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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. VINC 78-395-P A/O No. 11-00599-02026V
v.	
FREEMAN UNITED COAL MINING COMPANY, RESPONDENT	Orient No. 6 Mine

DECISION

Appearances: Leo J. McGinn, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent.

Before: Judge Cook

I. Procedural Background

On June 7, 1978, a petition was filed by the Mine Safety and Health Administration (MSHA), for the assessment of civil penalties against Freeman United Coal Mining Company for alleged violations of 30 CFR 75.301-4 and 30 CFR 75.400. This petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977 Mine Act). An answer to the petition was filed on June 19, 1978.

On June 27, 1978, MSHA filed a motion for production of documents, and the motion was granted by an order dated July 19, 1978.

Notice of hearing was given on July 14, 1978. The hearing was held between September 26 and September 29, 1978, in Chicago, Illinois. Representatives of both parties were present and participated.

At the hearing on September 26, 1978, stipulations were entered into as to both the history of violations and the annual tonnage produced at the Orient No. 6 Mine and the annual tonnage produced by the Freeman United Coal Mining Company.

When the hearing opened on September 26, 1978, settlement proposals were submitted in the following cases involving the same parties: Docket Nos. VINC 78-392-P, 78-393-P, 78-394-P, 78-396-P, 78-397-P. Settlement proposals were not submitted in either VINC 78-49-P or the present case. It was proposed that the record be consolidated as to all cases, but the Respondent preferred to maintain separate transcripts of the proceedings in Docket Nos. VINC 78-49-P and the present case. The record of the September 26, 1978, settlement negotiations was consolidated with the separate records of the remaining companion cases.

The hearing on the alleged violations in the present case was held between September 27 and September 29, 1978. A schedule for the submission of post-hearing briefs was agreed upon at the conclusion of the hearing, but a delay in the receipt of transcripts and other problems experienced by counsel forced a revision of the briefing schedules. Freeman filed its posthearing brief on March 21, 1979. MSHA filed no post hearing brief. No reply briefs were filed.

II. Violations Charged

Order No.	Date	30 CFR Standard
1 KLW	01/26/77	75.301-4
1 LDC	01/03/77	75.301-4
1 LDC	01/19/77	75.301-4
1 LDC	01/12/77	75.400

III. Evidence Contained in the Record

A. Stipulations

Stipulations were entered into by the parties on September 26, 1978, and are set forth in the findings of fact, infra.

B. Witnesses

MSHA called as its witnesses Kirby L. Webb and Lonnie D. Conner, MSHA inspectors.

Freeman called as its witnesses Peter Helmer, the mine superintendent at the Orient No. 6 Mine; Loren Boner, a foreman at the Orient No. 6 Mine; Wesley Helm, an underground supervisor at the Orient No. 6 Mine on the date of the hearing, and a face boss at the Orient No. 6 Mine on January 3, 1977; Ray E. Williams, a foreman at the Orient No. 6 Mine; and Paul Budzak, Freeman's safety director.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

(a) M-1 is a copy of Order No. 1 LDC, January 12, 1977, 30 CFR 75.400.

(b) M-2 is a termination of M-1.

(c) M-3 is a copy of Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4.

(d) M-4 is a termination of M-3.

(e) M-5 is a copy of Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4.

(f) M-6 is a termination of M-5.

(g) M-7 is a copy of Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4.

(h) M-8 is a termination of M-7.

2. Freeman introduced the following exhibits into evidence:

(a) O-1 is a diagram of a Lee Norse miner.

(b) O-2 contains calculations made by Inspector Webb representing the method used by him to compute mean air velocity.

(c) O-3 is a drawing.

(d) O-4 is a copy of a production sheet for January 3, 1977.

(e) O-5 contains background information pertaining to Paul M. Budzak.

(f) O-6 is a copy of a preshift examiner's report dated January 12, 1977.

(g) O-7 is a copy of a preshift examiner's report dated January 11, 1977 (afternoon shift).

(h) O-8 is a copy of another preshift examiner's report dated January 11, 1977 (day shift).

3. Exhibit 1 is a diagram pertaining to an air velocity measurement experiment described by Paul M. Budzak during the course of his testimony.

4. Exhibit 3 is a computer printout listing the history of paid penalty assessments at the Orient No. 6 Mine. (This exhibit was received into evidence during the September 26, 1978, settlement proceedings, and is filed in Docket No. VINC 78-49-P).

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

During the settlement proceedings on September 26, 1978, the parties entered into the following stipulations:

(1) The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year (Tr. 5, 11-September 26, 1978).

(2) The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year (Tr. 5, 11-September 26, 1978).

B. Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4; Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4; Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4

(1) General Findings

Between January 3, 1977 and January 26, 1977, MSHA inspectors Kirby L. Webb and Lonnie D. Conner issued the three subject orders of withdrawal for three separate violations of 30 CFR 75.301-4. Mr. Paul Budzak, the Respondent's safety director, appeared as an expert witness on the subject of air velocity measurement. His testimony refers to all three air violations. The Respondent's post-hearing brief presents questions of law and fact common to all three violations. To prevent undue repetition in the portions of this decision which separately address each order of withdrawal, the common questions of law and fact will be addressed herein.

30 CFR 75.301-4, the applicable mandatory safety standard, states:

> Velocity of air; minimum requirements. (a) On and after March 30, 1971, except in working places using a blowing system as the primary means of face ventilation or in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and carry away methane and to reduce the level of respirable dust to the lowest attainable level by the Coal Mine Safety District Manger, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined, or loaded from the working face with mechanical mining equipment, and (2) in any other working place designated by the Coal Mine Safety District Manager for the district in which the mine is located in which excessive amounts of respirable dust are being generated by any type of mechanical mining equipment.
>
> (b)(1) Except as provided in subparagraph (2) of this paragraph, and except in working places where combination face ventilation systems are employed, the mean entry air velocity of air passing through any room, entry, crosscut, pillar cut, or other working place shall be established as follows:
>
> (i) The quantity of air, when measured at the inby end of the line brattice or other approved device, shall be determined;
>
> (ii) The cross sectional area of the room, entry, crosscut, pillar cut, or other working place, when measured at or near the inby end of the line brattice system or other approved device, less the cross sectional area of the line brattice system or other approved device, shall be determined;
>
> (iii) The air quantity measured in subdivision (i) of this subparagraph shall then be divided by the remaining cross sectional area as determined in subdivision (ii) of this subparagraph and the resulting quotient shall constitute the mean entry air velocity; thus: [i/ii]=V.
>
> (2) When longwall mining is used the mean entry air velocity at the longwall face shall be determined by establishing the total intake air quantity delivered to

the longwall face and dividing this quantity by the cross sectional area of the longwall place at the entrance to the longwall face.

