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JANUARY

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

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Cleveland Cliffs Iron Company v. Secretary of Labor, MSHA and United Steelworkers of America, VINC 79-68-M, and Secretary of Labor, MSHA v. Cleveland Cliffs Iron Company, VINC 79-240-PM; (Judge Broderick, December 3, 1979)

Secretary of Labor, MSHA v. Cyprus Industrial Minerals Co., DENV 78-558-M (Judge Koutras, December 18, 1979)

Secretary of Labor, MSHA, v. Davis Coal Company, WEVA 79-130 through WEVA 79-133, (Judge Michels, December 13, 1979)

Secretary of Labor, MSHA, v. El Paso Rock Quarries, Inc., DENV 79-139-PM, etc., (Judge Moore, December 17, 1979)

Secretary of Labor, MSHA v. Cement Division, National Gypsum Company, VINC 79-154-PM, (Judge Broderick, December 26, 1979)

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Review was Denied in the following case during the month of January:

Secretary of Labor, MSHA, v. Ozark-Mahoning Company, VINC 79-138-PM, etc., (Judge Stewart, November 29, 1979)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 10, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. PITT 76X232-P
	:	PITT 76X235-P
v.	:	
	:	IBMA 77-23
U.S. STEEL CORPORATION	:	

ORDER

The decision of the administrative law judge assessing penalties against U.S. Steel Corporation is affirmed. See, Republic Steel Corp., 1 FMSHRC 5 (1979); Kaiser Steel Corp., 1 FMSHRC 343 (1979); and our November 30, 1979 order in this case.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

80-1-5

Distribution

Thomas A. Mascolino, Esq.
Edward H. Fitch, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Va. 22203

Billy M. Tennant, Esq.
U.S. Steel Corporation
600 Grant Street, Room 6082
Pittsburgh, PA 15230

Administrative Law Judge Paul Merlin
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VINC 77-132-P IBMA 78-3
CONSOLIDATION COAL COMPANY	:	

DECISION

This case involves a civil penalty proceeding under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, and contested within the administrative procedures then provided by the Department of the Interior. Those regulations required the Department's Office of Assessments to prepare and serve on the mine operator an initial order of assessment; they further provided that the operator could decline to pay the proposed assessment and request a hearing before an administrative law judge. In this case the mine operator had requested such a hearing. Thereafter, but before hearing, the operator offered to pay in full the penalty originally proposed by the Office of Assessments. The principal question presented here is whether the judge's denial of the operator's motion to adopt the original assessment of penalty as his own constituted legal error. We hold that it did not and affirm the judge's decision.

This case arises because of a fatal accident which occurred at a surface coal mine site operated by Consolidation Coal Company. A slide of material from a spoil bank at the mine site resulted in fatal injuries to a foreman-in-training. Following an accident investigation by the Mining Enforcement and Safety Administration (MESA), a notice of violation was issued charging a violation of 30 CFR §77.1006. Subsection (a) of that regulation requires that men other than those necessary to correct unsafe conditions shall not work near or under dangerous high walls or banks. The notice specifically charged that, at the time of the accident, an assistant superintendent at the mine and the foreman were performing their duties in an area between a stripping shovel and an unstable spoil bank.

In accordance with regulations then in effect, MESA's Office of Assessments issued an order assessing a penalty of $1,300 for the violation. The assessment was discussed without resolution at a conference between

representatives of the mine operator and the Office of Assessments. Consolidation then requested that the matter be referred for an evidentiary hearing before an administrative law judge.

A Petition for Assessment of Civil Penalty was filed by the Office of Solicitor, Department of Interior on July 11, 1977, and sought a penalty for the alleged violation. The petition made no reference to the earlier assessment of the Office of Assessments, nor did it propose any specific dollar amount for the penalty. A copy of the petition was sent to the mine operator with an accompanying letter signed by MESA's attorney. In that letter Consolidation was advised that it could dispose of the matter "at this time" by paying the $1,300 assessment in full.

On August 4, 1977, Consolidation filed an answer denying that a violation took place and the case was assigned to an administrative law judge. During subsequent settlement negotiations, the MESA attorney apparently advised Consolidation's attorney that he would not accept payment of $1,300 as a means of disposing of the proceeding. A prehearing conference was held before the judge on September 9, 1977, at which time the attorney for Consolidation moved that the judge adopt the findings of MESA's Office of Assessments and issue a final order of the Secretary assessing a penalty of $1,300. In opposing the motion, the Solicitor expressed the view that $1,300 was an insufficient penalty, on the grounds that the gravity of the violation and the negligence of the operator justified the maximum penalty of $10,000. By written order of September 14, 1977, the judge denied the motion and scheduled the case for a hearing on the merits. Consolidation's attempt to take an interlocutory appeal from the judge's order was denied by the Board on September 28, 1977.

The case then proceeded to hearing where the parties litigated the issues of whether a violation occurred and, if so, the appropriate penalty. In a written decision issued on January 21, 1978, the judge held that a violation of 30 CFR §77.1006 occurred and found that the evidence showed that the assistant superintendent's actions near the spoil bank immediately prior to the accident were "extremely negligent and reckless in every respect." The judge assessed a $10,000 penalty.

Consolidation appealed to the Board, arguing that the judge erred in denying its motion to adopt the Office of Assessments' original assessment prior to hearing. The operator contends that its willingness to pay the original assessment of $1,300 eliminated any triable issue, rendering a hearing unnecessary. It contends that, in such circumstances, the Board's decision in Zeigler Coal Company, 7 IBMA 312 (1977), requires that the original assessment be adopted by the judge. We reject Consolidation's argument.

In Zeigler, the operator had requested a hearing on all 295 alleged violations for which MESA had sought a penalty. Thereafter, but before the hearing, the operator had offered to pay the full amount assessed by the Office of Assessments for 97 of the violations. The judge found

that MESA would have accepted payment of each penalty in the original assessed amount if assessments for all of the 295 violations were voluntarily paid. Thus, in Zeigler, the Solicitor had not claimed that there was a triable issue of fact regarding the 97 violations, but rather took an "all or nothing" approach in the settlement negotiations. In those circumstances, the Board held that there was no triable issue and that the Office of Assessments' findings may be adopted by the judge if found to be appropriate. In that case the judge affirmatively adopted those findings. Here, the judge held, and we agree, that the Solicitor's request for a $10,000 penalty raised a triable issue, namely, the appropriate amount of penalty in light of the criteria for assessment of penalties set forth in section 109(a)(3) of the 1969 Act.

Furthermore, regulations of both the Office of Assessments, 30 CFR §100.7(d), and the Department's Office of Hearing and Appeals, 43 CFR §4.545(c), specified that if an evidentiary hearing were requested, the judge would determine the amount of civil penalty, if any, on a de novo basis. 1/ Thus, Consolidation was on notice of this Departmental policy at the time it requested the hearing, yet did not make its offer to pay the $1,300 until after the issues had been joined before the judge.

Accordingly, we conclude that the judge's action in denying Consolidation's motion was consistent with both the case law of the Board and the pertinent Departmental regulations that were then in effect. The decision is affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ 30 CFR §100.7(d) provided:

(d) In assessing a penalty, the Office of Hearing and Appeals may determine de novo the fact of violation and the amount of the civil penalty, taking into consideration the six criteria specified in section 109(a)(3) of the Act.

43 CFR §4.545(c) provided:

(c) In determining the amount of civil penalty warranted the administrative law judge and the Board of Mine Operations Appeals shall not be bound by a recommended penalty of the Mining Enforcement and Safety Administration or by any offer of settlement made by either party.

Distribution

Fred Souk, Esq.
Timothy M. Biddle, Esq.
Crowell & Moring
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

Thomas Mascolino, Esq.
Michael V. Durkin, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Va. 22203

Paul Merlin
Office of the Administrative Law Judges
FMSHRC
5205 Leesburg Pike, 10th Floor
Falls Church, Va. 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

JANUARY 1 - 31, 1980

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 2 1980

JAMES F. CRUMBAKER, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. BARB 79-313
PYRO MINING COMPANY, Respondent	:	Pyro Mine No. 11

DECISION

Appearances: William R. Thomas, Esq., Spenard & Thomas, 18 Court Street, Madisonville, Kentucky, for Complainant;
Kirby Gordon, Esq., Gordon & Gordon, 111 Frederica Street, Owensboro, Kentucky, for Respondent.

Before : Administrative Law Judge Steffey

Pursuant to a notice of hearing issued September 21, 1979, a hearing in the above-entitled proceeding was held on November 28, 1979, in Evansville, Indiana, under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

Upon completion of the evidence presented by the parties, I rendered the following bench decision which is reproduced below (Tr. 281-289):

> The application or complaint, I should say, in this case was filed on March 13, 1979, and as my opening statement indicated, was filed by Mr. Crumbaker after the Secretary of Labor had made a finding that the complainant was not involved in an activity protected by provisions of Section 105(c)(1) of the Act at the time he was discharged. Therefore, I base all the findings that I shall make in my decision entirely on what the witnesses have said here today.
>
> The issue, of course, is whether Mr. Crumbaker was engaged in a protected activity under Section 105(c)(1), so as to be entitled to a finding of discrimination and a ruling that he should be given the relief provided for in Section 105(c)(3).
>
> I shall first make some findings of fact and if those facts are entirely inconsistent with some of the witnesses' testimony, I shall in the subsequent part of my decision indicate, briefly, why I have ruled in favor of one witness as against another.

The incident which led up to Mr. Crumbaker's discharge occurred on November 21, 1978. Mr. Crumbaker had come to work on the day shift and the section foreman or unit foreman on that day shift was Mr. Griffin. Mr. Crumbaker first went to the number four entry and found that it needed to have some bolts installed and he proceeded to make that his first work of the day.

After he had completed his roof bolting in the number four entry, he constructed some crossovers at the intersection of the number four entry at the last open crosscut. And after completing those, he traveled into the crosscut between the fifth and sixth entries where Mr. Griffin had made some marks, indicating that additional roof bolts should be installed.

Mr. Crumbaker was in the process of beginning to install roof bolts in the crosscut when Mr. Griffin came into the crosscut and told Mr. Crumbaker that he wanted Mr. Crumbaker to go and get his roof bolting machine loaded with an additional supply of bolts, so as to be able to bolt the number six entry . . . the face of number six entry. At that time, Mr. Crumbaker told Mr. Griffin that the crosscut was unsafe, in his opinion, until such time as the additional roof bolts had been installed.

At that point, Mr. Griffin told Mr. Crumbaker that his roof bolting machine was not where he wanted it to be and that Mr. Crumbaker should move the roof bolting machine out of the crosscut.

It appears on the basis of both Mr. Griffin's and Mr. Crumbaker's testimony that Mr. Crumbaker might have had an option to whether he should continue on through that crosscut or back out of it and go down to the number two crosscut and over to the number six entry. But, at this point, it appears that both of the parties, the section foreman and Mr. Crumbaker, were probably somewhat heated in their emotional state and Mr. Griffin did not pursue any discussion on the topic, but simply gave Mr. Crumbaker an option of either moving the roof bolting machine out of the crosscut or going to the house, which everyone agrees in the case, meant if Mr. Crumbaker did not move the roof bolting machine at that moment out of the crosscut, that he would be discharged.

Mr. Crumbaker felt strongly that it was unsafe to. . .for anyone, himself or anyone else, to go through the crosscut; therefore, he took the option of going to the telephone and calling the mine foreman's office to advise the mine foreman that he needed transportation out of the mine because he'd been discharged by Mr. Griffin. Those are the basic facts that have to be found in order for one to apply Section 105(c)(1) to them, to determine whether Mr. Crumbaker was involved in a protected activity or not.

And, of course, Section 105(c)(1) reads and I quote, "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine * * *". And I shall stop quoting at that point, because I think that that's as far as[is] needed to apply as much of the Section as is [required] to apply the facts that we have in this case.

And I find that on the basis of the facts that Mr. Crumbaker was engaged in protected activity at the time of his discharge, because if there's any evidence in the case that's clear, it is that there was a violation of the roof control plan because the roof bolts in the crosscut between the number five and six entries were farther apart than they should have been.

They're supposed to be no more than five feet apart and even Mr. Griffin admits that they were between six and six and a half feet apart. And he conceded that in his deposition. He may have been correct in saying that they were up to seven feet apart. Now, I have [in] many cases, civil penalty cases, assessed substantial penalties for violations of the roof control plan which were no greater than the one involved in this proceeding. And I have had, in many cases, many [i]nspectors testify that more miners are killed in underground mines for violation of the roof control plans than any other cause of death and injury in mines. And therefore, if there's any kind of complaint that a miner can make which is beneficial to the preservation of the safety of the miners, it is for a man to insist that a roof control plan be followed and that roof bolts be installed before equipment or people pass through entries or crosscuts which have not been bolted in accordance with the plan.

Now, there's been testimony that the roof in the unit number three was safe and appeared sound, but [i]nspectors are constantly telling me, it's good roof that kills people because an unsafe or a hazardous looking roof gets supported, while the good roof is allowed to be unsupported and that's the time that a hunk of roof falls and injures or [k]ills someone. So, we cannot say that because Mr. Griffin walked under this unsupported roof that that made i[t] okay for everyone else to do so.

Now, I agree with Mr. Thomas that the testimony of Mr. Wilson is very helpful in substantiating the position of Mr. Crumbaker in this case. Mr. Wilson was very certain of where the power center should have been and where the trailing cables for all the equipment was and while he disagreed with both Mr.

Griffin and Mr. Crumbaker as to the location of those trailing cables, but still . . . his testimony was still supportive of the fact that Mr. Crumbaker was involved in trying to support a place in this crosscut. And Mr. Wilson's testimony shows it was his intention to go through that crosscut between the number five and number six entr[ies]and that was his way of going across the unit in order to mine or load from the number six entry, across to the number one entry. And, therefore, Mr. Wilson's testimony does support the complaint as it was stated by Mr. Crumbaker, namely that Mr. Crumbaker was entitled to assume, based on normal operating stages that the roof bolting machine was right behind . . . excuse me, the loading machine was right behind Mr. Crumbaker's roof bolting machine and that Mr. Wilson had every intention of going under that unsafe roof if Mr. Crumbaker had gone under that unsafe roof and had passed on out with the roof bolting machine to the number six entry.

The testimony of Mr. Griffin in this proceeding was extremely erratic. He changed his position several times about the location of trailing cables and whether they were supported and not supported. And I was not at all certain that he was clear in his mind as to the situation that existed at the time that Mr. Crumbaker was discharged. And I think that the discussion that occurred on the morning after Mr. Crumbaker's discharge, on November 22, were largely an effort by the mine foreman, Mr. Ramsey, to support the action which M[r]. Griffin had taken.

It's normal for one supervisor to try to sustain the act of another supervisor, because that's the only way to establish discipline in a mine or anywhere else. So, I'm not surprised that Mr. Ramsey supported Mr. Griffin. The fact that Mr. Ramsey declined to give Mr. Crumbaker a job even after Mr. Crumbaker was willing to concede that he was wrong, shows that management was not overly pleased with Mr. Crumbaker's insist[e]nce upon complying with safety regulations. And I think that the fact that Mr. Crumbaker refused to operate the shuttle car that was not in good mechanical condition would be a reason for management to be just as happy to not have that sort of man on their payroll. But the fact remains that Mr. Crumbaker has a history, based on this record, of trying to support safety in the mines and that if there's any reason at all for having Section 105(c)(1) in the Act, it is to give protection to a man who is willing to take a position as to safety in the mine. And therefore, instead of our condemning Mr. Crumbaker for his contentiousness or his inability to get along with people, I think instead we owe him an apology and we should congratulate him for being willing to [complain about unsafe conditions].

As Mr. Thomas has recognized, that sort of individual is, perhaps, not going to be liked by management, but sometimes a thorn in the flesh is a beneficial tool to bring about the kind of safety that this Act was intended to accomplish in coal mines.

I may not have touched on all the points that the arguments have, but I've tried to . . . that all the arguments have considered, but I have tried to give my reasons for finding in Mr. Crumbaker's favor.

WHEREFORE, it is ordered:

(A) The complaint filed by Mr. James F. Crumbaker is granted on the basis of my findings that Mr. Crumbaker was engaged in a protected activity under Section 105(c)(1) at the time of his discharge. And, therefore, he's entitled to the relief which is provided for in Section 105(c)(3).

(B) James F. Crumbaker is reinstated to his position of roof bolting machine operator at Pyro Mine, Number Eleven and he shall be paid back wages beginning on November 21 at ten a.m. and extending up to the present time, including interest at eight percent less $6,200 earned by Mr. Crumbaker for work for Mid-America Canning Corporation during the period covered by his discharge. 1/ The pay will be computed on the basis of nine dollars and twenty-eight cents an hour on the basis of a forty-one hour week, less insurance and state and federal taxes. Mr. Crumbaker shall also be entitled to whatever royalty and incentive pay other miners would have received for that same period. Additionally, he shall be entitled to payment for medical benefits for his family which he has personally paid during that period, and for reimbursement for all attorney's fees. 1/

(C) Finally, there shall be removed from Mr. Crumbaker's personnel file, any references to the discharge on November 21, 1978.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

1/ The provisions for offset for earnings and for reimbursement for attorney's fees were not part of my bench decision.

Distribution:

William R. Thomas, Esq., Attorney for James F. Crumbaker, Spenard & Thomas, 18 Court Street, Madisonville, KY 42431 (Certified Mail)

M. Kirby Gordon II, Esq., Attorney for Pyro Mining Company, 111 Frederica Street, Owensboro, KY 42301 (Certified Mail)

Assistant Solicitor, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

JAN 7 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. YORK 79-50-M A.O. No. 30-01185-05006A
v.	:	Docket No. YORK 79-51-M A.O. No. 30-01185-05007A
THADEAUS MEALUS (Shift Foreman), Respondent	:	Docket No. YORK 79-52-M A.O. No. 30-01185-05008A
JOHN KREIDER (Mine Superintendent), Respondent	:	Docket No. YORK 79-2-M A.O. No. 30-01185-05003W
ROBERT REUSS, (General Mine Superintendent), Respondent	:	Balmat Mine No. 4 and Mill
ST. JOE ZINC COMPANY, Respondent	:	

DECISION AND ORDER

The Secretary moves to withdraw the three captioned section 110(c) cases and for approval of a settlement of the section 110(a) case against the corporate operator. The settlement proposed is $1600.00, or 80% of the $2,000 initially proposed against the corporate operator.

Based upon an independent evaluation and de novo review of the parties' extensive prehearing submissions, the information furnished at the intensive prehearing conference of November 20, 1979, the Secretary's subsequent investigation and the representations of the parties, I find that because of the passage of time, the unavailability of certain material witnesses, the inability of the inspector to locate the areas involved in the claimed imminent danger with a reasonable degree of precision, the dimming of witnesses' memories of certain claimed admissions as well as the fact that the underlying imminent danger closure order was assessed at only $295.00 it is unlikely:

1. That the Secretary can sustain the burden of showing that the loose ground condition for which the underlying section 107(a) order (Order No. 210043) was issued was, in fact, an imminent danger;

2. That any of the individuals charged under section 110(c) ordered miners into an imminently hazardous area solely for the purpose of removing mining equipment in light of time cards which show that these miners were primarily engaged in abating the alleged condition;

3. That the hazard presented by the loose roof condition that existed, while arguably serious, created a substantial probability of physical harm to the miners who entered the area to scale the loose ground and to remove mining equipment; or

4. That the violation of the closure order alleged in Citation No. 210051 was the result of knowing or reckless disregard for the order or the law, or was caused by anything more than confusion over the conduct permitted following issuance of the order.

For these reasons, and after taking into consideration the other statutory criteria, I conclude the motion to withdraw and to approve settlement is in accord with the purposes and policy of the act.

Accordingly, it is ORDERED:

1. That the motion to withdraw the charges against Thadeaus Mealus, John Kreider and Robert Reuss be, and hereby is, GRANTED and the petitions for assessment of civil penalties DISMISSED.

2. That the motion to approve settlement of the charge against St. Joe Zinc Company be, and hereby is, GRANTED, and that subject to payment of the amount of the settlement agreed upon, $1600.00, on or before Monday, January 21, 1980, the petition as to the corporate operator be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Edward Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Sanders D. Heller, Esq., 23 Main St., Gouverneur, NY 13642 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 9 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. DENV 79-27-P A/O No. 05-00302-03001
v.		
ENERGY FUELS CORPORATION,	Respondent	Docket No. DENV 79-28-P A/O No. 05-00302-03002 Energy #1 & 2 Strip Mine

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
John D. Coombe, & Deborah Friedman, Esqs., Holland & Hart, Denver, Colorado, for Respondent.

Before: Judge Charles C. Moore, Jr.

The two cases captioned above allege 13 violations of the Federal Mine Safety and Health Act of 1977. At the beginning of the hearing, the parties submitted a stipulation of partial settlement which I accepted on the record. Pursuant to that stipulation, a total penalty of $650 is assessed for the following citations: Citation No. 389931, Citation No. 389950, Citation No. 389959, and Citation No. 389960. Petitioner vacated Citation No. 389952 because the circumstances did not constitute a violation of the mandatory standard. Six of the citations alleged that parking brakes on various equipment were insufficient. The citation numbers are 389935, 389943, 389945, 389953, 389963, and 389965. It was agreed that the trial would be confined to Citation No. 389965 but that all of the other citations would be controlled by the results in the citation tried, including the percentage relationship between the penalty assessed by the assessment officer and the penalty assessed by me. For example, if I were to double the assessment officer's penalty as to Citation No. 389965, all of the others would also be doubled. This resulted in only three alleged violations being subject to an evidentiary hearing. They were the parking brake citation mentioned, Citation No. 389964, involving alleged unsafe U-bolt clamps on a powder truck and Citation No. 389939, involving an accumulation of material.

After the Secretary had presented its entire case as to the three citations and after Respondent had submitted most of its evidence, the parties

decided to enter a further stipulation whereby the Secretary of Labor would withdraw its penalty action with respect to and consent to the vacation of all of the parking brake citations. The aforementioned parking brake citations are accordingly vacated. Respondent agreed to withdraw its challenge to Citation No. 389939 and the parties agreed that an appropriate penalty would be the original proposed assessment of $240. I approved this agreement. As to the remaining violation, Citation No. 389964, the parties agreed that the explosive hauling truck was in an unsafe condition and that a violation of the safety standard had occurred. The only issue left for me to decide was whether Respondent could be held responsible for a violation committed by the owners of an independent explosive supply company. The facts regarding the relationship between the mining company and the explosive company were stipulated and briefs were filed.

It was agreed, however, that I should stay my decision until after the Commission had decided Secretary of Labor v. Monterey Coal Company, Docket No. HOPE 78-469, etc. The Commission has issued a decision in Monterey, however, it based that decision on Secretary of Labor v. Old Ben Coal Company, Docket No. VINC 79-119, decided October 29, 1979. Petitions to review the Commission's decisions in both Monterey and Old Ben have been filed with a United States Court of Appeals, so the last word may not have been spoken on this issue.

