abated by respondent in good faith.

Based on these findings of fact and conclusions of law, I assess a penalty of $50 for the violation found.

Number ten, I find that the machine, which was cited in citation 295715, was not a stationary grinding machine, and therefore the absence of a hood on this machine did not constitute a violation of 30 CFR 56.14-8(a). I am not finding that the condition was not in violation of some other standard, however, the standard charged in the citation was 30 CFR 56.14-8(a), and my finding is that that standard was not violated. Therefore, the citation 295715 is hereby vacated, and no penalty is assessed.

Therefore, based upon these findings of fact, with respect to the two alleged violations, respondent is ordered to pay the sum of $50 for the one violation which I have found occurred. A written decision will be issued confirming this decision issued from the bench this morning. Either party, or both parties, have the right to petition for Commission review, the time for filing a petition for Commission review will run from the date of the issuance of the written decision, which will follow.

That will conclude the record in this proceeding, I thank you very much, gentlemen.

I hereby affirm the decision issued from the bench.

ORDER

Respondent is ORDERED to pay $50 in penalties within 30 days of the date of this decision. It is FURTHER ORDERED that Citation No. 295715 is VACATED.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution:

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Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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(703) 756-6230

7 Oct (sd)

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Orders and Citation
v.	:	Docket Nos. WEVA 80-116-R
	:	WEVA 80-117-R
SECRETARY OF LABOR,	:	WEVA 80-118-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), Respondent	:	Shoemaker Mine

DECISION

Appearances: Anthony J. Polito, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Contestant, Consolidation Coal Co.;
David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent, Secretary of Labor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

On November 26, 1979, Consolidation Coal Company (hereinafter Consol) filed these three actions to contest the validity of two orders of withdrawal pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(b) (hereinafter the Act) for failure to abate citations and the validity of a citation issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). Consol's motion to consolidate the three proceedings was granted.

Upon completion of the prehearing requirements, a hearing was held in Pittsburgh, Pennsylvania, on April 22-24, 1980. The following witnesses testified on behalf of Consol: Peter J. Dominick, Bill Zamski, Willard E. Behrens, Jr., Matthew Matkovich, Bill Newman, Ronald G. Stovash, Charles Causey, and Thomas W. Duffy. The following witnesses testified on behalf of the Secretary of Labor, Mine Health and Safety Administration (hereinafter MSHA): Michael Blevins, Dennis Pickens, Charlie Pyle, Charles Coffield, Howard Dabrawsky, and Charles A. Pettit. Consol and MSHA submitted post-hearing briefs.

ISSUES

Whether the orders and citation were properly issued.

APPLICABLE LAW

Section 104(b) of the Act, 30 U.S.C. § 814(b) provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), 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.

Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), provides in pertinent part as follows:

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

STIPULATIONS

The parties stipulated the following:

1. Shoemaker Mine is owned and operated by Consol.

2. Consol's operations at Shoemaker Mine are covered by the Act.

3. The presiding administrative law judge has jurisdiction to hear the case.

4. The following citations and orders issued under the Act were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Consol at the dates, times and places stated therein: Citation No. 0808594; Order of Withdrawal No. 0808596; Citation No. 0808599; and Order of Withdrawal No. 0808606.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. Shoemaker Mine is owned and operated by Consol.

2. Inspector Charles Coffield, who issued the citations and orders in controversy, was a duly authorized representative of the Secretary of Labor at all times pertinent herein.

3. On October 26, 1979, Inspector Coffield performed a regular inspection of the Shoemaker Mine and, at 6:15 p.m., issued Citation No. 0808594 under section 104(a) of the Act for a violation of the operator's approved roof control plan in the 4 right, 5 north section of the mine in that approximately 150 roof bolts were spaced from 4 feet 7 inches to 6 feet 2 inches apart whereas the approved roof control plan required that roof bolts be spaced 4 feet 6 inches apart. Consol does not challenge the validity of this citation. Consol's section foreman, Charles Causey, testified that he assumed that the roof control plan in this section called for the spacing of roof bolts at 5 foot intervals like the rest of the mine when, in fact, the approved roof control plan required the spacing of roof bolts at 4 feet 6 inch intervals in this section.

4. At all times and places relevant herein, the condition of the roof was good in that there was no evidence of recent falls of supported roof and no evidence of cracks, splits, or loose bolts. At all times and places relevant herein, there was only minimal sloughage of the ribs.

5. The existence of wide spaced roof bolts, in contravention of the approved roof control plan, increased the hazard of roof falls.

6. Upon issuing this citation, Inspector Coffield met with with Consol's general superintendent, Ronald Stovash, and told him that there was also a problem with improperly spaced roof bolts in the track supply area of this section even though that area was not included in the citation.

7. Citation No. 0808594, issued on Friday, October 26, 1979, at 6:15 p.m., set a termination due date of Monday, October 29, 1979, at 8:00 a.m. Consol's escort, Peter J. Dominick, was unable to give Inspector Coffield a specific estimate of the amount of time necessary for abatement but rather requested "as much as you can give me." Inspector Coffield believed that the condition cited could be abated during two working shifts.

8. On October 26, 1979, after being served with the citation, Consol management voluntarily closed the 4 right, 5 north section to evaluate and correct the cited condition. No coal was produced on this section after the citation was issued. Consol management determined that part of the area cited required resin roof bolts and the remainder required mechanical roof bolts. Although a mechanical roof bolting crew was on the section at the time the citation was issued, there were no resin roof bolt supplies. Consol

management ordered the mechanical roof bolting crew out of the section because it determined that the resin roof bolts should be installed first, but Consol offered no explanation or justification for this action.

9. Roof bolters were working at Shoemaker Mine on Saturday, October 27, and were instructed to begin abatement of this citation upon completion of their other work. The roof bolters did not complete their other work and did not perform any abatement work of the citation in issue on Saturday, October 27, 1979.

10. Consol management could have called in additional roof bolters to abate the citation on Saturday, October 27, or Sunday, October 28, but elected not to do so because management determined that the citation could be abated during the midnight to 8:00 a.m. shift on Monday, October 29.

11. Consol management believed that if it voluntarily closed the section, the time for abatement of the citation would be extended by Inspector Coffield on Monday, October 29, 1979.

12. Inspector Coffield returned to the Shoemaker Mine on Monday, October 29, 1979, and found that only 15 roof bolts had been installed to abate the cited violation when more than 100 roof bolts were required to totally abate the cited violation.

13. Consol management did not inform Inspector Coffield of any alleged problems with supplies or equipment prior to the issuance of the section 104(b) order on Monday, October 29, 1979.

14. On Monday, October 29, 1979, Inspector Coffield rejected Consol's request for an extension of time within which to abate the citation issued on Friday, October 26, 1979, and, instead, issued Order of Withdrawl No. 0808596 under section 104(b) of the Act for failure to abate the citation because little work had been performed to abate the violation during the six shifts after the citation was issued.

15. On Tuesday, October 30, 1979, Inspector Coffield returned to the mine to continue his regular inspection. He again went to the 4 right, 5 north section and issued Citation No. 0808599 under section 104(d)(1) of the Act for an area which was not included in his prior citation or order. The citation alleged that there were approximately 350 locations where roof bolts were spaced between 4 feet 7 inches and 7 feet 6 inches in rooms 31, 32, and 33 and for a distance of approximately 1,500 feet along the supply track.

16. Citation No. 0808599 issued on Tuesday, October 30, 1979, at 11:55 a.m., set a termination due date of Friday, November 2, 1979, at 8:00 a.m.

17. Consol knew or should have known of the violation cited on October 30, 1979, because the supply track was in an area which had been subjected to preshift examinations for more than 6 months, and Inspector Coffield advised Consol management on October 26, 1979, that there appeared to be a problem of wide spaced roof bolts in this area but Consol had taken no action to correct this condition by October 30, 1979.

18. All persons who walked under the wide spaced roof bolts were exposed to the danger of a roof fall.

19. Inspector Coffield did not return to the mine on Friday, November 2, 1979, but did return on Monday, November 5, 1979.

20. On Monday, November 5, 1979, Inspector Coffield returned to the area in question to determine whether the violation cited on October 30, 1979, had been abated. At that time, more than 400 roof bolts had been installed to abate the condition but the violation was not totally abated.

21. On November 5, 1979, at 9:45 a.m., Inspector Coffield refused to extend the time for termination of Citation No. 0808599 and thereupon issued Order of Withdrawal No. 0808606 under section 104(b) of the Act for failure to abate the citation.

22. Order No. 0808596 issued on October 29, 1979, was terminated on November 2, 1979.

23. Order No. 0808606 issued on November 5, 1979, was terminated on December 14, 1979.

DISCUSSION

Background

This controversy arises out of the fact that Consol management at the Shoemaker mine failed to follow its approved roof control plan pursuant to 30 C.F.R. § 75.200. The approved plan for the 4 right, 5 north section required that roof bolts be installed at 4 feet 6 inch intervals. The roof control plan for most of the mine required roof bolts to be installed at 5 foot intervals. Consol does not challenge Inspector Coffield's initial citation issued on October 26, 1979, under section 104(a) of the Act for violation of the approved roof control plan. However, Consol challenges the inspector's decision to refuse an extension of time for abatement and the issuance of a section 104(b) order on October 29, 1979. It also challenges his citation issued on October 30, 1979, under section 104(d)(1) of the Act for the same violation in a different area of the same working section of the mine, his subsequent refusal on November 5, 1979, to extend the time for abatement of this citation, and his issuance of another order of withdrawal on October 5, 1979, for failure to abate the citation under section 104(b) of the Act.

During the hearing, Consol challenged the credibility and impartiality of Inspector Coffield by adducing testimony concerning disciplinary action taken against the inspector by his supervisor. It was alleged that this disciplinary action resulted from the inspector's refusal to return to the Shoemaker Mine in December, 1979, to terminate an order. Inspector Coffield was interrogated extensively concerning this matter and the effect, if any, which it had upon his testimony at the hearing. Since the incident in question arose after all of the citations and orders in controversy here were issued, I find that this allegation is irrelevant to the action taken by the inspector in this case. I find no reason to question the inspector's credibility as a witness at the hearing. I also note that Consol has not addressed this matter in its brief.

Order No. 0808596

On October 26, 1979, at 6:15 p.m., Inspector Coffield issued Citation No. 0808594 to Consol for a violation of its approved roof control plan in that roof bolts in an area of the 4 right, 5 north section were spread farther apart than the 4 feet 6 inches required under the plan. This citation was issued under section 104(a) of the Act and Consol does not challenge the validity of this citation. The citation required that the 150 wide spaced roof bolts be corrected by 8:00 a.m., on Monday, October 29, 1979. Although Consol now contends that the inspector did not provide a reasonable period of time for abatement of the violation, it did not claim that it could not correct the violation within the period of time allotted when the citation was issued.

The evidence established the facts as follows: (1) Although Consol had a mechanical roof bolting crew in the section which could have commenced abatement of the citation immediately after it was issued, Consol management ordered that crew out of the section because it wanted to install resin roof bolts before installing mechanical roof bolts; (2) Consol management could have called roof bolters to work during the intervening Saturday and Sunday but decided not to do so because it determined that the entire violation could be abated during the midnight to 8:00 a.m. shift on Monday, October 29, 1979; (3) roof bolters assigned to other duties in the mine on Saturday, October 27, 1979, were told to commence abatement work on this citation after they completed their other duties but did not complete those duties in time to perform any abatement work; (4) only 15 roof bolts were installed during the midnight to 8:00 a.m. shift; and (5) although Consol alleged supply and mechanical problems during the midnight to 8:00 a.m. shift, it did not assert these problems to Inspector Coffield at the time it requested an extension of time to complete abatement.

The sum and substance of this matter is that Consol management made a calculated decision that the cited violation could be totally abated during the shift immediately preceding the termination time and, in the event of failure to totally abate, assumed that if it voluntarily closed the section, the inspector would extend the period of time for abatement. Consol failed

to establish that supply and mechanical problems prevented its timely abatement because it presented only hearsay evidence of such purported problems without documentation. Moreover, I find that Consol did not assert supply or mechanical problems as bases for its request for an extension of time on October 29, 1979. When Inspector Coffield returned to the mine at about 8:00 a.m., on October 29, he was confronted with the fact that only 15 roof bolts had been installed to correct 150 wide spaced bolts and that abatement work had only been performed during one shift after issuance of the citation.

I find that Inspector Coffield correctly concluded that Consol failed to exercise good faith to achieve timely abatement of the citation and failed to establish a valid reason for an extension of time. While the condition of the roof did not constitute an imminent danger to miners, the evidence established that the existence of wide space roof bolts herein increased the hazard of roof falls. The fact that Consol voluntarily closed the section after the citation was issued is entitled to little weight. To hold otherwise would sanction the tactic of voluntary closure of cited areas to indefinitely postpone abatement of safety and health violations. Such a course of conduct would be contrary to the intent of Congress when it enacted section 104(b). In this regard, the Senate Commitee on Human Resources stated as follows:

> The Committee believe that rapid abatement of violations is essential for the protection of miners. A violation of a standard which continues unabated constitutes a potential threat to the health and safety of miners. Therefore, if the violation is not eliminated by abatement in the specified period of time the miners should be withdrawn from the area affected by the violation until the violation is abated.

S. Rpt. No. 95-181, 95th Cong., 1st Sess. 30 (1977)

Hence, I find that the evidence establishes that the inspector acted properly in refusing to extend the time for abatement and in issuing Order No. 0808596 requiring the withdrawal of miners from the affected area. Consol's Contest of Order No. 0808596 is denied.

Citation No. 0808599

On October 30, 1979, Inspector Coffield returned to the section of the mine affected by the prior citation and order to determine whether the violation had been abated. After determining that the violation had not been abated, he continued with his regular inspection. He proceeded to inspect the supply track entry and rooms 31, 32, and 33 which area was adjacent to the area affected by the prior citation and order. Thereafter, he issued Citation No. 0808599 pursuant to section 104(d)(1) charging Consol with an unwarrantable failure to comply with its roof control plan in that approximately 350 roof bolts were not within 4 feet 6 inches of each other or the rib. The citation alleged that the space between roof bolts varied from 4 feet 7 inches to 7 feet 6 inches. The citation, issued at 11:55 a.m., on Tuesday, October 30, 1979, set a termination due date of Friday,

November 2, 1979, at 8:00 a.m. Consol does not dispute the fact that some violations of the roof control plan existed in the area covered by this citation. However, it contends that the violation was not due to its unwarrantable failure and that the violation could not significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operations Appeals as follows:

> [A]n inspector should find that a violation of a mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

Consol contends that the violation was not due to unwarrantable failure because of the following: (1) Roof bolters had been working in one of the rooms cited prior to the issuance of the citation but had been moved to the area of the prior citation and ordered to effect abatement of the prior violation; (2) the condition cited herein is identical to the violation in the prior citation which was issued under section 104(a) of the Act and which did not allege unwarrantable failure; (3) the section in which the violation had occurred had been voluntarily closed by Consol prior to the issuance of the citation.

Consol's evidence concerning the fact that roof bolters had been working in room 31 just prior to the time this citation was issued is entitled to little weight. There was no probative evidence that those roof bolters were attempting to abate the violation in controversy. Although Consol knew that it had probable violations of its approved roof control plan in the area covered by this citation, the evidence fails to establish that Consol exercised due diligence or reasonable care to abate this condition. The fact that the section was voluntarily closed at the time this citation was issued is irrelevant to the issue of unwarrantable failure as that term is defined under the Act. Likewise, Consol's claim that the condition of this area was the same as the area cited in the citation issued under section 104(a) on October 26, 1979, is of no moment. The validity of a citation must stand or fall on its own merits. If MSHA has established the required findings of unwarrantability at the time this citation was issued, the operator cannot escape a finding of an unwarrantable failure violation by showing that the condition was the same as a prior citation which did not allege an unwarrantable failure.

The evidence in the instant case establishes that the wide spaced roof bolts in question in this citation had been installed at least 6 months prior to the date the citation was issued. They were in an area which was subject to preshift examinations and, hence, Consol knew or should have known of this condition. Moreover, Consol was given notice on October 26, 1979, by Inspector Coffield that there may be violations involving wide spaced roof bolts in the supply track area. It follows that Consol failed to exercise due diligence and reasonable care to abate this condition prior to the time this citation was issued. I conclude that MSHA has established that the violation cited herein was the result of unwarrantable failure of Consol.

In Alabama By-Products, 7 IBMA 85 (1976) the Interior Board of Mine Operations Appeals held that the term "significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard" means all violations of mandatory standards except "violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." (Emphasis in original) Id. at 94. Consol concedes that this citation does not allege a purely technical violation but contends that the occurrence of any injury is only remote or speculative.

We are here concerned about the possibility of miners being injured by a roof fall. Although the roof in question was generally acknowledged to be in good condition, there was evidence of at least one prior fall of supported roof in this section. Even Consol's general mine foreman, Bill Zamski, conceded that wide spaced roof bolts increased the possibility of roof falls. While the approved roof control plan required that roof bolts be spaced 4 feet 6 inches apart, the credible evidence established that at some locations there were roof bolts 7 feet apart. The preponderance of the credible evidence establishes that the possibility of a roof fall injury in the cited area was neither remote nor speculative. I find that the violation could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

Therefore, the evidence establishes that Citation No. 0808599 was properly issued under section 104(d)(1) of the Act and Consol's contest of that citation is denied.

Order No. 0808606

On Tuesday, October 30, 1979, at 11:55 a.m., Inspector Coffield issued the citation for approximately 350 roof bolts that were in violation of the spacing requirements of the approved roof control plan. He set the termination due date at Friday, November 2, 1979, at 8:00 a.m. Consol superintendent Ronald Stovash protested the termination due date at the time the citation was issued. He stated that Consol would be required to close the entire mine and move all roof bolters into this section to abate this citation in the time allowed. Inspector Coffield did not return to the mine on November 2, 1979.

On Monday, November 5, 1979, Inspector Coffield returned to the mine and examined the preshift books. He noted that the condition of this violation was reported during seven shifts but there was no indication of work being performed. When he went underground to determine the extent of abatement of the violation, he walked the area cited and reported finding only 155 new roof bolts. He denied Consol's request for an extension of time and issued Order No. 0808606 pursuant to section 104(b) of the Act for failure to abate the violation.

Consol admits that the violation was not totally abated on November 5, 1979, but contends that it made a good faith effort to abate this citation by installing a total of more than 400 roof bolts in the cited area by working every shift between the time the citation was issued and the time the order was issued except for the three shifts on Sunday, November 4, 1979. In support of its contention that more than 400 roof bolts had been installed, Consol submitted documentary evidence concerning the number of roof bolters per shift and the number of roof bolts installed per day during the interval between the citation and the order (Exhibit 10). On this issue, I find that Consol's evidence is more credible and probative than the testimony of Inspector Coffield. Inspector Coffield admitted that it was sometimes difficult to distinguish between new bolts and old bolts. Consol did make a bona fide effort to abate this citation in a timely manner. Obviously, Consol found more than 350 roof bolts that were not in compliance. Consol was obligated to abate each violation whether or not it happened to be among those cited by the inspector. Consol's records show that more than 1,000 roof bolts were added to this section before the citation was terminated. In light of the fact that the inspector cited 350 roof bolts in violation of the approved plan on October 30, 1979, and Consol had installed more than 400 roof bolts by November 5, 1979, I find that the inspector failed to give proper credit to Consol for its abatement activities and erred in refusing to extend the time for abatement of this violation.

Therefore, Order No. 0808606 is vacated and Consol's contest of this order is granted.

CONCLUSIONS OF LAW

1. This administrative law judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

2. On October 29, 1979, Consol failed to totally abate the violation in Citation No. 0808594 issued on October 26, 1979, or to establish that the period of time for abatement of this citation should be extended.

3. On October 29, 1979, Order No. 0808596 was properly issued under section 104(b) of the Act and Consol's contest of that order is denied.

4. On October 30, 1979, Consol violated its approved roof control plan, 30 C.F.R. § 75.200, in the 4 right, 5 north section and that violation was

caused by the unwarrantable failure of Consol to comply with the mandatory standard and could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

5. On October 30, 1979, Citation No. 0808599 was properly issued under section 104(d)(1) of the Act and Consol's contest of that citation is denied.

6. On November 5, 1979, Consol failed to totally abate the violation in Citation No. 0808599 issued on October 30, 1979, but established that the period of time for abatement should have been further extended.

7. On November 5, 1979, Order No. 0808606 was improperly issued under section 104(b) of the Act; Order No. 0808606 is vacated; and Consol's contest of that order is granted.

ORDER

WHEREFORE IT IS ORDERED that the contests of Order No. 0808596 and Citation No. 0808599 are DENIED. And the subject order and citation are AFFIRMED.

IT IS FURTHER ORDERED that the contest of Order No. 0808606 is GRANTED and said order is VACATED.

James A. Laurenson

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

9 OCT 1980

CLIMAX MOLYBDENUM COMPANY, a division of AMAX, INC., Applicant	:	Application for Review
	:	Docket No. DENV 79-21-M
	:	
	:	Citation and Order No. 332803
v.	:	September 20, 1978
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Climax Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEST 79-24-M
	:	A.O. No. 05-00354-05014H
v.	:	
	:	Climax Mine
CLIMAX MOLYBDENUM COMPANY, Respondent	:	

DECISIONS

Appearances: Thomas Bastien and Harvey P. Wallace, Esquires, Denver, Colorado, for Climax Molybdenum Company;
James R. Cato and Jerry R. Atencio, Attorneys, U.S. Department of Labor, Denver, Colorado, for MSHA;
James A. Kasic, Leadville, Colorado, amicus curiae, Oil, Chemical, and Atomic Workers International Union.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern an imminent danger withdrawal order served on Climax by MSHA pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, and a subsequent civil penalty proposal filed by MSHA pursuant to section 110(a) of the Act, seeking a civil penalty assessment based on the conditions described in the order for an alleged violation of the provisions of mandatory safety standard 30 C.F.R. § 57.3-5.

Climax filed timely notices of contests in the proceedings and the parties engaged in extensive prehearing discovery, including the taking of depositions. A hearing was conducted in Denver, Colorado, May 8-9, 1980, and the parties appeared and participated therein. The parties filed posthearing briefs, and the arguments presented in support of their respective positions have been carefully considered by me in the course of these decisions.

Applicable Statutory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (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 of a penalty 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.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues Presented

1. Whether the conditions cited and described by the inspector in the order issued in these proceedings presented an imminent danger warranting the issuance of a withdrawal order pursuant to section 107(a) of the Act.

2. Whether the conditions described in the aforesaid order constituted a violation of the provisions of 30 C.F.R. § 57.3-5, and if so, the amount of the civil penalty which should be assessed for said violation taking into consideration the criteria set forth in section 110(i) of the Act.

3. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Stipulations

The parties stipulated to MSHA's enforcement jurisdiction over the Climax Mine in question, the fact that Climax is a large mine operator, and the fact that an assessment of any civil penalty in this matter will not adversely affect Climax's ability to remain in business (Tr. 175-177). The parties also stipulated that any danger or hazard which may have existed at the time the citation and order issued affected only employees of the contractor Colo-Maaco and that no employees of Climax were exposed to any hazard resulting from the conditions cited in the order (Tr. 177-178). The parties also stipulated that abatement was achieved in good faith once the order issued (Tr. 177), and Climax's history of prior violations for the 24-month period prior to the August 10, 1978, issuance of the order is reflected in the computer printout compiled by MSHA (Exh. G-4; Tr. 175-176).

Background

The facts developed in these proceedings reflect that MSHA inspectors David Park and Jack Petty conducted an inspection at the Climax Mine on August 10, 1978, and while walking through the surface open-pit area observed a condition which they believed constituted an imminent danger. Inspector Park issued an imminent danger order pursuant to section 107(a) of the Act, included a reference to section 104(d)(1) of the Act (unwarrantable failure finding), and cited a violation of mandatory safety standard 30 C.F.R. § 57.3-5. The order was served on a representative of Colorado-Maaco, an independent contractor performing work at the open-pit area where the alleged imminent danger occurred. MSHA inspector Richard King subsequently conducted a "special investigation" pursuant to section 110 of the Act, and his investigation was prompted by the issuance of the imminent danger order. Inspectors Park and Petty also participated in that investigation, but it is not an issue in this case.

The order was modified by Inspector Park on August 10, 1978, to reflect a reference to section 104(a) of the Act rather than section 104(d)(1), and it was modified again by Inspector Park on September 20, 1978, to show Climax Molybdenum Company, Division of AMAX, as the responsible mine operator rather than the contractor Colorado-Maaco.

The section 107(a)-104(a) citation and order issued by Inspector Park, No. 332803, on August 10, 1978, describes the following condition or practice which he believed constituted an imminent danger and a violation of mandatory safety standard 57.3-5:

> An imminent danger situation existed at the open pit entry to the old intake vent drift where the Colorado-Maaco employees were working near a dangerous bank. Unconsolidated material was observed on the bank and a loose chunk fell to the working area as inspectors looked on. Dangers of the loose rock in the bank had been discussed by the Colorado-Maaco supervisory personnel on August 9, 1978.

Inspector Park described the area affected by the withdrawal order as the "old intake vent drift adit," and the order was terminated on August 23, 1978, after abatement of the cited conditions, and the abatement action is described as follows:

> A bench was excavated to hard rock above the pit wall at the old intake vent drift site. Ten rolls of wire mesh, approximately 70 feet in length and 6 feet in width, have been placed against the face and anchored from above by 15-7 feet reinforced rock bolts set in epoxy. The rolls have been laced to each other vertically on two to three foot intervals. Work may now resume at the old intake vent drift site.

MSHA's Testimony and Evidence

MSHA inspector David Park testified that he was first appointed as an inspector-trainee with MESA in April 1975, was assigned to a subdistrict office in Albany, New York, and was subsequently appointed an MSHA inspector when the 1977 Act became effective on March 9, 1978. He attended a 6-week MSHA training course at Beckley, West Virginia, and has taken subequent training courses at Beckley, MSHA's Denver Technical Support Center, and at Michigan State University. These training courses included courses in surface and underground mining ground-control methods. Prior to his employment with MSHA, he worked during the summer months in quarries in Pennsylvania, and was employed by Bethlehem Steel Company for 10 years in an underground iron ore mine in Pennsylvania, and this included numerous assignments at Bethlehem Steel's open-pit operations where he was involved with highwalls. He has conducted some 30 open-pit inspections while employed as an MSHA inspector and first visited the Climax Mine on July 19, 1978 (Tr. 1-16).

Inspector Park confirmed that he inspected the mine in question on August 10, 1978, that he was accompanied by his supervisor, Jack Petty, and Climax's general mine foreman Kenneth Diedrich, and he also confirmed that he did not present his inspector's credentials that particular day. He identified Exhibit G-1 as a "plan view" of the Climax Mine Storke level, indicated the areas traveled during the inspection by marking his route of travel on the exhibit, and identified Exhibit G-2 as a similar diagram showing the general open-pit area in question (Tr. 17-21). He stated that the conditions he observed which prompted him to issue the citation and order was a highwall approximately 80 feet high at a location identified as "the old vent drift", and the highwall was composed of solid rock, sandy material, a variety of seams in the rock, and some rock with evident cracks (Tr. 21). As the inspection party entered the open-pit area, he observed some workmen at the base of the highwall, and he also observed a workman in another area handling a trailing cable in a manner which he believed may have been contrary to safety standards. As he proceeded toward that man, his attention was drawn to the highwall area by the sound of a rock striking a solid object. He did not actually observe the rock dislodge, and he estimated the sound came from a distance of some 40 or 50 yards away. However, after hearing the sound, he turned in that direction and observed the rock rolling to its resting place. He believed the sound came from the area of the concrete form being constructed at the base of the highwall at the old vent drift adit and he believed the rock fell from above that location (Tr. 24-26).

Inspector Park testified that he observed the highwall during the course of the entire morning of August 19, walked around the area at the base of the highwall where the construction was taking place, and later that morning observed the area from the top of the highwall. Photographs of the area were taken by him on August 11, and he identified one of them as Exhibit G-6, and he believed that the conditions depicted therein were the same as on August 10 (Tr. 27-30). He also identified Exhibit G-7 as another pictorial view of the highwall taken August 11, and he marked the photograph where he believed fractured and unconsolidated materials existed (Tr. 31-35). He went

on to identify other photographs taken August 11, described the terrain, and indicated that the photographs fairly depicted the conditions as they existed on August 10 when the order issued (Tr. 35-38; Exhs. G-8, G-10, G-14). He stated that approximately seven employees of the contractor, Colorado-Maaco, were exposed to the potential hazards described in the order, and he marked photographic Exhibit G-14 with "X's" as the approximate location where he observed the employees. The rolling rock which he heard was in the "general area" where the employees were located and within an approximate distance of 20 feet (Tr. 41-43).

Inspector Park described the highwall as approximately 80 feet high, with some slope, and with some indentations, both vertical and hanging "in and out" (Tr. 44). Based on the conditions he observed during his inspection of August 10, 1978, Inspector Park characterized the highwall as follows (Tr. 46):

> Q. Based upon your experience and what you observed at the Climax Molybdenum mine on August 10, 1978, do you have an opinion regarding the situation you observed regarding the highwall as being hazardous?
>
> A. Yes, I do.
>
> Q. And what is that opinion?
>
> A. I believe it to be hazardous.
>
> Q. What exactly is a hazard?
>
> A. The nature of the material and its placement on the highwall poses the possibility of falling rocks which could lacerate or fracture or even possibly fatally injure someone.

When asked what formed the basis for his opinion that the conditions he observed presented a hazard on August 10, Inspector Park replied that fractured material presented a hazard because if it should fall from a height of 80 feet or less it would fall directly below and bounce, and if it struck someone it would inflict harm, and he believed fractured material was more likely to fall than unfractured material (Tr. 52). Inspector Park also testified that he was aware that blasting had taken place at the mine on August 8, but that it was not in the open-pit area, but somewhere underground in the general mining area (Tr. 52-53). He then clarified his answer and stated that he was mistaken and was not aware of the fact that blasting had occurred on August 8, but rather, he was aware of blasting as early as July 19, when he began his underground inspection of the Storke level. On August 10, blasting had taken place between 8:15 and 8:40 in the morning, but he could not state the location where the blasting was taking place (Tr. 54-55). He also indicated that changing weather conditions such as rain, ice, and freezing would affect the rocks, and would increase the likelihood of a fall (Tr. 55).

Inspector Park stated that after he issued his oral imminent danger order, employees were permitted to retrieve tools and materials from the "fringes" of the danger zone, and that it took them 3 minutes to do this. The tools and materials were lying in areas to the front and side of the construction form, and he observed no employee go up to the form itself to retrieve tools or materials (Exh. G-14, Tr. 56). When asked whether Climax management personnel were aware of the hazards presented, Mr. Park stated "yes," but he then clarified his answer by stating they were contractor supervisors (Tr. 58). When asked to identify any Climax supervisors who had prior knowledge of the hazards, he named two individuals, and again clarified his answer by identifying them as contractor personnel. These individuals told him that they had attempted to scale the highwall in the past, and one of them told him of his "concern for the condition of the highwall" (Tr. 60-61). Specifically, Mr. Park testified that one man made a statement to the effect that "we knew it was bad" (Tr. 61).

Inspector Park stated that even if he had not heard the rock fall on the day in question, he would still have issued an imminent danger order. He also confirmed that the two contractor employees with whom he spoke advised him that they had attempted to scale the highwall on August 9, the day before the order issued, and that a cherry picker and scaling bar were used for this task. Mr. Park believed that the cherry picker would only reach 30 feet up the highwall, and he observed unconsolidated and fractured material above that height. He could not remember asking the employees if they made any attempts to scale the upper half of the highwall. Abatement was achieved by fastening wire mesh netting over the highwall and attaching it with bolts (Tr. 66-67).

On cross-examination, Inspector Park confirmed that when he viewed the open-pit area he observed construction work going on, and a shovel was loading a truck, while a bulldozer was parked idly nearby. The area was noisy, and he confirmed that he peripherally observed the rock and marked the spot where he believed the rock came to rest on photographic Exhibit G-14 (Tr. 78). He also confirmed that he could not determine where the rock came from, but identified three locations on photographic Exhibit G-7, one of which was the location of the rock which concerned him. At the time he issued his verbal withdrawal order, he was some 10 feet from the man on the east side of the construction form and some 20 feet from the base of the bank. He could not identify the person whom he had ordered off the form but subsequently learned that his name was Chris Nelson, a foreman for Colorado-Maaco. Immediately following this incident, Inspector Park stated that he made a closer inspection of the bank by walking in front of the form and inspecting it from above by looking over the edge of the bank to observe the conditions at the top. After the order issued, he also observed one of the Colorado-Maaco employees in a cherry picker attempting to pry or scale rocks loose, and he confirmed that he spoke with some of the supervisory employees present and that they advised him that they did not believe the bank was dangerous (Tr. 79-82). None of the employees told him that they had also observed the rock which he observed (Tr. 83). During the approximate 2 hours that he was on the scene, he did not see any rocks fall of their own volition, but he pushed some material down from the top of the bank with his feet (Tr. 83-84).

Inspector Park classified the rock formations where the citation issued as "probably sedimentary" (Tr. 85). He also confirmed that he permitted two employees to reenter the "fringe" area which had been withdrawn before the order was reduced to writing, and he did so for the purpose of allowing them to retrieve some of their tools, and they did not go back to perform abatement work, and they were in the area for approximately 3 minutes (Tr. 87). He did not believe these two employees were in any imminent danger (Tr. 87). When asked to explain why he permitted them to go into the area which he had closed because of the asserted imminent danger, he answered:

> I saw an area of imminent danger, part of it was more imminent than other areas. When I had my discussion with the two hourly employees about my granting them permission to reenter, I first asked them to explain where these tools were at and how long it would take for them to get them. I determined from that conversation that the tools and equipment were on the fringe area of the order, that they could be retrieved in a very short period of time and I had to make a judgment, I allowed them to get their tools.

(Tr. 88).

In pinpointing the area where he believed an imminent danger existed because of overhanging material, Inspector Park indicated that the word "adit" as described on the face of the order, was meant to describe the form at the base of the bank and the form area surrounding the adit as shown on Exhibit G-6 (Tr. 91). He was not present during the abatement and did not know who in particular was involved in that work (Tr. 92).

On redirect, Inspector Park gave his opinion as to how he believed the upper half of the 80-foot wall could have been scaled, and he had no knowledge that any attempts were made to scale the upper half of the wall on the day in question (Tr. 96). He defined "imminent danger" as "a condition or practice or a combination of them that might result in serious harm or even fatality before you can do something about it" (Tr. 97). The fact that the employees had been alerted to the danger was a factor which influenced his decision to permit them to reenter to retrieve their tools, and his alerting them made it less dangerous than their simply working on the form without knowing of any dangers (Tr. 97). His principal concern was that men would be hit by falling rocks, and he candidly admitted that the fact that they were alerted to this hazard could not have prevented rocks from falling (Tr. 98).

In response to bench questions, Inspector Park stated that he modified his order to delete the unwarrantable failure finding which he made and he did so after researching the law further and reviewing his Inspector's Manual and discovering that an imminent danger finding, coupled with an unwarrantable failure finding, is inconsistent because an unwarrantable failure finding can only be made if there is no imminent danger (Tr. 100-101). He believed the workers on the form saw the rock because after he heard the rock fall he observed the workers looking at each other and down

in the area where the rock came to rest (Tr. 101). The rock appeared to be 6 by 8 inches or "something like the size of a small cantaloupe melon" (Tr. 102-122). He did not believe the entire highwall was in danger of coming down on the men, but he was "convinced on the imminent danger of the different types of material above them and the condition of that" and his area of concern was an area of the highwall 50 to 60 feet wide (Tr. 103). The standard cited requires an operator to have a plan for scaling highwalls, and while he was aware that a plan existed, he has never reviewed it (Tr. 104).

Mr. Park believed a violation of section 57.3-5 existed because the bank was dangerous due to the nature of the material 80 feet above the area where the men were working, the material was overhanging, the conditions were not corrected promptly, and the area had not been posted or barricaded (Tr. 104). He had never observed highwalls of this nature at the Climax Mine in the past, but has observed them at other mining operations, and they looked like the one in question (Tr. 104). The inspection in question was his initial one at Climax under the new Act, and he made no inquiries to determine whether similar conditions had previously been cited under the Metal and Nonmetallic Metal Act (Tr. 106). He believed a rock slide could have occurred because of the sandy material and loose material at the top of the wall (Tr. 112). His prior statement concerning management's knowledge of the asserted dangerous conditions, and permitting workmen to work under those conditions, applied to the contractor, and he did not mean to suggest that Climax permitted its people to work in the alleged danger area (Tr. 113-114). He subsequently learned that the conditions were abated by the contractor (Tr. 114).

Mr. Park indicated that Climax personnel were engaged in mining operations some 75 yards away from the area affected by his order, but that no Climax supervisors were present when he issued the verbal order (Tr. 115), and the mining activities were taking place outside the area affected by the order (Tr. 116). He marked the area of the alleged imminent danger on Exhibit G-14 by parallel vertical lines indicating an area from the base of the highwall to the top (Tr. 123).

Jack Petty testified that on August 10, 1978, he was employed by MSHA as a supervisory mining engineer, and his job included supervising MSHA field inspectors. He is a graduate mining engineer from the Colorado School of Mines, and has undergone the usual MSHA training as an inspector. His experience includes inspection of open-pit mines, but he has no specific training with regard to highwalls, unconsolidated rock matter, or fractured materials (Tr. 125-127). He has some familiarity with rock formations, and has conducted other inspections at the Climax Mine (Tr. 129). He has no engineering training in highwalls, is not a soil engineer, but has conducted approximately 40 inspections involving open pits and rock walls (Tr. 129). He confirmed that he visited the mine in question on August 10, 1978, and was accompanied by Mr. Park (Tr. 132). He described the route traveled on the day in question, and indicated that as he exited the underground mine onto the open-pit area, he glanced toward the Colo-Maaco construction site at the base of the highwall and proceeded toward that area. As he passed the construction site, "rock fell from the general area and it caught my attention

out of the corner of my eye" (Tr. 134). He commented to Mr. Park that he should return to the construction site area and he then proceeded to look into the situation concerning the miner handling a trailing cable for the purpose of determining whether he was wearing suitable gloves. Upon returning to the scene of the construction site, he testified that he observed the following conditions (Tr. 135-136):

> [W]e went back and looked at the bank above the pipe. Looking at the bank there appeared to be certain areas above the pipe where there was rock that could possibly have slid and killed people. There was what appeared to be loose rock, there was an area on the right side up above which had a small overhang and it apparently had a slide sometime previous to us being there. Just looking at the area there appeared to have been numerous rocks there that had they been adequately scaled, they would have been brought down. There was an area up to the left, up at the top of the bank, that was full of rock which had been loose and had consolidated somewhat.

Mr. Petty indicated the approximate dimensions of the highwall as 50 feet high by 40 feet wide, and after observing the area from the front and side vantage points he described an area to the right above the vent pipe "which had a fracture there where a block appeared to have slid from it, and there was a fairly large rock there still in that area" (Tr. 136). After the order issued, he went to the top of the wall and stated that "there were rocks there that would have come off, I pushed one off with my foot" (Tr. 137). He also described what he believed to be loose rock at the bottom around the sides of the vent pipe and it was "loose and somewhat consolidated" (Tr. 137). He considered the conditions which he observed to be hazardous, observed four to seven men working in the area where the hazard existed, and he believed that a rock could have rolled with sufficient force and weight to injure or kill some of the men working below (Tr. 139). Referring to photographic Exhibit G-6, he pointed out the locations in and around the vent-pipe construction area where he observed men working in the areas where he believed they were exposed to falling rock (Tr. 140).

Mr. Petty defined an imminent danger as "a condition or practice that exists that could result in serious bodily harm or fatal injuries to a miner working in the area" (Tr. 142). He has issued imminent danger in the past during the course of his inspection duties, and in his judgment, the conditions he observed with respect to the highwall in question on August 10, 1978, constituted an imminent danger (Tr. 144). He indicated that Mr. Park cited section 55.3-5, as a violation because the vent pipe under construction was considered part of the underground mine workings (Tr. 147). The wall did not appear to have been scaled, and he considered the wall to be unsafe ground, and while the use of a cherry picker is a proper method of scaling such a wall, he did not believe that scaling had been done high enough on the wall since the cherry picker could only scale two-thirds of the wall from the ground up (Tr. 148-149).

On cross-examination, Mr. Petty conceded that he did not know whether the wall had been scaled, and he indicated that when he kicked the rock at the top of the wall it only went to the edge, and he then propelled it over and down the wall. Before going to the top of the wall, he knew nothing about it, and he went to the top about 30 minutes after the order had been issued (Tr. 150). He confirmed that while he was present, two men went into the closed area to retrieve their tools, but he could not estimate how long they took to obtain their tools (Tr. 151). He observed no adverse weather conditions on the day the order issued, and admitted that he was no expert on highwalls. He confirmed that he had a discussion with Colo-Maaco employee Chris Nelson on August 10, and that Mr. Nelson told him that the bank had been scaled the day before the order issued, and he did not disbelieve Mr. Nelson (Tr. 154). He confirmed that he saw a rock fall out of the corner of his eye, heard a sound, but could not attribute it to the falling rock. He marked Exhibit G-14 with letters "A" and "B" to indicate where he first saw the rock and where it came to rest (Tr. 155). Although Mr. Nelson told him the wall had been scaled with a cherry picker and a bar, the cherry picker could only reach two-thirds of the way up the wall (Tr. 157).

In response to bench questions, Mr. Petty stated that in the majority of cases it is his view that any highwall that is not properly scaled and has men working under it is an imminent danger. If no men were working under it, he would only issue a citation for failure to scale the wall (Tr. 158-159). Although he confirmed he saw an employee under the wall at the vent pipe location "hunching his shoulder over to avoid the rock", it was a split second peripheral observation on his part, and he made no attempts to confront the employee or to speak with him since his attention was diverted to the miner handling the cable in another area of the pit (Tr. 160). He had no idea where the rock came from or how far it fell off the wall (Tr. 161). He confirmed that Exhibits G-7 and G-8 depict fractured rock, and he conceded that such fractures result from the block-cave method of mining. He conceded that all rock fractures are not hazardous, but those which do not lie flat and are loose are because they possibly could fall on someone (Tr. 163). The dirt, loose rocks, and other materials depicted in Exhibits G-7 and G-8 are required to be cleaned out if the slope is sufficiently inclined enough and men are working under the material (Tr. 164). All of his examinations of the bank and materials were by visual observation, and he had no opinion as to whether or not the rock which he kicked over the wall would have dislodged itself had he not propelled it over the wall (Tr. 166), and he did not know how far the rock fell (Tr. 170). No Climax personnel were exposed to any hazard, but employees of the contractor Colo-Maaco were (Tr. 168).

Inspector Petty stated that the cited standard does not specifically detail what is required to render an alleged dangerous bank safe. It could be sloped to its angle of repose, it could be scaled to eliminate loose material, or it could be wire-meshed as an adequate protective measure (Tr. 289).

Climax's Testimony and Evidence

Gordon Matheson, a professional consulting rock mechanics engineer, testified that he was employed by Climax at one time but terminated his

employment during October 1979, and while at Climax he was employed as a senior geological engineer. He holds Bachelor's and Master's degrees from VPI in geology, and he indicated that his primary responsibility while with Climax was with the open pit. He was present in the vent-pipe construction area on August 1, 1978, for the purpose of examining the rock conditions so that he could give an opinion as to the stability of the foundation materials for an overpass that was being constructed in the area adjacent to the vent pipe structure. In his expert opinion, and based on his observations of the wall area in question, the possibility of any sort of large rock movement or large failure of the rock in the area was very unlikely (Tr. 179-187).

On cross-examination, Mr. Matheson conceded that while a large rock failure was unlikely, this did not foreclose the possibility that smaller rocks the size of grapefruits or basketballs could come loose from the formation on August 10, 1978, but due to the passage of time he could not recall whether loose rocks existed on that day. While the wall itself was stable, he did not examine it close enough to state whether the rock face had loose rocks on it or not (Tr. 183). He also conceded that his evaluation and opinion that the rock face was structurally sound did not take into account the fact that loose material in terms of smaller rocks may have been present on the face of the wall (Tr. 185).

Jerry Harris, testified that he is employed in "concrete work" and that during August through November 1978, he worked for Colo-Maaco at the Climax vent-drift construction site in question. He was the lead man on the rebar crew installing the concrete structure and had four to 10 men working for him at any one time. He recalled the MSHA inspectors who inspected the site on August 10, 1978, and he stated that he was working some 150 yards away when foremen Chris Nelson informed him that more scaling would have to be done on the wall. Mr. Nelson operated the cherry picker and he (Harris) went up above the drift sounding and checking the rocks with a scaling bar. However, he was unable to dislodge any rocks, but the day before he had also been up in the cherry picker and did knock out some loose rock, sounded others, and went from one side of the vent opening to the other knocking off loose rock (Tr. 186-190).

On cross-examination, Mr. Harris stated that the wall was 80 feet high and that the cherry picker would only reach a height of 40 feet, and no attempts were made to scale the wall any higher than where the cherry picker could reach. Although the foreman and superintendent went above the 40-foot height to look at the top of the wall, no attempts were made to scale it above the 40-foot level. He admitted that he told Inspector Park on August 10, 1978, that the wall was not safe and that no rocks were pried loose on that day, and that in order to scale a wall safely and properly it should be scaled at the top first before the bottom is scaled. He also admitted that he has had no training as to the sounding of rocks (Tr. 190-192).

In response to further questions, Mr. Harris stated that he is familiar with the practice of "sounding" rocks, and he explained his prior statement

to Inspector Park regarding his concern for the highwall as follows (Tr. 192-193):

> I got down off the cherry picker and I walked down to the front of the RO and that's where I met Mr. Park and he asked me if I felt safe up there and I said no, the situation never went any further than that. Later on when they asked me for a deposition about it I wanted to explain myself a little bit further and I told them that it wasn't the fact that I didn't feel safe. I didn't feel safe in prying any more loose because the rock up above was consolidated or it had a little stuff that dirt, and the rest of the rock was solid and I didn't want to start prying away rock because you don't know what was coming down or what rock was holding the other one up.
>
> Q. In other words, if it wasn't going to come out, you didn't want to get it out?
>
> A. I didn't want to mess with it when I was half way up the cliff.

Mr. Harris confirmed that he was one of the four men who were permitted to go back into the area withdrawn by the order to retrieve power tools, personal tools, and a generator, and that this took about 15 to 20 minutes. The crew went into the area next to the construction form at the base of the wall and into the adit (Tr. 195). He also indicated that approximately an hour or two elapsed from the time he was advised the withdrawal order had issued and the time he went into the area to retrieve the equipment (Tr. 196). With regard to the scaling of the wall prior to the issuance of the order, he stated that he has never engaged in the scaling of the upper 40 feet of the wall, has never worked on an 80-foot highwall, and the reason he was never higher than the initial 40 feet was due to the limited operating height of the cherry picker (Tr. 199).

Kenneth Diedrich, now retired, but employed on August 10, 1978, as a general mine foreman at Climax's storke level, testified that he accompanied Messrs. Park and Petty during their inspection on that day. While approaching a miner in the open pit to ascertain whether he was wearing suitable gloves while handling a cable, he did not see or hear a rock fall. Employees were permitted to reenter the area closed by the imminent danger order to retrieve their tools and he observed that they were in that area for at least 10 minutes. The men went in as far as the area around the pipe and concrete form (Tr. 212-216).

James Whitmore, testified he was employed as a general foreman in the open pit during July and August 1978. He inspected the construction site in question during this time, met with the contractor, and explained Climax's pit policies and rules to them. The contractor expressed some concern over three rocks near the area where they intended to locate their trailer office,

and Climax tried to remove them with bores, but due to their size they had to be blasted down with dynamite. In his view, there were no other problems at the construction site, and he believed the bank in question was competent (Tr. 216-218).

On cross-examination, Mr. Whitmore indicated that the rocks were blasted out in either late July or early August. The blasting took place some 100 yards to the west of the vent-construction form where the imminent danger order issued. Prior to the contractor's arrival on the site in early August or late July, Climax experienced no problems with the wall and had a shovel in the lower pit, and its trucks were passing by the area all the time. In his view, there was no need to scale the wall above the construction site (Tr. 220).

In response to futher questions, Mr. Whitmore stated that during this time there was an ongoing inspection program in the open pit concerning the slopes, and the pit walls are scaled with the shovel prior to being moved out to the next bench, but no shovels were used above the vent drift walls to scale it (Tr. 221). He also indicated that he did not accompany the inspectors nor make any observations of the site on the day the order issued (Tr. 221). He explained the usual procedures for scaling highwalls, and they include observation, scaling with the shovel at 40- and 80-foot bench intervals, blasting, and barring (Tr. 222). The three rocks blasted down were to the west, or to the left, of the area depicted in photographic Exhibit G-6 (Tr. 223).

Upon review of photographic Exhibit G-7 and the area circled with a "C," Mr. Whitmore could not specifically characterize the material shown as "unconsolidated and loose material" without physically inspecting the area. He denied that such material was observed by him prior to August 11, admitted that as a general rule he does not physically go above a height of 40 feet unless there is a need to, and that he determined the wall was safe by visual inspection from the bottom up for a distance of some 80 feet (Tr. 226).

Dan Wilmot, former assistant superintendent at Climax's underground and open-pit mines, testified that prior to his retirement he was employed with Climax for approximately 30 years and is quite familiar with its mining operations. He identified Exhibits G-8 and G-14 as a photograph of the intake vent-construction site and stated that he was the assistant superintendent at the time that section was excavated. He described the hill area depicted as a highly mineralized, high-grade ore bed being developed in 1975, and that from 1977 to 1978 the area had been mined out. He described the process for scaling the wall in question by use of a shovel bucket from the first cut to the floor below for a distance of some 80 feet. A "catch" area is cut out to provide a catch for loose material. He confirmed that three rocks were blasted down, and following that shot, the area was observed and inspected. He observed the wall regularly during August 9 and 10, and believed it was competent and did not constitute an imminent danger. He observed persons in the area which was closed by the order, and this led him to believe that the

order had been terminated. The mine had a daily "dig plan" in effect which included procedures for scaling or attempting to solidify loose rock (Tr. 227-235).

On cross-examination, Mr. Wilmot confirmed that Exhibit G-10 accurately depicts the scene above the vent as he viewed it on August 10, 1978, and he indicated that the rock slope is almost vertical, but that the overall slope is greater. He conceded that unconsolidated material can be found to exist at any wall (Tr. 237). He was not aware that the contractor found it necessary to scale the wall on August 9, but if they did, and thought it required it, the contractor did what any competent operator would do (Tr. 237). Abatement was achieved through the joint efforts of Climax and the contractor by using a bulldozer on the wall and by installing a net-like material over the wall area above the adit to prevent any rocks and other materials from falling below, and he was not aware of any rocks dislodging during this process (Tr. 239-241).

In response to bench questions, Mr. Wilmot stated that the contractor arrived on the property during the latter part of July or early August and was there until November. The specific construction project in question had been in progress for about a week before the order issued and would have been completed in 2 or 3 more days. The wall area which was covered by the netting was approximately 30 to 35 feet wide and 80 feet in length (Tr. 243). He identified photographic Exhibit G-7 as the area over which the netting was installed (Tr. 247). He also indicated that it was possible that seven to 10 rolls of 5-foot wide netting were used in the abatement, and indicated that while this netting would have provided protection to the men below from any falling rock, it would not have protected them against a slope failure (Tr. 248).

Chris Nelson testified that he was formerly employed with Climax and with Colo-Maaco. While employed with Climax for some 6 years, his duties included blasting out blockages on the drifts and this entailed going up on the drift for distances of 50 to 60 feet. This work requires some judgment of rock stability. On August 10, 1978, he was employed as a labor foreman by Colo-Maaco at the cited Climax construction site, and he was operating a front-end loader in the pit when the inspectors arrived at the scene. Power tools were being used and the area was noisy. Upon being advised of the issuance of the withdrawal order, he and Jerry Harris obtained a cherry picker and Mr. Harris went up to check the rock and found that the face of the wall was in the same condition that it was in the previous day. Mr. Nelson stated that it was his own view that the condition of the wall was as safe as it was the previous 2 days (Tr. 250-253).

Mr. Nelson testified that the day before the order issued, on August 9, he operated the cherry picker and directed Mr. Harris in the scaling of the wall and whatever loose rock was present was taken down. On August 10, at the time the order issued, someone told him that the inspectors had observed a rock fall, but when he discussed it with his crew no one indicated to him that they had observed a rock fall. After the order issued and the area was

roped off, he asked Inspector Park if the crew could go back in to retrieve their tools and he granted them permission to do so as long as they did not disturb any of the scaffolding or plywood forms. The crew went in and to the back side of the bulkhead which was under construction, and they were some 20 to 30 feet in from the face of the wall and were there for some 15 to 20 minutes. He identified Exhibit G-6 as the vent-drift adit where the construction was taking place and identified the area where the crew went in to retrieve the tools (Tr. 253-256).

Mr. Nelson stated that the inspectors rejected his suggestion to construct a timber bulkhead over the adit area as a means of abatement, and he personally worked on the subsequent abatement of the order. Abatement was achieved by building a road down to a bench with a D-9 Caterpillar, boring holes 7 feet deep in the wall to anchor the fence-netting meterial and he went up the face with a "bosun's chair" to sew and tie the netting seams together to produce a solid fence. He removed all of the small rocks from under the netting, and a "little rock" may have been dislodged while rolling out the netting material, but no rock as such came down during this process. He feels a responsibility for the men on his crew and believed that on August 10 the wall was a solid, safe, and workable wall (Tr. 258).

On cross-examination, Mr. Nelson confirmed that only the lower 40 feet of the wall was scaled, and that the only way to scale a wall is to "sound" the rocks by tapping them with a sounding bar. The purpose of scaling a rock wall is to knock loose rocks free of the wall and no one can say that it is solid without testing it. Another method of scaling is to bring someone over the side of the top of the wall or drag a tractor belt or steel chain across the wall knocking off loose rocks. He confirmed that very few rocks were knocked loose when the wire-mesh netting was being installed, and in response to a question as to whether the wire mesh made the wall safe because it knocked some of the loose rock free, he answered "anything is safer, yes" (Tr. 261).

Mr. Nelson stated that when he went in to retrieve his tools he was not concerned for his safety because he knew it was safe. He believed there was a conflict in the inspector permitting the crew to go into an area which he had just closed as an imminent danger (Tr. 262). He described the rock material depicted under the wire-mesh netting in Exhibits ALJ-2 and 4 as compacted rather than loose rock (Tr. 264). The soil-like material on the slope consisted of fractured rock at the bottom 40 feet, and red clay dirt mixed with rock at the upper sloped area, and it is not sandy, and a lot of rain would affect the rock embedded in the dirt (Tr. 264).

Ron Surface testified that he has been employed by Climax as a resident geologist for 11 years and prior to that time worked as a geologist for the company for some 6-1/2 years. He holds a B.S. degree in geology from Colorado College and prior to working for Climax was employed in consulting jobs as a geologist. He has 20 years of experience in mining and geology. His office designed and implemented the mine slope stability plan, and it was in operational use in August 1978. He described the terrain depicted in Exhibit G-7 as the highwall adjacent to and behind the vent-pipe construction

site and stated that it was not sedimentary rock, but rather, precambrian, younger, or silver-plume granite of igneous origin. There is no sedimentary rock in the Climax Mine ore body, but there is some several hundred feet to to the west of the adit site in question. The pit area in question was at one time a part of the underground mine. He arrived at the site the day after the order was issued, and based on his expertise he would say it was a stable wall (Tr. 265-270).

On cross-examination, Mr. Surface stated that while he was satisfied with the stability of the slope, loose rocks could have been present on the face of the wall (Tr. 270).

Inspector Park was recalled by MSHA and confirmed that he was at the mine on August 23, 1978, to ascertain whether the conditions cited in the order were abated. He traveled the wall face area as well as the top of the bank. He confirmed that the area marked with a "C" on photographic Exhibit G-7 is the area which concerned him and indicated that it was a portion of the hazard that the men were exposed to. He also marked an "X" on Exhibit ALJ-1 as the area which concerned him, and indicated that it was an area approximately 50 feet wide and 80 feet in height (Tr. 272276). He later testified that the circled area "C" on Exhibit G-7 did not exactly encompass the area he had in mind (Tr. 276), and that his concern was only with portions of the area (Tr. 281).

DISCUSSION

Procedural and Other Rulings

Party Status of the Union

At the hearing, the Oil, Chemical, and Atomic Workers International Union, Local No. 2-24410, (OCAW) Leadville, Colorado, sought leave to intervene as a party in these proceedings. MSHA did not object, but Climax did, and in support of its objection, Climax argues that it objects to the OCAW local being afforded party status on the ground that while they do represent a bargaining unit at the Climax Mine, the local does not represent the affected miners involved in the alleged imminentdanger incident. Climax asserts that those employees of Colo-Maaco allegedly exposed to the asserted hazard are not members of the Union, and citing 1 MSHC 2080, June 19, 1979, holding that the UMWA was not to be allowed party status because it did not represent the workmen in the Magma copper mines in question (Tr. 205), argues that OCAW should not be permitted party status in this case.

MSHA took the position that the union should be afforded party status where there is any possibility that its employees would be exposed to any imminent danger (Tr. 206). OCAW's representative indicated that the Union would be satisfied with an amicus curiae status allowing it to present a short argument and file briefs in the case, citing 1 OSMC, 1017, E.D. Michigan (1972) (Tr. 207). OCAW was granted party status and Climax's motion was overruled (Tr. 207-210). My ruling made at the hearing is herein reaffirmed.

Authority of the Inspectors and Alleged Citation of an Erroneous Standard

In support of its motion to dismiss, Climax argued that there is no proof or evidence that Inspectors Park or Petty were authorized representatives of the Secretary. The motion was denied (Tr. 211), as was Climax's assertion that the wrong section of the standard was cited (Tr. 211).

With regard to the authority of the inspectors who issued the citations, Climax argues in its posthearing brief that MSHA has failed to establish that the inspectors who conducted the inspection and issued the citation and withdrawal order were in fact acting in their capacity as authorized representatives of the Secretary of Labor, and that there is nothing in the Act which designates employees of MSHA as authorized representatives of the Secretary. This assertion and defense is rejected. While it is true that Inspector Park testified that he did not initially present his credentials on August 10, 1978, the record reflects that he had conducted numerous mine inspections concerning open-pit mines, including prior inspections at the Climax Mine, beginning on July 19, 1978. Mr. Petty testified that he and Mr. Park went to the mine on a follow-up compliance inspection, that when they arrived they made contact with Climax officials, and company officials accompanied them during the inspection (Tr. 132-133). He also testified that he had issued previous orders at the Climax Mine in his capacity as an inspector (Tr. 143). In addition, both inspectors testified in detail as to their appointments as inspectors, their training and duties, and I am satisfied that the record supports a finding that they were in fact duly authorized mine inspectors and that their inspection duties on the day in question were in complete accord with the provisions of the Act, and my previous ruling denying Climax's motion to dismiss on this somewhat frivolous claim is reaffirmed.

With regard to the asserted citation of the wrong standard, Climax argued at the hearing, and in its posthearing brief, that the cited standard, section 57.3-5, is part of the metal and nonmetallic metal standards for underground mines, and since the conditions cited occurred in the open-pit mine, the citation should be dismissed and vacated (Tr. 68-75, 147, 171-173). MSHA's brief does not address this issue, but an explanation was forthcoming from the inspectors during the hearing, and it is found at the referenced transcript pages, and for the reasons which follow below, Climax's arguments are rejected.

Section 57.3-5, is found under the general heading of Ground Control for Surface Areas of Underground Mines, and section 57.3-1 specifically puts an operator on notice that he must establish procedures for the safe control of pit walls and banks. Mr. Petty testified that he considered the surface vent-pipe construction site to be an extension of the underground mine, and Part 57 specifically deals to the surface area of such an underground mine (Tr. 171). He also testified that the correct standard was cited, and that the vent was considered part of the underground workings since it was being constructed to supply ventilation to the underground portion of the mine (Tr. 147).

Section 55.3-5, which is a standard found in the applicable Part 55 standards dealing with open-pit mines, is identical to the language used in section 57.3-5, and aside from the question of which standard applies, on the facts here presented, it would have been a simple matter for MSHA to amend its pleadings and I cannot conclude that Climax would have been unduly prejudiced since the two standards contain identical requirements. However, I conclude and find that the inspectors cited the correct standard, and my previous ruling denying Climax's assertions to the contrary is reaffirmed.

The Concept of Imminent Danger

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. § 802(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Section 107(a) of the Act provides as follows:

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

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969 at page 44 (March 1970), states in pertinent part as follows:

> The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. [Emphasis added.]

And, at page 89 of the report:

> The concept of an imminent danger as it has evolved in this industry is that the situation is no serious that the

> miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd., Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (7th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman, phrased the test for determining an imminent danger as follows:

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. § 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant

bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucas Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328, (1973-1974); Kings Station Coal Corporation, 3 IBMA 322, 81 I.D. 562 (1974).

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the facts presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspector's education and experience would conclude that the condition of the highwall above the vent adit construction site in question, a condition which the inspector characterized as a "dangerous bank" consisting of "unconsolidated material" from which "a loose chunk fell to the working area as inspectors looked on", constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately.

Findings and Conclusions

Docket DENV 79-21-M

Imminent Danger

In this docket the question presented for determination is whether the conditions described by Inspector Park on the face of the imminent danger portion of the order he issued on August 10, 1978, No. 332803, constituted an "imminent danger" within the meaning of section 107(a) of the Act. On the face of his order, Inspector Park stated that he observed unconsolidated material on the bank in question and that "a loose chunk fell to the working area as inspectors looked on". At first blush, it would appear that Mr. Park and Mr. Petty were standing near the highwall observing the men working beneath it, and that a "chunk" of unconsolidated material fell from the highwall where the employees were working. However, Mr. Park's testimony is that from a distance of some 40 or 50 yards, while observing a workman handling a cable in a manner which he believed may have been contrary to safety standards, he heard a sound which appeared to come from the highwall area where the employees were working, and when he glanced in that direction he peripherally observed a single rock about the size of a cantaloupe rolling to its resting place. He did not actually observe the rock dislodge or fall, and while he stated that he observed several of the workmen in the area looking at each other, he made no attempt to speak with them, could not identify

them, and the supervisory personnel with whom he spoke with could not confirm that they also observed the rock in question. In addition, during a period of some 2 hours while he was at the scene he saw no other rocks fall, except for one which he dislodged with his foot at the top of the wall and then kicked over the edge with his foot.

The basis for Mr. Park's opinion that the highwall conditions he observed were hazardous was his assertion that the situation presented a possibility that falling rock could lacerate or fracture, thereby resulting in serious injuries to the men working at the base of the highwall. He also initially alluded to the fact that blasting had taken place in the area 2 days before his inspection, and that coupled with changing weather conditions such as rain, ice, and freezing, he implied that these added factors somehow contributed to the danger. However, he subsequently clarified his testimony and indicated that any blasting would have occurred as early as July 19, and while blasting occurred on August 10, he could not state where it had taken place. As for any adverse weather conditions, he conceded that none were present at the time the citation and order issued.

With regard to the incident concerning his granting permission for several employees to re-enter the area which had been closed by his order for the purpose of retrieving their tools and equipment, Mr. Park stated that he permitted them to enter the "fringe" area which had been withdrawn and that part of the asserted imminent danger area was more "imminent" than others.

Finally, Mr. Park's initial finding of an "unwarrantable failure" violation pursuant to section 104(d)(1), was modified to reflect a section 104(a) citation after he discovered that such a finding was inconsistent with his imminent danger finding.

Inspector Petty testified that he too observed the rock in question out of the corner of his eye, and while he heard a sound, he could not attribute it to the rock which he claimed had fallen. He candidly admitted that his observation of the rock was a split second peripheral observation, and rather than proceeding immediately to the area, he and Mr. Park waited until they resolved the question concerning the employee handling the cable in the pit area without proper gloves. He did not know where the rock came from or how it fell off the wall. He too kicked a rock loose with his foot from the top of the wall after the order issued, but it only rolled to the edge of the wall, and he had to propel it over with another kick of his foot.

Finally, Mr. Petty expressed the view that in the majority of cases, any highwall which is not properly scaled and has men working under is in itself an imminent danger, but if no men were working under the wall, he would only issue a citation for failure to scale the wall.

On the facts presented in this case, when the inspectors initially heard and observed what they believed was a rock which had fallen from some undisclosed location on the highwall, they did not proceed directly to that area, but rather, continued about their business concerning a miner who was

apparently handling a power cable without wearing suitable gloves. Thus, the assertion by Inspector Park on the face of his order that a chunk of material fell while the inspectors looked on is a somewhat distorted and misleading conclusion which ordinarily would lead one to believe that an accident was likely to happen at any moment unless corrective action were taken immediately. The fact is, however, that the inspectors obviously were not concerned that the situation required their prompt attention since they did not immediately proceed to the area. Further, once the area was withdrawn, the inspectors permitted employees to re-enter to retrieve their tools, and while Mr. Park stated that they only entered the "fringe" area, three employees testified that they actually went into the adit area around and behind the concrete form to retrieve their tools and other equipment and that they were in the area for more than just a few minutes.

Regarding the actual conditions which existed on the highwall in question at the time the order issued on August 10, a professional engineer and a resident geologist testifying on behalf of Climax, stated that while it was possible that unconsolidate material may have been present, they were satisfied with the overall stability of the highwall and that it was highly unlikely that a massive rock movement or slide would occur. Construction Foreman Nelson testified that he checked the wall after the order issued and found it safe, and that he discussed the conditions of the wall with his crew and no one indicated to him that they had observed any rock fall. Assistant Superintendent Wilmot, a man with 30 years of mining experience, while conceding that unconsolidated material can exist on any highwall, testified that his inspections and observations of the highwall in question convinced him that the wall was stable and competent. General foreman Whitmore testified that he inspected the construction site, observed the highwall, and determined that it was safe. Lead man Harris testified that he and Mr. Nelson scaled part of the wall the day before the order issued and knocked down some loose rock but that after the order issued he scaled it again but could not dislodge any rock.

Inspector Park testified that the 80 foot highwall was composed of sandy materials and solid rock, with a variety of seams, some of which had evident cracks. He also observed unconsolidated and fractured rock on the upper portion of the highwall which was apparently out of the range of the 30-foot cherry picker which had been used to scale the lower portion of the wall. His inspection of the highwall was limited to his observations, and except for some material which he kicked down with his foot, during the 2 hours or so that he was on the scene he observed no rocks or materials fall from the highwall. And, while he alluded to the presence of some "overhanging" materials on the highwall, I take note of the fact that no mention of such a condition is made in the order he issued.

Inspector Petty's testimony regarding the highwall conditions is consistent with Mr. Park's evaluation of the highwall, and he candidly believed that most highwalls which are not properly scaled and with men working under them are imminently dangerous per se.

After careful consideration of all of the testimony and evidence adduced in this proceeding, I cannot conclude that the conditions described by Inspector Park in his order constituted an imminent danger on the highwall above the adit construction site in question on August 10, 1978. While the testimony by the inspectors may support a conclusion that there were some areas of loose unconsolidated materials scattered about the upper reaches of the highwall, including the area to the right of the adit area, as depicted in the photographic exhibits, I simply cannot conclude from the inspector's testimony in support of their imminent danger finding that the prevailing conditions on the highwall presented a situation which constituted an impending accident or disaster likely to occur at any minute. I believe that Mr. Park's real concern was over the fact that from his vantage point in the pit, there appeared to be some loose and unconsolidated material which had not been scaled down from the upper portion of the highwall, and that since the vertical range of the cherry picker used for scaling was limited to a distance of some 40 feet up the highwall, I am convinced that he believed some other methods of scaling should have been used. I am also convinced that Mr. Park was impressed by the 80 foot height of the highwall and that he issued the imminent danger order as a means of insuring routine immediate compliance with section 57.3-5, rather than any real assessment on his part of any imminently dangerous condition. I conclude that such a use of imminent danger orders to achieve compliance with routine or unusual situations which do not present an immediate threat to life and limb is an unwarranted abuse of such orders.

On the facts presented in this case, I believe it is clear that Inspector Park over-reacted by issuing the imminent danger order. In addition, while it is true that his testimony in support of his order came approximately 2 years after the order issued, I find it to be somewhat colored and contradictory, particularly with respect to the discrepancy in the order which states that a "chunk of material fell while the inspectors looked on," when in fact it turns out that a single rock may have been observed rolling to its resting place by the inspectors out of the corner of their eye from a distance of some 50 yards away. In addition, I am not too impressed by Mr. Park's explanation concerning his initial finding of an unwarrantable failure, and his subsequent modification of that finding, nor am I impressed by his attempts to include weather conditions and blasting activities as part of his initial determination of the asserted imminent danger, when in fact he had no facts to substantiate such claims. The weather was clear at the time the order issued, and the inspector simply did not know the extent of, or the details of any blasting in the area. Finally, the fact that the inspectors did not go immediately to the area where they claimed they saw a rock fall, the fact that they failed to interview any of the workers who they believed may have observed the rock fall, and the fact that they permitted miners to re-enter the area after they were withdrawn, adds to the doubts which I have concerning the presence of any imminent danger at the work site in question at the time the order issued.

In view of the foregoing findings and conclusions, I find that the preponderance of the reliable and probative evidence and testimony adduced in this proceeding simply does not support a finding that an imminent danger existed on August 10, 1978, and the Order is VACATED.

Findings and Conclusions

Docket No. WEVA 79-24-M

Fact of Violation

This docket concerns a proposal for assessment of civil penalty filed by MSHA seeking a civil penalty for an alleged violation of the provisions of mandatory safety standard 30 C.F.R. § 57.3-5, which provides as follows:

> Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

It is clear that while a condition or practice described by an inspector on the face of an order or citation may not constitute an imminent danger pursuant to section 107(a) of the Act, it may nonetheless constitute a violation of a mandatory safety standard for which a civil penalty may be assessed pursuant to section 110(a). In these consolidated proceedings, while I have vacated the imminent danger order issued by Inspector Park, there still remains the question as to whether the petitioner has established by a preponderance of the evidence that the conditions described on the face of the combined order-citation constitute a violation of section 57.3-5.

The conditions described by Inspector Park which are relevant to any determination as to whether section 57.3-5 has been violated are: (1) his characterization of the highwall bank as dangerous, and the assertion that men were working near it; (2) his asserted observations of unconsolidated material on the bank; and (3) the asserted presence of loose rock in the bank. Although he testified that he observed certain overhanging areas on the bank, no mention of that condition is made on the face of the order-citation, and I have given his testimony no weight in this regard, nor will I consider his after-the-fact testimony concerning the presence of any overhangs as any form of an amendment to the charges as cited on the face of the citation.

The record adduced in this case supports a finding that in certain areas and locations along the extent of the highwall bank in question loose rock and other unconsolidated materials were present. Respondent's evidence establishes that while some scaling took place the day before the citation issued, it was limited to the lower 40 feet of the bank because of the operational limitations of the cherry picker used for this chore. Although respondent's witness Wilmot testified as to certain procedures used for scaling highwalls through the use of a shovel bucket and the establishment of a "catch" area, I am not persuaded that respondent has established that this was in fact done

on the day before the citation issued and that all loose and unconsolidated materials had been taken down. As a matter of fact, Mr. Wilmot candidly admitted that such loose materials and rocks are present on all highwalls. Further, while Climax's engineers testified that the stability of the bank was such that any sort of large rock movement was highly unlikely, both Mr. Matheson and Mr. Surface conceded that loose materials and rocks may have been present on the wall, and the crew that scaled the wall candidly admitted that they did not scale above the 40-foot height of the wall.

I find that petitioner MSHA has established that there were several areas on the highwall above and to the right of the adit construction site in question, which contained some loose rocks and unconsolidated materials which had not been scaled, and that the men working at the adit were working near those areas. I conclude that such unscaled loose and unconsolidated materials as shown in Exhibits G-7 and G-8 constitute an unsafe ground condition within the meaning of section 57.3-5, and the failure of the respondent Climax to insure that the area was scaled of such materials constitutes a violation of the cited standard. Specifically, I find that the failure by Climax to scale the upper 40 foot portion of the highwall in question to insure that all loose and unconsolidated materials were removed while the crew was working at the adit construction site in question, constituted a failure on its part to insure that such unsafe ground conditions were promptly corrected. Accordingly, I find that petitioner MSHA has established a violation of section 57.3-5, and the section 104(a) citation is AFFIRMED.

Gravity

I find that the violation in this case was serious. Although I am not totally convinced that the construction crew working at the adit construction site were directly in a position to receive serious injuries from falling rock on the day in question, the fact is that the presence of loose unconsolidated materials above and nearby their work site presented a potential hazard to them should the materials shift or fall. In my view, the intent of the cited standard is to insure that all such identifiable material is scaled and removed so as to preclude its falling or bouncing in the area where men might be working.

Negligence

While the record reflects that the adit construction site involved construction work being carried out by one of Climax's contractors, the primary responsibility for insuring a safe work site for the workers there rested with Climax, and I am convinced that this was in fact the case since Mr. Wilmot went through great detail in establishing the procedures utilized by Climax to scale all highwalls on the mine site. As a matter of fact, the record reflects that when the contractor pointed out several rocks which presented a potential hazard, Climax had them taken down. I believe that Climax had a duty to inspect the highwall and to scale it in its entirety. Its failure to completely scale and remove all materials, particularly on the

upper 40 foot portion of the bank, resulted from Climax's failure to take reasonable care to prevent the cited conditions, and I conclude and find that this constitutes ordinary negligence.

Good Faith Compliance

The record supports a finding that Climax exercised good faith compliance in achieving abatement, and I take note of the fact that abatement was achieved in this case by the installation of a somewhat elaborate netting system to contain all of the material above the adit construction site. Respondent's abatement efforts in this regard have been considered by me in the assessment of a civil penalty for the citation in question.

Prior History of Violations

Respondent Climax's prior history of violations is reflected in Exhibit G-4, an MSHA computer printout reflecting 167 paid violations for the 2-year period covering August 11, 1976, through August 10, 1978. I take note of the fact that the prior history of violations contains no prior violations of section 57.3-5, and for a large operator, I cannot conclude that respondent's prior history in indicative of a poor history of violations, and that fact is also taken into consideration by me in the assessment of the civil penalty in this case. I have also considered the fact that the adit construction site was under the direct supervision of a contractor and that none of Climax's employees were exposed to a hazard. In this regard, the "independent contractor" question is not an issue in this case since the state of the law at the time this citation was issued was such as to hold the mine operator-owner accountable for citations resulting from a contractor's failure to comply with a mandatory standard, and Climax's counsel candidly recognized the fact that Climax, rather than the contractor, is in fact the responsible party.

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

The parties stipulated that respondent Climax is a large mine operator and that a civil penalty assessment will not adversely affect its ability to remain in business. I adopt this stipulation as my finding on this issue.

Penalty Assessment

It is clear that I am not bound by the initial proposed civil penalty arrived at by MSHA's assessment procedures and that I may assess a penalty de novo based on my consideration of the record adduced at the hearing in this proceeding. Accordingly, based on the entire record as a whole, and taking into account Climax's prior history of violations and its somewhat extraordinary efforts in achieving abatement in this case, I conclude that a civil penalty of $800 is appropriate in the circumstances. Accordingly, respondent Climax is assessed that amount for the section 104(a) citation which has been affirmed in this case.

ORDER

Respondent Climax IS ORDERED to pay a civil penalty in the amount of $800 within thirty (30) days of the date of this decision in satisfaction of Citation No. 322803, issued on August 10, 1978, for a violation of mandatory standard 30 C.F.R. § 57.3-5. Upon receipt of payment by MSHA, these proceedings are DISMISSED. It is further ORDERED that the section 107(a) imminent danger order issued on August 10, 1978, is VACATED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

9 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. WILK 79-24-PM
Petitioner	:	A.O. No. 43-00134-05001
v.	:	
	:	Derby Granite Quarry & Mill
DERBY GRANITE, INC.,	:	
Respondent	:	

DECISION

Appearances: Michael D. Felsen, Attorney, U.S. Department of Labor, Boston, Massachusetts, for the petitioner.