> (c) The determination of mean entry air velocity may be made either immediately before mining equipment enters a working place or during its presence in such working place and the person making such determination shall use an anemometer or other device approved by the Secretary.

The method of face ventilation employed at the Orient No. 6 Mine consists of 16 inch diameter exhaust tubing installed to within 10 feet of the working face. The tubes are hung from the left side of the roof. They are connected to an exhaust fan which pulls air through the tubing (Tr. 47, 128-29, 170).

30 CFR 75.301-4(b)(1) sets forth the prescribed formula to be used in establishing the mean velocity of air passing through the working place, except where combination face ventilation systems are employed. Combination face ventilation systems were not employed in the subject areas of the Orient No. 6 Mine at the time the three orders were issued. 30 CFR 75.301-4(b)(1)(i) requires a measurement to be taken at the inby end of the line brattice or other approved device to determine air quantity. 30 CFR 75.301-4(b)(i)(ii) requires the cross sectional area of the working place to be determined by taking measurements at or near the inby end of the line brattice system or other approved device, and deducting therefrom the cross sectional area of the line brattice system or other approved device. Under the formula in 30 CFR 75.301-4(b)(1)(iii) mean air velocity is compted by dividing the figure obtained under 30 CFR 75.301-4(b)(1)(i) by the figure obtained under 30 CFR 75.301-4(b)(1)(ii).

The Respondent argues that the inspectors failed to take measurements of the cross sectional area at or near the inby end of the exhaust tubing. (Respondent's Post-Hearing Brief, pp. 23-24, 28). According to the Respondent, the inspectors testified that in each instance the cross sectional measurements were taken behind the mining machine located in the working place at the time. The mining machines used at the Orient No. 6 Mine are 33 feet long (Tr. 115). In each instance, the end of the exhaust tubing was within 10 feet of the face. The Respondent thereupon argues that in each instance the inspector could not have been closer than 20 feet from the inby end of the exhaust tubing when he measured the cross sectional area of the room. "It is apparent," argues the Respondent, "that 20 feet outby the inby end of the exhaust tubing is not the location designated by section 75.301-4(b)(1)(ii) to take the measurement for cross sectional area of the room." (Respondent's Post-Hearing Brief, pp. 23-24). I disagree with the premise that such a measurement point could not be construed to comply with the regulations.

The Interior Board of Mine Operations Appeals (Board) was faced with an analogous set of facts in Zeigler Coal Company, 3 IBMA 78, 81 I.D. 173, 1973-1974 OSHD par. 17,615 (1974). The Board was confronted with an alleged violation of 30 CFR 75.301-3, with Respondent contending that the required measurements were taken in the wrong location in the mine. The pertinent language of 30 CFR 75.301-3(a) and (b) interpreted by the Board was similar to the pertinent language of 30 CFR 75.301-4(b)(1)(ii) in that it specified only a general location for taking the measurement. The Board concluded that the government could adopt its own interpretation as to the location at which to make the air volume measurement. The Board also noted that no rebutting evidence was present to indicate that moving the point of measurement made any difference in the readings obtained.

Mr. Budzak was present in the hearing room when the inspectors testified as to the method they employed to compute the air velocity (Tr. 202-03). He testified that, in his opinion, the method used by the inspectors was inadequate to the extent that they were not taking into consideration with any degrees of consistency, the areas that should have been deducted in computing the cross sectional area of the working place (Tr. 205-06, 222). He did not indicate either that the measurements were taken too far from the inby end of the tube or that the location at which the measurements were taken affected the accuracy of the results.

Accordingly, it is found that the inspectors took the measurements employed in computing the cross sectional area of the working place at or near the inby end of the approved device within the meaning of 30 CFR 75.301-4(b)(ii).

The Respondent's second position asserts that the cross sectional area of the exhaust tube must be deducted in computing the cross sectional area of the working place. (Respondent's Post Hearing Brief, p. 24). I agree. 30 CFR 75.301-4(b)(1)(ii) specifically states that the cross sectional area of the line brattice system or other approved device shall be deducted in computing the cross sectional area of the working place. According to Mr. Budzak, the 16 inch exhaust tubing has a cross sectional area of 1.39 square feet (Tr. 208, 235).

The Respondent's third position asserts that the cross sectional area of the mining machine located in the working place should have been deducted in computing the cross sectional area of the working place. (Respondent's Post Hearing Brief, pp. 24-25). Mr. Budzak testified that such an adjustment would increase the mean air velocity reading (Tr. 205), and indicated that the failure to make the adjustment resulted in an incorrect mean air velocity computation (Tr. 206).

I disagree with the Respondent's position. The regulation clearly states that the mean air velocity can be determined either

with or without mining equipment in the working place. 30 CFR 75.301-4(c). It is equally clear that only the cross sectional area of the approved ventilation device can be deducted in computing the cross sectional area of the working place. 30 CFR 75.301-4(b)(1)(ii).

The core of Mr. Budzak's disagreement with the measurement procedure used by the inspectors is not that the inspectors failed to follow the regulations by not deducting the cross sectional area of the mining machine. Rather, he disagrees with the formula set forth in the regulations (Tr. 237-38). In effect, the Respondent is requesting the Judge to invalidate the regulation by adopting Mr. Budzak's computation scheme.

Without considering the question as to the power of the Commission to pass upon the validity of such a regulation, it appears that there is no basis for holding that one part of the regulation, relating to the alternative procedures for taking measurements, should be held void since it is part of the overall regulation which sets the minimum velocity requirement. There is no claim that the overall regulation as to velocity is void. Apparently the drafters of the regulation had in mind a need for a maintenance of a minimum velocity of air whether the machinery was in or out of the working place at a given moment during the mining cycle (Tr. 149).

Accordingly, it is found that the inspectors were correct in not deducting the cross sectional area of the mining machine in computing the cross-sectional area of the working place.

The Respondent's fourth argument asserts that the Petitioner failed to establish that the pitot tube and magnehelic gauge are approved air measurement devices within the meaning of 30 CFR 75.301-4(c). (Respondent's Post Hearing Brief, p. 25). I disagree. Both Exhibits M-5 and M-7 indicate that the magnehelic gauge and pitot tube are approved air measurement devices. During the course of direct examination respecting Order No. 1 LDC, January 19, 1977, Inspector Conner indicated that the devices are approved (Tr. 171). Additionally, both inspectors had been instructed by the government as to the correct means of using the tube prior to the issuance of the orders (Tr. 53, 63, 133). The pitot tube and magnehelic gauge, on the one hand, and the anemometer, on the other, are alternative methods for determining air velocity at the face (Tr. 50). In fact, Inspector Webb testified that the pitot tube and the magnehelic gauge are more accurate than an anemometer (Tr. 51).

