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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. WEST 85-19 A.C. No. 05-00301-03551
v.	Dutch Creek No. 1 Mine
MIDÄCONTINENT RESOURCES, INC., RESPONDENT	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Lasher

This matter was initiated by the filing of a proposal for penalty by the Secretary of Labor under the authority of Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 801 et seq., (1982) (herein the Act). Subsequent to the hearing the presiding administrative law judge, John A. Carlson, passed away and this matter has been assigned to me for decision.

Petitioner originally sought assessment of a penalty ($345) for an alleged violation of 30 C.F.R. 75.1704 which is described in the subject Citation No. 2212848 (issued at 1725 hours on June 20, 1984, by Inspector Louis Villegos) as follows:

> "The designated return escapeway from the 102 longwall section was not maintained to insure passage at all times due to the following conditions being present. At a location 450 feet outby the 101 Longwall face, floor material had been pushed up to within 4 feet of the roof forming a bank and a impoundment of water and rock up to 15 inches deep, 6 feet wide and 75 feet in length. No one was observed in the area to correct the condition. Men were at work at the Longwall face."

The alleged violation was designated "Significant and Substantial" on the face of the Citation.

The subject regulation, 75.1704, pertaining to "Escapeways" provides:

> "Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency."

Following the issuance of the Section 104(a) Citation on June 20, 1984, Inspector Villegos, by extension dated July 5, 1984, extended the abatement time to July 11, 1984, with the following justification for his action:

> "Some progress has been made in the clean-up of the 102 longwall section return. At this time the 102 longwall section is broke down for repairs. This would allow ample time to clean up the escapeway."

On July 11, 1984, the Inspector again extended abatement timeÄto July 20, 1984Äwith this justification:

> "Evidence of work down in the return escapeway shows that an additional 100 feet of grading has been done. A continuous miner has been placed to do the grading. At this time, the work by this machine should go at a faster pace. This extension is based on this accomplishment."

On July 25, 1984, citing a "Safety" violation of 30 C.F.R. 75.1704 and under the authority of Section 104(b) of the Act, Supervisory Inspector Lee H. Smith issued Withdrawal Order No. 2336041 and described the "Condition or Practice" thereon as follows:

> "The designated return air escapeway from the 102 longwall active working section is still not being maintained to insure passage at all times of any person, including disabled persons. Citation No. 2212848 was issued on 06Ä20Ä84 because of this condition. This Citation has been extended twice and at this time travel through the affected area is extremely difficult. Passage of a disabled person or one being carried on a stretcher cannot be assured. (FOOTNOTE 1)
> (emphasis added)

I note here that inadequate "maintenance" would appear to be a "practice" and that obstructed passage would be a "condition". Five days later, on July 30, 1984, the Withdrawal Order was terminated by the Inspector on this basis: "The return escapeway from the 102 longwall working section has been graded out to a height of at least 6 feet and a width of 8 feet."

Contentions of the Parties

Following completion of the evidentiary record, counsel for the parties presented oral argument in lieu of briefs.

Respondent contends that the specific obstruction described in Citation No. 2212848 was separate and apart from that described in the Section 104(b) Order of July 25 and that the Order was improperly issued on the basis of its failing to abate the original obstructive condition. Respondent concedes the occurrence of the violation charged in the Citation but contends that such violation was not "significant and substantial". The "significant and substantial" issue, however, was not the subject of particular focus during the hearing.

Petitioner contends that the existence of the violative condition on June 20, 1984, described in Citation No. 2212848 was admitted by Respondent (T. 274) and that the "Failure to Abate" Withdrawal Order was appropriately issued since the escapeway in question was obstructed on July 25 even though the obstruction may have been a separate condition in a different location. Alternately, Petitioner argues that if the 104(b) order is not upheld, the violation described therein occurred and should constitute a second violation of the escapeway standard

(T. 274Ä275), calling for modification of the Order to a 104(a) Citation. (FOOTNOTE 2)

Preliminary Findings

On June 20, 1984, coal mine Inspector Louis Villegos, during an accelerated inspection authorized by section 103(i) of the Act where mines liberate excessive quantities of methane, inspected the designated return air escapeway from the 102 longwall active working section of the Respondent's Dutch Creek No. 1 Mine (T. 34, 41, 42). Inspector Villegos was the primary inspector conducting such inspections at the mine (T. 42).