Before: Judge Koutras

STATEMENT OF THE CASE

This proceeding concerns a proposal 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), charging the respondent with four alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

Respondent answered and contested the proposed penalty assessments and the case was scheduled for hearing at Montpelier, Vermont, on September 17, 1980. Petitioner appeared at the hearing but the respondent did not. Under the circumstances, the hearing proceeded without him and petitioner presented testimony and evidence in support of the citations and its proposal for assessment of civil penalties.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (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, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

The citations issued in this proceeding are as follows:

104(a) Citation No. 211881, May 4, 1978, 30 C.F.R. § 56.14-1: "Mandatory standard 56.14-1 was not complied with in that a guard was not provided on the rope drum gears of the wooden derrick hoist."

104(a) Citation No. 211882, May 4, 1978, 30 C.F.R. § 56.12-23: "Mandatory standard 56.12-23 was not complied with in that the 440 volt energized primary wooden derrick hoist turn meter brushes were not guarded to prevent contact by persons."

104(a) Citation No. 211886, May 4, 1978, 30 C.F.R. § 56.16-5: "Mandatory standard 56.16-5 was not complied with in that compressed gas cylinders were not secured in the hoist room."

104(a) Citation No. 211895, May 5, 1978, 30 C.F.R. 56.15-4: "Mandatory standard 56.15-4 was not complied with in that the mill foreman was not wearing safety glasses while breaking stone."

Petitioner's Testimony and Evidence

MSHA inspector John Rouba testified as to his training and experience, and stated that prior to the issuance of the citations in question during the course of an inspection at respondent's mining operation, he had previously inspected the mine and he detailed the dates of those inspections (Tr. 10-12; Exhs. P-a, P-b). He described the mining operation as a granite mine, and indicated that the operation consists of mining granite in "block" form approximately 8 feet long and 4 feet thick. The quarried granite is removed from the quarry by means of a derrick hoist and either stockpiled in the storage yard or stored in trucks for sale and transportation to quarry

customers. The operation also includes a milling operation on the mine property where some of the mined granite is sawed into blocks and finished and manufactured into curbing or monumental stone. Some of the granite is also used for stone chipped to a customer's specifications. He was advised and informed that some of the mined granite products from the quarry are sold and shipped to Canadian buyers and that some is shipped to buyers in New York and New Jersey (Tr. 12-14). He also indicated that sometime in July of 1980, respondent sold his quarry business and no longer operates the mine.

Inspector Rouba testified that as of May 4, 1978, MSHA's records reflect that the mine in question employed 31 employees, that it is located in Derby, Vermont, some 5 miles or so south of the Canadian border, and Exhibit P-2(a), a mine profile, reflects that the mine operated 5 days a week during one 9-hour shift each day (Tr. 14; Exhs. P-1, P-2(a)).

Inspector Rouba confirmed that he issued each of the citations in question in this proceeding during the course of an inspection at the mine on May 4, 1978, and he indicated that mine owner Bianchi accompanied him during the inspection. The unguarded drum gears on the derrick hoist were adjacent to a travelway and he identified a copy of a sketch he prepared indicating the location of the area in question (Exh. P-7). The derrick was located in a hoist room, and he indicated that a hoistman is on duty in the room to operate the hoist and that as many as seven men regularly traveled through the area and that the men usually ate their lunch in the hoist room. The unguarded gears presented a potential hazard to the men who could have slipped or fallen into the unguarded gear pinch point and received serious injuries while walking along the travelway which had a clearance of some 20 inches on one side of the hoist and some 30 inches on the opposite side. Mr. Rouba believed that the respondent should have been aware of the guarding requirements of section 56.14-1 because a second hoist located in the hoist room had its gears guarded and the respondent had been previously cited for other equipment guarding violations discovered during previous inspections (Tr. 23-28; Exh. P-2(b)). Mr. Rouba also identified several photographs of the hoist in question taken by him on September 10, 1980, showing the gears and the location of the derrick hoist before it was removed from the hoist room and dismantled (Exhs. P-4 through P-6).

Mr. Rouba stated that respondent exercised rapid good faith compliance by installing a guard on May 5, 3 days in advance of the May 8, date that he initially fixed for abatement (Exh. P-8; Tr. 29).

Regarding Citation No. 211882 concerning the unguarded derrick hoist turn meter brushes, Inspector Rouba identified two recent photographs of the motor electrical connections which he was concerned with and he indicated that the location of the motor in the proximity of the travelway, coupled with the fact that miners regularly passed through the area, presented a shock hazard if they were to contact the unguarded connectors. The unguarded motor was in plain view and he believed that the respondent should have been aware of the hazard and the fact that a guard was required. Abatement was achieved

the day after the citation issued and 3 days prior to the date he fixed for abatement and he considered this to be rapid good faith compliance (Tr. 33-48; Exhs. P-7, P-10 through P-12).

Mr. Rouba stated that Citation No. 211886 concerning the unsecured compressed gas cylinders involved only one such cylinder which he observed standing upright on the hoist room floor and it was not secured in any way to prevent it from being struck or knocked over. Failure to secure it in any way presented a hazard of the valve being struck and damaged by a tool. He did not determine whether the cylinder was full or empty and he described it as being approximately 5 feet high. He also indicated that men regularly passed through the area, and he stated that the cylinder was not in use but was either awaiting transport into the quarry or out of the hoist room to a storage area, but he was not sure as to which was the case. Abatement was achieved within the 50 minutes which he fixed by securing the cylinder against a wall with a rope. He believed the respondent should have been aware of the requirements of section 56.16-5, because he had previously been cited for identical violations (Tr. 48-57; Exhs. P-2(b), P-13).

Inspector Rouba identified the mill foreman without safety glasses as Ronald Le Clair, and he indicated that he was breaking and chipping stone when he observed him. The foreman had no safety glasses of his own on his person and had to borrow a pair from another employee. Abatement was achieved immediately, and Mr. Rouba indicated that respondent had previously been cited for safety glasses violations (Tr. 60; Exhs. P-14, P-2(b)). In support of his contention that the respondent's milling operation was owned and operated by the respondent, the inspector identified an MSHA accident report, Form 7000-1, reflecting that the accident (unrelated to the citation in question) occurred at respondent's mill or plant. The form is signed by respondent Bianchi's wife and that form reflects that respondent Derby Granite, Incorporated, owns the Derby Quarry and Plant (Tr. 58-60; Exh. P-15).

Findings and Conclusions

Failure of Respondent to Appear

I consider respondent's failure to enter an appearance in this matter to be a waiver of any further rights on his part to be heard. The record reflects that respondent received the two notices of hearing issued by me in this proceeding. In addition, although respondent's initial answer to the petitioner's proposals for assessment of civil penalties was not timely filed, prompting a show-cause order to be issued by Judge Broderick proposing to hold him in default, upon further consideration of his answer, and out of deference to respondent's apparent failure to comprehend the consequences of his failure to file a timely answer, I accepted his late-filed answer and accommodated him with a hearing site within reasonable commuting distance of the mine. Under these circumstances, I find that respondent has been given more than an adequate opportunity to be heard, but he obviously has failed to take advantage of it. Accordingly, I conclude that respondent has waived his right to any further hearing and that the issuance of any show-cause order

would be a fruitless gesture. I have considered this case de novo and my decision in this regard is made on the basis of the evidence and testimony of record as presented by the petitioner in support of its case at the hearing.

Fact of Violations

I conclude and find that petitioner's testimony and evidence establishes the fact of violation as to each of the citations issued by the inspector in this proceeding. The conditions described on the face of each citation are supported by his testimony and the conditions establish violations of each of the cited mandatory safety standards. The citations are therefore AFFIRMED.

Negligence

I find that the respondent failed to exercise reasonable care to prevent the conditions cited by the inspector and which resulted in the issuance of the citations in question and that such a failure on respondent's part constitutes ordinary negligence.

Gravity

With the exception of the citation for the unsecured gas cylinder, I find that the testimony of the inspector supports a finding that Citation Nos. 211881, 211882, and 211895 were serious violations. The conditions described in each of these citations, coupled with the inspector's testimony, establish that they exposed workers to the possibility of serious injuries. As for the one unsecured cylinder, I find that the possibility of a tool striking the gas valve to be highly remote, and since the inspector failed to determine whether the cylinder was full or empty, I have no basis for finding that the situation was hazardous. The cylinder was not in use, and there is no indication that it was located near or in the proximity of any travelway where it may have been in a position to topple over and strike someone. Under the circumstances, I conclude that Citation No. 211886, was nonserious. I also take note of the fact that while the citation refers to unsecured cylinders, the inspector candidly admitted that only a single cylinder was present.

Good Faith Compliance

The record supports a finding that Citation Nos. 211881, 211882, and 211895, were rapidly abated before the time fixed by the inspector, and that Citation No. 211886 was abated within the time fixed by the inspectors. Respondent's compliance in this regard has been considered by me in the penalties assessed for the citations which have been affirmed.

History of Prior Violations

Inspector Rouba stated that the respondent has a poor compliance record and that MSHA's records reflect that for the period prior to the issuance of the citations in question, respondent was issued 264 notices of violations

and 27 orders of withdrawal (Exh. P-2(a)). In addition, Mr. Rouba stated that during his inspection of May 4, 1978, he issued 15 additional citations and one order for various violations but he was unaware of the current status of those citations or whether or not civil penalties have been assessed.

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

I find that respondent conducted a small-to-medium-sized mining operation, and since he did not appear at the hearing, there is no information that the civil penalties assessed in this case will adversely affect the respondent's ability to continue in business.

Penalty Assessments

Petitioner's counsel asserted that the proposed civil penalties advanced in this case accurately reflect, and take into account, an evaluation of all of the statutory criteria found in section 110(i) of the Act, and that it is petitioner's position that as a minimum, those proposed assessments should be affirmed.

Although the record establishes that respondent's history of prior violations is not a good one for an operation of its size, I have considered the fact that respondent achieved rapid and timely abatement of the citations in question, that the citations were issued over 2 years ago, less than 2 months after the effective date of the Act, and that respondent has apparently sold his business and no longer operates the quarry. Under the circumstances, I conclude that the proposed penalties are reasonable and they are accepted and affirmed as the civil penalties assessed and imposed by me in this matter, as as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment
211881	5/4/78	56.14-1	$106
211882	5/4/78	56.12-23	90
211886	5/4/78	56.16-5	78
211895	5/4/78	56.15-4	130

ORDER

Respondent IS ORDERED to pay civil penalties in the amount of $404 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6210/11/12

10 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BOBBY D. SMITH, Complainants	:	Complaint of Discrimination
	:	Docket No. KENT 80-102-D
	:	No. 1 Mine
v.	:	
MULLIN CREEK COAL CO., INC., AND KENNETH STANLEY, Individually, Respondents	:	

DECISION

Appearances: William F. Taylor, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the Complainants; Charles Lowe, Attorney, Pikeville, Kentucky, for the Respondents.

Before: Judge Koutras

Statement of the Case

This is a discrimination proceeding initiated by the Secretary against the respondents pursuant to section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, charging the respondents with unlawful discrimination against complainant Bobby Smith for exercising certain rights afforded him under the Act. Mr. Smith was discharged by the respondent on October 22, 1979, but was subsequently reinstated on December 18, 1979, by Order of Chief Judge Broderick pending final adjudication of his complaint.

Respondent filed a timely answer denying the allegations of discrimination, and pursuant to notice, a hearing was convened at Pikeville, Kentucky, during the term September 9-10, 1980, and the parties appeared and participated fully therein.

Discussion

The hearing record adduced in this case reflects that complainant Smith has been regularly employed at the mine since his reinstatement on December 18, 1979, that he is considered a good employee by mine management, and that he presently enjoys a good working relationship at the mine with mine management (Tr. 204). Further, the record reflects that Mr. Stanley is no longer employed by the respondent mining company, and the Secretary conceded that the testimony and evidence adduced during the course of the hearing in support of the complaint does not support a finding that Mr. Stanley discriminated against Mr. Smith (Tr. 200). Accordingly, counsel agreed that Mr. Stanley should be dismissed as an individual party-respondent and he was dismissed from the case from the bench.

At the conclusion of the Secretary's case, respondent's motion to dismiss the complaint was denied. Shortly after the initiation of respondent's defense, the parties requested a bench conference for the purpose of proposing a settlement of the case. Pursuant to an agreement by the parties, including Mr. Smith, the settlement agreed to is as follows (Tr. 272-274):

1. Mr. Smith will be permanently reinstated to his position which he has reoccupied since his temporary reinstatement on December 18, 1979.

2. Mr. Smith will be paid $1,000 by the respondent as compensation for his back wages during the period that he was off the payroll.

In view of the proposed settlement of the matter, the complainants, including Mr. Smith, requested leave to withdraw the complaint and that I dismiss the case (Tr. 273).

Conclusion

After full consideration of the record adduced in this proceeding, including the transcript of the testimony presented by the witnesses who testified at the two-day hearing session of September 9 and 10, 1980, and the settlement agreement entered into by the parties, I conclude that the settlement disposition of this dispute is a reasonable and fair resolution of the matter and that approval of same is in the public interest. It seems clear to me that both Mr. Smith and the respondent are satisfied with the settlement disposition of this case, and the Secretary is in accord with the agreement.

ORDER

In view of the foregoing, the proposed settlement disposition of this matter is APPROVED, and the complainants' motion to withdraw and dismiss the complaints are GRANTED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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FALLS CHURCH, VIRGINIA 22041

1 0 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. YORK 79-10-M A.C. No. 30-00006-05002
v.		
ATLANTIC CEMENT COMPANY, INC.,	Respondent	Docket No. YORK 79-76-M A.C. No. 30-00006-05005 Ravena Quarry and Plant

DECISION

Appearances: William Gonzalez, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Howard Estock, Esq., Clifton, Budd, Burke & DeMaria, New York, New York, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter the "Act"). The general issue in these cases is whether Atlantic Cement Company, Inc. (Atlantic) has violated provisions of the Act and its implementing regulations and, if so, what are the appropriate civil penalties to be assessed. An evidentiary hearing was held in Albany, New York, on April 8, 1980.

I. Docket No. YORK 79-10-M

A. Uncontested Citations

Petitioner moved to settle all citations in this case except Citation Nos. 205218, 205244 and 205252. MSHA supported the reductions in penalty for the reasons set forth below:

Citation No. 205219 charges one violation of 30 C.F.R. § 56.12-8 (requiring the adequate insulation of power wires and cables where they pass into or out of electrical compartments). MSHA maintains that the condition cited, i.e., the wiring was not properly connected where it entered a junction box because a locking nut was missing, could not have been known or predicted and occurred due to circumstances beyond the operator's control. It further

contends that injuries were improbable in light of the fact that the junction box was not located where employees worked and that the possible hazard of electrical shock could not occur unless energized wires were actually pulled from the junction box and then contacted by an employee. A reduction in penalty from $48 to $26 is proposed.

Citation No. 205242 charges one violation of 30 C.F.R. § 56.11-12 (requiring the guarding of openings near travelways through which men or material may fall). MSHA now claims that the probability of injuries due to the cited condition, i.e., the absence of a toeboard around a hoist platform, was remote in that the platform was rarely used. It further maintains that Atlantic exercised extraordinary good faith in abating the condition inasmuch as a repairman immediately installed a 4-inch toeboard around the affected area. A reduction in penalty from $60 to $38 is proposed.

Citation No. 205246 charges one violation of 30 C.F.R. § 56.14-1 (requiring the guarding of exposed moving machine parts). MSHA now maintains that the operator was not negligent because it was unaware that an appropriate guard could be obtained for the radial arm saw in question. MSHA also asserts that Atlantic took extraordinary steps to gain compliance by immediately purchasing and installing a guard for the cited saw. A reduction in penalty from $90 to $44 is proposed.

Citation No. 205249 charges one violation of 30 C.F.R. § 56.9-3 (requiring brakes on powered mobile equipment). MSHA now asserts that injuries from the cited condition, i.e., the existence of an inoperative emergency brake on a forklift truck, were unlikely since the footbrakes were functioning and the forklift traveled at only a slow rate of speed. A reduction in penalty from $60 to $38 is proposed.

Citation Nos. 205245, 205250, 205253, and 205256 each charge a violation of 30 C.F.R. § 56.12-25 (requiring the grounding of metal-encasing electrical circuits). MSHA now maintains that in each instance Atlantic was not negligent since the conditions cited were essentially hidden in nature. MSHA also contends that Atlantic exercised extraordinary good faith in abating the violations by immediately removing the cited equipment from service. A reduction in penalty from $56 to $22, from $56 to $26, from $60 to $26, and from $60 to $22 is proposed for the citations, respectively.

Citation No. 205254 charges one violation of 30 C.F.R. § 56.12-8 (requiring the adequate insulation of power wires or cables where they pass into or out of electrical compartments). MSHA maintains that injuries from the cited condition were improbable and that the broken conduit was not readily visible thereby reducing the operator's negligence. MSHA further claims that Atlantic immediately removed the defective equipment from service. A reduction in penalty from $48 to $24 is proposed.

Although I do not necessarily accept the rationale offered by MSHA in support of the proposed settlement, I nevertheless conclude based on Petitioner's representations and the documentation submitted that the settlement is appropriate under the criteria set forth in section 110(i) of the Act.

B. Contested Citations

Atlantic contests both the existence of a violation and the penalty proposed for Citation No. 205252 but contests only the proposed penalty with respect to Citation Nos. 205218 and 205244.

Citation No. 205218 alleges that Atlantic violated the provisions of 30 C.F.R. § 56.14-1 in that the troughing idlers on the west side of the No. 4 clinker feeder belt were not guarded. The cited standard provides that "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." According to MSHA Inspector Thomas Rezsnyak, the troughing idlers at issue here were located some 43 to 62 inches above floor level thereby creating pinch points at a location accessible to employees. He concluded that Atlantic was negligent in allowing this condition to exist because "they should have known of the condition." Since Atlantic abated the condition within 2 hours of the citation, however, Rezsnyak deemed the abatement effort as "extraordinary." While Atlantic does not deny the existence of the cited violation, Ralph Stresing, Atlantic's safety engineer, testified that the same condition had existed at the time of a previous MSHA inspection only 6 months before and that Atlantic had not then been cited. Stresing emphasized, moreover, that no walkway existed on the side of the belt cited and that no employees would actually be exposed to the hazard since a front-end loader known as a "Bobcat" was used to clean up spillage under the feeder belt.

The failure of a previous inspector to have cited this condition does reflect in my opinion upon the operator's negligence. If the condition was in fact as serious as claimed by Inspector Rezsnyak and one therefore that should have been known to the operator, I cannot understand why this hazard was not discovered on a previous inspection. Under the circumstances, I cannot conclude that the operator was so negligent as suggested by MSHA. Moreover, I accept Stresing's testimony that the area cited was one having only limited employee access. The gravity of potential injuries is accordingly greatly diminished. I accord greater weight to the testimony of Mr. Stresing in reference to this violation inasmuch as he demonstrated, and understandably so, a much more thorough and intimate knowledge of the operations surrounding the cited condition. A penalty of $25 is appropriate.

Citation No. 205244 also charges a violation of 30 C.F.R. § 56.14-1. The cited idler rollers on the clinker belts were described as being only 31 inches off the ground and guarded only on the outside. According to Inspector Rezsnyak, at least one employee went into the area once a day and could suffer a broken hand or arm if caught in the exposed rollers. Stresing pointed out, however, that injuries were unlikely inasmuch as the exposed area was difficult to reach and that employees moving about the area would ordinarily use other protected cross-overs. Stresing also maintained that injuries were unlikely because there would be little pressure between the roller and the belt and claimed that few, if any, sharp metal splices existed

in the belt. Stresing did admit, however, that there was some degree of hazard if an employee's arm did come in contact with the exposed rollers. I accept Stresing's testimony, for the reasons previously given, that employee exposure to the cited condition would be minimal. A penalty of $50 is appropriate.

Citation No. 205252 charges that temporary wiring for outside lighting on the No. 6 pier was in violation of 30 C.F.R. § 56.12-30 since the ground wire was severed and wiring was exposed outside of the conduit. The cited standard requires that when a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized. Atlantic admitted the facts as stated in the citation but according to Robert Masner, its chief electrician, the condition presented no hazard because the building was in fact grounded by its ironwork and ground rods located at various points. The conduit in question was in fact connected to the building ground and therefore, argued Masner, there was no danger. In this technical area, I must accord greater weight to the testimony of Masner than to that of the inspector because of Masner's clearly superior expertise as an electrician. Accordingly, I conclude that the cited condition was not in fact potentially dangerous. There is, therefore, no violation and Citation No. 205252 is therefore vacated.

II. Docket No. YORK 79-76-M

A. Uncontested Citations

At hearing, MSHA presented a proposal for settlement with respect to Citation Nos. 205307, 205308, 205311, 205312 and 205317. Citation Nos. 205307 and 205312 each charge one violation of 30 C.F.R. § 56.14-1 (requiring that power wires and cables be adequately insulated where they pass through electrical compartments). MSHA now maintains that the condition alleged in Citation No. 205307, i.e., that the conduit carrying energized wiring for certain lighting circuits was broken in two locations, was located so that it afforded only minimal exposure of the hazard to employees. The area was checked only once a week and only for a brief period by one employee. MSHA therefore maintains that the gravity of the cited condition should be accordingly reduced. A reduction in penalty from $305 to $150 is proposed.

In Citation No. 205312, MSHA charged that a sealed tube carrying the energized wires for the light fixture located above the east side of the generator was broken where it left the junction box and where it entered the light fixture. According to the Secretary, an employee would be exposed only briefly to this condition once a week and therefore petitions for a reduction in the penalty from $305 to $150.

Citation Nos. 205308, and 205311 each charge one violation of 30 C.F.R. § 56.14-1 (requiring the guarding of exposed moving machine parts). As to the former citation, MSHA now maintains that the subject return idler on belt No. 7 had previously been guarded but that the guard had been knocked off and

was not discovered by the operator. MSHA also maintains that exposure to the hazard would have been quite brief to only one employee once a week. A penalty reduction from $345 to $170 is thus proposed.

With respect to Citation No. 205311, MSHA now maintains that although the cited equipment was not in fact guarded as required, the exposure of employees to the hazard was quite minimal. According to MSHA, an employee would pass the hazardous area at least once a day but only to make visual checks and would not make repairs unless the machine was shut down. A reduction in penalty from $345 to $170 is therefore proposed.

Citation No. 205317 charges one violation of 30 C.F.R. § 56.16-5 (requiring that compressed and liquid gas cylinders be secured in a safe manner). While the cited condition did exist in that a propane cylinder used to supply fuel to a heater inside the cab of a yard locomotive was not secured to prevent accidental damage to the exposed regulator, the likelihood of injuries was considered improbable. The cylinder was laying on its side and the locomotive in question was not used for 2 or 3 months at a time. A reduction in penalty from $240 to $120 is proposed.

Although I do not necessarily accept the rationale offered by MSHA in support of the proposed settlement, I nevertheless conclude based on Petitioner's representations and the documentation submitted that the settlement is appropriate under the criteria set forth in section 110(i) of the Act.

B. Contested Citations

While Atlantic does admit that the violations in fact did occur as charged in Citation Nos. 205306, 205309, 205314 and 205318, it questions the amount of penalties assessed for each of these violations. Citation No. 205306 charges one violation of 30 C.F.R § 56.4-24(c). The standard requires that fire extinguishers and fire suppression devices be replaced with a fully charged extinguisher or device or recharged immediately after any discharge is made. There is no question that the gauge on the cited portable fire extinguisher indicated that it was in a discharged condition. There is also no dispute that the extinguisher was located near a station used to unload coal and indeed that there had recently been a fire at that location that had in fact destroyed the unloading station. According to Rezsnyak, there would be a danger if an employee attempted to use the discharged extinguisher, from being too near a fire without effective means of extinguishing it. He thought the operator should have known of the condition of the fire extinguisher since it was located in plain view.

Atlantic does not deny these allegations but maintains that several factors should be considered to reduce the amount of penalty including: (1) the existence of a company policy requiring the reporting, and replacement, of discharged extinguishers and, (2) the company practice of having an outside contractor service the fire extinguisher once a month. It is apparent, however, because of the violation in this case, that such procedures have not been adequate. I therefore reject Atlantic's claims of "no negligence,"

but I do find reduced negligence because of these procedures. Atlantic also speculates that temperature and humidity could have affected the gauge on the fire extinguisher. It offered no affirmative evidence to support the contention, however, and I therefore reject it as purely speculative. A penalty of $180 is appropriate.

Citation No. 205314 charges one violation of 30 C.F.R. § 56.12-25 (requiring that all metal-enclosing electrical circuits be grounded or provided with equivalent protection). There is no dispute that the ground wire inside the power cable of the Black and Decker "nibbler" was broken and could cause electrical shock under certain conditions. Atlantic contends, however, that it was not negligent in that the cited tool had passed a continuity test within 1 month before the inspection and that the condition of the tool on the day of the inspection was such that continuity could be obtained by manipulating the molded plug of the "nibbler". In light of this undisputed evidence from Atlantic, I do consider that its negligence is somewhat reduced and the penalty therefore should accordingly be mitigated. A penalty of $180 is appropriate.

Citation No. 205309 charges one violation of 30 C.F.R. § 56.9-88(a)(2) in that the Model D-8 Caterpillar bulldozer having a roll-over protective structure was not equipped with the required seat belt. Inspector Rezsnyak pointed out that should the bulldozer roll over, the operator could be killed by hitting the steel roll-over bar. Although he found the hazard to be "probable" since the equipment occasionally pushed up stockpiles and performed other work where a roll-over could occur, Rezsnyak subsequently conceded that the bulldozer was primarily operated on level or nearly flat ground, thereby making the necessity for seat belts less significant and the likelihood of injury more remote. The operator did not contradict Respondent's conclusion that it should have known of the violation. A penalty of $300 is appropriate.

Citation No. 205318 charges one violation of 30 C.F.R. § 56.12-8 (requiring adequate insulation of power wires and cables where they pass through electrical compartments). The citation here charged that a conduit carrying electrical wiring had been pulled from the pull cord box located in the belt cross-over beneath the New York State Thruway. The wiring feeding the pull cord box was exposed and according to the inspector was subject to vibration and rubbing. The inspector thought that the operator should have known of the plainly visible condition inasmuch as the maintenance superintendent walked through the area at least once a week. The hazard was potential electric shock but the exposure potential was quite limited. While Atlantic admits the violation, it maintains that the conduit was broken by pressure from vibration from traffic on the Thruway above and that its negligence was therefore minimal. I reject Atlantic's argument, however, because it should have placed that particular area under closer surveillance if in fact it was subject to a higher risk of damage from the vibration. A penalty of $240 is appropriate.

With respect to Citation Nos. 205303, 205304, 205305, 205315 and 205316, Atlantic denies that any violation occurred. Citation No. 205303, charges one violation of 30 C.F.R § 56.9-2 (requiring that equipment defects affecting

safety be corrected before the equipment is used). It is not disputed that the No. 5 Caterpillar Model 773 haul truck was operating on the date at issue with an inoperable automatic reverse signal alarm. There is also no dispute that the view to the rear from the truck cab was obstructed. The truck was controlled to some extent at the primary crusher where an operator directs trucks backing up by the use of red and green signal lights. There was no other means of communication, however, between that operator and the truck driver and the system could prove insufficient in an emergency. Rezsnyak testified that he had also seen similar trucks backing up in the locker room area to park and at the quarry face.

Even assuming, arguendo, that the use of a signal light system at the crusher provided a sufficient alternative to a reverse signal alarm at that location, the credible evidence is that the haul trucks also back up to park at the end of a shift and in the quarry area. I find that a violation of the cited standard has therefore been proven. In the absence of evidence to support the inspector's opinion that the operator should have known of the existence of the violation, I cannot however conclude that the operator was negligent. I also give consideration in determining the amount of penalty to the undisputed evidence that there was only minimal employee exposure to the described hazard. A penalty of $200 is appropriate.

Citation No. 205304 also charges a violation of 30 C.F.R. § 56.9-2, for a defective automatic backup alarm on its "lube truck." The cited standard requires that equipment defects affecting safety shall be corrected before the equipment is used. Atlantic argues that the standard is so vague that it would be a violation of due process of law (presumably under the Fifth Amendment to the United States Constitutution) to enforce it without interpretive reference to other MSHA standards, namely 30 C.F.R. § 56.9-87 (relating to the use of backup warning devices but only on heavy-duty mobile equipment).

Clearly the cited standard does not involve First Amendment rights or criminal sanctions and therefore its facial constitutionality is not at issue. U.S. v. National Dairy Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L.Ed.2d 561 (1963); McLean Trucking Company v. Occupational Safety and Health Review Commission, et al., 503 F.2d. 8 (4th Cir. 1974). I will therefore consider the challenged vagueness of the standard only in terms of its application to this case. McLean Trucking Company, supra.

The regulatory standard cited herein is similar to the regulations considered in McLean, supra, and in Ryder Truck Lines, Inc., v. Brennan, 497 F.2d. 230 (5th Cir. 1974), in that "the regulation appears to have been drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury". Also just as in the case of those standards, inherent in the standard at bar "is an external and objective test, namely, whether or not a reasonable person would recognize [the cited hazard]". McLean, supra at p. 10. The "reasonable person" has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable". General Dynamics Corporation v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

In this case, there is no dispute that the operator's lube truck did in fact have an automatic reverse signal alarm that was not functioning. It is described as a flatbed truck with tanks of fuel oil and lubricants mounted behind the cab. A photograph of the truck is in evidence as Exhibit E-5. I find that the view to the rear of the cab was obstructed and that the truck operated (sometimes in reverse) in areas of pedestrain traffic. I also find that the operator had other equipment on the premises which was equipped with reverse signal alarms and this equipment operated in the same areas of pedestrian traffic. It may reasonably be inferred that employees would come to rely upon reverse signal alarms to warn them of the dangers of equipment operating in reverse. An increased hazard would therefore exist because of employee reliance upon those alarms if a backup alarm should cease function.

Under the circumstances I conclude that "a conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable", would easily recognize as reasonably foreseeable the hazard created by a non-functioning reverse signal alarm on equipment such as the lube truck in this case. The circumstances present herein were thus sufficient to convey to Atlantic a reasonable understanding that the non-functioning reverse signal alarm on its lube truck was a defect affecting safety within the meaning of the cited standard. Indeed it is disingenuous of Atlantic, which had installed the safety device on the subject lube truck to now claim that there would be no hazard to operate the truck without such a device. The evidence is such from which it may be concluded that Atlantic, indeed, had actual knowledge that a non-functioning back-up alarm on this type of equipment was a hazardous condition. Where such actual knowledge exists the problem of fair notice does not exist. Cape and Vineyard Division of the New Bedford Gas and Edison Light Co. v. OSHRC, 512 F.2d 1148 at 1152 (1st Cir., 1975). */

I find that the admitted existence of a non-functioning reverse signal alarm on the lube truck constituted a violation as charged. I also accept the essentially uncontradicted testimony of Inspector Rezsnyak that fatal or serious injuries were probable as a result of the defective alarm and agree that the operator should have known of the defect. A penalty of $350 is appropriate under the circumstances.

Citation No. 205305 also charges one violation of 30 C.F.R. § 56.9-2 alleging that a guardrail located on the south side of the No. 1 belt was damaged thereby leaving a troughing idler exposed. MSHA was unable, however, to produce any affirmative evidence that any employees would be exposed to this condition. The credible testimony from the operator indicates that the splice shack where the alleged violation occurred was not in fact used, that the belt conveyor tender could only walk on the side opposite the damaged rail and that rollers were replaced only when the belt was shut down. Under

*/ Since the facts in this case demonstrate that the lube truck in question was in fact "heavy duty mobile equipment" and thus was required under 30 C.F.R. § 56.9-87 to have a back-up alarm the "fears" cited by the court in Cape and Vineyard of turning company safety policies that exceed government requirements against the company thereby needlessly discouraging such desirable policies do not exist in this case. See, Cape and Vineyard, supra at p. 1154.

the circumstances, I find that no danger affecting safety existed and there was therefore no violation of the standard. The citation is therefore VACATED.

Citation No. 205315 charges one violation 30 C.F.R § 56.12-21, which requires that suitable danger signs be posted at all major electrical installations. In particular, it was charged that the transformer station which supplies power to the carpenter shop did not have a suitable danger sign posted on the fencing enclosure. Inspector Rezsnyak conceded at hearing that he could not recall whether there was any sign on any of the four walls or whether there may have been a sign and that he found that to be insufficient. In light of the testimony from Robert Mazner, Atlantic's chief electrician, that there was in fact a danger sign posted at or near the entrance to the transformer substation, that no guidelines are furnished the operators as to the "suitability" of such signs and that the MSHA inspector was not sure whether or not there was in fact a danger sign posted, I conclude that the Government has not met its burden of proving the violation as charged. The citation is therefore VACATED.

Citation No. 205316 charges one violation of 30 C.F.R § 56.14-1 (requiring the guarding of certain exposed moving machine parts). The testimony is undisputed that the center fans on the east and west walls of the precipitator building were not guarded to prevent employee contact. The blades were located approximately 44 inches above a walkway, and each fan was 30 inches in diameter. Serious injuries could clearly result if contact was made with a moving fan blade, but the credible evidence indicates that exposure to the hazard was quite limited. The fans were not used during the cooler months and according to the MSHA inspector an employee would only maintain the motor about twice a year. The operator did not contradict the inspector's conclusion that it should have known of the hazard because of fan location. A penalty of $200 is appropriate.

With respect to all violations cited, the Government concedes that the conditions were corrected within the time specified for abatement. Where Atlantic was extraordinarily diligent in correcting the cited condition or practice it has been specifically noted in this decision. There is no contention in these cases that the operator's ability to continue in business would be affected by any penalties imposed. Based on the submitted evidence, I find that Atlantic is a large size operator. It does not have a serious history of reported violations. These factors have been considered in arriving at the penalties imposed herein.

ORDER

Upon consideration of the entire record and the foregoing findings and conclusions and in light of the criteria set forth in section 110(i) of the Act, I hereby ORDER that the following penalties totaling $2,751 be paid within 30 days of the date of this decision.

Citation No.	Penalty
I. Docket No. YORK 79-10-M	
205218	$25
205219	26
205242	38
205244	50
205245	22
205246	44
205249	38
205250	26
205252	vacated
205253	26
205254	24
205256	22
II. Docket No. YORK 79-76-M	
205303	$200
205304	350
205305	vacated
205306	180
205307	150
205308	170
205309	300
205311	170
205312	150
205314	180
205315	vacated
205316	200
205317	120
205318	240

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

14 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 79-323-M A/O No. 02-01510-05002
v.	:	
MADISON GRANITE COMPANY, Respondent	:	Crushed Granite Operation

DECISION

At 9:00 a.m. Tuesday, September 23, 1980, the above-captioned action came on for hearing in accordance with the Notice of Hearing issued July 24, 1980.

The Solicitor was present on behalf of the Mine Safety and Health Administration. Operator's counsel did not appear. At 9:15 a.m. I telephoned the office of operator's counsel and was advised by his secretary that he was on his way to the hearing. At 9:40 a.m., operator's counsel not having appeared, I again telephoned his office and was informed by his secretary that he was at another hearing and that this matter was not written down on his calendar. Counsel's secretary asked for an opportunity to contact him which I granted. At 10 a.m. I once more telephoned and the secretary stated that she had been unable to reach counsel. Thereafter we went on the record and the Solicitor moved for a default. I reserved ruling on the motion.

The Notice of Hearing was mailed to operator's counsel Certified Mail Return Receipt Requested and the file contains the return receipt.

On September 25, 1980 I issued an Order for the operator to show good cause for counsel's failure to appear and good cause why the Solicitor's motion for default should not be granted.

The Order to Show Cause crossed in the mails with a letter dated September 24, 1980 from operator's counsel which stated:

> In my many years of practice, the first time that I have not appeared at a scheduled matter occurred on September 23, 1980 in the hearing before you.
>
> Although I thought that my calendar was fail-safe, somehow or other there was a failure to make an entry on the proper date.
>
> When your default is entered, I will take care of the judgment with my personal check.

In light of the letter from operator's counsel I find there was no good cause shown for the failure to appear, the Solicitor's motion for default should be granted and an order should be entered for penalties in the originally assessed amount of $194.

Operator and counsel should be aware of the fact that the government incurred substantial expenses in this matter including travel to Phoenix, a hearing site close to the operator. I believe I have authority to assess costs if I wished to do so. After consideration of the matter, including the frank and forthright letter from operator's counsel, I have decided not to levy costs against the operator in this instance.

In addition, operator and counsel should be aware that the logistics of obtaining a hearing site convenient for the operator, and most particularly the securing of an adequate hearing room, are most difficult and time-consuming. 1/ I trust this situation will not recur.

ORDER

It is hereby ORDERED that the operator pay $194 within 30 days from the date of this decision.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

John B. Renick, Deputy Regional Solicitor, Room 2106, 911 Walnut St., Kansas City, MO 64106 (Certified Mail)

W. T. Elsing, Esq., 34 West Monroe Street, Suite 202, Phoenix, AZ 85003 (Certified Mail)

1/ It is especially for this reason that the Commission's recent decision in Sewell Coal Company Docket Nos. HOPE 79-6-P, HOPE 79-227-P, is so disturbing.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

14 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. CENT 80-85-M A/O No. 34-01207-05001
v.		Shirley's Sand Pit
SHIRLEY'S SAND, INC.,	Respondent	

DECISION

Appearances: Patricia D. Keane, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Kenneth Dewbre, Esq., Oklahoma City, Oklahoma, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110(a) 1/ of the Federal Mine Safety and Health Act of 1977

1/ Sections 110(i) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

(hereinafter, the Act), 30 U.S.C. § 820(a). At the hearing in these matters in Oklahoma City, Petitioner called four witnesses and introduced three exhibits.

Citation No. 167118 which was issued on July 19, 1979, by MSHA inspector M. H. Smith cited a violation of 30 C.F.R. § 56.9-3 and stated that "The 645 Allis Chalmers End Loader has very little brake at this time. Will not stop with a load." Order of Withdrawal No. 166707, issued on August 6, 1979, stated that "the brakes in the Allis Chalmers Front End Loader were still not repaired."

30 C.F.R. § 56.9-3 provides: Mandatory. Powered mobile equipment shall be provided with adequate brakes.

At the outset of the hearing, the parties entered into the following stipulations:

> (1) Mr. Shirley knew that the brakes on the loader were not working.
>
> (2) There is no history of prior paid violations for this mine.
>
> (3) For the April through June quarter of the year preceding the citation, 1979, * * * 1,350 man-hours had been worked at the mine.
>
> (4) For the year preceding the citation, 900 loads had been sold for a dollar volume business of approximately $44,000 a year.

At the end of Petitioner's case, the parties announced that they had reached the following settlement agreement:

> The parties have agreed that Mr. Shirley will pay the $275 fine in this case within 30 days of the date of the order and that he is admitting guilt only in this instance and jurisdiction only in this instance; that, while this case may be used as past history should another violation occur, he is not admitting jurisdiction of the Act over him or his business for any other purposes. Mr. Shirley has agreed that he will not use the loader while the brakes are defective in the operation of Shirley Sand, Incorporated, or in the operation of the sand pit.

The settlement agreement was approved at the hearing and Respondent was ordered to pay Petitioner the sum of $275 within 30 days of the date of the order.

Based on an independent review and evaluation of the record, I find the settlement proposed is in accord with the provisions of the Act.

ORDER

The approval of the settlement negotiated by the parties in the above-captioned proceeding is AFFIRMED.

Respondent is ORDERED to pay 2/ the amount of $275 within 30 days of the date of this order, if it has not already done so.

Forrest E. Stewart
Administrative Law Judge

Distribution:

Patricia D. Keane Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified Mail)

Kenneth Dewbre, Esq., 3410 S. Western, Oklahoma City, OK 73109 (Certified Mail)

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

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order."

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 15, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-158-M
Petitioner	:	A.C. No. 20-1570-5002
v.	:	
	:	John R. Sand and Gravel Pit
JOHN R. SAND AND GRAVEL,	:	
Respondent	:	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner; Edward Evatz, General Manager, John R. Sand and Gravel, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Pursuant to notice, the above proceeding was called for hearing on the merits on August 6, 1980, in Detroit, Michigan. Victor Chicky, a Federal mine inspector, testified on behalf of Petitioner; Edward Evatz testified on behalf of Respondent.

At the conclusion of the testimony, I issued a decision from the bench as follows:

> THE COURT: The following will be my decision in the case of Secretary of Labor, Mine Safety and Health Administration versus John R. Sand and Gravel, Docket number LAKE 80-158-M.
>
> I find from the record made before me this morning that the Respondent is a small operator and that he has no history of previous violations under the Federal Mine Safety and Health Act of 1977.
>
> Although the matter is not entirely free from doubt, I find that on September 20, 1979, a violation of 30 CFR 56.14-1 occurred, with respect to the John R. Sand and Gravel Pit, in that a moving machine part which might be contacted by employees might cause injury, was not guarded.

I further find that the violation was not serious because considering all the testimony, the possibility of injury to an employee was relatively remote.

I find that the Petitioner has not established that the violation resulted from the Respondent's negligence.

The original citation required that it be abated, that the condition be abated by October 4, 1979. It was not abated by that date and the citation was extended by the inspector to October 18, and then to October 24, after request of Respondent.

It had not been abated as of October 25, and a withdrawal order was issued on that date. This indicates a lack of good faith on the part of the Respondent in attempting to abate the violation.

However, in the mitigation of this, the record shows a lack of communication between the MSHA officials and the Respondent and a failure to adequately point out the hazard and advise the Respondent as to how it might be abated.

The record further shows that Respondent, which is as I said, a small operation, has had or did have at this time employee health problems and genuine difficulties in achieving the abatement.

Normally, I would consider the failure to abate the citation describing a violation as a very serious matter, however minor the violation might have been. I would ordinarily under these conditions assess a very heavy penalty because of the failure to abate.

However, considering all the circumstances here and especially, when I consider the failure of the MSHA officials to adequately discuss this matter with Respondent, I will assess a penalty of only seventy-five dollars for the violation found.

A written decision confirming this decision will be issued. The right of either to seek review by the Commission will begin to run from the date of the written decision.

Either party has the right to petition the Commission for review of my decision. The Commission may grant a petition or deny it.

That will conclude the record in this case. I wish to express my appreciation to Counsel and to the parties for their cooperation in this hearing.

(Whereupon the Proceedings were concluded at about 12:00 P.M.)

The bench decision is hereby affirmed.

ORDER

Respondent is ORDERED to pay, within 30 days of the date of this decision, the sum of $75 for the violation which I found occurred.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Mr. Edward Evatz, Jr., General Manager, John R Sand and Gravel, 36401 Van Dyke, Sterling Heights, MI 48077

Gerald A. Hudson, Attorney, Office of the Solicitor, U.S. Department of Labor, 231 West Lafayette, 657 Federal Building, Detroit, MI 48226

Assessment Office, MSHA, U.S. Department of Labor,4015 Wilson Boulevard, Arlington, VA 22201

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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(703) 756-6210/11/12

1 6 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 80-297-M A.O. No. 39-00967-05011
v.	:	South Dakota Cement Plant
SOUTH DAKOTA CEMENT PLANT, Respondent	:	

DECISION AND ORDER

The Secretary moves to withdraw and dismiss his proposal for penalty as to citation 329618 on the ground the violation charged did not, in fact, occur. This I construe as a motion to withdraw a pleading and to vacate and proposed penalty ab initio pursuant to Rule 11 and not as a motion to approve settlement under Rule 30. See, Pomerleau Bros. Inc., WILK 79-4-PM (February 13, 1979).

Concurrently, the operator moves to withdraw its notice of contest as to citation 330611 and to pay the proposed penalty of $78. It has long been held that the requirements of Rule 30 and section 110(k) of the Act may not be circumvented by resort to Rule 11 through the withdrawal of a notice of contest since this involves approval of the penalty proposed and therefore approval of a settlement. See Pomerleau, supra. The operator's motion will therefore be considered as a motion to approve settlement.

Based on an independent evaluation and de novo review of the circumstances, I conclude both motions should be granted. Accordingly, it is ORDERED that the motion to withdraw and the motion to approve settlement be, and hereby are, GRANTED. It is FURTHER ORDERED the operator pay the amount of the penalty agreed upon, $78.00, on or before Monday, November 3, 1980 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

James H. Barkley, Esq., U.S. Department of Labor, Office of the Solicitor, 1585 Federal Bldg., 1961 Stout St., Denver, CO 80294 (Certified Mail)

Curtis S. Jensen, Esq., Gunderson, Farrar, Aldrich, Warder & DeMersseman, 516 5th Street, Rapid City, SD 57701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEVA 80-61-M
	:	A/O No. 46-02805-05002
v.	:	
	:	Docket No. WEVA 80-102-M
PENNSYLVANIA GLASS SAND CORP., Respondent	:	A/O No. 46-02805-05003
	:	
	:	Docket No. WEVA 80-103-M
	:	A/O No. 46-02805-05004
	:	
	:	Docket No. WEVA 80-104-M
	:	A/O No. 46-02805-05005
	:	
	:	Docket No. WEVA 80-175-M
	:	A/O No. 46-02805-05006
	:	
	:	Berkeley Quarry & Mill

DECISION

Appearances: David E. Street, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner
Jeffrey J. Yost, Esq., Pennsylvania Glass Sand Corporation, Berkeley Springs, West Virginia, for Respondent.

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the Act). The hearing in these matters was held in Berkeley Springs, West Virginia, on March 18, 1980.

1/ Sections 110(i), (j) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance

Stipulations

The parties entered into the following stipulations at the hearing:

Berkeley Works is a mine subject to the Federal Mine Safety and Health Act of 1977; and Pennsylvania Glass Sand Corporation, as operator of the mine, is subject to the Act.

The Federal Mine Safety and Health Review Commission has jurisidiction of these proceedings.

Prior to the inspection of June 22 and 23, 1979, the Berkeley Works history of previous violations consisted of one citation, No. 303092, which was issued for unsafe access caused by one step in a metal staircase being bent.

The Berkeley Works had between 300,000 and 500,000 annual hours worked, and Pennsylvania Glass Sand Corporation had between 900,000 and 3,000,000 hours worked at its 14 mines.

Assessment of the penalties proposed by the Federal Mine Safety and Health Administration will not materially affect the ability of the Berkeley Works or Pennsylvania Glass Corporation to continue in business.

The citations at issue in the proceedings, the termination orders and any modification orders which were issued to those citations are authentic.

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fn. 1 (continued)
after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

Bench Decision

After the presentation of evidence and oral argument by the parties on each issue, a decision was announced orally from the bench. The decision is reduced to writing in substance as follows, pursuant to the Federal Mine Safety and Health Review Commission's Rules of Procedure, 29 C.F.R. § 2700.65:

> The record shows there are one hundred eighty-five (185) employees at the Berkeley Works. The record supports a finding that the Berkeley Works is medium in size and that the corporation, as it pertains to mining, is medium in size. In accordance with stipulation 5, it is found that the assessment of the penalty imposed by the Federal Mine Safety and Health Administration will not materially affect the ability of the Berkeley Works or Pennsylvania Glass Sand Corporation to continue in business.

Docket No. WEVA 80-102-M

Citation No. 310020

On Citation 310020, which was admitted as Exhibit P-3, the inspector stated the condition or practice to be as follows: Railing was not adequate around the walkway at the top of the jaw crusher. There was an opening of about eighteen inches to two feet where employees use a hook to dislodge chunks stuck in crusher. There was a drop of about six to eight feet to platform below.

This citation alleged a violation of 30 CFR 56.11-27. This regulation reads as follows: Mandatory. Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

The record supports a finding that there was a space of approximately eighteen inches on the working platform where a handrail was not provided. The record also indicates that there was a drop of six to eight feet to the platform below. It is found that this is a violation of 30 CFR 56.11-27.

The record reflects that there was a handrailing around the crusher with the exception of a space of approximately eighteen inches into which it might be possible for an employee to fall. It would ordinarily be expected that only

one person would be affected. The nature of any such injury is indeterminate, ranging from no injury to a fatality. I find that the gravity is moderate.

The record supports a finding that the operator should have known of the existence of the condition and that it failed to exercise reasonable care to prevent or correct the condition. This is evidence sufficient to sustain a finding of negligence.

The record indicates that the citation was issued at 10:00 A.M. and that the condition was required to be abated by 4:00 P.M. on the same day. The condition was actually abated by 1:30 P.M. which demonstrates good faith on the part of the operator.

In view of the foregoing findings concerning the statutory criteria the penalty assessed for this violation is fifty dollars.

Citation No. 310023

Citation No. 310023 was admitted as Exhibit P-4. On this citation the inspector has listed the condition or practice as follows: There were unguarded electrical connections of 440 volts potential on the armature end of the Symon's crusher drive motor in the secondary crusher building. The motor was mounted alongside a work platform used by employees.

This citation cited a violation of 30 CFR 56.12-23. 56.12-23 reads as follows: Mandatory. Electrical connections and resistor grids that are difficult and impracticable to insulate shall be guarded unless protection is provided by location.

The record shows that the crusher drive motor was surrounded at the armature end by the housing. In this housing, there were four openings, approximately four to six inches in size, through which a person could reach--that is, through which a hand could extend. These openings were immediately adjacent to a walkway; therefore, protection was not provided by location. The record also supports a finding that the connections for the brush rigging were impractical to insulate. The record, therefore, shows that there was a violation of 30 CFR 56.12-23.

The record supports a finding that it would be improbable that injury would occur as a result of the conditions found by the inspector. This is due to the remote location

of the motor down the walkway and the small size of the openings. It is clear that only one person would be affected. However, if the person should be exposed to the shock hazard, it could result in electrocution or burns. The record supports the finding that overall gravity is slight.

Based on the stipulation 2/ of the parties it is further found that the negligence of the operator in regard to this violation was low.

Based on the stipulation of the parties it is found that, due to the rapid abatement of the condition, there was above normal good faith exhibited by the operator.

In view of the aforementioned findings with respect to the statutory criteria concerning Citation No. 310023, it is found that the penalty of forty-five dollars is a proper assessment.

Citation No. 310024

Citation No. 310024 has been admitted as Exhibit P-5. In that exhibit, the inspector listed the condition or practice as follows: There was an unguarded opening in the work platform on the third level of the secondary crusher building. This opening was around the feed roll of the Symon's crusher where employees travel.

The citation alleges a violation of 30 CFR 56.11-12 which states as follows: Mandatory. Openings above, below or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed. 30 CFR 50.2 defines travelways as follows: Travelway means a passage walk or way regularly used and designated for persons to go from one place to another.

The record is adequate to demonstrate that the area around the unguarded opening is a way regularly used by persons to go from one place to another while cleaning the area and maintaining the equipment. The record establishes that

2/ After findings were made regarding the existence of a violation as alleged in Citation No. 310023 and the gravity of the violation, the parties stipulated that the record supported a finding that the negligence in this case was low and, in view of Respondent's rapid abatement of the violation, above-normal good faith was demonstrated.

the opening is adequate to allow a person to fall through that opening at least "leg length." The record, therefore, establishes a violation of 30 CFR 56.11-12.

Pursuant to the stipulations 3/ by the parties, it is found that the gravity is low, the negligence on the part of the respondent was low and the operator exhibited above normal good faith in correcting the conditions found by the inspector.

It is found that, in view of the aformentioned findings concerning statutory criteria, the assessment for violation Citation 310024 is seventy-five dollars.

Citation No. 310026

Citation No. 310026 was admitted as Exhibit P-6. In this citation, the inspector noted the condition or practice to be as follows: The guards were not in place on the head pulley of the transfer belt to the south shuttle conveyor of the wet processing. The head pulley was bordered on both sides by a walkway used by the employees.

The inspector cited a violation of 30 CFR 56.14-6 which reads as follows: Mandatory. Except when testing the machinery, guards shall be secured in place while machinery is being operated.

The testimony of both the witness for petitioner and the witness for the respondent shows that the wire guard was missing from the head pulley as alleged. Without regard at the present time to the gravity of the failure to have this guard in place, the record does indicate that one of these guards was rusted away and was in the vicinity of the head pulley but not in place. The record, therefore, establishes that there was a violation of 56.14-6.

As to the issue of negligence, it is found that the condition was in a remote area and in the wet processing section where there is an atmosphere which produces rust. The time during which the guard had been missing or at least the part which had rusted away has not been established, therefore, it has not been determined that the operator should have known

3/ After the finding was made that the condition cited in Citation No. 310024 existed as alleged, the parties stipulated that the record as regards this citation showed that the gravity of the violation was low, the Respondent's negligence was low and that above normal good faith was shown in effecting compliance.

that this condition existed or that he had failed to take reasonable action to correct the condition. Therefore, I find that there is no negligence on the part of the operator. Pursuant to the stipulation 4/ of the parties it is found that the gravity was low, that there was above average good faith on the part of the operator, and that the condition was corrected prior to the time that it was required to be corrected by the citation. A penalty of seventy-five dollars is assessed for this violation.

Docket No. WEVA 80-103-M

Citation No. 310605

Citation No. 310605 has been admitted as Exhibit P-6. In that citation, the inspector alleged the following condition or practice: A hazardous condition existed in tank car cleaning operations due to one person entering the enclosed tanks of the cars without having an additional person in the vicinity to monitor his activity in case of an accident. The cleaning operations are done away from the immediate plant area. The tanks are entered from the hatch on the top of the car and this is approximately a fifteen (15') foot drop to the bottom of the tank. The internal ladder is situated back from the hatch.

The evidence establishes that the condition or practice alleged by the inspector existed with the exception that the car was not a tank car as that term is ordinarily used, i.e. a railroad car carrying liquids, and the evidence does not establish that the operation was done away from the immediate plant area. The citation alleges a violation of 30 CFR 56.15-5 which states: Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline where bins, tanks, or other dangerous areas are entered.

Although the evidence does not establish that the tank cleaner failed to wear a safety belt, it does establish that lifelines were not utilized and it established that a second person did not tend a lifeline. The evidence establishes that the compartments of the covered hopper cars which were

4/ After the finding was made that the condition cited in Citation No. 310026 existed as alleged, the parties stipulated that the gravity of the violation was low and that Respondent demonstrated above-average good faith in abating the violation because it was abated before the time set for abatement.

being cleaned were in the nature of bins, tanks or other dangerous areas encompassed by the language of Section 56.15-5. Since the lifeline was not attended by a person in the immediate area the record establishes a violation of 56.15-5. Although there were persons in a building near the area where the compartments were being cleaned, there is no evidence that these persons were actively engaged in tending the lifeline as required by the regulation. The testimony of the inspector establishes that the injury to the cleaner could vary from bruises to broken bones in the event he should fall. The record supports a finding that the gravity is moderate. The record does not support a finding that the cleaner on the occasion of the inspection was subjected to toxic substances. It is found that only one person would be affected by the injury and that the gravity was moderate.

The evidence establishes that the operator either knew or should have known that the tank cleaner was cleaning the bin or the compartments by entering them without lifelines instead of cleaning them from outside by the high pressure hose. Although facilities had been provided for cleaning with a high pressure hose, the cleaner did, in fact, enter the tanks. Since the supervisory personnel were located in the general area where the cleaning operations were being done, they should have been aware of the methods that were used in cleaning tanks. The record establishes that the negligence of the operator was moderate.

It is found that the operator exercised above normal good faith in abating the condition after the citation was issued. In consideration of the statutory criteria, a penalty of sixty dollars is assessed for Citation 310605.

Settlements

The following settlements and dispositions were submitted by motion at the hearing and approved by the Administrative Law Judge at that time:

Docket No. WEVA 80-61-M

Citation No. 302026

Petitioner submitted a motion for approval of settlement with regard to Citation No. 302026. The parties proposed settlement in the amount of $150. This citation had originally been assessed at $160. In support of the settlement, counsel for Petitioner asserted the following:

With regard to the negligence, the Assessment Officer had proposed a point total which reflected ordinary negligence. The parties would submit that under the circumstances of the

case ordinary negligence would be an appropriate finding. * * * It was probable that an accident could occur. If there were injury, there could be a fatal accident and one person would be affected by the violation. The respondent demonstrated above normal good faith in rapidly abating the violation.

Docket No. WEVA 80-102-M

Citation Nos. 310032 and 310035

The parties agreed to settle these proceedings with respect to three of the citations alleged in Docket No. WEVA 80-102-M. Petitioner proposed to withdraw its petition with respect to Citation Nos. 310032 and 310035. In support of its motion for withdrawal, Petitioner asserted that Petitioner would be unable to meet its burden of proof to show that a standard had been violated and that it was unable to prove a violation.

Citation No. 310601

In support of the settlement proposed regarding Citation No. 310601, counsel for Petitioner asserted the following:

> The originally proposed penalty for Citation 310601 was sixty-six dollars. The parties would move for approval of a settlement for the penalty amount of sixty-six dollars for that citation. As the government proposal would reflect, the respondent demonstrated negligence and it was probable that an accident would occur. The gravity of injury is indeterminate; it's a twelve foot drop and one person would be affected by the violation. Respondent demonstrated above normal good faith in its rapid abatement of violation.

Docket No. WEVA 80-104-M

Citation No. 310018

Citation No. 310018 was issued on July 10, 1979, by inspector Stanley Andrzjewski pursuant to section 104(a) of the Act. The inspector alleged a violation of 30 C.F.R. § 56.4-2 and described the pertinent condition or practice as follows:

> A sign for warning against smoking or open flame was not provided for at the permanent oil storage area in the primary crusher building. The oil storage area was between two doorways that employees use to enter and exit the building.

The cited mandatory standard reads as follows:

Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.

It was established at the hearing that the flashpoint of the lubricating oil observed by the inspector was 605 degrees Fahrenheit. The oil did not, therefore, present a fire or explosion hazard. At the conclusion of testimony, counsel for Petitioner moved to withdraw the citation. This motion was granted at the hearing. The granting of this motion is approved at this time. The proceeding with respect to Citation No. 310018 is hereby dismissed.

Citation No. 310040

In support of the settlement proposed regarding Citation No. 310040, counsel for Petitioner asserted the following:

> The penalty as proposed by the assessment office is sixty dollars. The parties move for an approval of settlement of sixty dollars. Respondent's negligence regarding the violation is ordinary. The probability of an accident occurring was low. The gravity of an injury resulting from the violation is high. It is a violation having to do with berms not being provided at a couple of locations on a railing about a mile long. The number of persons affected would be one and, as with the other citations, respondent demonstrated above normal good faith in the rapid abatement of these violations.

Docket No. WEVA 80-175-M

Citation No. 310603

The parties proposed to settle the proceeding with respect to Citation No. 310603 for the full amount as originally assessed. In support of this settlement, counsel for Petitioner asserted the following:

> As the assessment office recognized, * * * Respondent demonstrated ordinary negligence regarding the violation of a moderate level. The number of persons which would be affected by the violation is one. The type of injury could be serious injury or death. The probability of injury is very low. As with the other citation which has been in issue in these proceedings, the respondent demonstrated above normal good faith in compliance.

Based on the information furnished and an independent review and evaluation of the circumstances, the proposed settlements and motions for withdrawal were found to be in accord with the provisions of the Act and the motions were granted. At the conclusion of the hearing, the following order was entered: "It is ordered that the sum of six hundred seventy-one dollars

be paid to petitioner by the respondent within thirty days of the date of this order." By a letter filed March 24, 1980, counsel for Respondent asserted that Respondent paid the entire $671 as ordered.

ORDER

It is ORDERED that the approval of settlements and dispositions as well as the bench decision rendered at the hearing are hereby AFFIRMED.

In view of Respondent's statement that he has paid the agreed-upon sum, the above-captioned proceedings are hereby DISMISSED subject to the receipt of payment by Petitioner.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. LAKE 80-3
Petitioner	:	A.O. No. 33-01303-03007-V
v.	:	
	:	Broken Aro No. 1 Strip Mine
OHIO AMCO, INC.,	:	
Respondent	:	

DECISION

Appearances: Linda Leasure, Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the petitioner;
Paul E. Bryant, Coshocton, Ohio, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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. § 802(a), through the filing of a proposal for assessment of a civil penalty on October 29, 1980, for one alleged violation of the provisions of 30 C.F.R. § 77.1004(b). Respondent filed a timely response and contest and a hearing was convened in New Philadelphia, Ohio, on July 8, 1980, and the parties appeared and particiated therein. Petitioner filed a posthearing brief, but the respondent did not.

Issues

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

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty

to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The authenticity and admissibility of all documents identified and introduced by the parties.

2. Respondent is an operator engaged in augering surface coal at the Broken Aro No. 1 Strip Mine.

3. At all relevant times to this proceeding, respondent's coal production (1979) was 199,427 tons annually.

4. As of April 1, 1979, respondent employed 30 employees for all of its mining operations, and eight to nine employees were employed at the pit in question.

Discussion

The section 104(d)(1) citation, No. 0785532, April 30, 1979, citing 30 C.F.R. § 77.1004(b), states as follows:

> The auger crew (3 men) were observed working in close proximity to an overhanging highwall in pit 004. The overhanging area to the left of the auger had been readied for augering and according to the foreman, Gerald McCuiston, the employees were instructed to proceed in that direction. The next hole to be augered would have placed the coal conveyor operator directly beneath the affected highwall. The overhanging area was about 66 feet in length and 40 feet wide. The height of the highwall was approximately 105 feet.

Petitioner's Testimony and Evidence

MSHA inspector Robert L. Grissett confirmed that he conducted an inspection at the mine in question on April 30, 1979, and upon arriving at the pit

he noticed a large overhang in the highwall and he observed the auger crew close to it. He measured the overhang by pacing and estimating its height. Referring to his notes where he recorded the measurements, he indicated that the width of the pit from the toe of the highwall to the toe of the spoil was 140 feet, that the estimated height of the highwall from the ground up to the bottom of the overhang was approximately 105 feet, and that the overhang distance from where it jutted out from the highwall to where it went back it was 66 feet long (Tr. 20-26).

Mr. Grissett stated that there were three men on the augering crew, namely, an auger operator, his helper, and a man that operates the coal conveyor. He described the mining sequence carried out by the auger crew. He observed three holes which were augered to the right of the overhang, and the mining sequence was moving to the left in the direction of the overhang and the crew would have moved one more hole, or a distance of 2 to 3 feet, to place them under the overhang. He observed the highwall to the right of the auger operation and observed loose, hazardous material some 5 feet to the right where the augering had started (Tr. 26-31).

Mr. Grissett stated that he spoke with the foreman who advised him that his intention was to continue augering in the direction of five holes which had been prepared, and this would have put them under the overhang (Tr. 32). He also spoke with the auger operator who also confirmed the direction of the augering and also confirmed the existence of the overhang and stated that it "didn't look very good" (Tr. 35). He also said that Mr. Bryant knew about most of the mine conditions (Tr. 35). At that point, Mr. Grissett decided to issue Citation No. 0785532, and advised the foreman that if the crew continued to mine in the direction of, and under the highwall, he would issue an order of withdrawal. The foreman thereupon moved the crew and auger out of the area (Tr. 36). He also issued another Citation No. 0785533 for the area to the right of the augering operation for loose and hazardous material near the top of the highwall (Tr. 37).

Mr. Grissett observed equipment tracks in the area of the loose and hazardous materials and this indicated that equipment was in the area. He confirmed that he issued the instant section 104(d)(1) unwarrantable failure citation because the foreman admitted knowledge of the overhang and yet permitted the crew to work there (Tr. 38).

Referring to the notations on his inspector's statement concerning blasting and auger vibration contributing to the gravity of the citation, he could not state whether these conditions were present during his inspection (Tr. 41-42). He did state that the crew was augering into the side of the highwall and that the day was clear (Tr. 43).

On cross-examination, Mr. Grissett confirmed that when he first entered the pit the auger machine was idle and the crew was waiting for a truck. He spoke with the crew, and during this time no augering actually took place. The foreman then appeared on the scene, and Mr. Grissett discussed his plans

for the day and when the foreman told him that he and his crew intended to continue augering in the direction of the overhang area which had been cleaned, he decided he had to do something and issued the citation. Mr. Grissett conceded that no augering took place from the time he appeared and began talking to the crew and the time the citation issued (Tr. 45).

Regarding any vibration, Mr. Grissett conceded that none took place while he was there because no augering took place, and as for any blasting going on, he conceded that it was being done by another company "on the same ridge," but he did not know any of the details, including the distance from the citation location or the amount of blasting taking place (Tr. 47). Regarding the loose, hazardous materials citation, he conceded that there was no equipment in the area when he issued that citation and the reason he issued it was to keep equipment and men from going into that area (Tr. 48-49). Mr. Grissett testified as to locations of the auger and conveyor during the drilling operations and the distances that the equipment and men would be from the highwall (Tr. 50-52).

Mr. Grissett stated that before any augering can take place, the face must first be stripped of the coal and loaded out. In other words, coal was stipped and loaded from the face by someone else before the respondent moved in with its augering operation. Mr. Grissett did not know the angle of the highwall but estimated that the toe was out some 20 feet from the top (Tr. 55-56). When he observed the crew, the conveyor operator was some 10 to 15 feet from the base of the highwall (Tr. 58).

In response to bench questions, Mr. Grissett stated that he could not have issued an imminent-danger order because no one was under the overhang, and when the foreman asked him what he should do, Mr. Grissett told him to barricade the area. He did not expect the respondent to take the overhang down within the 15-minute abatement time (Tr. 68-69).

Paul E. Bryant, President, Ohio Amco, Inc., was called as an adverse witness by MSHA, and testified that as of April 30, 1979, his company employed approximately 30 employees, eight or nine of whom were engaged in auger operations, and that including the auger pit in question, his company operated a total of three auger pits. He indicated that foreman Gerald McCuiston supervised the auger crew at the mine in question and this was limited to one auger machine. He recalled being at the No. 4 pit on April 30, and indicated that unless he personally is present on the site to discuss any dangerous or hazardous highwall conditions, Mr. McCuiston has the responsibility for this area of his augering procedure and he indicated that Mr. McCuiston did his job well in this regard (Tr. 102-108).

Mr. Bryant could not specifically recall visiting the mine site on April 28 or 29, but stated that he did go there prior to April 30 to evaluate the highwall conditions to determine whether it was safe or unsafe for augering, that he normally follows this procedure as time would permit, and that Mr. McCuiston periodically reports to him in this regard. Mr. McCuiston's duties included the safety of his men, coal production, equipment scheduling

and maintenance, procurement of supplies and parts, and the scheduling of the crew. Mr. McCuiston had daily contact with him, either personally or by telephone or radio.

Mr. Bryant stated that he observed the overhang in question prior to April 30, and indicated that the portion he saw was safe. However, should the conditions change, his instructions were not to auger it if cracks or rock movement are observed. Highwalls are usually inspected through observation from the top, but he could not recall inspecting the particular highwall in question from the top because the overhang was not located near the top, and in this situation he would observe the adjoining rock protrusions and strata to determine whether it is consolidated or tied into the hill itself. Regarding that specific overhang, he did not determine whether it was tied in to the hill, but the employees have the right to refuse to work in unsafe places, they were not working under the overhang, and he could not state whether the foreman intended for the crew to work under the overhang on the day the citation issued. He did not authorize the men to continue augering in the direction of the overhang at the specific location which was cited by the inspector. The question of whethre to auger is left to the judgment of the foreman (Tr. 108-117). If the highwalls or overhangs look safe, they will mine under them (Tr. 128).

Respondent's Testimony and Evidence

Mr. Bryant testified by the time he arrived at the highwall after the citation had been issued, the area had already been barricaded and all of the men and equipment had been withdrawn. After discussing the matter with Inspector Grissett that same day or the next day, and after receiving Mr. Grissett's evaluations, he was disturbed over the inspector characterizing his company as an "unsafe company." Mr. Bryant stated further that his employees are free to report dangerous conditions to MSHA, and that on those occasions when dangerous highwalls are encountered, employees are not required to work under them, and even where a highwall is questionable, he has always honored the feelings of employees not to work in those areas. He also stated that his company's safety record is a good one and that he has trained his employees and has a concern for them and their families and would not want to see any of them injured (Tr. 136-139).

Mr. Bryant took issue with the inspector's statements concerning the positioning of the augering crew and their alleged exposure to the highwall, and he indicated that the conveyor operator would normally be at least 30 to 35 feet or more from the toe of the highwall (Tr. 140-141), and the auger operator would be even further back than that because the auger itself would take up 15 to 18 feet horizontally out from the highwall (Tr. 142-143). Further, since the inspector testified that the top of the highwall was 20 feet back from the toe, the overhang would have had to protrude out into the pit for a distance of 40 feet and this was clearly not the case (Tr. 144).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of the provisions of mandatory safety standard 30 C.F.R. § 77.1004(b), which provides that "overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted." The gist of the alleged violation in this case lies in the fact that Inspector Grissett believed that the augering crew intended to continue the mining process in the direction of the overhang and that this would shortly place them directly under the overhang in question. Since the overhang area was not posted or barricaded, the inspector concluded that had the mining cycle continued the crew would have proceeded under the overhang, thus placing them in a hazardous position.

Inspector Grissett indicated that his interpretation of section 77.1004(b) is that an operator has an option to either take down an overhang or to barricade and post the area and mine around it. In this case, due to the great size of the overhang, he believed it was unreasonable to expect the operator to take down the overhang because it would have cost him approximately "half a million dollars" to blast it out or to drill and take it out with a stripping machine (Tr. 67). However, he issued the citation because it was obvious to him that the crew intended to continue mining under the overhang and the area had not been posted. He also believed that it is incumbent on a mine operator to make his men aware of the existence of hazardous overhangs and he should not permit his men to work under them unless they are taken down or otherwise isolated by posting and barricading (Tr. 68-69).

Inspector Grissett also testified that had Foreman McCuiston indicated to him that he would immediately withdraw his men and barricade the area instead of indicating to him that he intended to continue mining in the direction of the overhang, he would not have issued the citation. However, since Mr. McCuiston readily admitted the existence of the overhang, that it "looked pretty bad," and stated his intention to continue mining, Mr. Grissett stated he had no choice but to issue the citation (Tr. 80-81).

Respondent does not seriously dispute the existence of the overhang in question, nor does it rebut the fact that the overhang was not taken down or that the area beneath it was posted or otherwise secured so as to preclude the augering crew from mining in that area. Accordingly, I find that the preponderance of the testimony and evidence adduced in this case by the petitioner supports a finding of a violation of section 77.1004(b), and Citation No. 0785532, issued on April 30, 1979, is therefore AFFIRMED.

Gravity

It is clear from the inspector's testimony that at the time the citation issued men were not mining coal and the augering machine was not in operation. Further, petitioner conceded that no employees were actually working under the overhang in question, and that while augering may have taken place shortly

before the inspector's arrival on the scene, no such augering was taking place under the overhang (Tr. 141, 155). Nonetheless, petitioner argues that the inspector considered the violation to be serious because the crew was about to move under the overhang and he considered the situation as bordering on an imminent danger. In these circumstances, petitioner argues that an additional degree of seriousness attaches in this case (Tr. 157). Inspector Grissett considered the particular overhang to be dangerous because he observed cracks with spaces in them, but he indicated that it would be impossible to determine whether there had been any recent movement of the overhang (Tr. 92).

Inspector Grissett clarified the matter concerning the position of the overhang by stating that it protruded some 18 to 20 feet from the highwall, and that in any normal augering process men would be exposed to an overhang danger while positioning the equipment and that should an overhang come down it does not "dribble down," but collapses. The distance it would collapse would depend on its thickness, and as an example, Mr. Grissett stated that a 2-foot overhang would not expose men to any hazard if they were working in an area 24 feet out from the base of the highwall (Tr. 146-147).

Although Mr. Bryant disputed the inspector's testimony concerning his estimates regarding equipment measurements, the location of the crew in relation to the highwall, etc., he did not dispute the fact that on occasion the autering crew is in fact at the base of the highwall while changing out augering bits, and that in these circumstances they would be in the area of any hazard. However, he steadfastly denied that his company would ever deliberately place men or equipment under an overhang, but conceded that "sometimes people do it" (Tr. 151-152).

While I consider the potential hazard resulting from an augering crew mining in the direction of an overhang to be a serious situation if it is not discontinued before they reach the danger zone, the particular gravity of the citation in this case must be considered in light of the violation which occurred. Here, the violation has been affirmed because the overhang area had not been taken down or posted to keep miners out. Therefore, I believe that any consideration of the question of gravity, insofar as a civil penalty assessment is concerned, should be considered in connection with the hazard to which the miners were exposed at the time the citation issued. In this case, the record reflects that no miners were working under any overhang or dangerous area, and the miners and equipment were immediately withdrawn from the area and it was barricaded. Therefore, the situation at the time the inspector arrived on the scene was not as grave as he made it out to be. Neverthless, I cannot overlook the fact that had he not appeared and acted when he did, the crew would have routinely continued to mine under the area of the overhang. Inspector Grissett relied on the statements of the foreman who purportedly advised him that the crew intended to continue mining in the direction of the overhang. While it is true that mining could have continued without incident or injury, one can never be sure in these circumstances, and the clear intent of the safety standard in question is to insure that miners are not exposed to hazardous conditions in the course of their duties.

Therefore, I conclude that the failure to post the area to preclude miners from continuing mining into the overhang area constituted a serious violation.

Good Faith Compliance

The record establishes that the respondent immediately withdrew the men and equipment from the area which concerned the inspector, ceased all further mining operations, and barricaded the area (Tr. 77). In the circumstances, I find that respondent exhibited rapid good faith compliance in abating the conditions cited and this fact has been considerede by me in the penalty assessed for the violation.

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

The parties stipulated that respondent's annual coal production for the year 1979 was 199,427, respondent's overall employment compliment for all of its mining operations as of April 1, 1979, was 30 employees, and eight to nine of them were employed at the strip mine operations where the citation was issued. In addition, Mr. Bryant indicated that as of April 1, 1979, one of his operations closed down due to a lack of sales, thus reducing his size considerably (Tr. 13). Based on all of this information, I conclude that for purposes of a civil penalty assessment, respondent is a small mine operator. Further, respondent does not assert that a reasonable penalty imposed for the violation in question will adversely affect its ability to continue in business, and I conclude that it will not.

History of Prior Violations

Respondent's history of prior violations is reflected in petitioner's Exhibit P-4, a computer printout containing a listing of assessed and paid violations for the period April 31, 1977, through April 30, 1979. In addition, respondent produced Exhibit R-4, an MSHA computer printout listing all assessed and paid violations for the period January 1, 1970, through September 21, 1979. Respondent also submitted two letters from his insurance carrier (Exhs. R-3 and R-6), concerning his company's favorable workmen's compensation rating as compared to other comparable operators in the industry, and he believes these favorable ratings attest to his good safety record.

Respondent's prior history of violations for the approximate 9-year period reflected in Exhibit R-4, shows that respondent has paid $9,319 for a total of 108 violations issued during 1970 through 1979. Three of these prior violations were for violations of section 77.1004(b), one each in the 1975, 1976, and 1978, for which respondent paid civil penalties in the amounts of $210, $94, and $560. This information is verified by petitioner's Exhibit P-4, which reflects two paid assessments for violations of section 77.1004(b), prior to April 31, 1977, and one paid assessment for the year 1978.

After careful consideration of the history of prior violations as documented by the computer printouts, I cannot conclude that respondent's prior

history is a bad one. To the contrary, the record establishes that for a period of some 9 years, respondent has averaged some 12 violations a year, and for an operation of its size and scope, I believe respondent has a good history of prior violations. Further, with regard to repeat violations of section 77.1004(b), the record simply does not support a finding that respondent has deliberately failed to insure compliance with this standard. The record in this case establishes that the overhangs which exist at respondent's strip mining operation are created during the coal-stripping operations at the highwalls and those stripping operations are carried out by another mine operator. Respondent has a contract with that operator, and his operations are limited to taking out the coal which remains at the highwalls by means of augering. In these circumstances, and taking into account the fact that respondent has been cited for only three prior violations of section 77.1004(b), I cannot conclude that respondent has consciously disregarded the requirements of this standard as suggested by the inspector's testimony.

It seems clear to me that respondent's contest in this case was prompted in part by the inspector's characterization of the mine as one which "seems to have a history of placing men under bad highwalls." This statement was made at part of the inspector's statement executed by Mr. Grissett at or near the time he issued the citation (Exh. P-1). Taken out of context, this charge has serious implications for an operator, particularly with respect to the penalty assessed for any such violations, since it implies that the respondent deliberately exposes his crews to dangerous overhangs. In this case, I cannot conclude that the inspector's characterization of the mine operator is supported by any credible evidence, and I have given it no weight in the assessment of the civil penalty made by me for the violation.