Accordingly, it is found that with this evidence the Petitioner has established at least a prima facie showing that the pitot tube used in conjunction with the magnehelic gauge is a device approved by the Secretary. In view of that evidence it would be up to the Respondent to prove otherwise if it were possible.

The Respondent's fifth position asserts that, by failing to introduce into evidence the conversion chart used by the inspectors in interpreting the readings from the pitot tube and magnehelic gauge, the Petitioner has failed to meet its burden of proof by omitting an essential evidentiary link. (Respondent's Post-Hearing Brief, p. 25). I disagree.

Zeigler Coal Company, 3 IBMA 78, 81 I.D. 173, 1973-1974 OSHD par. 17,615 (1974), was similar to the present case in that it addressed the government's burden of proof with respect to air violations. In Zeigler, the Board indicated that a notice of violation is sufficient to prove an air velocity violation in the absence of rebutting evidence tending to negate the grounds for the notice's issuance. In Zeigler, the Board noted that there was no indication that the notices were deficient.

In Eastern Associated Coal Corporation, 7 IBMA 14, 83 I.D. 425, 1976-1977 OSHD par. 21,195 (1976), aff'd on reconsideration en banc 7 IBMA 133, 83 I.D. 695, 1976-1977 OSHD par. 21,373 (1976), an operator challenged a sampling system employed by MSHA's predecessor, the Mining Enforcement and Safety Administration (MESA), in computing the average concentrations of alleged respirable dust in the mine atmosphere.

Eastern was a civil penalty proceeding involving 22 notices of violation issued under section 104(i) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 814(i) (1970), for alleged noncompliance with the Secretary of the Interior's respirable dust standards. The Board, citing Castle Valley Mining Company, 3 IBMA 10, 81 I.D. 34, 1973-1974 OSHD par. 17,233 (1974), observed that MESA had established its prima facie case by authenticating the subject notices and introducing them into evidence.

In this decision the Board indicated that an operator can challenge a sampling system used by the government agency charged with securing compliance with the mandatory standards by establishing that the sampling system does not conform with the requirements of the statute or the regulations promulgated thereunder. After addressing the various arguments raised by the parties on appeal, the Board summarized the record as follows:

> * * * (1) by placing the subject notices in evidence, MSHA established a prima facie case for its charges that Eastern had exceeded the applicable limit on average concentrations of "respirable dust;" (2) Eastern established by a preponderance of the evidence an affirmative defense--to wit, that each of the subject notices was based upon alleged concentrations of "respirable dust" that in fact included particulates of dust which are not "respirable" as a matter of law under section 318(k) of

> the Act and 30 CFR 70.2(i); and (3) MESA's sole rebuttal, namely, that the provisions of section 318(k) were properly ignored as a matter of law, is without merit.

7 IBMA at 46.

The three subject orders of withdrawal (Exhs. M-3, M-5, M-7) were properly identified and authenticated by the issuing inspectors (Tr. 45, 127, 168), and admitted into evidence without objection (Tr. 123, 156, 168-69). Each order of withdrawal sets forth the mean air velocity as computed by each inspector. By properly placing these orders into evidence, the Petitioner established a prima facie case for the respective violations of 30 CFR 75.301-4. Therefore, it was unnecessary for the Petitioner to introduce the conversion charts into evidence in order to sustain its burden of proof. The burden was thereupon placed on the Respondent to produce evidence tending to establish either that the inspectors failed to adhere to established procedures in interpreting the readings acquired through the use of the pitot tube and the magnehelic gauge or that the use of the tube and gauge or the use of the chart violated the statute or the regulations. Although the record indicates that Inspector Conner failed to properly determine the cross sectional area of the working place by failing to deduct the cross sectional area of the exhaust tubing, there is no indication that either Inspector Webb or Inspector Conner incorrectly used the chart in interpreting the readings taken with the pitot tube and magnehelic gauge. Additionally, no probative evidence was introduced to establish that the use of the tube and gauge or the use of the chart was not authorized by the statute or the regulations.

The sole evidence adduced by the Respondent with respect to the chart was through Mr. Budzak's testimony. According to Mr. Budzak, experts in the field of air velocity measurement agree that in order to obtain an air quantity reading, through the use of a pitot tube in an air duct, that is 100 percent accurate, 20 readings must be taken and averaged (Tr. 220-21, 229-35, Exh. 1). The method employed by the inspectors was to take one reading from the center of the exhaust tube (Tr. 67, 101, 235). According to Mr. Budzak, the federal authorities use an 85 percent correction factor to equate this one reading back to a result that is 100 percent accurate (Tr. 235-36). The 85 percent correction factor is reflected in the conversion chart used by the inspectors (Tr. 236). Mr. Budzak then indicated that laboratory testing indicates that a correction factor of approximately 90 percent is needed to equate one reading back to a result that is 100 percent accurate (Tr. 220-21, 224, 236).

However, he stated under cross-examination that it would be correct to say that the foremen testified that the method they used to reach their air velocity figures was essentially the same as the method used by the inspectors (Tr. 223). In fact, he testified that

he would not be the least bit surprised by the fact that Inspector Conner's 44 feet per minute calculation was approximately the same as the 45 or 47 feet per minute calculation computed by the section foreman approximately 5 minutes earlier (Tr. 225). He further stated that he was satisfied with the manner in which his section foremen were taking the readings. The only point he was attempting to make was that the .85 correction factor is disputed by the authorities in the Bureau of Mines who are contending that a .90 correction factor should be used (Tr. 224).

This testimony tends to establish that a dispute exists amongst the authorities in the field of air velocity measurement as to whether the .85 correction factor embodied in the chart is appropriate, but it does not tend to establish that the inspector's used the chart incorrectly. Additionally, the Respondent introduced no calculations using the 90 percent correction factor to establish that its use would materially affect the air velocity measurements.

An additional factor common to all 3 orders of withdrawal is the mathematical formula used to compute mean air velocity. This procedure is set forth as follows:

Step 1:

Cross sectional area of the working place when measured at or near the inby end of the approved ventilation device minus the cross sectional area of the approved ventilation device equals the adjusted cross sectional area of the working place.

Step 2:

The reading taken from the magnehelic gauge is applied to the conversion chart to obtain the corresponding CFM reading for 16 inch tubing.

Step 3:

Divide the CFM reading by the adjusted cross sectional area of the working place to determine the mean air velocity in feet per minute.

(Exh. O-2, Tr. 52, 55, 87-89, 105-06, 215-16)

2. Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4

(a) Occurrence of Violation

MSHA inspector Kirby L. Webb visited the Respondent's Orient No. 6 Mine on January 26, 1977 (Tr. 45). At approximately 10:30 a.m.,

he traveled to the 2nd northwest working section and proceeded to the working face of the No. 5 room (Tr. 46). Coal was being cut at the time (Tr. 46, 64). He thereupon took measurements in the 16 inch exhaust tubing used for face ventilation to determine the mean air velocity (Tr. 47, 50, 52, 55).