At all material times the mine operated three shifts per day (two production and one maintenance) seven days a week (T. 73). At all material times Respondent employed a longwall mining system at the subject mine which had two entries-an intake and a return entry.

There were two escapeways from the 102 longwall active working section. The primary escapeway was along an intake entry, i.e. a material road going into the section (T. 172Ä173). The second escapeway was a return air course for the longwall (T. 47) which the Inspector described as follows: "Where the air goes up the face and comes out of the return, that is a designated return escapeway out of this mine." (Tr. 42).

On June 20, 1984, the Inspector walked the return entry and observed a dam which had been built up by equipment grading which was impounding water at a point approximately 450 feet from the face (T. 43Ä44, 92Ä93, 100Ä101). The width of the return entry in this area was 6 feet (Tr. 43Ä44). The impoundment was 15 inches high, composed of rock and coal, and extended from rib to rib (T. 44Ä45). The distance from the top of the impoundment itself to the ceiling was 4 feet and the impoundment was 75 feet in length in addition to being 6 feet wide (T. 45Ä46, 97, 189).

The water contained within the impoundment was 3 to 6 inches from the top of the impoundment (T. 46) and covered the entire width of the entry (T. 98).

The hazard envisaged by the Inspector which was created by this condition was that if a fire occurred anywhere in the section, most of the smoke (T. 47, 91, 99, 112) would exit out of the return escapeway, creating this problem:

> " with smoke present in that return air course, the smoke does have a tendency to hang to the top. If a person was walking out of there and you wouldÄmore or less, would want to get out of the smoke if you were walking in it. You would want to get your head out of the smoke so you would have a tendency to lower your head. As you would come out of there, maybe, it would get to a point that you would be coming out of there on your hands and knees. With this obstruction in there, you would not know what was behind it. So, if you wanted to crawl over it, how do you know by going over it that the back end is clear? (T. 47Ä48).
>
> **********
>
> "He would be faced withÄwhen he would get to the impoundment, he couldn't see any further. If he came on this impoundment, how would he know that past the impoundment it was clear? Now, if there was no impoundment in there, then, he could see ahead of him." (T. 48Ä49).
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> **********
>
> "I believe his first reaction would be panic." (T. 49).

The Inspector also pointed out that the location of a fire would dictate whether miners would utilize the primary (intake) escapeway or the subject return escapeway (T. 103).

Other hazards contemplated by the Inspector necessitating use of the subject escapeway would be roof falls and failure of the pack wall (T. 112Ä113).

The likelihood of a fire or other hazard occurring was not ascertained. Inspector Villegos had never seen a fire in the subject mine in 14 years (T. 102, 104). There was one explosion, however, which resulted in 15 fatalities not attributable to an escapeways problem (105Ä107, 110).

The subject Citation was issued at 1725 hours on June 20, 1984; the time for abatement was set for 2100 hours on the same date by Inspector Villegos after Brian Savage, the foreman, agreed to such time. The Inspector's return visit was on July 5, 1984 at which time, according to the Inspector the escapeway had

not been cleared of obstacles and that such were the "same objects" that he "had observed on the first one" (T. 53). (FOOTNOTE 3) Allyn Davis, mine superintendent, advised the Inspector that they "were working on the problem" in explanation as to why abatement had not taken place (T. 54). Inspector Villegos sympathized with mine management's problem in achieving abatement because there existed a continuing and re-occurring "heaving problem" (T. 54Ä55, 57, 101) and abatement time was extended to July 11, 1984 at 8:00 a.m. (T. 56). On July 11, 1984, the abatement period was again extended to July 20, 1984 at 8:00 a.m. On this date, July 11, 1984, the same impoundment observed on June 20, 1984, was still in existence (T. 93, 111Ä112) and the Inspector noted that the mine operator had equipment working "right by this area" and were working "up to it." (T. 94).