Negligence

In its posthearing brief, petitioner asserts that the respondent demonstrated gross negligence "by permitting the development of employee exposure to the hazard despite his knowledge of his employees' activities and the existence of the unbarricaded overhang" (p. 8, Posthearing Brief). Coupled with the suggestion and inference that Mr. Bryant was personally aware of the dangerous nature of the overhang, but nonetheless instructed his employees to continue mining in that direction, petitioner seeks a substantial civil penalty in this case based on this asserted conduct on Mr. Bryant's part. However, based on a close review of all of the circumstances which prevailed at the time the citation issued, I cannot conclude that Mr. Bryant is the chief culprit in this matter, and my reasons for this conclusion follow.

Inspector Grissett candidly admitted that his opinion that the mine seems to have a history of placing men under bad highwalls was based on his "conversations in the past, on the history of that mine and the violations." He also stated that "I just got to the point where it appeared to me that that was the feeling at the mine" (Tr. 154-155). In his inspector's statement of April 30, 1979 (Exh. P-1), Inspector Grissett commented that the foreman in charge of the auger crew was aware of the hazardous nature of the overhang and that members of the crew, including a safety committeeman,

were also aware of the overhang but failed to express their views to mine management. However, none of the augering crew, including the mine safety committeeman, were called as witnesses to back up their purported statements concerning the highwall conditions. Further, Mr. Grissett could recall no work stoppages at the mine due to overhangs, nor could he recall that any dangerous highwall conditions had ever previously been brought to MSHA's attention (Tr. 97).

With regard to the culpabililty of Mr. Bryant, contrary to the veiled suggestion by the inspector that he somehow deliberately directed his personnel to continue mining in the face of a dangerous overhang, petitioner candidly admitted during the hearing that Mr. Bryant did not specifically direct the auger mining operation beneath the overhang (Tr. 122). Further, Inspector Grissett candidly conceded that due to Mr. Bryant's responsibilities as company vice president, that he could not be expected to be at the mine all the time, and that the primary responsibility for the day-to-day mining operations are delegated to the foreman (Tr. 72-76). It seems to me that a more effective method of achieving enforcement in a situation where MSHA believes that a mine foreman or operator deliberately and consciously places his men in peril through an infraction of any mandatory safety standard is to consider bringing an action pursuant to the "knowing" and "willfull" provisons of sections 110(c) and (d) of the Act. General, speculative suggestions in this regard, unsupported by any tangible evidence, simply are insufficient in my view.

At page 7 of its posthearing brief, petitioner asserts that Mr. Bryant knew about the overhang, knew that his crew was working in the pit, but gave his foreman no instructions either to take it down or barricade the overhang. However, a review of the transcript pages cited by the petitioner in support of these conclusions clearly indicate the following:

> 1. Mr. Bryant viewed the overhang 3 or 4 days prior to the issuance of the citation on April 30, 1979, and possibly the day before, but considering the location of the crew, he did not consider the overhang to be a hazard. Mr. Bryant considers an overhang to be dangerous if there are indications of movement or falling rocks, and highwalls are checked from the top to determine whether they are safe or unsafe (Tr. 112-113).
>
> 2. Mr. Bryant denied that he authorized or condoned employees working under dangerous highwalls, and indicated that judgments concerning the safety of highwalls are left to the foreman supervising the crew, and that if he or the men believe the conditions are unsafe, they are free not to continue augering (Tr. 115-117).

In addition Mr. Bryant also testified that as a general proposition, in the development of the different mine-augering areas, if he is not personally

present to confer with his foreman concerning possible hazards, it is the foreman's responsibility to make these judgments, and he believed that Mr. McCuiston does a good job in this regard (Tr. 107-108). As for the specific condition of the overhang in question, Mr. Bryant testified that when he viewed the overhang a day or so before April 30, it appeared safe to him and he advised Mr. McCuiston that if any conditions changed in the interim that would indicate it was not safe, he was not to auger it (Tr. 112). Having viewed Mr. Bryant on the stand during the hearing, he impressed me as a straightforward, candid, and honest mine operator, and taken in context, I find his testimony to be credible, and cannot conclude that he deliberately ordered his foreman or the mining crew to continue mining in the face of a clearly hazardous overhang, and the fact that the foreman may have made an off-hand comment to the inspector that Mr. Bryant "knows about all of the conditions out here" is hardly enough to support a finding of a knowing and reckless disregard for safety on his part, and petitioner's counsel candidly admitted the lack of any probative value to that purported statement (Tr. 127).

As indicated earlier, overhangs at the strip mining operation conducted by the respondent appear to be commonplace, and they result from coal being stripped from the highwalls. Those overhangs which are difficult to take down are left in place and mining is supposed to proceed around them. As long as the areas are posted or barricaded to prevent miners from mining under them, leaving the overhangs because they are too expensive or difficult to take down is not a violation of section 77.1004(b). Petitioner argues that Foreman McCuiston knew about the overhang in question, yet readily indicated his intention to continue the mining cycle in such a manner as to bring his crew directly beneath that overhang. However, at the time the citation issued, the crew was not positioned under the overhang, and the inspector's issuance of the citation resulted in the cessation of mining and the withdrawal of men. Thus, on the facts here presented, petitioner seeks to escalate the foreman's intent to continue mining toward an overhang into a violation of section 77.1004(b). However, it seems clear to me that the violation lies not in the fact that the crew was mining toward the overhang, but rather, deals with the existence of an overhang which had not been taken down or isolated as required by section 77.1004(b). In short, the approaching proximity of the crew to the overhang goes primarily to the question of gravity and the presence of the crew at the time the inspector arrived on the scene adds little to the question of whether the existence of the overhang per se constitutes a violation of section 77.1004(b). Nonetheless, I cannot disregard the inspector's testimony concerning the foreman's intent to continue mining toward the overhangs without taking any precautions to post or barricade the area. The inspector's testimony is not rebutted, and Foreman McCuiston did not appear at the hearing to testify. In the circumstances, since the foreman had the responsibility for the safety of his crew, his disregard for the overhang and his stated intention of continuing mining in that direction, thereby prompting the issuance of the citation and the threat of a closure order by the inspector, supports a finding of a reckless disregard on his part for the safety of his crew, and it constitutes a reckless mining practice which would have resulted in placing the crew in

a potentially hazardous position under the overhang had the inspector not acted to have them withdrawn. In these circumstances, I find that the violation resulted from gross negligence.

Penalty Assessment

This case was "specially assessed" by MSHA's Assessment Office, and I am convinced that the assessment officer was influenced by the inspector's narrative statement concerning the asserted regular practice of the respondent routinely exposing his mine personnel to unsafe highwalls and overhangs, as well as the inspector's statements concerning respondent's prior history of violations in this regard. However, it is clear that I am not bound by the assessment officer's evaluation and assessment based on the facts known to him at the time the initial assessment is made. My findings and conclusions are based on a de novo consideration of the record made during the hearing, including the testimony and evidence adduced by the parties, not only as to the fact of violation, but also in regard to the six statutory criteria found in section 110(i) of the Act.

In view of the foregoing findings and conclusions, and in particular my findings concerning respondent's prior history of violations, its small size, and the fact that abatement was achieved immediately, petitioner's suggestion that I affirm the initial assessment of $2,500 is rejected. However, taking into account my findings concerning respondent's negligence and gravity, I believe that a civil penalty of $950 is reasonable in the circumstances.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $950 within thirty (30) days of the date of this decision. Upon receipt of payment by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

1 7 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. KENT 80-187
		A.O. No. 15-02069-03013 V
v.		
		Sinclair Strip
PEABODY COAL COMPANY,		
	Respondent	

DECISION

Appearances: George Drumming, Jr., Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
Thomas Gallagher, Esq., St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of a civil penalty 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), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 77.807. Respondent filed a timely answer contesting the citation and requested a hearing. A hearing was held pursuant to notice on June 26, 1980, in Evansville, Indiana, and the parties appeared and participated therein. The parties filed posthearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issues

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

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

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations (Tr. 4-5)

1. Respondent is subject to the jurisdiction of the Act.

2. Respondent is a large mine operator and the subject mine employs 280 miners.

3. Respondent's history of prior violations at the mine in question is not excessive and any penalty assessed in this matter will not adversely affect respondent's ability to remain in business.

4. MSHA inspector Curtis W. Haile conducted an inspection at the mine in question on October 12, 1979, and issued Citation No. 799652.

5. The depositions taken in three prior proceedings which were settled by the parties (KENT 80-155, 80-156, and 80-157), where relevant and material in the instant proceeding, may be incorporated by reference in this case (Tr. 108-109).

Discussion

Citation No. 799652, issued by MSHA inspector Curtis W. Haile on October 12, 1979, charges a violation of 30 C.F.R. § 77.807, and states as follows:

> The high voltage cable supplying 4160 volts AC to the 5561 pit (I.D. 002) was inadequately protected against damage by mobile equipment in at least three separate locations between the main substation and the 5561 shovel. The cable locations at which mobile pit equipment were crossing was inadequate which was resulting in cable damage and or deterioration which was clearly visible especially near the 5561 shovel. Responsibility of Eddie Curtis (Supt).

Petitioner's Testimony and Evidence

Inspector Haile testified that he has been employed as an MSHA electrical inspector for approximately 5-1/2 years, and prior to this was employed in electrical maintenance with Peabody Coal and Island Creek Coal Companies. He confirmed that he conducted an electrical inspection at the mine on October 12, 1979, starting at the power substation and proceeding to the 5561 pit. He believed that there were damaged areas in the power cable and his visual observations confirmed this fact. The damaged cable constituted a violation of section 77.807 which requires that high-voltage transmission cables be installed or placed so as to afford protection against damage by mobile equipment. He walked along the cable inspecting it, and his inspection covered the area between the power substation and the 5561 pit shovel, and the area covered is depicted in a sketch which he drew (Exh. P-3, Tr. 11-15).

Inspector Haile described the damaged cable areas as those which are detailed in the citation, and in his opinion the damage was caused by mobile equipment crossing the cable even though a varied amount of dirt had been pushed over the cable in order to protect it. The cable supplied 4,160 volts of power to the 5561 shovel, and it was a 40 GGC-shielded cable approximately 5,000 to 6,000 feet long, beginning at the power substation, connecting to a series of connection boxes commonly known as "knife houses," and ending at the 5561 shovel. The cable was stretched out along travelways and reclaimed spoil areas, and it was lying on the ground. At the locations used for equipment crossings, mounds of dirt were pushed over the cable to protect it when equipment crossed over it. The type of equipment working in the pit varied, and Mr. Haile could not specify the types of equipment utilized other than bulldozers performing reclamation work. He observed no equipment crossing over any of the cable during his inspection (Tr. 15-20).

Inspector Haile testified that the cable damage he observed was limited to a torn outer jacket. The cable shielding was still intact at all three damaged locations, and the only damage visible was the torn outer jacket. The cable was not energized during the inspection because he asked that it be deenergized so that it could be inspected. He estimated the dirt cross-over ramps to be approximately 10 feet wide and the depth of the dirt ranged from 8 to 20 inches, but he made no measurements. He could not recall the three specific locations along the cable length where the damage had occurred (Tr. 20-29).

Inspector Haile indicated that the damage to the outer cable jacket would eventually result in deterioration to the cable due to its exposure to the soil. However, he conceded that respondent tried to keep rocks out of the dirt used for the ramps so as to prevent cable damage. The three damaged areas were not visible, and they were detected only after the cable was pulled out of the dirt. Abatement was achieved by repairing the damaged cable areas and repairs were also made to several questionable cable sections which were not cited. The cable was also placed in a different location (Tr. 30-33). A portion of the cable had been already been removed prior to his inspection

and a company electrician told him the cable was removed because it was damaged by a dozer (Tr. 37).

In addition to repairing the cable cover to achieve abatement, Inspector Haile indicated that he requested that the cable be placed in a trench at least the depth of the cable and then covered with dirt at the locations designated as equipment crossovers. The depth of the trench would depend on the size of the cable, and the three locations cited were trenched and covered. The other alternative abatement methods discussed with management were suspending the cable or placing it in a metal trough (Tr. 38-41).

Inspector Haile testified that the three alternative methods of cable protection through trenching, suspending, or placing it in a trough, was a policy arrived at collectively in his MSHA district at a conference of electrical personnel, an electrical supervisor, and the district manager, and the three methods were deemed acceptable as future compliance. Inspector Haile identified Exhibit P-4 as a district memorandum detailing the policy in writing, and although it pertains to section 77.604, it also applied to section 77.807, because a trailing cable covered by section 77.604 is of the same basic design as a high-voltage transmission line covered by section 77.807 (Tr. 42).

Mr. Haile confirmed that one would have to walk miles of cable and examine it closely in order to detect any damage, but he considered the practice of covering the cable with dirt to be more of a hazard than the actual cable damage condition because the cable could deteriorate over a period of time and it could contribute to cable blowouts (Tr. 45). Abatement was achieved immediately and repairs were made as each damaged cable condition was detected (Tr. 47).

On cross-examination, Inspector Haile recalled that the cable outer jacket insulation was damaged in three locations, but he could not recall whether he made notes of the specific extent of the damage, and indicated that if the damage had been more than just the outer jacket he would have cited other standards covering other damage. The three damaged areas were observed after the cable was pulled out of the dirt at the places where it had been covered. The practice of burying cable above ground is not a violation, and he confirmed that such a practice is contrary to the "Craft Memorandum." If a cable buried above ground is found to be damaged, he would cite the regulation and not the memorandum, but he would not issue a citation simply because a mine operator buried its cable above ground (Tr. 63-70).

Inspector Haile testified that the cable was on the pit spoil, and reclamation dozers would be in the area, although he observed none on the day of the inspection. The distances between the cable crossovers varied and some looked inadequate in that a small amount of dirt was pushed up over the cable (Tr. 80). He described the interior make up of the cable (Tr. 80-82), and he indicated that the three damaged cable locations he cited consisted of torn outer jackets ranging from 8 to 10 inches wide exposing the inner cable

shielding and the outer jacket was gapped open for approximately 2 inches (Tr. 84). He could pinpoint only one cable location which was directly under the dirt, and while he could not state whether the other two damaged cable locations were buried, he indicated that they were "near" (Tr. 88). He observed no evidence of the cable being run over at the areas away from the cable buries, and except for an electrician or pit foreman, no one would have any reason to be on the spoil (Tr. 91, 101).

Inspector Haile identified the notes he made when he issued his citation (Tr. 107, Exh. R-8, deposition of May 28, 1980). He confirmed tht his notes do not specifically describe the damaged cable locations (Tr. 112), and he could only confirm that one location was directly under the cable crossing bury and he could not confirm that the cable was not damaged before it was buried (Tr. 131).

Respondent's Testimony and Evidence

Richard D. Stokes, director of respondent's Eastern Service Electrical Engineering Operations (including the Sinclair Mine), who holds a B.S. degree in electrical engineering from the University of Kentucky, testified he was familiar with the alleged violation in question by reviewing the citation and speaking to several mine personnel, but he was not present when the citation was issued. Mr. Stokes examined a demonstration piece of a cable (Exh. R-1) and described its various parts (Tr. 146-157). The cable which was cited by Mr. Haile was an above-ground buried cable located on the spoil bank and it was apparently installed by being reeled off a cable reel mounted on a truck cable transporter, and he identified a series of aerial photographs showing the cable location area (Tr. 152-153, Exhs. R-4, R-5, R-6). When necessary, the cable is handled by electricians, and the cable locations depicted on the exhibits indicates to him that it is not handled often (Tr. 155-156). Based on his experience in surface mining since 1953, he believed that a high transmission cable such as the one in question only requires handling when there is a cable failure requiring repairs or when it is buried underground. Surface burying does not require the handling of the cable. In his view, the cable in question is a feeder cable (Tr. 158).

Mr. Stokes was of the opinion that assuming the cable outer jacket was damaged as described by Inspector Haile, no one would be in any danger or exposed to a hazard because the shielding affords protection against any faults and the cable is not handled without proper gloves while it is energized (Tr. 159-160). The function of the cable outer jacket is to afford mechanical protection to the internal cable conductors and it is not constructed as an insulation (Tr. 161).

On cross-examination, Mr. Stokes could not state with any certainty what caused the cable damage described by Inspector Haile, and he indicated that it could be damaged by rocks or equipment. Cables are surfaced buried to a sufficient depth to protect them at places where mobile equipment may cross over them (Tr. 162). Cables are inspected as required by the law, monthly or daily, but damaged cables are not reported to him since that it is the

responsibility of the mine chief electrician (Tr. 163-164). He could not state whether the cable cited was in fact handled at the time in question (Tr. 165). Cable hooks and rubber gloves are used to handle such cables (Tr. 166). Outer cable jackets do provide protection from cable electrical problems, and he did not believe that outer jackets are required for the cable construction in question and has never seen cable deterioration simply from a damaged outer jacket (Tr. 168). He confirmed that the cited cable was a high-voltage transmission cable and its construction is no different from the one depicted in Exhibit R-1 (Tr. 171). He was advised that abatement was achieved by trenching the cable below the surface and covering it (Tr. 172), and he believed that water would not present a hazard to the particular torn cable jacket in question because the conductors are composed of tin and are insulated from each other (Tr. 172-173).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of the provisions of mandatory safety standard 30 C.F.R. § 77.807, which provides as follows: "High-voltage transmission cables shall be installed or placed so as to afford protection against damage. They shall be placed to prevent contact with low-voltage or communication circuits."

The cited standard requires that cables be installed and placed in such a manner so as to provide protection against damage. Since the inspector found three areas of cable damage at or near locations where he believed mobile equipment was operating and passing over the cables, he concluded that respondent had failed to provide adequate protection for the cable and this caused him to issue the citation.

One of the defenses advanced by the respondent in its posthearing brief is the assertion that Inspector Haile did not specifically pinpoint the exact three locations between the area described as "the main substation and the 5561 shovel" where he discovered cable damage. This defense is rejected. While I am in agreement with the respondent's observation in this regard, and find that the inspector's citation is lacking somewhat in specificity, the fact is that his description adequately enabled respondent to achieve abatement, and the record reflects that company representatives, including electrical personnel, accompanied the inspector during his inspection and they were clearly aware of the cited three damaged cable areas.

It seems clear to me that Inspector Haile could not specifically pinpoint the three cable locations which he believed constituted areas which were apparently damaged by mobile equipment passing over the cable, and petitioner's counsel candidly conceded this fact at the hearing (Tr. 187). However, it is also clear from the inspector's testimony that in at least one cable location the outer jacket of the cable was torn and ripped apart to a degree which exposed the inner shielding, which in itself was not damaged. In addition, the inspector alluded to two other unspecified cable

locations which also contained some degree of damage to the outer cable, and he also indicated that one section of cable near the shovel had been removed and repaired by the respondent prior to his inspection due to apparent damage caused by equipment running over it. Respondent's testimony does not rebut these findings by the inspector, and the thrust of its defense centers on its assertion that MSHA is attempting to force it to bury its cables below the surface as a means of protection and to matters which go to the question of negligence and to the gravity of the conditions cited rather than a denial of the fact that the cable was in fact damaged as described by the inspector on the face of the citation, and respondent's counsel conceded this fact during the hearing (Tr. 188).

Respondent's suggestion that since the inspector did not personally observe any equipment actually running over the cable the petitioner has failed to establish a violation is likewise rejected as a defense in this case. Respondent has not rebutted the inspector's findings that in at least three locations along the approximately 6,000 feet of cable, there was some damage to the cable. While it is true that the inspector could not pinpoint the precise locations, he did in fact specifically recall one location where the outer jacket of the cable was torn and ripped open at a location where the cable was "surface buried." That is, dirt was piled over the cable so as to form a ramp to facilitate equipment crossing over it. Therefore, as to that location, absent any rebuttal or explanation from the respondent as to what may have caused the damage, there is a strong inference and presumption that the cable was in fact damaged by equipment passing over it at the point where it was covered with dirt.

In view of the foregoing findings and conclusions, and on the basis of the preponderance of the credible evidence and testimony adduced by the petitioner in support of the citation, I conclude and find that petitioner has established a violation of section 77.807, and the citation issued by Inspector Haile is AFFIRMED.

While I have affirmed the citation in this case, I believe that some comment is in order regarding the real concern by respondent regarding MSHA's enforcement policy concerning cable protection. The thrust of respondent's concern centers on its assertion that MSHA is attempting to impose a requirement that it trench or bury its cables underground as a means of complying with section 77.807, and that it has attempted to do this by adopting an enforcement policy issued by MSHA District 10 Manager William M. Craft, in a Memorandum dated October 16, 1978, directed to all "District 10 Surface Personnel and All Surface Mine Superintendents" (Exh. P-4). That memorandum states as follows:

> SUBJECT: 77.604 - Trailing Cable Protection
>
> Trailing cables shall be placed away from roadways and haulageways where they will not be run over or damaged by mobile equipment. Where trailing cables must cross roadways and haulageways they shall be protected from damage by:

1. Suspension over the roadway or haulageway

2. Installation under a substantial bridge capable of supporting the weight of the mobile equipment using the roadway or haulageway; or

3. An equivalent form of protection, i.e., by cutting a trench and burying the cable covered with dirt. Covering cable with dirt only will no longer be acceptable.

The subject matter of the Craft Memorandum deals with cable protection for trailing cables, while the cited standard in this case deals with cable protection for high-voltage transmission cables. The practical effect of the memorandum is to treat both mandatory requirements as interchangeable, and it seems clear to me that MSHA's district office believes that on the facts of this case the proper method to protect the cable which was cited by the inspector is to bury it beneath the surface of the ground, even though petitioner's counsel conceded that the standard itself does not provide for any specific method for protecting such cables (Tr. 51).

Although Inspector Haile denied that he would not issue a citation simply because the respondent did not trench or bury its cable beneath the surface of the ground, I believe that his assertion in this regard is tempered by the fact that there is no specific mandatory standard requiring that cables be protected by burying or trenching, and he was cognizant of this fact. In short, were it not for the fact that he discovered some cable damage which he attributed to equipment running over it, he clearly would not have issued a citation simply because the cable was not buried. Further, I am convinced that Inspector Haile was not oblivious to the Craft Memorandum and that he was influenced to some degree by the memorandum and by his own personal opinion concerning what he and his MSHA district believed to be proper cable protection. My conclusion in this regard is supported by the fact that abatement was achieved in part by retrenching the cable in question in the manner suggested by the memorandum after the damage was repaired (Tr. 130-131). It is further supported by Inspector Haile's assertion that in the event cable damage is detected, he would, as a matter of course, attempt to reach some agreement with an operator as to the best method to protect the cable from further damage or deterioration, presumably by burying it underground, before he would abate any citation. If this were not done, he would issue a withdrawal order (Tr. 127-128). This strikes me as being a rather arbitrary method of achieving compliance by the threatened use of closure orders.

In addition to MSHA's apparent use of the Craft Memorandum as a means of achieving compliance with section 77.807, respondent is also concerned with the real possibility that MSHA inspectors will require it to take up all of its surface-buried cables for inspection purposes, and if any damage is detected, will require respondent to trench or rebury it underground or suffer the consequences of a withdrawal order. In short, respondent believes that MSHA has rejected its surface-burying method of cable protection out of hand

and is attempting to impose the trenching or subsurface-burying method as a mandatory requirement for continued compliance with section 77.807.

After careful consideration of the facts and circumstances surrounding the issuance of the citation in this case, I believe that respondent's assertions concerning the somewhat arbitrary enforcement scheme concerning the application of section 77.807 has merit. I believe that the record adduced in this case supports a strong inference that at the time he conducted his inspection, Mr. Haile was influenced to some degree by the policy in his district concerning the MSHA method of protecting cables as opposed to the method used by respondent. In these circumstances, were it not for the fact that the inspector discovered unrebutted evidence of cable damage, I would vacate the citation forthwith on the ground that the cited standard does not require any particular method for protecting cables, that the District 10 Craft Memorandum, which is not a validly promulgated safety standard, may not serve to impose MSHA's cable-trenching policy on the respondent, and that respondent's failure to trench or bury its cable in accordance with the memorandum is not per se a violation of section 77.807. While I express no opinion on the merits of MSHA's suggestions concerning the methods of providing cable protection, suffice it to say that this is not the first time MSHA has attempted to impose its invalid unpromulgated will on a mine operator by means of a memorandum seemingly limited to one of its districts. It seems to me that a better way to achieve industry-wide compliance in these instances is to promulgate such requirements as mandatory standards, rather than attempting to force them on a selected operator through administrative fiat.

As far as I am concerned, I see nothing on the face of section 77.807, which prohibits the respondent from continuing to provide cable protection by means of constructing dirt ramps at mobile equipment crossover points. If that method results in adequate protection for the cable, then respondent has achieved compliance. If it does not, then respondent runs the risk of being cited again for failure to provide adequate damage protection for its cables. Further, if the respondent believes that MSHA's continued enforcement policy in connection with section 77.807, is arbitrary, then I suggest it avail itself of any additional legal remedies afforded pursuant to the Act.

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

The parties stipulated that the respondent is a large mine operator and that any civil penalty assessed in this matter will not adversely affect its ability to remain in business. I adopt this as my findings on these issues.

History of Prior Violations

Respondent's prior history of violations at its Sinclair Strip Mine is reflected in petitioner's Exhibit P-1, a list complied by the inspector. Although this history reflects two prior citations of section 77.807, both issued in October, 1979, there is no indication that these were paid assessments, and petitioner concedes that respondent's history does not appear to be

excessive for the mine in question (p. 4, posthearing brief). Under the circumstances, I cannot conclude that respondent's prior history is such to warrant any increase in the civil penalty assessment normally attributed to the citation in question.

Good Faith Compliance

The record supports a finding that respondent achieved rapid good faith compliance in correcting the conditions cited and abating the citation. As pointed out by the petitioner, the inspector testified that as soon as a damaged section of the cable was found it was corrected immediately and the respondent removed another damaged section of cable from use before being told by the inspector to do so (Tr. 37, 47-48). Respondent's abatement efforts in this regard are reflected in the civil penlaty assessed by me in this case.

Gravity

The entire length of the cable in question was some 6,000 feet, and its location at a rather isolated section of the mine along a spoil bank where miners normally do not travel as shown in the aerial photographs (Exhs. R-4 (a) (b); R-5 (a) (b); and R-6 (a) (b)), coupled with the fact that only one section of the cable exhibited any real surface damage, leads me to conclude and find that in the circumstances presented, the condition cited was nonserious. As noted by the petitioner at page 3 of its posthearing brief, the inspector's opinion that the condition was serious was based upon the possibility of greater damage existing inside the cable. However, since the inner parts of the cable which conducted the high-voltage current were not exposed, the potential for danger to any miners was not great.

Negligence

I agree with the petitioner's proposed finding that the conditions cited resulted from the respondent's failure to exercise reasonable care to prevent the occurrence of the violation. Accordingly, I find that the violation resulted from respondent's ordinary negligence. It seems to me that if respondent chooses to construct dirt ramps for cable protection, thereby concealing any damage, it has a positive duty to monitor and inspect those crossover locations to insure that the ramps are adequately maintained for continued cable protection against damage.

Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, a civil penalty of $950 is assessed for Citation No. 0799652, issued on October 12, 1979, for a violation of 30 C.F.R. § 77.807.

ORDER

Respondent IS ORDERED to pay the civil penalty assessed by me in the amount of $950 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

OCT 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PHELPS DODGE CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NOS. CENT 79-188-M CENT 79-189-M CENT 79-190-M CENT 79-191-M (CONSOLIDATED) Mine: TYRONE MINE & MILL

DECISION

APPEARANCES:

Marigny A. Lanier, Esq., Office of the Solicitor, United States Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, Texas 75202
For the Petitioner.

Stephen W. Pogson, Esq., EVANS, KITCHEL & JENCKES, P.C., 363 North First Avenue, Phoenix, Arizona 85003
For the Respondent.

Before: John A. Carlson, Judge

INTRODUCTION

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977 [hereinafter the "Act"], arose out of inspections conducted between January 31 and February 15, 1979 at respondent's mine near Tyrone, New Mexico. As a result of those inspections, thirty citations were issued.[1] A hearing on the merits was held in Albuquerque, New Mexico. Jurisdiction was not contested. Respondent filed a post-hearing brief. Petitioner waived his right to do so.

Of the eleven citations actually tried, six concerned alleged "equipment defects affecting [the] safety" of several vehicles.[2] These citations will be addressed together. The others will be addressed individually.

1/ Of the thirty citations issued, only eleven were actually tried. The parties reached an agreed disposition of seventeen citations and petitioner withdrew two citations.

2/ These citations charged that respondent had violated 30 C.F.R. 55.9-2 which provides:

> Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

DISCUSSION:

(1) Citation 46 -- Faulty Brakes.

This citation charges that respondent violated 30 C.F.R. 55.9-3[3] by allowing a truck (#127) with faulty brakes to continue operating. Respondent concedes that the standard was violated (respondent's brief at 2), but argues that the proposed penalty of $445.00 is unreasonable.

The parties stipulated that respondent operates a relatively large mine and has a relatively favorable safety record.[4] The gravity of the violation was high. If the brakes had failed, the truck could have struck another vehicle or person (Tr. 76). The inspector testified that respondent should have known of the violation because reports had previously indicated that the air brakes on the truck were not working properly (Tr. 77). The probability of harm was high because the truck was being used to haul heavy loads of ore; if it took ninety feet to stop the truck while empty, it would take a considerably greater distance to stop the truck while loaded (Tr. 78). Although respondent abated the violation in good faith (Tr. 79-80), the violation resulted from respondent's negligence and could have easily caused serious harm For these reasons, I find that $400.00 is an appropriate penalty.

(2) Citation 43 -- Illumination

Citation 43 charges that respondent violated 30 C.F.R. 55.17-1[5] because there was insufficient lighting to provide safe access to a dust

---

3/ 30 C.F.R. 55.9-3 provides:

Mandatory. Powered mobile equipment shall be provided with adequate brakes.

4/ Joint exhibit #2 shows that respondent's mine produced 875,688 tons in 1977 and 1,064,340 tons in 1978 (Tr. 8). These figures indicate that respondent operates a relatively large mine.

The same exhibit shows that in the two years prior to the inspection involved in this case respondent had been inspected eleven days and received five citation- (Tr. 8). These figures indicate that respondent has a history of relatively few violations.

In accordance with § 110(i) of the Act, these stipulations will be considered together with the four other statutory criteria in determining appropriate penalties for other violations proved in this case.

5/ 30 C.F.R. 55.17-1 provides:

Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

collector and hoist room facility. The uncontradicted testimony of the inspector is that on January 31, 1979, at 8:45 p.m., the mercury vapor light above the stairway and two lights on the southside of the platform at the top of the stairway were out (Tr. 20; See exhibit R-1).[6] Employees, he maintained, would have to use a flashlight to work on the dust control system or in the hoist room, and might trip on the stairway en route to these facilities (Tr. 21 - 22).

Respondent contends that the lights which remained operable at the time of inspection provided sufficient illumination. In support of this position, respondent stresses the fact that the inspector's conclusion was only a "judgement call" and was not based on a scientific test, e.g., a light meter reading (Tr. 45; respondent's brief at 4). Respondent also points out that only on rare occasions did employees work in the dust collector area at night and that those who did could easily obtain flashlights (Tr. 43, 45, 106, 117 - 119). Finally, respondent stresses the testimony of its former safety inspector, Nicholas Armijo, that he was able to see across the platform located at the top of the stairway (Tr. 103, 107).

The standard does not specify a minimum quantity of illumination, nor should it. By requiring "sufficient illumination ...," the standard provides necessary flexibility in ensuring safe access under different conditions. It is not necessary to use a light meter to determine whether there is enough light to walk safely up and down a stairway. For example, evidence that an inspector, standing at the base of a stairway, could not see the third step would be strong proof that the stairway was unsafe.

Petitioner, however, presented no such evidence of the inspector's observations. Although the inspector testified that three of six lights were not operating, we do not know how far and how clearly the inspector, or anyone else, could see up the stairway and across the platform. We have only the inspector's belief of a tripping hazard, unsupported by evidentiary detail, poised against the equally conclusory belief of respondent's witnesses that the light level was safe. (The fact that a flashlight would be needed to work on the dust collector or hoist apparatus says nothing about whether there was enough light to walk up and down the stairway and across the platform.) The burden of proof lay with the Secretary. The preponderant evidence failed to support that burden.

The citation is vacated for lack of proof.

(3) Citation Number 52 -- Exposed Wires:

(a) Violation:

6/ In R-1 the circles represent lights which were operating during the inspection; the arrows represent lights which were not working (Tr. 104).

This citation charges that respondent violated 30 C.F.R. 55.12-32[7] by failing to keep the electrical leads on a 120 volt AC-DC converter insulated (See Tr. 27). That the leads were exposed is undisputed (Tr. 170, 184). Respondent argues that the likelihood of injury was low because the machine was not used regularly and was not in use when inspected (Tr. 28, 48). The frequency of use, however, is not relevant to a determination of whether the standard was violated. The machine was available for use and was used periodically (Tr. 28, 176). Respondent also argues that the machine is used only for testing purposes and therefore requires a relatively modest current (Tr. 160-162, 181; respondent's brief at 9). This argument relates to the gravity of the violation and not to its existence. Finally, respondent contends that a passerby could not accidentally brush up against the machine and make contact with the wires (Tr. 162-163; respondent's brief at 9). A person could trip and fall across the machine, however (Tr. 29).

Respondent made no showing that the machine was being tested or repaired. The standard requires that at all other times cover plates be kept in place. Respondent's electrical foreman testified that leads are protected by insulation, not cover plates, and that the leads on this machine were exposed (Tr. 175-176).

(b) Penalty:

The gravity of this violation was relatively low because the machine operated on a low current; resulting injury was improbable since the machine was used only occasionally and few people would be exposed; the violation was promptly abated (Tr. 30). Under these circumstances an appropriate penalty is $25.00.

4. Citation Number 48 -- Unattended Truck:

(a). Violation:

This citation charges that respondent violated 30 C.F.R. 55.9-37[8] by leaving a truck unattended, parked on a grade without blocking the wheels or turning them toward the bank or berm.

As respondent concedes, there are no material facts in dispute (see respondent's brief at 6). A truck was left unattended on the side of a

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7/ 30 C.F.R. 55.12-32 provides:

> Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

8/ 30 C.F.R. 55.9-37 provides:

> Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

road. The road was graded at five to eight percent. The wheels of the truck were neither blocked nor turned towards a bank or berm.

Respondent argues that the position of the truck presented no hazard because the truck, if hit by another vehicle, would have to travel 900 feet and negotiate turns on its own before colliding with the electrical shop, the closest work area (Tr. 114 - 115; respondent's brief at 6 - 7). Although the likelihood of the truck striking the electrical shop is small, the unattended truck presented other hazards. The road is used by other vehicles. If the unattended truck were struck it could, in turn, strike another vehicle or person.

(b) Penalty:

The gravity of this violation is somewhat unclear (Tr. 67). Potentially, of course, the truck, if dislodged, could kill someone (Tr. 67). The probability of that occurrence was slight, however. Although the road was slippery, the truck was in park and the emergency brake was engaged (Tr. 26 - 27; 45 - 46). Respondent was negligent in allowing the violation to exist since the truck was clearly visible (see Tr. 26). There is no evidence, however, indicating how long the truck remained unattended and how often respondent's supervisory personnel had occasion to observe the truck's position. The violation was abated immediately (Tr. 27). For these reasons an appropriate penalty is $14.00.

5. Citation Number 80 -- Working on Crane-Rail Platform without a Safety Line:

(a) Violation:

This citation charges that respondent violated 30 C.F.R. 55.15-5[9] because one of its employees was observed walking on the overhead crane tracks sixteen feet above the floor in the electrical shop.

The electrical shop is a rectangular building. A crane-rail (a long, narrow-gauge steel track two to three inches wide) traces the length-sides of the building approximately sixteen feet above the floor (Tr. 187). The rail extends three feet over two elevated storage areas which span the width-sides of the building (Tr. 170; exhibits P-1 and R-8). Directly underneath the rail is a platform about ten inches wide (Tr. 165 - 166, 185), leaving about 3 1/2 inches of platform area on either side of the rails (Tr. 185).

Approximately two and a half feet below the crane-rail platform is another "platform" which is actually a beam within the wall structure; a horizontal distance of about ten inches separates the two platforms (Tr. 168 - 169).

9/ 30 C.F.R. 55.15-5 provides:

> Mandatory: Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

The undisputed facts are that Randy Lemke, one of respondent's employees, stepped from a storage level onto the rail platform and walked approximately twenty feet along the rail platform straddling the rail, without a safety line, until he reached a cable hanging on the wall (Tr. 174, 183 - 185; also see exhibit R-8). When he reached the cable, Mr. Lemke stepped from the crane rail platform down to the beam (Tr. 166). He then reached down to the cable and pulled up the slack while a man on the floor pulled the cable to the floor (Tr. 166). After unhooking the cable, Mr. Lemke returned to the storage platform by walking along the crane rail platform, again without a safety line (Tr. 186).

The evidence conflicts in three respects. First, Inspector Akers testified he saw no handrails alongside the rails (Tr. 40); Mr. Lemke claims there were handrails (Tr. 184). The inspector's testimony is corroborated by respondent's exhibit number eight: it reveals no handrails alongside the crane-rail. Second, Inspector Akers testified that he saw Mr. Lemke handling the cable at the same time that the man on the floor was pulling it (Tr. 53); Mr. Lemke claims he was not holding the cable while it was being pulled to the ground. Even if Mr. Lemke is correct, there remains the danger of his falling while he walked along the crane-rail platform without a safety line. Third, Mr. Lemke claims that he had a purlin[10] to hold onto while untangling the cable (Tr. 167); the inspector testified that he saw Mr. Lemke leaning against the wall with one hand (Tr. 35; respondent's brief at 16). Respondent also argues that Mr. Lemke was not in danger of falling while unhooking the cable because he was flanked on three sides by the wall, a roof support and the crane rail platform (Tr. 166, 167; also see exhibit R-8 and respondent's brief at 16). Mr. Lemke admits, however, that he could have fallen through the remaining empty space (Tr. 168; also see exhibit R-8). Furthermore, these conditions do not eliminate the danger posed by walking along the crane-rail platform without a safety line; and with regard to that danger, it is most significant that Mr. Lemke admitted his failure to use a safety line.

(b) Penalty:

The gravity of this violation is relatively high. If Mr. Lemke had fallen from the crane rail, he could have received serious injuries (see Tr. 41). The probability of injury was also relatively high. Mr. Lemke was straddling the rail, leaving himself only 3 1/2 inches of platform on either side of the rail on which to walk (Tr. 185). If Mr. Lemke were distracted or for some reason lost his balance for a moment, he could have easily fallen. The circumstances of the violation suggest that respondent was negligent in allowing it to occur. The foreman was in the immediate area at the time (Tr. 41); the workman on the floor certainly must have seen Mr. Lemke walking on the elevated platform without a safety line; and I must believe that a reasonable person in Mr. Lemke's position would have been aware of the danger of falling, despite Mr. Lemke's claims to the contrary (Tr. 167, 184). For these reasons I find that an appropriate penalty is $180.00.

10/ A purlin is an upturned brace that is fastened to the roof support arches (Tr. 167).

(6) Citation Numbers 47, 58, 62, 64, 68, 79 -- Vehicle Defects Affecting Safety.

(a) Violations:

These citations allege that respondent violated 30 C.F.R. 55.9.2[11] because it allowed vehicles to operate with safety defects. Respondent concedes the existence of the defects, but contends that they did not affect safety. In that regard, respondent argues that the determination of whether a defect affects safety involves judgment, and that, therefore, a violation cannot be proven by "subjective evidence" unless the safety risk(s) presented could not be reasonably questioned (respondent's brief at 10). Respondent voices concern that "[a] decision to the contrary would necessarily base violation solely on the unsupported conclusions of inspectors" (respondent's brief at 10).

A similar argument has already been rejected (see page 3, supra). The language of the standard provides flexibility necessary to ensure the safe operation of complex machinery. It would be impossible to draft enough "objective" standards to address all conceivable safety hazards. Of course the standard involves judgment. But that judgment is substantiated not by "unsupported conclusions", as respondent asserts, but by the inspectors' observations and expertise, and in some cases, by the admissions of respondent's witnesses as well. It is unnecessary to recount the five pages of testimony establishing Mr. Diggs' qualifications as a mechanic and mine inspector (See Tr. 59 - 64).

Respondent also argues that the defects involved here have never caused an accident at its mine (respondent's brief at 12). This fact does not relate to the existence of a safety risk but to the probability that it will result in injury; it is therefore a factor to be considered in ascertaining an appropriate penalty.

Citation 47 charges that a steering arm bushing on one of respondent's vehicles was loose. Inspector Diggs testified that the bushings were so worn that he was able to observe lateral movement of the wheels and steering wheel (Tr. 80 - 81).

Respondent relies on testimony of its experts, Mr. Leonard Duncan and Mr. John Wylie, in arguing that the defective bushings did not affect safety (respondent's brief at 13). Mr. Duncan testified that, under most circumstances, if the bushing were to break, the affected wheel would trail the others (Tr. 126). He admitted, however, that under some circumstances, particularly if the truck were moving in reverse, the broken wheel would not follow the others (Tr. 136 - 137). Mr. Duncan also admitted, as did Mr. Wylie, that if the broken wheel did not trail the others, the driver could lose control of the steering (Tr. 138, 148, 152 - 153).

11/ 30 C.F.R. 55.9-2 provides:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

Mr. Wylie testified that the breaking of ball joints and bushings is generally caused by impact rather than gradual wear and that "to the best of his knowledge," no ball joint had been destroyed by excessive wear (Tr. 147, 149). Assuming this opinion to be accurate, it does not entirely discount the risk of breakage due to excessive wear. Furthermore, the loose bushing, without breaking, presented a safety hazard. The lateral movement of wheels on a one hundred ton truck traveling over muddy roads with pot holes clearly presents a safety hazard (see Tr. 80 - 82).

Citations 58 and 62 also concern loose ball joints and bushings. Respondent argues that the rain and snow washed the grease from the joints and caused the joints to loosen (Tr. 130, 155; respondent's brief at 13 - 14). This condition does not justify the defect; it simply suggests a possible cause and the need to grease the joints more often.

Respondent also relies on Mr. Wylie's opinion that the ball joint was not loose enough to be dangerous (Tr. 149 - 150; respondent's brief at 14). Mr. Wylie observed the steering arm only after it had been removed from the vehicle, however (Tr. 149). Inspector Diggs observed the ball joint from the undercarriage of the steering while the driver manuevered the steering mechanism (Tr. 85). He was, therefore, in a better position to observe the effect of the loose ball joint on the steering mechanism.

Inspector Diggs issued the citations because he thought that the loose parts, together with the rough roads, presented a safety hazard (Tr. 85 - 86). Although Inspector Diggs apparently agreed with Mr. Wylie that the immediate cause of ball joint and bushing breakage is hard impact, he issued the citation because he thought that the loose condition of joints and bushings is a contributing cause of breakage (Tr. 101). This opinion is to some extent corroborated by Mr. Duncan's admission that excessive wear can affect the safe operation of a vehicle (Tr. 139 - 140); the opinion is not contradicted by Mr. Wylie's view that excessive wear by itself cannot cause breakage.

Citation number 64 involves a suspension spring which Inspector Diggs observed to be broken. Mr. Diggs also observed tire marks on an inner fender well caused by the rubbing of the right front tire. He issued the citation because if the truck hit a bump, the wheel could be wedged against the fender well and cause the driver to lose control (Tr. 87) -- a strong possibility considering the poor condition of the roads.

Respondent raises no credible defense.

Citation number 68 involves a loose idler arm on one of respondent's trucks. Inspector Diggs testified that he saw the part "just flopping" when the driver shook the steering wheel (Tr. 88), and issued the citation because the idler arm could "pull loose" under the stress of travelling over rough roads and cause a loss of steering (Tr. 88).

Mr. Duncan testified that the wet weather caused the defect. The point is immaterial because the effect of the defect, not the cause, is at issue under this standard. Mr. Wylie's opinion that the defect did not affect safety is poorly founded because he examined the idler arm after it had been removed from the truck (Tr. 151 - 152).

(b) Penalty:

The gravity of these violations is relatively high because they all affect the ability to control large vehicles. The violations were abated promptly.

Petitioner presented evidence to show that respondent was negligent in failing to prevent these violations. There was testimony that respondent had relied on state inspections and became lax when they were discontinued (Tr. 83). Respondent, however, presented evidence that it did not overly rely upon state inspections because they covered only brakes and lights (Tr. 124 - 125, 147). There was also testimony that the trucks were inspected and maintained regularly, suggesting that respondent should have detected the defects (Tr. 123, 146). There was no evidence, however, indicating when the trucks involved here were last inspected. In short, the evidence concerning respondent's negligence is inconclusive.

For the reasons discussed above, I find that an appropriate penalty for each of these violations is $100.00.

Respondent concedes that it violated 30 C.F.R. 55.9-2, as alleged in Citation 79, by failing to maintain the automatic reverse alarm on one of its trucks in operating condition. It contends, however, that the proposed penalty of $40.00 is unreasonable.

The gravity of the violation and the negligence suggested by the circumstances of the violation support the imposition of a $40.00 penalty notwithstanding respondent's prompt abatement. The violation could have resulted in serious harm or death (See Tr. 34); and the probability of an accident occurring was fairly high since the driver's rear view was obstructed by oil drums and equipment sitting in the truck's bed (Tr. 30, 32). The violation must have been apparent to the driver of the truck, suggesting at least some negligence on respondent's part.

FINDINGS OF FACT

(1) Respondent owns a mine near Tyrone, New Mexico. The mine was inspected between January 31 and February 15, 1979.

(2) Although several lights outside respondent's dust collector and hoist room facility were not working, no evidence was presented to show that the existing illumination was insufficient to provide safe access to the facility.

(3) The leads on top of respondent's AC - DC converter were exposed and thus presented a danger of electrical shock to workers making contact with them. Although the converter was not in use when it was inspected, it was available for use and was not being tested or repaired.

(4) One of respondent's trucks was left unattended on the side of a road graded at five to eight percent. The wheels were neither blocked nor turned towards a bank or berm. The truck, if struck by another vehicle, thus presented a risk of harm to persons walking or driving vehicles along the road.

(5) A crane-rail spans the length of respondent's electrical shop sixteen feet above the floor. A platform ten inches wide lies directly underneath the rail. One of respondent's employees walked along the platform, without a safety line, while straddling the rail.

(6) Steering arm bushings and ball joints on several of respondent's vehicles were loose, causing lateral movement of the wheels and steering wheel, and creating a risk that the driver might lose control of the vehicle.

(7) The suspension spring on one of respondent's trucks was broken. There were marks on the inside of the fender well where the tire had begun to rub against the fender. If the truck were jarred by a bump in the road, the tire could easily become wedged in the fender well and cause a loss of control over the vehicle.

CONCLUSIONS OF LAW

(1) The Commission has jurisdiction to decide this case.

(2) Respondent violated 30 C.F.R. 55.9-3 as alleged in Citation 162046.

(3) Respondent did not violate 30 C.F.R. 55.17-1 as alleged in Citation 162043.

(4) Respondent violated 30 C.F.R. 55.12-32 as charged in Citation 162052.

(5) Respondent violated 30 C.F.R. 55.9-37 as charged in Citation 162048.

(6) Respondent violated 30 C.F.R. 55.15-5 as charged in Citation 162080.

(7) Respondent violated 30 C.F.R. 55.9-2 as alleged in Citations 162047, 162058, 162062, 162064, 162068 and 162079.

ORDER

Pursuant to the foregoing, it is ORDERED that Citation 162043 is vacated, and that Citations 162046 and 162079, on the basis of the parties' stipulations, are affirmed. It is further ORDERED that all other citations which were actually tried are affirmed.

In connection with the citations which have been affirmed, the following penalties are ORDERED assessed:

DOCKET NUMBER CENT 79-188-M

Citation Number 162047:	$100.00	Citation Number 162058:	$100.00
Citation Number 162048:	$ 25.00	Citation Number 162062:	$100.00
Citation Number 162052:	$ 14.00	Citation Number 162064:	$100.00

DOCKET NUMBER CENT 79-189-M

Citation Number 162068:	$100.00	Citation Number 162079:	$ 40.00

DOCKET NUMBER CENT 79-191-M

Citation Number 162046:	$400.00	Citation Number 162080:	$180.00

TOTAL: $1,159.00

In connection with several other citations, petitioner has moved for approval of a partial settlement agreement made with respondent. The agreement provides for the reduction of proposed penalties as follows:

DOCKET NUMBER CENT 79-188-M

Citation Number 162044:	From $ 36.00 to $ 27.00
Citation Number 162054:	Withdrawn
Citation Number 162057:	From $114.00 to $ 85.50
Citation Number 162059:	From $ 72.00 to $ 54.00
Citation Number 162063:	From $ 90.00 to $ 67.50

DOCKET NUMBER CENT 79-189-M

Citation Number 162065:	From $ 78.00 to $ 58.50
Citation Number 162067:	From $ 90.00 to $ 67.50
Citation Number 162069:	From $ 90.00 to $ 67.50
Citation Number 162070:	From $130.00 to $ 97.00
Citation Number 162072:	From $ 90.00 to $ 67.50
Citation Number 162073:	From $ 90.00 to $ 67.50
Citation Number 162075:	From $ 90.00 to $ 67.50
Citation Number 162076:	From $ 90.00 to $ 67.50
Citation Number 162077:	From $ 90.00 to $ 67.50
Citation Number 162085:	From $ 72.00 to $ 54.00
Citation Number 162087:	From $ 72.00 to $ 54.00

DOCKET NUMBER CENT 79-190-M

Citation Number 162089:	From $ 84.00 to $ 63.00
Citation Number 162090:	From $ 90.00 to $ 67.50

TOTAL: $1,101.00

The written motion and the record developed at the hearing provide documented information relating to the statutory penalty criteria set out in Section 110(i) of the Act. The motion specifically states that Citation 162054 was withdrawn because the equipment which was cited had been scheduled for repairs and taken out of service before it was inspected.

Upon due consideration I conclude that the proposed settlement is consistent with the purposes of the Act and should be approved.

Accordingly, petitioner's motion is granted and the settlement agreement is ORDERED approved.

In addition to the written motion, petitioner orally moved for approval of withdrawal of Citation 162081 at the outset of the hearing (Tr. 6). Petitioner justified the withdrawal on the ground that its proof would not support a violation of the cited standard (see Tr. 7). The motion to withdraw was granted (Tr. 8).

If the agreed penalties have not previously been paid, respondent is ORDERED to pay the sum of $1,101.00, together with the assessed penalty sum of $1,159.00, within 30 days of this order.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

17 OCT 1980

CLIMAX MOLYBDENUM COMPANY, a division of AMAX, Inc.,	:	Application for Review
Applicant	:	Docket No. DENV 79-196-M
v.	:	
	:	Order No. 331091
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	December 11, 1978
	:	Climax Mine
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WEST 79-27-M
Petitioner	:	A.O. No. 05-00354-05017
v.	:	
	:	Climax Mine
CLIMAX MOLYBDENUM COMPANY,	:	
Respondent	:	

DECISIONS

Appearances: Thomas Bastien and Harvey P. Wallace, Esquires, Denver, Colorado, for Climax Molybdenum Company;
James Barkley and Jerry R. Atencio, Attorneys, U.S. Department of Labor, Denver, Colorado, for MSHA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern an imminent danger withdrawal order served on Climax by MSHA pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, and a subsequent civil penalty proposal filed by MSHA pursuant to section 110(a) of the Act, seeking a civil penalty assessment based on the conditions described in the order, as well as two other alleged violations of certain mandatory safety standards.

Climax filed timely notices of contests in the proceedings and the parties engaged in extensive prehearing discovery, including the taking of

depositions. A hearing was conducted in Denver, Colorado, July 16 and 17, 1980, and the parties appeared and participated therein. Climax filed posthearing briefs, but MSHA did not, and its failure to do so was "due to a shortage of clerical personnel in our office" (August 19, 1980, letter from Denver Regional Counsel).

Applicable Statutory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (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.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. Climax Molybdenum Company is a large mine operator, is subject to the provisions of the Act, and any civil penalties assessed by me in these proceedings will not adversely affect its ability to continue in business.

2. Government Exhibits G-1 through G-8, consisting of eight photographs taken by Climax concerning some of the citations issued in these proceedings, as well as Exhibit G-9, a computer printout detailing Climax's prior history of violations, may be received in evidence.

Discussion

On December 11, 1978, MSHA inspector Richard F. King issued a combined section 104(a) citation and a section 107(a) imminent-danger order. The citation alleges a violation of 30 C.F.R. § 57.12-30, and describes the following conditions or practices which Inspector King believed collectively constituted an imminent danger, as well as individual violations of several mandatory safety standards which he listed on the face of the order in brackets designated by a numerical reference to the specific standard:

> The electricially powered equipment on the core drill located at 9 IVL East, 929 Level had not been locked out before mechanical work was done on the drill. (12-16). The power cable to the motor on the drill had not been isolated (4-11), the power cable to the switchbox on the drill rig was

not bushed (12-8), the 2/o power cable feeding the drill rig had an inadequate splice in it 180 ft. east down the drift (12-13). 240 ft. east down the drift, were [sic] the power-cable enters the main switch, it was not bushed (12-8).

Each of the bracketed numerical references in the "condition or practice" portion of the order is a reference to a section of the mandatory safety standards found in Part 57, and they are itemized in petitioner's civil penalty proposals as follows:

Citation or Order No.	Date	30 C.F.R. Standard
331891 A	12/11/78	57.12-30
331891 B	12/11/78	57.4-11
331891 C	12/11/78	57.12-8
331891 D	12/11/78	57.12-13
331891 E	12/11/78	57.12-16
331891 F	12/11/78	57.12-8

Petitioner's motion to withdraw its civil penalty proposal for Citation No. 331891 B, December 11, 1978, citing an alleged violation of 30 C.F.R. § 57.4-11, was granted from the bench and the citation was dismissed (Tr. 7).

MSHA's Testimony and Evidence

Inspector Richard King testified that he has been employed by MSHA as an inspector since 1975, and prior to that time he had 6 years' mining experience with Homestake Mining Company. He holds a B.S. degree from the Black Hills State College in Spearfish, South Dakota, has done graduate work in criminal justice, and has received training and taken a number of MSHA training courses at the mine academy in Beckley, West Virginia, including several courses in electricity. He confirmed that he inspected the mine in question on December 11, 1978, at the No. 9 Intake Vent Lateral East on the 929 level.

Mr. King identified photographic Exhibits G-1 through G-3 as the electrically powered core drill which he cited, and stated that the conditions depicted appeared to be the same as those he observed at the time of his inspection. The switchbox depicted has only one main power control switch and it was not locked out at the time he observed it. He observed no warning signs attached to the core drill, nor did he observe anything which would lead him to believe that mechanical work was being performed on the drill (Tr. 8-12).

Mr. King identified Exhibit G-4 as the working deck of the drill rig showing the drill motor lead wire laying on the wet deck and disconnected from the motor. The wire was not connected when he observed the rig and Climax supervisor Ken Hack advised him at that time that mechanical work was being performed on the drill rig and that it was in the process of being repaired. Mr. King stated that the wire would normally have been connected to the motor, and upon observation, he determined that the wire conductor

leads were taped with what appeared to be one wrap of plastic electrician's tape, but the wire was not energized. The wire is energized by throwing a switch on the drill itself, and the switch is shown in Exhibits G-2 and G-3, and it is the switch which he determined was not locked out. The area where the drill was located was wet, with approximately a foot of water in the immediate area of the drill. However, the drill rig itself had a platform elevated inches above the water, and the platform itself was soaked, and portions of the drill were wet. The drill switch also controlled the rig lights, and he observed no signs warning employees not to turn the lights on or not to energize the disconnected wire. He observed no employees working in the immediate vicinity of the drill rig, but employees were in another area some 500 to 600 feet away. The rig was located in a drift which provided access to an escape raise, and anyone could venture into the area (Tr. 12-16).

Mr. King stated that it was his understanding that while the drill rig was owned by Broyles Brothers, Climax had a maintenance crew who took care of electrical problems. The drill motor was disconnected but he could not recall whether it was being taken out or being put back in, and more electrical work was certainly required to make an electrical connection. He was not sure which switch operated the wire leads he observed, but he believed that the main switch operated the rig lights. The drill switch could not be locked out at the drill location because he observed no lock-out attachments in the area, and it would have to be locked out at a disconnect switch located 240 feet away. He identified Exhibits G-7 and G-8 as the disconnect switch, and when he observed it he noted that the switch handle was in the ON position and that the power cable leaving the bottom of the switchbox was not provided with a proper fitting or bushing, and he saw none. Failure to provide such a bushing or fitting could result in the cutting of the cable conductor insulation where it exits the box and a hazard would result in that a phase conductor could go to ground and energize the switchbox, thereby resulting in an electrocution. He observed no one near the switchbox, but anyone would have access to it, and the area was wet from standing water and water from the roof (Tr. 16-21).

Mr. King identified Exhibits G-5 and G-6 as the power cable located at a splice point midway between the main disconnect switch and the drill rig, and the cable splice is shown hanging on a nail. The area was wet, and if one were reaching for the area next to the splice he would have his feet in the water. The splice phase conductors were connected to each other and were taped, and the ground conductor was intact and spliced with the other two, but no effort had been made to replace the outer cable jacket. The cable was energized at the time he observed it, and the lack of an outer jacket would diminish the insulation qualities of the cable and lessen the protection against damage to the wires. The splice which he observed would not afford protection equal to that of the original cable, and it was made with a rubberized tape (Tr. 21-27).

Mr. King testified that the drill switchbox contained no bushings at the point where the cable entered the box, and the insulated wire phase conductors

simply came out of the box at the opening and were not bushed. Vibration from the drill rig could cause the cable insulation to be cut and the phase current could ground and possibly energize the switchbox, and any personnel, such as electricians or mechanics, would have occasion to operate the switch. He identified the cable in question in Exhibit G-3 as the one entering the top of the box. The wire insulation was in place around the conducting wire but the jacketed portion of the cable protruded an inch and a half out of the box cable opening (Tr. 27-30).

Mr. King stated that he based his imminent danger order on the combined conditions he observed. He believed that the cited electrical violations, the sloppy electrical workmanship, coupled with the wet conditions and the fact that no warning signs were posted, constituted a "trap" and a place where one could "reasonably and easily get killed or electrocuted" (Tr. 31).

On cross-examination, Mr. King confirmed that the switchbox at the drill rig had a "bad bushing" which was "not functional." He stated the distinctions between a bushing and a fitting, and stated that the former was a fitting provided with some type of insulation quality, and that the latter was "just a connection point of something to fit around the sharp edge of the box." He stated that Exhibit G-6 (a fitting described by respondent's counsel as a Chase Nipple), looked familiar to him, but he could not recall seeing such a device installed on the switchbox in question (Tr. 39-40). He could not recall in detail how the lead wires on the cable he previously described were wrapped, could not recall the dielectric strength of the tape used, and he could not recall whether any portions of the wire leads were not taped (Tr. 42). He confirmed that the switch on the box was in the OFF position, and while power was coming into the box through the cable, none was coming out of or through the box. No one was working in the area, the drill was down for maintenance, and the nearest miners were located some 500 to 600 feet down the drift. He stated that if someone had simply walked up to the motor wires and picked them up by hand nothing would have happened. Even if the switchbox were in the ON position, he was still not sure what would happen if a person had picked up one of the motor lead wires because he did not know whether another switch was required to be engaged in order to energize the wires (Tr. 42-46).

With regard to the cable entering the top of the drill switchbox, Inspector King confirmed that the outer cable jacketing was missing for a distance of an inch and a half above the box. However, the phase conductors were insulated, and he did not know their dielectric strength. Although the drill was shut down at the time, he still believed the defective cable fitting or bushing contributed to the imminent danger because drill vibration would cause the cable to be cut and the defective fitting did not provide adequate protection to prevent this condition from occurring (Tr. 48). However, he conceded that the wires did not appear to be cut, there was no drill vibration present, and he was not sure when any cutting action would take place (Tr. 49).

With regard to the defective splice down the drift, Inspector King stated that a danger would be presented if someone were to grab hold of the

splice while standing in the wet water conditions which were present. That person would act as a ground, but this would occur only if the splice insulation were broken or damaged or if there were moisture leakage to the phase conductor through the tape splice. Although the splice was taped with some kind of a rubberized tape, he did not know the dielectric strength of the insulation and did not know whether another type of insulation was present beneath the taped splice he observed, nor was he sure whether the type of cable in question was designated for use under water (Tr. 51-52).

Regarding the main disconnect switchbox and the lack of a bushing or fitting, Inspector King stated that the outer cable jacket itself did extend into the box, but he could not recall looking into the box. The cable jacket was not cut, and while nothing could happen "at any moment," the situation was such that it was possible that a cable conductor could contact the metal framework of the box itself (Tr. 53). The lack of a fitting or bushing on this box was not essential to his imminent-danger finding, but it still contributed to it, and even if the fitting were on the cable, he would still have made an imminent-danger finding. He also confirmed that the "open splice" contributed to the finding of imminent danger, but if the splice was made "jacket-to-jacket," and a proper bushing had been installed on the disconnect switchbox, he would not have found an imminent danger. The essential condition which prompted him to make an imminent-danger finding was "the work practice conditions that existed" (Tr. 55). When asked to describe the conditions that he believed existed and which could hurt anyone, he replied as follows (Tr. 55):

> The condition is that with the violations in the contributing form in work practice that the standard requires that that circuit be de-energized, the way I looked at it back at the main disconnect switch, if you had that area posted, if you had that condition where they had no way to lock that box out on the drill rig, they should have had a sign there and people wouldn't go in there and inadvertently turn that on.

In describing the possibility of someone being injured by throwing the drill rig switch, Inspector King stated that he did not know exactly where the source of electricity would come from, and he stated that "it could have come from any of those violations that were there" (Tr. 56). He went on to explain that while there was a "distinct probability" of someone being hurt, "a variety of possibilities existed" (Tr. 56). He did not know which of the drill rig switches were required to be activated to energize the motor wires (Tr. 57). When asked the specifics of what conditions were required to be present for a hazard to exist, aside from a faulty switch and fitting, he stated "if the conditions were right," and when asked to clarify that answer, he stated that other than the violations he cited, he could not describe the alleged "conditions" he had in mind (Tr. 59).

Regarding the drill rig switchbox violation, Mr. King stated that the power wires themselves were insulated, and therefore the first sentence of the

standard was not violated. Since the wires were not a "cable" at the point where they entered the box opening, the second sentence of the standard was not violated. However, since the wires did not pass through a substantial bushing where it passed through the metal box frame, that part of the standard was violated. Even though a Chase Nipple may have been used, it is not insulated at all and it is not an insulated bushing (Tr. 60). However, had the cable jacket itself, rather than the insulated wires, passed through the Chase Nipple, compliance would have been achieved and there would be no violation (Tr. 60).

Regarding the main disconnect switch violation of section 57.12-8, the second part of the standard dealing with the requirement that cables pass through proper fittings was the part violated (Tr. 61). Regarding the failure to lock out the drill rig switch, while the drill itself was deenergized, it was not locked out. Even though the switch was OFF, it was still not locked out, and that is a violation (Tr. 62). He was present when Inspector Enderby cited the lack of guards on the drill rig lights, and the lights were off because the power was off, and the box was locked out due to the issuance of his order (Tr. 63). He conceded that his testimony in his prior deposition that the lights were on was in error (Tr. 63).

In response to further questions, Mr King confirmed that while the power to the drill switch itself was on, the drill motor was deenergized because the rig was down for maintenance (Tr. 64). However, he was not sure which switches had to be activated to energize the motor, and he saw no independent light switch (Tr. 64). The purpose of the bushing at the place where the cable entered the drill switchbox was to keep the cable in place and to eliminate any cutting due to vibration (Tr. 73). He did not determine whether the switch had a "neutral" position, but the switch was definitely OFF (Tr. 75).

In response to bench questions, Mr. King conceded that the drill rig was down for repairs when he made his inspection and that he was aware of this fact. He began his inspection at the drill rig site, and worked his way back down the drift to the location of the other conditions he cited, and respondent's electrical foreman, Kenneth Hack, and others accompanied him during the inspection. Mr. Hack is a certified electrician, but he did not consult him before issuing the order, and he stated he "pretty well made up my mind" (Tr. 81). While the drill rig itself could not be locked out, it could have been locked out down the drift at the main disconnect switch, or the area could have posted (Tr. 82). The power was deenergized from the drill switchbox to the drill motor (Tr. 82). Power along the 440-volt cable and up to the drill rig box was "hot," but the box and motor were not (Tr. 88).

Climax's Testimony and Evidence

Kenneth Hack testified that he has been employed with Climax as an electrical foreman, and that he is a 1971 graduate of Colorado State University with a B.S. degree in electrical engineering. At the time the

citations in question issued, he was supervisor for electrical maintenance and construction at the 600, 629, and 929 mine production levels. He stated that he was not with Mr. King when his citations issued on December 12, but he went to the scene the next day and took the photographs, Exhibits G-1 through G-8 (Tr. 136-139).

Mr. Hack identified Exhibits C-1 and C-2 as schematic drawings depicting the circuits and current path to the drill rig and disconnect switches which were cited by Inspector King, and he explained the path of current, the function of the disconnect switch and circuit breakers used in the system, the grounding systems, and he identified Exhibit C-7 as a 2/0 conductor cable similar to the one cited by Mr. King for a bad splice (Tr. 168-171). He stated that if someone were to step into the splice area shown in photographic Exhibits G-5 and G-6 and grabbed the splice, nothing would happen (Tr. 172). He also indicated that he is familiar with the manner in which the splice in question was made through routine supervision of electricians who routinely make such splices at the Climax Mine. He described the method by which such splices are made, and indicated they are placed butt-to-butt with Okonite 35 tape, then wrapped with Scotch 88 tape in an overlapping fashion similar to that of a tennis racket handle, and he identified Exhibit C-11 as the vendor's specifications for Okonite, as well as Exhibits C-3 through C-5 as Scotch 88 electrical tape, Okonite No. 35 cable jacketing tape, and Scotchfill electric insulation putty, the products used in the making of the splice in question (Tr. 173-177).

Mr. Hack indicated that had the splice in question fallen off the spike where it was hanging, and it was skillfully made by an electrician, it would have been impervious to water. However, if water leaked into the splice, a short circuit would have developed and resulted in the main circuit breaker tripping, thereby deenergizing the line (Tr. 177). The circuit breaker would trip in about "one to 240th of a second" (Tr. 178). He could not explain why the splice was hanging on the nail. With regard to the method used to make the splice in question, he stated that when he first became employed with Climax he questioned the manner in which such splices were made, and he explained that the splice was left "open" so that water could not accumulate in it and to permit visual inspection of the interior conductors. Also, during the war, Climax could not obtain insulating material and they found that the "open"-type splice was more reliable (Tr. 179). Had the splice fallen in the water, the breaker would trip and there would be no voltage on the drill rig (Tr. 180).

With respect to the cable entering the main disconnect switchbox, Mr. Hack stated that the cable jacketing extended some 2 inches into the box, and from that point on there is an additional 6 inches on insulated conductor wires before it is connected to the disconnect inside in the box (Tr. 181). He observed no cutting of the cable that extended into the box, and if all of the conductors were pulled out of the box, there would be no shock hazard on the rig because the cable would be deenergized and there would be no voltage to the drill rig (Tr. 182).

Regarding the drill rig switch breaker box, Mr. Hack indicated that an electrical bushing or fitting was installed at the top of the box and he identified it as a "Chase Nipple" (Exh. C-6). The device has a lock nut and a bushing and the terms "bushing" and "fitting" are used interchangeably, and when he examined it it "seemed acceptable" (Tr. 184). The 2/0 power cable jacketing entering the box through the Chase Nipple was flush with and to the bottom depth of the nipple and he observed no power conductor visible above the nipple and box, and it was that way when he observed it on the morning of the 12th before the condition was abated (Tr. 185). Mr. Hack stated that the breaker box contains an "on-off" push button which controls a starter for the drill rig motor, and that is a separate switch in addition to the "on-off" switch for the box circuit breaker itself (Tr. 189). The circuit breaker switch is for motor overcurrent protection and it is always on when drilling is taken place (Tr. 189).

Mr. Hack stated that in order to obtain electricity and voltage to the drill motor leg area where the taped wires which were lying on the deck were located, one would have to push the switch breaker on and then push the start button for the motor. Assuming one were to pick up the taped wires with both switches on, he would be in no danger and he described the method used for taping such leads (Tr. 191-192). If one were to turn the breaker switch "on" and plug in the lights, he would be in no danger, and he knew of no conditions in or around the drill rig platform, or 240 feet down the drift, on the day in question which presented any danger to anyone (Tr. 195). He did not dispute the fact that the system was not locked out when Mr. King issued his order (Tr. 195).

On cross-examination, Mr. Hack confirmed that he first observed the welding machine splice on July 14, 1980, some 2 years after the citation issued, and it was kept at the mine in his office (Tr. 205). He had no first-hand knowledge of the condition of the splice at the time it was cited, and he made no attempt to open the splice himself, but an electrician did and he (Hack) found that it was adequately made (Tr. 206-207). He described the manner in which the splice was made, did not know the thickness of the jacket, how many tape wraps were used, and conceded that it was not of the same mechanical strength of the cable insulation or the splice. No splice offers as much protection as the original cable because anytime the cable is broken, its integrity is destroyed, and while the splice may not be equal to the original, it was adequate for the application for which it was being used (Tr. 210-216).

Mr. Hack expressed some familiarity with the process of using vulcanization for making permanent splices, but has never personally used this process. If done properly, he assumed the splice which results would be equal to the existing cable, and he conceded that it is a better method for making splices, and also conceded that he questioned the "open-splice" method used by Climax when he first came to work at the mine (Tr. 217-218), and he questioned the lack of a jacket-to-jacket cover for mechanical protection (Tr. 219). Mr. Hack also indicated that the circuit-breaking system for the drill rig is engineered to provide protection for the machinery, and if one were to touch a live wire on the rig which was not fixed to trip the breaker at the proper cut-off amperage, there is a possibility of an electrocution (Tr. 227).

Regarding the "open splice," Mr. Hack conceded that the splice was not as mechanically strong as the original, was not made as nearly as possible as strong as the original cable, and since it had no outer jacket, it did not offer damage protection nearly as possible to the original (Tr. 227). Electricians at the Climax Mine routinely splice cables in the manner he previously described, but he personally has attended no training sessions at the mine for this purpose, and has only learned that this is the normal procedure through "firsthand conversations" (Tr. 231). He would have no hesitation in grabbing the open splice in question, but if there is moisture in it, that would possibly affect his willingness to touch it because it would be a defective splice and would possibly be electrocuted (Tr. 232-233). He would accept no amount of moisture in a splice if he were standing in water, but he would be safe with .12 percent water in a splice (Tr. 235). However, he did not know the amount of water absorption tolerance for the splice in question (Tr. 239).

With respect to the main disconnect switchbox down the drift, Mr. Hack conceded that the switchbox cited by Inspector King did not have any kind of a bushing or fitting when he observed it (Tr. 249). In response to additional questions, Mr. Hack stated that the cable (Exh. G-7), has a MESA approval but he did not believe it was completely impervious to moisture (Tr. 250). The splicing method used for cables would render them mechanically strong, the electrical conductivity would be as near as possible to the original, and no splice is 100 percent as good as the original cable (Tr. 251). Vulcanization is not used at the Climax Mine because it is not practical because of the great number of cables spliced with "T-Taps," and they could not operate underground if each splice had to be vulcanized (Tr. 251). The splicing method used at the mine takes 45 minutes to make a splice, while the use of vulcanization underground would take 4 or 5 hours to make a splice (Tr. 252). Climax has MSHA's approval to use "T-Taps" in its production drifts (Tr. 253). Although the open splice hanging on the nail was mechanically strong, the electrical conductivity was as near as possible to the original, and was sealed to exclude moisture, it did not have damage protection as near as possible to the original because the outer jacket did not extend across the splice (Tr. 254). However, by hanging on the spike and being wrapped in tape, he believed damage protection was afforded (Tr. 255).

In response to bench questions, Mr. Hack stated that the subject of how Climax makes its splices in the mine has been a topic of discussion with MSHA inspectors, and aside from the "T-Taps" splices, nothing concrete has resulted with respect to the other type splices, and MSHA has issued Climax no guidelines as to the types of cable-splicing kits it would accept as compliance (Tr. 266).

On December 12, 1978, MSHA inspector James G. Enderby issued section 104(a) Citation No. 333657, charging a violation of 30 C.F.R. § 57.12-13, and the condition or practice cited states as follows: "A bad splice was observed on the 440 volt power supply cable to the Chemtron welder on south and outside storke shop. The welder was being used at the time. A Tic Tracer was used to find this condition."

On December 13, 1978, Inspector Enderby issued section 104(a) Citation No. 333658, charging a violation of 30 C.F.R. § 57.12-34, and the condition or practice cited states as follows: "The portable flood lights around the Boyles Brothers drill rig at 9 IVL East 929 level were not guarded. The light bulbs could easily be reached while standing on drill rig platform."

MSHA's Testimony and Evidence

MSHA inspector James G. Enderby testified has he has been employed as an inspector for 5 years. He previously worked as a miner, and has taken MSHA courses in electricity at Beckley, West Virginia. He confirmed that he inspected the blacksmith's shop on the mine surface on December 12, 1978, and that he issued the citations in question. The portable welder splice citation was issued after he observed that a section of the cable had been spliced and that the plastic tape was torn and deterioriated from being dragged around the shop. The splice was about a foot long, and it supplied 440 volts of power to the welder. He used a "Tic Tracer" instrument to test the cable, and he described the Tic Tracer (Exh. C-9) as a battery-powered device which detects current by emitting a "chattering noise" through a speaker device on the instrument. As cable current gets stronger, the sound gets louder. By moving the instrument along the cable, the sound became louder at the location of the splice and this indicated to him that the splice was not as good as the initial insulation when the cable was originally installed (Tr. 91-94).

Mr. Enderby stated that the welder was in use at the time he observed the splice condition, he noticed no moisture in the area, and the person operating the welder was located some 10 feet from the splice (Tr. 96). He performed no other tests on the splice and he described it as a jacket-to-jacket splice. He was concerned over the fact that continued use of the cable would lead to further deterioration and it would not be in the same condition or as strong as the original manufactured cable. He was concerned that someone could be electrocuted or shocked if they came in contact with it (Tr. 96). He did not believe the splice was equal to that of the original and that is why he cited section 57.12-13 (Tr. 97).

Regarding the drill rig lights citation, Mr. Enderby identified Exhibits G-1 and G-2 as photographs of the lights in question and stated that there were four or five unguarded lights on the drill rig. If a man were standing on the drill rig platform in the picture identified as Exhibit G-2, the light would be in his face. It was possible that the lights could have been broken by a steel drill used during drilling, and if a person comes in contact with the broken filaments, there would be a potential shock hazard present (Tr. 100). The lighting circuit was not energized, and he saw no evidence that the lights were ever guarded prior to his inspection (Tr. 101-102).

On cross-examination, Mr. Enderby stated that in order to reach the unguarded lights, the person depicted in Exhibit G-1 (Mr. Hack), would be able to reach the lights with a bar, but would have to jam it into the socket in order to be shocked. Normally, he would be unable to simply reach up and in with his hand, but with a little effort he may (Tr. 103). He confirmed

that the lights were not energized, and while he believed that a shock hazard existed prior to the issuance of Mr. King's order, he conceded that no hazard was present on December 13 when his citation issued (Tr. 104).

With regard to the splice on the welder cable, Mr. Enderby confirmed that it was located between the man doing the work and the welding machine, and he could not recall whether the cable was AC or DC. He confirmed that when he gave his prior deposition, he indicated at that time that he used the Tic Tracer instrument to determine whether the cable was a main power supply cable or a ground. In addition, he has been trained to use the tic tracer to determine leakage in a cable and if the tracer noise increases it indicates to him a change of more current or voltage being exposed to the instrument. He also confirmed that the tracer is used to measure current. Regarding the condition of the splice, he stated that the torn and worn part of the splice appeared to be taped, that no power conductors were visible, and he did not know whether the cable had a ground wire. Even if the Tic Tracer had not indicated an increase in noise, he still would have probably issued the citation. Although the splice was mechanically strong, it was not insulated to a degree at least equal to the original, and he doubted that it was sealed to exclude moisture, and did not believe it was provided with damage protection as near as possible to that of the original cable (Tr. 106-109).