He used a small drill bit to bore a small hole into the second or third tube outby the working face (Tr. 50, 66). The tubing comes in 10 foot sections (Tr. 48). He inserted the L shaped pitot tube into the opening, and positioned the hole in the end of the pitot tube toward the air flow (Tr. 51-52). He thereupon checked the reading on the magnehelic gauge, which recorded .5 inches of water (Tr. 52). The magnehelic gauge was attached to the pitot tube by means of two hoses (Tr. 51). The gauge registers air pressure in inches of water which is then converted to CFM by means of a conversion chart (Tr. 51-52). He then consulted the conversion chart for 16 inch tubing and .5 inches of water and got a reading of 3,357 CFM (Tr. 52, 104). The entry was measured with a steel tape (Tr. 75), and measured approximately 7-1/2 by 14-1/2 feet (Tr. 77). The inspector testified that the cross sectional area of the working place was approximately 107 or 108 square feet after deducting 2 or 3 square feet for the cross sectional area of the exhaust tubing (Tr. 52, 55, 105-06). He thereupon calculated the mean air velocity as 33 feet per minute, (Tr. 55, 96, 97, Exh. M-3). He thereupon issued the subject order of withdrawal (Exh. M-3) citing the Respondent for a violation of the mandatory safety standard embodied in 30 CFR 75.301-4 which requires a minimum mean air velocity of 60 feet per minute in all working places where coal is being cut, mined or loaded from the working face with mechanical mining equipment.

A recomputation, using the precise adjusted cross sectional area of the working place, reveals the following: The working place measured 14-1/2 feet by 7-1/2 feet, yielding a cross sectional area of 108.75 square feet. The 16 inch exhaust tubing has a cross sectional area of 1.39 square feet (Tr. 208, 235). Therefore, the adjusted cross sectional area of the working place was 107.36 square feet. (108.75 square feet minus 1.39 square feet equals 107.36 square feet). 3357 CFM divided by 107.36 square feet yields a mean air velocity of approximately 31.27 feet per minute.

Mr. Loren Boner, a foreman employed by the Respondent, testified that the mining machine in the No. 5 room was broken when he arrived on the section at approximately 8:35 a.m. (Tr. 113, 116). The machine was repaired and returned to service shortly before the order was issued (Tr. 116). Although the miner could not have been operating for more than five minutes prior to the order's issuance (Tr. 117), Mr. Boner confirmed that the miner had cut coal during the 5 minute time period (Tr. 119). The machine was returned to service before Mr. Boner conducted air velocity tests (Tr. 117, 119).

Accordingly, it is found that a violation of 30 CFR 75.301-4 has been established by a preponderance of the evidence in that the mean air velocity was 31.27 feet per minute in a working place where coal was being cut, mined or loaded from the working face with mechanical mining equipment.

(b) Gravity of the Violation

The purpose of adequate face ventilation is to render harmless and remove methane, respirable dust, and other contaminants (Tr. 57).

The explosive range of methane is 5 to 15 percent (Tr. 210). The inspector recorded two-tenths of one percent methane in the subject area (Tr. 56), and opined that he did not consider the reading as indicating a hazardous methane level (Tr. 80). However, both Inspector Webb and Mr. Budzak agreed that it is impossible to predict the level of methane liberation in the face area when coal is being extracted with a continuous miner (Tr. 55-56, 227). The largest quantities of methane are released from a face when coal is being extracted (Tr. 98). The section does not have a history of sudden methane releases (Tr. 114).

According to Inspector Webb, the miners were taking approximately 6 inches of rock from the top with the continuous miner (Tr. 56), conduct which can cause a frictional ignition at the face (Tr. 56-57). Although the inspector stated that an ignition at the face can result in injuries to miners working or operating machinery in the working place (Tr. 57), he classified an occurrence as improbable (Tr. 57).

It should be recalled that the inspector computed the mean air velocity as 33 feet per minute. He considered this reading low because it represented just over half the amount of air required by 30 CFR 75.301-4 (Tr. 96-97). Although he expressed the opinion that the velocity was insufficient to carry away methane and respirable dust (Tr. 57), he admitted a lack of knowledge as to what relationship 33 feet per minute mean air velocity has to exposing a miner to respirable dust (Tr. 97). Although the mean air velocity has been recomputed as 31.27 feet per minute, the inspector's observations are still material to the gravity issue because both mean air velocity figures are approximately the same.

Mr. Budzak, an expert in the field of air velocity measurement and face ventilation, who testified for Freeman, opined that a miner operator was not endangered by respirable dust because he would have been 20 to 22 feet from the dust area (Tr. 212). He stated that the air velocity figure cited by the inspector would not represent a dangerous or hazardous condition to a coal miner (Tr. 213-14).

After consideration of all of the evidence, it is found that the violation was accompanied by a moderately serious degree of gravity.

(c) Negligence of the Operator

The low air velocity was caused by leakage in the exhaust tubing (Tr. 93-94).

Although the preshift reports contained no reference to inadequate air in the subject area of the mine (Tr. 81), the inspector opined that the operator should have been aware of the condition (Tr. 60). The machine was cutting coal when the order was issued (Tr. 60), although coal production could not have been underway for more than five minutes prior to the order's issuance (Tr. 117, 119). Mr. Lorne Boner, the foreman, had not taken air velocity readings prior to commencing coal production (Tr. 116-17).

The inspector testified that when proper air velocity is maintained, a person standing within 30 feet of the inby end of the exhaust tube can often hear a rush of air entering the tube (Tr. 58). The inspector could not hear air rushing into the tube, which indicated to him that either a leakage in the tube or some other problem was present (Tr. 59).

Accordingly, it is found that the Respondent demonstrated ordinary negligence.

(d) Good Faith in Securing Rapid Abatement

The order was issued at 10:40 a.m. on January 26, 1977, and was terminated 20 minutes later (Exhs. M-3, M-4, Tr. 92). The tubing was sealed to ameliorate the leakage problem, and the ends of tubing installed in other working places were moved outby to further reduce the leakage (Tr. 93-94). After abatement, the mean air velocity was computed as 63 feet per minute (Tr. 93). Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

3. Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4

(a) Occurrence of Violation

At 5:25 p.m. on January 3, 1977, MSHA inspector Lonnie D. Conner issued the subject order of withdrawal for a violation of 30 CFR 75.301-4 at the Respondent's Orient No. 6 Mine (Exh. M-5, Tr. 127). The subject order of withdrawal (Exh. M-5) describes the observed "condition or practice" as follows:

> The continuous mining machine in the 2nd North-West section, I.D. 067, was loading coal at the face of the No. 8 room, and the face was being ventilated with a mean air velocity of only 28 feet per minute.