Inspector Villegos was not in the area of the subject return escapeway during the interim periods between the issuance of the original Citation and the 2 extensions, i.e., between June 20 and July 5, between July 5 and July 11, and between July 11 and July 20 or July 25, on which latter date the Section 104(b) Withdrawal Order was issued by another Inspector (T. 95Ä96). Whether the original (June 20) impoundment was abated-and whether the entire escapeway ever came into complianceÄduring the 2Äweek period July 11ÄJuly 25 was not shown in the record (T. 155).

The Section 104(b) Withdrawal Order was issued during an inspection on July 25, 1984, by Supervisory Inspector Lee H. Smith after he observed another different impoundment (T. 123, 140, 154, 155, 165, 169) in the same escapeway. He described the condition as follows:

> "From the track slope in to where the water accumulation and mud accumulation was, the escapeway was in good condition up to that area that was under citation. From the water accumulation and mud accumulation in-by to within approximately 100 to 150 feet of the face, the heaving problem was very evident. The mine floor was within four feet of the mine roof. The area immediately out-by where they were grading contained water and mud resembling thick soup that was very hard to negotiate. The area where the grading had stopped, referred to earlier as an impoundment, the area was very small. The ventilating air current had picked up a considerable amount of speed. People traveling this area wereÄif there was a person in-by or

> any amount of dust which was coming off the mine roof or off any portion of that entry would result in a type of stinging action with the dust particles and the coal particles and rock particles would hit a person. It was very low." (T. 119).

Prior to July 25, 1984, it had been "some time" since Inspector Smith had been in the 102 longwall return area (T. 141) and he was not familiar with conditions in the area between June 20 and July 25, 1984 (T. 150).

Inspector Smith indicated that the impoundment area he observed was approximately 50Ä70 feet in length by 6 to 8 feet in width; that water of a depth of approximately 12 inches had accumulated in the impoundment for a distance of at least 20 feet; that the ungraded mine floor in the area had come within 4 feet of the ceiling (T. 120Ä122); and that the water would tend to gravitate inby toward the face (T. 147).

Inspector Smith felt that the grading process was possibly causing the impoundment of water, i.e. the "removal of material from the mine floor created a backstop against which the water could not continue its normal flow into the tail gate area of the 102 longwall" (T. 128). (FOOTNOTE 4) The area described in the Withdrawal Order was closer to the face than the area described by Inspector Villegos in the Citation (T. 123; Ex. RÄ1). After determining that the escapeway in question was not "suitable according to 1704", the decision to issue the Withdrawal order was made "to insure that the grading process would be completed in a reasonable amount of time." (T. 123).

The Inspector testified that the "heaving" problemÄstressed by Respondent as one of several problems which made maintenance of the escapeway difficultÄwas "an ongoing condition" in the area and that while mine crews were in fact engaged in grading the area, after two extensions it was felt that the area "was not being cleaned fast enough" and that the hazard, while located in a different place than that observed by Inspector Villegos, still existed (T. 151).

Inspector Smith described the hazard posed by the violative condition he observed as follows:

> "Well, I do not believe that an injured man, particularly an injured man that would need to be transported on a stretcher, would have an easy time while being transported through this area. I know it would be extremely difficult.

It was difficult for me to travel through this area and I can imagine how hard it would be to have an injured man on a stretcher going through it or, perhaps, a person with a broken leg or any bone fracture where a jarring movement is quite painful. The stop point of the grading would be a drop of approximately two and a half to three, three and a half feet into a muddy mess." (T. 129).

The Inspector also felt that while "a desperate man could probably make it through" the condition of the escapeway when he observed it would hamper or slow the escape of miners attempting to use it (T. 129). Based on this unrebutted testimony, it is concluded that this condition also constituted a failure to maintain the escapeway in a "safe" condition and thus a violation of the regulation.

Following the issuance of the Withdrawal Order the Respondent abated the violative condition in approximately 5 days (T. 147Ä148).

