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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

DECISIONS

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

Before: Judge Koutras

Statement of the Proceedings

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

Issues

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

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

Applicable Statutory and Regulatory Provisions

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

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

Discussion

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

DOCKET NO. DENV 78-521-P

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

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

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

Testimony and Evidence Adduced by the Petitioner

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

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

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

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

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

Testimony Adduced by the Respondent

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

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

DOCKET NO. DENV 78-522-P

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

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

30 CFR 75.313 provides:

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

Testimony Adduced by the Petitioner

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

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

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

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

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

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

Respondent's Testimony

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

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

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

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

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

30 CFR 75.200, provides:

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

> and shall be available to the miners and their representatives.

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

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

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

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

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

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

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

Respondent's Testimony

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

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

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

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

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

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

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

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

DOCKET NO. DENV 78-523-P

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

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

30 CFR 75.316, provides:

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

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

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

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

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

DOCKET NO. DENV 78-524-P

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Findings and Conclusions

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

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

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

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

History of Prior Violations

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

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

Fact of Violation--30 CFR 75.517

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

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

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

Gravity

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

Good Faith Compliance

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

Negligence

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

DOCKET NO. DENV 78-522-P

Fact of Violation--30 CFR 75.313

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

Good Faith Compliance

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

conceded that on many occasions he will note on his notice that parts are needed to repair a piece of equipment and that he uses this as justification for extending the abatement time. He conceded that this is what occurred in this case and that he allowed 8 days to obtain parts because the mine is in a remote area and parts must be obtained from Price, Utah. Inspector Lemon also candidly admitted that he did not believe that the respondent was using the fact that parts were required as an excuse for not complying with the abatement, and conceded that parts were "probably" needed. In the circumstances, and based on the totality of the evidence presented, I conclude that respondent abated the violation in good faith, and under the circumstances presented, exercised normal good faith in achieving abatement.

Gravity

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

Negligence

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

Fact of Violation--30 CFR 75.200

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

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

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

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

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

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

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

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

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

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

Negligence

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

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

Gravity

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

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

Good Faith Compliance

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

DOCKET NO. DENV 78-523-P

Fact of Violation--30 CFR 75.316

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

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

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

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

Gravity

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

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

Good Faith Abatement

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

Negligence

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

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

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

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

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

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

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

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

Fact of Violation--30 CFR 75.200

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

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

Good Faith Abatement

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

Gravity

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

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

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

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

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

Negligence

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

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

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

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

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

DOCKET NO. DENV 78-524-P

Fact of Violation--30 CFR 75.200

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

Good Faith Abatement and Negligence

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

Gravity

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

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

Petitioner's Assessment Procedures and Inspector Practices

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

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

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

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

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

Conclusion

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

Citation No.	Date	30 CFR Section	Assessment
Docket No. DENV 78-521-P			
8-0005	1/09/78	75.517	$25
Docket No. DENV 78-522-P			
8-0010	1/19/78	75.313	$25
8-0015	1/30/78	75.200	$250
Docket No. DENV 78-523-P			
7-0111	12/30/77	75.316	$150
7-0112	12/30/77	75.200	$1,000
7-0113	12/30/77	75.200	$850
Docket No. DENV 78-524-P			
7-0110	12/30/77	75.200	$1,000

ORDER

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

George A. Koutras
Administrative Law Judge