I see no point in delaying my decision pending a court decision because the losing party will undoubtedly appeal to the Commission and the result will eventually be controlled by the court decision anyway. Nor do I see any point in adding my analyses of the precedents which go to the point of this controversy. In Old Ben and in Monterey the Commission held the owner of a mine responsible for the actions of an independent contractor even though the decision of the Secretary of Labor to cite the owner had been based on an arbitrary policy of always citing the owner for a violation committed in the mine. The decisions were made without regard to whose employees might be endangered, who would be in the best position to observe and abate the unsafe condition, or the control which the owner exercises over the independent contractor. The Commission hints that it may change its position at some future time, but it has not done so yet and in accordance with my interpretation of the two Commission decisions on this point, I will hold Energy Fuels Corporation responsible for the violation. I realize that this means that in order to avoid the possibility of a citation, the mine owner may have to inspect every vehicle that comes on to mine property, and while I am not sure that such a requirement will promote mine safety, I nevertheless think it is required by the two Commission decisions mentioned above. The negligence on Respondent's part, however, was of a lower order and a penalty of $50 will be assessed. As to the other criteria, the only information in the file is that contained in the assessment sheet and I am relying on that.

ORDER

Respondent is ordered to pay to MSHA, within 30 days a penalty in the amount of $940.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Ann Noble, Esq., Office of the Solicitor, U.S. Department of Labor, 15019 Federal Office Bldg., Denver, CO 80202 (Certified Mail)

John D. Coombe & Deborah Friedman, Esqs., Holland & Hart, 555 Seventeenth St., Suite 2900, Denver, CO 80201 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

JAN 10 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. WEVA 79-358 A.O. No. 46-02208-0318V
v.	:	Docket No. WEVA 79-359 A.O. No. 46-02208-03019
DAVIS COAL COMPANY, Respondent	:	Marie No. 1 Mine

DECISION AND ORDER APPROVING SETTLEMENT

In response to the order to furnish additional information concerning the motions to approve settlement, the Regional Solicitor has declined to furnish "a current evaluation of this operator's ability to comply with the Mine Safety Law considering its financial difficulties." The Regional Solicitor claims that in reviewing a proposed settlement the advisability of a reduction in proposed penalties because of adverse business impact need not take into account or be balanced against the affirmative interest in perpetuating only safe mining operations. 1/ The logical extension of this position seems to be that mine safety is a consideration secondary to mine productivity and that the enforcement policy in effect is "all the safety consistent with production" and not "all the production consistent with safety."

These echoes of a production-oriented enforcement policy I thought were authoritatively rejected with the transfer of enforcement responsibility from the Interior Department to the Labor Department. I believe, therefore, that the view expressed by the Regional Solicitor, namely that "evaluation of an operator's financial ability to comply with the mine safety and health regulations is not" to be considered in evaluating a settlement where the principal justification

1/ While the Act requires that adverse business impact be "considered", it does not require that it be given controlling weight or that it cannot be outweighed by the countervailing interest in continuing only those mining operations that promote mine safety.

for the reduction is adverse business impact, represents a profound misreading of the legislative intent.

Congress has declared that "the first priority" of all concerned with mine safety is protection of the health and safety of the miner. Certainly an interpretation of that intent that puts safety at risk in the interest of continued productivity runs counter to the fundamental declaration of policy contained in the Act as well as the Secretary's explicit mandate to evaluate an operator's past performance and history of compliance to ensure that mining operations do not constitute a "continuing hazard to the health or safety of miners." 30 U.S.C. §§ 814(c)(1), 818(a)(2); S. Rep. 95-181, 95th Cong., 1st Sess., at 32-33, 38-39 (1977).

As the Senate Committee Report that accompanied the 1977 Act notes: "* * * the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." Id. at 41. How a penalty can deter future violations and ensure voluntary compliance if the operator does not have the financial resources to effect compliance is not explained. Nor is the public interest in encouraging a mining operation without the financial resources to comply with mine safety laws. Just as the purpose of the law is not to raise revenue so also its purpose is not to perpetuate unsafe or even marginally safe mining operations. In my judgment, the failure to make the evaluation called for is a violation of the Secretary's obligation to ensure a working environment substantially free of the hazards proscribed by the Act.

Under no circumstances, in my judgment, can the imposition of a token or unwarrantably low penalty be justified by the claim that the adverse business impact criteria precludes a realistic evaluation of the ongoing mine operation from the standpoint of ability to comply and to devote necessary resources to promote mine safety. Such an evaluation of an operation in serious financial difficulties is not beyond the competence and expertise of MSHA. The history and pattern of prior conduct and violations is highly predictive of the likelihood of future compliance. Simple observation should provide the basis for determining whether, for example, an operator has on hand the necessary materials to ensure compliance with its roof control plan. Consequently, I think it unfortunate that the Regional Solicitor has declined to furnish the evaluation requested.

Nevertheless, I am satisfied, at least for the present, that with the waters stirred, with the matter under review by the Commission, and with the possibility that MSHA may be held liable for the negligent execution of its duty to

prevent the continuation of mining conditions that constitute an ongoing hazard to miners, the surveillance of the Marie No. 1 Mine will be intensified. Compare, Raymer v. U.S., 455 F.Supp. 165 (W.D. Ky. 1978).

As previously noted, the overall reduction proposed in these cases is only $1250.00 or one-third of the amount initially assessed. It is unlikely, therefore, that it will be determinative of whether the operator sinks or swims. Furthermore, I am impressed with the operator's representations as to the efforts he will make to achieve future compliance.

Based on my independent evaluation and de novo review of the violations, the matters set forth in mitigation, including the fact that the hole-through occurred while the operator was acting under an MSHA approved plan, the operator's straitened financial circumstances, and the Pikeville National Bank loan to cover immediate operating expenses, I conclude the settlement proposed is acceptable.

Accordingly, it is ORDERED that the Secretary's motions to approve settlement be, and hereby are, GRANTED. It is further ORDERED that the operator pay the settlement agreed upon, $2,325.00 on or before Friday, February 7, 1980, and that subject to payment the captioned petitions be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Sidney Salkin, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Paul E. Pinson, Esq., P.O. Box 440, Williamson, WV 25661 (Certified Mail)

Winford Davis, Davis Coal Company, Box 427, Kermit, WV 25674 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 11 1980

McCORMICK SAND CORPORATION, Applicant	:	Applications for Review
v.	:	Docket No. LAKE 79-80-RM
	:	Citation No. 292383-1; 5/7/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 79-81-RM
	:	Citation No. 292384-1; 5/7/79
	:	McCormick Sand

DECISION

Appearances: Thomas J. O'Toole, Esq., Muskegan, Michigan, for Applicant; Karl Overman, Esq., Office of the Solicitor, Department of Labor, for Respondent.

Before: Administrative Law Judge Michels

These matters are before me for decision upon Applications for Review filed May 14, 1979, pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act). Answers were filed generally denying the allegations but admitting that the challenged citations were issued. A hearing was held on September 24, 1979, in Grand Rapids, Michigan, at which the parties were represented by counsel. The parties filed posthearing briefs and proposed findings and conclusions which have been carefully considered. The proposed findings not adopted or specifically rejected herein are rejected as immaterial or not supported by fact.

The charges concern Citation Nos. 292383 in LAKE 79-80-RM and 292384 in LAKE 79-81-RM. Both are the same except that they refer to different equipment. Citation No. 292383 reads: "A continuous metallic grounding conductor was not provided between the dryer plant and the transformer safety ground" (Applicant's Exh. No. 2). Citation No. 292384 reads: "A continuous metallic grounding conductor was not provided between the shop and the transformer safety ground" (Applicant's Exh. No. 1). In both instances the inspector charged a violation of 30 CFR 56.12-25 which states: "Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment."

Background Facts

There is little if any controversy on the electrical grounding in use by the Respondent. Respondent business is an industrial silica sand operation. The components include a work plant, a dryer plant and a shop. Electricity is supplied by a public utility. The system used is known as a "three phase ungrounded delta system" and it is not battery operated (Tr. 7). It was grounded by pin grounds or ground electrodes at three locations: One at the wash plant near the service entrance box, another at the dryer plant and finally a third one at the shop (Tr. 5-9, MSHA Exh. No. 1). The distance between the wash plant and the dryer plant is approximately 200 feet; that between the dryer plant and the shop, about 75 feet (Tr. 28-29).

The electrical system, as it had been modified, was designed and installed by an electrical firm known as Whittaker Electric. This firm supplies electric service and equipment and has offices in Grand Rapids and Muskegon, Michigan. It employs engineers and designers (Tr. 68-69). Robert Alcala, the firms vice president in charge of construction and technical service is a graduate electrical engineer and is registered in the states of Michigan and Ohio (Tr. 136).

The electrical system which Whittaker Electric installed has ground fault indicating lights. These are designed to give a warning if a fault occurs in the system (Tr. 36). Tests were performed which showed that the resistance level of the ground was less than 25 ohms, which is within the limit set in the National Electrical Code (Tr. 33-34).

The abatement procedure, approved by MSHA, consisted of stringing an overhead wire from the wash plant to the dryer plant and there grounding it to the ground pins and another overhead wire from the dryer plant to the shop, and likewise grounding it to the ground pin (Tr. 78).

There is no dispute that Applicant's electrical circuit required a ground or equivalent protection under 35 CFR 56.12-25. There is also no question that the circuit was grounded in the sense that it was bonded to three pin grounds or ground electrodes (Tr. 8-9). Inspector Clyde Brown testified that such a ground system was in place and he never claimed that it was not a ground as the term is defined in the regulations e.g. (Tr. 42-43). He admitted that grounding in the aspect of accepting voltage would occur (Tr. 35, 40). Mr. John Kavolski an electrician and an electrical inspector for MSHA, also conceded that under the pin ground system, current with one phase going to ground, would travel through the earth (Tr. 47-48). (His further contention, was that depending upon the resistance of the earth, if the current isn't sufficient it will not trip the breakers (Tr. 48)). He agreed that the earth was part of the system and that there would be continuity in such a system (Tr. 59, 61).

The pin grounds in this instance were adequately sized according to the National Electrica Code in all respects. The Code does not require a metallic grounding system for a delta ungrounded system (Tr. 81, 94).

In substance, Applicant employed a pin ground or ground electrode system which was installed by an electrician and which met the requirements of the National Electric Code. I find, therefore, the Applicant's electric system was grounded, though not grounded according to a method which MSHA demanded.

DISCUSSION

As noted above, mandatory standard 30 CFR 56.12-25, here charged, requires that "electrical circuits shall be grounded or provided with equivalent protection." The inspector alleged in his citation that a "continuous metallic grounding conductor" was not provided.

The issue, however, is not whether a continuous metallic grounding conductor was provided. The standard clearly does not require this. It demands only that the circuit be grounded or that equivalent protection be provided. Electrical grounding is defined in 30 CFR 56.2 as meaning "to connect with the ground to make the earth part of the circuit."

The principal argument of MSHA is that an effective grounding system must be continuous. It cites standard 30 CFR 56.12-28 which mandates that the "continuity and resistance" of grounding systems is to be tested; the testimony of John Kovalski an MSHA electrical inspector; and the National Electrical Code which provides that the path to ground from circuits, equipment and conductor enclosures shall be "permanent and continuous".

The problem with the terms "continuity" and "continuous" is that they are not clearly defined in this record. Mr. Kovalski, upon whom MSHA so heavily relies, failed to elaborate on the meaning of these terms when he had the opportunity to do so (Tr. 61). Furthermore, he conceded that there could be continuity in the pin grounding system which could be tested under the regulations. He qualified this only by stating that such would not be as effective as it should be (Tr. 61).

It is evident that MSHA in referring to "continuous" means a continuous metallic conductor, but the published sources relied on do not use such language. Moreover, MSHA appears to concede that in some instances a tie to a ground can be sufficient if it is a cold water pipe system underground. This, it claims, creates a metallic grid which makes the grounding system continuous.

Finally, MSHA apparently defines the term "continuity" as meaning not only the bonding to the ground pins, but, at least where there is a three phase system, a continuous metallic path connecting all the phases to the ground.

In light of the above, it appears to me that MSHA is attempting to require performance which is not specified in the standard. 1/ The standard,

1/ It seems to me if MSHA believes that the a continuous metallic ground conductor is a more effective and therefore a better and safer ground for the ungrounded delta system, the mandatory standards should specifically require its use.

fairly read, requires only a "ground" or its equivalent. It does not mandate a particular ground such as that mentioned in the citation, i.e., a "continuous metallic grounding conductor." The operator, moreover, has had no notice of any requirement under this standard other than to provide a "ground" or its equivalent.

In this instance the operator has provided a "ground." As noted, the standard requires only that the circuit be grounded and this the operator has done. It employed a qualified electrical contractor to install the system and the circuit met the requirements of the National Electrical Code for grounding.

Accordingly, I find and conclude that the charge in each docket of a violation of 30 CFR 56.12-25 has not been sustained and the citations should be dismissed. Further relief, as requested, is denied.

ORDER

It is ordered that Citation Nos. 292383 in LAKE 79-80-RM and 292384 in LAKE 79-81-RM be and hereby are vacated.

It is further ordered that these proceedings be dismissed.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

Distribution:

Thomas J. O'Toole, Esq., O'Toole, Stevens, Schuler, Johnson, Piasecki & Knowlton, 175 West Apple, Muskegon, MI 49443 (Certified Mail)

Karl Overman,Esq., Office of the Solicitor, U.S. Department of Labor, 231 W. Lafayette St., Rm. 57, Detroit, MI 48226 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	:	Civil Penalty Proceeding
		:	Docket Nos. Assessment Control Nos.
v.		:	NORT 78-325-P 44-00281-02018F
		:	Moss No. 2 Mine
CLINCHFIELD COAL COMPANY,	Respondent	:	NORT 78-364-P 44-00280-02022V
		:	NORT 78-365-P 44-00280-02023V
		:	NORT 78-366-P 44-00280-02024V
		:	Camp Branch No. 1 Mine
		:	NORT 78-367-P 44-00279-02012V
		:	Chaney Creek No. 2 Mine
		:	NORT 78-368-P 44-01773-02010V
		:	Hurricane Creek Mine
		:	NORT 78-369-P 44-00267-02019V
		:	Open Fork No. 2 Mine
		:	NORT 78-376-P 44-00241-02013F
		:	Lambert Fork Mine

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated August 16, 1978, as amended August 28, 1978, a hearing in the above-entitled consolidated proceeding 1/ was held on November 28 and 29, 1978, in Abingdon, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

1/ At the time the notice of hearing was issued, MSHA's Petition for Assessment of Civil Penalty in Docket No. NORT 78-376-P was a part of this consolidated proceeding, but on November 8, 1978, counsel for MSHA filed a motion for approval of settlement in Docket No. NORT 78-376-P. I issued on November 14, 1978, a decision approving the settlement agreement reached by the parties with respect to MSHA's Petition in Docket No. NORT 78-376-P and severed all matters concerning the issues in Docket No. 78-376-P from this consolidated proceeding.

All of the Petitions for Assessment of Civil Penalty in the docket numbers listed in the caption of this decision were filed on June 22, 1978, except the Petition in Docket No. NORT 78-325-P which was filed on May 12, 1978. All of the Petitions seek assessment of a civil penalty for a single violation of the mandatory health and safety standards except for the Petition filed in Docket No. NORT 78-366-P which seeks assessment of civil penalties for two alleged violations.

Counsel for MSHA filed on February 26, 1979, a posthearing brief with respect to the issues raised in each docket except for Docket Nos. NORT 78-366-P and NORT 78-368-P. Counsel for MSHA did not file briefs in Docket Nos. NORT 78-366-P and NORT 78-368-P because, during the hearing, he had orally made motions for approval of settlement with respect to those two cases. Counsel for Respondent filed posthearing briefs on March 1, 1979, with respect to the issues raised in all dockets except for the issues raised in the two cases in which the parties had entered into settlement agreements. Counsel for Respondent did not file a brief in Docket No. NORT 78-369-P, but there is nothing in the official files to show whether the failure to file a brief in that docket was by inadvertence or for some other reason.

Issues

The issues raised by the Petitions for Assessment of Civil Penalty are whether violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Four of the six criteria may usually be given a general evaluation, but in this particular proceeding only two of the criteria may readily be considered on a general basis so as to make such generalized consideration applicable to all of the violations which were alleged in each docket. The two criteria which may be given a general evaluation are the size of Respondent's business and the question of whether the payment of penalties would cause Respondent to discontinue in business. The remaining four criteria, namely, Respondent's good faith effort to achieve rapid compliance, Respondent's negligence, if any, the gravity of the alleged violations, and Respondent's history of previous violations, will be considered on an individual basis in each docket when the parties' evidentiary presentations are hereinafter reviewed. The two criteria concerning the size of Respondent's business and whether the payment of penalties would cause Respondent to discontinue in business are considered below.

Size of Respondent's Business

Five of Respondent's mines were the subject of the Petitions filed by MSHA in this consolidated proceeding. Respondent's Moss No. 2 Mine is one of the largest coal mines in the State of Virginia. It employs approximately 350 miners to produce from 2,500 to 3,000 tons of coal per day (Tr. 15). Respondent's Camp Branch No. 1 Mine employs about 185 miners to produce approximatley 1,200 tons of coal per day (Tr. 254-255). Respondent's Chaney Creek No. 2 Mine employs approximately 150 miners to produce about 1,300 tons

of coal per day (Tr. 477). Respondent's Open Fork No. 2 Mine employs about 150 miners to produce approximately 1,400 tons of coal per day (Tr. 524). There are no data in the record to show the size of Respondent's Hurricane Creek Mine because the Petition filed with respect to that mine was the subject of a motion for approval of settlement. Since the data already in the record supported a finding that Respondent operates a large coal business, no evidence was given with the respect to the size of Respondent's Hurricane Creek Mine. It was stipulated that Respondent is a part of the Pittston Coal Group (Tr. 16). On the basis of the foregoing facts, I find that Respondent operates a large coal business and that any penalties which may hereinafter be assessed in this proceeding should be in an upper range of magnitude insofar as they are determined under the criterion of the size of Respondent's business.

Effect of Penalties on Operator's Ability to Continue in Business

Respondent's counsel did not present any evidence at the hearing with respect to Respondent's financial condition. In Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), the former Board of Mine Operations Appeals held that when a Respondent fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties would not cause Respondent to discontinue in business. In the absence of any specific evidence to the contrary, I find that payment of penalties will not cause Respondent to discontinue in business.

The Settlement Agreements

Docket No. NORT 78-366-P (Camp Branch No. 1 Mine)

Order No. 1 CAG (7-46) September 6, 1977, section 75.400 (Exhibit M-18)

Order No. 1 CAG cited a violation of section 75.400 because float coal dust and loose coal accumulations existed in depths ranging from 1/8 inch to 2 inches along various conveyor belts for a distance of about 4,800 feet. The Assessment Office waived the formula normally used in assessing penalties and made findings as to the six criteria to support a proposed penalty of $4,000.

Counsel for MSHA stated that Respondent had offered to pay a penalty of $2,000 in settlement of the violation of section 75.400 alleged in Order No. 1 CAG. MSHA's counsel said that he was willing to accept the offer of settlement because MSHA personnel who were acquainted with the facts at the time Order No. 1 CAG was written had explained to him that a very serious roof problem had developed in a portion of the mine. Management had consulted with MSHA personnel and everyone agreed that the section with the bad roof should be abandoned because of the deteriorating condition of the roof. While the mine's personnel were engaged in removing the conveyor belt so that the section could be abandoned, the loose coal and float coal dust accumulated, but the urgency of the abandonment operations was believed to have priority over the cleaning up of the accumulations. MSHA's counsel noted

that the Assessment Office did not have the aforementioned extenuating facts in its possession when it proposed a penalty of $4,000 for the violation cited in Order No. 1 CAG (Tr. 463-466).

As has been found above, Respondent is a large operator. There was a good faith effort made to achieve rapid compliance with respect to Order No. 1 CAG. Respondent was nonnegligent in the circumstances. Exhibit M-12 shows that Respondent has paid penalties for 43 prior violations of section 75.400 at its Camp Branch No. 1 Mine. Exhibit M-12 also shows, however, that Respondent violated section 75.400 only three times during the first 8 months of 1977. That is an especially good trend in reducing the number of violations of section 75.400 and warrants acceptance of Respondent's proposed settlement with respect to the violation of section 75.400 alleged in Order No. 1 CAG.

Order No. 2 CAG (7-47) September 19, 1977 section 75.301-4 (Exhibit M-21)

Order No. 2 CAG alleged that section 75.301-4 had been violated because the velocity of the air reaching the working face of the No. 2 pillar split in the 2 Right Section off the 8 Left Mains was too low to be measured with an anemometer. The Assessment Office waived the usual formula employed for determining civil penalties and made findings as to the six criteria to support a proposed penalty of $4,000.

MSHA's counsel stated that Respondent had offered to settle the issues raised by Order No. 2 CAG by paying a civil penalty of $2,500. Although the Camp Branch No. 1 Mine releases some methane, there have been no explosive quantities of methane found in the mine. Consequently, the primary factor to be considered in assessing a penalty is that absence of a sufficient air velocity exposed the miners to the possibility of contracting pneumoconiosis. In such circumstances, MSHA's counsel expressed the opinion that the Assessment Office had not shown sufficient gravity to warrant imposition of a penalty of $4,000 and he moved that the settlement offer of $2,500 be approved (Tr. 466-467).

As previously shown above, Respondent is a large operator. There was a rapid good faith effort to achieve compliance as the alleged violation was corrected within a period of 45 minutes. There was ordinary negligence. Exhibit M-13 shows that Respondent has paid penalties for four previous violations of section 75.301-4 at its Camp Branch No. 1 Mine, but Exhibit M-12 also reflects that Respondent has not violated section 75.301-4 at its Camp Branch No. 1 Mine since November 30, 1976. In such circumstances, the facts support approval of Respondent's offer to pay a penalty of $2,500 for the violation of section 75.301-4 alleged in Order No. 2 CAG.

Docket No. NORT 78-368-P (Hurricane Creek Mine)

Notice No. 1 VH (7-28) August 1, 1977 section 75.200 (Exhibit M-27)

Notice No. 1 VH alleged that a violation of section 75.200 had occurred because Respondent had failed to comply with its roof-control plan in that

the face of the left crosscut off No. 3 entry had been advanced 29 feet but only two rows of roof bolts had been installed in the last 14 feet of supported roof. The Assessment Office waived the formula which is normally used in determining penalties and made findings with respect to the six criteria to support a proposed penalty of $1,500.

MSHA's counsel stated that Respondent had offered to settle this alleged violation of section 75.200 by paying a penalty of $1,250. MSHA's counsel said that the only extenuating circumstances were that the roof appeared to be sound and that the violation consisted of Respondent's failure to install two additional rows of roof bolts in an area from which coal had recently been extracted by the continuous-mining machine. The violation had not apparently exposed anyone to a serious threat and MSHA's counsel expressed the belief that a penalty of $1,250 was adequate in the circumstances (Tr. 468-472).

As has been found above, Respondent is a large operator. There was a good faith effort to achieve rapid compliance because the alleged violation was corrected within an hour after the notice was written. There was ordinary negligence. Exhibit M-26 shows that Respondent has paid penalties for 12 prior violations of section 75.200 at its Hurricane Creek Mine, but only one violation occurred in 1975, none in 1976, and only one occurred in 1977 prior to the violation alleged in Notice No. 1 VH. I do not condone any violations of section 75.200, but the evidence shows that Respondent is making an effort to eliminate violations of section 75.200 at its Hurricane Creek Mine. The aforesaid findings warrant approval of Respondent's offer of settlement with respect to the violation of section 75.200 cited in Notice No. 1 VH.