The air was measured with an approved magnehelic and pitot tube 20 feet outby the intake end of the exhaust tubing.

The end of the exhaust tubing was approximately 10 feet from the face (Tr. 130).

The inspector drilled a small hole in the rigid exhaust tubing, inserted the pitot tube, read the magnehelic gauge and applied the reading to the conversion chart (Tr. 132). He determined that 3,002 cubic feet of air per minute was passing through the exhaust tubing (Tr. 132). He made measurements to determine the area of the working place (Tr. 132). It measured 14.5 feet by 7.5 feet (Tr. 132), yielding an area of 108.75 square feet. He rounded off this figure to 109 square feet. He divided 3,002 CFM by 109 square feet, and reached a rounded off mean air velocity of 28 feet per minute (Tr. 132). He did not deduct the cross sectional area of the approved ventilation device as required by 30 CFR 75.301-4(b)(1)(ii) (Tr. 139).

A recomputation, using the correct adjusted cross-sectional area of the working place, reveals the following: The working place measured 14.5 feet by 7.5 feet, yielding a cross sectional area of 108.75 square feet. The 16 inch exhaust tubing has a cross-sectional area of 1.39 square feet (Tr. 208, 235). Therefore, the adjusted cross sectional area of the working place was 107.36 square feet. (108.75 square feet minus 1.39 square feet equals 107.36 square feet). 3,002 CFM divided by 107.36 square feet yields a mean air velocity of approximately 27.96 feet per minute.

A question is presented as to whether coal was being "cut, mined or loaded from the working face with mechanical mining equipment" within the meaning of 30 CFR 75.301-4(a). The Respondent contends that the Petitioner failed to overcome the Respondent's evidence that it was not cutting, loading or mining coal at the face when the inspector made his air velocity measurements (Respondent's Post-Hearing Brief, pp. 27, 28, 36). I disagree.

The inspector testified that when he entered the room the continuous miner was at the face and that through asking somebody he determined that five or six shuttle cars of coal had been loaded prior to the issuance of the order (Tr. 129, 135-36, 144). He did not see the actual subject matter that was loaded out (Tr. 144). Although the inspector had no present recollection as to whether he observed coal being loaded out, he concluded that he had observed such activity because an entry in his notes recorded that the miner was loading coal at the face of the No. 8 room (Tr. 144).

Mr. Wesley Helm, a face boss at the Orient No. 6 Mine on January 3, 1977, testified that when he arrived on the section at approximately 4:45 p.m. (Tr. 160), he observed rock from a rock fall,

measuring approximately 1-1/2 to 2 feet in depth, on the floor of the No. 8 room almost the entire distance of the cut (Tr. 161). The roof was not completely bolted (Tr. 162). The extent of Mr. Helm's knowledge as to the activities occurring in the No. 8 room prior to the issuance of the order was revealed on direct examination as follows:

> Q. Would you have bolted that roof before you mined any coal?
>
> A. I had to clean up the rocks first. Then it is possible it wasn't completely cut up. There might have been room for a little bit of cutting yet without going out from under the bolts. I am not sure about that.
>
> Q. Well, did you proceed to load out the rock.
>
> A. I had the miner loading the rock in Room 8. I was finishing the bolting in Room 9.
>
> Q. Do you recall Mr. Conner taking his reading for which he issued the order?
>
> A. I didn't see him take the reading. I was over with the bolter crew in Room 9.
>
> Q. Until what time were you loading out rock in Room 8?
>
> A. Until what time?
>
> Q. Yes, sir.
>
> A. I would say until 5:25 when Mr. Conner came in. He says they were loading coal. If so, it had to be they had finished the rock, and they had just hit the face for as much as I could tell. I wasn't there. Like I say, I was with the bolter crew.

(Tr. 162-63).

The foregoing testimony reveals that Mr. Helm was not present in the No. 8 room when the inspector conducted his air velocity measurements. He was uncertain as to precisely when the loading of rock ceased, and his testimony implies that some coal could have been loaded in the inspector's presence.

Exhibit O-4 reveals that the Respondent started loading coal at 8:35 p.m., and that 25 buggies of coal were loaded out (Tr. 165).

Normally, approximately 75 to 80 buggies of coal would be loaded out on a shift, absent cleanup difficulties or mechanical problems (Tr. 165).

However, Exhibit O-4 cannot be read for the proposition that absolutely no coal was loaded prior to the 5:25 p.m. issuance of the order because Mr. Helm's testimony reveals that a small amount of coal could have been loaded a few moments before 5:25 p.m.

Accordingly, it cannot be found that the Respondent has rebutted the evidence adduced by the Petitioner on the question of coal production.

Accordingly, it is found that a violation of 30 CFR 75.301-4 has been established by a preponderance of the evidence in that the mean air velocity was 27.96 feet per minute in a working place where coal was being cut, mined or loaded from the working face with mechanical mining equipment.

(b) Gravity of the Violation

The explosive range for methane is 5 to 15 percent (Tr. 210). Methane is normally liberated in greatest quantity at the face when coal is being cut and loaded (Tr. 135). It is not possible to predict when a large amount of methane will be liberated (Tr. 227). The inspector classified the mine as gassy, but his methane readings revealed no accumulations of methane at the face (Tr. 135). The miner was not cutting coal when the methane readings were taken (Tr. 135).

The inspector classified the violation as serious because the ventilation was not adequate to deal with the liberation of a sizable amount of methane (Tr. 134). According to the inspector, 28 feet per minute mean air velocity is not sufficient to carry coal dust from the face areas without contaminating the mining machine operator's breathing air (Tr. 134).

Mr. Budzak disagreed, stating that the air velocity was sufficient to alleviate respirable dust problems for the miner operator (Tr. 212-14).

After consideration of all of the evidence, it is found that the violation was accompanied by a moderately serious degree of gravity.

(c) Negligence of the Operator

According to Mr. Helm, the preshift reports indicated low air on the return (Tr. 159-60).

The exhaust tubing contained several flexible ribbed, canvas-type couplings that increased the air resistance in the tube (Tr. 130-137). The flexible couplings were being employed to negotiate

corners in lieu of rigid couplings (Tr. 137). The use of the flexible couplings caused the Respondent to experience considerable difficulty in maintaining 60 feet per minute mean air velocity (Tr. 138). Additionally, the Respondent was not sealing the joints between the sections of rigid tubing, thus contributing further to the air velocity problem (Tr. 138).

Accordingly, it is found that the Respondent demonstrated slightly more than ordinary negligence.

(d) Good Faith in Securing Rapid Abatement

The order was issued at 5:25 p.m. and terminated at 7:45 p.m. (Exh. M-5, M-6, Tr. 127).

The ribbed joints were removed. The ventilation tubing was taken down and reinstalled. The joints were sealed to prevent air leakage (Tr. 138). After abatement, the mean air velocity exceeded 60 feet per minute (Tr. 138).

Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

4. Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4

(a) Occurrence of Violation

At 9:50 a.m. on January 19, 1977, MSHA inspector Lonnie D. Conner issued the subject order of withdrawal at the Orient No. 6 Mine citing the Respondent for a violation of 30 CFR 75.301-4 (Exh. M-7, Tr. 168). The subject order of withdrawal (Exh. M-7) describes the observed "condition or practice" as follows:

> Coal was being loaded at the face of No. 22 room of the 15th North-East Section, I.D. 068, and the face was being ventilated with a mean air velocity of only 44 feet per minute. The air was measured with an approved magnehelic gage and pitot tube 20 feet outby the intake end of the exhaust tubing.

The testimony of Mr. Ray E. Williams confirms that two loads of coal were mined prior to the issuance of the order (Tr. 197).

The inspector computed the quantity of the air passing through the exhaust tube as 4,747 cubic feet per minute (Tr. 172). The working place measured 16.5 feet by 6.5 feet (Tr. 170, 173), yielding an area of 107.25 square feet (Tr. 173). He rounded off the area to 107 square feet (Tr. 173), divided 4,747 by 107 and thereby computed the mean air velocity as 44 feet per minute (Tr. 173). In computing the cross sectional area of the working place, he did not make an adjustment for the area of the exhaust tubing (Tr. 181).

A recomputation, using the correct adjusted cross sectional area of the working place, reveals the following: The working place measured 16.5 feet by 6.5 feet, yielding a cross sectional area of 107.25 square feet. The 16 inch exhaust tubing has a cross sectional area of 1.39 square feet (Tr. 208, 235). Therefore, the adjusted cross sectional area of the working place was 105.86 square feet. (107.25 square feet minus 1.39 square feet equals 105.86 square feet). 4,747 CFM divided by 105.86 square feet yields a mean air velocity of approximately 44.84 feet per minute.

Accordingly, it is found that a violation of 30 CFR 75.301-4 has been established by a preponderance of the evidence in that the mean air velocity was approximately 44.84 feet per minute in a working place where coal was being cut, mined or loaded from the working face with mechanical mining equipment.

(b) Gravity of the Violation

The inspector classified the violation as serious because the mean air velocity was insufficient to carry away either a large accumulation of methane or the coal dust suspended in the air (Tr. 173). A face ignition can occur in the presence of a buildup of methane (Tr. 173). The inhalation of coal dust can eventually develop into black lung disease (Tr. 173-174).

It is not possible to predict when sudden releases of methane from the face will occur during the mining operation (Tr. 174, 227). Methane is explosive in the 5 to 15 percent range (Tr. 210). The inspector took methane readings and detected no methane accumulation at the face (Tr. 171). Serious injury or death could result from an ignition (Tr. 174). The number of persons affected would depend upon the magnitude of the ignition (Tr. 174). The crew usually consists of 8 or 9 workmen (Tr. 174).

According to the inspector, the seriousness of the violation would not be diminished by the presence of water sprays on the cutting head of the miner because the spray does not precipitate out all respirable dust (Tr. 182-83).

Mr. Budzak testified that the air velocity as described by the inspector, was sufficient to prevent a coal miner from being exposed to a dangerous or hazardous condition (Tr. 212-14).

After consideration of all of the evidence, it is found that the violation was accompanied by a moderate degree of gravity.

(c) Negligence of the Operator

Mr. Ray E. Williams, the Respondent's foreman, permitted coal production to begin prior to conducting air velocity tests in the

exhaust tube (Tr. 195-97). When he took his readings, he discovered that the air velocity was 45 or 46 cubic feet per minute (Tr. 195). He testified that immediately upon discovering the low air velocity, but immediately before the inspector's arrival, he ordered the machine shut down (Tr. 196). Two loads of coal were mined during the course of approximately 4 minutes (Tr. 197).

According to the inspector, the last 10 joints in the tubing had not been sealed and there was one flexible ribbed, canvas type connecting joint in the line of tubing (Tr. 170). He testified that these characteristics indicated operator negligence because a previous discussion with mine personnel had resulted in a concensus that the tubing joints had to be sealed and the flexible-type couplings removed to assure adequate face ventilation (Tr. 174-75).

Accordingly, it is found that the Respondent demonstrated slightly more than ordinary negligence.

(d) Good Faith in Securing Rapid Abatement

The order was issued at 9:50 a.m. and terminated at 11 a.m. (Exhs. M-7, M-8, Tr. 168, 175). Abatement was achieved by sealing the joints in the exhaust tubing (Tr. 175). The corrective action increased the mean air velocity to greater than 60 feet per minute (Tr. 175).

Accordingly, it is found that the Respondent demonstated good faith through securing rapid abatement of the violation.

C. Order No. 1 LDC, January 12, 1977, 30 CFR 75.400

(1) Occurrence of Violation

MSHA inspector Lonnie Conner conducted a regular health and safety inspection at the Respondent's Orient No. 6 Mine on January 12, 1977 (Tr. 7). He walked the Main West North conveyor belt, arriving in the area at approximately 9:30 a.m. (Tr. 7). He issued the subject order of withdrawal at 11 a.m. (Tr. 6, Exh. M-1), citing the Respondent for violating the mandatory safety standard embodied in 30 CFR 75.400 in that accumulations of combustible materials were observed along the Main West North conveyor belt (Tr. 8, Exh. M-1).

Two airlocks were located across the belt travel entry approximately 5 or 6 crosscuts from the point where the subject belt dumped onto the Main North belt (Tr. 8). The two airlocks were approximately 70 to 80 feet apart (Tr. 8). Along that 70 to 80 foot distance, the inspector observed float coal dust, coal dust and loose coal (Tr. 8). Immediately inby the first airlock, he observed large accumulations of coal dust and float coal dust (Tr. 8). The coal dust was 5 to ¢mFMSHRC 1255
6 inches in depth where the air going through the airlock was blowing it off the belt (Tr. 9). The float coal dust was not only in the belt entry, but also in the intersecting crosscuts

and in the entry immediately north of the belt line (Tr. 8). The inspector testified that the instability of float coal dust renders it difficult to measure (Tr. 10).

The inspector proceeded from the inby airlock, traveling west on the south side of the belt (Tr. 10). He observed accumulations of coal and coal dust 2 to 6 inches deep all along the south side of the belt and underneath the belt up to a point 70 feet outby the tailpiece, a distance of approximately 2,300 feet (Exh. M-1, Tr. 10). The 2,300 feet was determined by taking a measurement off the mine map (Tr. 11).

Float coal dust was observed on rock dusted surfaces along the belt entry and intersecting crosscuts from the inby airlock to the 1,150 foot mark (Tr. 12, Exh. M-1).