Mr. Enderby testified that the splice was not sealed to exclude moisture because the tape was torn, deteriorated, and was cracked and coming off. He did not know what was below the outer tape and believed that "Scotch Fill" is a type of insulating material used in splices (Tr. 109). He could not specifically recall making any inquiries of anyone from Climax as to the splice and how it was made (Tr. 113). He stated that he would have issued a citation even if the Tic Tracer were not used and he would have done so because of the deterioration of the tape wrapped around the splice (Tr. 111).

In response to bench questions, Mr. Enderby stated that the splice in question was a permanent splice, that the cable was some 50 feet long, and was used to power the portable welder (Tr. 114). An increase in noise from the Tic Tracer indicated to him that the splice was leaking current and was not being protected or insulated to the same degree as manufactured. He was concerned that someone picking up the cable would be electrocuted, but he did not examine the splice after it was cut out of the cable, and he was not familiar with the manner in which splices are made at the mine (Tr. 117-118).

In response to further questions, Mr. Enderby stated that he was not certain that electrical leakage detected by a Tic Tracer is an indication of diminished insulation quality from the power cable to the splice, but in "office conversation," he was told that any increase in the volume of the sound emitted by that instrument indicates "some sort of leakage" (Tr. 124). He did not remember that the manufacturer's instructions concerning the use of a Tic Tracer instrument state that its purpose is to detect splice leakage (Tr. 124). Regarding the unguarded lights, Mr. Enderby stated that four or five bulbs were not guarded, that a man would likely stand by the drill at one location on the backside of the drill, that on similar rigs the lights are usually guarded by a cage or screen attachment, and the location of the lights is a factor in determining whether guards are required (Tr. 121-122).

Climax's Testimony and Evidence

Regarding the welding cable splice citation, Mr. Hack stated that he was familiar with the splice in question and described how it was made. It was a butt-to-butt splice made with Scotch 88 electrician's black tape. The wire terminals were built up with Scotch Fill, an electrical putty used to maintain cable asymmetry. The sequence for making the splice is to use the tape and putty over the power conductors, and the Scotch 88 is then used jacket-to-jacket, thereby replacing the original cable jacketing (Tr. 139). The torn and deteriorated condition of the outer tape as described by Mr. Enderby is normal because the outer taping on the cable is deliberately heavily taped and built up so as to absorb any cable abuse (Tr. 140).

Mr. Hack identified the manufacturer's specifications for the tape and scotch fill (Exhs. C-10 and C-12) and stated that they are regularly used in his work in the electrical department (Tr. 140). He confirmed that no tests were conducted on the splice, that he relied on the manufacturer's representations as shown in the specifications, and he had no knowledge of any field tests conducted by the manufacturer concerning the products in question in his electrical work and had no reason to question the manufacturer's representations (Tr. 157). He examined the particular splice which was cited and found it to be made in the manner he previously described (Tr. 160). The cable portion between the welding machine and the man using it was DC and the other cable portion was AC. A Tic Tracer is primarily used to detect interior breaks or loss of voltage in trailing cable conductors which are not readily visible (Tr. 161). As an example, if a piece of equipment ran over a cable, the Tic Tracer could be used to detect a possible damaged open conductor within the cable which is not visible, and a break in a conductor could possibly indicate that the interior insulation of the conductor was damaged (Tr. 162-163). DC current cannot be measured by a Tic Tracer (Tr. 163). The floor in the machine shop where the welder was located is a concrete floor and is not normally wet. He believed the splice was acceptable in terms of being mechanically strong (Tr. 164). He was not present when the splice was cited (Tr. 164), but based on his examination of the splice after it was removed, he believed it was as good as the original and the basis for this opinion is his experience with the use of the products for making such a splice (Tr. 165).

Regarding the unguarded lights citation, Mr. Hack stated that the light depicted in Exhibit G-1 is approximately 10 feet off the drill rig deck and some 12 feet off the floor, and the other two lights are about 12 feet off the floor (Tr. 167-168).

MSHA's Rebuttal Witness

Paul Price, electrical engineer, MSHA's Denver Technical Support Center, testified that he holds a 1965 B.S. degree in electrical engineering, and that his past experience includes the design of surface and underground lighting and power-distribution systems, cable-splicing methods, grounding systems, and he helped develop the electrical tape manufactured by the 3M Company (Tr. 273-276).

Mr. Price stated that he was present during the testimony presented in these proceedings, and upon examination of photographic Exhibit G-4 concerning the taped drill rig motor wires, he stated that based on the manner in which those wires appeared to be taped, they were exposed to the possibility of being punctured with a screw or nail, and since the power was not locked out, anyone turning on the breaker on the box and then activating the start button would be in danger. Aside from any possible punctures, he believed that the use of tape is a "last ditch" effort and he would not care to touch a "hot" taped wire. Based on the testimony he heard, the drill rig was not locked out because the box had no lock hasp and it therefore should have been locked out down the drift at the feed line (Tr. 279-280).

Upon viewing photographic Exhibit G-5 concerning the "open splice" down the drift, Mr. Price testified that he did not consider it to be a safe splice because there was no outer jacket bonding across the spliced wires. The lack of such an outer jacket violated the standard cited because the standard specifically requires an outer bonded jacket, and that jacket provides additional insulation and protection against damage and abrasions. Failure to provide such a jacket renders the spliced cable less than equal to the original. The lack of a jacket would also not afford at least equal protection against moisture. The cable in question is an MSHA-approved cable, and if it is undamaged it should not have any water in it since it is approved for use under water and .12 percent of water in a cable could only be detected under laboratory conditions (Tr. 281-285).

Mr. Price stated that the splice depicted in Exhibit G-5 presented a hazard to any miner touching it, and coupled with the water conditions in the area, if the cable were reachable, and if someone touched it, an imminent danger would be presented. He would not touch it even under dry conditions because to the untrained eye the cable may have some damage which is not readily detectable. In response to a question as to whether the spliced cable presented an imminent danger simply because it had no outer bonded jacket, Mr. Price answered as follows: "If perhaps I had done it myself and knew there was no damage, if it had not been hanging out in that location for any period of time, if it were under laboratory conditions, I wouldn't mind touching it" (Tr. 292).

Regarding the cable citation at the point where it entered the drill switchbox (Exh. G-3), Mr. Price testified that at the point where the cable enters the box a clamp fitting providing for strain relief should have been installed. Since the inspector testified that the cable jacket was out of the fitting, a proper clamp-type fitting would have prevented this. By allowing the cable to move up and down out of the box, there was a danger that the phase conductor would have been disconnected from its normal contact point inside the box, thereby energizing the box frame or the frame of the machine. A "Chase Nipple" is not a clamp-type fitting, and it was originally designed for use in protecting cables which are installed in conduits, and it is totally inadequate for use in conjunction with a cable or single insulated wires which enter a switchbox such as the one in question (Tr. 289-290). Assuming the cable did not extend into the box and the

wires were stripped above the point where they enter the box, those wires are no longer considered a "cable," but rather, "power wires," and permitting them to enter the box without a fitting is a poor wiring practice (Tr. 290).

Mr. Price stated that the term "fitting" is a generic term covering basically all fittings. A "bushing" is a particular type of fitting which may or may not be insulated. Under section 57.12-8, insulated wires and power cables are treated differently. A cable entering a machine or a box should be provided with a relief-type or clamp-type fitting that would hold it securely in place to prevent it from slipping up and down inside the box. If this is not provided, the cable may slip up and down enough to dislodge the connector connections inside the box thereby causing a short (Tr. 286). Viewing Exhibit G-7, a photograph of the switchbox 240 down the drift, Mr. Price stated that it should have a clamp-type fitting to secure the cable, and there is no proper fitting at all installed on that box (Tr. 287). However, the cable itself appears to be adequately insulated (Tr. 288).

In the interest of time, the parties stipulated by way of a proffer by MSHA's counsel, that Mr. Price would also testify that the use of a Tic Tracer adequately and accurately indicates whether a splice is insulated to the degree of the original cable, that the placement of the unguarded lights at the locations shown in Exhibits G-1 through G-3 presented a shock and burn hazard to men in the area should they or their equipment come into contact with the wiring inside the lights, and that the splice on the cited welding machine did not comply with the standard because the same danger and insulation protection as the original was not provided (Tr. 293-294).

On cross-examination, Mr. Price stated that rather than taping the wires on the drill motor, he would leave them bare, but only if the machine was locked out. He conceded that anyone unlocking the box, pushing the starter, and then picking up the bare wires, would be electrocuted, but that would be a remote set of circumstances. It would also be equally remote for someone to push the starter button, and pick up taped wires and be hurt (Tr. 294-295). He stated that he had never visited the Climax Mine or any large underground molybdenum mine (Tr. 295). He also indicated that any cable has an absorption rate and none are 100 percent impervious (Tr. 296), and that under certain conditions, a Chase Nipple is a proper fitting (Tr. 297).

Mr. Price identified a PST system of cable splicing as a kit manufactured by the 3M Company which provides jacket-to-jacket protection and is approved by the Bureau of Mines. He described the method of splicing with such a kit, and indicated that it is extremely similar to the method described by Mr. Hack with respect to the welding machine cable up to the point of the outer jacket. The kit is provided with a neoprene tube and spring to hold it in place over the splice after the scotch fill and taping is done, and the splice is then vulcanized by a chemical process which bonds to the tube to the outer cable jacket. This procedure does not require a vulcanizing machine and would not take as long as taping (Tr. 300).

In response to a question from me as to whether the cited standard concerning splices would be clearer if the standard specifically required the use of Bureau of Mines approved splicing methods for making splices, Mr. Price answered "I don't thing we would be here" (Tr. 302). When asked why this had not been done, he answered "Non-electrical people make the standards" (Tr. 302).

Climax's Challenge to the Authority of the Inspectors

In its posthearing brief at pages 25-26, Climax asserts that MSHA has failed to establish that Inspectors King and Enderby were "authorized representatives of the Secretary" within the meaning of the Act. In support of this assertion, Climax argues that MSHA has failed to establish that the inspectors who conducted the inspection and issued the citations and withdrawal order were in fact acting in their capacity as authorized representatives of the Secretary of Labor, and that there is nothing in the Act which designates employees of MSHA as authorized representatives of the Secretary. This assertion and defense is rejected. I am satisfied from the inspectors' testimony that they are duly authorized representatives of the Secretary, that they are qualified and competent to conduct mine inspections, that they did so at all times pertinent to these cases, that mine management was aware of the fact that Mr. King and Mr. Enderby were in fact MSHA inspectors, and that the inspections were conducted in accord with the provisions of the Act.

Findings and Conclusions

Docket No. DENV 79-196-M

The issue presented in this contest is whether or not the conditions or practices cited by Inspector King in the section 107(a) imminent danger Order No. 331891, December 11, 1978, in fact constituted an imminent danger within the meaning of the Act. "Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. § 802(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at page 44 (March 1970), states, in pertinent part, as follows:

> The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved.

And, at page 89 of the report:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd., Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (7th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman, phrased the test for determining an imminent danger as follows:

> Each case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessary immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent-danger order, the burden of proof lies with the contestant, and the contestant must show by a preponderance of the evidence that an imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. § 556(d) (1970)), and may be imposed only if the Government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It

should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant bears the ultimate burden of proof in a proceeding involving an imminent-danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See Lucas Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328 (1973-1975); Kings Station Coal Corporation, 3 IBMA 322, 81 I.D. 562 (1974).

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the facts presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d at 34). Thus, on the facts presented in the instant proceeding, MSHA must show that reasonable men with the inspector's education and experience would conclude that the conditions cited by Inspector King constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately.

MSHA's theory seems to be that an imminent danger existed sometime before Inspector King's inspection, and its counsel candidly admitted this at the conclusion of the hearing when he stated "[t]here was an imminent danger there sometime before the inspection" (Tr. 256). In addition, I take note of the fact that on direct testimony by Inspector King to support his imminent-danger order, after MSHA's counsel had completed his questioning concerning the conditions observed, Mr. King said not one word about any imminent danger. The question was put to him after I inquired of counsel as follows (Tr. 30):

> MR. BARKLEY: Your Honor, that concludes my questioning of this witness.
>
> JUDGE KOUTRAS: You're not going to ask him the $64,000 question?
>
> MR. BARKLEY: I would if I knew what it was.
>
> JUDGE KOUTRAS: How did he come to the conclusion that all these conditions constituted an imminent danger?
>
> Gentlemen, we're not playing games in this proceeding and I have a responsibility to make a record, and if Counsel doesn't ask a critical question, I'm going to ask it. I assume that's why you sighed, Mr. Bastien?

Inspector King then went on to explain his rationale for issuing the imminent-danger order as follows (Tr. 31):

> Q. Mr. King, did you draw a conclusion at the time of your inspection as to whether or not any or all of the conditions that we talked about presented an imminent danger?
>
> A. Yes, I did.
>
> Q. On what facts did you base that conclusion?
>
> A. I based it on the observations I had made at the time of the inspection when I entered the 9 IVL Drift. I based it on the fact that excessive water was in the area, multiple electrical violations I had discussed in my testimony, the fact that there were no warning signs, there was nothing to tell anybody that there was danger in there. I perceived this as a trap, a place that you could reasonably and easily get killed, electrocuted.
>
> The power cable, the main feed cable was under water in some cases around the drill rig, there was evidence of sloppy workmenship in the insulation of the electrical equipment, the cables not being bushed or having proper fittings, the bad splice, the power to the drill rig. That's basically what I based it on.

Although Inspector King testified as to some arcing inside the drill switchbox, and included this observation on his inspector's statement in support of the order, the fact is that he did not observe such a condition when he issued the order, was unaware of any loose lug inside the box, and inserted the comment concerning arcing in his inspector's statement on December 15, after abatement had been achieved and after the order had been terminated, and MSHA counsel candidly admitted that any arcing condition had nothing to do with the imminent-danger order (Tr. 261). Although the record is somewhat unclear as to the amount of arcing, the fact is that based on the testimony of Mr. Hack, it is clear to me that any prior arcing was not an imminently dangerous situation, and it had been corrected, and MSHA's attempts to amend the condition cited by the inspector or to add to those conditions 2 years after the fact on the basis of any speculative testimony generated at the hearing was summarily denied (Tr. 262-263).

It is clear from the testimony and evidence adduced in this case that at the time Inspector King issued his imminent-danger order, the drill rig in question was shut down, the drill motor had been removed and was down for maintenance, no drilling or mining was taking place, and the only employees remotely close to the area were miners who were working in another section some 500 to 600 feet away. In addition, the drill motor junction box was disconnected, the activating switches were not on, and the drill was down for repairs. With respect to the inadequate splice some 180 feet from the rig,

while it may not have contained a jacket-to-jacket outer bonding to render it as mechanically strong as the original cable, Mr. Hack indicated that electricians at the mine routinely splice cables in this manner, and the cable itself is an MSHA-approved cable which is approved for underwater use. Aside from the fact that he believed the lack of an outer jacket diminished the insulation and physical protective qualifies of the splice, Inspector King conceded that the splice-phase conductors were connected and taped, and that the ground conductor was intact and spliced with the conductors. Further, the splice was hung up on a nail and was somewhat isolated by a ditch of water (Exh. G-6). While Mr. King's concern was over the fact that someone standing in the water and grabbing the splice would be in danger, he conceded that this would be true if the insulation were damaged or there was moisture leakage through the taped conductors. However, he had no knowledge of the insulation qualities of the tape in question, was not aware of the fact that the cable was MSHA approved for use under water, and he did not rebut the fact that the splice was in otherwise good condition.

After careful review and consideration of all of the foregoing circumstances which I believe prevailed at the time Mr. King issued his order, I am not convinced that the conditions cited, taken collectively or singularly, presented any imminent danger. It seems clear to me that Mr. King's principal concern was in connection with what he believed were "sloppy work practices" and he candidly admitted as much (Tr. 55). However, I find his somewhat speculative concern over a "probability that a variety of possible circumstances" would result in an imminent danger to be conjecture unsupported by any credible facts. As for Mr. Price's testimony, I find that while he is a qualified electrical expert, his testimony was mostly theoretical and speculative. He has never been in the Climax Mine, did not view the conditions cited by the inspectors during the course of the inspections, and had no first-hand knowledge of those conditions. MSHA's attempts to support the imminent-danger order by simply having Mr. Price present listening to the testimony and giving his opinions are rejected. Accordingly, I conclude and find that MSHA has failed to establish a prima facie case of imminent danger, and the section 107(a) order in this regard is VACATED.

Findings and Conclusions

Docket No. WEST 79-27-M

Fact of Violations

The overall conditions or practices described by Inspector King on the face of the combined section 104(a) citation and section 107(a) imminent-danger Order No. 331891 are as follows:

> The electrically powered equipment on the core drill located at 9 IVL East, 929 Level had not been locked out before mechanical work was done on the drill (12-16). The power cable to the motor on the drill had not been isolated (4-11). The power cable to the switchbox on the drill rig was

not bushed (12-8). The 2/o power cable feeding the drill rig had an inadequate splice in it 180 ft. east down the drift (12-13). 240 ft. east down the drift where the powercable enters the main switch, it was not bushed (12-8).

As indicated earlier, each of the bracketed numerical references following the conditions described in the order are references to the mandatory regulatory sections found in Part 57, Title 30, Code of Federal Regulations. In addition, the top portion of the citation form itself, in the space labeled "Part and Section," includes a citation to mandatory standard section 57.12-30, which provides as follows: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

MSHA's civil penalty proposals include a separate proposal for an alleged violation of section 57.12-30, and I take note of the fact that the portion of the citation asserting a violation of section 57.4-11, for an alleged failure to isolate the drill motor power cable was dismissed on MSHA's motion at the hearing. Since the Secretary opted not to file any posthearing arguments, I have no way of knowing the theory of MSHA's assertion that Climax has somehow violated section 57.12-30. One can speculate that the inspector believed that all of the combined individual violations enumerated on the face of the citation/order also violated section 57.12-30. However, after close examination of the trial transcript, I find no testimony or evidence advanced by MSHA to support a violation of section 57.12-30, separate and apart from any of the other enumerated cited alleged violations.

Although MSHA's counsel alluded to section 57.12-30 during a discussion of the manner in which the drill motor leg wires were taped (Tr. 191-192), and touched on it during his opening remarks (Tr. 46-47), it is clear to me that Inspector King did not specifically cite the wire leads which he believed were inadequately taped, as a separate violation. Petitioner's counsel stated that this was in fact the case. That is, Inspector King did not cite what he believed was a poor splicing job on the wire leads testified to as violations (Tr. 44). Counsel believed that the conditions concerning the wire motor leads had something to do with "the standard that requires adequate measures or whatever the wording is" (Tr. 44). He also conceded that the wire lead conditions testified to by Inspector King were not among those conditions cited on the face of his order (Tr. 44).

After careful review and consideration of the entire record adduced in these proceedings, I cannot conclude and find that MSHA has established a violation of mandatory safety standard section 57.12-30, and that portion of the citation citing this alleged violation is VACATED and MSHA's proposal for a civil penalty for this asserted violation is REJECTED and DISMISSED.

Citation No. 331891-C, December 11, 1978, 30 C.F.R. § 57.12-8, states that "the power cable to the switchbox on the drill rig was not bushed." Citation No. 331891-F states that "240 ft. down the drift, where the power cable enters the main switch, it was not bushed."

Section 57.12-8 states as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Although Inspector King's citation states that the drill switchbox power cable was not bushed, the fact is that a fitting or bushing was provided but that Mr. King believed it was defective because it permitted the cable or conductors to move up and down as they entered the top of the box and, in short, he did not believe that the fitting was a proper fitting. Since both the inspector and Mr. Hack agreed that the terms "bushing" and "fitting" are used interchangeably, the fact that Mr. King used the term "bushed" does not, in my view, render the citation defective. The question presented is whether MSHA has established a violation by a preponderance of the evidence.

I find that MSHA has established that the power cable entering the drill switchbox did not enter the top of the box at the opening provided through a proper fitting. In short, it was not bushed as required by section 57.12-8. Having examined a Chase Nipple produced at the hearing (Exh. C-6), I conclude that it was not a proper fitting for use with the cable in question because it did not permit the cable to be maintained in a "locked-in" or rigid position, but rather, allowed for free movement of the cable in and out of the box opening. The inspector observed insulated wires protruding from the opening, and although a Chase Nipple may have provided some protection against possible cutting, I cannot conclude that it provided adequate protection to prevent the cable or cable conductors from being pulled out of the box and being accidentally disconnected in the event tension were applied to the cable. Citation No. 331891-C is AFFIRMED.

With regard to the power cable which entered the main disconnect switchbox some 240 feet down the drift and outby the drill rig itself, I find that MSHA has established a violation by a preponderance of the evidence. Although Inspector King's narrative description of the condition cited is far from a model of clarity, I believe it is clear that he cited section 57.12-8 because the box opening through which the cable passed contained no fitting at all to keep the cable in place and to prevent it from coming loose or being pulled out of the box. Again, while the inspector used the term "bushed," it seems clear to me from his testimony that since there was no fitting at all, he believed the standard was violated. Since the second sentence of the standard requires that cables entering electrical compartments shall enter only through proper fittings, the absence of any device at all to maintain the cable in place is sufficient to establish a violation of the cited standard. Respondent's evidence does not rebut the fact that at the point where the cable entered the box, no fitting or other device was present to prevent the cable from being cut or accidentally pulled out or disconnected from the box. Citation No. 331891-F is AFFIRMED.

Citation No. 331891-D, December 11, 1978, 30 C.F.R. § 57.12-13, states the "the 2/0 power cable feeding the drill rig had an inadequate splice in it 180 ft. east down the drift." Mandatory standard section 57.12-13 states as follows:

> Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
>
> (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
>
> (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
>
> (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector King's citation asserts that the cable in question had an "inadequate" splice. The term "inadequate" is a rather broad conclusion and it would be much better if MSHA inspectors would detail their findings in more specific terms so that an operator is informed as to what is required for corective action and abatement. More attention to such detail will also preclude evidentiary and credibility problems which invariably always regularly arise when citations are drafted in such a general manner, and an inspector later attempts to justify his citation at the hearing months later.

Exhibit G-5 is a photograph of the splice in question and Inspector King testified that while the splice phase conductors were corrected and taped and the ground conductor was intact and spliced with the other conductors, the outer cable jacket was missing. Respondent does not dispute the fact that the cable splice in question did not contain an outer jacket and that it was not bonded at all. Further, respondent's own witness, Mr. Hack, candidly admitted that the lack of an outer cable jacket at the splice did not offer damage protection as nearly as possible to that of the original cable, and that the cable in such a condition was not as mechanically strong as the original.

I conclude that the condition of the cable splice as depicted by Exhibit G-5, coupled with the testimony of Mr. King and Mr. Hack, supports a finding that the failure to install an outer bonded jacket to the cable splice in question rendered it inadequate in that a cable in that condition is not mechanically strong as nearly as possible to that of the original cable with the outer jacket intact, nor does it provide damage protection as nearly as possible to that of the original cable. Failure to install the outer bonded cable as part of the splicing process constitutes a violation of section 57.12-13, and Citation No. 331891-D is AFFIRMED.

Citation No. 331891-E, December 11, 1978, 30 C.F.R. § 57.12-16, states that "the electrically powered equipment on the core drill located at the 9 IVL East, 929 Level had not been locked out before mechanical work was done on the drill."

Section 57.12-16 states as follows:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventative devices shall be removed only by the persons who installed them or by authorized personnel.

Inspector King's citation asserts generally that "electrically powered equipment on the drill rig was not locked out." Again, the citation is rather ambiguous since it does not specify the particular equipment that Mr. King had in mind at the time he issued the citation. However, his testimony reflects that what he had in mind was the fact that the switchbox mounted on the drill rig itself, as shown in photographic Exhibits G-2 and G-3, was not locked out (Tr. 62). The reason that it was not locked out is that the box was not equipped with a hasp or lock attachment, and in these circumstances, Mr. King believed that the main disconnect switch located some 240 feet away (Exhs. G-7 and G-8), and which supplied power to the rig should have been locked out. While it is clear from the photographs that the disconnect box was equipped with a lock and hasp, and that it was in place at the time the citation issued, Mr. King's testimony that the switch handle was in the ON position, indicating that the power was on the cable exiting the box, has not been rebutted by the respondent.

Respondent concedes that the drill rig switchbox was not locked out (Tr. 195). Its defense to the citation is based on the fact that the drill itself was deenergized, that the electrical source to the drill motor was disconnected, and that mechanical work to complete the installation of a new motor had not been completed. In addition, since several steps were required to activate the flow of current to the motor legs, respondent also argues that it would have been impossible for the motor legs to have been energized without the knowledge of the individuals working on the equipment.

Respondent's arguments in defense of the citation are rejected. In my view, these arguments go to the extent of the gravity or seriousness of the situation presented at the time the citation issued. Although the facts may support a finding that respondent was in partial compliance with section 57.12-16 by deenergizing the drill rig motor by disconnecting it from its power source, and that the drill switchbox itself was not energized or functional due to the maintenance which was taking place, the fact is that in this case the main disconnect switchbox which supplied power to the rig was energized and was not locked out by throwing the switch to the OFF position and locking the box in that mode. Therefore, to this extent, I conclude that MSHA has established a violation of the second sentence of section 57.12-16, which clearly requires that power switches be locked out while mechanical work is being performed. The "other measures" preventative arguments advanced

by the respondent leave too much to the imagination and they are rejected as an absolute defense to the citation, but may be considered in mitigation of the seriousness of the citation condition. Citation No. 331891-E is AFFIRMED.

Citation No. 333658, December 13, 1978, 30 C.F.R. § 57.12-34, states as follows: "The portable flood lights around the Boyles Brothers drill rig at 9 IVL East 929 level were not guarded. The light bulbs could easily be reached while standing on drill rig platform."

Section 57.12-34 requires that "portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded."

Although it is true that the drill rig lights were not energized at the time the citation issued, this fact may go to the gravity of the citation but it may not serve as an absolute defense to the violation. The record establishes that none of the lights on the drill rig were guarded. The light depicted on photographic Exhibit G-2 would be within one's reach and respondent concedes that it could present a hazard if it were energized. With regard to the other lights shown in Exhibit G-1, while Inspector Enderby stated on the face of the citation that they could easily be reached while standing on the drill rig platform, I believe his real concern was his belief that the lights could have been broken by a drill bit used on the drill. Mr. Hack testified that the lights are some 12 feet off the mine floor and approximately 10 feet off the drill platform.

I find that the location of the three lights as shown in Exhibit G-1 was such as to reasonably preclude a shock or burn hazard in the unlikely event they were broken by someone handling a drill bit. The location of the lights some 10 feet off the deck of the rig would place them out of the reach of someone who may inadvertently come into contact within any exposed filaments. As for the light bulb shown in Exhibit G-2, its location is such as to bring it within reach of anyone working in the area, and, as indicated above, respondent conceded that this unguarded light presented a hazard if it were energized. Accordingly, Citation No. 333658, as applied to the single unguarded drill rig light bulb, is AFFIRMED.

Citation No. 333657, December 12, 1978, 30 C.F.R. § 57.12-13, states as follows: "A bad splice was observed on the 440 volt power supply cable to the Chemtron Welder on South end of outside storke shop. The welder was being used at the time. A Tic Tracer was used to find this condition."

Inspector Enderby's citation alleges that the welder cable in question contained a "bad splice." That conclusion is not further elaborated on by the inspector and the citation is devoid of any specifics. However, his testimony clearly reflects that he issued the citation after visually observing that the splice contained some torn and deteriorated tape, and by use of an instrument called a Tic Tracer, he determined that the splice had somehow lost some of its original insulation qualities, thereby supporting his assertion that the splice was "bad."

Section 57.12-13 requires that permanent splices and repairs made in power cables be mechanically strong, insulated and provided with damage protection. The requirement that it be mechanically strong includes a requirement that the electrical conductivity of the splice be as near as possible to that of the original cable. Insulation must be to a degree at least equal to that of the original cable, and the splice must be sealed to exclude moisture. Damage protection must be as near as possible to that of the original cable, and must include good bonding to the outer jacket.

By failing to detail on the face of the citation the specific cable defects noted, it is difficult to ascertain from that notice how one can conclude that the splice was "bad." However, a review of Mr. Enderby's testimony reflects some doubt on his part that the cable was adequately sealed to exclude moisture or to provide damage protection. The evidence in support of this conclusion is limited to Mr. Enderby's visual observations that the taped splice was torn and somewhat deteriorated, coupled with his use of a Tic Tracer device. Mr. Enderby did not examine the splice after it was cut out and removed from service, he was not familiar with Climax's procedures for making splices, and he could not recall whether the cable was AC or DC. In these circumstances, I cannot conclude that MSHA has established that the so-called "bad splice" was in fact made in such a manner as to be in violation of the cited safety standard, and the reasons for my finding in this regard follow.

Mr. Enderby's use of the Tic Tracer to support his finding of a "bad" splice is somewhat suspect. To begin with, his testimony that he used the Tic Tracer to detect a drop or leakage in cable current is directly contrary to his testimony taken by deposition where he stated that he used the device as a means of determining whether the cable was a ground cable or a main source of power. Further, he did not establish to my satisfaction that the use of such a device is a reliable means for determining the existence of a "bad splice." As a matter of fact, Mr. Enderby candidly admitted that any current leakage indicated by a Tic Tracer is not in fact an indication of diminished insulation, and such a conclusion on his part came by "office conversations" with his fellow inspectors. Further, a review of the manufacturer's specifications concerning the use of the device (Exh. G-9), makes no reference to the fact that it may be used to detect faulty splices. As a matter of fact, the literature seems to indicate that the use of the device is limited to AC current, and I am not convinced from Mr. Enderby's testimony that he was at all certain as to whether the cable he cited was in fact AC or DC. Quite frankly, aside from his cursory observations that the tape used to make the splice was torn, I am not convinced that he made any real evaluation or assessment of the condition of the splice, and once observing that the outer splice tape was torn, he made a summary conclusion that the splice itself did not meet the requirements of section 57.12-13. In these circumstances, I conclude and find that MSHA has failed to establish a violation and the citation is VACATED.

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

The parties stipulated that Climax is a large mine operator and that any civil penalty assessments will not adversely affect its ability to remain in business. I adopt this stipulation as my finding in this regard.

Gravity

Citation No. 333658, concerning the unguarded light bulb on the drill rig, is nonserious. The rig was down for maintenance, no one was in the area, and the inspector conceded that the condition would be serious only if the lights were energized. The lights were not only deenergized, but the power switch had been locked out as a result of Mr. King's order (Tr. 63).

Citation No. 331891-D, concerning the open splice located 180 feet down the drift, is serious. Although the splice was hung on a nail, failure to provide jacket-to-jacket bonding exposed the splice to possible damage or saturation with water in the event it fell off the nail and into the water. The lack of an outer jacket also affected the mechanical strength of the splice and respondent's own witness admitted that this was the case.

Citation No. 331891-F, concerning the lack of a bushing on the main disconnect switchbox power cable is serious. Power was on the box and the cable was energized. The lack of any bushing or fitting would in time subject the cable to possible damage or becoming disconnected from the power source inside the box.

Citation No. 331891-C, concerning the inadequate bushing on the drill rig switchbox, is nonserious. The inspector's concern was over the possible cutting of the cable jacket caused by vibration of the rig. However, at the time the citation issued, the rig was down for maintenance, no one was present in the area, the motor was not energized, there was no power entering the switchbox, and the cable itself was not cut and was otherwise in good condition.

Citation No. 331891-E, concerning the failure to lock out the drill rig at the main disconnect switch, is nonserious. While it is true that power was on at the main disconnect switch, the drill rig itself was not in operation since it was down for maintenance. The mechanical work being done on the drill was work connected with the motor. However, the motor was not energized and was disconnected from the rig. As a matter of fact, Inspector King did not know whether the motor was being taken out or being put back in.

Negligence

I conclude that each of the violations which have been affirmed resulted from ordinary negligence. I find that Climax failed to exercise reasonable care to prevent the cited conditions and I believe that closer attention to the work being performed and onshift or preshift inspections by qualified electrical personnel possibly could have prevented the conditions cited by the inspectors.

Good Faith Compliance

Citation No. 333657, concerning the unguarded lights on the drill rig, was abated on December 21, 1978, a day before the time fixed by the inspector, and this reflects rapid good-faith compliance by Climax. As for the remaining violations which I have affirmed, the record supports a finding that Climax corrected the conditions cited in good faith after the order issued and after being advised of the conditions by the inspector.

History of Prior Violations

Climax's prior history of violations is reflected in Exhibit G-9, an MSHA computer printout indicating 159 paid violations for the period covering December 12, 1976, through December 11, 1978. Included among these prior paid violations are 17 for violations of section 57.12-8, three for prior violations of section 57.12-13, five for prior violations of section 57.12-34, and one prior violation of section 57.12-16.

For an operation the size of Climax, I cannot conclude that its overall prior history of violations is necessarily a poor one. However, I take note of the 17 prior citations for violations of the cable fitting and bushing requirements of section 57.12-8, and an inference can be made that this seems to be a recurring problem which Climax needs to address in its mining operation.

ORDER

Docket No. DENV 79-196-M

In view of the foregoing findings and conclusions made in this case, the section 107(a) imminent-danger order, No. 331891, December 11, 1978, is VACATED.

Docket No. WEST 79-27-M

On the basis of the foregoing findings and conclusions, the following citations are VACATED, and the proposals for assessment of civil penalties, insofar as these alleged violations are concerned, are DISMISSED:

Citation No.	Date	30 C.F.R. Standard
331891-A	12/11/78	57.12-30
333657	12/12/78	57.12-13

Citation No. 331891-B, December 11, 1978, 30 C.F.R. § 57.4-11, was DISMISSED from the bench upon motion by MSHA, and it is VACATED.

On the basis of the foregoing findings and conclusions concerning the citations which I have affirmed, and considering the six statutory criteria set forth in section 110(i) of the Act, civil penalties are assessed as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment
331891-C	12/11/78	57.12-8	$200
331891-D	12/11/78	57.12-13	250
331891-E	12/11/78	57.12-16	200
331891-F	12/11/78	57.12-8	250
333658	12/13/78	57.12-34	20
			$920

Respondent is ORDERED to pay the civil penalties assessed in these proceedings, as indicated above, in the total amount of $920 within thirty (30) days of the date of these decisions.

George A. Koutras
Administrative Law Judge

Distribution:

Thomas Bastien, Harvey P. Wallace, Esqs., Tallmade, Tallmadge, Wallace & Hahn, Suite 2400, 717 17th Street, Denver, CO 80202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

OCT 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 80-363-M A.O. No. 45-02684-05002
v.	:	QS-C-109 Mine
N. A. DAGERSTROM, INC., Respondent	:	

DECISION AND ORDER

Pursuant to Rule 11, the Secretary moves for an order vacating the citation which underlies the charge of violation of the mandatory safety standard cited. The motion is predicated on the fact that the solicitor's pretrial investigation of the charge conclusively demonstrates that no violation, in fact, occurred.

Based on an independent evaluation and de novo review of the circumstances, I conclude the evidence is insufficient to support the charge upon which the proposal for penalty rests.

Accordingly, it is ORDERED that the motion to withdraw the proposal for penalty, vacate the citation, and dismiss this matter be, and hereby is, GRANTED and the captioned matter be, and hereby is, DISMISSED WITH PREJUDICE. Climax Molybdenum Company, 2 FMSHRC ___ (October 7, 1980).

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

17 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control Nos.
v.	:	KENT 80-39	15-10815-03020
	:	KENT 80-85	15-10815-03023
PYRO MINING COMPANY, Respondent	:	KENT 80-128	15-10815-03024
	:	KENT 80-143	15-10815-03025
	:	Wheatcroft Mine	
	:	KENT 80-86	15-11408-03020
	:	KENT 80-129	15-11408-03021
	:	KENT 80-144	15-11408-03022
	:	KENT 80-163	15-11408-03023
	:	KENT 80-164	15-11408-03024 V
	:	KENT 80-165	15-11408-03025
	:	Pride Mine	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
H. Michael McDowell, Safety Director for Pyro Mining Company, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a written notice of hearing dated July 28, 1980, a hearing was held in the above-entitled proceeding on September 17, 1980, in Evansville, Indiana, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence with respect to the contested issues, I rendered the bench decision which is set forth below (Tr. 89-95):

As was indicated at the beginning of this hearing, only one alleged violation has been contested and that is related to the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-164.

The issues raised in each civil penalty case are whether a violation occurred and, if so, what civil penalty should be assessed based on the six criteria set forth in section 110(i) of the Act. The first question that has to be answered is whether a violation occurred. I shall make some findings of fact on which my decision will be based. Those findings are set forth in the following numbered paragraphs.

Findings of Fact

1. An inspector on September 17, 1979, went into the Pride Mine of Pyro Mining Company for the purpose of making a regular inspection. On his way into the mine, he was accompanied by the safety director for the Pride Mine. During the trip into the mine, the inspector traveled down the supply road. At that time, he noticed that a number of posts, which should normally have been installed under crossbars along the supply road, had been knocked down. He determined that a sufficient number had been knocked down to require the citing of a violation of a mandatory safety standard.

2. The inspector issued Order No. 798942 dated September 17, 1979, citing a violation of 30 C.F.R. § 75.202. The order alleged that 17 supports had been knocked out from under crossbars and that the knocked-down supports extended for 15 crosscuts along a total distance of 2,100 feet. Later it was indicated that the probable distance was 900 feet because there were 15 crosscuts and each crosscut was 60 feet in length.

3. The inspector's order was terminated within a short period of time, the order having been issued at 8:30 a.m. and the termination having been issued at 10:20 a.m. The timbers had been left lying in the supply road and all that was required for abatement was that they be reset. Eight miners were used for the purpose of resetting the timbers.

4. Section 75.202 provides in pertinent part, "[e]xcept in the case of recovery work, supports knocked out shall be replaced promptly."

5. Respondent's roof-control plan provides in Safety Precaution No. 31 that "[c]rossbars and railbars shall be

supported by posts; however, if conditions permit, crossbars or railbars installed inby the dumping point shall be bolted or strapped to the roof and legs will be placed under the bolted bars when the dumping point is moved inby the bolted bars." The testimony of both the inspector and the safety director indicates that the company does not have to install the crossbars except when the company feels that the conditions require the installation of crossbars. Both the company's representative and the Secretary's attorney agree that once the crossbars are installed, if posts are knocked down, they should be replaced.

I believe that those paragraphs constitute the primary facts to be considered in this case. I think that the facts support without any doubt that there was a violation of section 75.202 because supports had been knocked down and they had not been promptly replaced. Having found that a violation occurred, it is necessary now to consider the six criteria. There were stipulations by the parties with respect to some of the criteria.

First of all, it was stipulated that respondent is subject to the provisions of the 1977 Act and that I have jurisdiction to hear the case. It was stipulated that respondent operates the Pride Mine and that the inspector was a duly authorized representative of the Secretary of Labor when he issued the order here involved. It was stipulated that the order was issued under section 104(d)(2) of the Act.

The first criterion is the size of the operator; and it was stipulated that respondent is a large operator. One of the criteria is whether the payment of penalties would cause respondent to discontinue in business. It was stipulated that a penalty assessed in this case would not adversely affect respondent's ability to continue in business. It was also stipulated that the company demonstrated a normal good faith effort to achieve rapid compliance after the violation was cited.

As to the criterion of history of previous violations, there was introduced as Exhibit 1, a computer printout showing that in all of respondent's mines, there have been 22 previous violations of section 75.202. For the Pride Mine, which is the one here involved, there have been three previous violations in the 24-month preceding the violation here involved. As the Secretary's counsel noted, however, all three of those occurred between March 1979 and September 11, 1979. Those violations establish an unfavorable trend in violations of section 75.202; therefore, any penalty assessed in this case should be increased by $150.00 because of the adverse history of previous violations.

The remaining criteria of gravity and negligence are the ones that generally determine whether a penalty should be large or in a low range of magnitude. Of course, anytime that a large operator is involved, the penalty should be larger than if only a very small company is involved. The gravity of the violation in this instance was only moderate because there were a number of extenuating circumstances. For example, respondent's safety director testified that respondent had made a number of safety installations in the supply road to increase its security because it was anticipated that the road would be used for a considerable period of time and the company wanted it to be as safe as it could be made. Consequently, not only had some conventional roof bolts been installed in the travelway on a 5-foot spacing plan, but some resin roof bolts had also been placed in the haulageway. In addition, some 7-foot conventional bolts had been placed at strategic points, such as intersections, for improving the stability of the roof.

Finally, the company had installed crossbars on not more than 4-foot centers through the entire 900-foot area here involved. When it is considered that out of the total of 450 posts that would have been situated in this 900-foot area, only 17 were missing, and that there were a large number of roof bolts in addition, there was not a great likelihood that a roof fall would have occurred solely because of 17 posts having been knocked out.

As to the criterion of negligence, I think that ordinary negligence was involved because, so far as respondent's safety director was able to determine, the supports had been knocked out on the first shift of the week which began at midnight on Sunday. At that time, the equipment necessary to operate an entire section had been moved down the supply road which was only 14 to 16 feet wide. There was close tolerance of equipment being moved through the haulageway and some likelihood of hitting timbers was prevalent. Additionally, a continuous-mining machine had been used in the supply road to increase the height by taking out some of the bottom or floor and all of these activities had occurred only a short time prior to the inspection of September 17.

Nevertheless, regardless of the length of time between the knocking out of the timbers and their discovery by the inspector, a supervisor would have been in charge of the movement of the equipment or any work that took place because this was the primary way to get in and out of the mine. Consequently, some supervisory person was present and should have seen the timbers when they were knocked down. Safety Precaution No. 31 requires that timbers be replaced promptly,

which means as soon as they are knocked down they are supposed to be replaced. Consequently, there was at least ordinary negligence in respondent's failure to replace the posts. Although the seriousness of the violation was not great, I must take into consideration the fact that several of these posts, as many as four or five, were in some places consecutively knocked down which had the effect of possibly weakening the roof in a given area. Four or five posts knocked down in a single area should have been more noticeable than a single post or posts knocked down out of sequence.

By way of summary, respondent is a large operator and there are previous violations of this same section. There was a moderate degree of seriousness, but the violation involves a roof-control problem which is very important in ensuring safety to the miners. The circumstances show that the supervisor in charge had ignored the fact that these posts had been knocked down and had not been replaced. Considering all of these factors and mitigating circumstances, I find that a penalty of $500.00 is warranted, to which $150.00 should be added under the criterion of history of previous violations, making a total penalty of $650.00 for this violation of section 75.202.

Settlement

This consolidated proceeding involves a total of 57 alleged violations of the mandatory health and safety standards for which civil penalties are sought in 10 Proposals for Assessment of Civil Penalty. A settlement agreements was entered into by the parties with respect to all of the Proposals except for the Proposal filed in Docket No. KENT 80-164 which is the subject of the bench decision set forth above. Under the settlement agreement, respondent has agreed to pay the full amount proposed by the Assessment Office with respect to the remaining 56 alleged violations.

When a respondent agrees to pay the full amounts proposed by the Assessment Office, it becomes necessary to consider whether the Assessment Office reasonably evaluated all of the six criteria set forth in section 110(i) of the Act when it arrived at the penalties proposed for each of the violations involved in the settlement agreement. As I have already indicated in my bench decision, the parties' stipulations cover some of the criteria. The Assessment Office correctly considered respondent to be a large operator and the Assessment Office appropriately gave respondent credit for having shown a normal, or better than normal, good faith effort to achieve rapid compliance. It has also been stipulated that payment of penalties would not cause respondent to discontinue in business.

The Assessment Office, pursuant to 30 C.F.R. § 100.3, assigned from four to 10 penalty points under the criterion of history of previous violations. A computer printout was introduced in the record as Exhibit 1. That

exhibit lists respondent's previous violations for which penalties have been paid. While Exhibit 1 shows in a few instances that the Assessment Office should have assigned more penalty points than it did for some alleged violations, Exhibit 1 also shows that the Assessment Office assigned, in some instances, more penalty points than are supported by the data in Exhibit 1. A balancing of the overages and underages in the Assessment Office's assignment of penalty points under the criterion of history of previous violations, when compared with the data in Exhibit 1, gives a result which enables me to find that the Assessment Office reasonably evaluated respondent's history of previous violations with respect to the alleged violations involved in the settlement agreement.

I have examined the Assessment Office's assignment of penalty points under the criteria of negligence and gravity and I find that they are also reasonable and should be accepted for purposes of the settlement agreement.

It should be noted that the Assessment Office considered that it had made an error in listing one of the alleged violations in Docket No. KENT 80-86 with respect to Citation No. 800321 dated October 2, 1979, which shows a violation of section 75.523. As to that particular alleged violation, the Proposed Assessment in Docket No. KENT 80-86 indicates that the Assessment Office proposed a zero penalty. Therefore, in the listing of the amounts to be paid under the settlement agreement in paragraph (B) of the order accompanying this decision, the alleged violation of section 75.523 in Docket No. KENT 80-86 is shown to have a zero penalty because the Assessment Office believes that no violation of section 75.523 occurred. It is necessary that I show that particular violation in my list of settlement penalties so that it will not appear that I have made an error in considering all of the violations alleged by the Proposals for Assessment of Civil Penalty in this proceeding.

Since two of respondent's safety directors were present at the hearing, I discussed with them some matters which needed clarification or emphasis. For example, although the inspector refers to the fact that roof bolts should be no more than 2-1/2 feet from the ribs in Citation No. 798220 in Docket No. KENT 80-129, in Docket No. KENT 80-163, there are references in Citation Nos. 799818 and 800865 to the fact that roof bolts should be no more than 3 feet from the ribs. It was agreed at the hearing that the roof-control plan requires bolts to be no more than 3 feet from the ribs. The reference to 2-1/2 feet was not in accordance with respondent's roof-control plan because the plan has not been amended at any time to change the distance from 3 to 2-1/2 feet (Tr. 5).

One aspect of the settlement which gives me some concern is that there are nine alleged violations of section 75.200 among the 56 violations involved in the settled cases. The Assessment Office assigned some rather low penalties for the violations of section 75.200. The only reason that I have agreed to approve a settlement involving nine roof-control violations for which the Assessment Office has proposed low penalties is that all of the violations are relatively nonserious because most of them involve a failure

to have proper spacing for just four or five roof bolts. Inasmuch as a small area was involved in the alleged violations, it does not appear that the failure to comply with the roof-control plan would have exposed the miners to any serious hazard. Nevertheless, I emphasized at the hearing that I was disturbed by the fact that nine violations of the roof-control plan were involved in this proceeding (Tr. 6).

I also pointed out to respondent's safety directors that I felt five different violations with respect to the cutting machine indicated that the miners had not been as careful as they should have been in operating the cutting machine and in performing work on it (Tr. 7). I also expressed concern at the hearing about the fact that the settlement cases involved repetitious violations of section 75.316 for respondent's failure to ensure that permanent stoppings were promptly constructed within three crosscuts of the working face. Respondent's safety directors indicated that they would increase their efforts to avoid the repetitious violations which were pointed out to them at the hearing.

Aside from the matters discussed above, I have found no reasons to disagree with the assessments proposed by the Assessment Office for the 56 violations which were the subject of the settlement agreements. Therefore, I find that the motion for approval of settlement should be granted and that the settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement with respect to nine of the 10 Proposals for Assessment of Civil Penalty is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement and in accordance with my bench decision in the contested case in Docket No. KENT 80-164, supra, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $5,942 which are allocated to the respective dockets and violations as follows:

Contested Case

Docket No. KENT 80-164

Order No. 798942 9/17/79 § 75.202.....	$ 650.00

Settlement Cases

Docket No. KENT 80-39

Citation No. 798764 7/23/79 § 75.316.....	$ 150.00
Citation No. 797210 7/30/79 § 75.313-1.....	195.00
Citation No. 798928 8/27/79 § 75.200.....	170.00
Citation No. 798929 8/27/79 § 75.503.....	72.00

Citation No. 797219 8/30/79 § 75.1107-16(b).....		106.00
Citation No. 798600 9/6/79 § 77.400(c).....		180.00
Total Settlement Penalties in Docket No. KENT 80-39....	$	873.00

Docket No. KENT 80-85

Citation No. 798247 9/10/79 § 75.523.....	$	150.00
Citation No. 798249 9/11/79 § 75.503.....		78.00
Citation No. 798250 9/11/79 § 75.1107-16.....		130.00
Citation No. 798255 9/17/79 § 75.503.....		90.00
Citation No. 799789 9/25/79 § 75.1722(b).....		170.00
Citation No. 799790 9/25/79 § 75.1722(a).....		140.00
Citation No. 799792 9/25/79 § 75.1103-8(b).....		72.00
Citation No. 799798 9/29/79 § 75.401.....		122.00
Total Settlement Penalties in Docket No. KENT 80-85....	$	952.00

Docket No. KENT 80-86

Citation No. 798217 9/11/79 § 75.1401-1.....	$	160.00
Citation No. 799151 9/12/79 § 75.302-1.....		98.00
Citation No. 799149 9/13/79 § 75.503.....		40.00
Citation No. 799154 9/14/79 § 75.503.....		48.00
Citation No. 799156 9/14/79 § 75.503.....		48.00
Citation No. 798943 9/17/79 § 75.1722.....		106.00
Citation No. 800138 10/2/79 § 75.503.....		44.00
Citation No. 800139 10/2/79 § 75.503.....		44.00
Citation No. 800140 10/2/79 § 75.1107-16(b).....		48.00
Citation No. 800321 10/2/79 § 75.523.....		0.00 1/
Citation No. 800323 10/5/79 § 75.200.....		90.00
Citation No. 800324 10/5/79 § 75.604(b).....		84.00
Citation No. 800326 10/5/79 § 75.1105.....		84.00
Citation No. 800343 10/12/79 § 75.1101-1.....		48.00
Total Settlement Penalties in Docket No. KENT 80-86....	$	942.00

Docket No. KENT 80-128

Citation No. 800307 10/10/79 § 75.1722(b).....	$	140.00

Docket No. KENT 80-129

Citation No. 9948661 8/30/79 § 70.250.....	$	36.00
Citation No. 798220 9/11/79 § 75.200.....		98.00
Citation No. 798961 9/11/79 § 75.200.....		98.00

1/ This alleged violation was included in Docket No. KENT 80-86 by the Assessment Office in error and no penalty was proposed for the violation (Tr. 12).

Citation No. 799150 9/12/79 § 75.200.....		56.00
Citation No. 800345 10/15/79 § 75.316.....		72.00
Citation No. 800346 10/15/79 § 75.316.....		84.00
Citation No. 799809 10/18/79 § 75.1722(a).....		106.00
Citation No. 800352 10/25/79 § 75.1400-2.....		38.00
Total Settlement Penalties in Docket No. KENT 80-129...	$	588.00

Docket No. KENT 80-143

Citation No. 798336 7/19/79 § 75.503.....	$	48.00
Citation No. 799125 8/14/79 § 75.403.....		60.00
Citation No. 799921 11/15/79 § 75.313-1.....		150.00
Total Settlement Penalties in Docket No. KENT 80-143...	$	258.00

Docket No. KENT 80-144

Citation No. 9948716 10/4/79 § 70.250.....	$	160.00
Citation No. 801121 11/5/79 § 75.316.....		195.00
Total Settlement Penalties in Docket No. KENT 80-144...	$	355.00

Docket No. KENT 80-163

Citation No. 800342 10/12/79 § 75.1100-2(b).....	$	52.00
Citation No. 800353 10/25/79 § 77.400.....		84.00
Citation No. 799818 11/2/79 § 75.200.....		106.00
Citation No. 800865 11/9/79 § 75.200.....		122.00
Citation No. 800866 11/9/79 § 75.1308.....		60.00
Citation No. 800874 11/19/79 § 75.200.....		114.00
Citation No. 800875 11/19/79 § 75.1722(a).....		66.00
Citation No. 800877 11/19/79 § 75.1722(b).....		106.00
Total Settlement Penalties in Docket No. KENT 80-163...	$	710.00

Docket No. KENT 80-165

Citation No. 800344 10/15/79 § 75.200.....	$	90.00
Citation No. 799808 10/18/79 § 75.200.....		90.00
Citation No. 800872 11/19/79 § 75.400.....		60.00
Citation No. 800873 11/19/79 § 75.316.....		48.00
Citation No. 800855 11/30/79 § 75.1306.....		72.00
Citation No. 799492 12/4/79 § 75.313-1.....		114.00
Total Settlement Penalties in Docket No. KENT 80-165...	$	474.00

Total Settlement Penalties in This Proceeding..... $5,292.00

Total Contested and Settlement Penalties in This Proceeding..... $5,942.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Pyro Mining Company, Inc., Attention: H. Michael McDowell, Director of Training, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 79-86
	:	A.O. No. 40-02292-03002
v.	:	
	:	Moon Tipple
BILLY MOON TRUCKING COMPANY, INC., Respondent	:	

DECISION

Appearances: William F. Taylor, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
Billy W. Moon, pro se, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns 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), charging the respondent with four alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened at Chattanooga, Tennessee, on September 30, 1980. The parties waived the filing of posthearing proposed findings and conclusions, were afforded an opportunity to present arguments in support of their respective positions on the record, and agreed to a bench decision which is herein reduced to writing as required by Commission Rule 65, 29 C.F.R. § 2700.65.

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, 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 charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

The citations in this case were issued by MSHA inspector Billy C. Layne on November 1, 1978, during the course of a regular inspection of the respondent's mining operation. The citations and the conditions or practices cited by Mr. Layne are as follows (Exhs. P-1 through P-4):

Citation No. 240757, November 1, 1978, 30 C.F.R. § 77.410: "An automatic warning device was not provided for the 530 end-loader that was being operated at the tipple. The warning device shall give an audible alarm when the equipment is put in reverse."

Citation No. 240758, November 1, 1978, 30 C.F.R. § 77.400(a): "A guard was not provided over the bottom part of the two sprockets in the bottom of the hopper."

Citation No. 240759, November 1, 1978, 30 C.F.R. § 77.400(c): "A guard was not provided around the tail pulley under the coal hopper."

Citation No. 240760, November 1, 1978, 30 C.F.R. § 77.400(b): "A guard was not provided over the (V) belt on the shaker line.

Petitioner's Testimony and Evidence

Inspector Layne testified to the circumstances surrounding each of the citations which he issued. He observed the front-end loader in operation in reverse and heard no backup alarm sound when the loader was operated in that mode. The loader was approximately 12 feet long and 7 feet wide and he discussed the matter with the operator of the loader who advised him that he would have the alarm repaired. Mr. Layne indicated that the respondent should have been aware of the inoperable alarm because the equipment is supposed to be checked out before it is operated and it was obvious that the alarm was not operating when the loader was in reverse. He did not know how

long the device was inoperable, no one was in the area where the loader was operating, and he believed the possibility of any injuries in these circumstances was remote, and the condition was abated in good faith (Tr. 8-19).

With regard to the lack of guards on the hopper sprockets, Mr. Layne sketched a diagram of the device (Exh. P-2(a)), and indicated that while the device was partially guarded, the guard did not cover the bottom sprocket parts which were exposed and which presented a hazard of someone being accidentally caught in them. The lack of guards was visually obvious, and an employee told him that the guards were taken off to facilitate the cleaning of the hopper and were never put back on. He did not know how long the guards were off the equipment, but no one was working in the area at the time. Further, the hopper operator operates it by means of a control panel located some 10 or 12 feet away from the sprocket location, and when he leaves his work station he usually shuts the controls down. Mr. Layne considered the lack of guards as serious if someone were designated to work in the area near the sprockets. However, in view of the fact that no one was assigned to work there on the day the citation issued, he believes it was nonserious (Tr. 19-28).

With respect to the lack of a guard at the hopper tail pulley, Mr. Layne indicated that it is located some 15 to 18 feet from the control panel and since no one was near it at the time, he believed the violation was nonserious. However, men do go near the area to perform maintenance or to grease the pulley and they could be exposed to a hazard. The pulley is usually guarded by a piece of plywood which is adequate as a guard. However, on the day in question the plywood guard was not in place and was lying nearby, and he had no reason to dispute Mr. Moon's statement that the guard was taken off to facilitate cleaning of the pulley and someone forgot to put it back in place (Tr. 38-45).

Regarding the failure to guard the shaker line V-belt, Mr. Layne stated that a man was working on the belt picking slate off the belt by hand, but this task in and of itself is not a violation. While located some 12 to 14 feet from the unguarded belt, the man would have ocassion to go near the unguarded belt to grease the motor or to check it for icing conditions, and if the belt broke, he would be exposed to a hazard from the whipping action of the broken belt (Tr. 47-50). The belt was an overhead belt located some 12 to 15 feet off the ground, and it was never guarded in the past (Tr. 51). He believed the violation was nonserious because any injury resulting from the lack of guard would be a "freak accident" (Tr. 52, 56-57).

Respondent's Testimony and Evidence

Mine operator Billy Moon was given an opportunity to cross-examine the inspector, and he also testified as to the circumstances surrounding each of the citations. He did not dispute the conditions cited by the inspector, but rather, offered explanations and clarifications concerning the circumstances surrounding each of the citations. Regarding the lack of an alarm

on the loader, he stated that it was a new loader which was delivered to the mine a day before the inspection and the supplier checked it out and found the alarm was defective but did not notify him (Tr. 21).

Regarding the lack of a tail pulley and sprocket guards on the hopper, Mr. Moon testified that the guards are installed in such a manner as to facilitate their easy removal so that the belts can be cleaned on the afternoon of each day when the plant is shut down for this purpose. It is not normal practice to operate the tipple without the guards in place, and he conceded that they were not replaced after the cleanup operations were completed. He was not present when the citations were issued, and Mr. Layne agreed with his explanations concerning the lack of guards when he observed the violations (Tr. 29-37, 42).

With respect to the lack of a guard on the shaker V-belt, Mr. Moon stated that it was never guarded because he believed it was rather isolated by its position some 15 feet off the ground, and the belt moves at a relatively slow rate of speed. There was a coal storage bin directly under the belt location and no one would be in that area. However, he did not dispute the inspector's assertion that the belt was located on a platform and that there was a work access near the belt. He conceded the remote possibility of the belt breaking and flying off and that a "freak accident could happen" (Tr. 53-57).

Findings and Conclusions

I conclude and find that the testimony and evidence adduced by the petitioner in this proceeding establishes the fact of violations as to each of the citations issued by Inspector Layne. While a backup alarm was installed in the loader in question, it was not in operation when the inspector observed the equipment operating in reverse and respondent conceded this fact. As for the hopper-guarding violations, it is clear that while guards are normally in place on the equipment, they were not installed when the inspector viewed the equipment, and the V-belt was not guarded at all. All of the citations are AFFIRMED (Tr. 67-69).

Size of Operations and Jurisdiction

The testimony adduced in this proceeding reflects that respondent operates a very small mining operation consisting of a tipple operation where coal is sized and prepared for sale to customers, including several textile mills, schools, and others. Respondent employs two or three employees to operate the tipple, and he also owns five trucks which are used to haul coal to and from the tipple operation. During 1978, the tipple operated on an intermittent basis, and at the current time, it operates at 50 percent capacity. Respondent mines no coal as such, but purchases coal as needed to fill customer orders. Coal is purchased from strip and underground mines located in Tri-cities and Alabama, including the Black Diamond Coal Company and Russell Mining Company. Sales of the processed coal are made within the state of Tennessee as well as to several textile mills in the State of

Georgia, and the volume of coal processed at any given time is dependent on customer requirments, and range from 300 to 500 tons a day, or as much as 1,000 tons a week. While Mr. Moon himself is not at the tipple site at all times, he is there on an intermittent basis and the operation is supervised by a certified mine foreman.

Respondent conceded, and I conclude and find that respondent is subject to the Act and to MSHA's enforcement jurisdiction (Tr. 65). Petitioner stipulated that respondent is a small operator and I adopt this as my finding in this matter.

History of Prior Violations

Petitioner asserted that respondent has no prior history of any particular consequence, that it received three or four previous citations, and Inspector Layne testified that respondent has always timely corrected any violations brought to its attention. I conclude that respondent has a good record of prior citations and this has been taken into consideration by me in the penalties assessed in this matter (Tr. 4).

Good Faith Compliance

Inspector Layne testified that each of the citations issued in this case were abated by the respondent within the time fixed by him for that purpose. Although he actually terminated the citations on November 29, 1974, he did so at that time because that was the next opportunity he had to visit the tipple when it was actually in operation. In the circumstances, I find that respondent exercised good faith compliance in timely abating the conditions cited in each of the citations.

Gravity

Petitioner stipulated and agreed that based on all of the circumstances which prevailed at the time the conditions were noted by the inspector, all of the citations here were nonserious (Tr. 15, 28, 39), and I adopt these conclusions as my findings concerning the question of gravity (Tr. 69-74).

Negligence

I conclude and find that each of the citations resulted from respondent's failure to exercise reasonable care to prevent the conditions cited. An examination of the loader before it was placed in service would have detected the defective backup alarm, and failure to reinstall the guards taken off to facilitate cleaning is an indication of carelessness which could have been prevented by a supervisor checking the belts. As for the V-belt, while the respondent did not believe a guard was required, he nonetheless conceded that the lack of guard did present a hazard, although remote. I find each of the citations resulted from ordinary negligence (Tr. 76).

Effect of Penalties on Respondent's Ability to Remain in Business

Respondent conceded that the payment of the assessed civil penalties in this case will not adversely affect his ability to remain in business, and I conclude that this is in fact the case (Tr. 76).

Penalty Assessments

On the basis of the foregoing findings and conclusions, I believe that the following civil penalties are reasonable and appropriate in the circumstances and they are imposed by me for each of the citations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
240757	11/1/78	77.410	$ 50
240758	11/1/78	77.400(a)	45
240759	11/1/78	77.400(c)	35
240760	11/1/78	77.400(b)	30
			$160

Order

Respondent IS ORDERED to pay civil penalties in the amount of $160 as indicated above within thirty (30) days of the date of this decision, and upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204 OCT 17 1980

UNITED STATES STEEL CORPORATION, GENEVA MINE, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	NOTICE OF CONTEST DOCKET NO. WEST 80-312-R CITATION NO. 0790979 MINE: GENEVA MINE

DECISION

APPEARANCES: Louise Q. Symons, Esq.
United States Steel Corporation
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James H. Barkley, Esq. and Eliehue Brunson, Esq.
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1961 Stout Street
Denver, Colorado 80294, for the Respondent

BEFORE: Jon D. Boltz, Administrative Law Judge

STATEMENT OF THE CASE

Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978), the Contestant filed its Notice of Contest to the issuance of Citation No. 0790979, dated May 13, 1980. The citation alleged that the Contestant failed to follow its approved roof control plan in violation of 30 CFR 75.200. Specifically, it alleged that the spacing from the last roof bolt to the rib exceeded five feet in several areas of Contestant's coal mine.[1]

1/ Citation No. 0790979 alleges the following: "The approved roof control plan was not being follow[ed] in the 3 dip section in that the spacing from the Last roof bolt to the rib was in excess of 5' at the following Location, (1) in the no[.] 1 entry at 14 Location the spacing ranged from 6'3" to 10'6" (2) in the no[.] 2 entry at 6 Location the spacing ranged from 6' to 10 foot (3) in the no[.] 3 entry at 6 Location the spacing ranged from 6'4" to 8'7" (4) the no[.] 1 room along the Lower rib at 6 Location the spacing ranged from 6'3" to 8'5"."

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS

During the hearing in Denver, Colorado, on June 10 and 11, 1980, there was no evidence presented by Contestant challenging the measurements from the last roof bolt to the rib, and I therefore find that the distance did exceed 5 feet in the areas as alleged in the citation.

The question of whether or not there was a violation of 30 CFR 75.200 centers around the interpretation of several provisions of the roof control plan.

The MSHA inspector testified that the Contestant failed to comply with paragraph 22 of the roof control plan. (Tr. 26). The applicable part of paragraph 22 states as follows: "When heavy sloughing or heaving conditions require the roadway to be cleaned and/or brushed to a width greater than twenty feet, a supplementary row of timbers will be set on eight-foot centers leaving a minimum of sixteen feet of roadway for travel."

It is undisputed that entries were not initially driven wider than 20 feet. However, after a period of time sloughage occurs on the rib at the roof line and, as a result, the entry exceeds 20 feet when measured at the roof line. In all areas where violations were alleged to have occurred, the spacing from the last roof bolt to the rib exceeded 5 feet due to sloughage of the rib at the roof line.

The MSHA inspector testified that he considered the entire entry to be the roadway (Tr. 27), and that the distance between the ribs as measured at the roof exceeded 20 feet. Thus, supplementary rows of timber should have been set as required by paragraph 22.

The Contestant contends that the roadway must be measured at roadway level and that the width did not exceed 20 feet. The gist of the testimony is that neither Contestant nor Respondent agree as to how the width of a roadway is to be measured; on the surface between the sloughage from the rib lines, rib to rib half way up, or on the roof.

The roof control plan contains no definition of roadway or of how a roadway is measured. If the roadway is measured at the bottom of the entry, it did not exceed 20 feet in any area cited and there would be no violation of paragraph 22. However, if the roadway is measured the same as an entry, it might be measured at its widest span which would be at the roof line. Since that measurement exceeded 20 feet, paragraph 22 would not have been complied with. Neither side agrees as to what is "common accepted mining practice" when measuring a roadway.

"Since provisions of the roof control plan are not regulations of the Secretary, but are adopted by the operator and approved by the Secretary, there is no written legislative history to look to for clarification." Secretary of Labor v. Penn Allegh Coal Company, Inc. (Docket No. PITT 79-390-P, February 28, 1979). Much of the trial time was taken up with each party explaining through its engineers and inspectors the accepted method of measuring the roadway. The testimony convinced me that there was no meeting of the minds in regard to measuring a roadway, nor had there been when the roof control plan was entered into and approved. Both parties agreed that it is not the function of the Judge to "re-engineer" the roof control plan, but merely to interpret it as contained within the four corners of the instrument. I agree. I find that the applicable part of paragraph 22 is unclear and ambiguous. Therefore, it is inapplicable in determining whether or not there was a violation of Contestant's roof control plan.

The MSHA inspector also stated that Contestant was in violation of that part of the plan which states: "On initial installation, bolts will not be installed more than 5 feet from the face or ribs." (Tr. 32). However, the witness subsequently testified that he did not know if the bolts as initially set were within 5 feet of the rib. Therefore, this evidence does not show a violation of the roof control plan.

The inspector testified that the Roof Bolting Plan as shown on the document designated as A3-1198-1, which is part of the roof control plan (Exhibit R-2), requires bolting on 5 foot centers throughout the mine (Tr. 35). The Contestant argues that the drawing showing the bolts as spaced 5 feet apart applies only to an intersection (Tr. 289; Contestant's post hearing brief, pg. 2). I agree that the words "centers - 5 feet" are written in the middle of the intersection. However, I also find that the entire diagram, including the entry, two cross-cuts and the intersection, are shown as being roof bolted on 5 foot centers. In addition, the drawing also shows the edge of a roadway commencing from the entry and turning into a cross-cut along with the proper placement of the roof bolt in the turn.

The roof control plan does not state that additional roof bolts must be installed if sloughage from the rib at the roof line causes the distance to exceed 5 feet from the last roof bolt to the rib. But the drawing previously referred to as A3-1198-1 shows no exceptions from bolting on 5 foot centers. If the distance from the last roof bolt to the rib exceeds 5 feet because of sloughage, or for that matter any other reason, roof bolts must be installed in order to comply with that part of the plan. To conclude otherwise would require me to ignore what is plainly drawn on the Roof Bolting Plan.

There was evidence that putting in additional roof bolts after sloughage might require a miner to be momentarily under unsupported roof. (Tr 92). There was also evidence concerning the difficulty encountered in roof bolting over the area of sloughage. (Tr. 92, 93). These problems may or may not cause an unsafe condition to exist in connection with requiring additional roof bolts to be installed after the distance from the last bolt to the rib exceeds 5 feet. However it is unequivocal in the roof bolting plan that bolting on 5 foot centers is a requirement as it now exists. Since the plan, by regulation,[2] is periodically reviewed at least every six months by the Secretary, these are matters which may suggest that changes be made in the roof control plan.

I find that there was a violation of 30 CFR 75.200 as alleged in Citation No. 0790979 in that the distance from the last roof bolt to the rib exceeded 5 feet in the areas alleged in the citation, all of which was contrary to the provisions of the approved roof control plan.

ORDER

Citation No. 0790979 is hereby AFFIRMED.

Jon D. Boltz
Administrative Law Judge

2/ 30 CFR 75.200.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control Nos.
v.	:	VA 79-66	44-00281-03017 V
	:	VA 79-107	44-00281-03021
CLINCHFIELD COAL COMPANY, Respondent	:	Moss No. 2 Mine	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Gary W. Callahan, Esq. and Donald R. Johnson, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 29, 1980, a hearing in the above-entitled proceeding was held on May 1 and 2, 1980, in Abingdon, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence with respect to the contested issues, I rendered the bench decisions which are set forth below:

Docket No. VA 79-66 (Tr. 72-77)

This consolidated proceeding involves two Petitions for Assessment of Civil Penalty filed in Docket Nos. VA 79-66 and VA 79-107 on July 30, 1979, and September 26, 1979, respectively. First I shall deal only with the single violation which was alleged in Docket No. VA 79-66. In that docket, MSHA's Petition alleged a violation of section 75.200 based on Order No. 678352 dated February 12, 1979.

In a civil penalty proceeding, the issues are whether or not a violation occurred and, if so, what penalty should be assessed under the six criteria set forth in section 110(i) of

the Act. As to the question of whether a violation occurred, the inspector's testimony shows that he believed that a violation of section 75.200 had occurred because a permanent stopping had been constructed in a crosscut to the left of the No. 1 entry in the 1 West 025 Section of Clinchfield's Moss No. 2 Mine. The inspector believed that the men who constructed the stopping had gone out from under supported roof to do so. According to the inspector's testimony, there was a cavity in the crosscut approximately 17 feet in length. The inspector said that, insofar as he could tell, there was about a foot between the 17-foot cavity and the stopping. There were three roof bolts between the stopping and the cavity so that a 1-foot protected area existed along the stopping. The inspector believed that the men who constructed the stopping would necessarily have had to have been under the unsupported area to construct the stopping. The inspector did not think that the men could have bent over and picked up cinder blocks and stacked them while remaining within the protected 12-inch area.

The inspector's conclusion that the stopping was constructed by men who worked under unsupported roof is based on his examination of the site without his actually having seen anyone working there and without his actually having gone up close to the stopping. The location of the stopping, its proximity to the cavity, and the spacing of the roof bolts are shown on Exhibits 10 and B. The inspector stated that his measurement of the 17-foot cavity was made by tying a rock to a tape and throwing the tape and rock across the area under the cavity. His estimate as to how far the stopping was from the edge of the cavity was based on a visual examination made by the inspector while he was standing in the No. 1 entry at a point which, according to his testimony, would have been at least 17 feet from the stopping which had been constructed. Therefore, the inspector based everything that was stated in his Order No. 678352 on conjecture and on facts that the company has presented witnesses to rebut.

The company presented two witnesses who were the men who constructed the stopping. Their testimony is almost identical despite the fact, as Mr. Callahan pointed out, that they were sequestered during the testimony of the inspector and of each other. As Mr. Callahan also pointed out, the company has done all it can do to show that it feels that it was improperly cited for this particular violation. The testimony of the two men who constructed the stopping differed primarily in the fact that Mr. Salyer believed that the cavity in the crosscut was smaller than Mr. Fields thought it was. Otherwise, their testimony is identical in that both of them stated that they were told by their foreman to construct the stopping and to do

it safely. They are both members of a self-rescue team and they are both skilled in checking roof conditions.

It was their testimony that the only place that they saw in the crosscut that they considered hazardous was an area of from 3 to 4 feet in diameter or length. It is their testimony that they checked the roof bolt close to the cavity and found that it was 48 inches long and they believed that it was well anchored. They then loaded cinder blocks for constructing the stopping on a scoop which Mr. Salyer estimated to be about 25 feet long. They then drove the scoop completely under the cavity so that the bucket containing the cinder blocks was on the far end or front end of the scoop. The operator of the scoop remained on the rear end of the scoop but he was not under the cavity. According to their testimony, they had a protected area of from 4 to 6 feet within which to build the stopping. The protected area extended from the point where the bucket ended to the line along which the stopping was constructed. They say that they, at no time, were under unsupported roof. They also say that the roof bolts that they visually checked appeared to be sound, except for one bolt inside the cavity area under which they did not travel.

As both Mr. Cohen and Mr. Callahan have indicated, the case goes off on a question of credibility. I do not think credibility is necessarily something which, if decided in favor of Clinchfield's witnesses, means that the inspector was improperly concerned about the conditions which he observed. The inspector was dealing with an area which he believed to be hazardous and under which he did not wish to travel. I can respect his reasons for feeling that it was a hazardous area. Under those conditions, I think that he properly had additional support installed before any other work was done. Nevertheless, when I am confronted with two witnesses who say that they were there in person and who describe almost exactly, without contradiction between them, what was actually done, I think that the preponderance of the evidence shows that the men who constructed the stopping did not go under unsupported roof to construct the stopping.

In his testimony, the inspector alleged that there was a violation of section 75.200. The sentence in section 75.200, to which the inspector referred, states, "[t]he roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." What I am further required to consider is whether the inspector alleged the violation of section 75.200 by what is shown in his Order No. 678352. While the inspector testified here

this morning that the above-quoted portion of section 75.200 was violated, in his order, he stated "that the roof control plan for this mine was not being complied with on the 1 West 025 section in that a permanent stopping had been erected 17 feet inby any supported roof in the 3rd connecting crosscut outby the face of the No. 1 entry."

The ultimate decision as to whether a violation of section 75.200 occurred should be made on the basis of the language used by the inspector in his order. In the order, the inspector simply alleged a violation of the roof-control plan. In support of the violation, the inspector cited a provision in the roof-control plan on page 5, paragraph 3(c), which states that only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary supports are installed (Exh. 3). Since the witnesses for Clinchfield have stated that they did not go beyond the permanent supports to install the stopping, I do not think there was a violation of paragraph 3(c) of the roof-control plan. I find that the testimony given by the two men who built the stopping preponderates in this instance. Therefore, I find that the violation of section 75.200 alleged in Order No. 678352 did not occur. The order accompanying this decision will dismiss the Petition for Assessment of Civil Penalty in Docket No. VA 79-66.

Docket No. VA 79-107 (Tr. 84-93)

The Petition for Assessment of Civil Penalty in Docket No. VA 79-107 was filed on September 26, 1979, and alleged that two violations had occurred. One of the alleged violations was of 30 C.F.R. § 75.1101-15(d). With respect to that particular alleged violation, the parties entered into a settlement agreement which was placed in the record yesterday and about which I shall make some further comments when this decision is issued in final written form.

This bench decision is related to the other violation alleged in Docket No. VA 79-107, which is an alleged violation of section 75.1722(a). I have already stated in the other bench decision above what the issues are in a civil penalty case.

The first consideration is whether any violation has occurred. The inspector's citation here involved is No. 680970 which was issued on May 29, 1979, at 6:00 p.m. The inspector actually alleges three different violations of section 75.1722(a) but the Petition for Assessment of Civil Penalty seeks a penalty for only one alleged violation of section

75.1722(a). Consequently, when I assess the penalty in this instance I shall arrive at a single penalty after considering all three of the alleged violations.

I shall make some findings of fact which will show what conditions existed with respect to each of the alleged violations. My findings of fact will be given below in enumerated paragraphs.

1. The inspector first cited a violation with respect to a drive chain and in that instance he said that a part of the guard was still on the drive chain at the time that he examined it and it was his belief that it would have been possible for someone to have caught his hand in the top of the sprocket as well as at the bottom where the guard had been cut away.

2. The second violation alleged by the inspector was that the sprocket at the rock pick on the feeder had not been guarded. Although the chain which would drive the sprocket wheel here involved was not on the sprocket wheel, there was a cylinder beneath the sprocket which turned when coal passed beneath it. The result was that the turning of the cylinder caused the sprocket wheel to turn.