The Contested Cases

Docket No. NORT 78-325-P (Moss No. 2 Mine)

Notice No. 1 WJT (6-85) December 21, 1976 section 75.1403-10 (Exhibit M-7)

Findings. Section 75.1403-10, to the extent here pertinent, requires that a permissible trip light or other approved device, such as reflectors, be used on the rear of coal cars pulled by locomotives. Respondent violated section 75.1403-10 because no light or reflector had been placed on the last or 17th car of a line of loaded coal cars being pulled in Respondent's mine (Tr. 14). The violation was very serious because the train of cars became stalled on the main track leading to the dumping point and the unlighted end of the train of cars was hit by another locomotive pushing an empty car (Tr. 41; 152). The impact of the collision drove the empty car back upon the operator of the locomotive. The empty car came to rest upon the locomotive operator and caused his death by suffocation (Tr. 60-61; 80-81). Respondent was grossly negligent in failing to provide a proper reflector on the end of the train of loaded coal cars (Tr. 44-45; 47).

Discussion and Conclusions. Respondent's brief (pp. 8-9) contends that MSHA failed to prove that the death of the locomotive operator was the result

of Respondent's failure to provide a reflector or other light on the end of the 17th car of coal. Respondent argues that the locomotive which was pushing the empty car was 1 inch higher than the empty car and that the operator of the locomotive would have had to have been crouched down to avoid the cold air in the track haulageway and would have had to have been unobservant to have run into the rear of a loaded coal car which was 8 feet wide and 30 inches high. It is true that no one saw the operator of the locomotive just before the collision and it is possible that he was not alert in performing his job, but the coal car was not a bright color and it is a fact that the end of the car was not equipped with a light or reflector which might have caught the locomotive operator's attention in time for him to have stopped before colliding with the end of the coal car (Tr. 117; 130; 148).

Respondent's superintendent testified that before becoming a supervisor, he had been a locomotive operator for about 20 years, and that it is the practice for motormen to crouch low in the locomotives to avoid the cold air in the haulageway and thereby get only occasional glimpses of the track in front of them (Tr. 135; 140-141; 148). It is management's obligation to train its operators to look where they are going and to provide them with such shields or goggles as may be necessary to withstand the cold air and still enable them to operate the locomotives in a safe manner. The deceased operator may well have been following the example of the superintendent and may have assumed that nothing would be on the track in front of him. Nevertheless, I must reject the defense that Respondent cannot be held to be negligent because of the claim that the deceased operator of the locomotive would have seen the unlighted stationary coal car if he had been observant.

It is true, as Respondent notes in its brief (p. 6), that one of MSHA's witnesses expressed the belief that a trip light would not have helped the deceased operator of the locomotive (Tr. 69). On the other hand, two of MSHA's witnesses believed that a trip light would have assisted in preventing the fatal accident (Tr. 117; 130). In fact, one inspector believed that the fact that there was no trip light and the fact that the deceased locomotive operator was pushing (instead of pulling) an empty car were the direct causes of the fatal accident (Tr. 131-132). Respondent can hardly expect to avoid liability for the fatal accident by claiming that it had failed to train the deceased operator of the locomotive to look where he was going and had also failed to instruct him in safe operating procedures, that is, to pull cars on the main line instead of pushing them (Tr. 132).

MSHA's brief (p. 9) recommends that a penalty of $9,000 be assessed for this violation of section 75.1403-10. I believe that a penalty of $9,000 is warranted. None of the facts associated with the fatal accident are favorable to Respondent's management. The locomotive which was stalled was not functioning properly at the time the dispatcher suggested to its operator that he take a trip of 17 loaded cars to the loading point (Tr. 94). The locomotive had just come from the repair shop and should have been returned there for further repairs (Tr. 92). The operator of the locomotive which stalled did not report to the dispatcher that the train was stopped (Tr. 97). There was speculation that the locomotive operator's failure to call the

dispatcher was related to a discharged battery, but MSHA's electrical inspector testified that locomotive phones or radios depend on the trolley wire for power rather than batteries (Tr. 96; 122). In any event, the operator of the stalled locomotive was able to talk to the dispatcher after the fatal accident occurred (Tr. 101). Thus, the events leading up to the occurrence of the fatal accident all indicate that Respondent's management had failed to train its personnel in proper safety procedures. The lack of lights or reflectors on the end of the 17th car was not the only negligent act which caused the fatal accident, but the unmarked car was certainly a contributing cause of the accident and may have been the sole reason for the deceased operator's failure to see the 17th car in time to avoid the collision which resulted in his death.

Respondent's brief (p. 6) argues that failure to have a trip light or reflector on the end of the loaded car was not a serious violation, but no safety violation can be judged in a vacuum. The failure to have a reflector on a coal car in a well-lighted place is nonserious, but when that same car is stalled in total darkness on a main track in a coal mine, where 10 tram locomotives and six supply locomotives are operated, the failure to equip the car with a reflector is a very serious violation (Tr. 149).

In assessing a penalty of $9,000, I am bearing in mind that a large operator is involved (Tr. 15-16), that there was a good faith effort to achieve rapid compliance after the violation was cited (Tr. 52), and that Respondent has violated section 75.1403-10 on only two previous occasions (Exh. M-1, p. 5). The two criteria of gravity and negligence require that a high penalty be assessed. It should be noted that Respondent repeatedly failed to provide trip lights. On October 10, 1973, an inspector issued a notice to provide safeguards requiring Respondent to install trip lights on the ends of coal cars (Exh. M-2; Tr. 22). Yet, over 3 years later, Respondent was using coal cars in its mine without equipping them with proper reflectors (Tr. 130; 133). I consider the failure to comply with section 75.1403-10 in such circumstances to be the result of gross negligence and the penalty of $9,000 recommended by MSHA will hereinafter be imposed for this violation.

Docket No. NORT 78-364-P (Camp Branch No. 1 Mine)

Notice No. 1 CAG (7-38) June 21, 1977 section 75.317 (Exhibit M-13)

Findings. Notice No. 1 CAG dated June 21, 1977, alleged that Respondent had violated 30 CFR 75.317 because (Exh. M-13):

> Five foremen entered underground with flame safety lights that had not been tested in a gas box provided for that purpose to insure that such lamps were in a permissible condition and could not ignite the outside atmosphere of such lamps. This violation occurred despite the fact that this requirement of the regulations was discussed with mine management on June 15, 1977, with the hope that this requirement would not be violated.

Section 75.317 states as follows:

> Each operator shall provide for the proper maintenance and care of the permissible flame safety lamp or any other approved device for detecting methane and oxygen deficiency by a person trained in such maintenance, and, before each shift, care shall be taken to insure that such lamp or other device is in a permissible condition.

The inspector's notice alleged that Respondent's foremen had not tested their flame safety lamps in a gas box to insure that such lamps were in a permissible condition. There is nothing in the language of section 75.317 which requires that a flame safety lamp be tested in a gas box to insure permissibility. In fact, the unrebutted testimony of Respondent's witness Strong, who has a mining engineering degree (Tr. 338), shows that once the light in a flame safety lamp has been extinguished by being placed in a box containing methane, the lamp may be rendered nonpermissible by such testing and the lamp should then be removed from the gas box and be disassembled, examined, defective parts, if any, replaced, and reassembled in order to restore the lamp's permissibility (Tr. 342). 2/

The inspector's notice citing a violation of section 75.317 is based solely on an allegation that Respondent's foremen had not checked the permissibility of their lamps by testing them in a gas box. Since the evidence shows that placing flame safety lamps in a gas box may destroy their permissibility instead of insuring permissibility, I find that use of a gas box for testing permissibility is an undesirable procedure. Therefore, the alleged violation of section 75.317 cited in Notice No. 1 CAG cannot be sustained.

Discussion and Conclusions. MSHA's brief (p. 3) argues that a violation of section 75.317 was proven because it is undisputed that all five foremen failed to check the permissibility of their lamps by placing them in the gas box. As I have already found above, failure to place a flame safety lamp in a gas box to test permissibility is not a violation of section 75.317. MSHA's brief attempts, alternatively, to prove that a violation of section 75.317 occurred by alleging that at least one of the five foremen admitted that he had not cleaned his flame safety lamp before going underground (Tr. 307).

There are several reasons for rejecting MSHA's claim that Notice No. 1 CAG should be sustained because one of the foremen admitted that he had not cleaned his flame safety lamp. First, there is nothing in the pleadings to show that Respondent was advised that the inspector was claiming that a violation had occurred because of the failure of one foreman to clean his lamp

2/ According to 30 CFR 21.6(a)(2)(ii), MSHA's laboratory personnel reexamine the interior of a lamp to redetermine its permissibility after a lighted lamp has been extinguished by having been placed in a gaseous atmosphere.

before going underground. The former Board of Mine Operations Appeals held in Old Ben Coal Co., 4 IBMA 198, 208 (1975), that MSHA must give Respondent notice of the violation which is being charged so that it can prepare a proper defense. I cannot accept MSHA's attempt to sustain a violation of section 75.317 based on an entirely different reason from the one alleged by the inspector when he wrote the notice which is the basis for the Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P.

The second reason for rejecting MSHA's claim that a violation of section 75.317 occurred because one foreman had not cleaned his lamp before going underground is that the inspector himself knew little about the condition of the flame safety lamps. The inspector first stated that he did not examine the lamps to determine whether they had been cleaned (Tr. 260). Thereafter he claimed that he could on the basis of experience and general observation attest to the fact that all five flame safety lamps were dirty (Tr. 294). Yet, one of Respondent's foremen testified that he had cleaned his lamp and had lighted it while the inspector was in the mine office (Tr. 319), so there is evidence in the record to rebut the inspector's claim that his general observation was sufficient for him to conclude that all five lamps were dirty. Additionally, one of the witnesses subpoened by MSHA's counsel testified that he was with the inspector and had observed the lamps, but that he could not say that they were either dirty or clean (Tr. 308).

That same subpoened witness introduced the only specific facts in the record about a dirty lamp by testifying that one of the foremen stated that he had not cleaned his lamp before going underground (Tr. 307). The failure of one foreman to clean his lamp falls short of proving that the lamp was nonpermissible. The foregoing conclusion is supported by the testimony of one of Respondent's foremen who said that he sometimes cleans his lamp every other shift. He testified that the lamp held enough fuel to last for two shifts and that since no one used the lamp but him, he was sure it was permissible for use on two shifts. Thus, the failure to clean a lamp immediately prior to going underground does not necessarily mean that the lamp is nonpermissible. It is true that the flame in one of the five lamps could not be ignited, but the inspector said that the failure of the lamp to ignite had nothing to do with his claim that a violation of section 75.317 had occurred (Tr. 292).

Respondent's brief (pp. 7-9) argues that Notice No. 1 CAG should be vacated because the inspector issued the notice under the unwarrantable failure provisions of section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 and Respondent claims that the inspector failed to show that the violation was unwarrantable. The former Board's holdings that the validity of a notice issued under the 1969 Act is not an issue in a civil penalty proceeding has been upheld by the Commission in MSHA v. Wolf Creek Collieries Co., Docket No. PIKE 78-70-P, 79-3-11, and in Pontiki Coal Corp. v. MSHA, Docket No. PIKE 78-420-P, 79-10-13. Therefore, it would be improper for me to address Respondent's argument that Notice No. 1 CAG was shown by the evidence in this case to have been erroneously issued under section 104(c)(1) of the 1969 Act.

As a part of my finding that section 75.317 is not violated when an operator fails to test the permissibility of a flame safety lamp by placing it in a gas box, it is desirable, however, that I discuss the ramifications which accompany an inspector's failure to understand the intended use of a gas box. The inspector placed a lot of emphasis on the fact that he had warned Respondent's management on June 15, 1977, that they were not using the gas box to test permissibility of flame safety lamps (Tr. 256). The inspector advised management on June 15 that he would make further checks to determine whether they were testing permissibility of the lamps by placing them in the gas box. On June 21, 1977, the inspector returned to the mine and wrote the notice here involved after observing five foremen go underground without having tested their lamps in a gas box (Tr. 251).

Respondent's mine superintendent testified that they did test the flame safety lamps by placing them in the gas box for a short period of time after the notice was issued, pending consideration of the matter by Respondent's safety department. The safety department subsequently advised the superindendent that testing the lamps in the gas box was not required for compliance with section 75.317 and all further testing by use of the gas box was discontinued (Tr. 347).

The inspector issued the notice here involved at 12:15 a.m. when Respondent's superintendent was at home because the superintendent works the day shift instead of the midnight-to-8 a.m. shift during which the notice was issued. Respondent's superintendent testified that if he had been at the mine, he would not have permitted the lamps to be tested on June 21 by placing them in the gas box because Respondent did not then have a tank of methane at the mine for injection of gas into the box. For that reason, the foremen on June 21, in order to satisfy the inspector's requirement that the lamps be tested by placing them in the gas box, used a tank of acetylene to test the lamps. The superintendent stated that acetylene is much more explosive than methane and that it was hazardous for the men to use acetylene for the purpose of testing permissibility by insertion of the lamps into the box (Tr. 347).

The evidence also shows that Respondent did not have the gas box at its Camp Branch No. 1 Mine for the purpose of testing permissibility of flame safety lamps. A gas box is used by the State of Virginia as part of the testing given to persons who wish to become certified mine foremen. The purpose of the gas box is to have the prospective foremen demonstrate how the flame in the lamp will react when it comes into contact with methane in the mine. A halo effect forms around the flame as a warning to a person carrying the lamp that methane is present (Tr. 310; 321). Respondent's superintendent testified that the gas box was kept at the mine in a room used by State and Federal personnel to test employees for competency in performing gas tests, rather than for the purpose of checking permissibility of flame safety lamps (Tr. 345). Therefore, the inspector misunderstood the reason that the gas box was kept at the mine and consequently incorrectly stated in his notice that Respondent failed to check permissibility of the flame safety lamps by placing them in "a gas box provided for that purpose"

(Exh. M-13). Moreover, the gas box was not kept near the mine office where the flame safety lamps were maintained, but was kept in a building which was about a half mile from the mine office (Tr. 345). That location in itself was an indication that Respondent did not keep the gas box at the mine for the purpose of testing permissibility of flame safety lamps.

A final reason for declining to uphold the inspector's citation of a violation of section 75.317 lies in the fact that the inspector admitted that not all operators have gas boxes and that permissibility can be established at mines without gas boxes simply by disassembling the lamps, inspecting them, cleaning them, replacing defective parts, if any, and reassembling them. The inspector's concession that cleaning and inspecting are sufficient to establish permissibility if an operator has no gas box, but that placing them in a gas box is required when the operator has a gas box, would produce a disparity in the degree of permissibility and safety of flame safety lamps, depending on which operators have gas boxes at their mines (Tr. 292-293). Fortunately, the evidence in this proceeding shows that gas boxes should not be used at all to test permissibility, so permissibility of flame safety lamps at all mines is assured by careful cleaning and examining of the lamps before they are taken underground. Specifically, permissibility may be insured as required by section 75.317 by (1) opening the lamps with a special magnet, (2) checking and cleaning the leather gasket, gauze ring, asbestos rings, pyrex globe, gauzes, nuts, boot, and bonnet, and (3) replacing any of the aforementioned parts, prior to reassembly, which show any sign of defectiveness (Tr. 339-342).

The testimony of John W. Crawford, who was Respondent's director of health and safety at the time the hearing was held, and who had formerly been the district manager of MSHA's Norton Office and assistant administrator of the Mining Enforcement and Safety Administration, was also significant. He stated that it is not Pittston Company's policy to use a gas box to test for permissibility because that kind of test is not required by section 75.317, that it was not the practice of the inspectors, when he was district manager, for them to use a gas box to test permissibility of their flame safety lamps, and that the gas box was supposed to be used to tune one's eye to the appearance of the flame when it was subjected to a gaseous atmosphere (Tr. 325-329).

For the foregoing reasons, I find that the violation of section 75.317 alleged in Notice No. 1 CAG dated June 21, 1977, was not proven. Therefore, MSHA's Petition for Assessment of Civil Penalty in Docket No. NORT 78-364-P will hereinafter be dismissed because the sole civil penalty sought to be assessed in that docket was the violation of section 75.317 alleged in Notice No. 1 CAG issued June 21, 1977.

Docket No. NORT 78-365-P (Camp Branch No. 1 Mine)

Order No. 2 CAG (7-15) January 31, 1977 section 75.400 (Exhibit M-15)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible

materials, shall be cleaned up and not be permitted to accumulate in active workings. Respondent violated section 75.400 because float coal dust and loose coal had been permitted to accumulate in two areas of Respondent's mine. One location was inby the 8 Left Mains tailpiece for a distance of 500 feet. The second location was inby Survey Station No. 3006 in the No. 3 entry of the 3 Right off 8 Mains and in the Nos. 1 and 2 entries of 2 Right off 8 Mains. In both the 3 Right and 2 Right sections, the accumulations existed at crosscuts for a distance of 1,100 feet. The accumulations ranged in depth from 1/4 inch to 20 inches (Tr. 355-356). The accumulations constituted a serious violation because the float coal dust could have propagated an explosion if one had occurred.

A trolley wire constituted a potential ignition source in the first area of accumulations in the 8 Left Mains and at least one high-voltage disconnect switch was a possible ignition source in the second area of accumulations in 2 Right and 3 Right Sections. The ignition sources would have posed a threat of an explosion if methane in an explosive quantity had accumulated in the vicinity of the trolley wire or disconnect switch (Tr. 371). Float coal dust, if thrown into suspension, may explode in the presence of a spark.

At the time the order was written, the areas where the accumulations were observed were traveled mostly for inspections and served as a transfer point for coal produced from other parts of the mine, but the accumulations had originally occurred during active mining operations and had remained a potential explosive threat for a period of several months. The violation was the result of gross negligence because the coal accumulations were being deliberately left in the areas cited in Order No. 2 CAG because Respondent's continuous-mining equipment then being used was unable to extend far enough to extract coal from crosscuts and clean up the residual coal left at such break-through points (Tr. 364-365; 432). Moreover, one of the reasons that the accumulations were not cleaned up was that Respondent was unable to get its roof-bolting equipment into the areas where the accumulations existed for the purpose of installing roof bolts. For the foregoing reason, it would have been hazardous for Respondent to have cleaned up the accumulations because such clean-up would have required that miners work under unsupported roof (Tr. 369).

Discussion and Conclusions. Respondent's brief filed in Docket No. NORT 78-365-P recommends for my consideration a large number of findings of fact, but does not contain a discussion of the six criteria or make any recommendations as to whether a penalty should or should not be assessed. Petitioner's brief contends that a maximum penalty of $10,000 should be assessed because the coal accumulations had been in existence for a long period of time and were associated with Respondent's failure to comply with the provisions of its roof-control plan (Br., p. 5).

There is some merit in Petitioner's argument that a maximum penalty should be assessed for this violation of section 75.400. Even the two witnesses presented by Respondent corroborated the inspector's statement that accumulations existed (Tr. 413; 430-432). Still, it is a fact that the

inspector was unable to show that the ignition sources were located within the actual area of the accumulations. Therefore, the inspector felt that the likelihood of an explosion depended on the presence in the vicinity of the trolley wire or disconnect switch of an explosive quantity of methane. Respondent's Camp Branch No. 1 Mine has historically liberated such a small amount of methane, that it has not been detected with a hand-held methanometer, but from .01 to .03 of 1 percent of methane has been detected through analyses of bottle samples (Tr. 376). Nevertheless, all mines are classified as gassy under the Act and a mine which liberates any methane could have a concentration large enough to cause an explosion which, in turn, could be propagated by the existence of float coal dust in quantities such as were described in the inspector's order (Tr. 378). As the Commission pointed out in its decision in MSHA v. Old Ben Coal Co., 79-12-4, one of the primary purposes of the Act is to prevent death and injury from fire and explosions. In that case, the Commission also held that the mere existence of combustible materials constitutes a violation of section 75.400. Consequently, the inspector no longer has to satisfy the prerequisites set forth by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), in order to prove that a violation of section 75.400 occurred.

Despite the foregoing considerations, the inspector appeared to have considerable difficulty in supporting his belief that the accumulations were very hazardous in this instance because he was faced with the remoteness of the ignition sources to the accumulations and with the fact that he had observed no defects in the physical condition of those potential ignition sources (Tr. 362; 381-382). A countervailing consideration is the fact that one of Respondent's witnesses agreed with the inspector that the disconnect switch was supposed to be in a neutral split of air, but through a mistake in the way the ventilation curtains had been installed, the disconnect switch was in return air (Tr. 383; 440). Therefore, the area was more susceptible to a possible methane accumulation than it would have been if the area had been properly ventilated. When all aspects of the accumulations are evaluated, the only conclusion which one can reach is that the accumulations constituted a serious threat to the miners' safety.

A consideration of Respondent's negligence shows that Respondent deliberately failed to clean up the accumulations because the mining equipment it was then using would extend only 200 feet and that was not a sufficient distance to permit the crosscuts to be completed without leaving accumulations of loose coal at such break-through points (Tr. 442-443; 451). A mitigating factor about the equipment is that Respondent recognized the equipment's hazardous limitations and has now ceased to use that type of equipment in its mine in order to avoid occurrence of the kinds of accumulations which were cited in the inspector's order (Tr. 460). As Petitioner notes in its brief, Respondent's failure to support the roof in the area of the accumulations was another aspect of the coal accumulations which augumented both the seriousness and negligence associated with occurrence of the coal accumulations.

The extent of the accumulations is emphasized by the fact that three consecutive shifts of miners worked around the clock for 3 days in applying

enough rock dust in the areas cited in the inspector's order to render the accumulations sufficiently inert to eliminate their threat to the miners' safety (Tr. 455-456).

In view of the fact that the accumulations were extensive and were the result of a deliberate pattern of mining which necessarily resulted in such accumulations, a penalty of $8,000 is warranted and will hereinafter be imposed. The penalty of $8,000 also takes into consideration that Respondent is a large operator and that Respondent's Camp Branch No. 1 Mine has an unfavorable history of previous violations because Exhibit No. M-12 shows that 41 previous violations of section 75.400 have occurred at the Camp Branch No. 1 Mine. Since 10 of those 41 violations occurred in 1976, there is no mitigating downward trend in Respondent's proclivity for violating section 75.400. Therefore, assessment of a large penalty of $8,000 seems to be necessary in this instance to achieve the deterrent effect which imposition of civil penalties was intended to accomplish.