Of considerable significance to the ultimate determination of the abatement question is Inspector's Smith's testimony with respect to the condition of the impoundment area cited on June 20 by Inspector Villegos when he (Smith) observed such area on July 25. After first testifying that the area described in the June 20 Citation had not been "completely cleaned up" (T. 154) and after ambivalent responses to questions of the trial judge, the witness then gave the following testimony:

> Q. All right. Let's address this from a somewhat different direction. My understanding was that Mr. Villegos indicated that the length of the entry way affected when he was there the first time andÄactually, the second and the third time was about 75 feet. Is that right? Is that the way you recall his testimony?
>
> A. Yes, sir.
>
> Q. Okay. Now, can you tell me with a reasonable degree of certainty when you were there on the 25th how much of that 75 feet had been effectively cleared up and how much hadn't or don't you really know?
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> A. No, sir, I cannot say that with a reasonable degree of certainty.
>
> Q. Can you assure me that all 75 feet hadn't been cleared up?
>
> A. No, sir.
>
> (T. 155).

Respondent's Mine Superintendent, Allyn Davis, testified at length concerning various inherent difficulties encountered in

the mine in maintaining the escapeway (T. 169Ä201) and indicated that what Inspector Villegos observed on June 20 was "the pile of muck that had been rooted up by" a Deisel EIMCO machine (similar to a front-end loader) on the previous shift the night before. Mr. Davis attributed the impoundment of water to the pile of muck (T. 175, 176, 188, 190) and essentially agreed with Inspector Villegos' description of it (T. 190). Mr. Davis opined without elaboration that the area in question was "passable" (T. 190Ä191).

At the time of the issuance of the Citation, Respondent had two EIMCO machines engaged in grading the entire escapeway 2 shifts per day to keep the subject escapeway clear (T. 201Ä204, 211) one of which machines worked in the escapeway exclusively (T. 204). After the Citation was issued, no machines or personnel were added, nor were any significant changes made in the grading program to achieve abatement (T. 204Ä205, 217, 221) nor were any such changes made after issuance of the Withdrawal Order on July 25, 1984 (T. 205Ä206). Issuance of the Withdrawal Order stopped production (T. 205). Mr. Davis pointed out that two machines were the maximum which could be employed (T. 211).

Mr. Davis explained why the Citation was not abated during a period of approximately 30 days but that the Order was abated in five days as follows:

> Well, when we got the original citation, theÄat that point in time, I knew that the job that was ahead of me was to grade the entire tail gate not just that particular area in question. Because that area, you knowÄthat would just propogate itself. If I cleaned that area up, then, we would find the same thing ahead. So, we started grading from both directions and while the original area was being extended there was a lot of work being done from the in-by end by the face coming back towards that area. That was much more productive. And, in fact, we did grade most of the tail gate out coming from that direction and we had very little luck driving from the out-by end in because of the water. So, at the point in time when the order was issued, there was, in fact, very little tail gate left to be graded out. And, then, the job was finished.
>
> (Emphasis supplied) (T. 208)

ULTIMATE FINDINGS AND CONCLUSIONS

A. Validity of the Withdrawal Order.

The question arises whether, following the issuance of the initial Citation on June 20, 1984, it was established that the secondary escapeway in question did not come into compliance with the regulation, 75.1704, prior to the occurrence of the conditions leading to the issuance of the 104(b) Order on July 25, 1984. This would appear to be a prerequisite element of proof to Petitioner's "failure to abate" contention because the second violation occurred in a different area of the escapeway.

Broken down, the elements of the cited regulation itself are that there (1) "at all times" (2) "be at least two separate and distinct travelable passageways" which (3) "are maintained to insure passage of any person, including disabled persons" which (4) "are to be designated as escapeways" and (5) "shall be maintained in safe condition"

Did the dynamics of the type of mining conducted here create a continuous violation, that is, one obstruction of the escapeway always overlapping the other? The validity of the "failure to abate" Order would seem to hinge on an affirmative answer to this question. By way of illustration, if at Point A of one of a mine's two escapeways a violative obstruction occurs and 75.1704 violation is cited, and before it is removed, another obstruction occurs at Point B, and after A is cleaned up (abated) but before B is cleaned up, a third obstruction occurs at Point C, it cannot be said that abatement of the original violation at Point A occurred, since at no time were there two travelable passageways in the mine which were maintained in safe condition.