The inspector believed that it would have been possible for someone to have caught his hand or arm in the sprocket as it was being turned by this moving coal, and he had good reason to think so, because he said that the area around the sprocket wheel was uneven and he himself slipped and fell toward this sprocket. It caused him to realize that it was a dangerous area.

3. The third violation alleged by the inspector was in connection with the tram chain and sprocket wheels which operate only when the feeder is being trammed to a new location. There was no guard at all on this tram chain, but it was not in motion at the time that the inspector examined the feeder.

He could only assume that the machine had been trammed without the guard having been on it. He saw the guard some 300 feet outby the place where the feeder was then situated and he said that the condition of the teeth on the sprocket wheel made him feel that the feeder had been trammed recently and that as far as he was concerned the guard was not on at the time it was moved. That conclusion was, of course, an assumption on his part.

4. Respondent's chief electrician at the present time, and who was assistant chief electrician on May 29, 1979, gave

some testimony with respect to all three of these alleged violations. With respect to the chain drive and guard on the feeder, the chief electrician said that he had examined them on May 29, and while a portion of the guard was not in place, he felt that the remainder served as an adequate guard because he did not think that anyone would have been caught in it. Therefore, he would not have made any effort to change that guard if it had not been cited by the inspector. After it was cited by the inspector, however, they did install a guard completely enclosing the drive chain.

5. As to the rock pick, the chief electrician testified that the guard for that particular item had been bent and that he had instructed his miners to take that guard off and send it to the shop so as to have it either repaired or to have a new one made. Those instructions were being carried out at the very time that the rock-pick sprocket was cited by the inspector. The chief electrician also expressed an opinion that it would not have been likely for anyone to be hurt by this particular sprocket wheel because he said that at least half of it is protected, that is, on the outer side of the sprocket, there is a speed reducer which would tend to keep anyone from getting completely into the teeth of the sprocket wheel.

6. With respect to the guard on the tram chain, the chief electrician said that the mine superintendent had called him on May 29, on the day shift and had told him that there was no guard on that tram chain. The response of the chief electrician to that notification was that the pump should be disconnected which operates the tram so that the tram could not be moved until a guard could be put on it. The superintendent had the pump taken off. Therefore, the chief electrician says that the lack of a guard on the tram chain at the time that it was cited by the inspector could not have been a hazard to anyone.

Additionally, the chief electrician says that the feeder cannot be pulled around by any other vehicle, such as a scoop, because the track on which the feeder sits will not move unless everything is disconnected at the tram chain and that they normally will not try to move the feeder except under its own power.

I think that those are the primary facts that should be considered in connection with each of these alleged violations. I find that the violation alleged by the inspector with respect to the guard on the chain drive occurred because the inspector, I believe, looked at this with great care and the chief electrician agreed that it might be possible for someone to have gotten

hurt if he had fallen completely against this guard where it was not entirely in place. So, while the hazard may not have been as great as it would have been if the guard had been lacking entirely, there was still a violation of section 75.1722(a).

In connection with the rock pick, Mr. Johnson, the attorney for Clinchfield, has argued that no violation occurred at all and he bases that primarily on a contention that the chain on this particular sprocket wheel is removed and does not operate because the company has found it unnecessary to break up the coal coming from a continuous-mining machine.

Since the chain had been disconnected, it is Mr. Johnson's feeling that it is a type of wheel that does not move except when coal moves the drum underneath it. Inasmuch as it is not operated under power, Mr. Johnson believes that it does not need guarding or at least is not hazardous. I find that that particular argument is not well taken because the inspector himself testified that he practically fell into it.

Therefore, I find that the violation of section 75.1722(a) occurred here also. I particularly would like to point out, in this connection, that respondent itself recognized that this guard should be on this piece of equipment and a guard was in the process of being made or repaired when the citation was written. So, I think that respondent achnowledged that the guard does need to be installed on the feeder.

Finally, with respect to the guard for the tramming device on the feeder, obviously that was a violation of section 75.1722(a) because respondent was having it repaired and replaced at the time the citation was written and the superintendent himself had been the one who noticed that it was missing and who recommended or ordered that it be replaced.

Having found a violation of section 75.1722(a), I now have to assess a penalty by considering all of the six criteria. It was stipulated yesterday on the first day of the hearing that respondent is subject to the jurisdiction of the Commission and subject to the Federal Mine Safety and Health Act of 1977.

It was stipulated that respondent is a large operator and a member of the Pittston Coal Group. It was stipulated that Moss No. 2 Mine is fairly large and has 250 employees. It was also stipulated that payment of a reasonable penalty would not affect respondent's ability to continue in business.

That leaves for consideration the gravity and negligence associated with the violations. I find that the violations

were all moderately serious except the one at the rock pick. The one at the chain drive was partially guarded. The lack of a guard at the tram would not have been a hazard to anyone because the feeder could not have been trammed at the time the citation was written.

The violation at the rock pick was serious because the inspector came close to falling against the sprocket. The lack of a guard would not, by itself, have been serious if the conditions near the rock pick had not contributed to producing a possible injury. The foregoing conclusion is based on the existence of several hazardous conditions. There was an incline at the rock pick as well as water and mud in the area. There were enough accumulations along the rib that a person walking by the rock pick was forced toward the unguarded sprocket. Therefore, I find that the lack of a guard at the rock pick should be classified as serious and that the other two guarding deficiencies should be classified as moderately serious. As to the criterion of negligence, the fact that respondent disconnected and made inoperable the tram chain supports a finding of no negligence with respect to that violation because the lack of a guard had been found by the superintendent and the tram chain had been disengaged so that it could not be operated.

In connection with the guard at the drive chain, the chief electrician had examined that one and he reached a conclusion that it was satisfactory and did not need additional work. There was no negligence because there was only a difference of opinion between two people as to what was adequate or not adequate.

As to the rock pick, I think that there was negligence of a fairly high degree because the area was slippery and the guard had been taken off and nothing had been done to keep a person from slipping against the sprocket at the time the citation was written.

As to the criterion of whether there was a good faith effort to achieve rapid compliance, the inspector said that a good faith effort had been made to achieve compliance. The testimony shows that respondent was in the process of repairing two of the guards at the time they were cited and respondent very rapidly fixed the third one and had it installed before the inspector returned to the mine the next day. Therefore, respondent demonstrated an extraordinary effort to achieve rapid compliance in connection with the three guards.

Finally, consideration must be given to the criterion of history of previous violations and that information is

shown in Exhibit No. 1 in this proceeding. I have examined the exhibit and find that respondent had eight violations of section 75.1722 in 1974, one in 1975, one in 1976, 11 in 1977, three in 1978, and one in 1979, by January 9, 1979.

It has been my practice to increase a penalty otherwise assessable under the other five criteria if I find that respondent has violated the same section on a previous occasion even if there is only one previous violation. I always add at least $5 to $15 depending on the size of the company, but I also take into consideration the trend that I see in those violations. If I had seen an increase in the trend from 1977, when there were 11 violations, and that had gone to 12 and 13 for the next 2 years, I would have assessed a large penalty under the criterion of history of previous violations.

The fact that respondent had only three violations in 1978, and one in 1979, before being cited for the instant violation on May 29, shows that respondent is making an effort to maintain adequate guards on its equipment. The fact that the tram guard on the feeder was reported by the superintendent himself is a very good indication to me that respondent is making a sincere effort to avoid this type of violation. Consequently, in this instance, I shall assess $25 under the criterion of history of previous violations.

As indicated above, I am not going to assess a separate penalty for each of the three violations alleged in Citation No. 680970 since the Petition for Assessment of Civil Penalty seeks assessment of a single penalty for a violation of section 75.1722(a). Respondent, therefore, has not received notice that more than one penalty is to be assessed. Of course, inasmuch as all three violations alleged in Citation No. 680970 have been given individual consideration in my decision, there would be no difference in the total penalty even if I were to assess three separate penalties because the total penalty is based on all three violations and their effect on the health and safety of the miners.

In view of respondent's extraordinary effort to achieve rapid compliance, the fact that no negligence was associated with two of the three violations, and the fact that only one of the three violations was serious, an amount of $100 will be assessed for all three violations. The penalty of $100 will be increased by $25 under the criterion of history of previous violations to a total penalty of $125 for the violations of section 75.1722(a) involved in Citation No. 680970 dated May 29, 1979.

SETTLEMENT

Counsel for the parties moved at the hearing that I accept a settlement agreement with respect to the other violation for which a civil penalty is sought in the Petition for Assessment of Civil Penalty filed in Docket No. VA 79-107. Under the settlement agreement, respondent would pay the full penalty of $90 proposed by the Assessment Office for the violation of section 75.1101-15(d) alleged in Citation No. 680971 dated May 30, 1979.

Section 75.1101-15(d) requires that an adequate number of nozzles and reservoirs be supplied to provide maximum fire protection for belt drives and electrical controls along conveyors. The Assessment Office considered the violation to be relatively nonserious, to involve ordinary negligence, to have been associated with a normal effort to achieve compliance, and to warrant a civil penalty of $90. I find that the Assessment Office assigned a reasonable number of penalty points under 30 C.F.R. § 100.3 and derived an appropriate penalty. I further find that the motion for approval of settlement should be granted and that the settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement with respect to the violation of 30 C.F.R. § 75.1101-15(d) alleged in Citation No. 680971 in Docket No. VA 79-107 is granted and the settlement agreement is approved.

(B) The Petition for Assessment of Civil Penalty filed in Docket No. VA 79-66 is dismissed because the evidence submitted in this proceeding did not prove that the violation of 30 C.F.R. § 75.200 alleged in Citation No. 678352 dated February 12, 1979, occurred.

(C) Respondent, pursuant to the settlement agreement approved in paragraph (A) above, and pursuant to the bench decision above, shall pay civil penalties totaling $215.00 within 30 days from the date of this decision. The penalties are allocated to the respective violations as follows:

Citation No. 680970 5/29/79 § 75.1722(a)...(Contested)...	$125.00
Citation No. 680971 5/30/79 § 75.1101-15(d)(Settlement)..	90.00
Total Settlement and Contested Penalties in This Proceeding.....	$215.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Robert A. Cohen, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Gary W. Callahan, Assistant General Counsel, Donald R. Johnson, Esq., Attorneys for Clinchfield Coal Company, Lebanon, VA 24266 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 1980

LOCAL UNION 6025, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. WEVA 80-457-D
CONSOLIDATION COAL COMPANY, Respondent	:	MSHA Case No. HOPE CD 80-53
	:	Bishop Mine

ORDER OF DISMISSAL

On June 16, 1980, Complainant filed a complaint of discrimination, alleging that Respondent violated section 105(c) of the Act by refusing to pay a walkaround representative for time spent accompanying a Federal inspector during a "spot" inspection. Respondent filed a motion to dismiss on October 6, 1980, for failure to state a claim upon which relief can be granted. F.R. Civ.P. Rule 12(b)(6); 29 C.F.R. § 2700.1(b). In reply, Complainant filed a copy of a motion to stay submitted to Administrative Law Judge Lasher in a case involving the same parties and the same issue. Local 6025, UMWA v. Bishop Coal Co., Docket No. WEVA 80-429-D.

I agree with Judge Lasher's approach in the cited case and therefore will deny the motion for a stay and grant the motion to dismiss. The Commission has decided that a walkaround representative need not be paid for participating in a "spot" inspection. MSHA v. Helen Mining, Inc., 1 FMSHRC 1796 (November 21, 1979). That case is controlling here.

I must note that Complainant submitted a motion to stay without mentioning that the motion had been denied by Judge Lasher and that the Commission on September 16, 1980, had voted not to disturb the judge's decision.

However, I find no authority in the Act for granting Respondent's request for reimbursement of attorney's fees. Therefore, the request will be denied.

Complainant's motion for a stay is DENIED; Respondent's request for attorney's fees is DENIED; Respondent's motion to dismiss is GRANTED and, accordingly, the case is DISMISSED.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: Page 2.

Distribution: By certified mail.

Karl T. Skrypak, Esq., Counsel, Consolidation Coal Company, Consol Plaza, Pittsburgh, PA 15241

Dkt

Mary Lu Jordan, Esq., Attorney, United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, DC 20005

Special Investigation, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6210/11/12

2 0 OCT 80

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-279-M
	:	A.O. No. 33-01460-05002F
v.	:	Eldean Pit and Mill
ELDEAN GRAVEL COMPANY, Respondent	:	

DECISION AND ORDER

The parties move for approval of a settlement of this matter in the amount of $300, 60% of the amount initially assessed. Based on an independent evaluation and de novo review of the circumstances I conclude (1) that as a matter of law the violation charged is marginal in that it is not at all certain that the standard cited applies to the practice that resulted in the death of the front-end loader operator on October 15, 1979, (2) that assuming a violation occurred it was extremely serious in that a fatality resulted, and (3) that the death of the front-end loader operator was the result of his independent and inexplicably reckless disregard for safety while performing an operation not required by his employer. For these reasons, I conclude that despite the serious consequences of the front-end loader's grossly negligent conduct, that conduct is not rightly imputable to the operator.

Accordingly, it is ORDERED that the settlement proposed be, and hereby is, APPROVED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $300, on or before Friday, October 30, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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20 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. YORK 79-9-M
	:	A.C. No. 30-00589-05003
	:	
	:	Docket No. YORK 79-16-M
v.	:	A.C. No. 30-00589-05004
	:	
N. L. INDUSTRIES, INC., Respondent	:	MacIntyne Development Mine & Mill

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Secretary of Labor, Mine Safety and Health Administration, Petitioner; William R. Bronner, Esq., Office of General Counsel, N. L. Industries, Inc., Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

These are proceedings filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), to assess civil penalties against N. L. Industries, Inc. (hereinafter N. L.) for violations of mandatory safety standards. A hearing was held in Burlington, Vermont, on June 3 and 4, 1980. MSHA inspector John Rouba testified on behalf of MSHA. Merrell Arthur and Walter Chapman testified on behalf of N. L.

ISSUES

Whether N. L. violated the mandatory standards as charged by MSHA and, if so, the amounts of the civil penalties which should be assessed.

APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. § 820(i) provides in pertinent part:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 C.F.R. § 55.5-5 provides in pertinent part:

Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal of exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment.

30 C.F.R. § 55.9-2 provides: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

30 C.F.R. § 55.11-1 provides: "Mandatory. Safe means of access shall be provided and maintained to all working places."

30 C.F.R. § 55.11-16 provides: "Mandatory. Regularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable."

30 C.F.R. § 55.12-32 provides: "Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

30 C.F.R. § 55.14-1 provides: "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."

30 C.F.R. § 55.14-6 provides: "Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated."

30 C.F.R. § 55.17-1 provides: "Mandatory. Illumination sufficient to provide safe working conditions shall be provided in an on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

30 C.F.R. § 55.20-3 provides in pertinent part: "Mandatory. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable."

STIPULATIONS

The parties stipulated the following:

1. The facility known as MacIntyre Development Mine and Mill located in Tahawus, New York is a mine within the meaning of Section 3H of the Act.

2. N.L. Industries is the operator of the said mine within the meaning of Section 3(d) of the Act.

3. The products of said mine enter and affect commerce within the meaning of Section 4 of the Act. Accordingly, the operator is subject to the provisions of this Act.

4. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

5. Any penalty that may be assessed in this proceeding will not affect the ability of the respondent to continue in business.

6. The inspector who issued the citations was a duly authorized representative of the Secretary of Labor.

7. The concentrations alleged in citations number 212026 and 212028 directly reflect the concentration levels to which these two employees named herein were exposed to on the date of the initial sampling.

DISCUSSION

Docket No. YORK 79-9-M

Citation Nos. 212026 and 212028 both allege violations of 30 C.F.R. § 55.5-5. To establish these violations, MSHA must show (1) exposure to dust exceeded permissible levels and (2) there existed feasible methods to control employee exposure to dust which were not utilized. At the hearing, the parties first stipulated, "that the concentrations alleged in Citation Nos. 212026 and 212028 directly reflect the concentration levels to which these two employees named herein were exposed to on the date of the initial sampling." N. L., on cross-examination, questioned the method of taking samples.

MSHA objected, stating that N. L. had stipulated to the validity of the test. N. L. answered that it had not intended to make such a broad stipulation. N. L. did not wish to contest the validity of the samples (i.e., whether the analyses of the samples accurately reflected the amount of dust which MSHA contends they did); rather, N. L. apparently wished to contest whether the conditions which were measured should have been measured to determine employee exposure to dust. This distinction was not contained in the stipulation, but N. L.'s Answer and the questions asked at the hearing make clear that N. L. was not conceding this issue. Under these circumstances, N. L. is not bound by the strict wording of the stipulation. Moreover, MSHA was not prejudiced in any way since it had notice and an opportunity to rebut N. L.'s evidence.

N. L. contends that the sampling procedure was invalid because the inspector did not remove the sampler while the miner was performing certain tasks. These tasks were part of the miner's job duties. N. L. does not explain why the sampler should be removed while the miner was performing this part of his job. The samples accurately reflect the conditions to which the miner was exposed in performing his job; they show that the miner was exposed to a greater amount of dust than is acceptable. N. L. has not shown that the sampling procedure was invalid.

MSHA has the burden of proving that feasible methods to control exposure to dust existed but were not utilized. For the crusher operator (Citation No. 212026), MSHA presented evidence that extending the control booth and requiring the use of a vacuum when cleaning would control exposure to dust. I find that these methods were feasible but not adopted. N. L. therefore violated 30 C.F.R. § 55.5-5 as alleged in Citation No. 212026.

N. L. was chargeable with ordinary negligence. Miners were exposed to a greater amount of dust than is acceptable because of this violation. Abatement was timely. I find that a penalty of $78 should be assessed for this violation.

For the millwright (Citation No. 212028), MSHA presented evidence that his exposure to dust could be controlled by spraying the conveyor belt with water. Although N. L. claimed that the use of a water spray under freezing conditions might present a slip and fall hazard to those who worked near the conveyor, I note that this violation was timely abated. I find that N. L. has failed to rebut MSHA's evidence that feasible methods for controlling dust existed but were not adopted. N. L. therefore violated 30 C.F.R. § 55.5-5 as alleged in Citation No. 212028.

N. L. was chargeable with ordinary negligence. Miners were exposed to a greater amount of dust than is acceptable because of this violation. Abatement was timely. I find that a penalty of $78 should be assessed for this violation.

N. L. contends that Citation Nos. 212185 and 212187, Citation Nos. 212026 and 212028, and Citation Nos. 212188 and 212183 should be merged because, in all three instances, the violations were abated by one remedial measure. The citations refer to distinctly separate violations. The fact that the same kind of remedial measures were taken by N. L. to abate the conditions does not make them a single violation. I therefore hold that the citations shall not be merged.

Citation No. 212180

Citation No. 212180 alleged a violation of 30 C.F.R. § 55.11-16 which requires that regularly used walkways be sanded, salted or cleared of snow and ice as soon as practicable. The evidence establishes that there was an accumulation of 6 inches of snow and ice on a walkway along a conveyor which had not been cleared. The snow and ice had been there for up to 3 days. I find that this regularly used walkway was not cleared as soon as practicable. I reject N. L.'s contention that this regulation is unconstitutionally vague because I find that this regulation gives operators a reasonable warning of proscribed conduct. N. L. therefore violated 30 C.F.R. § 55.11-16 as alleged in Citation No. 212180.

N. L. was chargeable with ordinary negligence. A person could slip and fall up to 50 feet because of this violation. Abatement was timely. I find that a penalty of $210 should be assessed for this violation.

Citation No. 212181

Citation No. 212181 alleged a violation of 30 C.F.R. § 55.12-32 which requires that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairs. The evidence establishes that two panel doors of cabinets which housed electrical equipment were open 2 to 3 inches. No repairs or testing were being done. I therefore find that N. L. violated 30 C.F.R. § 55.12-32 as alleged in Citation No. 212181.

N. L. was chargeable with ordinary negligence. A person could be shocked or burned because of the violation. The possibility of occurence was slight. Abatement was timely. I find that a penalty of $75 should be assessed for this violation.

Citation No. 212182

Citation No. 212182 alleged a violation of 30 C.F.R. § 55.17-1 which requires that "illumination sufficient to provide safe working conditions shall be provided." N. L. contends that MSHA can establish a violation of this section only through objective measurements of the lighting. I conclude that MSHA can show a violation through evidence other than by objective measurement of lighting. See, Clinchfield Coal Company v. Secretary of Labor, MSHA, No. 79-1306 (4th Cir., April 8, 1980). Here, the inspector's

testimony was that two of three lights in a room 10 by 15 feet were burned out and that the remaining light bulb was covered by dust. He stated that there were steps in the area which could hardly be seen because of the lack of light. Part of the area was almost totally dark. The area was used as a travelway and maintenance had to be performed around a tail pulley in the area. I find that the inspector's testimony establishes that sufficient illumination to provide safe working conditions was not provided. I reject N. L.'s argument that this regulation is vague for the reason stated in my discussion of Citation No. 212180. N. L. therefore violated 30 C.F.R. § 55.17-1 as alleged in Citation No. 212182.

N. L. was chargeable with ordinary negligence. A person could trip and fall because of the lack of light, possibly into the pinch point of a conveyor. Abatement was timely. I find that a penalty of $80 should be assessed for this penalty.

Citation No. 212183

Citation No. 212183 alleged a violation of 30 C.F.R. § 55.14-6 which requires that guards be securely in place when machinery is operated. The evidence establishes that the head pulley of a conveyor was not guarded while the conveyor was operating. N. L. contends that the machinery was guarded by location in that the pinch point of the pulley was not readily accessible and that there was therefore no violation. However, the evidence shows that an employee is within 18 inches of the pinch point at least once a shift without there being a guard between him and the pinch point. I therefore find that the pinch point was not inaccessible. N. L. has violated 30 C.F.R. § 55.14-6 as alleged in Citation No. 212183.

N. L. was chargeable with ordinary negligence. Because of the violation, a person could come into contact with the pinch point and be killed or severely injured. Abatement was timely. I find that a penalty of $305 should be assessed for this violation.

Citation No. 212184

Citation No. 212184 alleged a violation of 30 C.F.R. § 55.11-1 which requires that a safe means of access be provided and maintained to all working places. The evidence establishes that a catwalk which extended for approximately 100 feet along the tops of bins was partially covered with spilled material. Work was occasionally performed on this catwalk. The spilled material increased the danger of using the catwalk. I find that N. L. did not maintain the catwalk as a safe access to working places. N. L. therefore violated 30 C.F.R. § 55.11-1 as alleged in Citation No. 212184.

N. L. was chargeable with ordinary negligence. A person could trip and fall into the bin because of this violation. Abatement was timely. I find that a penalty of $180 should be assessed for this violation.

Citation No. 212185

Citation No. 212185 alleged a violation of 30 C.F.R. § 55.20-3 which requires that the floors of working places be maintained in clean and, as far as possible, dry condition. The evidence establishes that 75 percent of a work place floor with an area of 400 square feet was covered by a wet, slippery material varying in depth from 1 to 6 inches. The condition had existed for 2 days. I reject N. L.'s argument that the floor was kept as "dry as possible" because N. L. management decided to utilize its personnel, who could have cleaned up the material, elsewhere. I also reject N. L.'s argument that the regulation is unconstitutionally vague for the same reason as in my discussion of Citation No. 212186. I find that the evidence establishes a violation of 30 C.F.R. § 55.20-3 as alleged in Citation No. 212185.

N. L. was chargeable with ordinary negligence. A person could slip and fall, possibly over a railing with a 25-foot drop because of this violation. Abatement was timely. I find that N. L. should be assessed a penalty of $180 for this violation.

Citation No. 212186

Citation No. 212186 alleged a violation of 30 C.F.R. § 55.11-1 which requires that a safe means of access be provided to all working places. The evidence establishes that in an area where a spill of wet, slippery material had occurred, the portable steps to a work platform had been replaced by a ladder. The ladder was leaning at an angle against the platform and the foot of the ladder was in the wet, slippery material. I find that this was not a safe means of access to the working platform. N. L. therefore violated 30 C.F.R. § 55.11-1 as alleged in Citation No. 212186.

N. L. was chargeable with ordinary negligence. A person could have fallen off the ladder because of this violation. Abatement was timely. I find that a penalty of $100 should be assessed for this violation.

Citation No. 212187

Citation No. 212187 alleged a violation of 30 C.F.R. § 55.20-3 which requires that the floors of working places be maintained in clean and, as far as possible, dry condition. The evidence establishes that there was a spillage of wet, slippery material on three working place floors. Approximately 500 feet of each floor was covered by the material to a depth of 2 to 6 inches. The condition had existed for 2 days. I reject N. L.'s argument that the floor was kept "as dry as possible" because N. L. management decided to utilize its personnel, who could have cleaned up the material, elsewhere. Therefore, I find that N. L. violated 30 C.F.R. § 55.20-3 as charged in Citation No. 212187.

N. L. was chargeable with ordinary negligence. A person could slip and fall, possibly 25 feet, because of the violation. Abatement was timely. I find that a penalty of $160 should be assessed for this violation.

Citation No. 212188

Citation No. 212188 alleged a violation of 30 C.F.R. § 55.14-1 which requires that pulleys be guarded. The evidence establishes that an adequate guard was not provided for the head pulley of a conveyor belt. N. L.'s argument that a guard was provided which, even if inadequate, would prevent this from being a violation, is rejected. I therefore find that N. L. violated 30 C.F.R. § 55.14-1 as alleged in Citation No. 212188.

N. L. was chargeable with ordinary negligence. A person could be caught in the pinch point of a pulley because of this violation. Abatement was timely. I find that N. L. should be assessed a penalty of $210 for this violation.

Citation No. 212189

Citation No. 212189 alleged a violation of 30 C.F.R. § 55.9-2 which requires that equipment defects affecting safety shall be corrected before equipment is used. The evidence establishes that a front-end loader which had an inoperable backup alarm was being operated by N. L. N. L.'s argument that there was no violation of 30 C.F.R. § 55.9-2 because another, more specific regulation could have been cited, is rejected. I therefore find that N. L. violated 30 C.F.R. § 55.9-2 as alleged in Citation No. 212189.

N. L. was chargeable with ordinary negligence. A person could be struck by the front-end loader because of the violation. Abatement was timely. I find that N. L. should be assessed a penalty of $100 for this violation.

Citation No. 212190

Citation No. 212190 alleged a violation of 30 C.F.R. § 55.9-2 which requires that equipment defects affecting safety be corrected before the equipment is used. The testimony establishes that there were several broken wires in one or more lays in the wire rope used on a crane in the machine shop. N. L. presented evidence that the rope was, at the time the citation was issued, more than strong enough to hold any load which would be placed on it. The MSHA inspector did not know how many strands were broken or how it would affect safety. MSHA did not present evidence to rebut N. L.'s evidence and has not addressed the citation in its briefs. I find that MSHA has not shown that there was a defect affecting safety. Therefore, MSHA has not proved a violation of 30 C.F.R. § 55.9-2 as alleged in Citation No. 212190. The citation is therefore vacated.

ORDER

IT IS ORDERED that Citation No. 212190 be VACATED.

IT IS FURTHER ORDERED that N. L. pay the above assessed civil penalties in the sum of $1,756 within 30 days of the date of this decision.

James A. Laurenson

James A. Laurenson, Judge

Distribution Certified Mail:

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Jithender Rao, Esq., U.S. Department of Labor, 1515 Broadway, Rm. 3555, New York, NY 10036

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

21 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-127 MSHA CASE NO. 05-00303-03003
v.	)	DOCKET NO. WEST 79-211 MSHA CASE NO. 05-00303-03004
THE PITTSBURG AND MIDWAY COAL MINING COMPANY,	)	
Respondent.	)	MINE: EDNA STRIP

Appearances:

James Abrams, Esq., Office of Henry C. Mahlman, Regional Solicitor, United States Department of Labor, Denver, Colorado
for the Petitioner

George M. Paulson, Jr., Esq., and Terrance Cullen, Esq. Denver, Colorado
for the Respondent

Before: Judge John J. Morris

DECISION

In these civil penalty proceedings Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that four Pittsburg and Midway Coal Mining Company (P & M) trucks were in violation of 30 C.F.R. 77.1104[1], a regulation issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Pursuant to notices, a hearing on the merits was held in Denver, Colorado, on January 11, 1980 and in Littleton, Colorado, on February 6, 1980.

The parties filed post trial briefs.

1/ The cited standard provides as follows:

> § 77.1104 Accumulations of Combustible Materials. Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

ISSUE

The issue is whether the facts establish a violation of the standard.

FINDINGS OF FACT

The evidence is essentially uncontroverted. I find the following facts to be credible.

1. A mixture of motor oil, grease, diesel fuel, dirt, and water was present on the upper portion of the engines of PITTSBURG trucks #656, #657, #658 and #27 (Tr. 24-26,49, 58, 59, 72, 73, 88)

2. Motor oil, grease, and diesel fuel are combustible materials (Tr. 7, 55, 75, 88, 174, 176).

3. The mixture on the engines of trucks #656, #657, and #658 was one sixteenth to one-eighth of an inch thick. The substance covered most of the engine in truck #27 (Tr. 22, 26).

4. If there was a sufficient concentration of the combustible materials a fire could be started by a statically caused spark, by friction brakes, by mechanical sparking, or by arcing (Tr. 218, 219).

5. The mere presence of combustible oil or grease similar to lubricating oil and #2 diesel fuel does not create a fire hazard (Tr. 199, 222).

6. Road dirt would significantly suppress the flash point of the combustible materials on the engines. It would also make the ignition point of the materials higher, thereby substantially reducing the chance of a fire (Tr. 199, 223).

DISCUSSION

The above findings of fact do not support a conclusion that P & M violated the standard. The evidence fails to show the quantitive composition of the material on the engines (Tr. 24, 49, 72, 73). The inspector indicated the upper portion of the engine was covered with oil, grease and dirt but the inspector could not say how much dirt or "lacquered type thing" was present. (Tr. 73, Exhibit R-1(a)). In view of the lack of evidence on this pivotal issue, I consider that MSHA failed to prove that there was a sufficient accumulation of combustible materials where they can create a fire hazard within the terms of 30 C.F.R. 77. 1104.

MSHA's post trial reply brief asserts three basic contentions. First, MSHA argues it need only establish the presence of one of the substances mentioned in the standard. Second, that the inspector's expertise establishes the violation. Third, that the possibility of ignition was clearly established.

Concerning the initial argument: I agree with MSHA that there were on these engines accumulations of combustible materials and that, by themselves, such materials are combustible. The inspector, during portions of his testimony, established the foregoing facts. However, a careful evaluation of the evidence establishes that the accumulations were in

combination with dirt. (See transcript pages 22, 24 - 26, 49, 58, 59, 72, 73, 88). A finding that dirt was combined with the combustible substances leaves the Commission in the quandary of trying to evaluate the combustibility of the dirt component and its effect on the possible ignition of the other materials. The lack of a clear articulation of these facts lends considerable strength to the testimony of P & M's expert witness (see findings of fact 5 and 6).

In short, MSHA understates its burden of proof under 30 C.F.R. 77. 1104. The evidence must show the presence of a sufficient accumulation of combustible materials in an area where there is an ignition source for these materials.

I am not persuaded by the admissions of the P & M safety director who at the inspection characterized the inspector's finding as "right" and the cited conditions "bad". The admissions are conclusory in form. But more to the issue, in my view, a mine operator's representative during an inspection would be more inclined to agree rather than disagree with an inspector. The comments of the safety director do not prove that there was a sufficient accumulation of combustible materials to create a fire hazard.

Concerning MSHA's second argument: The expertise of the inspection is not persuasive since the factual basis for his opinion, as stated above, is fatally flawed. While expert testimony is commonly given greater weight than lay testimony, expert testimony need not be accepted even if uncontradicted, U. S. Steel v. O.S.H.R.C., 537 F. 2d 780, 783, (3rd Cir., 1976). Indeed, expert testimony is not conclusive. It is up to the trier of the fact to determine what, if any, weight will be given to that testimony, Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 627 (1944).

Further diminishing MSHA's expert testimony argument is that prior incidents of fires in trucks involved broken fuel lines (Tr. 36, 39). The inspector had never experienced a situation where a vehicle caught fire except where there was a leaking fuel or oil line (Tr. 56). The parties stipulated to the fact that no leaking fuel or oil lines near the engines were observed or repaired after the engines were steam cleaned to abate the citation. (Tr. 176, 177).

Contrary to P & M's views, it was not necessary to conduct a test on the accumulations before issuing the citations. However, there must be some persuasive evidence that there was a sufficient accumulation of the combustible materials to create a fire hazard. American Coal Corp. 3 IBMA 93 (1974).

MSHA's final argument concerning the possible ignition of the materials involves an evaluation of the evidence.

MSHA points to the heat of the turbocharger (1000 - 1250 degrees F) and the Hauser report (Exhibit 3) to conclusively establish combustibility and the presence of an ignition source. I disagree. The turbocharger is

at the top of this diesel engine and the accumulations were beneath it at best within an inch or two of the heating source (Tr. 46 - 47, Exhibit R-1(a)). Mere close proximity to the heat source does not, on this record, prove the existence of a fire hazard. These vehicles had been running and hauling material at the jobsite when the inspection occurred. When running his finger in the area of the accumulations the inspector described the area as "warm" (Tr. 50). If the heat at that point will ignite these materials, one would anticipate it would have a degree of heat greater than "warm".

P & M's expert admitted to the existence of other ignition sources. However, without proof of a sufficient accumulation of combustible materials, MSHA has failed to prove a violation.

CONCLUSIONS OF LAW

Petitioner did not prove a violation of 30 C.F.R.77. 1104.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Case number WEST 79-127:

Citations 791120, 791121, and 791122 and all proposed penalties therefor are VACATED.

2. Case number WEST 79-211:

Citation number 791124 and all proposed penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

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21 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. WEVA 80-309 A.C. No. 46-02208-03033R
v.		
DAVIS COAL COMPANY,	Respondent	Docket No. WEVA 80-310 A.C. No. 46-02208-03034 Docket No. WEVA 80-311 A.C. No. 46-02208-03035 Docket No. WEVA 80-325 A.C. No. 46-02208-03036V Docket No. WEVA 80-330 A.C. No. 46-02208-03037 Marie No. 1 Mine

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Paul E. Pinson, Esq., Williamson, West Virginia, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." A hearing on the merits in the cases docketed as WEVA 80-310 and WEVA 80-325 was held on September 9 and 10, 1980, in Charleston, West Virginia. The parties thereafter agreed to proceed on stipulations of fact as to the cases docketed as WEVA 80-311 and WEVA 80-330 and moved to settle the case docketed as WEVA 80-309. I approved the motion for settlement and accepted the stipulations of fact. I now reaffirm those determinations.

The general issue in these cases is, of course, whether the Davis Coal Company (Davis) has violated the provisions of the Act and its implementing regulations and, if so, what are the appropriate civil penalties to be paid.

In determining the amount of penalty that should be assessed for such violations, 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) the effect on the operator's ability to continue in business, (4) whether the operator was negligent, (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.

A. Contested Cases

Docket Nos. WEVA 80-310 and WEVA 80-325

At the conclusion of the evidentiary hearing as to these cases, I rendered a bench decision which is reproduced below with only non-substantive corrections. I reaffirm that decision at this time.

> I am prepared to rule. With respect to Citation No. 75994 which charges a violation of 30 C.F.R. § 75.316, I find that the violation clearly did occur. That particular standard requires, in essence, that a ventilation system and methane and dust-control plan and revisions thereto be filed and approved by the Secretary. That standard has been interpreted by both the Board of Mine Operations Appeals and by various judges in the Federal Mine Safety and Health Review Commission, including myself, to mean that violations of the plan are also violations of this particular standard. The plan here in effect called for the use of a Lee-Norse model 265 continuous miner with 35 regular sprays on the ripper head each operating with 58 pounds per square inch of pressure and a flow rate of 17 gallons per minute.
>
> The inspector's testimony I find completely credible and in all essential respects uncontradicted. Inspector Hinchman testified that of the 35 spray nozzles on the cited Lee-Norse continuous miner, 30 were completely clogged when he conducted his regular inspection of the Marie No. 1 Mine, on July 26, 1979, and that of the five remaining nozzles, only a trickle of water was being emanated. His determination of the reason for this defect, while not essential to proving the violation, is nevertheless interesting because it shows that the condition existed for some time. His analysis of the situation showed that the nozzles were in fact clogged with coal dust, that in fact some of the fittings were broken, and that some of the branch hoses leading to the particular nozzles were leaking and thereby decreasing the water and water pressure available to those nozzles.
>
> Now, Inspector Hinchman could very well have issued an unwarrantable failure type of citation in this case. Clearly, based on his testimony, which is uncontradicted, the condition

existed prior to the beginning of this shift. The miner operator was in a position and the mine foreman (Mr. Beasley) was certainly in a position to have observed this condition from at least the beginning of the shift, and that therefore, they certainly should have known of the violative condition. I consider the failure to correct that condition to be gross negligence.

The hazard presented was essentially from the increased dust that would result from the failure of the spray nozzles to function and this dust could not only increase the health hazard of miners working in the area from increased respirable dust, but also increase the amount of float coal dust in the immediate vicinity of the miner and in other areas of the mine. I note also that there had been previous violations relating to float coal dust in this particular mine. The failure to have the spray controls functioning could also increase the methane level and, as the inspector testified, this mine has had methane problems on prior occasions. Although there was no testimony of an ignition source in the immediate vicinity, I find that a hazard from potential fire and explosion was nevertheless present because of the operating equipment and I consider that the dangers that I have described were likely to happen, and could result in serious health problems or injuries. I observe also that there were two persons in the immediate vicinity of the miner and that there were five or six additional people who would have been exposed to these additional hazards.

Now, the defense in this case was essentially that if there was no water coming out of the nozzles, the machine would have burned up as a result of failure in the cooling system. However, this argument presupposes that the water could not have leaked out after passing through the cooling system and the evidence in this case is that in fact the water was leaking out in such other locations, that is, out of the branch hoses. Mr. Davis, himself, testified that the water goes through the cooling system before reaching those branch hoses, so the machine could clearly have been cooled sufficiently and then the water could have leaked out through the branch hoses before reaching the nozzles. So, that defense is not supportable.

Now, with respect to Citation No. 676020, I also find a violation there. The citation, as amended, charges a violation of 30 C.F.R. § 77.502. That standard reads as follows: "Electric equipment shall be frequently tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from

service until such condition is corrected. A record of such examination shall be kept." Under 30 C.F.R. § 77.502-2, the examination and tests that are required under Section 77.502 must be made at least monthly.

Now clearly, and it is undisputed in this regard, the operator did not have any entry in the appropriate books to reflect that an electrical examination was conducted in the surface facility at the Marie No. 1 Mine after April 22, 1979. The MSHA inspection was conducted on August 6, 1979. The violation, therefore, is proven as charged.

Mr. Hinchman testified that the hazard in this case is that electrical equipment could have been faulty during this interim period and remained undetected and that unsuspecting employees could therefore place themselves in a dangerous position from which they could receive serious injuries from electrical shock. I consider this to be a potentially dangerous and serious hazard. I observe in this regard that on the same date as this citation, serious electrical defects were detected, including bad splices and defective grounding of the frame, in areas where employees would be expected to work on a daily basis. Five employees would have been exposed to these dangerous situations.

Now, I also consider that the operator was negligent with regard to this violation and again an "unwarrantable failure" citation would have been justified in this case. Clearly, the operator should have known that this condition existed. More than 3 months had elapsed since an entry had been in the book which indicates a serious failure on the part of the operator to maintain the books in conformity with the standards.

The defense in this case was essentially that the electrical equipment could have been inspected and probably was, but this is strictly speculation on the part of Mr. Winfred Davis and there is no affirmative evidence that this equipment was in fact examined properly and found to be in a safe operating condition. In fact, from the evidence that there were in fact electrical hazards existing on the date of this inspection, it is apparent that such inspections by the operator were in fact not made or if they were made, they were made in a slipshod or negligent manner. I therefore reject the defense.

The bench decision in Docket No. WEVA 80-325 is as follows with only non-substantive corrections. I reaffirm that decision at this time.

I am prepared to rule. First of all, regarding Order No. 677287, which was a 104(d)(2) order charging a violation of 30 C.F.R. § 75.316. Of course, section 75.316 specifically

relates again only to the requirement for the filing and approval of a ventilation system and methane and dust-control plan, but as I said with respect to the previous case, that regulation has been interpreted as meaning that the approved plan must also be complied with. The plan in this case that was in effect on the date in question, that is June 11, 1979, called for the use of a continuous miner, the Lee-Norse 265, and called for 35 regular sprays located on the top, bottom, and sides of the ripper head.

Now, Inspector Hinchman testified that upon his arrival at the site where this particular miner was operating, he first of all observed an excessive amount of dust in the air. He then observed that all 35 of these spray nozzles were clogged and were in fact dry. He also observed that there was no water on the ground or around the miner.

Now, the witness presented by the operator, Mr. Mondlak, who certainly is an expert in the operation of this type of machinery, testified that if all the nozzle heads were in fact clogged fully, the machine would most likely shut down in less than 30 minutes. He said 30 minutes was probably the outside limit on this particular machine and that would be because one of the sensors on the three motors would most likely turn the equipment off automatically when it reached a certain temperature due to a lack of cooling water flowing through the system. Mr. Mondlak also testified that the machine could operate, however, with as many as 10 percent of the nozzles plugged up and would not overheat under those circumstances. He also testified that the nozzles might periodically clog and unclog without any outside attention.

This testimony by Mr. Mondlak does not directly contradict the testimony of Inspector Hinchman, except regarding possibly the amount of time that this miner may have been fully or totally clogged. I would tend to accept Mr. Mondlak's testimony to the extent that the miner was probably not operating in this condition for a very long period of time. However, the testimony does not in any way contradict Inspector Hinchman's testimony that the miner was in fact clogged totally at the time he observed it. There is no direct contradictory testimony of that fact and I therefore accept it and therefore, the violation is and has been proven.

Inspector Hinchman also testified that the foreman in this particular section, Mr. Beasley, was present and in a position from which he could have observed the condition of the miner and with the excessive dust in the air, it should have been obvious to Mr. Beasley that something was awry. Mr. Hinchman, by the way, testified that the mine foreman, Mr. Beasley, was actually within 20 feet of the miner at

this time. Certainly, under those circumstances, I can find that management, through its foreman, Mr. Beasley, should have known that there was a problem with this miner. I therefore find that the operator was negligent in this regard. The fact that the miner may not have been operating in that condition for as long as Mr. Hinchman thought it might have been dilutes somewhat the amount of negligence, but nevertheless, there was negligence here.

The hazard presented was clear. The excessive dust causes a hazard to miners in the respirable dust sense and it also presents a hazard from float coal dust. The inspector testified that there was in fact a possible ignition source from the miner striking rock and causing a spark, thereby causing potentially fatal injuries to as many as three people who would be in that particular area.

In light of the testimony from Mr. Davis, himself, I take the history of methane in this mine to be somewhat less severe than the impression created by Inspector Hinchman. Although there is always the danger of methane being emanated, I consider the hazard from potential explosion or fire to be slightly less than perhaps was presented by the inspector.

Now, with respect to Order No. 677923, which was also a section 104(d)(2) order and was issued on June 12, 1979, for a violation of 30 C.F.R. § 75.200. That section requires, in part, that the mine operator file and have an approved roof-control plan in effect. That section also requires, however, that: "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

Now, the order at issue here actually charges two violations. The first part of that order charges a violation of the roof-control plan itself, and the second part of the order, beginning with the last line (Exh. G-11), under the subheading "Condition or Practice," the order states, "and the area experiencing a fault slickenside roof formation (horseback) was inadequately supported."

I do not find that in the first part of that order that a violation has been actually charged and that is because in reading the roof-control plan, under the section cited to me, it requires something totally different than the violation cited in the order itself. The roof-control plan provides on page 9, "(c) torque checks will be made on at least one out of every ten roof bolts from the face to the outby side of the last open crosscut each 24 hours during coal producing days." There is no evidence that that particular provision has been violated in this case. The plan goes on to state, "[t]he results shall be recorded, showing how many checks were made,

how many roof bolts were below 100 foot pounds when installed against the roof, or 70 foot pounds if installed against wood, and how many roof bolts were above 240 foot pounds." I think Mr. Hinchman conceded that the results were recorded, although he was somewhat suspect of the accuracy of the results. But nevertheless, I find that there is not sufficient proof that this provision has been violated. Then finally, the plan states, "[i]f more than one-half of the tested roof bolts fall outside the listed range, supplementary support," and so forth. But in this case, according to the records of the company which have not been proven to be false or incorrect, the roof bolts did not fall outside the listed range and therefore this provision too is inapplicable.

However, I do find that based on the expert testimony of Mr. Hinchman that the conditions of the roof here clearly did warrant special attention and were in fact not adequately supported. In fact, the foreman, Mr. Beasley admitted and acknowledged that there was a serious problem with that roof. This admission certainly supports the credible testimony of Inspector Hinchman in this regard and I do therefore find a violation in the second part of the order as a result of inadequate roof support. I would vacate, however, the first part of the order and that particular order should be modified to reflect that the first part of that has been vacated. I do not find a violation of the first part of the order. This illustrates the problems in dealing with orders that really cite more than one violation. I think that is not a proper procedure. I think in the future, I think instructions have come down from MSHA headquarters not to follow that practice. Is that correct, Mr. Hinchman?

MR. HINCHMAN: Yes, sir.

JUDGE MELICK: It does cause some confusion sometimes.

I have no problem finding that this condition was in fact known to management because Mr. Beasley admitted he knew it existed and that it was a serious problem. Therefore, I find that negligence existed on the part of Davis Coal Company. I also find this to be an extremely hazardous condition. Roof falls are notoriously the primary killers in the mining industry. The fact that Davis has not had any serious casualties due to roof falls is no defense. It is a hazard regardless of the previous history and is a serious hazard.

Order No. 675599 charges a violation of section 77.200 of Title 30, Code of Federal Regulations. The operator has admitted the violation in closing argument and has, of course, presented no contradictory testimony to the fact of the violation nor any defense to it. Clearly, the violation has therefore been proven as charged.

I also find that the operator clearly knew of the condition because Mr. Don Davis told Inspector Hinchman how the accident had actually occurred that caused the large sections of blocks to be broken and in bad repair in the supply storage building. There was a serious hazard presented by the fact that the structure could collapse upon someone in the vicinity of the building and indeed, apparently one worker, the supply man, was periodically in the vicinity of that building.

Order No. 677199 charges another violation of 30 C.F.R. § 75.200. Again there is no evidence to directly contradict the testimony of Inspector Hinchman. It is not denied that the entries were of excessive width in the locations cited in the order. There is, therefore, no question that this was a violation of the roof-control plan which specifically and precisely sets the width limit on the entries to be 20 feet, and in particular, I am referring to page 5 of the roof-control plan, in evidence as Exhibit No. 12.

Now, it is clear that management was aware of this condition in light of the fact that the foreman admitted to Mr. Hinchman that, "I'm not through with it," in referring to the fact that he started to place crib blocks in the affected areas to alleviate the problem. However, there were not sufficient crib blocks in place when the violation was found and indeed, there was no work then being done to provide sufficient crib blocks. In addition, men were continuing to mine in this particular area where the roof, according to Inspector Hinchman, was in fact starting to break up due to the excess width. This is not contradicted. Indeed, the seriousness of the hazard was underlined by the testimony of Hinchman that the roof was actually spalling around the bolts and the plates, showing signs of excessive pressure on the plates. He also observed cracks in the roof.

Order No. 675993 also charges a violation of 30 C.F.R. 75.200. Now again, this violation is proven as charged. There is no defense presented to this other than the allegation that torque wrenches were available on the surface. The fact is, however, that the torque wrench was not provided, as required in the roof-control plan, on the roof-bolting machine. In particular, on page 8 of that plan, item 12(a) requires that "an approved calibrated torque wrench, maintained in workable condition, shall be kept on each roof bolting machine in use."

There is also evidence that this particular roof-bolting machine was being used. The machine operator told Inspector Hinchman that he then had no torque wrench and had none the day before. Foreman Beasley had to call outside to get a torque wrench. There was none in the vicinity of the machine or even inside the mine.

As pointed out by Inspector Hinchman, the fact that no torque wrench was available is serious because there is no other way to check the torque on the roof bolts without using such a tool. Of course, proper roof bolting is essential to a sound and safe roof condition. So, I consider the violation to have been serious. The fact that the machine operator had not had a torque wrench for at least 2 days does suggest a high degree of negligence.

The fact that the operator had many torque wrenches on the surface is no defense to this. Those are useless on the surface. They must be located where they can be used.

All right, moving on then to Order No. 676006, again charging a violation of the roof-control plan and in particular, a violation of the provisions requiring entries not be more than 20 feet in width. It charges that the roof bolts were 7-1/2 feet from the rib on the left side of the No. 3 entry, over a distance of 15 feet. Actually, there are a number of charges in this particular order. Again, there is no defense presented to the testimony of Mr. Hinchman that the entries were in fact wider than 20 feet, in excess of that mandated width as provided on page 5 of the roof-control plan, and therefore, that violation is proven as charged. Moreover, there has been no defense presented to the fact that the roof bolts were placed more than 4 or 5 feet from the rib on the left side of the No. 3 entry. Clearly, in either case, whether it was required to be 4 feet or 5 feet at that point, it was in violation since they were 7-1/2 feet from the ribs. There has been no defense proffered to that violation either so that that, too, has been proven as charged.

I find also that the operator was negligent in this case because Mr. Beasley admitted that he had in fact ordered the entry to be widened to allow the conveyor to be placed in a straight line. It was also a hazardous condition. The mine was in operation. Coal was being mined and the conveyor was operating.

A defense has been offered that the cribs were partially stacked, that is, two cribs were partially stacked, but there is no evidence to indicate that work was continuing on the cribs and according to Mr. Hinchman, even had those two cribs been completed, they would have been insufficient to support the roof as bad as it was. The hazard was indeed increased in this location because of the nature of the roof there. It consisted of broken slickensided slate and it was a particularly bad roof according to Inspector Hinchman. There is no evidence to contradict that testimony.

All right, moving along to Order No. 676008. That charges a violation of 30 C.F.R. § 75.512. That standard requires that:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to miners in such mine.

Now, the order at issue here charges that, "[t]he Number 3 shuttle car operating in the 014 section, serial number L569772 FMC, was not maintained in a safe condition for operation. The shuttle car did not have brakes and the light system was partially inoperative and was being operated under these conditions." The essence of this violation is in fact that this particular shuttle car was not properly maintained. This particular provision does appear in the first part of the cited standard. The evidence is uncontradicted that the shuttle car did not have proper brakes and did not have proper lights.

The testimony of Inspector Hinchman was that the lights on this shuttle car were only providing 2 or 3 feet of illumination even though he could see the lights from as far away as 50 feet. The machine also, according to Mr. Hinchman, was essentially operating in an uncontrolled manner and that it could be stopped only by bumping against a mound of coal or such similar obstacle. Both of these conditions indeed could have and did expose at least two people to injuries of a serious nature.

I am also going to consider the testimony of the machine operator in this case, that he had told the chief electrician, Larry Davis, the day before this order was issued that indeed the shuttle car did not have brakes or lights, and therefore, I am finding that the operator was indeed negligent with respect to this order also.

Now, with respect to Order No. 676014, again, there is no denial of the offense charged. The cited standard, 30 C.F.R. § 77.701, requires the "grounding of metallic frames, casings, and other enclosures of electrical equipment receiving power from a direct current power system."

Now, I consider, however, that the gravity of the violation is attenuated by the testimony from Mr. Davis that the pump was located some 75 feet from the preparation plant and that really, the exposure would have been, at most, to one

person who would go to the pump and service it, certainly not every day, but over some extended period of time. The switch that controlled the pump was located not only on the pump, but in the preparation plant itself and was in fact operated from the preparation plant, thus limiting the exposure to that particular hazard. The hazard was nevertheless present to that one employee when he would be in the vicinity of the particular pump, and indeed, the hazard was aggravated by the fact that it was a wet environment, that the splices themselves were improper and that there was no rubber insulating mat provided, as required apparently by some other regulation.

B. Uncontested Cases

Docket Nos. WEVA 80-311 and WEVA 80-330

The following stipulations were proffered by MSHA at hearing and accepted by the operator. I adopted those factual stipulations at hearing as my findings of fact.

MS. ROONEY (MSHA counsel): In regard to WEVA 80-311, the parties have agreed to stipulate the following testimony with reference to each of the five citations.

With reference to Citation No. 677216, issued on May 10, 1979, a 104(a) citation for a violation of 30 C.F.R. § 75.512, the condition or practice stated is that, "[t]he Number two shuttle car and S and S coal scoop charger in the 14 section were not examined often enough to assure a safe operating condition and were being used as electrical equipment in this working section."

Termination due date upon that citation was May 11, 1979, at 8 o'clock.

If the inspector were to testify, his testimony would be that the operator should have known about the violation and this type of violation occurs frequently at this mine. The gravity of the violation was such that it was probable that the occurrence of the event which the cited standard is directed--the injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be permanently disabling. The number of persons who would be affected if the event were to occur would be one person at the charging station.

Conditions or circumstances which might have increased the likelihood or the severity of the event were that there were mud and water and improperly spliced cable in the area. The operator did terminate the violation within the time specified for abatement.

With reference to Citation No. 0676822, issued on August 9, 1979, a 104(a) citation, part and section violated was 30 C.F.R. § 77.400. The condition or practice cited was, "[t]he metal dodge line shaft coupling for the washer located on the second floor of the preparation plant was not guarded and the exposed moving parts could be contacted by persons, causing an injury."

The termination due date was set for August 10, 1979, at 8 o'clock.

If the inspector were to testify, he would testify that the operator should have known about the violation in that it was visible to anyone entering the tipple. The gravity of the violation was such that it was probable that the occurrence of an event against which the cited standard was directed could occur.

The injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be permanently disabling. The number of persons who would be affected if the event were to occur would be one person at the prep plan.

The operator also terminated this violation within the time specified for abatement.

With reference to Citation No. 676823, issued on August 9, 1979, a 104(a) citation, the part and section violated is 30 C.F.R. § 77.205. The condition or practice set forth is that, "[t]he wooden flooring located on the second floor of the preparation plant near the wash box and where men were traveling was badly deteriorated and a section of the flooring missing, creating a hazard to persons required to travel in this area."

The termination due date was set at August 17, 1979, at 8 o'clock.

The inspector would testify that the operator should have known about this violation. It could easily be detected and was quite visible to all persons. The gravity of the violation was such that it was probable that an occurrence of the event against which the cited standard is --

JUDGE MELICK: What was the event that was concerned about in this?

MS. ROONEY: What was the --

JUDGE MELICK: What was the specific hazard that you are talking about?

MS. ROONEY: Oh. A fall of a person through a deteriorating floor.

JUDGE MELICK: Oh, all right.

Go ahead.

MS. ROONEY: The occurrence of the event, i.e., the fall of a person through a deteriorating floor, was probable. The injury resulting from or contemplated by the occurrence of such an event would be permanently disabling. The number of persons who would be affected would be one and that person would be at the surface prep plant.

The operator, here, terminated the violation within the time specified for abatement.

MS. ROONEY: With reference to Citation No. 676824, a 104(a) citation, the part and section cited were 30 C.F.R. § 77.505. The condition or practice set forth is that, "[t]he power cable for the wet coal elevator motor switch box was not entered through proper fittings and located on the third floor of the preparation plant. No fittings were provided. Insulated wires passed through the energized metal box."

A termination due date was set for August 10, 1979, at 8 o'clock.

If the inspector were to testify, he would state that the operator should have known about this violation. It could easily be detected by the certified persons present. The gravity of this violation was such that it was probable that electrical shock could occur. The injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be permanently disabling.

The number of persons who would be affected if the event occurred would be one person at the preparation plant.

The operator abated this violation within the time specified for abatement.

With reference to WEVA 80-330, the parties stipulate that the testimony on this 104(d)(2) order would be as follows:

Order No. 676007, issued on July 30, 1979, the part and section violated is 30 C.F.R. § 75.303. The type of action is a 104(d)(2). The condition or practice cited is that , "[t]he results of the pre-shift examination for the day shift on July 30, 1979, was inadequate in that the hazardous roof control practices were not recorded in the book provided for that purpose by the certified person."

The initial action for this 104(d) order was--occurred on January 3, 1979, and that was 104(d) Order No. 024472.

If the inspector were to testify, he would testify that the operator knew about this violation. The preshift examiner should have found the conditions obvious and located on the last open crosscut, and this should have been recorded within the book.

The gravity of the violation was probable in that a failure to record hazards could result in persons who are authorized or miners who are authorized to check these books--would be able to find out where and what these hazards were.

The injury resulting from or contemplated by the occurrence of such an event could reasonably be expected to be permanently disabling. The number of persons who could be affected if the event were to occur would be eight at the working section.

The operator terminated the condition by a new preshift examination which was made and recorded. The hazards in the 014 working section were recorded and that was done on July 30, 1979, at 1400, which is 2 p.m.

C. Settled Case

Docket No. WEVA 80-309

At hearing, the parties moved for approval of a settlement of the one citation in this case requesting a penalty of $200. The citation (No. 023297) was issued for a violation of section 103(a) of the Act in that the operator directed the MSHA inspector to leave the area of his preparation plant thereby preventing him from conducting his inspection. There had been no history for the preceding 5 years of any type of threats or violence toward any authorized representative of the Secretary and there had been no history of this specific type of violation. I consider the evidence submitted in light of the criteria under section 110(i) of the Act and I find that the proposed assessment is appropriate.

D. Additional Findings as to Penalty Criteria

(1) Size of Business

The parties have stipulated in all cases that the annual production for Davis and its Marie No. 1 Mine is under 50,000 tons thereby placing it in a small-size category.

(2) Good Faith Abatement

The parties have further stipulated that the operator exercised good faith in attempting to achieve rapid compliance after notification of the violations in the citations and orders before me.

(3) History of Violations and Ability to Continue in Business

I rendered a bench decision at hearing in which I made specific findings applicable to all cases before me regarding these criteria. Those specific findings are set forth below with non-substantive corrections and reaffirmed at this time:

> One of the two criteria that remains for consideration at this time is the operator's prior history of violations and as I stated before, I find that history not to be very good. In fact, it is quite bad. There had appeared to be a very lax attitude by Davis toward safety, a rather sloppy attitude, and I therefore cannot consider any significant penalty reductions in this case. In light of the testimony of Inspector Hinchman about an improved recent history, however, I will consider some reduction.
>
> Now, the operator has also placed great emphasis in this case on his financial condition and he claims that even the penalties that were proposed by the Mine Safety and Health Administration would adversely affect his ability to continue in business. Of course, we heard extensive testimony from his accountant, Donald Wright, but I do observe that even that accountant could say no more than that the proposed assessments could affect Davis' ability to stay in business. That is as far as he would permit himself to go. I also observe that in spite of these alleged financial difficulties that Davis claims to have had for a number of years, he has managed to stay in business and indeed, has even seen fit to vote he and his wife salary increases, giving them a combined salary in a recent year of more than $67,000. I also observe that Davis Coal Company has been able to continue to get financial assistance from institutions that are usually quite critical when loaning money, namely, banks. So, I am not all that convinced that the dire financial condition that was proffered by the accountant is in actuality all that bad. Of course, the statements that were utilized by the accountant were not audited or certified statements. The credibility of those statements is accordingly affected.
>
> I also observe that, although these are not liquid assets, that Davis does retain valuable coal leases over large coal reserves, both in its own and its subsidiary's control and that these properties or this right was not considered by the accountant and it is not considered in accounting practice, apparently, to be an asset. I also observe that the valuation placed on the various Davis Coal Company properties by the accountant was based on a depreciated value as determined by the ordinary practices of accountants in compliance with Internal Revenue Service guidelines and rules. But that does not always, of course, reflect the true market value of such property. I just point out by way of illustration that the

Rolls Royce that was purchased for over $43,000 by the Davis Coal Company in late 1977 had a book value placed on it of only $27,000. But I would hazard to guess that that vehicle is probably now worth substantially more than its original purchase price. I am just using that as an illustration that the accounting procedures or the accounting practices are not always truly reflective of market value.

In any event because of these factors I have just discussed, I do not give great weight to the accountant's figures or to the claims of poverty. Indeed, it might be in this case appropriate that because of the past history of Mr. Davis' company, that he sacrifice some of his rather substantial salary to pay some of these penalties. I do, however, consider that there has been sufficient evidence of financial difficulty that I am going to grant reductions in the penalties amounting to approximately 25 percent overall * * *.

ORDER

Upon consideration of the entire record and the foregoing findings and conclusions and in light of the criteria set forth in section 110(i) of the Act, I hereby ORDER that the following penalties totaling $9,030 be paid within 1 year of the date of this decision, payment to commence within 30 days of this decision and to be made in equal monthly installments over that period of time.

	Citation/Order No.	Penalty
I.	Docket No. WEVA 80-309	
	23297	$ 200
II.	Docket No. WEVA 80-310	
	675994	$ 180
	676020	110
III.	Docket No. WEVA 80-311	
	677216	$ 110
	676822	180
	676823	180
	676824	120
	676825	110

IV. Docket No. WEVA 80-325

677287	$ 400
677293	800
675599	1,200
677199	1,200
675993	1,200
676006	1,200
676008	1,200
676014	500

V. Docket No. WEVA 80-330

676007	140

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

Phone: (703) 756-6225

21 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-499
	:	A.O. No. 46-03775-03006
v.	:	Kessler Preparation Plant
KESSLER COALS, INC., Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

Petitioner filed a motion to approve settlement in this matter for $56. The amount proposed by the Assessment Office was $78. The motion contained an analysis of the six criteria in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act).

The citation in question was issued for an alleged violation of 30 C.F.R. § 77.1605(m), which provides: "Roadbeds, rails, joints, switches, frogs, and other elements on railroads shall be designed, installed, and maintained in a safe manner consistent with the speed and type of haulage." The citation alleged that rails and joints on the No. 1 loadout track were not being maintained in a safe manner.

The citation also noted that this track was owned and maintained by the C and O Railroad Company. The motion stated that Respondent's negligence was overestimated by the Assessment Office. Apparently, an agreement between the miners' union and the train workers' union prohibited mine workers from maintaining the rails and joints on this track. Therefore, Respondent's employees could not maintain the track despite the fact that Respondent was ultimately responsible for the track. The motion asserted that Respondent communicated often with the railroad company concerning any safety problems on the tracks, including the one which resulted in the issuance of this citation. Also, whenever Respondent felt that the health and safety of its employees were being affected by a problem with the track, those employees were removed from the area.

The motion concluded that "the operator was not as in control of the condition as originally determined," and that while this factor does not eliminate Respondent's negligence, it does mitigate it. Based upon this explanation of the situation at the scene of the violation, I approve the recommended settlement.

ORDER

Respondent is ORDERED to pay $56 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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21 OCT 1980

PENN ALLEGH COAL COMPANY, INC., Contestant	:	Notice of Contest
v.	:	Docket No. PENN 81-6-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Order No. 843525 October 7, 1980
	:	Underlying Citation No. 843526
Respondent	:	October 6, 1980
	:	Allegheny No. 2 Mine

DECISION

Appearances: Henry Ingram, Esq., and Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for the Contestant;
Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;
The United Mine Workers of America, which had been served with the pleadings and the notice of hearing, did not enter an appearance.

Before: Judge Stewart

On October 8, 1980, Penn Allegh Coal Company, Inc. (hereinafter, Penn Allegh), filed a contest of Citation No. 843526 and Order No. 843525 pursuant to section 105(d) 1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 801 et seq. At the same time, Contestant filed

1/ Section 105(d) reads as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the

a motion for expedition of the proceeding pursuant to 29 C.F.R. § 2700.52. This motion was granted. An expedited hearing in this matter was held on October 15 and 16, 1980, in Pittsburgh, Pennsylvania. To expedite the decision, the parties waived submission of proposed findings of fact and conclusions of law.

STIPULATIONS

The mine in question here is the Allegheny No. 2 Mine, an underground coal mine, operating in the Upper Freeport seam of coal.

There are five operating sections in the mine, underground.

There are approximately 150 underground employees, and 50 persons employed on the surface.

The annual production, coal production from the mine is approximately 600,000 tons.

DOCUMENTARY EVIDENCE (MSHA)

At approximately 10 a.m., Monday, October 6, 1980, Federal mine inspector John J. Savine issued Citation No. 843526 pursuant to section 104(a) 2/ of the Act. The inspector cited a violation of 30 C.F.R. § 75.316 and described the condition or practice as follows:

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fn. 1 (continued)
Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

2/ Sections 104(a) and 104(b) of the Act read as follows:

"(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

In the 1 right working section (I.D. #005) the operator's approved ventilation plan was not being followed in that, the water pressure, on the continuous miner, under flow conditions was only 80 P.S.I. when measured just outby the shut-off valve provided for the operator. The approved plan requires 150 P.S.I. when measured under flow conditions (page 6a), the miner is a Lee Norse 106, Serial No. 7786 approved 2G-2752A.

The inspector set 12:30 p.m., October 6, 1980, as the termination due date. At 12:30 p.m., he extended the termination due date to 12 midnight, October 6, 1980. The justification he gave for doing so reads as follows: "Citation No. 843526 is hereby extended to allow the operator more time to check into the ventilation plan with MSHA" (Govt. Exh. 16).

30 C.F.R. § 75.316 is a statutory provision corresponding with section 303(o) of the Act. It reads as follows:

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

At 8:45 a.m., on the following day, October 7, 1980, the inspector issued Order No. 843525 pursuant to section 104(b) of the Act. On the order, he noted as his reason for issuing the order: "No effort is being made to correct or increase the water pressure on the continuous miner to the 150 P.S.I. flow pressure as required in the ventilation plan." Edward Michaels, general manager, and Al Reisz, chief engineer, both stated that they were not going to take corrective action to abate the condition (Govt. Exh. 17).

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fn. 2 (continued)

"(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), 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."

Page 6(a) of Penn Allegh's ventilation system, methane and dust-control plan (hereinafter, dust plan) Review No 15, bears the date January 12, 1977, and it was established at the hearing that a similar page had been part of the dust plan several years prior to that date.

A safety and health ventilation and respirable dust technical inspection (hereinafter, technical inspection) conducted by MSHA between June 26 and June 30, 1978, found that the ventilation system, methane and dust-control plan (Review No. 11) (hereinafter, dust plan) of Contestant's Allegheny No. 2 Mine was being followed. Water pressure was 150 psi at the continuous mining machine and 150 psi at the sprays. Thirty seven of 39 sprays were operating (Govt. Exh. 1, Govt. Exh. 4).

A technical inspection completed on September 11, 1979, to determine compliance and adequacy of the dust plan (Review No. 14) approved on August 21, 1979, determined that the average respirable dust concentration on the 036 miner operator on the 1 right 005 section was 2.75 milligrams. A citation was issued. In his inspection report addressed to the MSHA district manager, the inspector stated: "It is my opinion that the plan is inadequate and the operator must submit a new revised ventilation and respirable dust control plan to the District Manager." The report stated that the water pressure at the continuous miner was as follows:

	Washdown hose 3/		
Location	Flow	Static	Pressure at Spray
1 Right 005	150	240	140 psi
4 Right 011	160	250	100 psi
East Main 010	150	200	150 psi
3 North 013	150	220	50 psi
1 North 014	180	210	60 psi

In a citation issued on September 17, 1979, the inspector stated:

> The average concentration of respirable dust collected in the working environment of the continuous miner operator and the roof bolter operator in 4 and 5 days respectively in the 005 section (1 Right) during a MSHA inspection was 2.75 and 2.4 milligrams per cubic meter of air respectively. Management shall collect and submit samples from the working environment of the two above occupations each production shift during the period of reasonable time. Management shall also revise their methane and dust control plan to

3/ Exhibit O-4, a schematic diagram of the water spray system shows a valve bearing the caption "flush valve" located outby the cut-off valve and outby the point marked "X" on that exhibit as the place where measurements were taken. The valve referred to by the witness as a cut-off valve bears the caption "ball valve" on Exhibit O-4.

provide protection measures for the continuous miner operator and the roof-bolt operator.

(Govt. Exh. 18).

The subsequent action terminating this citation on October 24, 1979, stated:

> Based on the results of 10 samples submitted by the Company, the cumulative concentration of respirable dust in Section 005-0 in the working environment of the continuous miner operator (036) was 8.6 milligrams and the roof bolter (046) was 7.6 milligrams, which is within the applicable limit of 2.0 milligrams per cubic meter of air. A plan has been submitted to the District Manager.

(Govt. Exh. 18).

Government Exhibits 19 and 20 were citations for average respirable dust concentrations of 2.25 and 2.24 millilgrams per cubic meter of air in sections other than the 1 right (005) section of the No. 2 Mine in April and September of 1979.

On January 29, 1980, a citation alleging a violation of 30 C.F.R. § 75.316 was issued, noting that "[t]he ventilation system and methane and dust control plan was not being followed in the 1 right (005) section in that the water pressure when measured at the continuous mining machine, serial no. 7341 measured only 120 pounds per square inch water gauge." The plan states that a 150-pounds per squre inch water gauge would be maintained. In a subsequent action on January 30, 1980, extending the time for abatement, the inspector stated: "The condition existed due to a malfunctioning in a pressure relief valve. The operator is in the process of obtaining a new valve." In a subsequent action on February 6, 1980, further extending the time for abatement, the inspector stated: "The operator has received a pressure relief valve to replace a valve which restricted flow to the 1 right (005) section." In terminating the citation on February 7, 1980, the inspector stated in his subsequent action report: "The water pressure was increased to 185 pounds per square inch gauge at the continuous mining machine in the 1 right (005) section" (Govt. Exh. 3).

Contestant's dust plan (Review No. 15) approved on March 4, 1980, specified 150 psi and 40 gallons per minute on the continuous miners at the Allegheny No. 2 Mine. There was a marginal notation, "coal producing," beside four of the continuous miners and "cutting bottom for track" beside two of the continuous miners. Thirty nine operating sprays were specified for the coal-producing miners and 23 operating sprays for the other two continuous miners. This information was contained on Page 6(a), the page dated January 12, 1977 (Govt. Exh. 4).

On April 16, 1980, in a citation alleging a violation of 30 C.F.R. § 75.316, the inspector stated: "The ventilation system and methane and

dust control plan was not being followed in east main (010) section in that the water pressure when measured at the continuous mining machine measured only 75 pounds per square inch water gauge." In his action to terminate the citation on the same date, the inspector stated: "The water pressure was increased to 240 pounds per square inch water gauge" (Govt. Exh. 5).

On April 17, 1980, in a citation alleging a violation of 30 C.F.R. § 75.316, the inspector stated: "The approved Ventilation System and Methane and Dust Control Plan dated March 4, 1980, is not being followed in that water pressure was measured with an Ashcroft gauge and flow pressure was 100 psi and static pressure 160 psi and at spray 45 psi." Further notations by the inspector in the citation indicated that this was in the (005) 1 right section (Govt. Exh. 6).

In a subsequent action on April 21, 1980, terminating the citation which had been issued on April 17, 1980, the inspector stated: "The approved ventilation system, methane and dust control plan is being followed in that water pressure at the HH265 miner as measured was 165 psi flow pressure in (005) 1 right section" (Govt. Exh. 6a).

In a letter to MSHA dated April 18, 1980, Penn Allegh stated:

> [W]e would like to modify our approved plan for clarification to mean and read as follows: The total water pressure when measured under flow condition at a point outby the shut-off valve provided to the operator of the continuous mining machine shall be maintained at seventy (70) psi or higher.

In this letter, Penn Allegh also stated:

> [S]ince the 150 psi pressure approved in our present plans were meant by us to represent shut off pressure at static conditions measured at any point of the system and your present enforcement policies, as we understand it now, call for evaluation under flow conditions, it is obvious that the two (2) subject citations were issued in error due to lack of understanding in respect to the meaning of the numbers * * *.

(Govt. Exh. 7).

A technical inspection completed on April 29, 1980, to determine compliance and adequacy of the dust plan (Review No. 15) approved on March 4, 1980, determined that the water pressure at the continuous miner on the 005 section was 45 psi. On the other four sections, the pressures were 60 psi, 155 psi, 65 psi, and 50 psi. In a memorandum to the district manager, the inspector included in his recommendations for plan improvement a statement that "[t]he plan should state water flow pressure as needed at miner in plan" (Govt. Exh. 8).

In a letter to Penn Allegh dated May 1, 1980, the MSHA district manager stated in part:

> Permission is granted to reduce the water pressure to 70 psi measured under flow conditions at the shutoff valve of the continuous miner only while an MSHA representative is collecting respirable dust samples to determine the adequacy of your revised plan. The survey will be conducted by MSHA inspection personnel from the Monroeville Subdistrict office. They have been instructed to conduct the survey with the quantity of air at the face, number of water sprays, and water pressure exceeding the parameters tested in your plan by not more than 10 percent. If neither compliance nor noncompliance can be determined after the first day of sampling, you will be given the opportunity to suspend the survey and revise your proposed plan.

(Govt. Exh. 9).

In a letter dated May 6, 1980, declining MSHA's proposed study, Penn Allegh reasserted its contention that the water pressure of 150 psi in its approved plans represent the shut-off pressure at the static condition measured at any part of the system and stated that the inspectors are measuring pressure under flow conditions (Govt. Exh. 10).

In a letter dated May 14, 1980, acknowledging receipt of the May 6 letter which had declined MSHA's offer to conduct the environmental dust-survey plan, Penn Allegh was informed that "[y]our current plans requiring 150 psi, measured under flow conditions at the shutoff valve of the continuous miner shall remain in effect" (Govt. Exh. 11).

On July 21, 1980, Penn Allegh forwarded an amended dust plan (Review No. 16) to MSHA for approval. A paragraph on Page 6(a) of this dust plan stated:

> At least 75 per cent of the spray heads on the continuous miners shall always be maintained operative. The pumps supplying the water to the continuous miners shall be operated at least 150 psi pressure and the total pressure under flow condition shall be maintained at least 70 psi when measured just outby the shut off valve provided for the operator.

(Govt. Exh. 12).

Penn Allegh's forwarding letter, making no direct reference to the proposed change in water pressure, stated: "For your review and approval, attached are the 'Ventilation System and Methane and Dust Control Plan' and the updated mine map, in triplicate, showing: the extent of mining on June 30, 1980; the present ventilation system; and the areas of contemplated mining" (Govt. Exh. 13).

A letter dated September 4, 1980, approved Penn Allegh's revised dust plan without reference to the change in water pressure. The last paragraph stated: "Revised ventilation system and methane and dust control plan shall be submitted to the District Manager for review by January 20, 1981" (Govt. Exh. 13).

By a letter dated August 11, 1980, Penn Allegh had forwarded a dust plan for the Allegheny No. 3 Portal Mine for approval by MSHA. This is for the No. 3 Mine, not the No. 2 Mine, the subject of this proceeding. In approving the plan, MSHA stated, in pertinent part, in a letter dated September 22, 1980:

> Your revised ventilation system and methane and dust control plans as required by Section 75.316, 30 CFR 75, for the Allegheny #3 mine, I.D. No. 36 05691, (Review No. 8) are approved with the following stipulations and revisions as shown on the attached prints:
>
> Page 6(a), Item 1. c. Water pressure is to be maintained at 150 psi when measured just outby the shutoff valve provided for the operator. * * * If we do not hear from you within 10 days from the date of this letter, it will be assumed you are in agreement.

(Govt. Exh. 14).

After MSHA discovered its mistake in inadvertently approving Review No. 15, it sent a letter dated October 2, 1980, to Penn Allegh, stating:

> This is intended to clarify our position regarding the environmental dust control plan for the Allegheny #2 mine, I.D. No. 36 02581.
>
> Reference is made to our letter of May 1, 1980, granting permission to reduce the water pressure to 70 psi as measured under flow conditions at the shutoff valves of the continuous miners only while an MSHA representative is collecting respirable dust samples to determine the adequacy of your revised plan.
>
> Your reply dated May 6, 1980, indicated that you had decided to decline the proposed study. Consequently, you were notified by letter dated May 14, 1980, that a water pressure of 150 psi as measured under flow conditions at the shutoff valves of the continuous miners would remain in effect.
>
> You are hereby notified that a water pressure of 150 psi as measured under flow conditions at the shutoff valves of the continuous miners shall remain in effect as part of your

ventilation system and methane and dust control plans (Review No. 16).