Docket No. NORT 78-367-P (Chaney Creek No. 2 Mine)

Notice No. 1 KCK (7-95) November 17, 1977 section 75.501-2(2) (Exhibit M-24)

Findings. Section 75.501-2(2) provides in pertinent part that all hand-held drills taken into or used inby the last open crosscut shall be permissible. Respondent violated section 75.501-2(2) because its electricians were using a 3/8-horsepower, hand-held nonpermissible drill inby the last open crosscut to drill holes in headless bolts to facilitate their removal by means of a screw extractor or "easy out". The violation was moderately serious because methane emissions of up to .06 of 1 percent have been detected in Respondent's Chaney Creek No. 2 Mine, but methane checks were being made at the time the violation was cited and power for the hand-held drill was being obtained from the continuous-mining machine which would have deenergized the power for the electric drill if as much as 2 percent of methane had accumulated in the atmosphere where the drilling was being done. Respondent was grossly negligent for using the hand-held drill because the electricians knew that it was a nonpermissible drill and were obligated to evaluate the conditions under which they were deliberately using a drill which emitted sparks when it was running (Tr. 478; 486; 491; 508; 515).

Discussion and Conclusions. Respondent's brief raises two primary defenses with respect to MSHA's claim that a violation of section 75.501-2(2) occurred. Respondent's first defense (Br., pp. 5-6) is based on the preliminary observation that using a nonpermissible drill is less dangerous than using a cutting torch or welding equipment under ground. Respondent's argument continues by pointing out that section 75.1106 would have permitted Respondent to use a welding machine for removal of the headless bolts, whereas section 75.501-2(2) entirely prohibits the removal of the bolts by a less dangerous means, namely, use of a nonpermissible hand-held drill. The mere fact that the regulations permit cutting and welding to be done under certain controlled conditions does not remove the danger associated with use of nonpermissible equipment. As the inspector noted, it is always possible

for methane to accumulate in an explosive quantity despite the fact that only .06 of 1 percent of methane was detected by the inspector at the time he wrote Notice No. 1 KCK (Tr. 480; 486; 491).

Respondent had an option of using a welding machine to remove the bolts, but if Respondent had done so, it would have been obligated to follow the precise provisions of section 75.1106 which require that a check for methane be maintained on a continuous basis. Such welding or cutting is entirely prohibited if as much as 1 percent of methane is encountered and Respondent must have present at the welding or cutting site a suitable supply of rock dust or fire extinguishers. Respondent's witnesses conceded that they were not continuously testing for methane with a hand-held methane detector and, while Respondent did have fire-suppression equipment on the continuous-mining machine and a water hose, Respondent did not have rock dust or fire extinguishers as required by section 75.1106 (Tr. 504; 509). Therefore, Respondent was not taking precautions equivalent to those required by section 75.1106 when welding or cutting is being done. Since Respondent had not taken the same precautions which are required by section 75.1106 when welding or cutting is being done, Respondent cannot expect its use of the nonpermissible drill in violation of section 75.501-2(2) to be condoned.

Respondent's second defense (Br., pp. 7-9) is that the inspector's notice was improperly issued under the unwarrantable failure provisions of section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. The Commission has already held in MSHA v. Wolk Creek Collieries Co., 79-3-11, and in Pontiki Coal Corp. v. MSHA, 79-10-13, that the validity of notices and orders issued under the 1969 Act are not at issue in civil-penalty proceedings. Nevertheless, since Respondent's contentions are based essentially on arguments pertaining to the criteria of negligence and gravity, which must be considered in civil-penalty proceedings, I shall discuss its arguments with respect to those two criteria.

Respondent argues in its brief (pp. 8-9) that the violation was not serious because Respondent's electricians were making methane tests every 15 minutes and that the Chaney Creek No. 2 Mine does not have a history of emitting enough methane to make the likelihood of an explosion more than a mere possibility. As MSHA notes in its brief (p. 9), it is necessary to consider the potential danger associated with a given violation because the purpose of the regulations is to require that miners be protected from possible explosions as well as those which are indisputably likely to occur. An inspector does not have to find the existence of an imminent danger in order to conclude that the use of a nonpermissible drill inby the last open crosscut is a potentially dangerous violation (Tr. 483; 486).

Respondent's brief (p. 8) also argues that there was a very low degree of negligence, if any, associated with the violation. The testimony shows that Respondent's electricians were grossly negligent in using the nonpermissible drill inby the last open crosscut. While it is true that the chief electrician said that he was unaware that the continuous-mining machine was inby the last open crosscut and that he would not have used the nonpermissible drill if he had known that the continuous-mining machine was inby the

last open crosscut (Tr. 514-515), the fact remains that the chief electrician knew that the drill was nonpermissible. He either knew or was obligated to know whether the machine was inby the last open crosscut. The chief electrician had been working in coal mines for over 30 years and can hardly be found to have been nonnegligent in failing to realize that he was using a nonpermissible drill inby the last open crosscut.

The chief electrician's use of the nonpermissible drill was also associated with his having removed the cover on the control compartment of the continuous-mining machine for the purpose of obtaining electrical current to power the nonpermissible drill (Tr. 514; 517). He stated that he was making checks for methane every 15 minutes for the reason that he had removed the panel cover rather than for the reason that he was using a nonpermissible drill (Tr. 514). Respondent's safety director was hard pressed to support the chief electrician's removal of the panel cover. The most the safety director could say in justification of the opening of the control compartment was that such acts are permitted if the purpose of opening the compartment is to determine the reason for a malfunction of the continuous-mining machine. There was no need to open the control compartment for the purpose of trouble shooting because the electricians working on the mining machine knew what was wrong with the machine, namely, that sheared bolts in the tracks prevented the machine from being trammed from one location to another (Tr. 499-500).

MSHA's brief (p. 3) argues that the inspector's testimony to the effect that a trailing cable was being used to power the hand-held drill is more credible than that of the electrician's testimony to the effect that the drill was being powered from an outlet located in the control compartment beneath the panel cover which had been removed. I have found the chief electrician's testimony to be more credible than the inspector's for several reasons. First, in stating that he had removed the cover to the control compartment (Tr. 514), the chief electrician was admitting that he had done an unsafe act. It is unlikely that he would have fabricated a statement that made him look even more negligent than he would otherwise have appeared. Second, the electricians were very anxious to restore the continuous-mining machine to an operating condition. Use of power from the mining machine would have been an easy way to obtain power for the drill without the electricians' having to find a trailing cable and connect it to the main power source in the mine. Third, at the time the inspector left the scene of the violation, the drill was still hooked to a power source, but the drill had been removed from the vicinity of the mining machine by the time the inspector returned (Tr. 488). The inspector, therefore, was not present when the drill was disconnected from its power source. The chief electrician was certainly in a position to know what the drill's source of power really was. Therefore, I find that the source of the drill's power was the control compartment on the continuous-mining machine. Of course, the removal of the cover from the control compartment increased the number of potential arcing electrical components which could have caused a fire or explosion if a dangerous accumulation of methane had occurred.

MSHA's recommendation that a penalty of $10,000 be assessed for this violation of section 75.501-2(2) fails to recognize many of the extenuating

circumstances surrounding the violation. First, the continuous-mining machine weighed 40 tons and the inspector incorrectly stated that a shuttle car could have been used to pull the machine a distance of 25 to 30 feet so as to permit the work to be done outby the last open crosscut (Tr. 492; 505-506). Second, the operator did not have the kind of hoist which would have been required to move the machine to a point outby the last open crosscut. Third, a period of about 3 days, or nine shifts, would have been required to bring in another continuous-mining machine having sufficient power to pull the inoperable machine to a point outby the last open crosscut. Third, the inspector removed himself physically from the site of the repair operations with the result that the electricians had time during the inspector's absence within which to continue using the nonpermissible drill for the purpose of completing the removal of the headless bolts (Tr. 509-510; 516). Fourth, if the inspector considered the use of the nonpermissible drill to be a very serious violation, he should have required that the drill be immediately removed from the site of the continuous-mining machine instead of merely advising the electricians that he would not issue a notice of violation at that time and would return later for that purpose (Tr. 509-510). Fifth, the electricians were making a methane test every 15 minutes and the drill would have been deenergized by the continuous-mining machine's methane monitor if the concentration of methane in the atmosphere had reached as much as 2 percent. MSHA's brief (p. 6) argues that the methane tests required by section 75.1106 must continously be made by means of a hand-held methane detector and that a methane monitor cannot be substituted for a hand-held device. That may be true if we were determining whether a violation of section 75.1106 had occurred, but we are not here confronted with an actual violation of section 75.1106, and MSHA introduced no evidence to controvert the chief electrician's statement that the methane monitor on the continuous-mining machine was working. Therefore, the monitior would have deenergized the drill if methane in a concentration of 2 percent had occurred. For the foregoing reasons, I find that the violation was not of such a serious nature as to warrant assessment of a maximum penalty of $10,000.

MSHA's brief (p. 8) does correctly argue that Respondent's deliberate use of the nonpermissible drill was equivalent to gross negligence. Consequently, in assessing a penalty, most of the weight in determining the penalty must be assigned under the criterion of negligence and the criterion of the size of Respondent's business. Respondent has not previously been cited for a violation of section 75.501-2(2) (Tr. 477). Therefore, it is unnecessary to consider the criterion of Respondent's history of previous violations. There was a good faith effort to achieve rapid compliance (Tr. 488). Since Respondent operates a very large coal business and inasmuch as its electricians were grossly negligent in using a nonpermissible drill inby the last open crosscut, a penalty of $2,000 will hereinafter be assessed for this violation of section 75.501-2(2).

Docket No. NORT 78-369-P (Open Fork No. 2 Mine)

Notice No. 2 KFO (7-115) October 18, 1977 section 75.400 (Exhibit M-31)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible

materials, shall be cleaned up and not be permitted to accumulate in active workings. Respondent violated section 75.400 because loose coal had been permitted to accumulate in active workings for a depth of 2 to 4 inches in the No. 3 entry for a distance of 175 feet inby the loading point and for a depth of from 2 to 24 inches in an adjacent crosscut for an additional distance of 60 feet, or for a total distance of 235 feet (Tr. 526-527). The deepest coal accumulation in the crosscut had fallen from the feeder prior to the time that the belt line had been moved (Tr. 528; 568). The loose coal accumulations in the No. 3 entry resulted from overfilling of the shuttle cars so that the coal was dragged off the top of the shuttle cars as they passed through the entry on their way to the dumping point (Tr. 562; 570). The violation was moderately serious because the only ignition sources in the vicinity of the accumulations were the trailing cables and electrical components of the shuttle cars. The danger of a fire or explosion was reduced because no methane was detected and the inspector observed no defects in the shuttle cars' trailing cables (Tr. 547-548). While the inspector found a permissibility violation in one of the shuttle cars, he did not know if that particular shuttle car had passed through the loose coal accumulations (Tr. 548). Respondent was grossly negligent in permitting the accumulations to exist because Respondent's employees had to stand in the deepest of the accumulations at the time they moved the conveyor belt and the accumulations should have been cleaned up at that time (Tr. 532).

Discussion and Conclusions. Respondent failed to file a posthearing brief with respect to the issues raised by MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-369-P. MSHA's brief is primarily devoted to demonstrating that MSHA's presentation in Docket No. NORT 78-369-P was sufficient to satisfy the evidentiary steps for proving the existence of a violation of section 75.400 as those steps were established by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977). While it appears that MSHA did prove that a violation occurred even if the requirements of the Board's Old Ben case were still in effect, the Commission held in MSHA v. Old Ben Coal Co., 79-12-4, that MSHA does not have to satisfy the criteria established by the Board in its Old Ben opinion. The Commission held in its Old Ben decision that the mere existence of combustible materials is sufficient to show that a violation of section 75.400 has occurred.

Respondent's section foreman agreed that the inspector had correctly described some loose coal accumulations which existed in the No. 3 entry and adjacent crosscut (Tr. 564). Respondent's section foreman agreed that the accumulations had been caused by loose coal accumulating at the belt feeder before it was moved and by loose coal having been dragged off shuttle cars on which coal had been piled too high to pass under the low roof which existed inby the loading point (Tr. 569-570). The section foreman stated that he had observed the loose coal accumulations before the inspector arrived on the section and that he would have had them cleaned up by the continuous-mining machine when it completed cutting through the pillar from which it was extracting coal at the time the inspector arrived to examine conditions in the section (Tr. 564). The section foreman said that he would have had the loose coal cleaned up within a period of from 30 minutes to an

hour (Tr. 566). The section foreman said that he did not stop the continuous-mining machine and clean up the loose coal immediately after he observed the loose coal accumulations because they were engaged in retreat mining and he believed that interrupting the cutting process in a given pillar of coal during retreat mining subjected the miners to greater danger than allowing the loose coal accumulations to exist for a period of from 1 to 2 hours (Tr. 566-567).

Since Respondent's section foreman testified after the inspector had finished his testimony, there is nothing in the record to controvert the validity of the reason given by the section foreman for not having cleaned up the loose coal prior to the time that it was observed by the section foreman. On the other hand, it would appear that the section foreman could have examined his section for the existence of loose coal accumulations prior to commencement of mining operations. If he had done so, it appears that he could have used the mining machine to clean up the loose coal prior to initiation of cutting operations in a pillar of coal. The section foreman who testified at the hearing was the one who was present at the time the inspector's notice of violation was written. That section foreman had been on leave for the 2 days preceding the writing of the notice and it was during his absence from the mine that the belt conveyor had been moved. He was, therefore, not present at the time the loose coal accumulations were left after the belt was moved. He was, nevertheless, grossly negligent in failing to clean up the loose coal accumulations prior to the commencement of mining operations. The section foreman should have been notified by entries in the preshift book that the loose coal accumulations existed. If the preshift book did not record the existence of the accumulations, then Respondent's section foreman and preshift examiner on the previous shifts were grossly negligent for either not having cleaned up the accumulations or for not having made an entry about the accumulations in the preshift book.

MSHA's brief (p. 10) recommends that a penalty of $2,000 be assessed for this violation of section 75.400. That appears to be a reasonable penalty when all of the criteria are considered. Although there were potential ignition hazards in the form of trailing cables to the shuttle cars, the actual danger of an explosion or fire was somewhat remote (Tr. 554). The inspector did not detect any trace of methane in the mine at the time he wrote the notice of violation (Tr. 547). The most methane the inspector had ever detected in the mine on any prior inspections was .2 of 1 percent and a bottle sample taken by the inspector revealed only .05 of 1 percent of methane (Tr. 547; 549). Consequently, the inspector himself said that an explosion was not likely to result from existence of the accumulations (Tr. 554).

As I have indicated above, the primary criterion which requires the assessment of a rather large penalty in this instance is that Respondent's supervisory personnel had known of the existence of the loose coal accumulations for a considerable time and had failed to clean them up. Considering that a large operator is involved, that there was a good faith effort to achieve rapid compliance (Tr. 545), that the violation was moderately

serious, and that Respondent was grossly negligent, a penalty of $1,500 should be assessed. Exhibit M-30 shows that Respondent has paid penalties for 52 prior violations of section 75.400 in its Open Fork No. 2 Mine. Two of the violations occurred in 1971, 12 in 1972, 5 in 1973, 9 in 1974, 3 in 1975, 9 in 1976, and 12 in 1977. I find that the foreging statistics indicate that Respondent's Open Fork No. 2 Mine has a very unfavorable trend in its history of previous violations. The history is especially adverse in that Respondent had violated section 75.400 on 12 occasions during the 9-1/2 months of 1977 preceding the writing of the instant violation on October 17, 1977. In such circumstances, the penalty of $1,500 should be increased by $500 to $2,000 under the criterion of history of previous violations.

Summary of Assessments and Conclusions of Law

(1) The motions for approval of settlement made with respect to MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. NORT 78-366-P and NORT 78-368-P should be granted and the settlements should be approved for the reasons given in the firt part of this decision.

(2) Pursuant to the settlement agreements, Respondent should be ordered to pay civil penalties totaling $5,750.00 which are allocated to the respective alleged violations as follows:

Docket No. NORT 78-366-P

Order No. 1 CAG (7-46) 9/6/77 § 75.400	$ 2,000.00
Order No. 2 CAG (7-47) 9/19/77 § 75.301-4	2,500.00
Total Settlement Penalties in Docket No. NORT 78-366-P	$ 4,500.00

Docket No. NORT 78-368-P

Notice No. 1 VH (7-28) 8/1/77 § 75.200	$ 1,250.00
Total Settlement Penalties in Docket No. NORT 78-368-P	$ 1,250.00
Total Settlement Penalties in This Proceeding	$ 5,750.00

(3) On the basis of all the evidence of record and the foregoing findings of fact, Respondent should be assessed the following civil penalties:

Docket No. NORT 78-325-P

Notice No. 1 WJT (6-85) 12/21/76 § 75.1403-10	$ 9,000.00
Total Civil Penalties in Docket No. NORT 78-325-P	$ 9,000.00

Docket No. NORT 78-365-P

Order No. 2 CAG (7-15) 1/31/77 § 75.400	$ 8,000.00
Total Civil Penalties in Docket No. NORT 78-365-P	$ 8,000.00

Docket No. NORT 78-367-P

Notice No. 1 KCK (7-95) 11/17/77 § 75.501-2(2)	$ 2,000.00
Total Civil Penalties in Docket No. NORT 78-367-P	$ 2,000.00

Docket No. NORT 78-369-P

Notice No. 2 KFO (7-115) 10/18/77 § 75.400	$ 2,000.00
Total Civil Penalties in Docket No. NORT 78-369-P	$ 2,000.00
Total Civil Penalties in Contested Cases in This Proceeding	$21,000.00

(4) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P should be dismissed for failure to prove that the violation of section 75.317 alleged in Notice No. 1 CAG (7-38) dated June 21, 1977, occurred.

(5) Respondent, as the operator of the coal mines listed in the caption of this decision, is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) The motions for approval of settlement described in paragraph (1) above are granted and the settlement agreements are approved.

(B) Respondent, within 30 days from the date of this decision, shall pay civil penatlies totaling $26,750.00 of which $5,750.00 are assessed pursuant to the parties' settlement agreements described in paragraph (2) above and $21,000.00 are assessed pursuant to my decision on the contested issues as summarized in paragraph (3) above.

(C) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P is dismissed for the reason given in paragraph (4) above.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Gary W. Callahan, Esq., Attorney for Clinchfield Coal Company, Lebanon, VA 24266 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 15 1980

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 79-304 AC No. 46-01417-03014V
v.	:	No. 14, No. 3 Seam Portal
UNITED STATES STEEL CORP., GARY DISTRICT, Respondent	:	

DECISION GRANTING MOTION TO DISMISS

On November 22, 1978, Petitioner issued Order No. 253998 to Respondent, under section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq., citing a violation of 30 CFR 75.200, a mandatory safety standard. Respondent filed an application for review of the order. A hearing on the merits was held and on September 19, 1979, a decision was issued by Judge Stewart in United States Steel Corporation, Docket No. HOPE 79-152 (September 19, 1979). In vacating the order of withdrawal, he found that "Applicant did not violate its roof control plan or section 75.200 as alleged in Order No. 253998."

On September 4, 1979, Petitioner filed a petition for assessment of civil penalties for the roof control violation as alleged in Order No. 253998. Respondent filed an answer denying the violation and moved to dismiss the petition based on the decision of Judge Stewart in HOPE 79-152.

I find that Judge Stewart's decision in HOPE 79-152 is res adjudicata as to the issue of a violation in this proceeding.

WHEREFORE IT IS ORDERED that the Respondent's motion to dismiss is GRANTED and the petition for assessment of civil penalties is DISMISSED.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

Louise Q. Symons, Esq., 600 Grant St., Rm. 6044, Pittsburgh, PA 15230

Sidney Salkin, Esq., Office of the Solicitor, US Department of Labor, Rm. 14480 Gateway Building, 3535 Market St., Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 15 1980

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 79-36-M
v.		AC No. 36-00238-05008F
	:	
MARBLEHEAD LIME COMPANY Respondent	:	Pleasant Gap Mill

DECISION AND ORDER APPROVING SETTLEMENT

On December 26, 1979, the Solicitor filed a motion for decision and order approving settlement of this case. This case involves one charge of violation of safety and health standards initially assessed by MSHA for $7000.00. The parties requested approval of a settlement as follows:

Citation No. 303938 alleged a violation of 30 CFR 57.14-20 (failure to block machinery against motion while performing repairs or maintenance). The parties moved for approval of a settlement in the amount of $3600.00 whereas the initial assessment was for $7000.00. In support of the motion it is stated that "The operator's negligence was over assessed." Although this citation resulted from a fatal accident where a repairman mechanic was crushed against a work bench by a front end loader, the operator "believed that motion was necessary to make adjustments during the installation of axles" and "This procedure was also used at the repair facilities of several other area companies."

Having duly considered the matter, I conclude that the recommended settlement is consistent with the purposes and policy of the Act. The recommended settlement is, therefore, approved.

Accordingly, it is ORDERED that the motion for decision and order approving settlement is GRANTED. It is FURTHER ORDERED that the operator pay $3600.00 and that subject to such payment the petition be DISMISSED.

James A. Laurenson, Judge

Distribution Certified Mail:

James H. Swain, Esq., US Department of Labor, Office of the Solicitor, Rm 14480 Gateway Bldg., 3535 Market St., Philadelphia, PA 19104

Harry M. Coven, Esq., 300 West Washington St., Suite 1500, Chicago, IL 60606

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 22 1980

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. MORG 79-109
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 814153 Dated: February 26, 1979 Four States No. 20 Mine
UNITED MINE WORKERS OF AMERCIA (UMWA), Respondent	:	

DECISION

Appearances: Karl T. Skrypak, Esq., Pittsburgh, Pennsylvania, for the applicant;
Leo J. McGinn, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for respondent MSHA;
Joyce A. Hanula, Legal Assistant, Washington, D.C., for respondent UMWA.

Before: Judge Koutras

Statement of the Proceeding

This is an action filed by the applicant on March 8, 1979, pursuant to section 107(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e)(1), seeking review of an imminent danger closure order issued by MSHA inspectors Raymond L. Ash and Frank D. Bowers on February 26, 1979, pursuant to section 107(a) of the Act. Withdrawal Order No. 814153, described the following condition or practice which the inspectors believed constituted an imminent danger warranting closure of the entire mine and the withdrawal of miners:

> An order of withdrawal is issued to withdraw all miners from the inside of the Consol No. 20 mine and miners on the surface at the Four States Preparation Plant to insure their safety due to the danger of the fresh water dam giving way. The fresh water dam is used for the Four States Community

water. Water is being discharged from the dam with 2 Ford tractors, discharging into (2) 10" inch lines, approximately 1000 gallons per minute, approximately half-way over the embankment and the water pressure from these 10" lines are eating away at the embankment and toe of the dam to a depth of approximately 6 to 7 feet. This order is issued through no fault of the company. Also, other signs of instability exists along the face and toe of this, such as piping and etc.

In its review petition, applicant asserted that the order was improperly and unlawfully issued because:

1. The description of the conditions and practices in the order is inaccurate, no violation of section 3(j) of the 1977 Act occurred as alleged, and that there did not exist in the Four States No. 20 Mine at the time in question any conditions or practices constituting an "imminent danger" within the meaning of section 107(a) of the Act.

2. The order is invalid since the Mine Safety and Health Administration (MSHA) did not have the authority, capacity, power or right to act in the subject situation. MSHA lacked jurisdiction in the matter since the dam was not owned, operated or controlled by the applicant, and it was not used in, to be used in or resulting from the coal mining operations at the Four States No. 20 Mine. An engineering study relating the volume of water in the dam to the elevation of the mine shaft indicates that it would have been physically impossible (in the event of a dam failure) for the resulting water flow to reach the site of the mine shaft.