All depths were measured with a steel tape (Tr. 10, 11). All areas cited were dry, including the float coal dust (Tr. 12). The inspector testified that the belt was in operation and that the conditions were observed during a production shift (Tr. 7), but he did not recall whether coal was being loaded (Tr. 7).

The witnesses disagreed as to the extent of the combustible accumulations. The inspector described them as deep and continuous (Tr. 250), while the testimony of Mr. Peter Helmer, the mine superintendent, portrays a different picture. Mr. Helmer inspected the area cited in the subject order of withdrawal immediately after its issuance (Tr. 267). He testified that he observed intermittent piles containing loose coal, rock and coal dust along the south side of the belt. According to Mr. Helmer, it was not a continuous spillage (Tr. 267). He indicated that a problem existed in that area of the mine with rock falling from the roof and ribs, a condition that makes any accumulation appear more extensive than if it consists only of coal (Tr. 267). However, he did not mention specifically either the presence or the absence of float coal dust in the subject area, while the inspector indicated that the float coal dust was present for a length of 1,150 feet (Tr. 10, 12).

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board of Mine Operations Appeals (Board) held that the presence of a deposit or accumulation of coal dust or other combustible materials in the active workings of a coal mine is not, by itself, a violation.

In that case, the Board held that MSHA must be able to prove:

> (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;
>
> (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
>
> (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonble time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

The Respondent in its post-hearing brief, argues that MSHA has failed to prove that an accumulation of combustible materials existed in the mine's active workings as described in the order of withdrawal (Exh. M-1) (Respondent's Post-Hearing Brief, pp. 52). In support of its position, the Respondent points to the testimony of Mr. Helmer, which indicates that some rock was intermixed with the accumulations, and argues that samples were not taken and analyzed to determine the combustibility of the accumulation. I disagree with the Respondent's theory for two reasons: First, visual observations are sufficient to prove a violation of 30 CFR 75.400. Coal Processing Corporation, 2 IBMA 336, 345-46, 80 I.D. 748, 1973-1974 OSHD par. 16,978 (1973). Second, the rebutting evidence adduced by the Respondent is insufficient to establish that rock was present in sufficient quantities to render the accumulations inert. Accordingly, it is found that accumulations of combustible materials were present in the mine's active workings as described in the order of withdrawal (Exh. M-1).

The second question presented is whether the operator knew or should have known of the accumulation's presence. The preshift report for the examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. O-6) states: "The 4th main west belt dirty, 800 to 850" (Tr. 259). This entry refers to the belt cited by the inspector (Tr. 258, 259). According to Mr. Helmer, the entry refers to a 50 foot section of belt located at the second north belt transfer point (Tr. 259). The preshift reports for the 2 previous shifts, (Exh. O-7, 0-8) described the subject belt as "safe" (Tr. 260-61). Accordingly, it is found that the Respondent first gained knowledge of an accumulations problem along the subject belt through the entry in Exhibit 0-6.

It should be pointed out that the 50 foot area described in Exhibit O-6 is considerably less than the area cited in the subject order of withdrawal (Exh. M-1). However, the evidence is insufficient

to conclude that the Respondent knew or should have known of the more extensive accumulation problem for the following reasons: First, there is no credible evidence in the record to establish that the preshift examination was less than thorough. Second, the inspector's estimate that the condition had existed for more than 16 hours was based on his observations of the extent of the accumulations which he interpreted in conjunction with his belief that the area had been reported dirty on two successive shifts (Tr. 13, 14, 250). Since this misaken belief as to the entries in the preshift reports for the three preshift examinations immediately preceding the order of withdrawal figured conspicuously in his time estimate, his opinion that the accumulations had existed for two shifts cannot be accepted.

The remaining question presented is whether the Respondent failed to cleanup, or failed to undertake to cleanup, the accumulations within a reasonable time after discovery. As to the issue of "reasonable time," the Board stated:

> As mentioned in our discussion of the responsibilities imposed upon the coal mine operators, what consitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

8 IBMA at 115.

The Board further stated:

> With respect to the small, but inevitiable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation, it is our view that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shift, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the usual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the Act upon a coal mine operator to protect the safety of the miners.

8 IBMA at 111.

Only meager evidence is contained in the record as to the Respondent's cleanup plan. The extent of the inspector's knowledge on this subject is revealed in the following question-and-answer dialogue with counsel for the Petitioner:

> Q. Do you know if there was a plan in effect for the cleaning up of the spillage along these belt lines?
>
> A. No, sir; not at that time, I didn't.
>
> Q. Had you ever seen a plan?
>
> A. I had never seen a plan.
>
> Q. Have you any idea that there was a plan in effect for cleanup at the mine?
>
> A. No, sir; not as far as belt lines go. I am unaware of any cleanup plan for belt lines. The only thing that I know is that men were assigned to some belts, some belts they weren't, and men were assigned as needed, as determined by the mine manager, to certain belts.
>
> Q. Do you know if men were regularly assigned to this belt?
>
> A. No, I don't.

(Tr. 15).

Furthermore, at the time the order was written, the inspector made no attempt to determine whether a cleanup program existed for the belt (Tr. 36). The sole evidence adduced by the Respondent as to cleanup procedures at the mine was Mr. Helmer's statement that belt cleaners are regularly assigned to clean belt transfer points at the start of every shift (Tr. 265).

Proof of the inadequacy or nonexistence of a cleanup plan is central to the question of whether the operator failed to cleanup, or failed to undertake to cleanup, the accumulations of combustible materials within a reasonable time after the operator knew or should have known of their existence. Therefore, such proof must be adduced by MSHA as part of its prima facie case if the inadequacy or nonexistence of the cleanup plan is to provide the corner stone for a finding on the question of reasonable time. This conclusion is reinforced by the Board's statement that proof of the absence of a regular cleanup program, coupled with the presence of any accumulation, might be sufficient to support a violation of 30 CFR 75.400. Old Ben Coal Company, 8 IBMA 196, 198, 1977-1978 OSHD par, 22,328 (1977) (denying

the government's motion for reconsideration of the decision in Old Ben Coal Co., 8 IBMA 98). The Board's statement indicates that the burden of going forward with the evidence is borne by MSHA.

Both the inspector's uncertainty as to the existence of regular cleanup procedures for belts and the limited extent of his knowledge as to the assignment to cleanup men to the belts, cannot be deemed sufficient proof of the absence or inadequacy of a regular cleanup program.

However, this conclusion does not end the inquiry, because the crux of a violation is the failure to cleanup, or undertake to cleanup, the accumulations within a reasonable time after discovery. The above-mentioned proof as to the cleanup plan, although an effective gauge of the reasonable time factor, is by no means the exclusive method of proof. All that Old Ben requires of an inspector before issuing a citation is that he make a sound judgment as to when the operator acquired knowledge of the accumulation's presence and whether cleanup commenced within a reasonable time.