If you wish to have your plan changed, please notify this office and appropriate action will be taken.

This correspondence, as well as the other letters between MSHA and Penn Allegh, was between Mr. Reisz and Mr. Huntley. The letter was addressed to Mr. Alfred Reisz, Chief Engineer, Penn Allegh Coal Co., Inc., R.D. #2, Box 238-A, Tarentum, Pennsylvania 15084. It was signed by Donald W. Huntley, District Manager--Coal Mine Safety and Health District 2 (Govt. Exh. 15).

DOCUMENTARY EVIDENCE (PENN ALLEGH)

In response to MSHA's repudiation of its inadvertent approval of Penn Allegh's dust plan (Review No. 16) containing amendments concerning the water pressure, Penn Allegh, in a letter dated October 7, 1980, stated:

We were dismayed to receive your letter dated October 2, 1980, purporting to clarify your position regarding our ventilation plan for the Allegheny No. 2 Mine. As we understand your letter (and MSHA's subsequent enforcement activities), you purport to rescind approval of paragraph 1 of Page 6(a) of Penn Allegh's approved Ventilation Plan. We are advised and believe you have no authority to do so. Penn Allegh contends your authority is limited to approving the plan or if you disapprove the plan, to state in detail the reasons for such disapproval including technical or regulatory reasons, and after giving us an opportunity to discuss your reasons, to allow us to adopt a plan acceptable to us.

Throughout our discussions of this matter, neither you nor others in MSHA have cited any provisions of the Mine Safety Act or Regulations which requires an operator to maintain a water pressure of 150 psi, as measured under flow conditions at the shutoff valves of the continuous miners. An internal memorandum has been alluded to by certain MSHA representatives but our requests for a copy have been refused.

Our position on the technical issues involved is outlined in my letter of May 6, 1980, to you. Our legal position is being asserted in Review Commission proceedings at Docket Nos. PENN 80-208-R and 80-209-R and in proceedings which are being filed tomorrow.

Despite the foregoing, we are willing to continue to discuss this matter with MSHA if you will set forth in writing and in detail the technical and/or legal basis for MSHA's position. These discussions, of course, would be without prejudice to positions advanced or rights asserted by either party in pending proceedings before the Review Commission.

In reference to the last paragraph of your letter, we do not wish to have our plan changed and our plan, which you approved on September 4, 1980, remains in effect.

(Exh. O-1).

Penn Allegh had previously been issued citations for failure to comply with its dust plan for which it filed an application for review on April 21, 1980, stating in pertinent part:

PENN ALLEGH COAL CO., INC., the Petitioner above named, hereby respectfully requests a formal hearing in respect to Citations No. 837274, dated 4/16/80, and No. 0624481, dated 4/17/80, both citing violation of the ventilation system and Methane and Dust Control Plans, more particularly the part referring to the water pressure. One copy of each citation is attached. The Petitioner maintains that the Ventilation System and Methane and Dust Control Plans, more particularly the part referring to the water pressure, was complied to in both instances.

The Petitioner hereby respectfully requests that MSHA be restrained from arbitrarily, frivolously, and without notice to the Petitioner assign different meanings to the numbers found in the Petitioner's plans than meanings which were purported by the Petitioner.

The Petitioner hereby respectfully requests reimbursement from MSHA for all damages and expenses incurred by the Petitioner because of MSHA's indefensible, relentless and reckless efforts to cite the Petitioner for violations of the plans which, in fact, did not take place.

The April 16, 1980, citation noted:

Condition or practice: The ventilation system and methane and dust control plan was not being followed in east mains (010) section in that the water pressure when measured at the continuous mining machine measured only 75 pounds per square inch water gage. John Patterson was the section foreman.

Action to terminate: The water pressure was increased to 240 pounds per square inch water gage.

The April 17, 1980, citation noted:

Condition or practice: The approved ventilation system and methane and dust control plan dated March 4, 1980, is not being followed in that water pressure was measured with

an Ashcroft gage and flow pressure was only 100 psi and static pressure 160 psi and the spray 45 psi on miner HH 265 serial number 7241 and 29 working sprays were operative out of 34 sprays located on the miner in 005, 1 right section.

(Exh. O-2).

Operator's Exhibit O-3 consisted of excerpts from a published report entitled "Measurement and Control of Respirable Dust in Mines." The part of this exhibit to which Penn Allegh alluded at the hearing concerned underground tests on a continuous miner performed to compare the dust suppression efficiency of two different models of spray nozzles. The relevance of these tests to the instant case was not established at the hearing.

Exhibit O-4 was a schematic diagram showing, in general, the point in the water supply line at which the pressure was measured, the shut-off valve, the pressure regulator, the booster pump, and the nozzles.

The water pressure regulator valve on the miner was factory-set at 150 psi pressure (Exh. O-5).

A letter dated July 23, 1980, acknowledged receipt of Penn Allegh's dust plan (Review 16) (Exh. O-6).

A notice of compliance for the Allegheny No. 2 Mine dated August 18, 1980, noted a cumulative concentration of 10 samples to be 4.7 with a 12-milligram limit under the Interim Compliance Panel Permit quantity (Exh. O-7).

A reminder notice of insufficient sample (intake air) dated September 11, 1980, noted a cumulative average concentration of 3.0 with a 12-milligram limit.

SUMMARY OF TESTIMONY

At the hearing, Petitioner called four witnesses--Robert Lee Davis, John Karp, John J. Savine, and Joseph J. Garcia. Respondent called two witnesses--Alfred Reisz and Peter Montali. The testimony of these witnesses is summarized in pertinent part as follows:

Robert Lee Davis

Mr. Davis is a coal mine technical specialist in charge of health for the bituminous region of Western Pennsylvania. He reviews health programs and plans submitted by operators and recommends approval.

Mr. Davis testified that it was MSHA policy to take water pressure readings for dust-suppression systems on continuous miners under flow conditions. He stated that it would be meaningless to take such measurements under static

conditions. He also stated that the manual used by MSHA inspectors recommended that pressure readings be taken at the water spray, but that District 2 policy permitted the measurement to be taken anywhere under flow conditions. This District 2 policy was not written but passed on to inspectors verbally.

Mr. Davis testified that he was aware that Penn Allegh's plan called for a water pressure of 150 psi at least as early as March 1978.

Mr. Davis testified that most of the larger mines in District 2, approximately 20 percent of the total number of mines in the district, have requirements of water pressure in the 150-psi range. The remaining mines have, for the most part, pressures in the 50-100-psi range.

Mr. Davis also testified that MSHA requires that a study be made of a change in a plan, unless that change is an improvement. Upon request by an operator to revise a plan downward, such revision is permitted while a survey is taken. The survey takes 2 days, during which time respirable dust is collected and methane monitored.

Mr. Davis testified that he first became aware of the Penn Allegh position that the requirements in its plan for 150 psi water pressure was static rather than flow pressure when Mr. Reisz complained to him of the issuance of two citations (Govt. Exhs. 5 and 6) in April 1980. At that time, Davis orally offered to conduct a study to determine the adequacy of 70-psi flow pressure. He also drafted a letter containing the same offer for Mr. Huntley's signature. These offers were declined by Mr. Reisz.

Mr. Davis stated that he did not participate in the review of Review No. 16.

John Karp

Mr. Karp testified that he is a mining engineer for MSHA assigned to the health section. Among his responsibilities are the conducting of dust, noise and airborne contaminant surveys, and the review of plans and recommendation of their approval.

Mr. Karp testified that he examined the dust-control measures specified in Review No. 16 and recommended approval of the plan to Mr. Huntley through Alex O'Rourke, MSHA's supervisory mining engineer. In examining Review No. 16, he noted provisions as to the number of water sprays, water pressures, air quantities, and other control measures. He admitted that he was aware of the provision contained on Page 6(a), to the effect that a water pressure of 70 psi under flow conditions would be required by the plan. He stated that he approved the provision for a flow pressure of 70 psi because he observed MSHA's letter of May 1, 1980 (Govt. Exh. 9) in the file. In that letter, MSHA had offered to conduct a survey of the effectiveness of the 70-psi flow pressure. He assumed that the survey had been made. Standard procedure during a review of the plan includes examination of prior reviews to spot changes. Mr. Karp testified that Penn Allegh made no mention in the cover letter to Review No. 16 of the change in its plan.

Mr. Karp testified that he was first made aware of his mistake on October 2, 1980, by a phone call from the MSHA subdistrict office. (In later testimony, it was established that this phone call had been made by Joseph Garcia, a supervisory technical specialist at MSHA's Monroeville Office.)

On October 2, 1980, Mr. Karp had a telephone conversation with Mr. Reisz. During this conversation, he told Mr. Reisz that the reduction to 70 psi flow pressure could not be approved by MSHA without a survey of its effectiveness. Mr. Karp agreed with Mr. Reisz's observation that the measurement of flow pressure would be more meaningful if it was taken at the sprays. Mr. Karp also prepared the letter dated October 2, 1980, in which MSHA asserted that the approval of the flow pressure of 70 psi was revoked.

Regarding MSHA policy, Mr. Karp testified that (1) it had "always" been MSHA's policy to measure flow pressure and (2) that it was standard MSHA procedure to conduct a survey of the effectiveness of the reduction before approving a reduction in the water pressure called for under a plan.

John Savine

Mr. Savine is an MSHA inspector working out of the Monroeville Office. On October 2, 1980, in preparing for an inspection of the Allegheny No. 2 Mine, he observed the apparent change in Penn Allegh's plan requiring a water pressure of only 70 psi. He called the change to the attention of his supervisor, Joseph Garcia, who, in turn, called John Karp.

On October 6, 1980, Inspector Savine proceeded to the Allegheny No. 2 Mine, 005 section. He measured a water pressure of 80 psi under flow conditions on the continuous miner and issued Citation No. 843526. He took the measurement on the outby side of the valve located on the water line in the operator's compartment. The inspector set 2-1/2 hours as the time for abatement. He extended the period for abatement in the belief that some misunderstanding might have existed with regard to the water pressure provision of the plan.

Upon his arrival at the mine on the following morning, Inspector Savine was told by Ed Michaels, one of Penn Allegh's managers, that they would do nothing more about the water pressure. The inspector proceeded to section 005, found a water pressure of 110 psi under flow conditions and issued Order No. 843525.

Inspector Savine testified that his instructions had always been to measure water pressure under flow rather than static conditions, that he knew of no plan which called for measurement of static pressure.

The inspector noted that a coupling at the end of a hose failed during Contestant's abatement efforts, but that it had failed because it was not fastened tightly enough.

On rebuttal, the inspector testified that he had told Mr. Reisz that he was not personally aware of any other mine at which the water pressure

was required to be 150 psi under flow conditions. He also explained his statement to Mr. Reisz to the effect that notification of the mistaken approval should have been given 2 weeks earlier. He assumed that an MSHA ventilation inspector had reviewed the major points of the plan during the period from September 8, 1980, through October 2, 1980.

Joseph J. Garcia

Joseph Garcia, Inspector Savine's supervisor, confirmed that the inspector approached him on October 2, 1980, and pointed out that Penn Allegh's plan had been changed. Mr. Garcia, in turn, contacted Mr. Karp.

Mr. Garcia stated that, as far as he knew and for as long as he could recollect, water pressure had been measured under flow conditions.

Alfred Reisz

Alfred Reisz is Penn Allegh's chief engineer. As such, he is responsible, among other things, for the formulation and submission to MSHA of Penn Allegh's ventilation and methane and dust-control plans.

Mr. Reisz testified that it was his understanding that the plan for the Allegheny No. 2 Mine called for the measurement of water pressure under static conditions. He testified that he became aware of MSHA's interpretation that the measurement be taken under flow conditions on April 16, 1980, when Penn Allegh received a citation for not having 150 psi under flow conditions. A second citation was issued to Penn Allegh on April 17, 1980, for the same reason.

Mr. Reisz met with Mr. Davis and Mr. Karp on April 18, 1980, to discuss the disputed provision of the plan. He testified that he stated within earshot of Mr. Karp that he would not permit a survey of the effectiveness of the lower water pressure because he disputed the soundness of MSHA's methods of testing; he would cooperate if MSHA had a "technically sound, statistically valid method of doing a study."

Mr. Reisz testified that he objected to MSHA's survey methods because the cause of the results unfavorable to Penn Allegh could not be identified. He stated he based his objection on his opinion that the dust-measuring devices were inaccurate and that the survey limited study to only three variables--water pressure, number of operating sprays and air quantity. He admitted that Penn Allegh had never submitted to an MSHA survey because of its objection to MSHA's survey techniques.

Mr. Reisz was responsible for the submission to MSHA of Review No. 16, including the change in the provision regarding required water pressure.

On October 2, 1980, Mr. Reisz received a phone call from Mr. Karp regarding the provision of Review No. 16 relating to water pressure. Mr. Reisz testified that Mr. Karp told him that the requirement would be changed back

to 150 psi flow pressure measured just outby the shut-off valve provided for the operator of the continuous miner. Mr. Reisz thereupon suggested that the measurement of pressure be taken at the water sprays and that an appropriate flow pressure at that point would be 40 psi.

Mr. Reisz testified that he was present on the 005 section on October 6, 1980, and that he spoke with Inspector Savine regarding the requirements of the plan. He stated that at that time he had yet to receive the letter dated October 2, 1980 (Govt. Exh. 15), containing notification that MSHA would enforce a pressure of 150 psi under flow conditions. Inspector Savine agreed to extend the time set for abatement because he said that he wanted to talk with his office for "clarification." Mr. Reisz later testified that, although the October 2, 1980, letter from MSHA had been stamped into his office on October 3, 1980, he had not seen it until October 6, 1980. Reisz continued operation of the continuous miner at 250-255-psi static pressure and 108-112-psi flow pressure. On October 7, 1980, the static pressure measured 160-170 psi and the flow pressure measured 108-112 psi. He attributed the differences in pressure on the two consecutive days to variations in the use of water by the second continuous miner and other sprays drawing from the same source of water.

Mr. Reisz testified that he had been told by Inspector Savine on October 7, 1980, that he (Savine) knew of no other operator required to maintain a 150-psi flow pressure and that at other mines where a 150-psi pressure is required, it was static rather than flow pressure.

Mr. Reisz testified that underground sumps provided the water at the Allegheny No. 2 Mine. The water for the continuous miner on the 005 section and for one other miner was drawn from one of these sumps.

Mr. Reisz explained the water spray system on the continuous miner, as represented in Operator's Exhibit No. 4. He testified that the water system was used in the machine's cooling system as well as for the dust-suppression system. The water passes first through the shut-off or ball valve. If the operator of the continuous miner were to shut off the supply of water to the machine, he would do so at the ball valve which is located in his compartment.

The water proceeds past the shut-off valve to a pressure regulator. The function of the pressure regulator is to protect the equipment from excessive pressure. The regulator, although adjustable, is factory-set to a pressure of 150 psi. The water is then routed so as to cool the pump motor and the cutter motors. Finally, the water passes through a booster pump which provides the correct pressure for operation of the sprays.

Mr. Reisz testified that the water pressure varies throughout this spray system under flow conditions and that to his knowledge, there is no direct relationship between the water pressure under flow conditions at the shut-off valve and the pressure at the sprays.

Mr. Reisz stated that he placed the marginal notations on Page 6(a) of Review No. 15. By the notations "coal producing" and "cutting bottom for

track," he had intended to locate the places where the continuous miners were to be used.

Peter Montali

Mr. Montali, a member of Penn Allegh's engineering department, was present when Inspector Savine issued Order No. 843525. When asked if he recalled Mr. Reisz's testimony to the effect that Inspector Savine stated at the time he issued the order that he, Mr. Savine, knew of no other mine in the district that was required to have a flow pressure of 150 psi, but that he knew that there were a couple that had a static pressure of 150 psi, Mr. Montali stated "I remember Mr. Savine stating that he did not know of any mine that required 150 psi flow pressure. That is the only thing that I remember that Mr. Savine said."

Method of Water Pressure Measurement

Penn Allegh asserts that the water pressure on its continuous miner was to be measured under static conditions (with the shut-off valve closed) and MSHA asserts that the pressure was to be measured under flow conditions (with the shut-off valve open).

MSHA has established that a water pressure reading of 150 psi to a closed valve would have little meaning since the static pressure could be maintained (as long as the valve remained closed) even with the volume of the available water supply inadequate to operate the spray nozzles. The record establishes that this might be due to inadequate size of the supply line, restrictions on the supply line, inadequate pump capacity, or too many spray nozzles in operation on other continuous miners or on the belt line operating from the supply line. With a severely restricted supply measuring 150 psi under static conditions, the pressure could be reduced sharply when the cut-off valve is opened and only a trickle might reach the spray nozzles.

It was the policy in MSHA District 2 to measure continuous miner water pressure under flow conditions (with the cut-off valve open) and the inspectors measured all of the continuous miners in the mines in that district under flow conditions. Penn Allegh's chief engineer, Mr. Alfred Reisz, was under the impression that on October 7, 1980, MSHA inspector John Savine had told him that there were several other mines in MSHA District 2 where static pressure, not flow pressure, had to be maintained and he so testified at the hearing. Mr. Savine, upon being recalled, testified that there were no mines in District 2 approved for measurement under static conditions and that he had never made and did not tell Mr. Reisz that measurements were made under static conditions. Mr. Peter Montali, employed in Penn Allegh's engineering department, was in the presence of Mr. Reisz and Inspector Savine on October 7, 1980, when they were discussing the methods of measuring water pressure in other mines. Upon being called on surrebuttal, he testified that on October 7, 1980, when the order of withdrawal was issued, he heard Mr. Savine say that he knew of no other mine with a requirement of 150 psi flow pressure but he did not remember any statement about static pressure. Each of the witnesses

for Petitioner testified that measurements of water pressure were taken under flow, rather than static, conditions.

Included in Review No. 15 approved by MSHA on March 4, 1980, there was a Page No. 6(a) which had the date January 12, 1977. Mr. Reisz testified that Page 6(a) went as far back as 1974. He had provided the information on a form which he had filled out at MSHA's request in 1974. The information provided in this form thereupon became part of Contestant's ventilation plan. He testified that the 150 figure he placed under the column headed "PSI" was meant to be 150 psi measured under static conditions although there was nothing in the plan to specifically show that a measurement of static pressure was intended.

Mr. Reisz made a marginal notation "coal producing" alongside four of the continuous miners (which he designated HH 265 Lee-Norse). MSHA contended at the hearing that this notation conclusively establishes that a pressure of 150 psi was required under flow conditions since it meant that 150 psi was to be maintained while producing coal, i.e., cutting coal with the continuous miner. This specific contention was rebutted by Mr. Reisz who testified that by the notation "coal producing" he meant to indicate that one group of miners was to be used at the face and another group of miners was to be used in other areas of the mine. Mr. Reisz had written the marginal notation "cutting bottom for tracks" alongside this second group of miners listed on Page 6(a). Nevertheless it has been established that in MSHA District 2 it was the policy that all plans were approved for flow pressure and that the inspectors in District 2 measured flow pressure when making their inspections.

For the four coal-producing miners listed in Page 6(a), Mr. Reisz entered the figures 150 psi, 40 gpm (gallons per minute), and 39 operating sprays. This could reasonably be construed to mean that the plan called for 150 pounds per square inch of water pressure at a flow rate of 40 gallons per minute with 39 sprays in operation.

The continuous miner on the 1 right section has a pressure regulator which was preset at the factory for 150 psi under flow conditions. That the 150-psi pressure quoted by the manufacturer in Operator's Exhibit 5 was a pressure under flow conditions follows because the pressure regulator is inby the water shut-off valve (Exh. O-4). No water would reach the pressure regulator under static conditions with the shut-off valve closed even though the pressure reading taken outby the shut-off valve might be 150 psi. When the valve is opened, the water is flowing and the pressure regulator should be expected to reduce any supply of water pressure in excess of 150 psi to a pressure of 150 psi under flow conditions. The pressure regulator can be reset but mechanical operations and additional pressure gauges would be necessary to change the set pressure and determine the gauge pressure at that setting. This indicates that the factory setting of the reducing valve would produce a flow pressure of 150 psi measured at that point if water at sufficient pressure and volume was provided by the supply pump.

The record establishes that the pump supplying water to the continuous miners has in general been capable of producing pressure in excess of 150 psi

and that in the past Penn Allegh has been able to comply with the requirement of 150 psi under flow conditions. In June 1978, MSHA inspector Jesse A. Bates found that "water pressure was 150 psi at the continuous mining machine and 150 psi at the sprays" (Govt. Exh. 1). In a technical inspection completed on September 11, 1979, MSHA inspector Erick Kenesky found water pressure at the continuous miner on the 1 right 005 section to be 150 psi flow and 240 static with a pressure of 140 psi at the spray. Pressures under flow conditions on the four continuous miners in the other sections were measured at the washdown hose to be 160 psi, 150 psi, 150 psi, and 180 psi.

Although the Allegheny No. 2 Mine had been cited for excessive concentrations of respirable dust in the past, there is no indication in the record of specific problems in maintaining water pressure until January 29, 1980, when a measurement of 120 pounds per square inch gauge was made on the 1 right (005) section and a citation was issued. On February 7, 1980, the water pressure was increased to 185 pounds per square inch gauge (Govt. Exh. 3). A citation was issued on April 17, 1980, when on that 1 right section the flow pressure was 100 psi, the static pressure was 160 psi and the pressure at the spray was 45 psi. The citation was terminated on the same day when the flow pressure was raised to 165 psi (Govt. Exh. 6(a)). A technical inspection completed on April 29, 1980, determined the water pressure in one section to be 155 psi but less than 150 psi in the other four sections (Govt. Exh. 8). This record therefore establishes that in the past it has not been impossible in general for Penn Allegh to comply with its plan calling for 150-psi flow pressure and that the 150-psi figure in the plan has always been considered by MSHA to mean that pressure measured under flow condition.

Before the time of Penn Allegh's refusal to take any further action to raise the flow pressure on October 7, 1980, in an apparent attempt to abate the violation, the pressure had been raised to some extent but not enough to comply with the requirements of the dust plan. Penn Allegh offered no explanation why it was unable to comply.

On October 6, when a measurement was made after the citation was issued, the pressure was 250 to 255-psi static pressure and 110 to 115-psi flow pressure. On October 7, the pressure had dropped to 160 to 170 psi and a flow pressure of 108 to 112 psi. The changes in pressures were attributed by Mr. Reisz to the operation of other machinery drawing upon the same water system.

Under the circumstances of this case, the 150-psi figure in the dust control plan is construed to mean 150 psi under flow conditions.

Amount of Flow Pressure Required

Mr. Reisz is the Penn Allegh official responsible for creating and submitting plans for approval by MSHA. The 150-psi figure was placed by him on Page 6(a) of Review No. 15 (approved by MSHA on March 4, 1980). This is the page bearing the date January 12, 1977, which had been approved for several years as submitted on a form developed by MSHA. The dust plan is a continuing

plan which remains in effect until changed. The Act prescribes a review of the plan every 6 months. Normally only the mine maps, which show continual change as mining progresses, are submitted for review unless required by MSHA, or there are amendments to other parts of the plan. This is to eliminate the need for copying and submitting bulky paper work which is unchanged. In the March 4, 1980, letter approving Review No. 15, MSHA stated: "Revised ventilation system and methane and dust control plans shall be submitted to the District Manager for review by July 20, 1980. For your next submittal, (Review No. 16), please submit the general information and face plans with the maps."

The form on which Page 6(a) had previously been submitted provided for the recording of the pertinent information in tabular form in a manner in which changes would be readily apparent. This procedure was not followed by Penn Allegh in submitting Review No. 16 in which there was a separate paragraph stating that a total pressure under flow condition shall be maintained at least 70 psi when measured just outby the shut-off valve provided for the operator. The letter from Penn Allegh forwarding Review No. 16 for approval on July 21, 1980, contained no explanation of the changes and indeed no reference at all to the change in water pressure on the continuous miner.

It should be noted that prior to the submission of Review No. 16 for approval, a number of significant events had transpired that year regarding water pressure on the continuous miner in the 005 section. On January 29, 1980, a citation was issued when the pressure was found to be 120 psi. On February 7, this citation was terminated after a pressure-relief valve had been replaced and the pressure increased to 185 psi. On March 4, Review No. 14 was approved. On April 16, a citation was issued for 75 psi and terminated when the pressure was increased to 240 psi. On April 17, a citation issued when the pressure was 100 psi, static pressure was 160 psi, and pressure at the spray was 45 psi. That citation was terminated on April 21 when 165 psi flow pressure was established. On April 18, Penn Allegh requested a modification to 70 psi flow. On April 21, Penn Allegh filed an application for review of the citation which had been issued on April 16 and 17. On April 29, a technical inspection was completed. On May 1, MSHA granted permission to reduce the water pressure to 70 psi flow for 1 day only while conducting a survey to determine the adequacy of a revised plan. On May 6, Penn Allegh declined the survey. On May 14, MSHA notified Penn Allegh that the 150-psi requirement under flow condition should remain in effect. Under these circumstances, either Penn Allegh knew that, without a survey, Review No. 16 calling for only 70 psi under flow condition would not knowingly be approved by MSHA, or Penn Allegh was proceeding under a misconception amounting to a material mistake of fact.

The dust plan was reviewed by Mr. John Karp, a mining engineer assigned to the health section of MSHA District 2. His unrefuted testimony was that it is standard practice to conduct a survey at the mine before approving a reduction in the requirements in a dust plan. In the file, he saw MSHA's letter offering to conduct a survey and mistakenly assumed that a survey had in fact been conducted. Under this erroneous assumption, he recommended that

the district manager approve the plan and the letter dated September 4, 1980, was accordingly prepared for the signature of Donald W. Huntley, the district manager. Mr. Karp testified that he would not expect that Mr. Huntley would go through each plan in the review process. Mr. Karp became aware of his mistake in recommending approval before a survey had been conducted when Mr. Joseph J. Garcia, supervisory coal mine technical superintendent at the Monroeville Subdistrict Office phoned on October 2, 1980, and asked why the plan had been approved without a survey. After the mistake was discussed, immediate steps were taken to rectify the error and advise Penn Allegh that 150-psi flow pressure was still required.

On August 11, 1980, Penn Allegh had forwarded for approval a dust plan for the Allegheny No. 3 Portal. This was after the date Review No. 16 for Mine No. 2 had been submitted, but before the date of the inadvertent approval of Review No. 16. On September 22 (a time after the date of inadvertent approval of Review No. 16, but before the date the mistake was discovered by MSHA) the dust plan for the Allegheny No. 3 Portal was approved subject to the following stipulation: "1. Page 6(a), Item 1. c. Water pressure is to be maintained at 150 psi when measured just outby the shutoff valve provided for the operator."

In the circumstances under which Review No. 16 was approved, it is clear that the inadvertent approval was due to a mistaken assumption of fact on the part of MSHA. It is undeniable that the mistake in approving the plan was made in good faith.

In a recent decision involving a civil penalty proceeding arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976 and Supp. I 1977), the Federal Mine Safety and Health Review Commission affirmed the decision of the administrative law judge who held that regulations adopted by the Department of Interior to implement the civil penalty program did not bind the Government to an assessment settlement agreement where such agreement was entered into because of a mistaken assumption of fact on the part of the department's assessment personnel. Secretary of Labor v. Island Creek Coal Company (Docket No. BARB 76-297-P, IBMA 77-27 (July 9, 1980)). That case was initiated as a result of a fatal accident that occurred at an underground coal mine. A mechanic employed at the mine was fatally injured when the boom of a loading machine fell on him.

The inspector failed to indicate on the face of the notice that it was being issued as a result of a fatality investigation. The regulations (citing 30 C.F.R. Part 100 (1975)) adopted by the Secretary to implement the civil penalty program required MESA's Office of Assessments to prepare and serve on the mine operator an initial order of assessment. Due to the omission on the face of the notice referred to above, the subject violation was assessed as a non-fatal infraction. By applying the point system provided in 30 C.F.R. § 100.3(b) (1975), a penalty of $102 was assessed. The penalty was further reduced to $78 as a result of a settlement conference between a MESA assessment official and Island Creek. During the conference, a formal assessment agreement was executed, in compliance with section 100.6, by the representatives of the parties.

Two weeks later, the Office of Assessments discovered that the notice of violation involved a fatality and determined that the assessment agreement was based on a mistaken assumption of fact on its part. On August 14, 1975, before Island Creek had tendered payment, MESA (MSHA's predecessor under the 1969 Act) wrote Island Creek a letter indicating the mistake and repudiated the agreement. Island Creek replied to MESA's letter stating that MESA was bound by the assessment agreement and could not unilaterally void the agreed penalty of $78. Island Creek then tendered payment of the $78, which amount was returned by MESA. MESA reassessed the violation on the theory that it contributed to the fatality and assessed a new penalty of $5,000. Island Creek refused to pay the second assessment and requested a hearing.

Before the judge, Island Creek moved that the proceeding be dismissed with prejudice on the basis that it had previously made payment of an amount agreed upon by MESA in full satisfaction of civil penalty liability for the subject notice of violation. The judge denied the motion and the case proceeded to hearing. In a written decision issued on March 24, 1977, the judge held that a violation as charged occurred, but found that there was no negligence on the part of the mine operator. After a lengthy discussion of the criteria provided in section 109(a)(1) for the assesment of a penalty, the judge determined that a penalty of $5,000 was appropriate.

An appeal on the contentions of Island Creek was that the judge erred in denying its motion to dismiss the proceeding. Island Creek argued that the record was devoid of any evidence which would support a finding that MESA entered into the agreement because of a good faith mistake. It further urged that MESA did not have a right to unilaterally void the assessment agreement and that the judge's decision nullifies the purpose of a key provision of the assessment regulations in section 100.6(d). Under that provision, failure of the mine operator to tender payment of the agreed amount within 10 days resulted in the agreed amount being entered as the final order of the Secretary. It was Island Creek's position that once the assessment agreement for $78 was signed, MESA was precluded from further administrative action. The Commission in rejecting those arguments stated:

> The record did not include testimony from the assessment official who signed the agreement regarding his state of mind during the negotiations. It did, however, provide substantial evidence that during the conference, this official was operating under a mistake of fact. Documents of record indicate that, in agreeing to a reduced assessment of $78, he was unaware that the violation was considered by MESA to be the cause of the accident, in this case a fatality.
>
> One of the six statutory criteria to be considered in assessing a civil penalty is "the gravity of the violation" (section 109(a)(1)). Island Creek's criterion was obviously not considered by the MESA assessment official in the context of the actual facts of this case.

In the instant case, we have the unrefuted testimony of Mr. Karp regarding his state of mind in recommending approval of the plan to establish that this official was operating under a mistake of fact because he assumed that a survey had been made.

The Commission held that if Island Creek was also unaware of all facts material in assessing the civil penalty, the agreement of the parties was predicated upon a mutual mistake of fact, a firmly established basis for relief and avoidance of an agreement. (Citing 54 Am. Jr. 2d Mistake, Accident, or Surprise, § 4 et seq. (1971); Peabody Coal Company, 7 IBMA 318, 325 (1977)).

Here Penn Allegh was unaware of all facts material in approving the plan just as Island Creek was unaware of all facts material in assessing the civil penalty. Although Penn Allegh should have anticipated under the circumstances that Review No. 16 would be disapproved, there is no evidence whatever to indicate that it was aware of the fact that the plan was approved because Mr. Karp had mistakenly assumed that a survey have been conducted.

Even if it had been established that Penn Allegh was aware of all material facts underlying the plan's approval and was also aware of MSHA's lack of knowledge, the plan reducing the water pressure on the continuous miner to 70 psi still would have been repudiated under the principles of Island Creek in which the Commission further stated:

> [I]f the operator's representative was aware of all such material facts underlying this citation, and also aware of MESA's lack of such knowledge, he had an equitable obligation to so inform the MESA assessment official, or take the risk that the agreement herein could be timely avoided. In either case, the resulting document could be and under these facts was properly repudiated.

The principles enunciated by the Commission in Island Creek may be and clearly should be applied to this case in holding that Review No. 16 was void or voidable and had been repudiated. In Island Creek, the judge noted that the mistake and the repudiation of the agreement were called to the mine operator's attention before payment of the penalty. He concluded that the operator was not prejudiced and ordered the case to proceed to a full evidentiary hearing. The judge found, and the Commission agreed, that the regulations under Part 100 were designed to provide a mechanism by which an operator could settle penalties for alleged violations without the need for a hearing or a decision on the merits, but that these regulations were not intended to bind MESA to an assessment agreement which was entered into on the basis of a good faith mistake that became known to all parties prior to payment.

Likewise, the operator was not prejudiced in this case where the mistake by MSHA and the fact that 150-psi flow pressure must be maintained were called to the attention of Penn Allegh before an inspection was made. There is no

evidence whatever that Penn Allegh changed its mining practices in any way or that it suffered harm in reliance on the erroneously approved plan.

MSHA inspector John J. Savine was assigned to make a respirable dust technical inspection at the Allegheny No. 2 Mine on October 3, 1980. He was familiar with the 150-psi requirement in the dust plan so he obtained a copy of the latest dust plan at the subdistrict office. He noticed the change to 70 psi. He asked Mr. Joseph J. Garcia, supervisory coal mine technical specialist at the Monroeville Subdistrict Office, about the change and after discussing the change, Mr. Garcia made a phone call to Mr. Karp in Pittsburgh. After Mr. Garcia read him the change, Mr. Karp said the pressure was not meant to be reduced to 70 psi and that the 150-psi requirement was supposed to stay in effect. Mr. Karp said that he would telephone Mr. Reisz and he would follow through with a letter. Mr. Savine also called and told Penn Allegh that the 70-psi flow pressure was not in effect and that it was to be 150 psi. The letter dated October 2, 1980, telling Penn Allegh that a flow pressure of 150 psi was required, prepared that day by Mr. Karp for Mr. Huntley's signature, was received by Penn Allegh on October 3, 1980.

After discussions between Mr. Savine and Mr. Garcia, it was decided that it would not be fair for the inspector to show up the very next day to enforce 150 psi, so the inspection on which Citation No. 843526 was issued was not started until the morning of October 6, 1980. Any additional time that might be required to adopt and submit a new plan was not raised as an issue. Mr. Reisz indeed testified that as long as he was chief engineer at Penn Allegh there would never be a dust survey of the type required by MSHA before the required pressure would be reduced.

Under these circumstances, the reduced requirement for only 70 psi had been repudiated, the requirement for 150 psi under flow condition was in effect and Penn Allegh should have maintained that pressure on its continuous miner.

Dust Survey

The focal point of this controversy between the parties to the proceeding seems to be the survey required by MSHA before it would reduce the minimum standards in a dust plan. In his testimony, Mr. Reisz stated that no survey was necessary because the 150-psi figure meant static pressure and that a change to 70 psi under flow condition was actually a more rigid requirement. This contention is not supported by the record which clearly shows that 150 psi under flow condition had previously been the requirement in the dust plan; therefore, a reduction to 70 psi would be a reduced standard. In his proposed plan (Review No. 16), Mr. Reisz proposed 70 psi flow measured outby the shut-off valve. In his testimony, he stated that 40 psi at the sprays would be acceptable. He was unable, however, to explain how he could demonstrate to MSHA that these were acceptable levels.

In his letter of May 5 declining the proposed survey, he stated that the study proposed by MSHA was not sound technically or scientifically because

the variables affecting the outcome were not professionally structured; MSHA had no sound method to evaluate the effects of the individual variables on the result; and, the result would not be statistically valid.

As one of the bases of his criticism, the letter stated that recent weight comparisons of simultaneous dust samples indicate that an individual dust sample by MSHA may be as much as three times greater than the average of all the others. There is little basis for this fear. Although as Mr. Reisz testified the sampler might be defective, turned upside down, or otherwise mishandled, some of the exhibits admitted at the hearing are reports of dust analyses tending to show quite uniform results even when taken on different days at the Allegheny No. 2 Mine. While it is possible that there is a nominal margin of error, the high readings usually indicate concentrations that are actually high and susceptible to correction. Penn Allegh in this case has offered analyses of samples of the type which Mr. Reisz criticizes as proof that the operator is now maintaining dust concentrations well below the prescribed level.

In proposing a survey, MSHA told Penn Allegh that if neither compliance nor noncompliance can be determined after the first day of sampling, it would be given the opportunity to suspend the survey and revise its proposed plan. Mr. Reisz in his testimony stated that 1 day would not be sufficient time and that sampling for several days would be necessary. It is true that in the normal sampling cycle the cumulative average for 10 different days is used to determine compliance, however, sampling under strictly supervised conditions for a lesser period would seem to have validity under test conditions. Penn Allegh is now able to maintain its respirable dust at less than half of the maximum allowable concentration as contended at the hearing. The use of more than one proposed sample under close supervision might eliminate some of the potential problems feared by Mr. Reisz. Close supervision should eliminate his suspicion that someone might "monkey around" with the sample.

In his letter declining a survey, Mr. Reisz stated that "[o]ur approved plans are not designed or meant to operate with all the variables simultaneously at their minimums, which is substantiated by the results of frequent inspections." If this is true, it is possible that the minimums in Penn Allegh's plans are set too low. The reluctance of operators to set the minimum standards in their plans at acceptable levels is understandable, however, the Act requires that they must adopt plans and it must be demonstrated that the minimums in the plan submitted for approval are acceptable.

Although the issue therein was the acceptable amount of ventilating air instead of the acceptable water pressure, a recent decision of Federal Mine Safety and Health Review Commission Judge James A. Laurenson is illustrative of the problems encountered in the instant case. Sewell Coal Company v. Secretary of Labor, Docket Nos. WEVA 80-264-R and WEVA 80-265-R (August 11, 1980).

Sewell abandoned its plan of May 1979, and switched to an all-exhaust system for dust control in the section. At the same time, it submitted to

MSHA a proposed ventilation and dust-control plan (hereinafter proposed plan) which detailed the changes from the May 1979, plan.

MSHA gave verbal, tentative approval to the proposed plan. The inspector who was already at the mine, was instructed to conduct tests in the section to determine if the proposed plan adequately controlled dust and if it should be approved. To conduct the test, the inspector put dust samplers on miners with five different occupations. The samples were then sent to an MSHA laboratory to determine the dust concentration to which the men were exposed. The men were instructed to wear the samples for 2 to 5 days and the measured dust concentrations were averaged. A maximum concentration of 2.0 milligrams per cubic meter was permitted for a plan to be approved.

The inspector instructed Sewell that it could set its ventilation controls at any level it wished but he further indicated that the actual conditions during the test would be the minimum conditions which would be approved. Sewell chose not to change its ventilation. During the tests, the inspector measured the actual conditions present in the mine. The actual controls far exceeded the conditions in the proposed plan. The proposed plan required 18 operating water sprays at 90 pounds pressure on the continuous-mining machines; but during the test, there were 30 operating water sprays at 100 pounds pressure on the continuous-mining machines. The proposed plan required that an air velocity of 15 feet per minute be maintained in the main entry; during the test, there was an average air velocity of 60 feet per minute in the main entry. The proposed plan required an air volume of 3,000 cubic feet per minute at the end of the line curtain; but during the test, there was an average air volume of 4,000 cubic feet per minute behind the line curtain. Even with the controls set at these higher levels during the test, the results of the tests showed Sewell barely within the acceptable 2.0 milligrams per cubic meter level.

At the end of the inspection, the inspector told Sewell that the proposed plan would not be approved. He told Sewell to submit a new plan by February 8, 1980. On February 14, 1980, when the inspector returned to the mine, a new plan had not been submitted. The inspector thereupon issued a citation for a violation of 30 C.F.R. § 75.316.

At that time, he set February 18, 1980, as the time by which the violation should be abated. On February 19, 1980, the inspector returned to the mine. Sewell had not submitted a new plan to abate the violation. The inspector thereupon issued a section 104(b) order of withdrawal. Immediately upon being served with the order of withdrawal, Sewell submitted a new proposed plan to the inspector. That plan mirrored the conditions present in the mine during the tests. The inspector thereupon terminated the order of withdrawal. The plan submitted on February 19, 1980, has been approved.

Sewell presented testimony that the proposed plan should have been approved by MSHA, including testimony that in late January 1980, Sewell conducted its own respirable dust tests. During those tests, Sewell tried to stay as close as possible to 3,000 cubic feet per minute main entry air

volume. According to Sewell's analysis, dust samples taken at that time were in compliance.

In this case, Mr. Reisz testified that water pressure on the continuous miner had little effect on dust concentrations and that measured ventilation was more effective. In Sewell, where the amount of air was the issue, the operator's witness testified that studies done with methane demonstrated that the volume of air could be lowered from 10,000 cubic feet per minute to 5,000 cubic feet per minute without an appreciable change in the methane concentration. He believed that that study would be applicable to respirable dust. He further stated that it is very difficult to maintain volume and velocity around air curtains. He stated that a plan requiring an air velocity of 60 feet per minute and an air volume of 4,000 feet per minute could be significantly reduced and still maintain a safe level of dust. On cross-examination, he stated that the minimum air velocity that would move dust would have to be empirically determined. He stated that the type of dust and the concentration of rock in the dust would be important in determining what velocity would be necessary.

In Sewell, the judge held that:

> Normally when a proposed plan is submitted, MSHA will give the operator tentative written approval. Subsequent to such tenative approval, tests are performed to evaluate the efficacy of the proposed plan. Thereafter, that plan is either approved in writing or disapproved. Here tentative approval and the subsequent disapproval were given verbally.
>
> Although regular procedures were not followed, Sewell was aware that the proposed plan was disapproved and it also had sufficient time to rework the proposed plan to meet MSHA's requirements. When the inspector issued the citation, Sewell had not adopted a dust-control plan which showed the equipment and quantity and velocity of air in the mine which had been approved by MSHA. Sewell, therefore, was in violation of the requirements of 30 C.F.R. § 75.316.

In his decision in Sewell, the judge stated:

> Another witness for Sewell gave a theoretical argument why air volume could be lowered without affecting dust concentration, but he could not state exactly to what extent the volume should be lowered. He conceded that the only way to arrive at the proper volume would be to test it empirically. Sewell failed to establish that its proposed plan would have been approved.
>
> Here MSHA tested the conditions in the mine empirically. Sewell was given the opportunity to adjust its controls to correspond to the proposed plan for the test; it chose not to

do so. The test results show that the conditions present during the test were barely adequate to control dust. Therefore, the average conditions during the test were considered to be the minimum acceptable conditions. MSHA did not err in requiring these conditions or in refusing to approve Sewell's proposed plan. 4/

The procedures to be followed while collecting respirable dust samples to determine the adequacy of Penn Allegh's revised plan was stated simply and succintly by MSHA as follows:

> The survey will be conducted by MSHA inspection personnel from the Monroeville Subdistrict office. They have been instructed to conduct the survey with the quantity of air at the face, number of water sprays, and water pressure exceeding the parameters listed in your plan by not more than 10 percent.

Therefore in the case-at-hand, MSHA did not require Penn Allegh to set its minimum standards at precisely the levels used in the survey as Sewell was required to do. Here the requirement was less stringent in allowing the proposed survey to be conducted with the quantity of air at the face, number of water sprays, and water pressure exceeding the parameters listed in the plan by not more than 10 percent. Mr. Reisz has testified that there are other factors affecting the concentration of respirable dust and some of these factors were discussed in Sewell. The instructions to the inspectors concerning the survey did not place limitations on those factors while performing the tests so Penn Allegh was not constrained thereby.

Mr. Reisz in his testimony has also charged that the proposed test is really an experiment disguised as a survey for which the operator should be compensated. In his letter declining the proposed survey, Mr. Reisz said that to "insure some sort of acceptable results of a study of the variables at their simultaneous minimums, we would be compelled by common sense to hold our production also at the minimum acceptable by MSHA, which we understand to be 60% of the average production." He explained his reluctance by saying that no "company should be expected or required to participate in a study where the effect of the variables on the result cannot be professionally evaluated and where the result is statistically invalid, when the cost of the study to the company is 40% decrease in its production." In his testimony, Mr. Reisz stated that there was also difficulty in determining what his average production was.

In its letter proposing a survey, MSHA did not require that production be held to 60 percent of the average production and the record does not

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4/ The judge in Sewell also stated that:
"The fact that Sewell formerly had an approved plan which had not been disapproved in writing is not a defense to this violation. That plan was abandoned by Sewell."

reflect that there was any such requirement. To the contrary, the record reflects that the general rule is that production must be at least 60 percent of average production in order for respirable dust samples to be valid. Of course, the test parameters may be relaxed and factors affecting respirable dust may be maintained at a reasonable level accceptable to MSHA during the survey but common sense would suggest that the parameters for respirable dust control should be set at levels where the result would be adequate suppression of respirable dust during normal production in the mine.

Mr. Reisz's belief, as expressed in his testimony, that MSHA was requiring that during the survey all factors be at minimum levels prescribed by the plan or by the regulations is unfounded. Although, as he stated, the proposed survey might not have been a scientifically structured test or experiment with a broad statistical basis, it apparently gave the operator the benefit of any reasonable doubt that there might have been as to its validity. It is doubtful that a comprehensive series of scientifically structured tests of sufficient duration and scope to provide a broad established basis would be practicable each time a plan is amended by an operator.

Surveys of the type proposed by MSHA in the case-at-hand are routinely conducted in the course of its enforcement activities and evidently have not proved a serious obstacle to the approval of plans in which the standards are properly set. The criticism expressed by Contestant in declining the survey is unfounded; especially its statement that the "kind of study proposed by MSHA would not promote a better understanding of the subject but would have a tendency to obfuscate the issues, propagate superstitions and, therefore, it would not serve the health and safety of the miners."

Penn Allegh has introduced evidence to establish that its most recent dust sampling showed the average concentration of dust to be 0.47 milligrams of dust per cubic meter of air; a concentration well below the prescribed maximum of 1.2 milligrams of dust per cubic meter of air in its Allegheny No. 2 Mine. If these conditions remain true today, the operator should have little difficulty in adopting meaningful parameters in its dust plan and establishing under controlled conditions that it is able to maintain a concentration of 1.2 milligrams of dust per cubic meter.

After declining the survey, Penn Allegh stated that it would welcome a study by MSHA to promote the health and safety of the miners, provided that the study is professionally structured to yield statistically valid results reflecting the effects of changes in the variables, under a research grant to compensate for its loss of production. While this offer is commendable, the proposed study is not the kind of survey for which MSHA is calling as a prerequisite to reducing water pressure requirements on the continuous miner. This is not to say that a study such as that proposed by Contestant would not be useful. In Sewell, supra, where the amount of ventilation air was the issue, there was expert testimony that the air could be appreciably reduced with little effect on respirable dust. In this case, where water pressure to the continuous miner is the issue, Mr. Reisz has testified that such water pressure has little effect on respirable dust concentrations and

that ventilation air is more important. While a comprehensive technical study of the type proposed by Contestant might resolve the question as to which of the two factors is more important in the control of respirable dust, the resolution of that question is not necessary to resolve empirically the underlying problem in this case. All MSHA is asking is that the operator set minimums in its plan that would reduce the dust concentration to that required by the Act.

Citation No. 843526

Violation of 30 C.F.R. § 75.316

Contestant has introduced evidence to establish that the No. 2 Mine has a good safety and health compliance record in the past and this has been acknowledged to some extent by MSHA inspectors at the mine. Nevertheless, the record establishes that there are now serious problems in maintaining the prescribed water pressure to a continuous-mining machine and there have been some problems with excessive respirable dust concentrations in the past. Even if the operator had a perfect record in keeping the concentration of respirable dust below the prescribed levels, the Act in dealing with dust requires more than compliance with a general performance standard. After prescribing means of determining the maximum respirable dust levels that would be required, the Act in section 303 sets forth specific requirements for some of the variable factors affecting the concentration of respirable dust. It prescribes in detail the quantity of ventilating air that must reach the working face and the specific requirement for line brattice to direct the air to the working face. Regulations promulgated by the Secretary elaborate upon these requirements, and section 303(a), cited supra, provides for further elaboration and the adoption of additional standards, suitable to the conditions and the mining system of the individual coal mine, to be set forth in a ventilation system and methane and dust-control plan. Review No. 15, adopted and approved under this section, established requirements for water on the continuous miner at 150 psi, 40 gallons per minute and 39 operating sprays. MSHA granted permission to reduce the water pressure for 1 day only for a proposed survey. When the survey was declined, MSHA informed Penn Allegh that the current plans requiring 150 psi measured under flow condition shall remain in effect.

Consonant with the findings in this decision, there was no ambiguity at that point in time. A pressure of 150 psi was clearly required under flow condition. The words in Review No. 16 stating that "the pumps supplying the water to the continuous miners shall be operated at least 150 psi pressure" introduced a new concept with apparently little meaning. This phrase failed to specify either the point at which pressure was to be measured or the condition under which it would be measured, i.e., flow or static. Previously, a requirement for 150-psi pressure under flow condition measured at a point outby the cut-off valve had been consistently applied in determining compliance with the plan. Nevertheless, the other phrase in Review No. 16 stating that the "pressure under flow conditions shall be maintained at least 70 psi when measured just outby the shut-off valve provided for the operator" was clear and unequivocable. This is the relevant phrase in that sentence by

which the operator sought to reduce the pressure under flow conditions from 150 psi to 70 psi.

As soon as MSHA discovered its mistake in approving Review No. 16, it voided the 70-psi provision by notifying Penn Allegh that a water pressure of 150 psi measured under flow condition shall remain in effect as part of Review No. 16. There was no ambiguity whatever as to the pressure that was required. It was clearly 150 psi under flow condition. The legal question as to whether, under the circumstances, MSHA could reimpose the requirement for 150 psi under flow condition after discovering the mistake is an entirely different issue which is answered in the affirmative.

MSHA waited until 4 days after voiding the erroneously approved 70 psi-provision and reimposing the 150-psi provision before conducting the inspection on which the citation was issued. At the inspection, inspector John Savine measured a pressure under flow condition of only 80 psi which was clearly a failure of Penn Allegh to comply with its dust plan in violation of 30 C.F.R. § 75.316 as MSHA has alleged. 5/

In contending that 80 psi on its continuous miner was not a violation, Penn Allegh relies on a decision by Federal Mine Safety and Health Review Commission Judge John Cook in Secretary of Labor v. Penn Allegh Coal Company, Inc., Docket No. PITT 78-390-P (February 27, 1979). On the issue of ambiguity, that case (hereinafter PITT 78-390-P) is readily distinguishable from the present Penn Allegh case where there is no ambiguity whatever as to the pressure that was required, i.e., 150 psi under flow condition. The citation in PITT 78-390-P alleged a violation of the roof-control plan because temporary roof supports designated D, E, F, and G were not installed in the Allegheny No. 3 Mine. Drawing No. 2, included as part of that plan, stated that temporary supports D, E, F, and G shall be installed prior to installing roof bolts. On Page 94, that plan approved a provision that when resin-grouted rods cannot be installed immediately, the pertinent exposed roof area shall be supported by installing temporary supports on not more than 5-foot centers. In holding that there was no violation, in this instance where resin-grouted rods were installed, the decision in PITT 78-390-P stated:

> Needless to say, the roof control plan is totally ambiguous as to the issue raised by the notice of violation. It appears that this plan has grown by stages and that attempts have been made to tie it together as it progressed through each stage. It seems almost incredible that a plan

5/ Section 75.316 provides, for the most part, only for the adoption by the mine operator of an approved ventilation system and methane and dust-control plan. It has been held, however, to require compliance with this plan as well. Violations of section 75.316 have been found for failure to comply with ventilation plans. Zeigler Coal Company, 4 IBMA 30 (January 28, 1975), aff'd., 536 F.2d 398 (D.C. Cir. 1976).

worked out by action of both MSHA and the operator could have resulted in such ambiguity. However, one point is clear, the documents resulted in absolute ambiguity on the points which are the crux of this case. It is the duty of MSHA to immediately make an effort to clarify the plan so that no question exists in the future as to what is required for the safety of the miners.

Under the circumstances that exist here, there is no way that a finding can be made that the plan requires the action which the inspector set forth in the notice as constituting a violation of law. [Emphasis in original.]

By the time the citation was issued in the instant Penn Allegh case, there remained no ambiguity whatever in what pressure was required. In the letter revoking the reduced requirement for only 70 psi, Penn Allegh was clearly notified that a water pressure of 150 psi, as measured under flow condition, shall remain in effect as part of Review No. 16. Previously, it had been forcefully and clearly brought to Penn Allegh's attention that Review No. 15 required 150 psi under flow condition. Two citations had been issued and Penn Allegh was repeatedly told both orally and in writing that 150 psi under flow conditions were required and that its requirement would not be reduced until the survey proposed by MSHA was conducted.

By its course of action after the two previous citations (which are not in issue in this proceeding) were issued, MSHA has fulfilled its duty as outlined by Judge Cook in PITT 78-390-P when he stated that it was the duty of MSHA to immediately make an effort to clarify the plan so that no question exists in the future as to what is required for the safety of the miners.

Citation No. 843526 was properly issued.

Order of Withdrawal

Section 104(b) of the Act requires that an inspector shall issue an order under that subsection when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. As noted above, mine management did not abate the violation within the time set by the inspector. The test as to whether a 104(b) order was properly issued was enunciated by the Board of Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). 6/ It was stated therein that "the

6/ The Board was addressing section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970), which reads as follows:

"Except as provided in subsection (i) of this section, 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 but the violation has not created an imminent danger, he shall issue a notice to

inspector's determination to issue a section 104(b) order must be based on 'facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed.'" The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

The citation was issued by inspector John Savine at 10 a.m. on October 6, 1980, after measuring only 80 psi water pressure on the continuous miner. The inspector gave the operator until 12:30 p.m. (2-1/2 hours) to abate the violation, which he thought was a reasonable time to set the pump pressure in the line. The inspector was told by the acting section foreman that there was a pump in the water line and that they were going to go back and make some changes on the pump.

Before the 2-1/2 hours had expired, Mr. Reisz arrived on the section and he told the inspector, who had remained on the scene, that he had been in contact with John Karp and that there was some misunderstanding or some discrepancy about the plan. The inspector decided at that time that he would extend the citation to midnight that night to "give them a chance to iron out these problems with the plan, and also to continue working on the water pressure problem, if that's what they were going to do."

After issuing the extension, the inspector left the mine and went back to the office. He returned to the mine the morning of October 7. When he arrived at the mine that morning, the manager of mines for Penn Allegh Coal Company told him that they "weren't going to do anything further with the water pressure, whatever pressure he had found yesterday, would be the pressure that he would find today, and that they weren't going to do anything more about it."

In a discussion with the manager of mines about issuing a withdrawal order, the inspector told him that "if the water pressure didn't come up to the specs in the plan, the 100 psi flow pressure, then he would have to issue what is called a B order, for short." The response was "You can go

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fn. 6 (continued)
the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative finds that the violation has not been totally abated, and he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

This section of the 1969 Act and section 104(b) of the 1977 Act are substantially similar with respect to the requirements each imposes on an inspector confronted with an operator's failure to abate a violation within the time specified.

ahead and issue it right here, if you want to, you don't have to go underground."

The inspector had to check for himself so he went underground and found that after the changes and adjustments that had been made, the pressure was still only 110 psi under flow condition.

The order of withdrawal was issued at 8:45 a.m. on October 7, 1980. Mr. Reisz, the chief engineer, was on the section at the time and there had been some discussion between him and the inspector. When the inspector issued the order, the chief engineer told him that "they weren't going to shut the section down, just go ahead and issue the paper that he had to issue, but they weren't shutting the section down, and they weren't going to do anything more to correct the situation."

Additional time to abate the violation was not requested by the operator. The lengths of abatement time fixed in the citation and in the modification extending the time for abatement were reasonable. Moreover, the operator informed the inspector that no further abatement efforts would be made.

The order of withdrawal was properly issued.

ORDER

Citation No. 843526 and Order of Withdrawal No. 843525 are AFFIRMED.

The contests of Citation No. 843526 and Order of Withdrawal No. 843525 are DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

22 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. YORK 80-36-M
	:	A.C. No. 30-00839-05007
v.	:	
	:	Morrisonville Plant
CONCRETE MATERIALS, INC., Respondent	:	

DECISION

Appearances: Deborah B. Fogarty, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner; George T. White, Jr., Esq., White, Miller & Wurst, Rochester, New York, for Respondent.

Before: Administrative Law Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", in which the Secretary charges Concrete Materials, Inc. (Concrete Materials), with two violations of 30 C.F.R. § 56.9-3. The cited standard requires that powered mobile equipment be provided with adequate brakes. In response to a prehearing order, Concrete Materials challenged the validity of the standard alleging that it was "not specific or detailed enough to properly advise operator as to his obligations or failed to provide sufficient guidelines for the operator to comply with the intent of the regulations and in doing so, also failed to establish guidelines for the inspectors, and therefore, leave [sic] too much of a discretionary judgment in the eyes of the inspector, all to the detriment of the operator." Although Concrete Materials cites no legal authority in support of its contention, I interpret it as a challenge to the sufficiency of the standard in light of due process requirements for specificity under the Fifth Amendment to the United States Constitution. The issues before me then are whether the cited standard meets constitutional due process requirements for specificity and if so, whether Concrete Materials has violated the regulatory standard as alleged in the petition for civil penalty filed herein and, if so, the appropriate civil penalty to be assessed for the violation.

I. Constitutional Validity of the Cited Standard

Clearly, the challenged regulation does not involve First Amendment rights or criminal sanctions, and therefore its facial constitutionality is

not at issue. United States v. National Dairy Corp., 372 U.S. 29, 83 S. Ct. 594, 9 L.Ed2d 561 (1963); McLean Trucking Company v. Occupational Safety and Health Review Commission 503 F.2d 8 (4th Cir. 1974). I will therefore consider the challenged vagueness of the standard only in terms of its application to this case. McLean Trucking Company, supra.

The language of the cited standard, i.e., that "powered mobile equipment shall be provided with adequate brakes," indeed does not afford any concrete guidance as to what is to be considered "adequate brakes." A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an operator unless read to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. Cape and Vineyard Division of the New Bedford Gas and Edison Light Co. v. OSHRC, 512 F.2d 1148 (1st Cir. 1975); National Dairy Corp., supra, United States v. Petrillo, 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed. 1877 (1947). Unless the operator has actual knowledge that a condition or practice is hazardous the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. Cape and Vineyard, supra. The reasonably prudent man has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics Corporation, Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

The question before me then is whether Concrete Materials knew that the operation of either or both of the cited Euclid haulage trucks with brakes in the condition then existing would be hazardous or whether a conscientious safety expert would have protected against the brake conditions existing here because they presented a reasonably foreseeable hazard.

Citation No. 221884 charges that the brakes on the No. 2 Euclid haulage truck would not stop or hold the empty truck at coast speed on a 5-degree slope. According to MSHA inspector Randall Gadway, the Inspector's Manual recommends testing brakes with the equipment fully loaded on the steepest grade used at that mine. The trucks here were tested unloaded and on a 5-degree grade (although the steepest grade at the mine was 10 degrees) because Gadway thought the brakes would not hold on the steeper grade and that it would therefore be hazardous to perform the tests on that grade. According to Gadway, the driver of the suspect truck was asked to apply his brakes on the 5-degree slope while traveling at a coast speed of 2 or 3 miles an hour. There was "no indication of any brakes" and the truck finally stopped only after moving onto a level area and then dropping into a small recess. The truck continued to roll 60 to 70 feet before stopping. These facts are undisputed. Gadway opined that the truck should have stopped in 3 to 4 feet, and indeed found that it did in fact stop within 3 to 4 feet when tested after the brakes were repaired.

Howard Collins, a qualified mechanic for Concrete Materials conceded that the Euclid truck had "never been known to have good brakes." He opined that if an empty Euclid truck stopped within 15 to 25 feet after the application of its brakes at coast speed on a 5-degree grade, the brakes were adequate. Collins also testified that after the citation on the No. 2 Euclid was issued, its brake linings and seals were replaced and an air leak was repaired by the removal of some foreign material.

Donald Barry, also qualified as an expert in the mechanics of Euclid trucks, opined on behalf of Concrete Materials that it would take a properly maintained empty Euclid truck moving at coast speed on a 5-degree slope no further than 10 to 12 feet to stop, and, moving from 7 to 8 miles per hour, about 20 to 25 feet to stop.

Within this framework of evidence I find it indeed disingenuous for Concrete Materials to now contend that it did not know what was meant by "adequate brakes" in the context of this violation. By the testimony of one of its own expert witnesses the brakes on the No. 2 Euclid truck would in essence be "adequate" only if they stopped the truck, under the testing conditions here present, within 12 feet. The undisputed evidence is that the truck here continued to roll 60 to 70 feet after the brakes were applied and then only stopped because it dropped into a depression. Under the circumstances, I conclude that Concrete Materials knew that it would be hazardous to operate its No. 2 Euclid haul truck with the brakes in the condition found in this case. Where such actual knowledge exists, the problem of fair notice does not exist. Cape and Vineyard, supra at p. 1152.

Citation No. 221885 also charges a violation of 30 C.F.R. § 56.9-3. It alleges that the brakes on the No. 3 Euclid haul truck were not effectively functioning and that the empty truck took approximately 15 to 20 feet to stop at coast speed on a 5-degree slope. Inspector Gadway conceded that the truck had some braking capability and that it indeed did stop within 15 to 20 feet after application of its brakes. As previously noted, there is some conflict in the testimony as to the distance such a truck would require to stop under the testing conditions here utilized. The Government contends that the truck should have stopped in 3 to 4 feet but offered no evidence of industry standards to support this contention or the contention that the brakes on this truck constituted a hazard. The burden of this proof is upon the Government. U.S. v. Petrillo, supra; Cape and Vineyard, supra; Bristol Steel & Iron Works Inc. v. OSHRC, 601 F.2d 717 (4th Cir. 1979).

The operator's experts testified on the other hand that under those testing conditions, a properly maintained truck of this type would take from 10 to 25 feet to stop. Under the circumstances, I cannot conclude that Concrete Materials knew that it would be hazardous to operate its No. 3 Euclid haul truck with its brakes in the condition found in this case. Nor can I conclude, in the absence of any evidence that industry standards are as strict as the Government alleges, that a conscientious safety expert would have found that a hazardous condition existed in operating the No. 3 Euclid truck with its brakes in the cited condition. Accordingly, I find that the standard at bar was improperly applied to the facts of this citation and the citation is therefore vacated.

II. The Violation and Appropriate Penalty - Citation No. 221884

The evidence discussed and the findings made under Part I of this decision also lead to my conclusion that the violation alleged in Citation No. 221884 is proven as charged. In determining the appropriate penalty to be assessed

against Concrete Materials for this violation, I note that the operator's business utilized 177,654 man-hours in a recent year, and this particular mine utilized 21,120 man-hours in a recent year, thereby placing the mine and the parent company in a small category. According to the evidence submitted, the operator does not have a serious history of violations. There is no evidence that the penalties I am assessing in this case would have any effect on the operator's ability to continue in business. I consider the condition of the brakes on the No. 2 Euclid, to have presented a serious hazard to the driver of the truck and to pedestrian traffic throughout the mine area. Gadway's testimony that he had seen pedestrian traffic on the haul road, in the pit area, and in the stockpile area--areas in which the subject haul truck would be traveling--is undisputed. There was accordingly an imminent danger of death or serious injury presented. I also find the operator to have been negligent in allowing this condition to exist. The credible evidence reveals that the operator did not even test the brake function on this truck before allowing it to operate on that particular shift even though it knew that its Euclid haul trucks had a history of having bad brakes. Under the circumstances, a penalty of $600 is appropriate.

ORDER

Wherefore, Concrete Materials is ORDERED to pay a penalty of $600 within 30 days of this order.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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23 OCT 1980

CLINCHFIELD COAL COMPANY, Contestant	:	Contest of Order
	:	Docket No. VA 79-98-R
v.	:	Lambert Fork Mine
SECRERARY OF LABOR, Respondent	:	

DECISION AND ORDER VACATING ORDER OF WITHDRAWAL

On August 6, 1980, I issued a show cause order in this case. In that order, I stated:

"The uncontroverted facts as presented in the prehearing statements are that the operator was issued a citation for failure to pay a miner, Bernard Johnson, for the time spent by him in accompanying an inspector in a C.A.A. spot inspection. The order contested here was issued because the operator did not abate that violation. The parties have raised no other issues of material fact. The sole issue in this case is whether an operator is required by § 103(f) of the Act to pay a miner who accompanies an inspector during a "spot" inspection of a mine. This issue has been decided by the Commission in Helen Mining Co., PITT 79-11-P, November 21, 1979 and Kentland-Elkhorn Coal Co., November 30, 1979."

The parties were given thirty days to show cause why the case should not be decided upon the uncontroverted facts of record and to present any other evidence or authority which they wanted considered.

Neither contestant nor respondent has filed anything further, therefore, the case will be decided upon the uncontroverted facts in record. In Helen Mining Co., supra, the Commission held that miners are entitled to walkaround pay only for regular inspections. In this case a citation was issued because a miner was not paid for his participation in a C.A.A. spot inspection. The order in question here was issued because the operator did not abate the citation within the time permitted.

> "A mine operator contesting the validity of a 104(b) order of withdrawal is entitled to challenge the existence of the violation set forth in the underlying 104(a) citation. United Mine Workers of America v. Andrus, 581 F.2d 888, 894 (D.C. Cir. 1978); Old Ben Coal Company, 6 IBMA 294, 301 n. 3, 83 I.D. 335. 1976-1977 OSHD par. 21,094 (1987). The language of sections 104(a) and 104(b) of the 1977 Mine Act indicate that the withdrawal order must be pronounced invalid where the underlying citation fails to describe a violation of either 1977 Mine Act or a mandatory safety standard."

Consolidation Coal Co., Docket No. WEVA 79-129-R, July 31, 1980.

Because the underlying citation does not describe a violation of the Act or regulations under the reasoning of Helen Mining Co., supra and Kentland-Elkhorn Coal Co., supra, the section 104(b) order in question here is invalid. Therefore, the order is vacated.

WHEREFORE IT IS ORDERED the contest of order is GRANTED and the order of withdrawal is VACATED.

James A. Laurenson

James A. Laurenson, Judge

Distribution Certified Mail:

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Leo J. McGinn, US Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
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27 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PHILLIPS URANIUM CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 80-208 ASSESSMENT CONTROL NO. 29-01688-05006 MINE: NOSEROCK NO. 1

DECISION AND ORDER

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. On June 11, 1980, the Petitioner, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], and the Respondent, Phillips Uranium Corporation [hereinafter "Phillips"], filed both a Joint Motion for Submission of Proceedings upon Stipulated Facts and a Stipulation with the Commission pursuant to Commission Rule 64, 29 CFR 2700.64.

On August 22, 1980, I issued an Order requesting that the Secretary determine whether, in view of the Federal Mine Safety and Health Review Commission's decision of Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburg and Midway Coal Mining Company (Docket No. BARB 79-307-P, August 4, 1980), he wished to continue to proceed against Phillips; and if so, whether the Secretary chose to proceed solely against Phillips, or against Phillips and any independent contractor involved. Pursuant to that Order, the Secretary determined to proceed solely against Phillips, although he would not oppose any motion by Phillips to join any independent contractor involved. The Secretary filed a Motion for Summary Decision to that effect on September 24, 1980.

FINDINGS OF FACT

The parties agree, and I concur, that there is no issue in dispute as to any material fact. From the uncontroverted evidence, I find the following facts to be established:

1. Harrison Western Corporation [hereinafter "HW"] was engaged by contract with Phillips as an independent contractor to construct shafts and associated facilities at a proposed underground uranium mine owned by Phillips, designated as Nose Rock No. 1.

2. HW's contract with Phillips requires compliance with all applicable local, state and federal laws, including the 1977 Act and any standards promulgated thereunder.

3. HW began work on construction on or about November 5, 1979, and in the course of its duties had a continuing presence at the mine.

4. On November 11, 1979, an inspection of Nose Rock No. 1 was conducted by a duly authorized representative of the Secretary pursuant to section 103(a) of the 1977 Act.

5. During the course of his inspection, the MSHA inspector observed an employee of HW working in the headframe of the No. 2 shaft about 40 feet above the surface shaft collar. Although wearing a safety belt and line, the employee had not tied his safety line off to protect himself from injury should he fall, contrary to the provisions of 30 CFR 57.15-5.[1]

6. Order of Withdrawal No. 152143 was issued to Phillips by the MSHA inspector for HW's violation of the above-cited mandatory safety standard.

7. During the course of his inspection, the MSHA inspector observed that a walkway on the headframe of the No. 2 shaft, elevated about 40 feet above the surface shaft collar, did not have a handrail for about 3 feet on the shaft side. Men or material might have fallen through this opening, contrary to the provisions of 30 CFR 57.11-12.[2]

8. Citation No. 152144 was issued to Phillips by the MSHA inspector for HW's violation of the above-cited mandatory safety standard.

9. The conditions and practices described in Order of Withdrawal No. 152143 and Citation No. 152144 were abated by employees of HW.

10. MSHA policy in existence at the time the relevant order of withdrawal and citation were issued provided for issuance of citations or orders pursuant to section 104(a) and section 107(a) of the Act for mine safety and health violations to entities identified to MSHA by a Federal Mine Identification Number.

11. A Federal Mine Identification Number may be issued to any entity registering with the Mine Safety and Health Administration upon a demonstration that that entity controls, or is capable of controlling, the activities of the mine and is in a better position than other entities present at the mine to supervise activities affecting the health and safety of mine personnel. However, only one mine identification number is issued at any given mine.

1/ Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

2/ Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

12. Federal Mine Identification Numbers have been issued by MSHA to entities other than mine owners at mines subject to the 1977 Act, however, this is unusual.

13. HW does not possess a Federal Mine Identification Number for Nose Rock No. 1, the Federal Mine Identification Number having been issued to Phillips.

14. Not having a Federal Mine Identification Number, HW could not be issued a citation or order by the MSHA inspector.

15. Phillips, as opposed to the independent contractor, was proceeded against under an MSHA agency-wide policy of directly enforcing the 1977 Act only against owner-operators for contractor violations.

16. MSHA's agency-wide policy of directly enforcing the 1977 Act only against owner-operators for contractor violations was and is an interim policy pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors, and was intended by MSHA to insure consistent, predictable and fair enforcement of the Act.

17. On October 31, 1978, MSHA announced the availability of a draft proposal which would allow identification of certain independent contractors as operators under the Act, by publication at 43 Fed. Reg. 50716 (1978). Forty-five days were given to comment on the draft rule.

18. On August 14, 1979, a proposed regulation for independent contractors, by which MSHA could identify certain independent contractors as operators under the Act, was published at 44 Fed. Reg. 47746 (1979). The comment period for this proposed regulation was to have closed on October 15, 1979.

19. On July 1, 1980, MSHA announced a final rule setting forth procedures and requirements for the identification of independent contractors performing services or construction at mines covered by the 1977 Act. Publication was made at 45 Fed. Reg. 44494 (1980) and the effective date of the final rule was declared to be July 31, 1980.

20. For the limited purpose of agreeing that the amount of any penalties are not in issue in the above-captioned Civil Penalty Proceeding, the parties agree, and I find, that the gravity of the violations, Respondent's negligence with respect to the violations, good faith in abating the violations, history of previous violations and size of business are accurately reflected and set forth in the proposed assessment issued to Phillips.

21. Payment of the proposed penalty will not impair the ability of Respondent to continue in business.

ISSUES PRESENTED

The sole issue presented for determination is whether Phillips, in the absence of direct enforcement of the Act, can be held liable for activities of an independent contractor which constitute violations of regulations promulgated pursuant to the 1977 Act?

DISCUSSION

The issue of owner-operator liability has previously been addressed by the Federal Mine Safety and Health Review Commission. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Company, (Docket No. VINC 79-119, October 29, 1979) [hereinafter cited as "Old Ben"], the Commission decided that an owner-operator can be held responsible for the violation of the Act committed by its independent contractor. The Commission elaborated:

> "When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation." Old Ben at 1483.

Several other decisions of the Review Commission are in agreement. See also Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, (Docket No. IBMA 76-28, April 11, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).

The Review Commission in its decision of Old Ben emphasized that the amendment of the definition of "operator" in the Act to include independent contractors makes it clear that contractors can be proceeded against and held responsible for their own violations. "Indeed, . . . direct enforcement against contractors for their violations is a vital part of the 1977 Act's enforcement scheme." Old Ben at 1483.

The issue of direct enforcement of the Act was addressed again in a recent pronouncement of the Federal Mine Safety and Health Review Commission. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburg and Midway Coal Mining Company, (Docket No. BARB 79-307-P, August 4, 1980), a majority ruled that in light of publication in

the Federal Register of new enforcement guidelines (see Finding of Fact No. 19) as to when the Secretary of Labor will cite independent contractors, when he will cite owner operators, or when he will cite both, fair enforcement of the Act requires an opportunity for the Secretary to determine whether he will prosecute only the owner-operator. My Order of August 22, 1980, afforded the Secretary just such an opportunity. Pursuant to that Order, the Secretary determined to proceed solely against Phillips.

Examination of the legislative history of the 1977 Act reveals that Congress clearly intended that both the Secretary and the Review Commission should share in the responsibility for the direct enforcement of the Act with respect to independent contractors. The Report of the Senate Committee on Human Resources on Senate Bill 717 expressed this intention when, in commenting on the wording of Title I of the bill, it stated:

> ". . . the definition of mine "operator" is expanded to include "any independent contractor performing services of construction at such mine." It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the Federal Mine Safety and Health Act of 1977. In enforcing this Act, the Secretary should be able to issue citations, notices and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F 2d 240 (C.A. 4, 1977)." S. Rep. No. 95-181, 95th Cong. 1st Sess., 14 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT, p. 602.

The Conference Report of the committee of conference echoed this sentiment when it reported:

> "The Senate bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine. The House amendment had no comparable provision.
>
> The conference substitute conforms to the Senate bill." S. Rep. No. 95-461, 95th Cong. 1st Sess., (37) (1977), id. at 1315.

Judicial construction of the quoted provision of the Report of the Senate Committee on Human Resources accompanying Senate Bill 717 is revealing. In National Indus. Sand Ass'n. v. Marshall, 601 F. 2d 689 (3d Cir. 1979), the court, in holding that the allocation of responsibility for training programs between mining companies and independent contractors was best left to the initiative of the Secretary, stated:

> "As this excerpt from the legislative history reveals, independent contractors were included in the definition of "operator" because "the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors." Congress was clearly concerned with the permissive scope of the Secretary's authority, not with the mandatory imposition of statutory duties on independent contractors." Id. at 703 (emphasis in original).

Taken together, the text of the legislative history and its judicial construction present an indication of the intent of Congress as to the allocation of responsibility for the direct enforcement of the Act with respect to independent contractors. The Secretary, within the permissive scope of his powers, should be able to issue citations, notices and orders against independent contractors as well as against the owner, operator or lessee of the mine. The Commission, within the permissive scope of its powers, should be able to assess civil penalties against independent contractors as well as against the owner, operator or lessee of the mine.

In the case before me, the Secretary, by deciding to proceed solely against Phillips, has effectively limited the ability of the Commission to assess a civil penalty against a responsible independent contractor because the latter has not been brought within the personal jurisdiction of the Commission. While the Federal Mine Safety and Health Review Commission's ruling in Old Ben allows for the imposition of civil penalties against the owner-operator for violations of the Act by an independent contractor, the decision also states that continuation of a policy that forecloses direct enforcement of the Act against contractors provides evidence that the policy in force is grounded upon improper considerations of administrative convenience. Old Ben at 1486-7. I find indications to that effect contained in the record of the present case. (See Petitioner's Motion for Summary Decision).

From the facts as found, it appears that Order of Withdrawal No. 152143 was properly issued for a violation of 30 CFR 57.15-5. It also appears that Citation No. 152144 was properly issued for a violation of 30 CFR 57.11-12. I must therefore resolve the issue of whether Phillips

can, in the absence of direct enforcement of the Act, be held liable for independent contractor activities in the affirmative. Old Ben clearly establishes that the duty to maintain compliance with the Act regarding a contractor's activities can be imposed on both the owner and contractor as operators. Even though the Secretary has unduly prolonged the interim enforcement policy of citing owners only, the owner-operator should be held liable for independent contractor activities which constitute a violation of the Act.