3. The order falsely implies that the breastwork of the dam was purely earthen when same was in fact concrete and steel at the face banked with earth and covered with trees and vegetation. Therefore, "no danger" existed and the likelihood of the dam breaking was certainly not "imminent."

Respondents filed timely answers to the review petition and asserted that the imminent danger order was properly issued and should be affirmed. A hearing was held in Morgantown, West Virginia, on July 31 and August 1, 1979, and the parties appeared and participated fully therein. Posthearing proposed findings, conclusions, and supporting briefs have been filed by all parties and the arguments presented have been carefully and fully considered by me in this course of this decision.

Applicable Statutory Provisions

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

2. Section 107(a) of the Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized

representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

3. Section 3(j) of the Act (30 U.S.C. § 802(j)) provides that the term "imminent danger" means: "[T]he existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated; * * *."

Issues

1. Whether the conditions cited and described by the inspectors presented an imminent danger warranting the issuance of a closure order pursuant to section 107 of the Act.

2. Whether MSHA exceeded its jurisdiction by issuing an imminent danger closure order and requiring the withdrawal of miners based on an asserted imminent danger which purportedly did not exist in the mine or on mine property.

3. Additional issues raised by the parties are identified and discussed in the course of this decision.

Background of the Controversy

Aside from the question of jurisdiction and whether an imminent danger did in fact exist, the essential facts surrounding the issuance of the imminent danger order in question do not appear to be in dispute. The events leading up to the issuance of the order began on the evening of February 26, 1979, when MSHA's subdistrict office received a telephone call through MSHA's chain of command concerning a "hotline" telephone call received by MSHA's Arlington, Virginia, headquarters reporting that someone was discharging water from a dam in the municipality of Four States, West Virginia. The dam in question is known as the Four States Dam, and it is owned and operated by the Four States Public Service District and is used as a water supply for the residents of the community of Four States. The dam is not owned or controlled by the applicant and it is not located on mine property. It was originally constructed in the early 1900's and is located in a remote rural area, approximately 1,600 feet from the mine property beginning at a parking lot, and approximately one-half mile northeast of the town of

Four States on an unnamed tributary of Tevebaugh Creek of the West Fork River of the Monongahela River. The physical characteristics and type of construction for the dam are detailed in a study compiled in February 1979, by the West Virginia Department of Natural Resources under guidelines provided by the United States Corps of Engineers pursuant to the National Dam Inspection Act, P.L. 92-367, August 2, 1972. A copy of the study is a part of the record and was supplied to all of the parties and to me for the purpose of familiarizing the parties with the physical characteristics and problems concerning the dam as perceived by those entities who compiled the report and for the purpose of posthearing arguments (Tr. 259-260). Since the report was mentioned and referred to on several occasions during the course of the hearing, it was received by me over objections by applicant's counsel as to its probative value.

In general, the dam in question is approximately 29 feet high and 255 feet wide, and it consists of an arched concrete, brick, and concrete block cantilever retaining wall with an earthen embankment consisting of trees, soil, and extensive and dense vegetation and brush. The embankment was described as a slope varying from 25 to 35 degrees to the downstream side, and the surface water area was described as encompassing some 3.7 acres and extending some 800 feet. At normal height, the volume of water impounded by the structure was described as approximately 45-acre feet, although the actual volume of water retained by the dam has apparently never been precisely computed. In addition to the Corps of Engineers study, the record compiled in this proceeding includes maps, surveys, descriptions, sketches and pictorial slides which detail the physical exterior and engineering construction specifications for the dam. In addition, for the purpose of familiarizing me and the parties with the general topography and geography of the dam and surrounding terrain, including its proximity to the mine which is located downstream, a visit was made to the dam site and the mine at the conclusion of the hearing and those in attendance included counsel for all parties as well as MSHA's inspectors and others who testified at the hearing.

Upon arriving at the dam site at approximately 7:30 p.m., on February 26, 1979, a dark, cold, and snowy evening, MSHA inspectors Ash and Bowers observed two tractors parked at the side of the dam pumphouse. The tractors were supplying power to two pumps which were pumping water from the dam through two 10-inch lines. One line was extended part way down the earthen side of the dam structure, and the second line was located below the first one, and both lines were discharging water from the dam down the earthern embankment. No one was tending the pumps and no one was in the area. The inspectors observed and believed that the water being pumped from the dam resulted in the washing away of a large gulley or culvert, and the depth of the this wash-out was approximately in excess of some 5 feet. After this initial observation, the inspectors traversed across the dam and observed what was described as fresh water coming out of the ground in several locations on the earthern side of the structure, and moving water which was swirling about in different directions at the bottom or toe of the earthern side of the dam. They believed that these conditions had resulted

from water seepage from the inside or water impoundment side of the dam through the concrete structure. They estimated the water level in the dam at that time as approximately 2 or 3 feet below the top of the dam. They then proceeded back to the gulley area created by the pumping water and at that time estimated it to be some 7 to 8 feet in depth and much longer than initially observed. At that point in time, they decided that the continuing erosion of the portion of the earthern structure where the water was being pumped created a potential for collapse of the dam, thereby creating an imminent danger to the miners working at the mine located downstream at the mouth of a hollow extending from the dam to the mine property. The inspectors then drove to the mine and advised the mine superintendent by telephone that a section 107(a) closure order would be issued until such time as the pumping of the water from the dam was stopped or the lines extended at the face of the dam, and the written order was issued at 8:30 p.m. A prior incident involving the dam occurred in December 1978, when state and local authorities, concerned about the possible collapse of the dam after a heavy rainfall, ordered the evacuation of the inhabitants downstream, including miners from the Four States No. 20 Mine.

After the closure order was issued and the miners withdrawn, the inspectors returned to the dam to await the arrival of an MSHA engineer. The only person in the area at this time was a civil defense representative who was apparently in charge of the pumping of the water from the dam, and it was later determined that the pumping was done at the recommendation of the Corps of Engineers in order to prevent the water from reaching the spillway level of the dam. Upon arrival of the engineer, he and the inspectors again inspected the dam, and the engineer concurred in the inspectors' assessment that the pumping of the water from the dam onto the earthern face of the structure had caused the erosion creating the gulley, and coupled with leakage from the structure, could lead to a collapse of the dam if the pumping were to continue unabated.

After the cessation of the pumping of the water, the order of withdrawal was terminated at 11:45 a.m., on February 27, 1979, and the termination order states as follows: "Pumping of water on the earthern breastwork of the Four States water dam has been discontinued, therefore, there is no longer erosion of the breastwork and it is now in a more stable condition."

Following the termination of the order, MSHA engineers engaged in a study to determine in future incidents, what the precise effects would be downstream should the dam fail. Based on this study, it was determined that in the event of a partial or full collapse of the dam structure, a wall of water ranging from 5 to 8 feet in depth would reach parts of the mine property, including the railroad yards and some of the surface area of the preparation plant, but not the mine shafts or the preparation plant building itself.

Testimony and Evidence Adduced by MSHA

MSHA inspector Raymond Ash, testified that on February 26, 1979, he received a telephone call from the MSHA office in Arlington about a water

problem at the Four States Fresh Water Reservoir and in response to the call, he and fellow inspector Frank Bowers went to the dam and arrived at 7:30 p.m. Mr. Ash observed two tractor pumps discharging water through two 10-inch rubber lines in an uncontrolled manner on the earthern part of the dam. The first rubber line, located near the toe of the dam, was washing away the earthen breastwork of the dam. The second rubber line, located over the embankment, was not causing any damage to the dam (Tr. 19-23). When he walked along the dam embankment, he found the ground icy, slushy, and spongy, and when he inserted a 3-foot long tree limb and a five-eighths-inch steel bolt rod into the embankment, they disappeared. He found muddy cavities in the breastwork of the dam, including gully erosion. The gully was about 8 feet deep and 60 feet long, and the water was about 3 feet below the top of the dam and the spillway was not being used. When he walked to the other side of the dam, he saw more cavities in the earth breastwork, and water was bubbling in the center of the earth breastwork as well as out of the ground against the stone face of the dam. The water was traveling down the hill, and the presence of running water, including the gully erosion, frightened him. The presence of running water coming through the earth breastwork, led him to believe that the pumping had caused the stone wall of the dam to fail, and a trench created by the pumping provided a place for the whole side of the earth dam to slide. Water, clay and stones were swirling at the toe of the dam. After making all of these observations, it was his judgment that the stability of the dam was so bad that there was a real danger of the dam "coming out." He discussed the situation with Mr. Bowers, and while they concluded that MSHA did not have jurisdiction over the dam, they believed that something had to be done and they wanted someone at the mine to help take care of the problem (Tr. 23-31).

Mr. Ash testified that the mine property was 500 to 600 feet below the dam and while traveling to the mine he saw 6 inches of muddy water running over the road, and he believed that the muddy water came from the dam. Upon arriving at the mine he talked to superintendent Eugene Jordan by telephone about the situation, and Mr. Jordan advised him that the company had nothing to do with the dam. After attempting to issue a verbal withdrawal order at 8:15 p.m., which Mr. Jordan would not accept, it was issued in writing and served on the company at 8:30 p.m. At that time he also telephoned the assistant district manager, the state police, and the U.S. Army Corp of Engineers about the dam conditions (Tr. 34). After the withdrawal order was served, he and Mr. Bowers went back to the dam to wait for Frank R. Watkins, MSHA's water impoundment engineer.

Mr. Ash defined an imminent danger as "it is a condition or practice that if it is allowed to continue and the operation goes on as normal, and this condition or practice is allowed to continue, someone will get seriously hurt or killed" (Tr. 36). The dam is 300 feet wide, 1,000 feet long, with a face of some 30 feet, and it had a prior water overflow problem. The uncontrolled pumping and wash-out led Mr. Ash to believe that if he had not issued the withdrawal order the continued pumping would have caused the right side of the portion of the dam upstream to erode that it would have

lost its earth face and stone wall at the same time. Fifty to 60 miners, as well as the recreational hall downstream could be in danger from flooding (Tr. 36-42).

On cross-examination, Mr. Ash testified that his training in water impoundments consists of a 5-day MSHA training program dealing with the recognition of dangerous conditions rather than water volume calculations and structure analysis and he has no such training (Tr. 42-43). On the evening in question it was dark and the only lighting available was his cap lamp (Tr. 44). If the dam had broken, the water may have reached mine property, and at the time the order issued he thought it would reach the portal (Tr. 54). When he arrived at the mine, he did talk to certain mine supervisors about the condition of the dam, but he did not inspect the mine completely to determine the extent of the imminent danger, nor did he remain to insure that all miners were in fact withdrawn and this was because he is not required to. He denied that he had given his consent to anyone to remain in the mine (Tr. 54).

On redirect, Mr. Ash reiterated that he observed a steady stream of water at the top of the earthen portion of the dam and it was starting to flow down the face of the bank with enough force to carry sediment away very quickly. It was his opinion that the water resulted from a break somewhere in the stone-faced dam because the water flow was more than mere seepage. When asked why he believed the water from the dam would reach the mine in the event of a collapse, he answered as follows (Tr. 59-60):

> Q. When you related about the collapse of the dam to the danger on mine property, did you have any basis for a judgment as to whether or not there was enough capacity here to affect or involve the mine property?
>
> A. I actually thought there was enough water that it would go down both shafts there. It would probably knock the power off at the Four States and go down at least two shafts, the coal shaft and the shaft that the men who worked near that bottom came down.
>
> Q. What was the basis for this judgment?
>
> A. I have seen water. I have seen water running in shafts before.
>
> Q. But from this dam related to the mine, what made you think that this dam was large enough in capacity to possibly have this happen?
>
> A. I had no firm basis for my opinion, nothing; engineering, no firm basis, or anything. To me, the dam was large enough. There was a large volume of water, and I couldn't see how it could go down that hollow without getting into that shaft.

Later on, it is easy to look at it and think but then, it is a snowy night; it is cold, and the wind is blowing. There was rain; there was water; there was mud all over the face of that dam. To me, we did the proper thing.

Mr. Ash further stated that he could not determine how the tractors got to the dam site, nor could he find out who was operating them. His attempts to ascertain these facts by telephone were fruitless since no one wanted anything to do with the dam. He believed that when he issued his order there was a definite potential danger of risk to the miners in the mine (Tr. 61).

In response to questions from the bench, Mr. Ash explained the basis on which he issued his imminent danger order as follows (Tr. 68-70):

JUDGE KOUTRAS: Assuming that that dam had been two and one-half to three feet below the level of the crest, and assuming that they had no pumps there, would you have done anything that night? There wouldn't have been any cause for anybody to go there, would there?

THE WITNESS: No, there wouldn't have.

JUDGE KOUTRAS: Your concern was the manner in which this water was being pumped out of this dam that was causing some erosion?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So am I to assume then that the principal cause of the apparent imminent danger, or what you thought was imminent danger, was caused by the manner in which this water was being pumped out of the dam?

JUDGE KOUTRAS: So the rushing water that you were concerned about was the water that was being pumped out of the dam with these ten-inch lines?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Which was causing a little erosion here?

THE WITNESS: In my opinion, it was more than a little.

JUDGE KOUTRAS: It was causing a gully of water to rush down?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Theoretically if they pumped all of the water out of the dam, it would inundate the mine at some point in time, wouldn't it?

THE WITNESS: No, because it would come out gradual.

JUDGE KOUTRAS: The reason that you decided to withdraw the miners was because that you thought this pumping of the water was done in such a manner that eventually --

THE WITNESS: This pumping was done in such a manner that this gully, the erosion gully, would come down here and give this bank, which is nothing but mud, spongey mud, a place to slide and let the whole dam go.

JUDGE KOUTRAS: If that spongey mud slid, what would happen to the stone wall and the cement behind it and all of that? Would that come down, too, in your mind?

THE WITNESS: Yes, it would have.

And, in response to questions by Applicant's attorney (Tr. 77):

Q. Mr. Ash, isn't it true that if the people who were pumping this dam had extended those hoses below the dam, they could have pumped out the entire volume of water in that dam, and it would not have bothered that mine whatsoever; isn't that true?

A. Yes, sir.

Q. The real imminent danger that you were fearful of is the actual bursting of that dam and the wall of water coming down that valley; is that correct?

A. Yes, sir.

MSHA Inspector Frank D. Bowers testified that he has been a coal mine inspector for approximately 9 years but that his experience and training on dams and impoundments was the same as that of Mr. Ash. He accompanied Mr. Ash on the evening of February 26, during the inspection of the dam, and after listening to his testimony he indicated substantial agreement with it. The discharging of the water over the dam and onto the earthern embankment by pumping was eating away at the embankment, and this in turn would weaken the stone or brick dam wall behind the embankment. He has seen training films which depicted water seeping through an embankment from a crack, and he indicated that once started it will eventually eat away the dirt and then give way. Aside from the gulley of water, the other water they observed was from seepage through the dam. Since he had no authority to order the pumps shut down and could do nothing about the dam, his only recourse was to "pull

the men out of the mine for their safety." He believed an imminent danger existed and he defined "imminent danger" as "an event which could be reasonably expected to cause serious harm or death before such condition or practice can be abated" (Tr. 82-85).

On cross-examination, Mr. Bowers reiterated that his dam and impoundment training consisted of a 1-week training class which consisted primarily of viewing slides, films, and classwork. In the event he observes an impoundment condition which does not appear normal or is not an imminent danger, his practice is to call on Mr. Watkins for assistance. Mr. Bowers agreed that he had no jurisdiction over the dam itself. He believed the mine property was approximately 500 to 600 feet down the hollow from the dam, but also agreed that the distance could be 1,600 feet (Tr. 87). There was vegetation on the earthern breastwork structure of the dam and some of it was as high as 20 feet. He had not previously inspected the dam and has not inspected it since the order was issued (Tr. 88). With regard to the existence of an imminent danger outside of mine property, Mr. Bowers testified as follows (Tr. 89-90):

Q. Is it your opinion that an imminent danger condition can exist outside of mine property?

A. At this particular time, yes.

Q. And you would agree that this condition was outside of the mine property?

A. Yes.

MR. SKRYPAK: I have nothing further.

BY MR. McGINN:

Q. Mr. Bowers, what area was closed as being in imminent danger under the order?

A. The entire mine, the inside and outside surface facility.

Q. So the imminent danger consisted of the area of the mine?

A. Yes.

Q. When you say that the imminent danger was outside, did you mean --

A. As far as the dam giving way, which was not, as far as we knew, on mine property.

Q. So the cause of the imminent danger, is that correct?

A. Yes.

Q. Was upstream?

A. Right.

Q. But the closure order was issued --

A. It was on the mine property itself.

Q. That is where the danger existed; is that correct?

A. That is right.

JUDGE KOUTRAS: That is a play on words, too. It is clear to me that both inspectors believed that the cause of the imminent danger was something that was off mine property, but they were concerned that if they did not withdraw those miners, the imminent danger would get on mine property; the water would get down. Isn't that what their testimony is?

MR. McGINN: Yes. I have nothing further.

In response to questions from the bench, Inspector Bowers testified that the water from the dam was coming down the hollow, and while it did not reach mine property at that time, it did reach the roadway paralleling the hollow. His concern was that the pumping of the water over the earthen breast of the dam would eventually weaken the dam wall, and while he did not know how long this process would take, he stated, "By all indications, it looked to me like it wouldn't take long" (Tr. 93). Mr. Bowers also stated that Consolidation Coal was not in violation of any regulations, and that while he had no jurisdiction to check out the dam, the only thing he had to work with was section 107(a). As far as he knows, no MSHA inspector has been back to the dam to inspect it again. Assuming there were another rainfall, he would not go back to inspect the dam unless he were asked to because he has no authority over the structure.

MSHA supervisory engineer Frank R. Watkins, testified that he is in charge of waste banks and impoundments and that he previously worked for the Federal Power Commission, Bureau of Power. His prior experience includes the writing of engineering reports along with Commission license orders for hydraulic and power generation dams on navigable waterways operated by private parties. He also conducts engineering studies on the construction and maintenance of water impoundments, refuse piles, shaft construction, and ground control for strip mines (Tr. 98). He visited the dam site in question after receiving a telephone call from Merle Manus, MSHA Assistant District Manager, and after arriving at the Four States Water Reservoir at 9:30 p.m., he spoke with the MSHA inspectors, a safety committeeman, the

dam pump operator, and a Civil Defense representative. He walked across the dam to the spillway, and observed that water was not going through the spillway. There was 2-1/2 to 3 feet of freeboard between the top of the dam and the water level. There were two areas that were leaking through the dam structure. The first leak was located in the middle which was free-moving, and the second leak was located to the right which was a slow leak. In addition to water, he observed an 8-foot gully near the water pumps. After observing the 8-foot gully, he observed an "old hole" which appeared to be the place where the water was coming from and it was located at the center of the dam 3 feet from the top. The water was coming straight through the dam itself and exiting downstream.

Mr. Watkins stated that the area from where the water was exiting indicated to him that the dam had a high "phreatic line" which is a line indicating the water level within the dam, and it is a critical sign of instability. The higher the level of the phreatic line, the lower the level of stability of the dam (Tr. 100-105). When he arrived at the water pump location, he observed two 10-inch pump lines, one above the other, discharging water, and the lines were washing away the earth part of the dam's structure. A gully and channel were being created by these water lines. The gully was 8 feet deep, 6 feet wide and 18 feet long, with a 32-degree slope. It was his opinion that the sloped gully hole was a significant factor in causing the dam to be unstable (Tr. 107). He also observed a soft sink hole where he could push anything into it and the object would completely disappear. The sink hole was a sign that the dam was heavily saturated with serious voids in its structure. In addition to the pumping of the water, the existence of vegetation was a factor in causing the dam to be unsafe in that when the trees die, their roots leave holes where water can enter the earth embankment, thus carrying particles that create larger holes and erosion which can create a pumping type of failure. In his opinion, the water was flowing through the earthen part of the dam, the dam was capable of collapsing, and, the water in the dam was capable of flooding the mine (Tr. 109-110).

On cross-examination, Mr. Watkins, testified that his conclusions were based on visual observations rather than engineering tests. He testified that he did not compute the water volume and depth, and he believed that the water that flowed at the bottom of the dam was due to seepage rather than runoff (Tr. 112-115). Although MSHA did not conduct a stability analysis on the dam, he believed that the concrete-stone abutment could have retained the water even if the earth breastwork had washed away (Tr. 116-119).

On redirect examination, Mr. Watkins testified it is likely that the remaining concrete-stone impoundment would fail if the earth embankment had washed away (Tr. 120). The washing away of the downstream face of the dam by two 10-inch lines was the primary reason for the issuance of the imminent danger order. When the pumping stopped it was his opinion that the imminent danger had ceased. The water content of the dam is 29 feet, and the volume of water is 51 acre-feet. Based on the 51 acre-feet, the water level would

reach the mine property if the dam collapsed, but there is no data or estimates available that would change his opinion about water flooding the mine property (Tr. 129-130).

On recross-examination, Mr. Watkins testified that the concrete stone structure behind the earth structure may have withstood the water pressure, and if there was an instantaneous collapse, the water would reach the mine preparation plant but not the mine shafts (Tr. 131-133).

Mr. Watkins testified that if the water impoundment was located on mine property, it would fall under the Federal jurisdiction of the Secretary of Labor, and would be within the purview of Part 77 dealing with water impoundment regulations (Tr. 133). The reason the dam does not fall under the Part 77 water impoundment regulations is that it is not owned by Consolidation. If the dam is not covered by Part 77 regulations, the Secretary has no jurisdiction to act, and MSHA does not have any jurisdiction over the dam structure (Tr. 134). However, when the dam endangers miners, withdrawal orders are issued notwithstanding the fact that other agencies may have direct jurisdiction and control over the dam (Tr. 137).

Inspector Ash was recalled and testified that with regard to the previous December incident concerning the possibility of the dam collapsing, MSHA assigned an inspector to make a routine inspection for the purpose of determining whether Consolidation had withdrawn the miners from the mine. It was reported that miners were withdrawn and several unidentified agencies were at the dam site. Since MSHA had no jurisdiction, he advised the inspector not to get involved. Mr. Ash confirmed that miners were voluntarily withdrawn without any orders being issued by MSHA, and had they not been withdrawn, a withdrawal order would probably have been issued by MSHA (Tr. 138-140).

MSHA mining engineer Edwin Brady, testified that he is a graduate of the University of West Virginia and since 1976 has specialized in waste impoundments and water hydraulics. Specifically, he has served MSHA in an engineering capacity reviewing impoundment designs and dam projects to determine whether they comply with the regulations (Tr. 141). On February 27, 1979, he and Mr. Watkins inspected the Four States Water Reservoir. He arrived there at 8:30 a.m., and walked up and down the dam, including the area downstream. In measuring the dimensions of the dam, he found that it was 255 feet wide, 800 feet long, 29 feet high, with a slope angle of 27 degrees. He took 14 photographs of the dam and described them by means of a slide projector (Exhs. 1-14, Tr. 146). He conducted two studies of the dam to determine the effects of a dam collapse, and based on a UD-16 soil conservation service field mechanical method, it was determined that if there was a 50-foot breach in the dam, the water elevation level on the average would approximately come to 1,040 feet and would reach the mine railroad yard and a small area beyond that, but, below the buildings and shafts (Tr. 147). Using the UD-16 method, the depth of the water reaching the railroad yard could not be determined because of a lack of data concerning the elevation of the mine property (Tr. 148). However, in his

opinion, if there was a complete collapse of the dam, the water level would be at an 8-foot level at the railroad yard area, and this opinion is based on the fact that the distance between the dam and Mine property is 1,600 feet and the elevation in the railroad yard is 1,032 feet (Tr. 148-149).