In various applications, such as the interpretation of whether an imminent danger exists, or whether a violation is "significant and substantial", the Commission has analyzed a particular mining condition or practice in the perspective of "continued mining operations". If, as a result of the dynamics of continued mining or any other reason, the subject escapeway after the issuance of the 104(a) Citation on June 20, 1984, never came back into compliance with the regulation so as to serve as an escapeway, abatement did not occur. Again, when one of the two designated escapeways is obstructed to the point of non-compliance with the subject regulation (a) at one place or another, or (b) due to one condition or another, or (c) due to a particular mining practice or another, if it fails continuously to serve as a distinct travelable passageway, etc., following the issuance of a Citation and until a "failure to abate" withdrawal order is issued, the issuance of such order should be found appropriate under Section 104(b) of the Act. (FOOTNOTE 5)

A violation occurs when one (or both) of the designated escapeways fails to adequately function as such.

The testimony of Petitioner's witnesses was reliable and does establish that there were two separate violations of 30 C.F.R. 75.1704 one on June 20 and one on July 25, 1984. Other than a bald opinion of one of its witnesses to the contrary (T. 191) Respondent makes no contention that such was not the case. Nevertheless, the Petitioner, in these circumstances where the situs of the second violation was different than the first, did not establish (1) when the second violation commenced or (2) that the first violation was not abated prior to the occurrence of the second, that is, there was no showing that the obstructive condition constituting the first violation was in existence when the second violation was detected. The record reveals that continuous grading efforts were carried on after the Citation's second extension was issued on July 11, 1984. There was no showing that the secondary (return) escapeway was continuously obstructed in one location or another. Even though it is clear that the essence of the standard is the having of two escapeways-as contrasted to a focus on the presence of a particular condition, obstruction, or impediment to passage at a given place in the escapeway- (FOOTNOTE 6) it has not been established that the escapeway did not come into compliance after the first violation and before the second (a 14Äday period), a prerequisite to the conclusion that the mine operator did not abate the first violation.

I thus find insufficient evidence of Petitioner's "failure to abate" allegation, not simply because the second (July 25) violation occurred in a different area, but because there (a) is no reliable evidence as to the condition of the original (June 20) violation situs after July 11, coupled with the fact (b) that there is insufficient evidentiary basis to draw the inference that the return escapeway, for one reason or another, at one location or another, was not cleaned up, or maintained adequately during the period July 11ÄJuly 25 to constitute an abatement at some point in time of the original violation. Accordingly, it is concluded that the 104(b) Withdrawal Order was improperly issued. However, since the Order itself specifically cites a violation of 30 C.F.R. 75.1704, and the evidence establishes the occurrence of such a violation, modification of the Order to a Section 104(a) Citation is called for within the authority of Section 105(d) of the Act and a separate penalty assessment therefor will be made.

B. Significant and Substantial

With regard to the "significant and substantial" finding of the Inspector on the face of Citation No. 2212848, (FOOTNOTE 7) there was no specific attention placed on this subject either during the evidentiary hearing or in oral argument. Respondent did challenge the "significant and substantial" designation (T. 5).

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard[.]" 30 U.S.C. 814(d)(1). The Commission first interpreted this statutory language in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981}:

> [A] violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, if based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National Gypsum, and stated:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazardÄthat is, a measure of danger to safetyÄcontributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3Ä4 (footnote omitted). Accord, Consolidation Coal Co., 6 FMSHRC 34, 37 (January 1984). The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Suffice it to say that the record does not support a finding that there existed a reasonable likelihood that the hazards described which were contributed to by the violation would result in an event in which there is an injury, even under the most liberal construction of the phrase "reasonable likelihood."