Based upon the foregoing discussion, the facts as found to exist in Findings of Fact No. 20 and No. 21, my finding that the Secretary has continued in a policy that forecloses enforcement of the Act against independent contractors and my finding of a lack of culpability on the part of Phillips, I conclude that penalty assessments in nominal amounts of $1.00 for Order No. 152143 and $1.00 for Citation No. 152144 are appropriate.

CONCLUSIONS OF LAW

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

2. The conditions found to exist on November 5, 1979, in Finding of Fact No. 5 constitute a violation of the mandatory safety standard contained in 30 CFR 57.15-5.

3. The conditions found to exist on November 5, 1979, in Finding of Fact No. 7 constitute a violation of the mandatory safety standard contained in 30 CFR 57.11-12.

4. Respondent can be held liable for the activities of its independent contractor constituting the violations found to exist in Conclusions No. 2 and No. 3 above.

5. The Secretary has continued in a policy that forecloses enforcement of the Act against independent contractors for activities which constitute violations of regulations promulgated pursuant to the 1977 Act.

6. Respondent is liable for the activities of its independent contractor which constitute the violations found to exist in Conclusions No. 2 and No. 3 above.

7. Penalty assessments in nominal amounts of $1.00 for Order No. 152143 and $1.00 for Citation No. 152144 are reasonable and appropriate under the circumstances.

ORDER

Based upon the foregoing findings of fact and conclusions of law, Order No. 152143, together with a penalty assessment of $1.00, and Citation No. 152144, together with a penalty assessment of $1.00, are hereby affirmed. Respondent shall pay the affirmed penalties within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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2 7 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. YORK 80-13-M
Petitioner	:	A/O No. 30-00075-05003H
v.	:	
	:	Haverstraw Quarry & Mill
HUDSON RIVER AGGREGATES, INC.,	:	
Respondent	:	

DECISION

ORDER TO PAY

Appearances: William M. Gonzalez, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner, MSHA;
Frederick Braid, Esq., Rain and Pogrebin, Mineola, New York, for Respondent, Hudson River Aggregates, Inc.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by MSHA against Hudson River Aggregates, Inc. A hearing was held on October 15, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-4):

(1) The operator is the owner and operator of the subject facility.

(2) The operator and the facility are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) I have jurisdiction in the case.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was properly served upon the operator.

(6) Imposition of a penalty in this matter will not affect the operator's ability to continue in business.

(7) The alleged violation was abated in good faith.

(8) The operator's history of prior violations is small.

(9) The operator's size is moderate.

(10) The operator's witness, N. Clarke Applegate is accepted as an expert in the field of structural design of conveyors, including sand conveyors.

(11) The MSHA inspector is accepted as an expert, generally, in mine health and safety.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 8-161). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead they agreed to make oral argument and have a decision rendered from the bench (Tr. 162). A decision was rendered from the bench setting forth findings and conclusions with respect to the alleged violation (Tr. 174-178).

BENCH DECISION

The bench decision is as follows:

> This case is a petition for the assessment of a civil penalty for an alleged violation of 30 CFR 56.9-2. Section 56.9-2 provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."
>
> The subject citation sets forth:
>
> > Approximately 20 cross sectional braces were rusted away in a 60 foot section of the sand conveyor. The three inch by one quarter inch main angles of the framework were rotted in several areas along the entire length of the conveyor. Many cross sectional braces were rotted away for the entire length of the conveyor. 250 feet. Height on the end of the conveyor approximately 40 feet. (Order modified to allow welders and other necessary maintenance personnel to make the necessary repairs.)
>
> I find a violation existed. There is some conflict in the testimony with respect to the extent of the rusted and deteriorated angle irons and other supports. After due

consideration, I accept the inspector's description, including his statements setting forth that 60 upright angle iron supports above the horizontal angle iron support, as well as 60 cross section supports below were rusted and deteriorated. I further accept his testimony that the 60 rusted supports above were not in contact with the horizontal angle iron and that the 20 below (directly over the roadway) also were not attached.

I further conclude that the written citation adequately covers the description given by the inspector in his testimony. The reference to 20 cross sectional braces in the first sentence of the citation refers to the bottom supports and the second and third sentences of the citation cover both supports above and below the horizontal support.

There can be no doubt that this condition affected the safety of the conveyor belt. Both the inspector and the operator's plant manager explained how the "above" supports are for the vertical weight load and how the "bottom" cross supports are for lateral support. When these supports are in proper condition they enhance safety. Conversely, their poor condition adversely affects safety.

Moreover, although the operator's expert engineer expressed the view that the 50 per cent deterioration in effectiveness of the upper angle irons which he saw did not affect safety, he admitted that a decrease in effectiveness of 75 to 80 per cent would create a danger of collapse. This mandatory standard requires only that defects "affecting" safety shall be corrected. It does not mean that an operator can wait until the equipment is on the brink of a total breakdown before it remedies the situation. I recognize that this conveyor had a cable system, walkway outriggers and 45 degree supports, which added to safety. However, this does not mean that the defects cited by the inspector did not reflect negatively upon safety. They surely did. Indeed, safety was affected even when the operator's evidence is considered by itself. The operator's expert engineer testified that maintenance was necessary because if the uncorrected situation were allowed to become worse, it might not have been possible to join new welds to the old metal, thereby making repairs impossible and necessitating construction of an entirely new conveyor system. The expense that construction of a new system would require might mean further delay on the operator's part, thereby adversely affecting safety in still another way.

Accordingly, I conclude there was a violation.

I further conclude the violation was serious because, as the inspector testified, the danger of serious injury or even death would be present if the belt collapsed. The operator's plant superintendent testified that fifteen supports, all next to each other, over the roadway, had to be replaced. However, I find that gravity was substantially mitigated because cables, walkway outriggers and other factors added to safety above and beyond the components cited by the inspector.

I recognize the operator had ordered materials necessary for repairs. Nevertheless, I find the operator was negligent. This condition existed for some time and was becoming progressively worse.

The parties have stipulated that there was good faith abatement; imposition of a penalty will not affect the operator's ability to continue in business; the operator is moderate in size; the operator has only a small history of prior violations. I accept all these stipulations.

Bearing in mind that gravity was mitigated, the operator's moderate size and small history of previous violations, a penalty of $250 is assessed.

ORDER

The operator is ORDERED to pay $250 within 30 days of the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

27 OCT 1980

MATHIES COAL COMPANY, Contestant	:	Contest of Order
	:	Docket No. PENN 80-319-R
v.	:	Order No. 841925; 7/21/80
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mathies Mine

DECISION AND ORDER

Pursuant to Rule 11, 29 C.F.R. 2700.11, the operator moves to dismiss voluntarily its contest of an unwarrantable failure closure order based on an inspector's finding of a serious violation of 30 C.F.R. 75.200. The operator has concluded that after a careful consideration of the merits of the order it is apparently not subject to challenge.

After dismissal, the validity of the order and its subsidiary findings of violation and unwarrantability will no longer be subject to challenge. Wolf Creek Collieries, PIKE 78-70-P (March 26, 1979); Pontiki Coal Co., 1 FMSHRC 1476 (October 25, 1979). For this reason, I conclude the dismissal will establish an estoppel as to those issues in any subsequent penalty proceeding. F.R.C.P. 41(a)(2); Climax Molybdenum Company, 2 FMSHRC _____ (October 7, 1980); Energy Fuels Corp., 1 FMSHRC 299 (May 1, 1979); Rule 22, 29 C.F.R. 2700.22.

Accordingly, it is ORDERED that the captioned matter be and hereby is, DISMISSED WITH PREJUDICE.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

28 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. CENT 79-16-M
	:	A/O No. 41-00995-05002
v.	:	
	:	Docket No. CENT 79-17-M
TEXAS ARCHITECTURAL AGGREGATES, INC., Respondent	:	A/O No. 41-00995-05003
	:	
	:	Docket No. CENT 79-38-M
	:	A/O No. 41-00995-05004
	:	
	:	Docket No. CENT 79-147-M
	:	A/O No. 41-00995-05005
	:	
	:	Docket No. CENT 79-357-M
	:	A/O No. 41-00995-05006
	:	
	:	Van Horn White Marble Mine

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Ralph William Scoggins, Esq., El Paso, Texas; David M. Williams, Esq., San Saba, Texas, for Respondent.

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the Act). The hearing in these matters was held in El Paso, Texas, on May 14, 15, 16, 1980, and August 27 and 28, 1980.

1/ Sections 110(i) and (k) of the Act provide:

"(1) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid

At the outset of the hearing, Petitioner read a number of admissions by Respondent into the record. Respondent admitted the following: (1) that, in essence, it fell within the jurisdiction of the Act, (2) that the citations listed in Exhibit 1, a copy of the proposed assessment numbered 41-00995-05001, had not been challenged and that the proposed assessment had, therefore, become a final order of the Commission, (3) that Respondent's employees worked a total of 84,456 man-hours in 1978, (4) that its employees worked a total of 8,008 man-hours in 1978 at the Van Horn White Marble Mine.

The proposed assessment, identified as Exhibit 1, showed that the operator had a history of 19 prior violations, for which it was assessed a total of $997.

The parties stipulated that the size of the Van Horn White Marble Mine was a small operation with 8,008 total man-hours worked in 1978 and that Respondent was a small- to medium-sized operator.

After the presentation of evidence and oral argument by the parties on each alleged violation and each of the criteria to be considered in the assessment of a penalty, a decision was announced orally from the bench. The decision is reduced to writing in substance as follows, pursuant to the Federal Mine Safety and Health Review Commission's Rules of Procedure, 29 C.F.R. § 2700.65. General findings were made with regard to Respondent's size, its history of violations and the effect of civil penalties assessed herein on its ability to remain in business. Evidence regarding each citation was presented in the chronological order of the citations rather than by docket numbers and the decision on each citation was accordingly announced in that order rather than by docket numbers.

BENCH DECISION

> Pursuant to stipulation by the parties, it is found that the Van Horn White Marble Mine is a small-sized operation and that the Respondent is a small- to medium-sized operator. All employees of the operator worked a total of 84,456 man-hours in 1978. The employees of the operator at the Van Horn White Marble Mine worked a total of 8,008 man-hours in 1978.

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fn. 1 (continued)
compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

Exhibit P-1 indicates that the operator has been assessed the amount of $997 total for 19 prior violations, in 1978. Pursuant to Exhibit P-1, it is found that the operator's history of previous violations is moderately good.

It is found that the civil penalties in this case will not affect the operator's ability to continue in business.

Citation No. 162002

Citation No 162002 was issued on November 7, 1978, by MSHA Inspector Sidney R. Kirk. The condition or practice listed on the citation was "Beer bottle, a round stick of 12 inches in length, and an air gauge and hose were in the floor of the operator's cab of company number zero haul truck."

The citation alleged a violation of 30 C.F.R. § 57.9-12, which states as follows: "Mandatory. Cabs of mobile equipment shall be kept free of extraneous materials."

The record establishes that a beer bottle, a round stick of 12 inches in length and approximately 1-inch diameter, and an air gauge and air hose were on part of the seat structure of the company No. 0 haul truck. It has not been established that in this particular instance that the beer bottle, the round stick, the air gauge or the air hose were necessary in order to operate the truck on the day in question. While these items might have had some possible use in maintenance of the truck, it is not clearly indicated that it was necessary that they be in the cab of the truck on the day of the inspection. Since these materials were extraneous, the record supports a finding that there was a violation of 30 C.F.R. § 57.9-12.

While it is possible that a person might be injured as a result of these conditions, the possibility is quite remote. I believe that an injury is improbable under these conditions, due to the fact that it would be necessary for a series of events to occur in order for an accident to take place. First, the material would have to get from the seat through somewhat restrictive openings to the floor. Then they would have to somehow become entangled with the controls of the truck. Even after that, with the truck moving at a slow rate of speed, perhaps only 5 or so miles per hour, in low gear, an accident might still be averted. For that reason, I find that an injury, as a result of these conditions, is improbable.

The record establishes that the mine was in operation at the time of the violation and that the extraneous articles

were in plain view and obvious. This supports a finding that the operator should have known that the extraneous articles were in the cab of the truck and he should have taken steps to remedy the condition. It has not been established as to what length of time these articles were actually on the seat in the operator's cab. Therefore, the appropriate finding is that the negligence of the operator was slight.

As to the remaining issue of good faith, the record supports a finding that the condition was abated less than an hour after the citation was issued. This demonstrates that once the citation was issued, the operator demonstrated good faith in abating the citation.

In consideration of the foregoing findings of fact and the statutory criteria to be applied in assessing the civil penalty, it is found that a civil penalty of $75 is appropriate for this violation.

An assessment in the amount of $75 is entered.

Citation No. 162003

Citation No. 162003 was issued on November 7, 1978, by Inspector Sidney Kirk. The condition or practice noted on the citation was, "The haul truck number zero, entered the mine portal in total darkness and the headlamps had been torn off. No other illumination was provided."

The record does not support a finding that the truck did, in fact, enter the portal in total darkness. However, it does establish that the truck entered the mine portal from bright sunlight outside to an area where it was considerably darker.

30 C.F.R. § 57.9-2 provides: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

Notwithstanding the fact that the record does not support a finding that the haul truck entered the portal in total darkness, the citation citing a violation of 30 C.F.R. § 57.9-2, did apprise the operator and the operator's counsel as to the nature of the alleged violation sufficiently to allow the operator to present its defense. The evidence supports a finding that when the truck is entering the portal from the bright sunlight outside into the darker area, vision is momentarily reduced, creating a safety hazard for a short period of time. The record, therefore, does support a finding that there was a violation.

The record establishes that there was sufficient light to maneuver vehicles and perform loading functions after passing through the portal. The evidence establishes that the probability that the absence of headlights on the No. 0 haul truck would cause an injury is slight. I have made no finding as to the effect of the lack of headlights if the truck was coming out of the mine because the effect as the truck came from the somewhat darker area out into a bright area has not been established by the record. It was also not established that any great hazard would occur in the operation of the truck inside the mine after the driver's vision had adapted itself to the darker conditions. Also, as the truck came in through the portal from the outside, it would be silhouetted by the portal and should be readily visible to the persons or vehicles coming out through the portal. Nevertheless, there was a momentary impairment in vision of the truck driver as he came through the portal. I accept the testimony of the inspector as to this point. However, since that condition was only momentary, I find that the probability was slight.

The record supports a finding that the headlights had been missing from the No 0 haul truck for a considerable period of time prior to the issuance of the citation. It also supports a finding that the operator either knew or should have known that the headlights were missing. Since the operator should have known and failed to take corrective action, this amounts to negligence. However, it is evident that the operator used good faith in reaching its decision not to replace the headlights or furnish the vehicle with headlights. In view of his good faith in this respect, the finding is that the operator's negligence was slight.

In view of the admission by MSHA that the operator did exhibit good faith in abating the violation, the finding is that the operator did display good faith.

In view of the findings of fact and in consideration of the statutory criteria for assessment of a civil penalty, a civil penalty in the amount of $100 is assessed for this violation.

Citation No. 162004

Citation No. 162004 was issued by Inspector Sidney R. Kirk on November 7, 1978. The condition or practice noted on the citation was: "The park brake on the number zero ore haul truck was inoperative. While parked on a grade, two employees removed the boulders from behind the rear wheels while the driver held the truck with engine power."

The citation alleged a violation of 30 C.F.R. § 57.9-37, which provides as follows: "Mandatory. Mobile equipment shall not be left unattended unless brakes are set. Mobile equipment with wheels or track, when parked on a grade, shall be either blocked or turned into a bank and the bucket or blade lowered to the ground to prevent movement."

It is clear here that the Secretary is alleging a violation of the first sentence of this regulation which states that mobile equipment shall not be left unattended unless the brakes are set. The record supports a finding that the No.0 haul truck did not have parking brakes and that no brakes were, in fact, set at the time the inspection was made and the citation issued. Since the brakes were not set on the No. 0 haul truck, a violation of 30 C.F.R. § 57.9-27 did exist.

It has already been determined as one of the considerations of whether or not there was a violation of 30 C.F.R. § 57.9-37, that the vehicle was unattended. This finding was entered since there was no one at the vehicle and no one in attendance nearby at the time of the inspector's arrival. The evidence clearly shows that the vehicle was unattended, that it did not have parking brakes and that the brakes were not set. The record shows that it is probable that this condition could result in serious injury to personnel.

While the evidence shows that a new truck had been ordered prior to the time of the inspection, the evidence does not indicate that truck No. 0 had been removed from service or that it had been tagged to prohibit further use until repairs were completed. The record clearly shows that the operator, either knew or should have known, that the vehicle did not have parking brakes and that the brakes were not set while the vehicle was unattended. Therefore, I find that the operator was negligent.

In view of the statement by MSHA that respondent exercised good faith, a finding is entered that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In view of the above findings of fact and the consideration of the statutory criteria for determination of the amount of the civil penalty to be assessed, it is found that an appropriate civil penalty for the violation of this citation is $200.

The operator is assessed the penalty of $200 for the violation set forth in Citation No. 162004.

Citation No. 162005

Citation No. 162005 was issued on November 7, 1978, by MSHA inspector Sidney R. Kirk. The condition or practice noted on the citation was as follows: The No. 0 ore haul truck driver's visibility to the rear was blocked by a cab protector and only one mirror located on the driver's side, backing through the plant yard without a person signaling, and was not equipped with an automatic reverse signal alarm to warn persons in the area.

The citation alleged a violation of 30 C.F.R. § 57.9-87 which provides as follows: "Mandatory. Heavy-duty mobile equipment shall be provided with audible warning devices, when the operator of such equipment has an obstructed view to the rear. The equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or a lever to signal when it is safe to back up."

Due to the construction of the cab protector the view of the operator to the rear was obstructed. The record supports a finding that the equipment did not have an automatic reverse signal alarm which was audible above the surrounding noise level. The record also establishes that on the day the citation was issued and at the time the citation was issued, there was no observer to signal when it was safe to back up. While there were other persons in the area, none of them were in the immediate vicinity of the No. 0 ore haul truck. They did not fulfill the function of an observer to signal when it was safe to back up. The record clearly establishes a violation of 30 C.F.R. § 57.9-87. The first sentence of 30 C.F.R. § 57.9-87 says, "Heavy-duty mobile equipment shall be provided with audible warning devices." The evidence established that the No. 0 ore haul truck was, in fact, heavy-duty mobile equipment, that it was not provided with a horn or other audible warning devices that were in working condition at the time. The evidence indicates that the horn did not, in fact, operate.

The evidence establishes that the truck was subject to being operated in the vicinity of where other miners were working or otherwise present. At times, the truck was subject to being backed up for considerable distances. The record establishes that it was probable that the conditions found by and cited by the inspector could result in serious injury to personnel. The record clearly establishes that the truck was backed for a distance of approximately 125 feet on the 7th of November, 1978, during the inspection. It has not been established, however, that it was backed up at any other time, without an automatic reverse signal alarm or a person to signal and warn persons in the area.

It was established that the horn did not work and that there was no other audible warning device. However, it was not established how long this condition had existed. The only witness for the Government has testified that there was no representative of the operator there and that these conditions could, therefore, have not been known by the operator of the mine. On the basis of this testimony, I find that the negligence of the operator has not been established.

Pursuant to a statement by MSHA that respondent exhibited good faith, I find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

For this violation of 30 C.F.R. § 57.9-87, a civil penalty in the amount of $125 is assessed.

Citation No. 162006

Citation No. 162006 was issued on November 7, 1978, by Inspector Sidney R. Kirk. The condition or practice noted on this citation was, "High voltage lines over the truck haul road approximately 40 feet in front of the haul truck dump site were not conspicuously marked."

This citation alleged a violation of 30 C.F.R. § 57.9-60 which states: "Mandatory. Where overhead clearance is restricted, warning devices shall be installed and the restricted area shall be conspicuously marked."

The testimony of Inspector Kirk has shown that the lines over the truck haul road that he noted in this citation were not, in fact, high-voltage lines under the regulation in Title 30 of the Federal Regulations. More important, however, is the question as to whether or not the overhead clearance was restrictive. The Secretary asserts that the overhead clearance was restrictive because it is possible that some piece of equipment could contact it, that is, the lines. The record in this case, however, indicates that the highest piece of equipment was in use on this haul road that might contact the lines or any other construction over the road was the Euclid haul truck. With the bed in the dump position, the evidence establishes that there was a 2-1/2-foot to 3-foot clearance.

I, therefore, find that this was not a restricted clearance, within the meaning of 30 C.F.R. § 57.9-60.

Citation No. 162006 is, accordingly, vacated. The proceeding concerning Citation No. 162006 is dismissed.

Citation No. 162007

Citation No. 162007 was issued on November 7, 1978, by Inspector Sidney R. Kirk. The condition or practice noted on the citation is: "Handrails were not provided at the truck dump, north side, where personnel observed the ore hopper contents. A drop-off of approximately 20 feet (existed)."

The citation alleged the violation of 30 C.F.R. § 57.11-2 which provides: "Mandatory. Crossovers, elevated walkways, elevated ramps and stairways shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided."

The evidence shows that there was a small mound approximately 3 feet in width on one side of a dump ramp. From this mound, there was a drop-off of approximately 16 to 20 feet. This mound was in addition to the berms on the side of the dump ground.

Although the company had issued instructions to the truck drivers that they would dump and receive their instructions from the truck cab, the evidence clearly shows that the mound was used as a walkway. The multiple tracks on it indicated that persons had walked on it. There was testimony to the effect that persons had been observed there watching the feeder contents. This mound is clearly elevated and it is clearly a place where persons walked at times. It, therefore, falls within the purview of the regulations as being a walkway.

Although this mound is built on cribbing, there is no indication that this cribbing extends up above the ramp in any way to act as a guard. The testimony is undisputed that there was no handrail present at this mound, which is in the nature of a walkway. The record supports a finding that the Respondent was in violation of 30 C.F.R. § 57.11-2.

As to the gravity, the evidence establishes that if a person were to fall from the elevated mound or walkway that the fall would be at least in the area of a 16-foot or a 20-foot fall and that the person would fall on a hard surface of some type. A fall of this nature could be expected to result in severe injuries to the person.

The testimony has shown that this walkway was on occasion used by persons, specifically some of the truck drivers. However, the number of occasions and the frequency of these occasions was not established by the testimony. Due to the

limited exposure of personnel to the danger of falling, I find that it is improbable that a person would be injured by a fall from this elevated walkway.

The evidence has established that there was no handrail at the elevated mound or walkway. It has also established that this condition was obvious and open to view, even from the office. This supports a finding of negligence on the part of the operator. The evidence has, however, failed to show that the operator knew that this area was being used with any frequency by the truck drivers or other persons. Due to the lack of showing as to frequency, the fact that the truck drivers had actually been instructed to remain in their cabins and not use the walkway, I find that the negligence, in this case, is slight.

The record reflects that the citation was issued on November 7, 1978, and that the termination or abatement date was set for November 14. Although the violation was not abated within this time frame, the inspector did modify the citation on November 15, 1978, to give the company until November 20, 1978, to abate the violation. The citation terminating the original citation was not issued until January 4, 1979; however, it has not been established that the operator did actually take that much time in abating the violation.

When the violation was not abated by November 14, the time set, the inspector did see fit to modify the citation to allow additional time. There is no indication that an order of withdrawal was issued for failure to abate in sufficient time. Since the actual time of abatement leading to the termination of the citation has not been established, I will give the operator credit for good faith in attempting to achieve rapid compliance after the citation was issued.

In consideration of the findings of fact and the statutory criteria to be applied in assessing a civil penalty, a penalty of $125 is assessed for this violation.

Citation No. 162008

Citation No. 162008 was issued on November 7, 1978, by inspector Sidney R. Kirk. The condition or practice noted on the citation was, "Access to the cutoff valve on the diesel storage tank on the south side of the crusher was by climbing the slant structure and using pliers to turn off the fuel."

The citation alleged a violation of 30 C.F.R. § 57.11-1 which states: "Mandatory. Safe means of access shall be provided and maintained to all working places."

"Working place" is defined in 30 C.F.R. § 57.2 as follows: "Working place means anyplace in or about a mine where work is being performed."

There was a great deal of conflict in evidence as to whether or not this was a working place and that it was a place in or about the mine, where work was being performed. However, there is no need to resolve this conflicting testimony, at this stage of the decision.

The violation was abated by Mr. John Aragon on January 4, 1979. The justification for his action on his subsequent action form, which terminated the violation, was as follows: "The diesel fuel storage tank on the south side of the crusher was equipped with a cutoff valve." This was evidently done because the cutoff valve, at the time of the inspection, was not equipped with a valve wheel to operate the valve. The square handle had been rounded off by pliers used to close and to open the valve. The termination form issued by Inspector Aragon did not mention the installation of a ladder or the installation of additional handrails around the area of the valve.

While the access to some of the working places might have been hazardous and a violation, attention has been directed in this case to the access to the cutoff valve on the diesel storage tank. This has been the issue that has been litigated here. Mr. Simpson has testified that the cutoff valve could be operated by reaching from the platform to the valve and this was a safe operation. He also testified that there were steps built on the A-frame structure, holding the diesel fuel tanks, which could be used as a ladder.

Inspector Kirk, in his testimony, stated that, to the best of his knowledge, that the condition was terminated merely by the installation of a cutoff valve. There was nothing to indicate that additional ladders or handrails had been provided.

I therefore find that the record does not establish a violation of 30 C.F.R. § 57.11-1, in that it has not been shown that a safe means of access was not provided and maintained to the cutoff valve on the diesel storage tank.

Accordingly, Citation No. 162008 is vacated and the proceeding concerning Citation No. 162008 is dismissed.

Citation No. 162009

At the conclusion of the presentation of evidence with regard to Citation No. 162009, Respondent moved that the proceedings with respect to this

citation be dismissed. It had been alleged that a master control switchbox was not equipped with a ground in violation of section 57.12-25. Respondent argued that testimony had established that the control box was equipped with a ground.

Respondent's motion to dismiss was granted as follows:

> Mr. Kirk has clearly testified that the master control switchbox was grounded with a metal conduit and that a metal conduit was an approved and acceptable method of grounding this particular type of installation. What Mr. Kirk has testified to was that the magnetic starter was not grounded by a conduit between the master switch and the magnetic starter.
>
> Mr. Kirk has testified that he did not check to see whether there was a continuous ground from the magnetic starters through the conduit, through the motor casings to ground, and he has stated that while this might have complied with the regulation, it still might be unsafe due to the different degree of grounding in the three motors which might cause an electric potential. Since Citation No. 162009 refers to the master control switchbox and not the magnetic starter, the citation is vacated.

Citation No. 162010

Citation No. 162010 was issued on November 8, 1978, and it alleged a violation of 30 C.F.R. § 57.18-10. The condition or practice listed on the citation reads as follows: "First aid training had not been made available to all the employees. The selected supervisor had been trained in first aid four years ago in school. The seven employees were working 30 miles from the nearest town and only a pickup truck and a stretcher was available, and no communications."

30 C.F.R. § 57.18-10 reads as follows: "Mandatory. Selected supervisor shall be trained in first aid. First aid training shall be made available to all interested employees."

Notwitstanding what had been told to the inspector by Mr. Arturo Gonzalez, foreman, the selected supervisor, the evidence shows that he had in fact been trained in first-aid on September 14, 1977.

As to the second requirement of the regulation, the evidence shows that first-aid training had been made available and had actually been given to some of the employees and it fails to show that the operator failed to make such training available to all interested employees.

Citation No. 162010 is vacated and the proceeding in regard to this citation is dismissed.

Citation No. 162011

Citation No. 162011, issued on November 8, 1978, by inspector Sidney R. Kirk, alleged a violation of 30 C.F.R. § 57.11-58. The condition or practice noted on the citation stated: "Two employees were found working underground without any identification. The check-in board tags showed four persons to be underground. When investigated, neither were underground since two of them were no longer employed at this mine."

30 C.F.R. § 57.11-58 states as follows: "Mandatory. Each operator of an underground mine shall establish a check-in and check-out system which shall provide an accurate record of persons in the mine. These records shall be kept on the surface in a place chosen to minimize the danger of destruction by fire or other hazards. Every person underground shall carry a positive means of being identified."

It has hardly been disputed that there were persons underground without a positive means of being identified. Inspector Kirk stated in the citation that two employees were found working underground without any identification. His testimony clearly shows that two employees were found working underground without any identification even though at one time he possibly did use language to indicate that perhaps those two persons did have positive identification. This was fully explained in subsequent testimony. The record establishes that there were employees without positive means of identification.

The citation also stated that the check-in tag boards showed four persons to be underground when they were not underground and two of them were no longer employed at the mine.

Although a check-out system had been established by which the miners checked in and out of the mine, or were supposed to check in and out of the mine, the system did not, on the day the citation was issued, provide an accurate record of persons in the mine as required by 30 C.F.R. § 57.11-58.

The record establishes that there was a violation of the sentence of the regulation which states: "Each operator of an underground mine shall establish a check-in and check-out system which shall provide an accurate record of persons in the mine."

The record also establishes a violation of the last sentence of 30 C.F.R. § 57.11-58 which states: "Every person underground shall carry a positive means of being identified."

The operator was, therefore, in violation of 30 C.F.R. § 57.11-58 as alleged in Citation No. 162011.

I do not find that the violation was willful as urged by Petitioner. However, I do find that the operator was negligent and failed to follow the mandates of 30 C.F.R. § 57.11-58. The operator had established a system for checking persons in and out of the mine. However, on the day of the violation, the system was not sufficient to provide an accurate record of persons in the mine since it showed four persons underground who were not actually underground. The operator also should have known that there were persons underground without positive means of being identified. Not only had these persons failed to leave their tags at the check-out board in accordance with the check-out system and the check-in system established, but they had not been issued means of identification to be used under that system.

As to gravity, the unrebutted testimony of Inspector Kirk was that the violation posed no hazard to the miners working at the time. However, he further testified that there could have been danger to persons involved in rescue efforts in looking for bodies. Clearly, these persons might also have been miners. Nevertheless, the operator's mine was a small mine and the danger to miners would have been triggered only by a disaster. I therefore find that the possibility of injury due to the violation was remote.

In view of the concession by Petitioner that temporary nametags were immediately issued and that the four nametags were removed from the check-in board, I find that the operator demonstrated good faith in abating the condition after the citation was issued.

Having considered the six statutory criteria, I find that a proper assessment for this violation is $95.

Order No. 161774

Respondent objected on jurisdictional grounds to the assessment of civil penalties for alleged violations in Citation Nos. 161774 and two others; 161776 in Docket No. CENT 79-16-M and Citation No. 161775 in Docket No. CENT 79-38-M. At the conclusion of testimony and oral argument on the issue, the following decision was rendered:

The March 29, 1979, memorandum of understanding between OSHA and MSHA is set forth in a document offered by Respondent on page 344, section 516 of The Commerce Clearinghouse, Inc., a document published in 1980, entitled "Employment Safety and Health Guide."

According to this document the Occupational Safety and Health Act of 1970 (OSHA) gives the Secretary of Labor authority over all working conditions of employees engaged in business affecting commerce except those conditions with respect to which other Federal agencies exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health.

This document also states that the Federal Mine Safety and Health Act of 1977, Pub. L. 91-173, as amended by Pub. L. 95-164 (Mine Act), authorizes the Secretary of Labor to promulgate and enforce safety and health standards regarding working conditions of employees engaged in underground and surface mining extraction (mining), related operations, and preparation and milling of the minerals extracted.

The definition of a coal or other mine in the Act is given in section 3(h)1 as follows:

> Coal or other mine means (a) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (b) private ways and roads appurtenant to such area, and (c) lands, excavations, underground passageways, shafts, slopes, tunnels, working structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

I believe that this definition can be read to mean that a mine is an area of land from which minerals are extracted

in nonliquid form and facilities, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in liquid form.

The MSHA/OSHA agreement of 1979 sets forth certain general principles as to which an agency will have jurisdiction. These are stated as follows: "This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved.

The general principle is that, as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions.

However, where the provisions of the Mine Act do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g., hospitals or mine sites), or where there is statutory coverage under the Mine Act but there exists no MSHA standards applicable to particular working conditions on mine sites, then the OSHA Act will be applied to those working conditions.

Also, if an employer has control of the working conditions on a mine site or milling operation, and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSHA Act may be applied to such an employer where the application of the OSHA Act would in such a case provide a more effective remedy than citing a mine operator or an independent contractor subject to the Mine Act who does not in such circumstances have direct control over the working conditions.

This statement of general principle seems to apply in most cases to mine sites and in milling operations. I do not have sufficient information to determine if there was a milling operation at the Van Horn loading dock and will assume that the loading operation there consisted only of the use of hoppers, front-end loading, and railroad cars, and perhaps other associated equipment.

This case does not seem to fall under one of the exceptions in the OSHA/MSHA memorandum of understanding in the case where there is statutory coverage under the Mine Act, but there exists no MSHA standards applicable to particular

working conditions on such sites. There appears to be MSHA standards applicable to particular working conditions at the Van Horn loading dock.

Another exception set forth in the memorandum of understanding is where an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act. Here, it appears that the employer is a mine operator who does have control of the working conditions at the loading dock and is, therefore, not under the exception. Also, there is no indication in this case that the application of the OSHA Act would provide a more effective remedy than citing a mine operator subject to the Mine Act.

The memorandum of understanding does not seem to specifically address the jurisdiction of the agencies over a loading facility such as that of Texas Agricultural Aggregates--Architectural Aggregates at Van Horn. However, as stated by counsel for Respondent, there are subgroups of nonmetals listed under the authority of MSHA. These include sand and gravel, and crushed and dimension stone industries, as well as another list including sand, gravel, cement, and marble.

The memorandum of understanding does contain the statement that OSHA regulatory authority commences as indicated in the following types of operations: gypsum board plant, brick clay pipe and refractory plants, ceramic plant, fertilizer products, asphalt mixing plant, concrete ready-mix or batch plants, custom stone finishing, smelting, electrowinning, and salt and cement distribution terminals not located on mine property, and refining. The memorandum of understanding does, therefore, place certain distribution terminals not located on mine propery under the jurisdiction of OSHA. However, these are only salt and cement distribution terminals. No other types of distribution terminals are listed and there are no general words to indicate that OSHA has jurisdiction in this case.

I will, therefore, apply the words of the Federal Mine Safety Act of 1977 in determining whether or not MSHA has jurisdiction over the mine operations or the distribution mine operations at the Van Horn loading dock.

Since the definition of mine includes facilities used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, the loading facility at Van Horn is clearly within the statutory definition of a mine.

Since there is nothing in the memorandum of understanding between OSHA and MSHA to place this facility under the jurisdiction of OSHA rather than MSHA, my ruling is that MSHA does have jurisdiction over that facility.

The bench decision continued as follows:

Order of Withdrawal No. 161774, citing a violation of 30 C.F.R. § 57.9-3, was issued on November 9, 1978, by inspector Sidney Kirk. The condition or practice noted on the order of withdrawal stated: "The brakes on the Hough-30 payloader used at the railroad loading facility in Van Horn, Texas was used normally on an appropriate grade of ten to twelve percent. The brake line was broken and when tried, the loader would not stop and/or hold on an approximately three percent grade."

30 C.F.R. § 57.9-3 states: "Mandatory. Powered mobile equipment shall be provided with adequate brakes."

The testimony of Mr. Simpson and Inspector Kirk has established that some time between November 3 and the date of the order of withdrawal on November 9, an eye had broken from a tie rod, which, in turn, had broken a brake line to one of the wheels. Mr. Simpson's testimony has established that this line was to the left rear wheel. His rationale was that the tie rod was on the rear wheels used to steer the machine and that is what broke the line. So it was clearly the left rear line that was broken. From reports received by these two witnesses, it was established that the eye bolt had been repaired and that repair to the brakes had been attempted by placing a nail in the brake line and reconnecting it to the master cylinder to create a blockage rendering the brakes on the wheel served by that line inoperative. The repairs were never tested and the testimony of Mr. Simpson has established that brake fluid was never placed in the brake cylinder.

Although the evidence establishes that the machine was never used, it was there and available for use and might have been used, relying on the brakes of only three wheels by placing brake fluid in the cylinder and by making additional adjustments and bleeding.

The machine was never used by Mr. Tranago, the only person other than Mr. Simpson who normally used the machine, after the time of the breakage of the brake line. Mr. Tranago obviously knew that the machine was not fitted with adequate brakes at the time and he did not attempt to use the machine. However, there was nothing to prevent the use of the machine.

There is no evidence that the machine was tagged or locked out in any manner to prevent its use, therefore, I find that there was a violation of 30 C.F.R. § 57.9-3.

Since it was obvious that there was a malfunction in the braking system due to the dangling brake line and since the condition was known to the parties at the Van Horn loading facility, the operator either knew or should have known that the vehicle did not have adequate brakes and the operator should have taken appropriate steps to remedy the inadequate brakes. I, therefore, find that the operator was negligent.

In view of agreement by the parties that the gravity was slight, I find that the gravity was low. I find that it was low because, as stated by counsel, the machine was not actually used and it was also not likely that it would be used since the malfunction was known by Mr. Tranago, the person who was ordinarily the only operator of the vehicle other than Mr. Simpson.

Although the order of withdrawal which was issued on November 9, 1978, was not terminated until November 14, 1978, the evidence establishes that efforts had been made to abate the violation promptly and that the repairs were accomplished at a reasonable time after the day of the order. Since reasonable efforts were made to repair the braking system, I find that the operator demonstrated good faith in abating the violation after receipt of the order of withdrawal.

In consideration of the evidence adduced and the statutory criteria which must be considered in determining the amount of a civil penalty, I find that a penalty of $400 is appropriate.

A civil penalty of $400 is assessed for Order of Withdrawal No. 161774.

Order No. 162020

Order No. 162020 was issued by inspector Sidney Kirk on November 8, 1978. It alleged a violation of 30 C.F.R. § 57.3-22.

30 C.F.R. § 57.3-22 reads in pertinent part: "Loose ground shall be taken down or adequately supported before any other work is done."

The record establishes that drilling was done in the face area and that loose ground in the nature of boulders of marble were in the vicinity of the face area and over the

drill control. The record establishes that the loose fractured rock was there because of blasting operations and was not, as suggested by Respondent, caused by tremors or airplanes flying over. I therefore find that loose ground was not taken down or adequately supported before any other work was done as required by the regulation.

While the inspector acknowledged that there were no persons working in the area at the time the citation was written, he has given evidence sufficient to support a finding that persons had worked in the area underneath the unsupported boulders at a time while they were loose and unsupported. The fractures were obvious and they should have been known by mine management. Since the operator either knew or should have known that work was being done under loose, unsupported ground, action should have been taken to eliminate the hazard. I therefore find that the operator was negligent.

The record establishes that it was probable that a serious injury could occur as a result of this violation. It establishes that there was loose, hanging rock above areas where persons had been working and when scaled down, at least one of those rocks did hit the drill. The drill must have been brought into the mine by some person and it is obvious that the drill had been used in drilling the holes in the face.

In view of the fact that the Petitioner conceded good faith by the Respondent, I find that the operator demonstrated good faith in abating the violation once the citation was issued.

In consideration of the statutory criteria which must be followed in determining the amount of a civil penalty to be assessed, I find that an appropriate penalty for this violation is $300. A penalty of $300 is assessed.

Settlements

Petitioner moved for approval of settlement of a number of citations herein. The proposed settlements and supporting assertions are as follows:

With regard to Citation No. 161773 in Docket No. CENT 79-38-M and Citation No. 161790 in Docket No. CENT 79-357-M, I do not believe that there is a factual dispute. Certain records were kept at the San Saba Office of Texas Architectural Aggregates, Inc.

These records were not kept at either the Van Horn facility or at the Van Horn White Marble Mine, some 30 miles north of Van Horn, Texas. And if the Act and the regulations permit the records to be kept in San Saba, Texas, there would be no violation. But if the Act or the regulations require the records to be kept at the mine, there would be a violation.

Basically, what is involved in these two citations is a question of law. I do not think there is any factual dispute to be determined. And if the Commission could rule as to whether or not the records are allowed to be kept in San Saba, Texas, or allowed to be kept at the location in Van Horn or at the mine itself, I think that this citation could either be vacated, or if not vacated, then settled.

The presiding Judge thereupon rendered a decision with regards the existence of a violation as follows:

Citation No. 161773 was issued on November 9, 1978, by inspector Sidney Kirk. The citation alleged a violation of 30 C.F.R. § 57.18-28(d). The condition or practice noted on the citation was as follows: "Records of self-rescue and mine emergency training were not available at the mine office nor the Van Horn, Texas loading facility office. The San Saba, Texas, office confirmed that last training recorded was September 1977."

30 C.F.R. § 57.18-28(d) states: "Records of all instruction shall be kept at the mine site or nearest mine office at least two years from the date of instruction. Upon completion of such instruction, copies of the records shall be submitted to the nearest Mine Safety and Health Administration Training Center."

Citation No. 161790 was issued by inspector Sidney Kirk on March 7, 1979. The citation alleged a violation of 30 C.F.R. § 50.30(a). The condition or practice noted on the citation was: "Records of quarterly employment reports were not available at the Van Horn, Texas office."

30 C.F.R. § 50.30(a) states:

> Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete an MSHA form 7000-2 in accordance with the instructions and criteria in Section 50.30-1 and submit the original to the MSHA Health and Safety Analysis Center, Post Office Box 25367, Denver Federal Center, Denver, Colorado 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from

MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall retain an operator's copy at the mine office nearest the mine for five years after the submission date."

I take this subsection to mean quarterly employment reports of mines other than the coal mines since the coal production report is required by 30 C.F.R. § 50.30(a) which states as follows: "Each operator of a coal mine in which an individual worked during any day of a calendar quarter shall report coal production on Form 7000-2." My ruling on the issue as to whether the retention of records at San Saba, Texas, approximately 400 miles from Van Horn, complies with the rules will be a narrow ruling and it will apply only to the specific facts of this case.

The offices at the mine site and the office at the Van Horn loading facility at the time the citations were issued were not suitable for the retention of records. However, my ruling is that this is not an adequate excuse for failure to retain records at the place reguired by the regulations.

As counsel for Petitioner has pointed out, section 109(a) of the Act does require that at each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine.

This ruling does not reach the issue, since it is not necessary to resolve this case, as to whether the records should be kept at the mine site, at the bus body designated as an office at the mine site, or whether they might be kept at Van Horn, 30 miles away. It is, however, merely a ruling that the retention that the records in San Saba, 400 miles away, does not meet the requirements of the Act and of the regulations.

There seems to be some guidance from the words of 30 C.F.R. § 57.18-28(d), where there is a requirement that records of instruction shall be kept at the mine site or nearest mine office. This would seem to infer, even without considering the requirements of section 109 of the Act, that it is expected that the mine office would be maintained near the mine site and not at a point 400 miles away or at some distant corporate office.

My ruling, therefore, is that the retention of records at San Saba, Texas, instead of at Van Horn or at the mine site, 30 miles from Van Horn, was in violation of the regulations as alleged in Citation Nos. 161773 and 161790.

After the decision regarding the existence of a violation was rendered the parties stipulated as follows: "There was no gravity because no employees were exposed to injury by these violations and that the mine operator showed good faith by immediately terminating the violation on being notified that the records should be kept in Van Horn."

Following these stipulations the bench decision continued as follows:

> The stipulation that there was no gravity and that the operator exhibited good faith in abating the condition after the citation was issued is accepted.
>
> I rule that the operator did maintain the records at the facility which was most convenient to him at the time to maintain those records and that he had not become aware that it was necessary at that time to maintain records near the mine. Although ignorance of the requirements of the statute and regulations is no excuse, I feel that the operator acted in good faith in maintaining the records at the site most convenient to him. Therefore, I find that any negligence of the operator was very slight.
>
> In consideration of the six statutory criteria, a nominal penalty of $10 will be assessed in each case.
>
> The assessment for Citation No. 161773 in Docket No. CENT 79-38-M is $10.
>
> The assessment for Citation No. 161790 in Docket No. CENT 79-357-M is $10.

Petitioner also moved for approval of the following settlements:

> With regard to Citation No. 162012 in Docket No. CENT 79-16-M, the proposed assessment was $180. The agreed assessment is $60. In support of this settlement, the Petitioner would show that there was ordinary negligence and that the operator should have known of the violation, that the occurrence of the event against which the standard was directed was improbable, but if the event had occurred, it likely would have resulted in a fatal accident, that only one employee was exposed, and that the Respondent demonstrated good faith in the termination of the violation.
>
> With regard to Citation No. 162016 in Docket No. CENT 79-16-M, the proposed assessment was $180 and the agreed assessment is $87.
>
> In support of this settlement, the Petitioner would show that the Respondent should have known of the condition, that

the accident was probable, and that only a disabling injury would have happened if the accident had occurred, that only one employee was exposed to the condition, and that the Respondent demonstrated good faith in termination of the condition upon receipt of the citation.

With regard to Citation No. 161762 in Docket No. CENT 79-16-M, the proposed assessment was $160 and the agreed assessment is $60.

In support of this disposition, the Petitioner would show that there was ordinary negligence in that the operator should have known of the condition, that the occurrence of an accident was improbable but that if an accident had occurred, it possibly could have been a fatal accident, that only one employee was exposed to the condition and the operator demonstrated good faith in terminating the condition.

With regard to Citation No. 161763 in Docket No. CENT 79-16-M, the proposed assessment was $114 and the agreed assessment is $42.

In support of this disposition, the Petitioner would show that the operator should have known of the condition but that the occurrence of an accident would have been improbable, that only lost work days would have resulted from a possible accident, that only one employee was exposed, and that the operator demonstrated good faith in terminating the condition.

With regard to Citation No. 161769 in Docket No. CENT 79-38-M, the proposed assessment was $160 and the agreed assessment is $87.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition but that the occurrence of an accident as a result from this condition was improbable, that a fatal accident possibly could have resulted, that only one employee was exposed, and that the operator demonstrated good faith in terminating the condition upon receipt of the citation.

In Citation No. 161770 in Docket No. CENT 79-38-M, the proposed assessment was $98 and the agreed assessment is $51.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition, that an accident resulting from this condition was improbable, that only lost work days would be the likely result of an accident, that only one employee was exposed, and that the Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

With regard to Citation No. 161771 in Docket No. CENT 79-38-M, the proposed assessment was $150 and the agreed assessment is $81.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition, that an accident resulting from this condition was improbable, that if an accident had resulted, it possibly could have resulted in disabling injuries, that only one employee was exposed to the condition, and that Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

In Citation No. 161772 in Docket No. CENT-79-38-M, the proposed assessment was $78 and the agreed assessment is $51.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition, that an accident resulting from this condition was improbable, that only lost work days would have resulted from an accident, and that one employee was exposed, and that the Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

In Citation No. 161777 in Docket No. CENT 79-16-M, the proposed assessment was $98 and the agreed assessment is $36.

In support of this disposition, the Petitioner would show that Respondent possibly should have known of the violation, that the occurrence of an accident was improbable, that lost work days possibly could have resulted from the accident, and that only one employee was exposed, and that the Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

A ruling was accordingly announced that the negotiated settlements were approved in the following amounts: Citation No. 162012, $60; Citation No. 162016, $87; Citation No. 161762, $60; Citation No. 161763, $42; Citation No. 161769, $87; Citation No. 161770, $51; Citation No. 161771, $81; Citation No. 161772, $51; Citation No. 161777, $36."

Petitioner also moved for approval of additional settlements as follows:

With respect to Citation No. 161775 in Docket No. CENT 79-38-M, the proposed assessment was $130. The parties have agreed that an assessment of $42 would be appropriate, subject to the Respondent's exception to the ruling that the Van Horn distribution terminal is covered by MSHA regulations instead of by OSHA regulations.

In support of this settlement, the Petitioner would show that there was some negligence in that the operator should have known of the condition, that an accident because of this violation would have been improbable, that if such an accident had occurred only lost days would have been attributed to the accident, that only one employee was exposed to the condition, and that the Respondent demonstrated good faith in the termination of the condition.

With regard to Citation No. 162014 in Docket No. CENT 79-38-M, the proposed assessment was $72 and the agreed assessment is $39.

In support of this disposition, the Respondent would show that there was only ordinary negligence in that the operator should have known of the condition, that it was improbable that an accident would have resulted from the condition, that if an accident had resulted, it was unlikely that an employee would have received a lost day injury, that only one miner was exposed, and that the Respondent demonstrated good faith in terminating the condition.

With regard to Citation No. 162017 in Docket No. CENT 79-38-M, the proposed assessment was $180 and the agreed assessment is $27.

In support of this disposition, the Petitioner would show that there was very little negligence involved in that there was only a possibility that the operator could have known of the condition, that it was improbable that the condition would have resulted in an accident and if the condition had resulted in an accident, the likely injury would have not involved lost work days to the miner, that only one miner was exposed to this condition, and that the Respondent demonstated good faith in terminating the condition once the citation was issued.

The negotiated settlements were approved and assessments were entered as follows:

A civil penalty for Citation No. 161775 is assessed in the amount of $42.

For Citation No. 162014, a civil penalty is assessed in the amount of $39.

For Citation No. 162017, a civil penalty is assessed in the amount of $27.

Petitioner proposed that the presiding Judge, after rendering a determination as to whether the condition was in violation of the Act, approve the following settlement:

If the Commission should find that the ramp is an elevated roadway within the meaning of the standard, the parties agree that an assessed penalty of $87 would be appropriate (for Citation No. 161776). Of course, this $87 is subject to the Respondent's exception to the ruling that the Van Horn distribution terminal is covered by MSHA regulations instead of by OSHA regulations, 2/ and also, subject to Respondent's exception to any ruling that the loading ramp is an elevated roadway within the meaning of 30 C.F.R. § 57.9-22.

In support of the agreed disposition, the Petitioner would show that there was ordinary negligence in that the Respondent should have known that the ramp did not have guardrails. The occurrence of an accident from lack of guardrails was improbable but that if such an accident should occur, possible disabling injuries could have occurred to the operator of any equipment on the ramp, that only one employee was exposed, and that the Respondent demonstrated good faith in termination of the condition.

The bench decision was in substance as follows:

To place the issue in context, I will read the citation, or the applicable parts thereof, on the record. Citation No. 161776 was issued on November 9, 1978, by inspector Sidney Kirk. The citation alleged a violation of 30 C.F.R. § 57.9-22. The condition or practice noted on the violation was: "The elevated ramp to the railroad loading facility was not provided with berms or guardrails along the west side where the height was from a flat to approximately six feet high."

30 C.F.R. § 57.9-22 provides as follows: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

Inspector Kirk has testified that the length or ramp was 60 to 70 feet and that it led from an alley to the loading place, where the height was approximately 6 feet. Mr. Simpson, on the other hand, has testified on behalf of the Respondent that the ramp was approximately 25 feet with a short extension and that the maximum height was approximately 4 feet.

Since there is nothing to indicate the actual length and the height, there is no possible way to reconcile this testimony in such a way as to determine the accurate length

2/ See discussion above, beginning at p. 14.

of the ramp nor the height of the ramp since Inspector Kirk has stated that he did not make measurements and there is no indication that Mr. Simpson made any actual measurements. In disposing of the issue, it will be considered that the ramp is somewhere between 25 feet and 70 feet in length and that the height is somewhere between 4 to 6 feet.

Counsel have cited no cases directly in point and I know of no such cases. However, I am aware that a Judge of the Federal Mine Safety and Health Review Commission has held in two instances that ramps, loading places, and places where trucks travel were required to be bermed or guarded.

The first of these cases is the Golden R Coal Company, issued by Judge George Koutras on November 5, 1979. The docket number is BARB 79-301-P. That case dealt with an elevated roadway leading to a dump site. In that instance, dump trucks would pull up to a turnaround and the trucks would be placed in reverse to back up the short roadway to the dump site.

The other case which involved berms and also the issue as to whether or not the operation was a mine was Rock Valley Cement Block and Tile. That was Docket No. DENV 79-587-PM, which was issued in July of 1980. A resume of that case is contained in the August 1, 1980, issue of "Mine Productivity Report." The case dealt with a dike which was being constructed to prevent a nearby river from flooding a sand and gravel pit. In that case, a metal/nonmetal operator was required to have berms on the dike being constructed even though the roadway used on the top of the dike was only for the purpose of the construction of the dike. It was held, in essence, that the short duration of the dike construction did not prevent the top of the dike used by trucks from being a roadway.

Now, I do not have these cases or excerpts therefrom before me. However, the first of these cases, the Golden R Coal Company case, did contain a dictionary definition of a road and a roadway which was taken from Webster's New World Dictionary. A road was defined as a "way, path, or course," and a roadway was defined as "that part of a road used by cars, trucks, etc.--traveled part of a road."

It is noted in that decision that a ramp is defined in two ways in the Dictionary of Mines, Minerals, and Related Terms. It is first defined as, "An inclined approach--Used loosely when applied to a loading ramp." The other definition is, "An incline connecting two levels." The facility

used by Respondent clearly was a ramp, but that does not dispose of the issue because we must now determine whether a ramp can also be a roadway.

The ramp was clearly the extension of a roadway used by trucks to load rail cars. Even if, as testified by Mr. Simpson, the length of this ramp was only 25 feet, the record establishes that it was a road used by trucks and that it was a traveled part of a road.

The regulation requires that berms must be built on elevated roadways. Under the circumstances of this case, even if the drop-off were only 4 feet as testified by Mr. Simpson, there could be a serious hazard due to the elevation and it is clear that the ramp was an elevated roadway.

While the cases that I have cited are not binding, they do provide guidance and the reasoning therein is persuasive to some degree, even though the circumstances were different. I believe that they are correct.

A short duration of use (which might be because of the short length of the roadway or because it was used only for a short period of time while loading), does not prevent the ramp in this case from being an elevated roadway and subject to the requirements of the regulation. I therefore hold that the ramp was an elevated roadway subject to the requirements of the regulation.

The parties have agreed that the $160 proposed penalty should be reduced to $87. In its motion that the settlement be approved, counsel for Petitioner has set forth the statutory criteria applied and I am in agreement with the negotiated settlement reached.

For Citation No. 161776, a civil penalty in the amount of $87 is assessed.

Petitioner also moved that Respondent's motion to withdraw its contest be approved as follows:

With regard to Citation Nos. 161764, 161766, and 161767, the Respondent moves to withdraw its contest.

With regard to the citations on which Respondent is withdrawing its contest, the Petitioner would show that in each of these cases, the Respondent could have known of the cited condition, that the condition against which the cited condition was directed, the likelihood of occurrence was probable,

that the Respondent demonstrated good faith in attempting to terminate the condition once it had been called to Respondent's attention.

With regard to Citation No. 161764, the Petitioner would show that lost work days could have resulted had an accident occurred and with regard to Citation Nos. 161766 and 161767, the Petitioner would show that if an accident had occurred, a possible disabling injury would have resulted from it.

And also, in each of those three cases, the Petitioner would show that only one employee was exposed to the hazardous condition.

For Citation No. 161764, the proposed assessment is $84 and the agreed assessment is $84.

For Citation No. 161766, the proposed assessment was $114 and the agreed assessment is $114.

For Citation No. 161767, the proposed assessment was $114 and the agreed assessment is $114.

These settlements were approved.

Withdrawn Citations

Petitioner made an oral motion for withdrawal of the following citations:

Docket No. CENT 79-16-M:	Citation Nos. 162019, 161761 and 161768
Docket No. CENT 79-147-M:	Citation No. 161765
Docket No. CENT 79-17-M:	Citation Nos. 161778 and 161779
Docket No. CENT 79-38-M:	Citation No. 161780

In support of this motion to vacate, counsel for Petitioner asserted the following: "A close examination of the citations and the evidence available to the Petitioner indicates that the Petitioner will not be able to go forward and sustain a proof of a violation in those instances."

The motion was granted and the following citations were vacated: Nos. 162019, 161761, 161765, 161768, 161778, 161779, and 161780.

The following motions for approval of withdrawal of citations were also submitted by Petitioner:

With regard to Citation No. 162013 in Docket No. CENT 79-16-M, and with regard to Citation Number 162015 in Docket No. 79-16-M, the Petitioner moves to withdraw the citations.

In support of this disposition, the Petitioner would show that the motion to withdraw Citation Nos. 162013 and 162015 is made because the Petitioner has doubtful evidence concerning rather involved electrical violations and is not at all certain that the Petitioner could prevail.

This motion was approved by the presiding Judge. The two citations, Nos. 162013 and 162015, were vacated.

ORDER

IT IS ORDERED that the above bench decision is AFFIRMED.

IT IS FURTHER ORDERED that Respondent pay the sum of $2,502 within 30 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

Issued:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

2 9 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. YORK 80-34-M
v.		A.C. No. 30-00006-05007
ATLANTIC CEMENT COMPANY, INC.,	Respondent	Ravena Quarry and Plant

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Howard G. Estock, Esq., New York, New York, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging two violations of health regulations. The general issue is whether the Atlantic Cement Company, Inc., (Atlantic) has violated the provisions of the Act and its implementing regulations charged herein and, if so, the appropriate civil penalties to be paid.

At hearing held in Albany, New York, on June 17 and 18, 1980, the parties moved to settle Citation No. 205221. Atlantic was charged therein with one violation of 30 C.F.R. § 56.5-60, for exceeding permissible noise exposures in the cab of a scraper. A reduction of penalty from $78 to $50 was proposed because of Atlantic's extraordinary efforts in abating the violative condition. It spent $5,000 installing noise-suppressing engineering controls in the cited scraper cab. I approved the proposal at hearing as being consistent with the criteria under section 110(i) of the Act and affirm that decision at this time.

The citation remaining at issue (No. 205351) charges one violation of the standard at 30 C.F.R. § 56.5-1(a). That standard requires, in essence, that employee exposure to airborne contaminants not exceed certain limits. The citation here charges that crane operator Michael Fatica was exposed to silica-bearing dust in an amount exceeding those limits. Atlantic does not appear to deny that Fatica was in fact exposed as charged (See Atlantic's brief) but cites the provisions of 30 C.F.R. § 56.5-5 by way of defense.

That section provides, in essence, that where accepted engineering control measures have not been developed or when necessary by the nature of the work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment under certain conditions. MSHA admits that the provisions of section 56.5-5 would have furnished a valid defense to the citation had the subject employee been wearing such protective equipment at the time in question (see Petitioner's Brief at p. 3 and Tr. 128).

The credible evidence in this case leads to the inescapable conclusion that the subject employee was not in fact "protected" by appropriate respiratory equipment even though such protective equipment was clearly available to him. MSHA inspector Kettlecamp saw the employee on four occasions for approximately 3 to 4 minutes each and the employee was not wearing a respirator on any of these occasions. According to Kettlecamp, the employee did not even have a respirator on or about his person. The subject employee, Michael Fatica, admitted that he could not remember whether he wore a respirator that day. In light of this admission made shortly after the violation, I can give but little credence to his self-serving testimony at hearing that he thought he had worn the respirator "once in a while" that day. It is reasonable to infer therefore that Fatica was not in fact "protected" by appropriate respiratory protective equipment during the time of the cited exposure. Under the circumstances, Atlantic clearly has not met its burden of proving the affirmative defense provided by section 56.5-5. Accordingly, I find that the violation has been proven as charged.

Although a violation of the cited standard would in most cases be considered serious, under the unusual circumstances of this case, I find only minimal gravity. The exposed employee ordinarily worked within an air-conditioned and pressurized cab where exposure to airborne contaminants had been shown by prior testing to have been within permissible limits. On the date of this citation, the equipment had broken down and the employee was therefore working outside of the protected cab in an environment to which he was not ordinarily exposed.

I also find that the failure to have utilized respiratory protective equipment in this case was due solely to the negligent or intentional failure of the individual employee and not to any negligence on the part of Atlantic. MSHA inspector Thomas Reszniak conceded at hearing that Atlantic had in effect at the time the citation was issued "a very good respirator policy and program" and that part of that program was "to ensure" that the men wore respirators when they were in dusty areas. The company then had on hand an ample supply of approved respirators and indeed a box of respirators was kept in the crane cab where the subject "employee" usually worked. The employees had been instructed on how to fit and wear those respirators. Disciplinary action had also been taken in the past against employees who violated company rules regarding the use of respirators. This evidence is not disputed. Under the circumstances, I consider that a nominal penalty of $10 is appropriate for the violation.

ORDER

Upon consideration of the entire record in this case and in light of the criteria set forth in section 110(i) of the Act, I hereby ORDER that Respondent pay the following penalties within 30 days of the date of this decision:

Citation No. 205221 -- $50
Citation No. 205351 -- $10

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 9 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. DENV 79-393-PM
v.	:	A.C. No. 05-00354-05007
	:	Climax Mine
CLIMAX MOLYBDENUM COMPANY,	:	
Respondent	:	

DECISION

Appearances: James Cato, Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Petitioner;
Rosemary Collyer, Esq., Charles Newcom, Esq., of Sherman and Howard, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on September 11, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered a detailed opinion on the record. 1/ It was found that the violation charged in the withdrawal order did occur. My oral decision containing findings, conclusions and rationale appear below as it appears in the record aside from minor corrections in grammar and punctuation, and the deletion of obiter dicta:

> This matter arises upon the filing of a petition for assessment of civil penalty by the Secretary of Labor. This proceeding initially involved four citations. Two of those citations were the subject of a settlement agreement between the parties which has been approved by me. (One citation, No. 332991, was vacated with my approval at the end of the hearing (Tr. 161-162)). My decision with respect to the remaining citation, No. 332993, follows.

1/ Tr. 153-161

The subject citation was issued by Inspector Richard King on July 28, 1978, and charged Respondent with the following allegedly violative conditions: "Loose ground was observed in the back and on the ribs of the 613-25 stope subdrift. Several large slabs were taken down." The regulation cited by the inspector was 30 C.F.R. § 57.3-22, a mandatory safety standard which provides: "Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary." It appears that the Government's primary allegation of violation is in reliance on the last sentence of the regulation.

Inspector King issued the citation in question while he was a member of an inspection party on July 28, 1978, at the Climax Mine. He was accompanied by mine management personnel and a union representative. During his inspection of the 613-25 stope he observed loose ground in the back and rib along a cutout in the 613 stope which is depicted on Respondent's Exhibit 1 where there is indicated a slight indentation. The 613 stope runs between the 614 crosscut and the 613 crosscut and behind the indentation shown on the diagram. As indicated, there is a steel rack and a manway. The condition, which will be subsequently described, was observed when the inspection party stopped to inspect the manway which is in the vicinity of the steel rack, which is set into the cutout which is approximately 3 feet in depth of the 613-25 stope.

The terminology or jargon in vogue at this mine is that the term "back" refers to the roof, and the word "ribs" as is the usual case, refers to the side wall. The inspector indicated that he observed several large slabs on the ribs extending over the back. I infer from his testimony that the large slabs referred to were large slabs of loose ground. He also found debris on the ground. One large slab was positioned over the steel rack which I find was set into the cutout at approximately waist-high height. To have access to the steel rack, a miner would necessarily have positioned himself directly under the loose ground. However, the record indicates that the steel rack, which at the time observed by the inspector had four to five pieces of steel resting on it, had not been used over a period in excess of two months. The steel rack was used to store steel which was used in

drilling, and the pieces of steel on the rack at the time were visibly bent or defective. No explanation was given why steel in such condition, i.e., having no utility, remained on the rack.

From the cutout or aperture-reflected on Respondent's Exhibit 1 - bad ground extended approximately 2 feet into the drift. The slabs referred to by the inspector were composed of grey rock the largest of which, according to the inspector, was from 2 to 3 feet long, 1 to 2 feet wide, and 6 to 12 inches thick, and of a weight which the inpector guessed to be 100 pounds. The inspector indicated that the slabs in question at the highest point would be 3 to 4 feet above the head of a miner. He indicated there were two other slabs nearly the size of the largest slab above described.

The evidence is clear that the subdrift 613-25 referred to above is a travelway. I find specifically, with reference to the language of the regulation, that the 613-25 subdrift was not a working place on July 28, 1978. I find that there was no imminent danger present as a result of the loose ground observed by the inspector and I find that the physical conditions with respect to loose ground described by the inspector, did, in fact, exist. This latter finding, however, does not automatically constitute a finding that a violation of the regulation occurred.

Respondent's evidence indicated that the standard working routine during the times material here-even on the day shift which began at 7:30 and ended at 3:30 p.m. - incorporated a daily scaling down of the travelway in question by either a safety miner, whose routine duties included the scaling or "barring down" of loose ground, or by a two-man crew specifically assigned to do such scaling work by the shift boss of the 12-man stope crew, Lonnie Arbaugh.

The north stopes, where the travelway in question is located, were being developed at the pertinent times herein by this 12-man crew, who shortly after the commencement of their shift at 7:30 a.m. would assemble for a meeting at the lunchroom, which is located near the 614 crosscut and duly depicted on Respondent's Exhibit 1. Various safety subjects would be discussed and assignments made by Arbaugh as a matter of daily routine, following which the crew would commence their work. On the day in question, most members of the 12-man crew proceeded down the 614 crosscut, walked down the 230-foot travelway in "subdrift 613-25E", then proceeded down the 613 crosscut into the 6240 crosscut. On July 28, 1978, Arbaugh assigned miners Thibado and Holmberg to do barring down work, which they commenced to do at the intersection of the 614 crosscut and the 613 subdrift. The two

miners, Thibado and Holmberg, commenced work at approximately 7:30 a.m. at this intersection and were in the process of continuing their scaling work when they were interrupted by the arrival of the inspection party, at which time they stopped their work as a safety precaution while the inspection party passes. They resumed their work after the passing of the party.

The inspector discovered the loose ground, as previously described, at approximately 9:30 a.m. At this time one of the members of the inspection party, Jose Romero, a repair foreman with Respondent, was standing in the subdrift opposite the steel rack on the right side of the subdrift. That is near the right rib of the subdrift, as the same is depicted on Respondent's Exhibit 1. Romero called to Thibado and Holmberg whose work had progressed to within approximately 20 to 30 feet of the cutout. Romero called for the crew to come forward and to "get a bar over here," meaning to take down the loose ground observed by the inspector. This was accomplished by one of the two scalers at the time who was assisted to some extent by Romero.

There is a conflict in the testimony as to how long it took to take down the loose ground in the vicinity, and also as to the extent of the loose ground observed by the inspector. In view of my ultimate conclusion in this case, I make no particular findings with respect to those two issues, other than to find as I have previously, that it was loose ground, that it was a substantial amount of loose ground, that it was the amount of loose ground as described by the inspector, and that the same did constitute a hazardous condition which could have resulted in a variety of injuries to miners who may have been hit by falling rock -- the degree of the injury depending upon the part of the anatomy struck, the weight of the rock in question, and the height of the same.

I fully credit Respondent's evidence that on a daily basis in proximity to the inspection, the travelway in question would have been examined and scaled by either, as I have previously indicated, the safety miner or by a specific crew designated for that purpose by Arbaugh. I find that the travelway thus would have been "periodically" examined, as that term is used in the subject regulation. I also find that it would have been scaled at least daily.

The question remains whether or not the travelway was scaled or supported as necessary within the language of the regulations. To some extent this raises the question of what is reasonable under the circumstances. There is no evidence of other employees having been struck or injured

along the travelway in question by loose ground which was falling. The travelway is 8 feet wide and Respondent indicated that, with reference to the loose ground in the cutout in question, it would have been possible for miners passing through to do so without placing themselves in a perilous position under the rock. I infer from the evidence presented that scaling operations which are being conducted sometimes by members of the stope crew, which would have been traveling down the travelway, would have alerted the crew to the conditions. I find on the basis of all the evidence in the record that it would have been common knowledge that there was loose ground in these areas. The regulation requires that ground conditions along travelways shall be examined periodically and scaled or supported as necessary. Daily scaling of this area, I find, was a sufficient compliance with the requirement of the safety standard. Petitioner has argued that the employees were not specifically warned of the specific condition in question, and that accordingly the "as necessary" requirement of the regulation was not being complied with. I find no merit in this for the reasons previously stated. In view of my finding that there would have been common knowledge of the loose ground conditions, a specific warning, would have been unnecessary.

As is frequently the case, the regulation provides considerable leeway in the obligations it places upon the mine operator. The requirement is that travelways should be examined periodically with no particular hint of what "periodically" means. Again, the requirement that the travelway be scaled or supported "as necessary" pinpoints no specific function, activity, or physical condition in the mine. The concept "as necessary" suggests a high degree of discretion on the part of management personnel. Thus, a high degree of proof to establish a violation rests upon the Government in the face of such a regulation. I am unable, and no judge can be able, to state unequivocally that that was a safe condition along the subdrift in question on the morning of July 28, 1978, to the satisfaction of anyone reading this record. Indeed, there was a significant hazard present had a miner gone into the cutout and, in particular, attempted to remove steel from under the steel rack. Nevetheless, having found the Respondent - as a result of its examining and scaling activities which have been described at length in the record - to have been in compliance with the requirements of the regulation in question, I find no merit in the petition for penalty assessment. The citation involved, No. 332993, must be vacated.

My ruling at the hearing granting the Secretary's motion to vacate Citation No. 332991 for lack of evidence is affirmed.

ORDER

(1) All proposed findings of fact and conclusions of law submitted to me prior to the entry of this decision which have not been expressly incorporated in this decision are rejected.

(2) Citations Nos. 332991 and 332993, dated July 28, 1978, are vacated.

Michael A. Lasher, Jr., Judge

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29 OCT 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 80-358
Petitioner	:	A.O. No. 12-00329-03012
	:	
v.	:	Mine: Old Ben No. 2 Strip
	:	
OLD BEN COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Petitioner moved to withdraw its petition for a civil penalty in this matter "without prejudice, and with leave to the Secretary to initiate proceedings against the independent contractor." The motion stated that the worksite where the subject citation was issued was under the control of an independent contractor. It also stated that there is no evidence that any employees of Respondent were exposed to the cited condition, and that Petitioner has no reason to believe that the independent contractor cannot be served.

Commission Rule 11, 29 C.F.R. § 2700.11, allows a party to "withdraw a pleading at any stage of a proceeding with the approval of the Commission or the Judge." Based on the reasons set forth in the motion, the motion is GRANTED and this case is DISMISSED WITHOUT PREJUDICE.

Edwin S. Bernstein
Administrative Law Judge

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29 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. DENV 79-554-PM
Petitioner	:	A/O No. 41-02789-05001F
v.	:	
	:	Dixon Underground Mine
CONTINENTAL OIL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert Fitz, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Karl Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a). At the hearing in this matter held in Corpus Christi, Texas, the parties entered into stipulations, called witnesses and presented documentary evidence.

At the conclusion of the hearing, the parties were informed of their right to submit proposed findings of fact and conclusions of law. It was agreed that this submission would be deferred until 30 days after a decision was rendered by the Federal Mine Safety and Health Review Commission regarding the liability of owner-operators and independent contractors. After the pertinent decisions, Old Ben Coal Company, Docket No. VINC 79-119 (October 29, 1979), and Monterey Coal Company, Docket No. HOPE 78-469 et seq. (November 13, 1979), were issued, an order was issued requiring that those parties desiring

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

to submit briefs do so on or before 30 days after receipt of the transcript. The parties did not file proposed findings of fact and conclusions of law or any other brief within the specified time.

The stipulations presented by the parties at the outset of the hearing were as follows:

1. The Dixon Underground Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Pub. L. 95-164 (Act), dated November 9, 1977.

2. The Administrative Law Judge has jurisdiction over this proceeding under the 1977 Act.

3. The subject order, and termination thereof, were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

4. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

5. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

6. The appropriateness of the penalty, if any, to the size of the operator's business should be determined based on the fact that in 1978 the Dixon Underground Mine, I.D. No. 41-02789, was a noncoal mine. The underground mine had been open for only 3 days; less than 100 hours had been worked at the underground mine; and the size of the controlling company, if found to be Continental Oil Company (now known as Conoco, Inc.), would be over 6 million annual hours worked or if found to be Coast Mining Company would be under 60,000 annual hours worked.

7. The Respondent did not have any history of previous violations at the underground mine in that the average number of violations assessed per year in the preceding 24 months was 0 and that the average number of violations assessed per inspection day in the preceding 24 months was 0.

8. As far as the gravity criteria is concerned: The event occurred; it was a fatal injury; affecting one (1) person.

9. A violation of 30 C.F.R. § 57.3-20 occurred in the subject underground mine being excavated by Coast Mining Company, an independent contractor working under a contract with Continental Oil Company.

The stipulations establish that at the time of the citation, the Dixon Underground Mine was a small mine which had been open for only 3 days and less than 100 hours had been worked. The mining operations of Continental Oil Company (hereinafter Conoco), the controlling company, were large with over 6 million hours worked.

The Dixon Underground Mine had no history of previous violations. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

The gravity of the violation is high. The accident resulted in a fatality.

The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement after notice of the violation.

The parties also stipulated that a violation of 30 C.F.R. § 57.3-20 occurred in the subject underground mine being excavated by Coast Mining Company, an independent contractor working under a contract with Continental Oil Company. This establishes that there was a violation by the operator and that Coast Mining was an independent contractor. Therefore, two issues remain. The initial question is whether Respondent Conoco can be held liable for the stipulated violation. If Respondent is liable for the violation, the negligence of Respondent must be determined, along with other statutory criteria, to ascertain the amount of the civil penalty that must be assessed.

There is no serious dispute as to the material facts established by the record in this case. On March 1, 1978, Respondent, Conoco, entered into a contract with Coast Mining Company (hereinafter, Coast) under which the latter, as an independent contractor, would remove ore reserves remaining in the walls of Respondent's pits. Coast was a small corporation which existed for 4 months, from May to September 1978. Donald Buddecke was its owner and president, as well as supervisor of its mining operations.

The proposed method of mining was experimental. It had been conceptualized and developed by Donald Buddecke. A small drift would be cut into a pit wall. A slusher sitting outside the drift would pull a bucket back and forth to remove the ore. The slusher had been designed and built by Mr. Buddecke. Hypothetically, no miner would be required to proceed into the excavated area so ground support would, therefore, be unnecessary.

Mining on a day-to-day basis was to be carried out by Robert Ousley. In testimony, Donald Buddecke stated that Robert Ousely was to be the "laborer-contractor." He was to be paid on the basis of tons of ore extracted, but worked under the supervision of Donald Buddecke.

Coast began operations at the Dixon Underground Mine on August 8, 1978. The Dixon Mine was located in Respondent's Dickson Pit, also designated as Man Site No. 13. The first drift was cut with a front-end loader. After 3 days of operation, the initial drift had been extended approximately 25 feet. Its height was approximately 7 feet and its width 5-1/2 feet.

On the afternoon of August 10, 1978, two individuals were present at the Dixon Mine. The first of these was Robin Buddecke, the son of Donald Buddecke and an employee of Coast. The second individual was Robert Ousley. Donald Buddecke had left for Corpus Christi to obtain supplies on the prior evening. He was scheduled to return on the evening of August 10. Donald Buddecke testified that he had left orders for Robert Ousley and Robin Buddecke to begin timbering the roof in the drift to a distance of 15 or 20 feet. He stated that he ordered that no one proceed into the drift past the timber-supported roof unless they were in the front-end loader.

At approximately 4 p.m. on August 10, 1978, a roof fall occurred in the Dixon Underground Mine. The fall resulted in the death of Robert Ousley. He had proceeded approximately 15 feet inby the mouth of the drift. Timbering had been installed only at the mouth of the drift and no roof support had been installed inby the mouth.

Robin Buddecke was unable by himself to extricate Mr. Ousley. He drove 2 miles to the nearest active Conoco site, the Franklin Pit, and obtained the assistance of Conoco personnel. A mine foreman and several other Conoco employees proceeded to the Dixon Mine and removed Robert Ousley's body from the drift. Roland Henry, one of Respondent's mine superintendents, arrived at the Dixon Mine 30 minutes after being notified of the accident. Horace Harper, manager of the Conquista Project, arrived at 5:30 p.m.

After the accident, operations ceased at the Dixon Underground Mine. James Sweeney, one of Respondent's safety engineers, filed a document with MSHA noting the closing of the mine. He completed the actual closure of the mine pursuant to instructions given by Alex Baca, an MSHA inspector.

MSHA began its investigation of the accident on August 11, 1978. On August 14, 1978, Alex Baca issued an order of withdrawal pursuant to section 107 of the Act. He described the condition or practice as follows: "No means of ground support was being used at the time of the fatal accident; the drift was approximately 25 to 40 feet in the pit wall and only one timber set had been installed at the entrance." Inspector Baca terminated the order after the mine had been barricaded and permanently sealed with waste material.