On cross-examination, Mr. Brady testified that no one, including MSHA, has yet determined the actual depth of the reservoir, and his calculations are based on information submitted by another governmental agency. He did not use any other engineering methods to determine the depth of the dam, but hand instruments were used to compute calculations on the dam and these were compared with the other data supplied to him (Tr. 152). Based on his observations at the dam, he did not believe that an instantaneous break would occur, but that a partial failure would occur. The "worst thing" that could have occurred was an instantaneous, rather than partial break, and in this event his calculations indicated that there would have been 8 feet of water at the mine property on the railroad track, and with a partial breach, there would have been 6 feet at that location. With an instantaneous breach, the water itself would never have reached the mine shafts or preparation plant, but would have reached the upper portions of the railroad track as shown on the topographical map (Exh. G-4). Based on the elevations and topography as depicted on the map, the primary flow of water from the dam in the event of a break would be out to the left rather than directly at the mine shaft and preparation plant, and his visual observations upon visiting the dam site confirmed this fact.

Mr. Brady stated that based on his after-the-fact calculations, he would have withdrawn men from the lower part of the railroad yard which is associated with the car-dropping process, but he would not have withdrawn them from the preparation building itself or from the underground mining facilities. In his view, the only persons in possible danger were those who may have been located in the railroad track area below the actual preparation plant in an area depicted within contour line 1,040 as shown on the map (Tr. 152-158).

In response to UMWA questions, Mr. Brady stated that based on his study of the situation, if the dam totally collapsed and the water came down the hollow, it would not reach the mine portal. Under certain conditions, the recreation center building located down the middle of the hollow could possibly determine the flow of water, but this would be hard to define (Tr. 160).

Testimony and Evidence Adduced by the UMWA

Betty Garrett, Chairperson of the Four States Public Service District, testified that her agency did not exercise any legal authority over the dam, including the water pump system, when Withdrawal Order No. 0814153 was issued on February 26, 1979 (Tr. 163). When her agency obtained ownership of the dam in May 1979, she became involved in attempting to resolve the matter when no one wanted to do anything about the imminent threat. The

State Department of Natural Resources and the U.S. Corps of Engineers would take no action other than to conduct dam studies. Her attempts at locating the dam owners came about as a result of the fact that Federal funds to aid in a dam stability analysis, or to effect repairs, which has still not been done, are only available if the dam is not privately owned. Prior to her agency's involvement, the previous owners were the Rochester & Pittsburgh Coal Company and a Mr. Daniel Hall, who was the operator of the water system, and those are the entities from whom her agency obtained the deed to the dam.

She was at the dam at approximately 5 p.m., on the day MSHA's order issued and she wondered why no one was there watching the pumps since she was concerned that school children ride in and out of the area on a school bus. She has never determined who started the pumps which were pumping the water. She telephoned a Mr. Gene Straight at the Fairmont Civil Defense Office and he did not know who started the pumps, but Mr. Daniel Hall came to the dam the same evening and turned them off. Mr. Hall denied starting the pumps and told her there was nothing he could do since he did not start them.

Mrs. Garrett testified further that she hopes the dam will be repaired and she is still attempting to get someone to conduct a stability study. In the meantime, pumping will again be done when the water level rises, and this will be monitored by her agency and the State Department of Natural Resources. She was told that the water level must be maintained 2 feet below the spillway level. In the event the water level rises again, her agency will notify the Department of Energy as well as the people downstream, including the mine itself. The dam is the only source of local water supply (Tr. 163-166).

On cross-examination, Mrs. Garrett stated that the tractors which were pumping water are controlled by the Civil Defense Office but owned by the State Department of Highways. The orders to keep the water level 2 feet below the spillway came from a report made by the Department of Natural Resources and the U.S. Corps of Engineers. Those reports reflect that the dam is "a high hazardous potential structure, introducing imminent threat to the people below the dam" (Tr. 168). Her agency now owns the land that the water is on and the water and waterworks, but the Four States Community has been using the water as their water source since 1911 (Tr. 168, 172). However, she also later indicated that Four States has been using the water at the dam as a source of their water supply since 1946 or 1948 (Tr. 173).

Mrs. Garrett related her attempts to ascertain the owner or owners of the dam through the search of tax and deed records at the local courthouse. She believed that the last owner was the R & P Coal Company, but since Consolidation Coal paid taxes for land in Four States she also assumed that Consol owned it, but she confirmed that the deed came from R & P, and that at the time of the prior dam problems last December, R & P owned it, but Four States was buying the water from Mr. Hall, who in turn had leased the water rights from R & P. She entered into negotiations on behalf of her

agency to purchase the dam from R & P, and this occurred on May 22, 1979 (Tr. 171). Her interpretation of the deed is that "It gives us the ground so that we could do something with the dam. That's all. The dam; it gives us the dam." (Tr. 180).

Earnest W. Michael, chairman of the Consol No. 20 Mine Safety Committee, testified that he was notified of the withdrawal order 45 minutes after it was issued, and he and fellow safety committeeman Gary Riggs went to the dam and walked around looking at the conditions. He expressed agreement with the contents of the imminent danger order as issued, including the finding of imminent danger. The next day, he met with company officials and safety inspectors, and Inspector Ash advised Consol employee Mauck that if he could guarantee that no more water would be pumped down over the crest of the dam the order would be lifted. Mr. Mauck assured him that he would make sure the pumping was stopped (Tr. 186-189).

On cross-examination, Mr. Michaels testified that neither MSHA nor anyone else ever led him to believe that Consol had anything to do with the pumping at the dam, but he always believed that Consol owned the dam. He has worked at the No. 20 Mine for 8 years and it was his understanding that Consol owned the dam and the property around it (Tr. 192).

Michael P. Zemonick, president of the UMWA local, and an employee of Consol, testified that he was scheduled to work at the mine on December 9 and 10, 1978, but was advised by mine superintendent Darrel Auch that in view of a reported danger at the dam all work for those 2 days had been cancelled, and he did not work that weekend. He participated in the meeting the day after the order in question was issued, and he believed that mine management was trying to contact Mr. Hall to take care of the dam so that the mine could return to production. He indicated that "some people" say that Mr. Hall owns the dam, but that "it is really not known" (Tr. 195).

Applicant's Testimony

Kent Simmons, preparation plant foreman, testified that the order in question was served on him on the evening of February 26, 1979, after Inspectors Ash and Bowers advised him that they were going to shut the mine down because the dam was in danger of bursting and that the water would go down the mine shafts. Mr. Simmons then telephoned mine superintendent Jordan, and the inspectors left to return to the dam, and after some 15 minutes, they again came to the mine and told him they were writing an order and that miners should be withdrawn, and by 9:15 a.m., everyone was out of the mine. Mr. Simmons did not go to the dam and had no personal knowledge as to what was there. Responding to a question about the physical mine layout near the preparation plant, Mr. Simmons testified that railroad cars are filled one at a time with coal, uncoupled, and then dropped off for shipment by a car dropper who spends 5 to 10 percent of his time in the coal yard, and he is usually the only person there (Tr. 217).

On cross-examination, Mr. Simmons testified that coal miners walk down by the tipple rather than the lower end of the railroad tracks to get to

the privately-owned recreation center, and that occasional maintenance work is performed at the tipple (Tr. 219). With regard to the recreation center, Mr. Simmons stated that it is not located on mine property and is privately owned and operated by someone in the community (Tr. 220).

Eugene L. Jordan, general mine superintendent, Consol No. 20 Mine, testified that he received a phone call from Mr. Simmons at approximately 8:15 the evening of February 26, and he advised that MSHA inspectors Ash and Bowers were concerned about the dam. He spoke with Mr. Ash who informed him that the dam was in a "dangerous condition" because someone was pumping water there. Mr. Ash inquired as to the identity of the person doing the pumping and Mr. Jordan suggested a contact with Mr. Dan Hall because he (Jordan) believed that Mr. Hall was in charge of the water system or, in the alternative, a contact with Mrs. Garrett. Mr. Ash called him again and advised him that a withdrawal order would issue against Consol but that it will note that "it is no fault of Consolidation Coal Company." Mr. Jordan did not visit the mine after the order issued, but he did go there on the morning of February 27, and he also went to the dam site at approximately 8:30 a.m. that morning, and the pumps were not operating. He subsequently learned that they ran out of gas. He observed the dam conditions, including the gulley which had been washed out, and he stated that the dam did not appear any different from the way he observed it on any other day (Tr. 220-226).

Mr. Jordan testified that he had previously observed the dam weekly during his travels along the dam road, and he considered buying a home nearby but did not do so because of the dam and his fear that his young son might fall into it. The morning after the order issued, and while at the dam, he observed the water seepage through the dam breastwork, but was not concerned about it. Since the order issued, he has traveled back and forth from the dam site no less than three times a week and has observed no one performing any reclamation work at the site, although he has observed the water level at the same height or higher than it was on February 27. He testified that Mr. Mauck, who is now retired as a company vice president, advised Inspector Ash that although Consol has nothing to do with the dam, he would look into the water pumping situation (Tr. 226-231).

Mr. Jordan testified that Mr. Daniel Hall is employed by Consol as a bratticeman, but that Consol is not involved with the dam at all. Mr. Hall advised him that he started the pumps on the advice of the state agency who controls the dam, and the state agency purportedly told Mr. Hall that the water should be pumped when it reaches close to the spillway. Mr. Hall advised him that he would in the future extend the pumping lines beyond the area of the wash-out and that was the last time he saw Mr. Hall (Tr. 233). The pumps were not owned by Consol and Consol had nothing whatsoever to do with the dam (Tr. 234). Mr. Jordan stated that it was his opinion that on February 27 the dam was not in such a condition that it posed a threat of serious injury or death to the miners at the mine (Tr. 236). Mr. Jordan stated that Mr. Ash agreed that he could keep supervisory personnel in the mine after the order issued in order to keep it from flooding (Tr. 238).

On cross-examination, Mr. Jordan testified that he has never been concerned about the dam because he has gone by it "hundreds of times" since 1969. He indicated that on December 7, 1978, representatives of the U.S. Corps of Engineers and the State Department of Natural Resources visited his office at the mine and expressed concern over the fact that water was going over the dam spillway. The state police were also present and people were being evacuated from the area, and water was being pumped from the dam by the local fire department. Although he was not particularly concerned, men were withdrawn from the mine shaft but not from the preparation plant. He was not concerned because he had observed the dam "come up and down for ten years" and based on his visual observations and judgment, even if the dam had totally collapsed the water would not have reached the shafts because the shafts are at a higher level than everything else (Tr. 243-244). The Corps of Engineers has never advised him that it did not think the dam was safe, but did tell him it was in a deteriorating condition (Tr. 245).

Mr. Jordan stated that Mr. Hall charges his customers directly for the water used from the dam, and while he owns the water system, he did not know whether Mr. Hall also owns the dam (Tr. 253). Regarding the water that was being pumped from the dam on the evening the order issued, Mr. Jordan testified that his "concern" over that condition would depend on the appearance of the gulley and whether it was eroding "a whole lot of the face of the dam away or just the small amount it did" (Tr. 256). Assuming that the pumping had continued continuously for a couple days, that would possibly have concerned him (Tr. 256). Since Consol did not own or control the dam, he was not going to send anyone there to shut the pumps down in order to abate the order (Tr. 257).

DISCUSSION

The Concept of Imminent Danger

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

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

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the condition or practice which caused such imminent danger no longer exists.

> The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969 at page 4 (March 1970), states in pertinent part as follows:

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

And, at page 89 of the report:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

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

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the

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

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. § 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucal Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328, (1973-1974); Kings Station Coal Corporation, 3 IBMA 322 81 I.D. 562 (1974).

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the fact presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspectors education and experience would conclude that the water being pumped out of the dam over and down the earthern breastwork at such a rate which was causing a gulley and other erosion and washing away of materials to occur constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately.

Arguments Presented by the Parties

Applicant Consolidation Coal Company (Consol)

In its posthearing brief, applicant traces the chain of title to the dam and maintains that this is conclusive proof that the subject fresh water dam is not owned, operated, or controlled by Consol. In addition, applicant states that MSHA has admitted that this is in fact the case, and that the inspectors themselves testified and conceded that they have no jurisdiction over the dam structure.

With regard to the existence of any imminent danger on the day the order issued, applicant argues that a literal reading of the definition of the term "imminent danger" as it appears in section 3(j) of the Act, coupled with the definitions of "coal or other mine" as set forth in sections 3(h)(1) and (2), clearly establishes that the condition or practice purported to be an imminent danger must exist in a coal or other mine as defined by the Act, and that the water dam area in question obviously does not come under any definition of coal mine or coal property. Applicant maintains further that section 302 of the 1977 Amendments Act, which established MSHA in the Labor Department, did not grant to MSHA broad general police powers as the protector of all mankind and the enforcer of all laws, but limited its jurisdiction to the provisions of the Act, namely enforcement powers for mining activities.

With respect to the independent contractor cases such as MSHA v. Republic Steel, decided April 11, 1979, holding an owner responsible for violations where it lacked control or was not at fault, applicant points out that in all of these cases the conditions or practices cited existed in a coal mine over which MSHA had jurisdiction. Regarding the recent decision in Westmoreland Coal Co. v. Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979), where the Commission upheld the closing of a mine because of the danger of flooding from an adjacent mine, applicant argues that it is obvious that the condition or practice in that case was caused by and located in an adjacent coal mine, and that MSHA had jurisdiction over the condition or practice because of the definition of coal mine as found in section 3(h)(1), section 3(h)(2), and section 318(1) of the Act. In the instant case, applicant points to the fact that the fresh water dam, which was the condition giving rise to the issuance of the order, is not to be found within any of the jurisdictional guidelines given to MSHA. Applicant maintains that if MSHA is allowed to construe their jurisdiction as covering extrinsic factors as conditions or practices which can cause an imminent danger the boundaries are limitless. An inspector could believe that Skylab or a similar satellite might fall on a mine; an inspector might believe that a nuclear reactor accident would affect a mine five or more miles away; an inspector might believe that Boulder Dam would burst and flood a mine 20 miles away. The possibilities are endless. As in this case, if there was a danger of a dam breakage, Applicant maintains that the police powers of the State of West Virginia would authorize civil defense or police-related authorities to evacuate people including miners at the mine who

might be in danger. The civil authorities, who are more experienced in these matters, did not envision any danger since they did not request that anyone, including residents of the homes directly below the dam be evacuated.

With regard to the existence of "imminent danger, applicant cites the court decisions in Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th Cir. 1974), aff'g Eastern Associated Coal Corporation, 2 IBMA 128, 136 (1973), and Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975), where the court affirmed the Secretary's determination that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. However, applicant argues that in order to determine "reasonable actions," one must consider the inspectors' training and experience. In this case, applicant asserts that while Inspectors Ash and Bowers may have been qualified inspectors for underground coal mining, they were novices in the area of dam evaluation. In support of this premise, applicant cites the testimony of Inspector Ash indicating that his total training in evaluating water impoundments consisted of a course lasting 5 working days at an average of 6-1/2 hours per day (Tr. 43). The training consisted of lectures and visual aids in the form of slides of various impoundments (Tr. 42-44). Training was not given in methods of calculating structural stability or water volume but merely in recognizing dangerous conditions (Tr. 42-44). Further, the training dealt with earthen dams, not with dams having solid wall construction (Tr. 43). The training was conducted in a classroom (Tr. 42-44). Likewise, applicant cites the testimony of Inspector Bowers indicating that his total training was exactly the same as that of Mr. Ash (Tr. 86). He had the same 5 days at the rate of 6-1/2 hours per day (Tr. 86). Applicant maintains that the two inspectors, with only 32-1/2 hours of training each in water impoundments were certainly not qualified to make a judgment as to whether or not the fresh water supply dam was in danger of bursting.

With regard to the conditions which prevailed on the evening of February 26, 1976, when the order issued, applicant argues that it was already dark when the inspectors arrived at the dam site, and that the only means of lighting was the inspectors mine cap lamps (Tr. 44). Inspector Ash testified that the lamps normally shine 90 to 100 feet, but that night in the rain, snow, wind and fog, it was somewhat less (Tr. 45). The inspectors did not know the depth of the water in the dam (Tr. 46). Nor did they know its actual length or width (Tr. 48). Therefore, there is no possible way a reasonable calculation of the water volume behind the dam could have been made. Therefore, prior to the issuance of the order at about 8:30 p.m., on February 26, 1979, the inspectors only had less than 1 hour to visually observe the dam in adverse weather conditions. They saw some wet areas on the face of the dam and alleged three areas where they believed water was flowing (Tr. 47-49). However, they only assumed the water was coming through the dam when it could have been run off from outside water

sources. The primary area of concern was a ditch that was being created by water discharging from hoses connected to the two pumps. However, it turns out that when issuing the order, the inspector did not know how much water was in the dam; he did not know where water seepage on the breast of the dam was coming from; he did not know what material the dam was constructed from; he did not know its stability; he could not determine if a partial bursting or if a total instantaneous burst would take place. With all of these unknowns, one would contend that if an inspector is alleging that water is going to flood a mining area he cannot just guess at it. He must have a reasonable idea of the amount of water that he speculates might be rushing toward the mine. In this case, applicant suggests the inspector could do nothing more than guess as to all factors involved which is certainly not reasonable.

Finally, applicant argues that after the order was issued, MSHA's own engineering studies and the testimony of its dam engineering expert, Mr. Watkins, established that even if there was a complete instantaneous burst of the dam, that the water would never have risen to a level that it would go down the shaft into the mine (Tr. 133). Mr. Watkins testified:

> (Skrypak) Q. Based on what you know now, would that water have reached the Preparation Plant or the shafts where the men go into the mine?
>
> (Watkins) A. Based upon what I know now, I would say that it would not go down the openings into the shaft.
>
> (Skrypak) Q. It would not go down the shaft?
>
> (Watkins) A. It would not go down the shaft.
>
> (Skrypak) Q. So although the inspectors did not know it on that night, the water, even assuming an instantaneous burst of that dam, would not have made it go down the shaft; is that correct?
>
> (Watkins) A. Right. That is our engineering judgment. [TR 133]. [Emphasis added.]

In summary, applicant's case rests on its assertions that while many state and Federal agencies had been involved with the fresh water dam in question and seemed to do nothing, MSHA is attempting to make Consolidaton Coal Company a scapegoat. Since MSHA does not have jurisdiction over the dam which is not owned, operated or controlled by a coal company, and since it does not fall within any definition of a coal mine, applicant claims MSHA lacks jurisdiction to issue any withdrawal orders. And, since an imminent danger must exist in a coal mine and not be an extrinsic causal factor, applicant asserts the testimony clearly establishes that the inspectors did not have the training or experience to make a reasonable judgment, and that even the crudest training or general common sense would dictate that the

inspectors should have had some knowledge of the volume of water involved, which these inspectors did not.

Respondent MSHA

Citing the precedent cases dealing with imminent danger, Freeman Coal Mining Company, supra; Eastern Associated Coal Corporation, supra, and Old Ben Coal Corporation, supra, MSHA argues that given the facts described in the record of testimony and on the face of the withdrawal order, the inspectors had no possible course of action other than to issue an 107(a) order withdrawing miners from coal mine property until the hazardous condition could be abated. Given the circumstances presented on the night of February 26, 1979, MSHA believs that no reasonable man charged with the responsibility for protecting the lives and safety of miners on coal mine property, could possibly have acted otherwise. MSHA asserts that the action of the inspectors completely satisfied the reasonable standard test set out in Freeman. The inspectors were authorized representatives with extensive mining experience; they had received specialized training for just such a situation as presented in this case which required a decision concerning the stability of a dam. Inspector Ash was personally familiar with the size and structure of the dam as well as its location with respect to the mine below it. Both inspectors were aware, as a result of a prior incident that occurred in December 1978, when state officials had evacuated families from the area below the dam and Consol officials had voluntarily evacuated miners from the mine before an inspector arrived in the area because of a feared dam collapse resulting from heavy rainfall, that the dam had been classified as highly unstable and had been recognized as a genuine threat. Further, MSHA argues that after inspecting the dam for signs of general instability, the inspectors determined that the continuing eroding of the earthen structure resulting from the high pressure water discharge would likely lead to collapse of the structure unless the pumping were terminated. Proceeding to mine property, and upon further investigation, they determined that the six (6) inches of water already covering the ground in the tipple area was leakage from the dam. They then explained to mine management the conditions observed by them and the reasons why an imminent danger existed at the mine, requiring the immediate withdrawal of those working there.

Based on the foregoing arguments, MSHA concludes that an imminent danger as defined under the Act and under controlling Board and court decisions existed as alleged and that the inspectors acted reasonably, and in accordance with legal precedents in ordering the immediate withdrawal of the miners. Further, MSHA asserts that the applicant has failed to sustain its burden of proof with respect to both the threshold issue of no danger and the issue of imminence. In support of this argument, MSHA argues that while Consol put forward two witnesses, neither of them could offer any eyewitness testimony concerning the issues of danger or of imminence and no direct evidence was offered by the applicant in this regard. MSHA concludes that the applicant has failed to rebut by a preponderance of the evidence the presumption of imminent danger which arose when the order was issued.

With regard to applicant's argument that the imminent danger order of withdrawal is invalid because it cannot be held responsible for the condition which caused the imminent danger on coal mine property and that the water dam in question is not owned, operated or controlled by applicant and therefore, not subject to MSHA's jurisdiction, MSHA contends that both arguments must be rejected. In support of its position, MSHA points out that the section 107(a) order in question itself states that "this order is issued through no fault of the company," and that unlike orders of withdrawal issued pursuant to sections 104(d)(1) and (2), in which an inspector must find that there there has been a violation of a mandatory health or safety standard and that such a violation was caused by the unwarrantable failure of the operator to comply, the valid issuance of an order issued pursuant to section 107(a) does not require the finding of a violation of a mandatory standard or any negligence attributable to the operator. Section 107(a) simply states that upon the finding that an imminent danger exists, an order requiring the operator to withdraw all persons from the affected areas shall be issued. The question in this proceeding, asserts MSHA, is not whether the imminent danger as alleged was caused by applicant, but rather, whether an imminent danger existed as alleged for miners working at the Consolidation Four States No. 20 Mine. Citing the case of District 6 United Mine Workers v. United States Department of the Interior Board of Mine Operations Appeals, 562 F.2d 1260 (1977), where the court held that imminent danger could exist even without any failing by the mine operator, for example, as a result of natural causes; whereas the other closures all involve some negligence by the operator. MSHA points to the court's citation from the legislative history of the Act which states that:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any normal proceedings or notice. The seriousness of the situation demands such immediate action. The first concern is the danger to the miners. Delays even of a few minutes may be critical or disastrous. After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector. The imminent danger may be due to a violation of a mandatory safety standard or some other cause not covered by a standard, including natural causes. Senate Report No. 91-411 91st Congress, 1st Session 90 (1969).