Although the inspector's background and training qualified him as an expert, he gave no affirmative opinion on the reasonble time issue. However, sufficient inferences can be drawn from his testimony to assess his thoughts thereon.

The inspector testified that he checked the preshift books, and that the belt had been recorded "dirty" for two shifts prior to his inspection (Tr. 13). The only notations that he took from the books were the approximate footage marks for the recorded accumulations (Tr. 13). According to the inspector, the belt was recorded dirty from the 790 foot mark to the 818 foot mark and, to the best of his recollection, from the 800 foot mark to the 880 foot mark, (Tr. 13), which totaled approximately 107 feet (Tr. 14).

The inspector testified that, in his opinion, the coal and coal dust accumulated "over a period of time" (Tr. 13). Although he never expressed a firm opinion as to the approximate duration of the accumulations existence, he did state on direct examination that the preshift books indicated that the condition had existed on two previous shifts (Tr. 14). He interpreted this as meaning in excess of 16 hours (Tr. 14). On redirect examination, the inspector testified as follows:

> Q. Mr. Conner, did visual observations which you had before you have any bearing on your determination on how long the accumulations had been there?
>
> A. Yes, sir, they did.
>
> Q. Could you explain how?

> A. The accumulations were deep and continuous. In one particular spot, there was more than three ton of coal in one particular spot along the belt that had got there from some kind of dumping. So, I assume, going along with the pre-shift examiners' books, it is my opinion that the accumulations had been there for some time.

(Tr. 249-50).

The inferences drawn from the above-quoted passage, coupled with the inspector's recollection as to the time periods covered in the relevant preshift reports, lead to the conclusion that the depth and extent of the accumulations were interpreted in conjunction with the preshift reports in reaching the conclusion that the coal and coal dust had been present for "some time." These factors evidently led to the conclusion that the accumulations had been present for 2 shifts; i.e., more than 16 hours.

However, the preshift reports do not support the inspector's time estimate. The report for the preshift examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. O-6) recorded a spillage problem on the subject belt between "800" and "850," a distance of 50 feet (Tr. 259). The reports for the preshift examinations conducted between 8 p.m. and 12 midnight on January 11, 1977 (Exh. O-7) and between 12 noon and 4 p.m. on January 11, 1977 (Exch. O-8) reveal no accumulations problems along the subject belt (Tr. 260-61). Thus, a key factor in the inspector's equation has been proven in error.

The second factor involves the presence of cleanup personnel along the subject belt. The inspector testified that he saw three workmen and one boss performing cleanup operations at the tailpiece of the subject belt (Tr. 37). He assumed that they had started at the beginning of the shift, an assumption confirmed by the testimony of Mr. Helmer (Tr. 266). The inspector opined that more than 25-manshifts would have been required to remove the accumulations and rock dust along the belt (Tr. 15).

It can be inferred from the above-mentioned factors that they provide the basis for whatever conclusion the inspector reached as to whether the operator failed to undertake cleanup procedures within a reasonable time after the operator acquired knowledge of the accumulations' presence. Since the time element, a key factor in this equation, was in error, and since the inspector failed to make a determination as to the cleanup procedures at the mine, it cannot be found that he made a sound judgment as required by Old Ben as to how long the accumulations had existed and whether the operator failed to cleanup, or undertake to cleanup, the accumulations within a reasonable time.

In fact, the evidence reveals that the Respondent first became aware of an accumulations problem along the subject belt through the preshift report recording the findings of the preshift examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. 0-6). The Respondent assigned men to the belt at the beginning of the 8 a.m. to 4 p.m. shift on January 12, 1977, in response to the entry in Exhibit 0-6 (Tr. 265-66), and these men were in the process of cleaning the belt during the inspector's inspection tour (Tr. 37, 279).

As the Board observed in Old Ben: "When a coal mine operator undertakes, or is engaged in, cleaning up accumulations of combustible materials, he is then certainly not permitting such accumulations." 8 IBMA at 112.

Since the Respondent commenced cleanup procedures immediately upon learning of the problem, it cannot be found that it was permitting them to accumulate. Furthermore, this interpretation of the facts is also set forth in the Respondent's post-hearing brief (Respondent's Post-Hearing Brief, pp. 53-54). It is interesting to note, although it is not a controlling factor, that the Petitioner did not submit a reply brief indicating any disagreement with this interpretation.

Accordingly, it is found that the Petitioner has failed to establish a violation of 30 CFR 75.400 by a preponderance of the evidence.

D. History of Previous Violations

Exhibit 3 is a computer printout of Office of Assessment records containing the history of paid penalty assessments for the Orient No. 6 Mine, beginning January 1, 1970 and ending October 28, 1976.

The history of previous violations during the 21 months prior to January 19, 1977, as reported in Exhibit 3, is contained in the following chart:

30 CFR Standard	Year 1 (12 Months) 1/20/75-1/19/76	Year 2 (9 Months) 1/20/76-10/28/76	Totals
All sections	181	133	314
75.301-4	0	2	2

(Note: All figures are approximations)

E. Appropriateness of Penalty to Operator's Size

The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year. (Stipulations embodied in transcript

of the September 26, 1978, proceedings, pp. 5, 11). The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year. (Stipulation embodied in transcript of the September 26, 1978, proceedings, pp. 5, 11).

F. Effect on Operator's Ability to Continue in Business

Counsel for the Respondent concedes in his post-hearing brief that assessment of the maximum penalty will have no effect on the Respondent's ability to continue in business (Respondent's Post-Hearing Brief, pp. 33, 38, 42, 56). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

(1) Freeman United Coal Mining Company and its Orient No. 6 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act during the respective periods involved in this proceeding.

(2) Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to this proceeding.

(3) MSHA inspectors Kirby L. Webb and Lonnie D. Conner were duly authorized representatives of the Secretary of Labor at all times relevant to the issuance of the orders of withdrawal which are the subject matter of this proceeding.

(4) The violations charged in Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4; Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4; and Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4 are found to have occurred as set forth in Part V, supra.

(5) Petitioner has failed to establish a violation of 30 CFR 75.400 as relates to Order No. 1 LDC, January 12, 1977.

(6) All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Freeman United Coal Mining Company submitted a post-hearing brief. MSHA submitted no post-hearing brief. Such brief, insofar as

it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

Order No.	Date	30 CFR Standard	Penalty
1 KLW	01/26/77	75.301-4	$ 800
1LDC	01/03/77	75.301-4	600
1 LDC	01/19/77	75.301-4	600
			$2,000

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of $2,000 assessed in this proceeding within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the petition be DISMISSED as relates to Order No. 1 LDC, January 12, 1977, 30 CFR 75.400.

John F. Cook
Administrative Law Judge