Inspector Baca cited Respondent because "Continental had the ID Number, so, as far as (the inspector) was concerned, (Donald Buddecke) was part of Continental Oil Company, although he was the owner of Coast Mining Company." In the opinion of the inspector, "Coast was conducting the operation at the Dixon Mine, but doing so without an identification number; if Coast had been mining in another area--one to which an identification number had not been

assigned to Conoco--it would have been mining illegally." The identification number for the Dixon Underground Mine was issued in Conoco's name on August 11, 1978. That is, it was issued after the fatality.

Donald Buddecke had attempted to obtain an identification number for Coast. He testified that he had been informed by an MSHA official that he could not be given an identification number because he did not own the mine. James Sweeney provided assistance to Coast in its effort to obtain an identification number in Coast's name. Mr. Sweeney testified that this was not normally done but "this (was) a special project and we wanted to assist these people to get a mine ID number because we just couldn't be responsible for their safe conduct on the job." He stated that he was unsuccessful in his attempt because MSHA officials felt that the legal definition of "independent contractor" had yet to be determined.

The witnesses generally agreed that the comparative expertise of Donald Buddecke and that of Conoco was such that Conoco employees were not accorded supervisory authority over Coast's operations. Conoco approved the mining methods to be used, but had no involvement in the actual mining. The contractors and employees of Coast were subject only to Coast control and supervision. Donald Buddecke was given a free hand to carry on the mining operations at the Dixon Mine as he saw fit.

Conoco contractually reserved the right to inspect Coast operations and require correction of unsatisfactory work. The clause reads as follows: "Conoco shall have the right of access to the work herein contemplated and shall have the right of inspection thereof. If, as a result of such inspection, it is Conoco's opinion that contractor's work is unsatisfactory, such unsatisfactory condition shall be promptly corrected by contractor at contractor's expense." Donald Buddecke testified that the clause was standard and was intended to be a broad statement; its scope might encompass conditions affecting safety if Coast was committing a flagrant violation, including improper timbering practices.

A number of Conoco's supervisory employees had been present in the Dickson Pit on August 10, 1978, prior to the occurrence of the accident. Horace Harper testified that he had been at the pit on August 10, 1978, at approximately 9 a.m. for 15 to 20 minutes. His purpose was to make sure that nobody was interfering with Coast. He had not received complaints of such interference. James Sweeney had been in the vicinity of the Dixon Mine at 4 o'clock on August 10, 1978, to take pictures of the Dixon Mine for a project newsletter. These individuals had no authority and made no effort to advise or supervise Coast employees on these occasions.

Conoco had completed its own mining in the Dickson Pit prior to Coast's initiation of mining operations on behalf of Conoco. The only active presence of Conoco in the Dickson Pit was an operative water pump.

The question as to whether Respondent can be held liable for the stipulated violation must be answered in the affirmative. Section 110(a) of the

Act requires that: "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *." Conoco was the owner of the Dixon Underground Mine and, as such, was the operator of that mine. 2/ Consequently, it is subject to the assessment of civil penalties pursuant to section 110(a). This is so despite the fact that the violation was due to acts by Coast whose status at the time was that of an independent contractor. An owner-operator can be held responsible without fault for a violation of the Act committed by a contractor. The Federal Mine Safety and Health Review Commission has recently ruled on this question in two cases, Secretary of Labor, Mine Safety and Health Review Commission v. Old Ben Coal Company (MSHRC Docket No. VINC 79-119) (now pending before the Circuit Court of Appeals of the District of Columbia, Docket No. 79-2367), and Monterey Coal Company v. Secretary of Labor, Mine Safety and Health Administration and United Mine Workers (MSHA Docket Nos. HOPE 78-469 through HOPE 78-476), now on appeal to the Fourth Circuit Court of Appeals. In Old Ben, the Commission held that the Secretary of Labor retained the discretion under the Act to cite the mine owner even though the 1977 Amendments amended the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In Monterey Coal, the Commission, citing Old Ben, reversed an administrative law judge's ruling decision in which he had held the owner not liable.

The remaining issue to be determined under the statutory criteria is whether Respondent was negligent. 3/ The record does not support a finding of negligence on the part of Respondent. No showing was made that Respondent knew or should have known of the failure to comply with the mandatory standard. Clearly, Conoco had no actual knowledge of the violation of the mandatory standard. Those Conoco employees who had been in the immediate vicinity of the Dixon Mine observed the portal of the mine but could not and did not observe roof conditions within the mine. They had neither the general authority under the contractual agreement between the parties nor the expertise to supervise the two Coast employees.

2/ In section 3(d) of the Act, the term "operator" is defined to mean "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

3/ Section 110(i) of the Act provides:

"The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

Moreover, it was not established that Respondent should have known of the conditions or practices which led to the death of Robert Ousley. The immediate cause of the accident was the failure of the deceased to heed instructions of Donald Buddecke to the effect that he should not proceed under unsupported roof. Although Respondent contractually reserved a measure of control over the broader aspects of Coast's operations, it did not supervise Respondent's employees or exercise control over day-to-day mining operations, including matters of safety during daily operations. Respondent could not have known that Robert Ousley would proceed unprotected under unsupported roof.

The Federal Mine Safety and Health Review Commission, on August 4, 1980, issued its decision in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburgh & Midway Coal Mining Company (P&M). That case was remanded to the judge to allow Petitioner an additional opportunity to elect the parties against which it desired to proceed.

In view of the Commission's decision, an order was issued affording the Secretary of Labor an opportunity to determine whether to continue to prosecute the citations against Conoco, or the independent contractor which was claimed to have violated the standards cited, or both.

The Secretary complied with that order by filing the following response: "In response to your September 11, 1980 order to elect parties against which petitioner is to proceed, please be advised that the Secretary of Labor elects to proceed against only Continental Oil Company. The Secretary of Labor elects not to proceed against Coast Mining Company." 4/

In consideration of the stipulations, findings of fact and conclusions of law contained in this decision, an assessment of $500 is appropriate under the criteria of section 110 of the Act:

ORDER

It is ORDERED that Respondent pay the sum of $500 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

4/ Subsequent to that response by the Secretary, Conoco filed a letter stating that it would seem appropriate that an order to furnish information be issued against the Secretary to ascertain the basis of his election. The letter, which was not in the form of a motion, suggested that such order be patterned after the enforcement guidelines concerning independent contractors listed in 45 Federal Register 128 at 44497 (July 1, 1980). All evidence already having been presented at the hearing prior to the time of the promulgation of the guidelines, no order for additional information was issued.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

2 9 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. CENT 79-280-M
	:	A/O No. 41-02733-05005
v.	:	
	:	Docket No. CENT 80-235-M
HELDENFELS BROTHERS, INC., Respondent	:	A/O No. 41-02733-05007
	:	Felder Uranium Operation Mine

DECISION

Appearances: Robert Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
H. C. Heldenfels Jr., Esq., Heldenfels Brothers, Inc., Corpus Christi, Texas, for Respondent.

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the Act.) The hearing in these matters was held in Corpus Christi, Texas, on September 4, 1980.

At the conclusion of presentation of evidence and oral argument by the parties on an issue-by-issue basis, a decision was rendered from the bench. The decision is reduced to writing in substance as follows, pursuant to the Commission's Rules of Procedure, 29 C.F.R. § 2700.65:

> The parties have stipulated 1/ that the Respondent has no history of prior violations; therefore, I find that the operator's history of previous violations is good.
>
> The parties have stipulated that Respondent's man hours for its total operations are 218,983 and for the Felder uranium operation, the man hours are 90,386 and that the Felder uranium operation is small. Therefore, I find that the size of the business of the operator is small.

1/ This stipulation and the two which follow were made by the parties at the outset of the hearing, prior to the presentation of evidence as to each alleged violation.

In view of a stipulation to that effect between the parties, I find that the effect of the assessments will have no effect on the operator's ability to continue in business.

Docket No. CENT 79-280-M

Citation No. 170601

Citation No. 170601 was issued on 5/8/79 by Inspector D. J. Haupt, citing a violation of 30 CFR 55.9-40(c). The condition or practice noted on the citation was, "I observed an oiler's helper standing on the outside of the 631-D Caterpillar No. 3236 scraper cab while the oiler was moving the machine around in the maintenance shop yard. This created a hazard of falling from the machine and being run over."

30 CFR 55.9-40(c) provides as follows: Mandatory. Men shall not be transported (c) outside of the cabs and beds of mobile equipment, except trains.

In view of the testimony to the effect that the inspector did observe an oiler's helper standing on the outside of the Caterpillar scraper while the machine was being moved and due to the fact that the violation has not been controverted by Respondent, I find that a violation of 55.9-40(c) did exist.

In view of the fact that Heldenfels did have a rule prohibiting persons from standing on the outside of such equipment, that Heldenfels could not have known of the violation and the fact that it was conceded by the Petitioner that there was no negligence, I, therefore, find that there was no negligence on the part of the Respondent.

The testimony of Inspector Haupt establishes that there was a low probability that the man would have fallen from the vehicle. It is also established that there was a low probability that the man would have fallen off in such a manner that he would have been crushed by the wheels of the vehicle. I, therefore, find that the gravity is low.

The testimony of Inspector Haupt was to the effect that the operator showed good faith. I, therefore, find that the Respondent demonstrated good faith in attempting to achieve rapid complicance after notification of the violation.

In consideration of the statutory criteria under the Act, I find that for Citation No. 170601 an appropriate penalty is $70. A penalty of $70 is, therefore, assessed.

Citation No. 170603

Citation No. 170603 was issued on 5/8/79, by Inspector Haupt and it cited a violation of 30 CFR 55.9-22. The condition or practice noted in the citation was as follows: The about eighteen inch high berm on the outer bank of the elevated haulage roadway by the switch station for the Felder No. 1 pit water pump was not high enough for 631-D Caterpillar pan scrapers, DJB end dump and R-35 Terex end dumps hauling backfill material along the roadway. The roadway was elevated about 20 feet.

30 CFR 55.9-22 provides as follows: Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

In his testimony the inspector has corrected one of the allegations. That is, that one of the machines was alleged to be a R-35 Terex. He stated that it was actually a Terex 33-03B.

The testimony of Inspector Haupt has established that the roadway was elevated about 20 feet and that there was a slope from this elevated roadway with a base of approximately 10 feet. His testimony has established that the height of the berm was approximately 18 inches. Although he did not measure this, he was certain that the dimensions would not vary more than two inches either way.

The testimony also establishes that the berm had a base of approximately four feet, but this could vary as much as from three to five feet. The inspector has testified that the berms in place were not sufficient to restrain the vehicles using the elevated haulage roadway. He based this opinion on his prior experience wherein he had seen similar equipment, although not identical equipment, cross over elevated piles of materials, which he called "windrows", which were not sufficient to restrain those vehicles.

Although the material and consistency of the windrows were not the same as the berms in all respects, I believe that his prior experience enables him to properly state that the berms at Respondent's mine were not sufficient to restrain the vehicles in use on the elevated roadway.

Counsel has argued that it believes that there is no violation because there was a berm on the roadway and that the citation itself so states that there was a berm about 18 inches high there. Although there was a mound of material along the elevated roadway, the evidence does not establish

that there was berm on the roadway because of the definition of berm in the regulations.

A berm is defined in 30 CFR 55.1 as follows: Berm means a pile or mound of material capable of restraining a vehicle.

Since the mound of material along the elevated roadway, in this case, was not capable of restraining the vehicles in use on that roadway, there was no berm there within the meaning of the regulation. I, therefore, find that the evidence establishes a violation of 30 CFR 55.9-22.

The evidence establishes that the berm or mound of material on the elevated roadway was only approximately 18 inches in height and that this was insufficient to restrain the vehicles in use on the elevated raodway and prevent them from going over the berm. It is clear that the 18 inch mound of material was not a berm within the requirements and definitions of the Act and that it was obvious that this mound of material would not restrain a vehicle. My finding is that the operator knew or should have known of the condition and had failed to exercise reasonable care to prevent or correct the condition. I, therefore, find the operator negligent.

The testimony of Inspector Haupt establishes and Petitioner in oral argument concedes that there was a low probability that one of the vehicles involved would go over the berm and result in injury to a person. The evidence further establishes that if the operator were wearing his seat belt that an injury consisting of bruises or, perhaps, a broken bone might occur. Inspector Haupt also testifies that if the operator were not wearing his seat belt that it was possible that he might be thrown from the vehicle and crushed or severely injured. I find that it is improbable that a serious injury would occur as a result of the condition.

Inspector Haupt has testified that there was good faith on the part of the operator. Therefore, I so find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria prescribed by the Act, I find that an appropriate penalty in Citation 170603 is $70. Respondent is accordingly assessed a penalty of $70.

Citation No. 170604

Citation 170604, issued by Inspector D. J. Haupt on 5/9/79 cited a violation of 30 CFR 55.6-112. The condition or practice noted in the citation was as follows: The burning

rate of the safety fuse in Strawn cap magazine was not known or posted. This created a hazard of not being able to get far enough away from a blast before it goes off.

30 CFR 55.6-112 provides as follows: Mandatory. The burning rate of the safety fuse in use at any time shall be measured, posted in conspicuous locations, and brought to the attention of all men concerned with blasting.

The testimony of Inspector Haupt has established that the burning rate of the safety fuse in the magazine was not known or posted. This testimony establishes a violation of 30 CFR 55.6-112 and Respondent has conceded that a violation did, in fact, exist. I, therefore, find the violation existed.

As counsel for Respondent has noted, only one person was exposed to the condition and the blaster who was that person was an experienced individual. However, this bears on the issue of gravity. The testimony of Inspector Haupt has established that the operator should have known of the condition. Therefore, I find that the operator was negligent and it knew or should have known of condition or practice, yet failed to exercise reasonable care to prevent or correct that condition or practice.

Inspector Haupt has testified that there was good faith on the part of the operator. Therefore, I find that Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

As to gravity, the testimony of Inspector Haupt establishes that there was a low probability of an accident occurring as a result of the violation and this is conceded by Petitioner in its argument on this issue. Although it is possible that if an accident had occurred, that it might have resulted in a fatality, the evidence establishes that the normal blasting method was by electric caps and not by the use of safety fuse, that the blaster was an extremely experienced person and that there was a low probability that a fatality or serious injury would, therefore, occur. I, therefore, find that the gravity is low.

In consideration of the statutory criteria prescribed by the Act, the operator is assessed a sum of $78.

Citation No. 170605

Citation 170605, issued on 5/9/79 by Inspector D. J. Haupt, cited a violation of 30 CFR 55.6-5. The condition or

practice noted on the citation was: the explosives magazine and blasting agents storage had brush and trees within 25 feet, creating a fire and explosion hazard.

30 CFR 55.6-5 provides as follows: Mandatory. Areas surrounding magazines and facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass or trees (other than live trees, 10 or more feet tall) for a distance of not less than 25 feet in all directions and other unnecessary combustible materials for a distance of not less than 50 feet.

Inspector Haupt's testimony that the explosives magazine and blasting agents storage had brush and trees within 25 feet is uncontroverted and the parties have stipulated that a violation existed. 2/ I, therefore, find that there was violation of 30 CFR 55.6-5 on the part of Respondent.

Inspector Haupt has testified that there was dried grass in the immediate vicinity of the explosives storage and that there were also trees and brush. His evidence establishes that the trees were green. Respondent argues that on the basis that the trees and brushes were green, that there was no negligence on the part of Respondent. This, however, bears more on the issue of gravity than on the issue of negligence. The record establishes that it was obvious that there were trees, brush and grass within the distance prescribed by the regulation. I, therefore, find that the operator knew or should have known of the conditions or practice and that it failed to exercise reasonable care to prevent or correct the condition. It is found that the operator was negligent.

The testimony of Inspector Haupt establishes that although a serious injury could occur if there was a fire in the grass or the brush in such a manner as to cause the explosive to detonate, he further testified that the probability of such a fire was low and this is conceded by Petitioner in its argument on this issue. The evidence establishes that the location of the explosive magazine and storage was not in a regular work area. I find that the gravity is low.

The testimony of Inspector Haupt has established that the Respondent demonstrated good faith in abating the violation. Petitioner in its argument on this issue concedes that

2/ Mr. Heldenfels, counsel for Respondent, stated at the hearing that he would "stipulate that there was a violation . . . . Mr. Haupt's testimony is uncontroverted."

the condition was abated within the time set by the citation. I, therefore, find that Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria prescribed by the Act in determining an appropriate assessment, a civil penalty in the amount of $60 is assessed for this violation.

Docket No. CENT 80-235-M

Citation No. 170682

Citation No. 170682 was issued on 11/20/79 by Inspector D. J. Haupt. The citation alleged a violation of 30 CFR 55.9-22. The condition or practice noted on the citation was as follows: The 11 degree inclined roadway along the south side of the Felders No. 7 and 4-B pit was equipped with a clay and sand mixture bladed up berm that measured from 12 to 20 inches high and varied in width at the base from five and one half to seven feet wide. The berm would not have restrained the 1-Caterpillar Model 623 or 4 Caterpillar Model 631 scrapers I observed hauling up the roadway in an emergency situation. At the bottom of this form under the heading "Action to Terminate" the Inspector noted: A berm measuring five and one half to six feet high with a base width 12 to 14 feet wide was installed immediately.

30 CFR 55.9-22 provides as follows: Mandatory. Berms or guards shall be provided on the outer banks of elevated roadways.

"Berm" is defined in 30 CFR 55.1 as follows: Berm means a pile or mound of material capable of restraining a vehicle.

Inspector Haupt has testified that the length of the roadway was approximately 600 feet and it was inclined at an angle of 11 degrees. The roadway was elevated and the ratio of the shape at the sides was a 1.1 to 1, meaning that the base of the slope was 1.1 as compared to a heighth of 1.

The testimony of Mr. Haupt establishes that at the time of his inspection the berm in place was from 12 to 20 inches high and varied in width from five and one half to seven feet. The 623 Caterpillar used for excavation and hauling of earth had wheels approximately five feet high with an axle heighth of approximately two and one half feet. The 631 Caterpillar scraper had a wheel heighth of approximately six feet with an axle heighth of approximately three feet.

The Inspector has testified that a berm of this size would be inadequate to restrain the vehicles in use under the conditions existing at the time of his inspection. Because the Inspector's testimony has not been rebutted and it is accepted, I, therefore, find that the material alongside of the haul road was inadequate to restrain the vehicles in use and that there was a violation of 30 CFR 55.9-22.

Inspector Haupt has testified that the berm in place at the time of his inspection measured from 12 to 20 inches high and varied in width at the base from five and one half to seven feet wide and that this was insufficient to restrain the vehicles in use. He has also testified that this condition was open and in plain sight. I, therefore, find that the condition was obvious and that the operator was negligent in that he should have known of the condition and that it failed to exercise reasonable care to prevent or correct the condition.

Inspector Haupt has testified that bruises, cuts could be sustained by the operator if the safety belt held and if the equipment in use did not roll into other machinery on the roadway below. The Inspector testified that he was apprehensive that the power train might fail and that the equipment might roll backward and roll over the berm. The record establishes that the vehicles were fitted with three braking systems-a service braking system, emergency braking system and a parking braking system. Under the conditions existing at the time of the violation, I find that it is improbable that a serious injury would be sustained by the operator or any other miner due to the conditions of the berm.

Mr. Haupt has testified that there was rapid compliance in building up the berm. Since the record establishes that the operator rapidly complied with the terms of the citation by building up a berm immediately, I find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria regarding this violation, I find that a penalty of $85 should be assessed for this violation. Respondent is accordingly assessed a penalty of $85.

It is ordered that Respondent pay Petitioner the sum of $363. This is the total sum consisting of the sum of $278 for the four violations under Docket No. 79-280-M and $85 for the violation in Docket No. CENT 80-235-M.

Motions to Dismiss

At the hearing, Respondent made an oral motion that the proceeding with respect to Docket No. CENT 80-235-M be dismissed because of the length of time taken by the Secretary of Labor to propose a penalty. Respondent's motion was denied in substance as follows:

> In this case the Citation No. 170682 was issued on November 20, 1979. The citation was terminated on that same date by the construction of an additional berm. The results of initial review are dated January 15, 1980. The notice to the mine operator, advising of his rights to an informal conference was dated January 22, 1980. The conference worksheet dated 1/5/80, stated that the conference date was February 5, 1980.
>
> The proposed assessment was dated February 13, 1980. A notice that Respondent had the right to contest the proposed assessment was dated February 22, 1980. The notice of contest was dated February 25, 1980 and the complaint proposing a penalty was dated April 4, 1980.
>
> Respondent has predicated his motion for dismissal partly on the requirements of 30 CFR 100.5. 30 CFR 100.5(a) states, "All citations which have been abated and all closure orders regardless of termination or abatement will be promptly referred by MSHA to the Office of Assessments for a determination of the fact of a violation and amount, if any, of the penalty to be proposed."
>
> There is nothing in the record on this point to support a finding that citations which had been abated were not promptly referred by MSHA to the Office of Assessments for a determination of the fact of the violation and the amount, if any, of the penalty to be proposed.
>
> The Respondent also based his motion for dismissal on the requirements of the Federal Mine Safety and Health Act of 1977. Section 105(a) of that act provides in pertinent part as follows: If after an inspection or investigation the Secretary issues a citation or order under Section 104, he shall within a reasonable time after the termination of such inspection or investigation notify the operator by certified mail of the civil penalty proposed to be assessed under Section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

The record indicates that the citation was issued as a result of an inspection on November 20, 1979, that the citation was dated November 20, 1979 and that the citation was terminated or that the condition was abated on November 20, 1979.

The proposed assessment was dated February 13, 1980 and the notice of right to contest was dated February 22, 1980. The complaint proposing a civil penalty was dated April 4, 1980.

The Petitioner has admitted that Inspector Haupt's inspection was complete on November 20, 1979, the date of the citation, and Respondent has admitted that there was no harm to Respondent as a result of any delay on the part of Petitioner in notifying Respondent of the penalty proposed to be assessed as required by Section 105(a) of the Act.

My ruling is that under the circumstances of this case the time interval between the issuance of the citation on November 20, 1979, and the time that Respondent was notified of the proposed penalty on or about February 13, 1980, was not a delay in time within the meaning of Section 105(a) of the Act, that would cause the citation issued by the inspector to be vacated. The Respondent's motion is accordingly denied.

Respondent's motion that the proceeding with respect to Docket No. CENT 79-280-M was also denied. The four citations alleged in Docket No. CENT 79-280-M had been issued on May 8 and 9, 1979. Two citations were terminated immediately and two were terminated on May 25, 1979. MSHA issued its Results of Initial Review on July 11, 1979. Approximately 60 days had elapsed between issuance of the citations and the transmittance of the Results of Initial Review. The Proposed Assessment was issued on July 26, 1979, approximately 75 days after issuance of the pertinent citations.

ORDER

It is ORDERED that the bench decision rendered in the above-captioned civil penalty proceedings is hereby AFFIRMED.

It is further ORDERED that Respondent pay the sum of $363, if it has not already done so, within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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3 0 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-352
	:	A/O No. 46-01455-03039I
v.	:	
	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Corvette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Samuel P. Skeen, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

A proposal for a 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, a prehearing order was issued, and the case was scheduled for hearing. On August 25, 1980, Petitioner filed a motion requesting approval of a settlement and for dismissal of the proceeding. On August 28, 1980, an order was issued requiring Petitioner to furnish certain additional information necessary to properly evaluate the proposed settlement. Certain additional information was filed on September 9, 1980. A copy of the accident investigation report was filed at the hearing on September 18, 1980, and the matter was continued to permit further study of the report.

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.

The proposed settlement is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
630835	8/21/79	75.512	$1,000	$ 800
630873	8/21/79	75.1403	500	500
		Totals:	$1,500	$1,300

Petitioner advances the following reasons in support of the proposed settlement:

* * * * * * *

3. On August 21, 1979 there was an accident at the Osage No. 3 Mine in which four miners were injured when a trip of loaded cars and a locomotive drifted out onto the main haulageway from a side-track and collided with a personnel carrier. None of the men received any permanent or serious injuries. As a result of that accident an MSHA investigation was conducted. Two citations were issued during the course of that investigation. This settlement agreement applies to one of the two citations.

The Respondent has agreed to tender the full amount of the original assessment, i.e. $500, in citation No. 0630873. The six statutory criteria have been considered and the circumstances surrounding the issuance of the citation have been reviewed. Citation No. 0630873 (30 CFR 75.1403) was issued because there was a violation of Safeguard Notice No. 1LA (6-16-76), which required that positive acting stop blocks or derails be used on all parked track-haulage equipment. The violation was one of the causes of the haulage accident and caused injuries to four employees. The violation did not result from the operator's negligence. The miners who parked the train discovered the defective stop block and reported it to management immediately. This was done a short time before the time of the accident. Thus, there was no way management could have known of the violation. There is no evidence that management had prior notice of the violation or that the violation had existed for a sufficient period of time so that management should have known about it.

Citation No. 0630835 (30 CFR 75.512) was issued because the weekly electrical examinations of five different locomotives was inadequate. The violation was one of the causes of the accident in which four employees were injured. The special assessment sets forth that the operator was negligent because the examination of the brakes on the locomotives had been inadequate, i.e., the fact that the brakes were defective

was overlooked or disregarded. However, further investigation has revealed that the operator's records indicated that the brakes were being checked weekly and no inadequacy had been noted. The inspector, who issued the citation, noted that the operator could not have known of this violation. Management personnel would not have had occasion to operate these motors, and if a problem was not reported, management would be unaware of it. This factor does not eliminate the operator's negligence; it does however slightly mitigate it. A reduction in penalty to $800 from $1000 is warranted and should be approved.

The violations were abated within a reasonable period of time.

The reasons given above by counsel for Petitioner for the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore 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 $1,300 assessed in this proceeding.

John F. Cook
Administrative Law Judge

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

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

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30 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-341 A/O No. 11-00609-03020
v.	:	Captain Strip Mine
SOUTHWESTERN ILLINOIS COAL CORP., Respondent	:	

ORDER OF DISMISSAL

On October 6, 1980, Petitioner filed a motion to dismiss in the above-captioned case stating as follows:

> The Petitioner, RAY MARSHALL, Secretary of Labor, United States Department of Labor, by the undersigned attorney, hereby makes a motion, pursuant to 29 CFR 2700.10, that this proceeding against Respondent, SOUTHWESTERN ILLINOIS COAL CORPORATION be dismissed. As grounds for this motion, the Petitioner states:
>
> 1. Citation No. 1000674 was issued on February 26, 1980 as a result of an act committed by a subcontractor, Darryll Waggle Construction Company, working at the Captain Strip Mine;
>
> 2. An assessment of $1,050 was proposed which was based, in part, on the negligence of Waggle Construction Company;
>
> 3. 30 CFR 45.6, effective July 31, 1980, establishes guidelines as to when the Secretary will cite independent contractors;
>
> 4. In the interests of fair law enforcement, the Secretary should be given the opportunity to apply this policy to the independent contractor, Waggle Construction Company;
>
> 5. A dismissal of this proceeding will permit the Secretary to determine whether a citation should be issued to Waggle Construction Company and, if issued, will permit Waggle Construction Company to file a Notice of Contest pursuant to 29 CFR 2700.20 if it chooses to do so.

Petitioner's motion is herewith GRANTED and the above-captioned case is herewith DISMISSED.

John F. Cook
Administrative Law Judge

Distribution:

Michele M. Fox, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Brent L. Motchan, Assistant Counsel, Southwestern Illinois Coal Corporation, 500 North Broadway, Suite 1800, St. Louis, MO 63102 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 1980

LOCAL UNION 6025, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. WEVA 80-648-D
	:	HOPE CD 80-59
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 80-649-D
	:	HOPE CD 80-72 thru 80-74
	:	
	:	Bishop Mine

ORDER OF DISMISSAL

On August 26, 1980, Complainant filed complaints of discrimination in these cases, based on section 105(c) of the Act. These are two of a number of cases filed against Respondent by Complainant for refusals to pay walkaround representatives for participating in "Spot" or irregular inspections. See Local 6025, UMWA v. Bishop Coal Company, 2 FMSHRC 2160 (August 7, 1980); Local 6025, UMWA v. Consolidation Coal Company, Docket No. WEVA 80-457-D (Order of Dismissal, October 20, 1980).

On their faces, these complaints are without merit. It is settled that a walkaround representative need not be paid for participating in a "spot" or irregular inspection. MSHA v. Helen Mining, Inc. 1 FMSHRC 1796 (November 21, 1979). Ordinarily, a responsive pleading should be obtained from Respondent, but in view of the history of these claims and need to secure the just, speedy, and inexpensive determination of all proceedings, the complaints will be dismissed. 29 C.F.R. § 2700.1(c).

Complainant has not stated claims upon which relief may be granted. Accordingly, IT IS ORDERED that the cases are DISMISSED.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, DC 20005

Mr. Bill Trump, Manager of Mines, Consolidation (Bishop) Coal Company, Pocahontas, VA 24635

Consolidation Coal Company, Legal Department, Consol Plaza, Pittsburgh, PA 15241

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

30 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. CENT 79-156-M
v.	)	ASSESSMENT CONTROL NO. 29-00782-05002-F
KERR-McGEE CORPORATION,	)	MINE: CHURCHROCK NO. 1
Respondent.	)	

DECISION

APPEARANCES:
Sandra D. Henderson, Esq. Office of the Solicitor, United States Department of Labor, 555 Griffin Square, Suite 501, Dallas, Texas 75202,
for the Petitioner,

Carolyn G. Hill, Esq., Kerr-McGee Center, P. O. Box 25861, Oklahoma City, Oklahoma 73125, and George W. Kozeliski, Esq., P. O. Box 1059, Gallup, New Mexico 87301,
for the Respondent.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Petitioner seeks an order assessing a civil monetary penalty against Respondent for its alleged violation of 30 CFR 57.15-5. The pertinent part of that regulation states as follows: "Safety belts and lines shall be worn when men work where there is danger of falling; ... ." The citation attached to the complaint alleges that a shaft miner was fatally injured when he fell into a 36 inch diameter bore hole while using a 20 foot long cable sling instead of a standard company constructed 10 foot long safety line. The citation further alleges that the 20 foot long cable sling allowed the miner to fall 9 1/2 feet into the bore hole at which time his safety belt failed and he fell an additional 54 feet to the level below.

By way of answer the Respondent alleges that it was in compliance with the cited standard.

FINDINGS OF FACT

1. The fatal accident occurred at Respondent's uranium mine located near Gallup, New Mexico on December 13, 1978.

2. The shaft where the accident occurred was originally a 36 inch diameter bore hole with a 1,529 foot vertical drop. The bore hole was being enlarged to a 12 foot diameter concrete lined shaft. The shaft depth had been completed to a depth of 1,475 feet.

3. The concrete lined shaft was to be used by Respondent for hoisting muck and supplies.

4. A "fine" grizzly plug, 38 inches in diameter and 3 feet high, was lowered over the bore hole and excessive muck was then leveled off around the grizzly plug making a platform from which the miners could install wire mesh and bolts.

5. The "fine" grizzly plug was raised or lowered by attaching it to a 20 foot long cable which was attached to the bottom of the bucket used to transport men and material in the shaft.

6. On the date of the accident, the lead miner and the decedent had completed installing a section of wire mesh and needed to relieve the muck pile in order to install another section of wire mesh.

7. The lead miner belled the bucket down to the bottom of the shaft, tied the "fine" grizzly plug to the bottom of the bucket, and the decedent used the 20 foot long cable as a safety line to secure himself to the wire mesh.

8. The lead miner then raised the grizzly plug approximately two feet and called down to the decedent to clean off the grizzly plug, but he got no response.

9. The lead miner then observed the safety line of the decedent hanging into the 36 inch diameter bore hole and decedent's body was later recovered approximately 54 feet below at the bottom of the bore hole.

10. The safety belt was in place around decedent's body, but the "D" ring which had been attached to the safety belt had been torn loose and was still attached to the safety line.

11. The lower end of the safety line was located at a point approximately 9.5 feet down into the bore hole.

DISCUSSION AND CONCLUSIONS

The regulation cited requires the use of a safety belt and line "where there is danger of falling." The Respondent did supply the decedent with a safety belt and line. However, the deceased miner did not use the safety line in a manner that would prevent him from falling approximately 9.5 feet down the bore hole. The decedent had tied off his safety line on two sections of the wire mesh before the accident occurred (Tr. 49). The miner could have tied the line off shorter by wrapping the line around several sections of the wire mesh (Tr. 49-50). Thus, the miner could have shortened his safety line sufficiently to prevent the fall into the bore hole.

The original length of the safety line was not as important as the use which was subsequently made of it. It could have been 15, 20 or 30 feet long. Proper use of the safety line would be to tie it off so that it is shortened sufficiently to be of use "where there is danger of falling". Otherwise, there would be little value in wearing a safety belt and line.

Evidence was introduced which showed that the safety belt worn by the decedent should have been able to withstand, without failure, a test of three successive drops of a 250 pound weight falling free through a distance of six feet. (Exhibit P-4, par. 5.3). The Respondent points out that even if the Petitioner had produced evidence of a "free fall" of 9.5 feet by the decedent who weighed 155 pounds, by mathematical calculation, the belt should have been able to withstand a free fall of 9.68 feet. The safety belt may not have lived up to its specifications by .18 of a foot, but the point is that had the safety line been properly tied off to shorten it, the deceased would not have fallen 9.5 feet into the bore hole, whether it was a free fall or a sliding fall.

I conclude that although a safety belt and line were worn by the decedent, the regulation was not complied with since the safety line as utilized by the decedent was ineffective in reducing the possibility of falling into the bore hole "where there was danger of falling."

After the Petitioner rested his case, the Respondent made a motion to dismiss on the basis that the Petitioner had failed to present a prima facie case. I took the motion under advisement. I now deny the motion based upon my conclusion that the Petitioner did show a violation of the regulation.

Since the cited regulation was not complied with by the failure of the miner to tie off the safety line in order to shorten it, and thus prevent the accident that did occur, is the Respondent operator liable for a violation of 30 CFR 57.15-5 as alleged?

It has recently been held that the Federal Mine Safety and Health Act of 1977 is a strict liability statute, that an operator is vicarously liable under the doctrine of respondeat superior for both the violations and negligence of its employees, and that the negligence of an operator's employee is imputable to the operator for the purpose of assessing an appropriate civil penalty. Secretary of Labor, Mine Safety and Health Administration (MSHA) v Warner Company, (Docket No. Penn 79-161-M, April 28, 1980).

The general mine foreman for the Respondent testified that the decedent could have used the line properly as a safety line if it had been doubled through the wire mesh and both ends hooked to the safety belt. (Tr. 103). The witness also testified that the Respondent operator does not approve of using this type of line for a safety line because it may become damaged (Tr. 104), and that the customary lines provided by the company are ten to fifteen feet in length (Tr. 102). Approximately two or three days before the accident, fifteen to twenty customary safety lines were constructed for use of the miners by the Respondent, but the decedent did not use any of them (Tr. 102, 103). I consider this as mitigating evidence in regard to assessing an appropriate civil penalty.

I conclude that the violation alleged did occur, and based upon the legal principles set forth in the case of Warner Company (Id.) I conclude that the Respondent is liable therefor.

ORDER

Respondent is ordered to pay a civil penalty of $1,500.00 within thirty days of the date of this Decision for the violation of 30 CFR 57-15.5, as alleged.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

31 OCT 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-290
	:	A/O No. 33-01159-03086
v.	:	
	:	Powhatan No. 6 Mine
NACCO MINING COMPANY, Respondent	:	

DECISION

This case consists of a petition for the assessment of civil penalties for two alleged violations of the Act. The Solicitor has filed a motion to approve a settlement for one of the two citations.

Citation 1008201 was issued for an alleged violation of 30 CFR 75.316. On September 8, 1980 a hearing was held in Secretary of Labor v. Nacco Mining Company, Quarto Mining Company and The North American Coal Corporation, LAKE 80-251, et al. in which the same provision of respondent's dust control plan at issue in this citation was litigated. In those cases a decision dated September 22, 1980 held invalid this provision of the dust control plan. The decision in LAKE 80-251 is dispositive of this citation.

Citation 1008126 was issued when exposed power conductors were observed in two locations on the trailing cable of a welding machine, a violation of 30 CFR 75.517. The original assessment for the alleged violation was $210. The recommended settlement is $140. In support of her motion, the Solicitor advises that although the jacket of the cable was cut, the insulation itself was intact. Further, the floor in the area of the cable was dry and the welding machine had been in operation on only an infrequent basis. These factors indicate a more remote probability of occurrence than was originally indicated. I accept the Solicitor's representations. The recommended settlement is approved.

ORDER

Citation 1008201 is hereby VACATED and the petiton to assess a civil penalty is DISMISSED insofar as it concerns this citation.

The operator is ORDERED to pay $140 within 30 days of the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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31 OCT 1980

MCCOY ELKHORN COAL CORPORATION, Contestant	:	Contest of Order
v.	:	Docket No. KENT 80-243-R
	:	Order No. 722582
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	April 4, 1980
	:	No. 4 Mine
	:	
	:	Contest of Citation
	:	
	:	Docket No. KENT 80-244-R
	:	Citation No. 722581
	:	April 3, 1980
	:	
	:	No. 4 Mine

DECISION

Appearances: Fred G. Karem, Esq., Shuffett, Kenton, Curry & Karem, Lexington, Kentucky, for Contestant;
William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order issued June 2, 1980, a hearing in the above-entitled consolidated proceeding was held on July 22, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). All civil penalty issues were consolidated for purposes of avoiding an additional hearing in the event a violation of a mandatory safety standard should be found to have occurred, but the civil penalty issues will be severed from this decision and will be decided in a subsequent decision after I have received a Petition for Assessment of Civil Penalty filed by the Secretary of Labor with respect to the violation of 30 C.F.R. § 75.400 alleged in Citation No. 722581 which is under review in Docket No. KENT 80-244-R.

At the conclusion of the hearing, counsel for the parties indicated that they would like to file briefs before a decision was rendered. It was agreed

that simultaneous briefs would be filed by September 29, 1980 (Tr. 366). Counsel for the Secretary of Labor filed a memorandum of law on October 1, 1980, and counsel for McCoy Elkhorn Coal Corporation filed a posthearing brief on October 2, 1980.

Issues

The memorandum of law (p. 2) submitted by counsel for the Secretary lists four issues which have been raised in this proceeding:

(1) Whether or not the violation set forth in the 104(a) citation issued April 3, 1980, had been completely abated at the time the 104(b) order was issued.

(2) Whether or not the Mine Safety and Health Administration's inspector abused his discretion when he determined not to extend the abatement time of the 104(a) citation.

(3) Whether or not failure to state correctly the initial action citation number voids the resulting 104(b) order.

(4) Whether or not the 104(b) order is void because the inspector failed to make a written finding that the abatement period should not be enlarged in regard to the 104(a) citation.

McCoy Elkhorn's posthearing brief contains arguments pertaining to the four issues set forth above. Since I am in substantial agreement with all of the arguments made in the Secretary's memorandum of law, my decision will primarily consider the arguments set forth in McCoy Elkhorn's brief.

Before considering the parties' arguments, I shall make some findings of fact on which my decision will be based.

Findings of Fact

1. Contestant McCoy Elkhorn Coal Corporation in April 1980 owned three coal mines, namely, Nos. 1, 3 and 4. On a daily basis, the No. 1 Mine produces about 1,900 tons, the No. 3 Mine produces approximately 400 tons, and the No. 4 Mine produces about 600 tons. McCoy Elkhorn has 237 employees, including both office and production personnel. McCoy Elkhorn is an affiliate of General Energy Corporation of Lexington, Kentucky. McCoy Elkhorn's three mines are all located in Pike County, Kentucky (Tr. 32; 178-180).

2. Mr. Kellis Fields, a duly authorized representative of the Secretary of Labor, traveled to McCoy Elkhorn's No. 4 Mine on April 3, 1980, for the purpose of initiating a regular inspection pursuant to section 103(a) of the Federal Mine Safety and Health Act of 1977 (Tr. 139). On that day, the inspector issued two citations alleging violations of 30 C.F.R. § 75.400

which provides "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment" (Tr. 14-15).

3. One of the citations alleged a violation of section 75.400 with respect to a loading machine and the other citation was No. 722581 issued at 11:30 a.m. alleging that "combustible material in the form of oil and grease with coal dust was allowed to accumulate under the lid, on and around electrical motors, in one place around the motor 1/2 inch deep on the 16-RB cutter on the 002 section." The time set for abatement was 8 a.m. the next day, that is, April 4, 1980 (Tr. 15-16; Exh. 1).

4. When the inspector returned to the mine on the morning of April 4, he first examined the loading machine and found that all combustible materials had been cleaned from the loading machine. He therefore terminated the citation which had been issued with respect to the loading machine (Tr. 19).

5. Mr. Michael K. Norman, McCoy Elkhorn's safety director, accompanied the inspector during his examination of the No. 4 Mine on both April 3 and 4, 1980 (Tr. 13; 183). At the time of the hearing held on July 22, 1980, Mr. Norman had been promoted to the position of mine foreman (Tr. 178).

6. After completing his examination of the loading machine, the inspector watched the miners load coal and took an air reading. Then the inspector went to the place where the cutting machine was sitting and began checking it (Tr. 51). He and the safety director were joined by Mr. Lester Varney, McCoy Elkhorn's section foreman on the day shift. The inspector could see down into the cutting machine because one of the guards on the back side had been removed. The inspector remarked that the cutting machine had not been cleaned of all combustible material. The safety director and the section foreman examined the cutting machine and both expressed the opinion that they thought the cutting machine was "okay" (Tr. 19-20).

7. The inspector then asked that the other lid on the front of the cutter be removed. After the front lid had been removed, the inspector again examined the remainder of the machine. The inspector used his ruler and found that oil and grease still existed under the lids to a depth of from 1/4 to 1/2 inch. The inspector again remarked that the cutter had not been properly cleaned of all combustible materials (Tr. 21; 42; 127; 359). Neither the safety director nor the section foreman offered to have any more cleaning done on the cutter (Tr. 105; 214; 359-361).

8. After the inspector had carefully examined the entire machine and had shown the safety director the amount of oil and grease which he had measured around electrical components, the inspector waited an additional 5 to 15 seconds for the safety director or section foreman to offer to do additional cleaning or explain why additional time was needed for properly cleaning the machine, the inspector stated that the machine was down or closed

(Tr. 21; 359-361). The safety director asked if that meant the inspector had issued a withdrawal order and the inspector replied that it did (Tr. 128-129). The inspector's Order No. 722582 issued April 4, 1980, stated "[a]ll combustible material still has not been cleaned from the 16 RB Joy Cutter, and oil and grease still can be measured from 1/4 to 1/2 inch in depth and no one is cleaning on this piece of equipment" (Tr. 118; Exh. 1).

9. The inspector defended his issuance of the withdrawal order on various grounds. He stated that it is his practice to grant extensions of time for compliance with violations he has cited when an operator explains why a given violation has not been abated and asks for an extension of time (Tr. 106; 135). The inspector stated that in this instance he did not grant an extension of time because no one asked for additional time within which to clean the remaining combustible material off the cutting machine and both the safety director and the section foreman had unequivocally expressed the opinion that the cutting machine had been adequately cleaned (Tr. 20; 51; 188; 212; 314). The inspector stated that he had reason to doubt that the additional cleaning he believed to be necessary would have been done if he had voluntarily extended the time for a couple of hours (Tr. 109). He believed that issuance of a withdrawal order was necessary to obtain total abatement, that is, the cleaning of all combustible materials from the cutting machine (Tr. 127; 361).

10. The inspector stated that about 60 percent of the combustible materials on the cutting machine had been removed between the time he issued the original citation on April 3 and the time he examined the cutting machine on April 4 (Tr. 88). The inspector believed that the use of water and solvents and the other cleaning which had been done on the cutting machine had reduced the machine's propensity for causing a fire on April 4 (Tr. 98), but the inspector believed that the water and solvents would evaporate at a subsequent time and leave the same kind of ignitable residue which he had initially observed (Tr. 93; 100). Therefore, he concluded that failure to remove all the combustible materials which existed on April 4 would cause the cutting machine to revert to a hazardous condition since oil was still present where heat from the motor and a possible spark from electrical components could produce a fire or an explosion (Tr. 27; 40; 58; 95).

11. The inspector believed that the violation was the result of a high degree of negligence (Exh. 1, p. 2). The operator's cleaning program under which the equipment was to be cleaned once every 2 weeks was either not being performed or, if being performed, was not requiring sufficient frequency of cleaning to keep the equipment free of combustible materials (Tr. 356-357; Exh. 12). The inspector stated that the amount of combustible materials he saw on the equipment would not have accumulated if the operator had been cleaning the equipment with sufficient regularity (Tr. 75; 161).

12. The inspector considered the violation to be serious depending on the circumstances that might exist at the time a fire or explosion might occur as a result of the accumulation of combustible materials on the cutting

machine. If all 10 of the miners who worked in the section where the cutting machine was used were present in the mine, they could be overcome by smoke inhalation depending on the adequacy of ventilation at the time of the fire and the extent of the miners' training as to what to do in case of fire, that is, how well they reacted in using the proper escapeways and whether the escapeways were being properly maintained (Tr. 27; 28; 40; 144). Considerations countervailing the above-mentioned hazards were that the mine had been adequately rock dusted on April 3 and 4, 1980, and the fact that no methane had been detected on either day (Tr. 65-66). Additionally, the cutting machine is equipped with a fire suppression system and a breaker system which should disconnect power in an emergency (Tr. 98).

13. As to the operator's history of previous violations, Exhibit 3 shows that McCoy Elkhorn was previously cited on October 2, 3, and 4, 1979, for having accumulations of combustible materials on five different pieces of mining equipment (Tr. 156; 356-357).

14. McCoy Elkhorn's safety director examined the cutting machine along with the inspector on the morning of April 4, 1980 (Tr. 183-184). The safety director was of the opinion that the cutting machine had been cleaned thoroughly, although he conceded that in the compartments under the lids there were still some accumulations of soggy-like stuff with oil in it (Tr. 186). The safety director had never seen a cutting machine, as clean as that one was, receive a citation before (Tr. 188). Although the safety director did not ask the inspector for an extension of time within which to do more cleaning (Tr. 214), he said they would have done additional cleaning if the inspector had voluntarily extended the time (Tr. 190). The safety director's description of the number of hours that were spent by the maintenance shift in cleaning the cutting machine was based on his discussion with the section foreman who works on the maintenance shift and with Mr. Dover Varney, the scoop operator, who was chiefly given the responsibility for cleaning the cutting machine (Tr. 225).

15. Mr. Ronnie Fletcher was the section foreman on the maintenance shift which began at 11 p.m. and ended at 7 a.m. (Tr. 253). He was called at home by the day-shift section foreman, Mr. Lester Varney, who told him that citations had been written with respect to excessive accumulations on the loading machine and cutting machine and that the superintendent wanted the machines thoroughly cleaned on Mr. Fletcher's shift (Tr. 236). The superintendent, Mr. Stanley Charles, called Mr. Fletcher at the mine about 10:50 p.m. and emphasized that the equipment should be made "extra clean" (Tr. 237; 344). Mr. Fletcher described in great detail how he and the three miners on his crew used cap wedges and roof bolts to scrape and loosen the dirt and grease around the motor and other fittings (Tr. 238). Two 3-inch holes in the bottom of the motor compartment were filled with mud when they began cleaning and those holes had to be opened with roof bolts so that the dirt could be raked out of the compartment (Tr. 239). After the four men had scraped dirt off the machine for 2 hours, one of them sprayed a solvent on the machine from a 55-gallon drum, using about 40 to 50 gallons on the cutter (Tr. 241; 262). Mr. Fletcher said that the solvent was sprayed on the

machine while it was still hot so that it would dissolve the grease around the motor (Tr. 241-246). The solvent works especially well when equipment is hot (Tr. 246).

16. The miners ate lunch from about 3 to 3:45 a.m. Then they rinsed the solvent off the cutting machine with a water hose and backed the cutter out of the place where they had cleaned it and turned it left-handed in the No. 6 entry (Tr. 256; 272-274). Two men had started scraping the dirt off the loading machine at 2 a.m. They finished scraping on the loading machine and had started scraping on the coal drill shortly before eating lunch at 3 a.m. (Tr. 259; 272-273). Then the loader was brought in, sprayed with solvent, and washed with water. Finally, after moving the loading machine out of the washing place, the coal drill was brought in, sprayed with solvent, washed with a water hose, and returned to the place where the men had found it in the No. 5 entry (Tr. 275). All three pieces of equipment were cleaned at the same place in the mine and not one of the three pieces of equipment was sitting in the place where it had been cleaned when it was examined by the inspector on the morning of April 4 (Tr. 274-275).

17. Mr. Fletcher referred to cleaning grease off the cutting machine, specifically mentioned that grease was cleaned from around the motor, and stated that grease ran out of the compartment under the lids (Tr. 238; 241; 242). Mr. Charles, the mine superintendent, claimed that the inspector should not have referred in his citation and order to the existence of grease on the cutting machine because the only grease used in the rear compartment was in a sealed unit (Tr. 363-364). Mr. Fletcher found it necessary to contradict himself about his references to grease in his direct testimony when his counsel specifically asked him if he saw any grease under the lid in the rear compartment (Tr. 245).

18. Mr. Fletcher stated that it was impossible to clean accumulations of oil from beneath the motor in the rear compartment and that if the inspector had put a ruler down beside the motor after the cutter had been cleaned, that he would expect the inspector would definitely have been able to measure from 1/4 to 1/2 inch of oil in that location (Tr. 283-284). Mr. Fletcher also stated that the miners had cleaned the cutting machine to his "satisfaction" (Tr. 271).

19. Despite Mr. Charles' position that grease can not exist on the cutting machine, a memorandum from McCoy Elkhorn's division manager states that all "grease" and other combustible materials are to be cleaned off the equipment every 2 weeks (Tr. 289; Exh. 12). Notwithstanding the posting of the memorandum about the necessity of cleaning equipment every 2 weeks (Tr. 290), Mr. Fletcher stated that it was not one of his regular duties to clean equipment on the maintenance shift and that cleaning of equipment was done primarily when equipment breaks down because, at such times, the men have nothing else to do other than to clean equipment (Tr. 285).

20. Mr. Dover Varney is a scoop operator on the maintenance shift and he had the primary duty of cleaning the cutting machine on April 4. His

description of the cleaning process does not differ from Mr. Fletcher's, but Mr. Varney did describe a practice which may well have contributed to the accumulations which the inspector saw when he issued his citation. Although Mr. Varney denied that grease existed in the compartment under the rear lid, he said that if they find an oil accumulation down in a compartment, they throw rock dust on the oil which has the effect of absorbing the oil. Then they can scrape off the combined mixture of rock dust and oil, spray the area with a solvent, and wash it with a water hose (Tr. 308).

21. Mr. Lester Varney, the day-shift section foreman, was present when the inspector issued the citation on April 3 and he stated that oil and dirt were "pretty thick" on the machine at the time the citation was issued (Tr. 310). Mr. Varney was instructed by the superintendent to check the cutter as soon as he went underground on the day shift. Mr. Varney checked the cutter and thought it looked clean and reported to the superintendent on the mine telephone that the cutter was clean (Tr. 312). Mr. Varney claimed that he was surprised when the inspector examined the cutter and stated that it was not clean enough (Tr. 314). Mr. Varney said that he would have been willing to clean some more on the cutter if the inspector had asked him to do so and had voluntarily extended the time for that purpose (Tr. 316). Despite the fact that Mr. Varney thought the cutter was clean, after the order was issued, he had five miners use cap wedges and roof bolts for about 1-1/2 hours for the purpose of cleaning the remaining materials from the cutting machine (Tr. 320). Mr. Varney stated that there was some mud, water, solvent, and a little oil on the cutter at the time the inspector issued his order (Tr. 313; 324). Although Mr. Varney was within 2 feet of the inspector when the inspector was checking the depth of the oil and grease inside the rear compartment on the cutting machine, Mr. Varney could not say how much oil showed on the inspector's ruler when he measured the materials on the bottom of the compartment (Tr. 335). Mr. Varney stated that the barrels from which the cleaning solvent had been taken were sitting nearby and were pointed out to the inspector by McCoy Elkhorn's safety director (Tr. 335). The maintenance shift foreman, Mr. Fletcher, however, testified that the barrel from which the solvent had been taken was left lying on the scoop so that they could conveniently fill buckets from the barrel (Tr. 262).

22. Mr. William Stanley Charles, the superintendent of the No. 4 Mine, did not personally see the cutting machine before the inspector's citation was written and did not examine the cutting machine before or after the inspector's order was written (Tr. 350). The superintendent stated that his foremen are very competent miners and that he believed that they correctly reported to him that the cutter was in excellent condition on the morning of April 4 when the inspector issued the withdrawal order after finding that all combustible materials had not been cleaned from the cutting machine (Tr. 351). Mr. Charles could not state that he has a specific program which assures that the equipment will be cleaned at least once every 2 weeks. All Mr. Charles could state was that cleaning was done when equipment had broken down and that cleaning was a priority consideration on Saturday (Tr. 355-357).

Consideration of Arguments Contained in McCoy Elkhorn's Brief

1. Whether There Was an Accumulation within the Meaning of Section 75.400 at the Time Order No. 722582 Was Issued on April 4, 1980

McCoy Elkhorn's brief does not challenge whether a violation of section 75.400 existed when the inspector issued Citation No. 722581 on April 3, 1980. McCoy Elkhorn cannot question whether a violation of section 75.400 existed when the citation was issued because its own witnesses agreed that the accumulations on the cutting machine on April 3, 1980, were "pretty thick" (Tr. 310) and that four miners worked on the cutting machine for about 12 man hours before they had cleaned it to the section foreman's "satisfaction" (Tr. 271; Finding Nos. 3, 15-16, 20-21, supra).

McCoy Elkhorn's brief (pp. 4-7) does contend, however, that there was no violation of section 75.400 on April 4, 1980, when the inspector issued Withdrawal Order No. 722582 after he had found that the violation had not been "totally abated" within the meaning of section 104(b) of the Act. McCoy Elkhorn argues that "accumulate" means "to heap or pile up" and that the mere existence of combustible materials cannot be considered a violation of section 75.400. In support of the foregoing contention, McCoy Elkhorn cites the Commission's decision in Old Ben Coal Co., 1 FMSHRC 1954 (1979), at 1958, where the Commission stated:

> We accept that some spillage of combustible materials may be inevitable in mining operations. Whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount. * * *

McCoy Elkhorn claims that its witnesses' testimony shows that the cutting machine had been thoroughly cleaned on the maintenance shift which begins at 11 p.m. and ends at 7 a.m. It is argued that the inspector's position as to what constitutes an "accumulation" within the meaning of section 75.400 is clearly wrong because he believed that mere existence of any amount of a combustible material is an "accumulation" prohibited by section 75.400.

The above argument of McCoy Elhorn is not well taken in the context of the factual situation which confronted the inspector on the morning of April 4. The inspector had on April 3, 1980, issued two citations alleging violations of section 75.400 because of accumulations of coal dust, oil, and grease on the loading machine and the cutting machine. When the inspector returned on April 4, he found that the accumulations had been properly removed from the loading machine and he terminated the citation with respect to that machine. The inspector, however, found that the cutting machine had not been properly cleaned because he could still see and measure up to 1/2 inch of oil and grease around the motor in the rear compartment of the cutting machine. Although the inspector agreed with McCoy Elkhorn's counsel on cross-examination that the oil and grease were then mixed with water and solvent as a result of the miners' partial abatement of the violation, he still believed that the accumulations he had cited on April 3 had been only

60 percent removed. He stated that the water and solvents used on the oil and grease would evaporate and the oily substances around the motor and electrical components would cause the cutting machine to become a possible fire or explosion hazard shortly after it began to be used again (Finding Nos. 4, 7-8, 10, supra).

It is true that McCoy Elkhorn's witnesses claimed that there were only small amounts of materials around the motor and electrical components, but not one of the foremen failed to concede that some oil still existed after they had completed cleaning the cutting machine (Finding Nos. 18 and 21; Tr. 185-186; 202; 215; 227). McCoy Elkhorn overlooks the fact that when its foremen conceded that any combustible materails remained after the cleaning of the cutting machine, the likelihood that the combustible materials were as extensive as those described by the inspector is great. The reason for the foregoing conclusion lies in the fact that the mine superintendent had specifically told his foremen to make certain that the cutting machine was thoroughly cleaned. They assured him that it had been (Finding Nos. 15, 21, and 22, supra). Therefore, when the inspector issued a withdrawal order, they had no choice but to take the position that the inspector had incorrectly claimed that the cutting machine still had not been properly cleaned.

I find that the inspector's testimony is more credible than that of McCoy Elkhorn's witnesses in the above-described circumstances. Additionally, there was no reason whatsoever for the inspector to examine the loading machine and find that it had been properly cleaned and then to examine the cutting machine and find that it had not been properly cleaned (Finding Nos. 4 and 7, supra). The fact that the inspector considered one violation of section 75.400 to have been "totally abated" and found that the other violation had not been "totally abated" shows that the inspector was making independent and impartial evaluation with respect to each piece of equipment.

I have examined the judges' decisions cited on pages 5 and 6 of McCoy Elkhorn's brief in support of its arguments, but those decisions were based on facts which are different from those which existed in this proceeding. I find that accumulations of oil and grease to a depth of 1/2 inch are sufficient to constitute an accumulation of "combustible materials" * * * "on electrical equipment" within the meaning of section 75.400 (Finding Nos. 2 and 8, supra). Therefore, McCoy Elkhorn's argument that there was no violation of section 75.400 when Order No. 722582 was issued is rejected.

2. Whether any Materials Remaining on the Cutting Machine Were "Combustible Materials" within the Meaning of Section 75.400

McCoy Elkhorn's brief (pp. 7-9) next contends that whatever nominal material may have still existed on the cutting machine on the morning of April 4 was basically inert matter and was so mixed with incombustibles as not to be ignitable. McCoy Elkhorn cites the extensive testimony of its witnesses in support of the foregoing argument. It is true that McCoy Elkhorn's witnesses explained in great detail all the hours of cleaning with

cap wedges, roof bolts, solvent, and water hoses which had been done to the cutting machine on the maintenance shift. It is true that all of the miners who worked on the cutting machine and the foremen who examined the cutting machine on April 4 emphasized that the cutting machine had been drenched in solvents and water. The inspector himself agreed that at the time he issued his order, the cutting machine was probably no hazard to the miners because of the amount of water which had been used on the machine. The inspector explained, however, that the water would evaporate after the miners began operating it and that the oily substance which was originally cited would again render the machine a fire or an explosive hazard (Finding Nos. 10; 15-16).

No witness rebutted the inspector's claim that the water would evaporate, leaving the oily substances which created the fire hazard. Additionally, if the cutting machine was as free of combustible materials as is contended by McCoy Elkhorn, there would have been no reason for five miners to clean on the cutting machine for 1-1/2 hours after the order was issued if the 40 percent of combustibles originally cited in the inspector's citation had not still existed on the cutting machine at the time the order was issued (Finding No. 21, supra). The preponderance of the evidence shows that combustible materials still existed on April 4 when the order was issued. Therefore, the argument that no combustible materials within the meaning of section 75.400 existed on the morning of April 4 must also be rejected.

3. Whether, Assuming Arguendo, that Additional Work toward Abatement Was Required, the Inspector Acted Arbitrarily and Unreasonably in Failing To Extend the Time for Abatement and in Issuing the Order

The first part of McCoy Elkhorn's argument as to the inspector's alleged unreasonableness in issuing the withdrawal order, instead of extending the time for compliance, is that the miners would have been exposed to no danger if the inspector had extended the time instead of issuing a withdrawal order (Brief, pp. 10-12). There is no doubt but that the inspector knew when he wrote the original citation giving McCoy Elkhorn until 8 a.m. the following day for abating the violation, that McCoy Elkhorn had the option of continuing to use the cutting machine during the remainder of the day shift and during the evening shift which followed before doing any cleaning on the cutter. As a matter of fact, that is what happened, because the superintendent of the mine assigned all work toward abatement of the violation to the section foreman on the maintenance shift which extended from 11 p.m to 7 a.m. (Finding No. 15, supra).

I have already found above that the inspector did not think that the miners would have been exposed to an immediate hazard if he had extended the time for abatement (Finding No. 10, supra). McCoy Elkhorn argues that the primary matter which the inspector must consider when deciding whether to extend the time for compliance, or issue an order pursuant to section 104(b), is whether an extension of time will expose the miners to any undue hazard. McCoy Elkhorn cites United States Steel Corp., 7 IBMA 109 (1976), in support of the above argument. In that case, the former Board of Mine Operations Appeals

affirmed a judge's decision finding that an inspector had abused his discretion in issung a withdrawal order instead of extending the time within which U.S. Steel could submit some additional respirable dust samples. The Board's decision emphasizes that U.S. Steel offered to achieve early abatement in securing the dust sample by calling a miner in to work on the shift beginning at 4 p.m., instead of his normal midnight shift, but the inspector declined to grant the extension despite U.S. Steel's affirmative and voluntary efforts to achieve early compliance.

In this proceeding, McCoy Elkhorn's safety director and section foreman told the inspector that they thought the cutting machine was "okay" and did not need further cleaning. They never did offer to have additional cleaning done, did not explain why the cutting machine had not been properly cleaned, and did not ask for an extension of time within which to perform additional cleaning (Finding Nos. 4-8, supra). Moreover, the inspector stated that he believed that the safety director and section foreman had taken a firm position indicating that they would not do any additional cleaning on the machine unless he issued a withdrawal order (Finding No. 9, supra).

Inasmuch as the cutting machine had been used on the evening shift, as was demonstrated by the fact that the section foreman on the maintenance shift stated that he had the machine sprayed with solvent while it was still hot, the inspector reasonably assumed that the cutting machine would again be used for production if he extended the time (Finding Nos. 10 and 15, supra). Although some of McCoy Elkhorn's witnesses claimed that no production had occurred on the morning of April 4 prior to the time that the inspector examined the cutting machine, the inspector had watched the men operate the loading machine just a few minutes before he examined the cutting machine which, up to that time, had not been used on the day shift (Finding No. 6, supra).

The Secretary's memorandum of law cites a decision by Judge Stewart in United States Steel Corp., 2 FMSHRC 1515 (1980), in which Judge Stewart held that the primary considerations in determining whether an inspector acts reasonably in determining whether to extend the time for abatement are whether the original time allowed for abatement was adequate and whether the operator communicated to the inspector any extenuating circumstances which prevented abatement within the allotted time. In that case, Judge Stewart affirmed an inspector's order because the inspector said that the operator had ample opportunity within which to correct the condition described in his citation but failed to do so. In this proceeding, all agree that the period of 21 hours originally given by the inspector for cleaning all combustible materials from the cutting machine was an adequate amount of time.

McCoy Elkhorn's chief claim of aggrievement is that the inspector acted arbitrarily and unreasonably in issuing a withdrawal order instead of extending the time for abatement. All of McCoy Elkhorn's claims of arbitrariness are based on obligations which it places upon the inspector's shoulders.

McCoy Elkhorn first states that it was obvious that its miners had made an extensive, good faith effort to achieve compliance (Brief, pp. 12-13). There is no doubt about that claim because the inspector agreed that McCoy Elkhorn's efforts had resulted in the cleaning of about 60 percent of the combustible materials from the machine (Finding No. 10, supra).

McCoy Elkhorn next contends that the inspector acted arbitrarily by issuing the order without making appropriate inquiries as to what action its foremen and miners had already taken to clean the machine (Brief, p. 14). The inspector had been a mine foreman himself before he became an inspector and knew how much work was involved in cleaning a cutting machine (Tr. 161). He knew that the miners had ample time within which to clean the machine. Therefore, he did not need to make an investigation to determine how many hours or what sorts of materials and equipment had been used to do 60 percent of the work needed to remove all combustible materials from the machine.

The third portion of McCoy Elkhorn's argument with respect to the inspector's arbitrariness in issuing the order pertains to a very long discussion about how long and how hard the foremen and miners had worked to clean all combustible materials from the cutting machine, along with emphasis on the fact that the inspector knew that McCoy Elkhorn had always shown a spirit of cooperation and willingness to abate all conditions promptly. It is contended that the inspector, knowing all the company had done in this instance and possessing an awareness of the company's spirit of cooperation in the past, acted very arbitrarily and unreasonably in declining to extend the time for abatement (Brief, pp. 15-25). As I have observed above, since the inspector knew what kind of effort is required to clean combustible materials from a cutting machine, McCoy Elkhorn's safety director and section foreman should have made it clear to the inspector that they were willing to have additional cleaning work performed. Instead, they took a firm position that the machine had already been cleaned.

I believe that the inspector satisfactorily and succinctly explained why his refusal to extend the time was not arbitrary or unreasonable when he answered the following question as indicated below (Tr. 361).

> Q. Yes. In other words, why didn't you just say to them, "I'm going to give you--if I give you another hour, will you get this cleaned to my satisfaction?"
>
> A. Okay. Like I said before, I think in my opinion, that I had already given them a sufficient amount of time to do the job in, which they had not done it. They at no time offered to tell me why they hadn't cleaned it, nor did they offer to get anybody to start cleaning on it. They never even offered to give me a reason to extend it.

McCoy Elkhorn's brief (pp. 18-19) cites as precedents two cases in which administrative law judge vacated orders issued under section 104(b) of the Act. Those cases dealt with factual situations which are completely different

from the facts in this proceeding. In Consolidation Coal Co., 1 FMSHRC 1638 (1979), Chief Judge Broderick vacated an order issued under section 104(b) in a factual situation which showed that the company was still working to abate the alleged violation at the time the inspector arrived to determine whether the violation had been abated. Additionally, the inspector was vague about what additional work was required to abate the violation. In this proceeding, McCoy Elkhorn was not still trying to clean the cutting machine when the inspector examined it and McCoy Elkhorn showed no willingness to do any additional work.

In Consolidation Coal Co., 2 FMSHRC 2021 (1980), the other case cited by McCoy Elkhorn, Judge Cook vacated an order issued under section 104(b) under factual conditions showing that the inspector's order required the company to abate a condition other than the one described in the original citation and the company requested additional time and gave reasons why an extension of time was needed. In this proceeding, the inspector very specifically stated in his order that from 1/4 to 1/2 inch of oil and grease still existed around the electrical components and McCoy Elkhorn did not ask for an extension of time or give any reason for needing additional time.

4. Whether Order No. 722582 Complied with Procedural Requirements of Section 104(b)

McCoy Elkhorn (Brief, pp. 25-27) argues that the inspector's Order No. 722582 is invalid because he did not make the findings required by section 104(b) which provides:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons * * * to be withdrawn * * *.

McCoy Elkhorn claims that the above-quoted language from section 104(b) requires that the inspector make some affirmative inquiry as to whether the violation has been abated and that his actions must show by some concrete manifestation that the findings have been made. McCoy Elkhorn says that the inspector's order clearly shows that he did not make the two findings required by section 104(b).

Findings of Fact Nos. 6 through 9, supra, show that the inspector did make a thorough investigation of the conditions which existed on April 4 and that his actions were sufficient to put McCoy Elkhorn's safety director and section foreman on notice that the inspector had found that the violation

still existed. There is nothing in section 104(b) which shows that the inspector has to make a formal preliminary finding that the time for abatement should not be extended. Section 104(b), unlike section 104(d)(1), contains no directive that the inspector's findings shall be included in his citation or order. As pointed out by the Secretary's memorandum of law (p. 9), there is nothing in the legislative history to show that Congress wanted the inspector to reduce to writing, or otherwise communicate to the operator, a formal finding that the abatement period should not be extended. In support of the foregoing conclusion, the Secretary quotes a passage from Senate Report No. 95-181, 95th Congress, 1st Session, at page 30, or page 618 of the Legislative History of the Federal Mine Safety and Health Act of 1977 prepared by the Senate Committee on Human Resources:

> The Committee intends that withdrawal orders shall be issued when there has been a failure to abate violations within the time specified in the citation. A withdrawal order is properly issued under this section if an inspector finds during the same or subsequent inspection of the mine that an operator has failed to abate a violation. For example, if a citation is issued with an abatement period of one hour, and the violation is not abated in that time, the authorized representative shall issue a withdrawal order under this section when he follows-up on the citation, whether such follow-up is on the same or a subsequent inspection.

The second argument in McCoy Elkhorn's brief (pp. 27-28) regarding its claim that the inspector's Order No. 722582 is invalid for failure to comply with all procedural requirements is that the inspector's order, when originally issued, alleged on the "Initial Action" line of the order that the order was preceded by Citation No. 722582, whereas, in fact, Order No. 722582 was preceded by Citation No. 722581 (Exh. 1). McCoy Elkhorn argues that the inspector had already terminated the order on April 4, 1980, the same day it was issued, and that the inspector could not thereafter properly modify the order on May 20, 1980, to reflect that the "Initial Action" reference should have been to Citation No. 722581 instead of to Citation No. 722582. McCoy Elkhorn argues that the inspector did not correct the reference to the incorrect citation until after McCoy Elkhorn had already filed its Notice of Contest in this proceeding. McCoy Elkhorn also contends that section 104(h) of the Act permits an inspector to modify or terminate an order, but does not permit him to modify an order after he has terminated it (Brief, p. 28).

In Old Ben Coal Co., 2 FMSHRC 1187 (1980), the Commission affirmed an administrative law judge's decision which had affirmed four orders of withdrawal which indicated that they had been issued under section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 when, in fact, they should have shown that they were issued under section 104(c)(2) of the 1969 Act. The judge had held that the incorrect reference to section 104(c)(1) was no more than a clerical error which did not prejudice Old Ben in any way. The Commission stated that it agreed with the judge that Old Ben was not prejudiced because Old Ben did not show how its defense to a 104(c)(2) order would differ from its defense to a 104(c)(1) order.

In this proceeding, the inspector's mistake in writing No. 722582 was even more the result of a clerical error than in the Old Ben case cited above. Exhibit 1 shows that the inspector's Order No. 722582 was served on the same person who had received Citation No. 722581 on the previous day. That individual testified at the hearing on cross-examination that the inspector's use of No. 722582, instead of No. 722581, had not in any way confused him. McCoy Elkhorn has not shown that its defense was prejudiced in any way by the inspector's having written the wrong citation number on Order No. 722582.

It appears to me that an inspector ought to be able to correct a mistake regardless of whether he discovers it before or after a Notice of Contest has been filed or whether he discovers it after he has already terminated the order. It is certain that section 104(h) of the Act empowers the Commission and its judges to modify orders. Therefore, to remove all doubt as to whether Order No. 722582 has been modified to correct the reference to the erroneous citation number, the order accompanying this decision will modify the order to change the reference to Citation No. 722581 instead of to Citation No. 722582. In any event, I find that the inspector's order was not rendered invalid by the fact that he mistakenly wrote Citation No. 722582 on the "Initial Action" line instead of Citation No. 722581.

5. Whether the Order Described a Different Condition from the Condition Set Forth in the Citation

The last argument in McCoy Elkhorn's brief (p. 28), to the effect that Order No. 722582 is invalid, begins with a claim that the language in section 104(b) shows that any order issued for failure to abate must be based on the continued existence of the same condition which constituted the violation described in the underlying 104(a) citation. McCoy Elkhorn claims that Citation No. 722581 referred to oil around "electrical motors" although the inspector admitted during cross-examination that there was only one motor under the cutting machine's lids (Tr. 70). McCoy Elkhorn contends that Order No. 722582 alleged a condition far beyond the scope of the condition described in Citation No. 722581.

As shown in Finding No. 3, supra, Citation No. 722581 alleged that "combustible material in the form of oil and grease with coal dust was allowed to accumulate under the lid, on and around electrical motors, in one place around the motor 1/2 inch deep on the 16-RB cutter on the 002 section." Order No. 722582, as shown in Finding No. 8, supra, alleged "[a]ll combustible material still has not been cleaned from the 16 RB cutter, and oil and grease still can be measured from 1/4 to 1/2 inch in depth and no one is cleaning on this piece of equipment."

As to McCoy Elkhorn's claim that the inspector mistakenly referred to "electrical motors" when, in fact, there is only one electrical motor, the testimony shows unequivocally that the rear compartment contains both a hydraulic motor and an electric motor (Tr. 364). To the extent that the inspector's citation referred to "electrical motors," he may have been in

error, but only because the adjective "electrical" modified the word "motors." Since McCoy Elkhorn's superintendent is the one who clarified the record by pointing out that the rear compartment contained both a hydraulic motor and an electrical motor, I find that the inspector's reference to the word "motor" in the plural was not so misleading or confusing as to make the inspector's order invalid.

As to McCoy Elkhorn's claim that Order No. 722582 unduly widened the scope of the condition alleged in the original citation, I find that the contention is not well taken. The inspector's citation had clearly stated that the combustible materials consisted of oil, grease, and coal dust. The order also clearly stated that "[a]ll combustible material still has not been cleaned from the 16 RB cutter, and oil and grease still can be measured from 1/4 to 1/2 inch in depth." I find that the order very precisely stated that the same condition described in the citation still existed. Inasmuch as the inspector had gone over the cutting machine and had shown McCoy Elkhorn's safety director the exact measurements of the oil and grease which still remained on the cutting machine, there can be no doubt but that the safety director knew exactly what conditions still existed when the inspector issued his order.

I do not agree that Order No. 722582 referred to "cutters" in the plural (Exh. 1), but assuming, arguendo, that such is true, McCoy Elkhorn's safety director stated that there is only one cutting machine at the No. 4 Mine (Tr. 197). Therefore, no one would have been confused by a reference to "cutters" even if the inspector had used that word in the plural.

Civil Penalty Issues

The last part of McCoy Elkhorn's brief (pp. 29-31) addressed the civil penalty issues which I shall consider when I have received the Secretary's Petition for Assessment of Civil Peanlty seeking assessment of a penalty for the violation of section 75.400 alleged in Citation No. 722581. As I indicated in the first part of this decision, I shall sever the civil penalty issues from this proceeding and decide them after I have received the Secretary's Petition. I shall consider McCoy Elkhorn's arguments with respect to the civil penalty issues in the separate decision which remains to be written.

Ultimate Findings and Conclusions

(1) Citation No. 722581 dated April 3, 1980, was properly issued under section 104(a) of the Act and correctly stated that a violation of section 75.400 had occurred. Therefore, the Notice of Contest filed on May 2, 1980, in Docket No. KENT 80-244-R should be denied and Citation No. 722581 should be affirmed.

(2) Order No. 722582 dated April 4, 1980, was properly issued under section 104(b) of the Act. Therefore, the Notice of Contest filed May 2, 1980, in Docket No. KENT 80-243-R should be denied and Order No. 722582 should be affirmed.

(3) The reference on the "Initial Action" line of Order No. 722582 should be corrected to reflect the fact that the initial action preceding the issuance of the order was the issuance by the inspector on April 3, 1980, of Citation No. 722581 instead of Citation No. 722582 as shown on the order as it was originally issued.

(4) McCoy Elkhorn Coal Corporation, as the operator of the No. 4 and other mines, is subject to the jurisdiction of the Act and to the regulations promulgated thereunder.

(5) Inasmuch as the Secretary of Labor has not yet filed a Petition for Assessment of Civil Penalty with respect to the civil penalty issues which were consolidated for hearing in this proceeding, the civil penalty issues should be severed from this proceeding and decided in a separate decision based on the facts in this record upon receipt by the undersigned administrative law judge of the Petition for Assessment of Civil Penalty pertaining to the violation of section 75.400 alleged in Citation No. 722581 dated April 3, 1980.

WHEREFORE, it is ordered:

(A) Citation No. 722581 dated April 3, 1980, is affirmed and the Notice of Contest filed in Docket No. KENT 80-244-R is denied.

(B) Order No. 722582 is modified on the "Initial Action" line to reflect that the initial action was Citation No. 722581 instead of Citation No. 722582.

(C) Order No. 722582 dated April 4, 1980, is affirmed, as modified by paragraph (B) above, and the Notice of Contest filed in Docket No. KENT 80-243-R is denied.

(D) The civil penalty issues consolidated for hearing in this proceeding are severed from this proceeding and the decision on those issues is deferred until such time as I receive the Secretary of Labor's Petition for Assessment of Civil Penalty with respect to the violation of section 75.400 alleged in Citation No. 722581 dated April 3, 1980.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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