Finally, MSHA argues that the language of section 107(a) and the definition of imminent danger in the Act specifically and deliberately exclude any considerations of liability, cause, or negligence upon the part of a mine operator, and that nowhere in the language of the Act or in its legislative history can there be found any basis for restricting an imminent danger to a situation whose cause, natural or otherwise, exists on mining property. Citing District 6 United Mine Workers, supra at 1267, MSHA states that Congressional hearings, statutory language, and judicial review all support the fact that "the clear intent of Congress is that coal

mines, or areas of coal mines, in which imminent danger was found to exist must be evacuated at once, with the benefit of any doubt cut in favor of withdrawal." The unmistakable intent of Congress is that it matters not one whit what caused the imminent danger; the sole concern is that miners on mine property be evacuated immediately. MSHA concludes that to adopt the narrow, restrictive meaning of imminent danger proposed by applicant in this proceeding would be in direct conflict with case law dealing with the interpretation of federal coal mine safety legislation, and it cites St. Mary's Sewer Pipe Company v. Director of U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959), where the court said: "It is so obvious as to be beyond dispute that in construing safety or remedial legislation, narrow or limited construction is to be eschewed."

MSHA suggests that the interpretative principles set out in St. Mary's Sewer Pipe, have been reaffirmed in the judicial decisions it has cited in support of its case, and that the Conference Committee Report in the legislative history of the 1969 Act further evidences the intention of Congress, in stating as follows: "In adopting these provisions, the managers intend that the Act be construed liberally when improved health or safety to miners will result." Conference Report No. 91-761, 91st Cong. 1st Sess. at 62.

Respondent UMWA

Respondent argues that the imminent danger in this case is the potential of flooding the surface and underground of Consol's Four States No. 20 Mine by the bursting of the Four States dam, which is classified as a "high hazard potential structure * * *." The dam is a high hazard potential structure, "because there is a chance of loss of more than a few lives should failure occur" (UMWA Exh. I, at 2). Citing the Fourth Circuit Court decision in Westmoreland Coal Company v. Mine Safety and Health Review Commission and Marshall, 606 F.2d 417 (1979), respondent argues that the condition or practice does have to exist in the mine that is shut down by a closure order, and the miners do not have to be working at the time a closure order is issued. Respondent asserts that in the Westmoreland case, the court upheld MSHA's closing of Westmoreland's Hampton #4 Mine because of the possibility that the mine could be flooded with water from an abandoned, adjacent mine, and that the court affirmed the Secretary's enforcement action, even though the source of the imminent danger did not exist in the mine that was owned, controlled, or operated by Westmoreland.

Respondent argues that the question of fault and control on the part of a mine operator are not prerequisites to the issuance of a closure order, and in support of this argument cites the Commission's decision of April 11, 1979, in MSHA v. Republic Steel Corp., Dockets MORG 76-21 and MORG 76-95-P, holding Republic responsible for violations created by its independent contractor even though Republic could not have prevented the violations. Respondent asserts that in both Westmoreland and Republic, the operator who was subjected to the Secretary's enforcement action did not control the area in which the dangerous condition existed, and although in each instance, the operator who received the withdrawal order could not have prevented the

dangerous condition from occurring, neither of these facts was considered an adequate reason for vacating the withdrawal order at issue and, in each case, therefore, the Secretary's enforcement action was upheld.

Citing a number of cases at page 9 of its brief, respondent argues further that the reasonableness of the Secretary's construction of section 107(a) is apparent, since the Secretary has followed the mandate of Congress and the Courts that the Act be construed liberally in order to promite its primary purpose, that of promoting safety in the mines. Citing the legislative history of the 1977 Act, Senate Report No. 95-181, 95th Cong., 1st Sess. (1977), respondent states that the Senate Committee Report rejected a construction of "imminent danger" which would require a finding by an inspector that it would be as likely as not that a serious injury or death would result before a condition might be abated. The report stated:

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. Since we are dealing with situations where there is an immediate danger of death or serious physical harm. The Committee intends that the Act give the necessary authority for the taking of action to remove miners from risk. [Emphasis added.]

Turning to the evidence and testimony adduced at the hearing, respondent points to the fact that Consol admitted some involvement with the dam and was aware of its condition in that it had given some piping to someone who ran the waterworks, but has since discontinued the practice. In addition, respondent argues that the testimony reflects that Consol employee Daniel Hall ran the water works, that mine superintendent Jordan contacted him about the pumping of the water, and that then Consol vice president Mauck prevailed on Mr. Hall to take certain steps to prevent any future incident involving the pumping of water over the face of the dam. Respondent believes it is apparent on the facts here presented that an employee of Consol, Mr. Mauck, felt he would be able to take steps to protect the miners from an imminent danger in the future. Respondent concludes that the inspectors, after observing the water and the condition of the dam, could not disregard the miners' safety and acted reasonably in issuing the section 107(a) order, and that they need not wait until the water is on mine property before issuing a section 107(a) order.

In its reply brief, respondent UMWA comments on applicant's discussion of the jurisdictional and reasonable belief issues, and it points to applicant's counsel's comments at the hearing where he stated:

> Mr. Skrypak: "Your Honor, we have no problem with the idea of the reasonable belief of the inspectors. If it

matters * * * we would accept that, that the imminent danger order is based on a reasonable belief by the inspectors. Our position is purely jurisdictional, that he did not have the jurisdiction over that outside force * * *." [Emphasis added.]

(Tr. 9, 11-17).

With regard to the applicant's arguments concerning the inspector's training and expertise in evaluating water impoundments, respondent states that applicant fails to mention that Mr. Ash has had 21 years of experience before joining MSHA, much of the time at the Four States No. 20 Mine, and that he was raised near the dam, saw it rebuilt, and knew the approximate size and dimensions of the dam (Tr. 17, 39). Further, respondent argues that while a stability analysis on the dam is not available, the Army Corps of Engineers' report classified it as a "hazardous structure," and in fact, asserts that the report had caused the pumping (which was the subject of the instant action) to be initiated in the first place because, when the water level raises, it must be kept 2 feet below the spillway (Tr. 145). Further, respondent argues that the term "reasonableness," as used in the Act, means reasonableness in the minds of the inspectors and not reasonableness as interpreted by applicant. Just as applicant cannot realistically expect the inspectors to wait until the water has reached mine property before issuing their closure order, so, too, applicant cannot expect to have only a dam expert issue the closure order. The inspector has adequate training to meet MSHA requirements and he was backed by the Army Corps of Engineers' study which stated that, whenever the water level rises, it must be kept 2 feet below the spillway for safety precautions. Thus, respondent again concludes that the 107(a) order was issued on a reasonable belief that the dam was in danger of bursting before abatement of the condition might occur which would endanger the lives of the miners working on the surface and underground at the Four States No. 20 Mine.

Findings and Conclusions

Were the conditions described by the inspectors an imminent danger, and if so, was the withdrawal order properly issued?

It is clear from the testimony of Inspectors Ash and Bowers that they believed the dam would weaken and collapse if the pumping of the water over the face of the dam and down the earthern embankment continued unabated. Their conclusion that this event was likely to occur was based on their observations of water being pumped and discharged in such a manner as to cause erosion of materials from the earthern breastwork of the dam, the formation of a gulley which grew in depth and breadth as they made their way across the dam structure during their inspection, water seepage which they attributed to a breach in the dam structure itself, other signs of instability which they described during their testimony in support of the withdrawal order, and their belief that had the dam collapsed, the surging water would go down the hollow and inundate the mine, including the surface

preparation plant as well as the shafts. The inspectors' conclusions, both as to the existence of an imminent danger, and the conditions which they observed which led them to conclude that the dam would collapse if the pumping and discharging of the water continued unabated was supported by the testimony of MSHA engineer Watkins who arrived at the dam site an hour or so after the written withdrawal order was issued. Mr. Watkins examined the existing conditions, including the water level in the dam, several leaks which he believed were caused by seepage through the dam structure itself, the gully being formed by the pumping and discharging of water through the two lines described by the inspectors, sink holes, erosion being caused by the pumping, and the existence of a high dam phreatic or seepage line which he believed was a critical sign of the instability of the dam structure. Mr. Watkins also believed that with the existence of all of these conditions, the dam was capable of collapsing, and if it did, the water would flood the mine.

The thrust of applicant's defense to the imminent danger order is its belief that such an order may not be issued on the basis of an imminently dangerous condition which exists outside of or off mine property, and MSHA's lack of jurisdiction over the dam structure itself. Also, applicant maintains that the inspectors' lacked the necessary engineering expertise to make an informed judgment as to the stability of the dam and that an after-the-fact engineering study conducted by MSHA indicated that even if the dam had collapsed, the water would only have reached the perimeter of the mine property at the railroad yard and would not have innudated the preparation plant or the underground mine shafts.

Regarding the actual conditions observed by the MSHA inspectors and Mr. Watkins, none of the witnesses presented by applicant actually observed those conditions on the evening of February 26 when the order issued. Preparation Plant Foreman Simmons never visited the dam site and knew nothing about the conditions observed there. Mine Superintendent Jordan visited the dam site the day after the order issued and after the pumping and discharging of water had ceased. Although he expressed little concern over the condition of the dam, he agreed that had the pumping and discharge of water continued for a couple of days, that would have been of some concern to him. He also indicated that the erosion and formation of the gulley, which was the primary concern of the inspectors, would have concerned him only if more rather than less of the face of the earthern portion of the dam were affected by the erosion. It seems obvious to me that the continuous pumping and discharging of the water from the dam over and down the earthern breastwork of the dam would have increased, rather than decreased, the erosion, thus expanding the gulley being formed. Under the circumstances, taken in perspective, Mr. Jordan's "concerns" with respect to the erosion and the existence of the gulley coincides with the concerns of the inspectors.

After careful review and analysis of the testimony presented by MSHA in support of the closure order in question, I find and conclude that the

inspectors acted properly in issuing the order and that their testimony supports their finding of an imminent danger. I am not persuaded by applicant's arguments concerning the lack of engineering expertise by the inspectors at the time they observed the conditions on which they based their action. It seems clear to me that the inspectors were qualified to make a judgement as to the existence of an imminent danger, that they were qualified mine inspectors of many years experience in mining, including the inspection of mines and the detection of any perceived hazards which may result from those inspections. Further, I do not believe that one necessarily has to be a professional engineer to determine whether an imminent danger actually exists. Those judgments may, and in fact are, made by inspectors in the normal course of their everyday mine inspections. The question presented is whether on the facts presented they acted reasonably in the circumstances presented on the evening of February 26, 1979. In this case, both inspectors were experienced inspectors and they had adequate training in the detection of conditions which could lead to the collapse of a dam structure. The fact that they were proved subsequently wrong with respect to the question of whether the water would actually reach the dam in the event of a collapse is immaterial to their judgement call made on the evening of February 26. The legislative history of the concept of "imminent danger," as well as the case law previously discussed herein makes it clear to me that the inspector's made the proper decision and that the facts and circumstances which they observed supports their judgement that an imminent danger did in fact exist at the time the order was issued.

Applicant's suggestion that an inspector must wait upon the arrival of a professional engineer or water impoundment expert, or must await the result of engineering studies before taking any action to insure the safety of miners is rejected. Faced with the situation of a possible dam collapse and the inundation of the mine from that collapse, the inspectors need not wait the results of further testing or studies before taking immediate appropriate action to protect the lives of miners. They are compelled to take prompt action, and to do anything less would endanger lives and lessen the impact of what Congress intended when it enacted the imminent danger withdrawal sanction of section 107(a). A literal application of applicant's argument on this point would require an inspector to sit back and wait until the water from the dam is running down the mine shafts before taking any action. On the facts presented here, if the inspectors had not acted and the pumping of water had continued unabated and uninterrupted, I conclude that it was just as probable as not that the earthern portion of the dam would have weakened and washed away to the point where it was likely that it would have collapsed and released a torrent of water downstream in the direction of the mine. Under the circumstances, it seems clear to me that the inspectors' intent in issuing the order was to remove the miners from the imminently dangerous position they were in and to insulate them from the possibility of being exposed to the water had it reached the mine shafts. Further, as pointed out by the UMWA in its brief, applicant's counsel more or less conceded during oral arguments at the hearing that the inspectors' finding of imminent danger was based on their reasonable belief that the conditions they observed presented an imminently dangerous situation.

May an imminent danger order be sustained in the basis of an imminently dangerous condition which exists off mine property?

After careful review and consideration of the arguments presented by the parties with respect to the question of whether extrinsic factors off mine property may serve as the basis for a finding of imminent danger affecting miners on mine property, I conclude and find that the arguments advanced by the respondents in this case are correct and that those advanced by the applicant must be rejected. While it may true that on its face, the definition of "imminent danger" as stated in section 3(j) speaks in terms of conditions or practices in a mine, it is also true and without question that the courts have construed the Act broadly and liberally so as to effectuate Congressional intent to insure the safety of miners while in their work environment. It seems clear to me from the legislative history and the court decisions cited by the respondents that the Act has been liberally construed on the side of safety and that once it is established that an imminent danger posing a threat to the lives and safety of miners has been established it matters not that the source of the imminent danger is some exstinsic set of circumstances. On the facts of this case, it seems clear that the imminent danger was the liklihood of a dam failure which the inspectors reasonably believed would have resulted in a torrent of water inundating the mine. In such circumstances, I cannot conclude that the inspectors acted unreasonably. Further, it seems clear that applicant too does not seriously contest the fact that such an imminent danger should be ignored. Aside from the legalistic and strict interpretation arguments advanced by the applicant in defense of the closure order, applicant still maintains that it would have voluntarily withdrawn miners without prodding from MSHA if in fact an imminent danger existed and that it did so in the past when it ceased mining operations and withdrew miners in December 1978 when the dam crested and resulted in an evacuation of persons downstream by several local agencies.

With respect to the question of whether MSHA had initial jurisdiction over the dam, the fact is that notwithstanding MSHA's own admission that it lacks inspection jurisdiction over the dam, the inspectors did venture on the dam property, albeit as trespassers, and determined that an imminent danger in fact existed. That is a fact that I cannot ignore, and coupled with the additional fact that the dam owner lodged no protest to the presence of the inspectors at the time the closure order was issued, I am constrained to apply the facts as I find them. Here, as previously found and concluded by me, the dam conditions as observed by the inspectors on the evening of February 26, constituted an imminent danger and they acted reasonably so as to protect the miners from harm. Under the circumstances, while the inspectors may not have had enforcement jurisdiction over the dam per se, they did have jurisdiction under the Act to determine the existence of any imminent danger to the miners and to take appropriate action to insure the safety of the miners and to insulate them from any hazards posed by that danger.

I believe it is clear from the evidence and testimony presented in this proceeding that applicant did not own, operate, or other control the dam

structure which in fact created the imminently dangerous condition found by the inspectors on the evening of February 26, 1979. Further, while it is true that applicant did not initially create the imminent danger nor exercised any legal control over the abatement of the conditions which resulted in the imminent danger, it is clear from the facts presented in this case that the abatement was a direct result of applicant's exercise of its influence over the person who was manning the pumps. While Mr. Hall's status as an employee of Consol may not be considered in a technical sense as creating an employee-employer relationship concering the dam and the pumping of water that was taking place on February 26, the fact is that applicant's then vice president prevailed on Mr. Hall to take the necessary steps to stop the pumping, thereby insuring the abatement and eventual termination of the closure order. In addition, one may infer that from a practical and realistic point of view, this act on the part of a Consol official precluded the future pumping of water in such a manner which undoubtedly would again expose the mine to another possible closure order. Thus, on the facts here presented, while applicant may be correct when it argues that it has no legal responsibility to insure against future pumping of the water in the manner in which it was being pumped on February 26, it seems clear to me that Mr. Hall would not want to again place himself in a similar position of defying or ignoring the pleas of his own employer to cease and desist from any future course of actions which would inevitably lead to another mine closure order and loss of production, irrespective of the fact that Consol may not have any legal obligations to intercede.

Although one may sympathize with Consol's predicament with respect to the abatement process, the fact is that on the facts of this case abatement was achieved through the direct intervention of Consol and that fact should be appreciated and recognized by all concerned. This is particularly true in this case where it seems clear that while the dam in question has for many years been a source of potential threats, not only to the miners and a community hall downstream, but to all of the inhabitants of the Four States Community, no one has taken any direct action to conduct stability studies and to take the necessary construction corrective action to insure against the loss of property and lives in the event of a dam failure. It also seems clear, and MSHA concedes, that the imminent danger resulted from no fault on the part of applicant, and MSHA should seriously consider this fact if it is contemplating filing a separate civil penalty proceeding seeking an assessment against Consol for the imminently dangerous conditions created by the dam on February 26. I take note of the fact that the language of section 107(a) with regard to the assessment of any civil penalty on the facts here presented suggests that the filing of any such act is discretionary or permissive rather than mandatory, and that considering the circumstances here presented, a civil penalty proceeding may be inequitable.

Conclusion

In view of the aforementioned findings and conclusions, and on the basis of the preponderance of the reliable and probative evidence adduced

in this proceeding, I find and conclude that the conditions described in the order of withdrawal constituted an imminent danger and that the order was issued. The evidence of record supports the judgment of the inspectors that the conditions they found on the day in question presented a situation that could reasonably be expected to result in death or serious injury to the miners in the Four States No. 20 Mine before the conditions could be abated and that normal mining operations could not continue or proceed until those conditions were abated.

Order

Order of Withdrawal No. 814153 issued February 26, 1979, is AFFIRMED and this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Leo J. McGinn, Trial Attorney, U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203

Karl T. Skrypak, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 23 1980

RAVEN MINING COMPANY,	:	Contest of Citation and Order
Contestant	:	
v.	:	Docket No. NORT 79-78
	:	
SECRETARY OF LABOR,	:	Order No. 0678141
MINE SAFETY AND HEALTH	:	January 22, 1979
ADMINISTRATION (MSHA),	:	
Respondent	:	Citation No. 035139
	:	January 8, 1979
UNITED MINE WORKERS OF AMERICA,	:	
(UMWA),	:	No. 1 Mine
Respondent	:	

DECISION

Appearances: J. Perry Dotson, Esq., Norton, Virginia, for the contestant; Leo McGinn, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the respondent MSHA.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a contest filed by Raven Mining Company on March 2, 1979, challenging the legality of the issuance of the captioned citation and order. The notice of contest is in the form of a letter dated February 8, 1979, from contestant's attorney, challenging the fact of violation and requesting a hearing on the closure order for the purpose of "determining damages sustained" by Raven Mining Company.

Respondent MSHA filed an answer on March 28, 1979, and asserted that the order was properly issued after contestant failed to take reasonable steps to abate the citation after an extension of the original time for abatement had been granted by the inspector who issued the citation. By notice of hearing issued on July 11, 1979, the matter was scheduled for hearing in Bristol, Virginia, September 11, 1979. Thereafter, on August 23, 1979, MSHA filed a motion to dismiss on the ground that the Act does not provide a remedy for recovery of "damages" sustained by a mine operator as a result of a closure order, and that a final order assessing a civil penalty in the amount of $160 for the violation in question was entered on May 23,

1979, and upon subsequent non-payment, was forwarded to the Department of Justice for collection on July 12, 1979. The collection procedure initiated by MSHA pursuant to 30 CFR 100.5 and 100.6, resulted from contestant's failure to respond to the initial notice of assessment issued by MSHA. Since MSHA's motion to dismiss was filed well after the notice of hearing, no ruling was made and the parties were directed to appear at the hearing and MSHA was afforded an opportunity to be heard on its motion. A hearing was conducted on the merits of the withdrawal order and the parties were afforded a full opportunity to be heard on all issues presented in the proceeding. The parties were afforded an opportunity to file posthearing briefs but declined to do so.

Issues Presented

1. Whether the final disposition of the civil penalty proceeding pursuant to Part 100, Title 30, Code of Federal Regulations, which resulted from contestant's failure to timely challenge the issuance of the citation, precluded contestant from challenging the propriety and legality of the closure order which resulted from the failure to abate the citation within the time fixed by the inspector.

2. Whether the time fixed for abatement of the citation was reasonable and whether the closure order was properly issued.

Applicable Statutory Provisions

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

2. Sections 104(a) and (b) of the Act, which states as follows:

> (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.
>
> (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.

DISCUSSION

Background of the Controversy

On January 8, 1979, at approximately 9:45 a.m., MSHA inspector Joseph Tankersley issued Citation No. 035139 pursuant to section 104(a) of the Act charging a violation of 30 CFR 75.1713-2. He fixed the abatement time as 9 a.m., January 12, 1979, and the citation stated as follows: "A communications system was not provided at the mine where the nearest point of medical assistance in case of an emergency could be contacted. (The phone company had removed the phone from mine property)."

On January 12, 1979, the inspector extended the abatement time to January 19, 1979, and the reason given for the extension was stated as follows: "The mine foreman stated that the operator contacted the phone company, and they are going to install the phone as they could get to it. More time is needed for the telephone company to install the telephone."

On January 22, 1979, the inspector issued a section 104(b) order of withdrawal and the basis for this action is shown on the face of the order as follows: "A communication system has not been provided at the mine where medical assistance could be contacted in the event of an emergency."

The inspector modified the withdrawal order on January 23, 1979, to show that the entire mine and surface work areas were closed. He further modified the closure order on January 24, 1979, to allow mine operations to continue, and the reasons for this action are shown on the face of the modification order as follows: "This is a modification allowing the operator to resume operations due to the fact that Moss 3-A Mine, Clinchfield Coal Company is readily available (estimated five (5) minutes travel) and the operator is installing communications to the Moss 3-A Mine. Moss 3-A personnel have agreed to the communication system."

The order was subsequently terminated on January 26, 1979, after abatement of the cited conditions and after telephone communications were established between the Raven Mine and the Clinchfield Mine, and Clinchfield agreed to supply emergency ambulance service. The telephone communications between the two mines is the system presently in use and MSHA has now

accepted this arrangement as compliance with the requirements of section 75.1713-2 (Tr. 78-84).

Testimony and Evidence Adduced by MSHA

MSHA inspector Joseph R. Tankersley testified that he issued the citation and order in question, and he identified copies of the citation, order, the modification of the order, and the termination of the order (Exhs. G-4 through G-6). During his January 8th inspection, he noticed that the telephone which had been installed for emergency communication had been removed from the mine. Based on conversations with the mine foreman, he ascertained that the telephone was removed by the phone company for failure to pay delinquent bills. The phone jack was still on the wall of the mine office and he had observed the telephone during previous mine inspections. The phone was installed to comply with section 75.1713-2, and mine president James C. Scarborough, had previously submitted a letter to the MSHA district manager advising that the emergency communication system would be by telephone. The letter stated that the operator would contact the Dante Clinic by telephone in emergency cases (Tr. 37). Inspector Tankersley explained the requirement of the standard to the foreman, and when asked whether a CB radio was acceptable to meet the requirements of section 75.1713-2, he advised him that it was. However, a CB radio was not located on mine property during the January 8th inspection. The CB radio was kept in the mine foreman's personal vehicle which was being used by his wife on that day, and anytime miners or their wives used the vehicles, the CB's would be off mine property. When he inspected the mine on January 8, 1979, there was no automobile or CB radio on mine property, and there was no other form of communications available.