C. Penalty Assessment

The Respondent is an underground coal mine operator with a history of 231 prior violations during the 2Äyear period preceding the issuance of the first Citation No. 2212848 on June 20, 1984 (Ex. PÄ7). Respondent previously had been cited for obstructed escapeways which were described as a "recurring problem" (T. 57Ä60). Both violations were obvious (T. 43Ä47, 122Ä129) and were the result of the nature of mining being conducted in the context of numerous difficulties encountered by Respondent. (FOOTNOTE 8) It is concluded that the first violation (June 20) resulted from ordinary negligence. However, the second violation occurred more than a month after the first and Respondent should have been acutely aware of the hazards posed by the violation and a high degree of negligence is attributed to it. Failure to provide two safe escapeways by its very nature is a serious infraction and both violations are found to be moderately serious in view of the gravity of the potential injuries posed by the hazards.

In mitigation, Respondent contends, in addition to its showing of considerable difficulty in keeping the escapeway clear, that it suffered a loss as a result of the inappropriate issuance of the Withdrawal Order which closed down production for 5 days. The vitiation of the "significant and substantial" charge in Citation No. 2212848 must also be considered. These factors in mitigation serve to reduce the level of penalties otherwise called for. Based on the foregoing considerations, a penalty of $175.00 for each violation is deemed appropriate and is assessed.

ORDER

(1) Citation No. 2212848 is modified to delete the "Significant and Substantial" designation thereon, is otherwise affirmed, and a penalty of $175 is assessed therefor.

(2) Withdrawal Order No. 2336041 issued pursuant to Section 104(b) of the Act is modified pursuant to Section 105(d) of the Act to a Section 104(a) Citation and a penalty of $175 is assessed therefor.

(3) On or before 30 days from the date of this decision Respondent shall pay to the Secretary of Labor the penalties above assessed in the total sum of $350.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

1 Line 13 of the standard form employed for the Withdrawal Order-wherein the "Area or Equipment" involved which is to be withdrawn from is to be describedÄwas left blank. To correct this, on August 1, 1984, a modification of the Order was issued stating: "Order No. 2336041 is hereby modified to indicate the area that was closed as the 102 longwall active working section."

~FOOTNOTE_TWO

2 Although there was considerable discussion on the record concerning whether the original Citation was "merged" into the subsequent Section 104(b) Withdrawal Order, I am unaware of such a legal doctrine and reject this notion to the extent that the identity and viability of the 104(a) Citation would be nullified. Both the Citation and Withdrawal Order are integral documentary components of a continuing mine safety enforcement process and the fact that but one penalty is assessed even though there are two enforcement papers seems only to reflect the impact of the 104(b) Withdrawal Order on the penalty assessment determination insofar as it directly bears on one of the six mandatory assessment criteria provided in Section 110(i) of the Act, i.e., "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

~FOOTNOTE_THREE

3 A close reading of this segment of the Inspector's testimony reveals that such is ambiguous as to whether the obstacle observed on July 5 was the same impoundment cited on June 20 (T. 53). However, on cross-examination, the Inspector made clear that the impoundment he observed on June 20, 1984 when he issued the Citation was still in existence when he issued the first and second extensions of abatement time on July 5 and July 11, 1984 respectively (T. 93, 111Ä112).

~FOOTNOTE_FOUR

4 On cross examination, however, the Inspector attributed the impoundment to the continuous miner (T. 146).

~FOOTNOTE_FIVE

5 Section 104(b) provides:

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

~FOOTNOTE_SIX

6 An obstruction, in and of itself, is not a violation of the subject standard.

~FOOTNOTE_SEVEN

7 No "significant and substantial" designation was made on the Withdrawal Order.

~FOOTNOTE_EIGHT

8 Was compliance with the 2 escapeway standard shown to be impossible? Respondent presented at length a variety of geologic, equipment, spatial, and time problems which it maintained posed difficulties in obtaining compliance, i.e., keeping the secondary return escapeway adequately cleared while production was ongoing. Nevertheless, the second impoundment was abated in 5 days after the Withdrawal Order issued and Inspector Villegos' testimony (T. 104) that the first violation could have been abated in 6 or 7 days went unrebutted. I thus conclude that compliance with the subject regulation was not impossible. See Sewell Coal Co., 3 FMSHRC 1380 (1981).