Inspector Tankersley testified that he fixed January 19 as the abatement time, but could not return to the mine until January 22, at which time he found that the mine phone had not been reinstalled because of non-payment of back bills. He modified his order on January 24, because Mr. Scarborough spoke with MSHA's subdistrict manager about providing an alternate communication system whereby Mr. Scarborough and the district manager agreed that a telephone line would be extended to the Clinchfield Mine, approximately 300 yards away, and Clinchfield Coal Company agreed to provide the Raven Mine with emergency ambulance service. Upon the subsequent installation of the telphone on January 26, he terminated the withdrawal order. Although he modified and terminated the withdrawal order, Mr. Tankersley did not believe that the contestant acted in a reasonable manner in abating the citation and withdrawal order because non-payment of bills is not a valid reason. The first time contestant attempted to negotiate with Clinchfield about a telephone line was January 24, 1979, and prior to this time contestant refused to pay the delinquent telephone bills, but the telephone was subsequently reinstalled at the mine (Tr. 33-43).

On cross-examination, Inspector Tankersley testified that section 75.1713-2 permits the use several means of communications, such as a phone, CB, vehicle radio phone, or "any other means of prompt communcation to the nearest point of medical assistance." He stated that "any other means of

prompt communication" means some kind of positive communication between the medical facility and the mine, and it does not mean face-to-face vocal communication. He would not accept as compliance Mr. Scarborough running to the Clinchfield Mine to seek ambulance assistance in the event of an accident. Although the Dante Clinic is some 5 miles, or 20 minutes, from the mine, whereas the Clinchfield Mine is 5 minutes away and has an ambulance available, Clinchfield does not have the medical personnel as does the clinic, and the intent of section 75.1713-2 is to provide medical service. Further, even though Mr. Scarborough is a lessee of Clinchfield, it is debatable whether Clinchfield would render assistance (Tr. 43-47). At the time the telephone line to Clinchfield was being installed on January 25, a CB system would have sufficed as long as there were someone present all the time to answer it. He did not believe that someone running to Clinchfield would satisfy the requirement of promptness (Tr. 48). There have been no medical emergencies at the mine (Tr. 48).

Responding to a question about section 75.1713-1, Mr. Tankersley testified that it requires the mine operator to advise the district manager of the type of communication plan used at the mine so the district manager can determine whether it complies with the standard, and if there are changes, the operator is required to notify the district manager within 10 days. Section 75.1713-2 allows the operator to determine whether or not the change in communication complies with the requirements (Tr. 49).

On redirect examination, Inspector Tankersley testified that the "Paul Revere" type of communication, as opposed to the telephone line to the Clinchfield Mine, is not satisfactory because the 300 yard distance by foot is not easily traveled or accessible during snow or rainy weather. If an accident occurs on mine property, the operator is required to maintain a permanent telephone number for the emergency medical facilities posted (Tr. 50).

On recross-examination, Mr. Tankersley testified that the Clinchfield Moss 3A Mine is 300 yards higher on the mountain than the Raven mine, and the mines are connected by a haulage road. Miners frequently use a vehicle in traveling on the haulage road to and from both mines (Tr. 51-52). Responding to a bench question about whether he was aware of the existence of an alternate means of communication when he issued the citation on January 9, 1979, Inspector Tankersley stated that he was not (Tr. 55). Calls from the mine to the Dante Clinic were not made by CB radio, and the reason for issuing the citation was that he observed no telephone at the mine (Tr. 57).

On redirect examination, Inspector Tankersley testified that if the telephone had been replaced in the mine office by a CB radio, he would not have issued a citation, and had he observed any telephone communication between the two mines, he would have contacted personnel at the other mine to ascertain whether this arrangement was acceptable (Tr. 58).

On recross-examination, Inspector Tankersley testified that he does not inspect any mines that are using CB radios. In Kentucky, MSHA inspectors have accepted CB radios under section 75.1713-1 only if they are installed in the mine office, but a CB radio installed in a vehicle which is not on mine property at all times does not comply with section 75.1713-1 (Tr. 59).

Contestant's Testimony

James C. Scarborough, President of Raven Mining Company, testified that he probably wrote up a communication plan, but when he first started operations, he could not obtain telephones. In view of the fact that the C & P Telephone Company was slow in installing telephones, he installed a telephone line down the hill to the Clinchfield Mine and used that system as a mine telephone. Although Mr. Tankersley did not inspect the mine at that time, another inspector did and and he accepted the system. On January 8, the mine used a CB radio instead of a telephone, because the existing line to Clinchfield was broken by a truck. When the CB was being used he did not advise MSHA of the change because he was not aware that he had to, and he spoke to no inspector about it (Tr. 62). He could not recall whether the phone was out or in and indicated that he was experiencing difficulties in maintaining the phone in working order when it rained and that the phone company could not maintain it in operating order (Tr. 63).

Mr. Scarborough testified that his CB arrangements entailed arrangements with a Mr. Darrel Duty, who is home all the time working with CB's. In the event of the need for medical assistance, a call would be made to Mr. Duty from a CB in three trucks at the mine and he in turn would call the Coeburn Rescue Squad which was an hours drive away. There was no CB in the mine office. This plan never included the Dante Clinic, and Mr. Scarborough stated he did not know that the Dante Clinic had an ambulance service. This arrangement was the mine plan which was filed with MSHA in addition to the plan to run to the adjacent clinchfield mine to summon their ambulance in the event of an emergency. He then stated that the CB plan was not filed with MSHA's district manager, but that it was in use at the mine. The district manager was also not informed about the arrangements to use Clinchfield's ambulance, but frequent trips are made to that mine either by automobile over the road or on foot. In addition, he can yell down to the mine and can be heard. He has never discussed this plan with Inspector Tankersley (Tr. 63-68).

Mr. Scarborough stated that under his interpretation of section 75.1713-2, he can "holler at somebody and get communication, it's just as well as talking to somebody on the telephone." He was not at the mine when the inspector was there on January 8, but he set up a CB radio after that time and his employee assured him from that day on that the three vehicles with CB's would be at the mine at all times. He learned from his employee that when the inspector returned to the mine, he refused an offer to call Mr. Duty on the CB and issued his closure order (Tr. 69).

Mr. Scarborough stated that he is not protesting the fact that the inspector issued a citation on January 8 after he observed that there was no

phone in the mine office. His protest is of the closure order after he established CB communication and the procedure for running to the Clinchfield mine for assistance (Tr. 77).

On cross-examination, Mr. Scarborough testified that he did not know when the telephone was removed from the mine office, nor he know whether the foreman's truck with the CB radio was off mine property. Although he did not see or talk to Inspector Tankersley, he testified that Mr. Tankersley returned to the mine on January 12, the date on which the citation was scheduled to be terminated, and he spoke with foreman Gary Johnson, and granted an extension for abatement until January 19. He further testified that he did not see or talk to Inspector Tankersley during the citation closure stage, and Mr. Johnson informed him about the CB arrangements with Mr. Duty, but that he personally has never met Mr. Duty (Tr. 91-93). Although the mine was operating under two shifts when the citation was issued, all three employees with the CB's in their trucks were on mine property at all times even though they worked only one shift. Now that the mine is operating under one shift, all three employees are present (Tr. 94).

Responding to a question about the reinstallation of the telephone system between his mine and the Clinchfield Mine, Mr. Scarborough testified that he authorized the issuance of a telephone order on January 22, 1979. Although Inspector Tankersley granted respondent 3 days beyond the extension to January 22, he testified that it was unreasonable for him for not trying out the CB radio. If all three employees were there, a CB radio was guaranteed to be there. Foreman Gary Johnson has never been absent since the mine has been in operation, and Mr. Johnson told him that Inspector Tankersley was mistaken about the CB radio truck being taken away by his wife on January 8, 1979 (Tr. 96).

Findings and Conclusions

Reviewability of the Closure Order

During the hearing, MSHA reasserted its view that the contest should be dismissed because the pleadings filed by the contestant indicated a desire by contestant to be heard on the limited question of "damages" sustained by the closure order. Since the Act does not provide for monetary damages, and since a final default order assessing a civil penalty in the amount of $160 for the citation in question was entered on May 23, 1979, and forwarded to the Justice Department for collection on July 12, 1979, MSHA argues that the operator's opportunity for affirmatively pleading economic loss as a mitigating factor in the amount of any penalty assessed is irrevocably lost (Tr. 8-10; MSHA's Motion to Dismiss, filed August 23, 1979).

Contestant argued that its intent in filing its initial notice of contest on February 8, 1979, was to challenge both the fact of violation and the subsequent withdrawal order which issued. Contestant maintained that it should be given the opportunity to establish and prove its contention that at the time the citation issued, contestant did in fact have a communications system in effect at the mine which met the requirements of

section 75.1713-2, that the issuance of the citation and the order were arbitrary, and that contestant should be entitled to present its case so as to avail itself of all available administrative, as well as economic remedies to which it is entitled under the Act (Tr. 12-14).

It would appear from the record in this case that no formal civil penalty proceeding has ever been filed by MSHA with the Commission, and this resulted from the fact that the contestant did not contest the initial proposed penalty issued by MSHA pursuant to 30 CFR 100.5 and 100.6, and the matter culminated in a default order being forwarded to the Department of Justice for collection of the $160 assessment for Citation No. 035139. Under the circumstances, I agree with MSHA's assertion that contestant is foreclosed from pleading any off-set resulting from the closure order in its current contest. However, it seems clear that in a civil penalty proceeding, the validity of the order is not in issue, and withdrawal orders are not subject to vacation, Buffalo Mining Company, 2 IBMA 327 (1973); Plateau Mining Company, 2 IBMA 303 (1973); Ashland Mining Company, 5 IBMA 259 (1975); Jewell Ridge Coal Company, 3 IBMA 376 (1974). The usual method for an operator to contest the propriety and legality of a withdrawal order is to seek review pursuant to section 105(d) of the Act, and the fact that the conditions cited have been abated and the order terminated does not warrant dismissal of the contest, Zeigler Coal Company, 1 IBMA 72 (1971). On the facts and circumstances presented in this proceeding, I conclude that contestant is entitled to an independent review of the validity and propriety of the closure order issued pursuant to section 104(b) of the Act, notwithstanding the fact that it did not contest the initial proposed civil penalty assessment. Under the circumstances, MSHA's narrow and restrictive reading of the notice of contest filed in this case is rejected and its motion to dismiss is DENIED. I conclude that contestant has a right to seek review of the reasonableness of the abatement time, and coupled with the fact that it may be liable to compensate miners under section 111 of the Act for the period of time the mine was closed as a result of that order, it is is entitled to its day in court, and MSHA conceded as much during oral argument (Tr. 20-23, 26). Although it is true the notice of contest filed by the contestant on February 8, 1979, makes reference to a desire for a hearing "to determine damages" sustained by the contestant as a result of the closure order, I believe that the pleadings should be broadly construed so as to protect not only the rights of miners, but mine operators as well.

Reasonableness of the Abatement Time

The underlying citation issued in this case charges the contestant with a violation of 30 CFR 75.1713-2, which provides as follows:

> (a) Each operator of an underground coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency.

(b) The emergency communication system required to be maintained under paragraph (a) of this § 75.1713-2 may be established by telephone or radio transmission or by any other means of prompt communicationi to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of § 75.1713-1.

The citation was initially issued on January 8, 1979, and the original abatement time was fixed as January 12, 1979, and subsequently extended to January 19, 1979. The inspector did not return to the mine until January 22, 1979, and at that time made the determination that abatement had not been achieved and that the time should not be further extended. Under the circumstances, he then proceeded to issue his withdrawal order, and the issue presented is whether the inspector acted reasonably in light of all of the prevailing circumstances. In this regard, it seems clear that where an inspector finds that a violation has not been abated within the initial or extended time fixed by him, he is authorized to either grant another extension or issue a withdrawal order. The inspector must act reasonably on the basis of the facts confronting him at that time, United States Steel Corporation, 7 IBMA 109 (1976), and it is an abuse of discretion to issue a withdrawal order if the circumstances show that the time for abatement should have been further extended, Old Ben Coal Company, 6 IBMA 294 (1976). The contestant has the burden of establishing that the inspector acted unreasonably in fixing or failing to extend the abatement time, Freeman Coal Mining Corporation, 1 IBMA 1 (1970).

It seems clear from the record in this proceeding that the inspector issued the initial citation when he failed to find a telephone installed in the mine office. Although he observed a phone jack, the telephone was missing, and upon further inquiry he learned that the phone had been removed because of non-payment of past bills. Contestant has presented no evidence to dispute this fact, and Mr. Scarborough did not deny it. The inspector believed that a violation occurred because contestant failed to maintain its telephone communications between the mine and a local clinic, and this arrangement was the only one on file with the local MSHA district office. Further, during the course of oral argument at the hearing, contestant indicated that it was not challenging the initial citation issued by the inspector as a result of his failure to find a telephone installed in the mine office (Tr. 76). Contestant's defense to the order is based on the assertion that subsequent to the issuance of the citation, contestant did in fact establish a communications system which complied with section 75.1713-2, when it instituted a procedure for voice of foot communications with the adjacent Clinchfield Mine and a system for use of CB radios mounted on vehicles which were on mine property. In these circumstances, contestant argued that it was in compliance at the time the order issued and that the inspector acted arbitrarily and unreasonably in failing to accept these procedures as compliance and in issuing his closure order (Tr. 75-80).

Although Mr. Scarborough alluded to the fact that he had somehow changed his communication plan which had been filed with MSHA, and intimated that MSHA had accepted something less than telephone communications, it seems clear from the abatement and the testimony presented by both Mr. Scarborough and the inspector, that abatement was achieved by the installation of a phone line between the Raven Mine and Clinchfield Mine so that emergency ambulance service could be provided, and that MSHA will not accept CB communications mounted in a mine vehicle or voice and/or foot communication as compliance (Tr. 79-85). It is also clear to me that contestant's attempts at compliance by utilizing means other than a telephone system took place during the abatement period (Tr. 89). Mr. Scarborough was not at the mine when the withdrawal order was issued on January 22, and he believed the inspector acted unreasonably by not trying out the CB radio arrangements (Tr. 95). Aside from the fact that it can be argued that contestant has waived its right to contest the fact of violation by not contesting the original civil penalty assessment and permitted that assessment to ripen into a default judgment, the facts and evidence adduced at the hearing in this contest proceeding supports a finding of a violation of the cited standard. It seems clear from the record that at the time the citation issued, contestant was not in compliance with section 75.1713-2, because it did not have the required operative telephone communications arrangements with respect to emergency medical assistance.

With respect to the reasonableness of the abatement time, I find and conclude that the record establishes that the inspector acted in more than a reasonable fashion in fixing the initial abatement time, as well as in the exercise of his discretion in not extending the abatement time any further. On the basis of the evidence adduced here, it seems clear to me that contestant's failure to maintain the required emergency telephone communications stems from the fact that contestant failed to pay its past due telephone bills. That is a matter solely within the contestant's control, and I can find no mitigating circumstances presented which detracts from that fact. The initial abatement time was more than ample for contestant to resolve the matter with the phone company. As a matter of fact, contestant was gratuitously given an additional period for compliance from January 19 to January 22. However, on the basis of the record here presented that time was apparently spent by contestant in an effort to convince MSHA that his alternative communications efforts were in compliance rather than to comply with the citation and timely reinstall the phone. Considering the totality of the circumstances presented, I conclude and find that the time fixed for abatement was reasonable and that the inspector was not arbitrary in failing to extend the abatement time further. The order is AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, Citation No. 035139, issued January 8, 1979, and Order of Withdrawal No. 0678141, issued January 22, 1979, are AFFIRMED, and contestant's request for any relief

with respect to the issuance of the citation and order pursuant to the Act is DENIED and this contest is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

J. Perry Dotson, Esq., Earls, Wolfe & Farmer, 470 Park Avenue, Norton, VA 24273 (Certified Mail)

Leo McGinn, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 24 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ANTHONY E. HERIGES, Applicant	:	Complaints of Discharge, Discrimination, or Interference
v.	:	Docket No. KENT 80-22-D
ISLAND CREEK COAL COMPANY, Respondent	:	CD 79-103
	:	Docket No. KENT 80-23-D
	:	CD 79-113
	:	Hamilton No. 2 Mine
	:	Morganfield, Kentucky
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of TOM ANTONINI, Applicant	:	Docket No. KENT 80-15-D
v.	:	CD 79-133
ISLAND CREEK COAL COMPANY, Respondent	:	Docket No. KENT 80-14-D
	:	CD 79-97
	:	Hamilton No. 1 Mine
	:	Madisonville, Kentucky
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOHNNY GIBSON, Applicant	:	Docket No. KENT 80-42-D
v.	:	CD 79-198
	:	No. 9 Mine
ISLAND CREEK COAL COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LARRY HALEY, Applicant	:	Docket No. KENT 80-52-D
v.	:	CD 79-199

ISLAND CREEK COAL COMPANY, : No. 9 Mine
Respondent :

ORDER OF DISMISSAL

The Secretary filed his response to my December 20, 1979 and January 3, 1980 Orders to Show Cause why the above cases should not be dismissed in light of the Commission's decision in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. The Helen Mining Co., Docket No. PITT 79-11P, 1 FMSHRC Decs. 1796 (1979), appeal docketed, No. 79-2537 (D.C. Cir. Dec. 21, 1979).

Most of the Secretary's arguments are directed to the soundness of the Commission's reasoning in Helen Mining. I have no power to disturb that decision. Thus, the Secretary must demonstrate that the facts of these cases are sufficiently distinguishable from those in Helen Mining that the latter case is not controlling. The Secretary argues that:

> "Helen Mining, supra, specifically addresses the spot inspection required by § 103(i) of the Act. This section requires the Secretary by his authorized representative to conduct spot inspections at irregular intervals where the mine to be inspected is found to liberate a given quantity of methane gas. Only Tom Antonini, Docket No. KENT 80-15-D, CD 79-133, is a true 103(i) inspection matter. The other cases under consideration involve spot inspection of a different nature than the type contemplated by Helen Mining, supra. Consequently, Helen Mining, supra, should not constitute precedent which would cause a dismissal of the complaints of discrimination." Secretary's Response at 10.

I do not find this argument to be convincing. In Helen Mining, the Commission stated the issue as "whether a mine operator must pay a miners' representative for the time he spends accompanying a mine inspector during a 'spot' inspection required by section 103(i) of the Federal Mine Safety and Health Act of 1977 * * *" 1 FMSHRC Dec. 1796. The Commission's analysis of the statutory language and legislative history of the Act clearly indicates that the decision was not intended to be so limited. The following statement of Congressman Perkins, made during an oral report to the House on the results of the conference committee's deliberations, was relied on by the Commission in Helen:

> "* * * [I]t is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator." 1 FMSHRC Decs at 1804 quoting Legislative History of the Federal Mine Safety and Health Act of 1977 at 1358.

This evidence of legislative intent is equally dispositive of the issue presented here. Furthermore, after the Commission's decision in Helen Mining, it again relied upon Congressman Perkins' remarks in holding that a miners' representative was not entitled to walkaround pay for the time spent accompanying an inspector during a special electrical inspection. Kentland-Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), and United Mine Workers of America, Docket No. PIKE 78-399, 1 FMSHRC Decs. 1833 (1979), appeal docketed, No. 79-2536 (D.C. Cir. Dec. 21, 1979).

ORDER

The cases are DISMISSED without prejudice.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

William F. Taylor, Attorney, Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Marshall S. Peace, Ass't. Corporate Counsel, Island Creek Coal Company, 2355 Harrodsburg Road, P.O. Box 11430, Lexington, KY 40575 (Certified Mail)

Office of Special Investigation, MSHA, U.S. Department of Laobr, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 24 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WEVA 79-293
Petitioner	:	A.O. No. 46-03859-03029
v.	:	
	:	Sewell No. 1A Mine
SEWELL COAL COMPANY,	:	
Respondent	:	

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of a civil penalty. Petitioner alleged that Respondent violated the mandatory safety standard at 30 CFR 75.1403-6(b)(3). That standard provides that: "[E]ach track-mounted self-propelled personnel carrier should: * * * [b]e equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys), which transport not more than 5 men, need not be equipped with such sanding device * * *."

A hearing was held on December 17, 1979, in Charleston, West Virginia. The issues are whether Respondent violated the standard and, if so, the appropriate civil penalty to be assessed, based upon the six criteria in Section 110(i) of the Act. At the hearing, Homer S. Grose, the MSHA inspector who issued the citation, testified for Petitioner and Paul E. Given, Respondent's safety director, testified for Respondent.

The parties stipulated, and I find, that:

1. I have jurisdiction over this proceeding, and Respondent is within the jurisdiction of the Act.

2. Respondent is a large operator and payment of an appropriate civil penalty will not affect its ability to continue in business.

3. Respondent was duly served with the citation and its termination notice.

4. Respondent exercised ordinary good faith in abating the conditions giving rise to the citation.

5. In the 24-month period immediately preceding the issuance of the citation, 452 alleged violations were assessed against Respondent, covering a total of 242 inspection days. This information was derived from an MSHA computer history printout.

6. Between 30 and 40 of these alleged violations involved 30 CFR 75.1403-6(b)(3), the standard involved in this case. By entering into this stipulation, Respondent does not concede that these citations actually represent violations of the cited standard.

7. All exhibits are authentic and may be admitted into evidence on that basis, subject to possible objections as to their relevancy.

Mr. Grose was the only witness present at the time of the alleged violation. His testimony was uncontradicted. He stated that at approximately 8 a.m. on January 18, 1979, he observed a self-propelled, track-mounted personnel carrier emerge from Respondent's No. 1A Mine and discharge miners who had worked the night shift. The vehicle, which was capable of carrying approximately eight men, was equipped with devices which apply sand onto the tracks in front of the vehicle's metal wheels. The purpose of the sand is to increase traction and allow for better control of the vehicle. There is one sand tube in front of each of the four wheels.

At about 8 a.m., Mr. Grose observed Respondent's representative, Robert Neal, check the personnel carrier. After Mr. Neal had completed his inspection, Mr. Grose inspected the carrier. He found that two of the four sand hoses were clogged and therefore inoperative. Based upon this, he issued the citation. The hoses were cleared within 15 minutes of the issuance of the citation.

The sand hoses are approximately an inch and a half in diameter and can become clogged if the sand becomes damp or moist. They can be unclogged by inserting a rod or similar object into them and removing the damp sand. On January 18, 1979, there was no moisture on the mine's surface but there was dampness in the low-lying areas within the mine. Mr. Grose stated, and I find, that the mine contained steep grades and narrow areas which had little clearance and no shelter holes. Therefore, if a personnel carrier lost control, it could cause a dangerous accident.

The Secretary of Labor issued a safeguard notice with regard to this type of violation to Respondent in January 1978. During January 1979, there were nine other citations issued to Respondent for violations of this standard. Mr. Grose testified that violations of 30 CFR 75.1403-6(b)(3) occurred quite frequently at this mine.

Mr. Given did not know the facts surrounding the alleged violation. He was not present at the site on January 18, 1979, but he testified that the mine had a policy of attempting to comply with all personnel carrier standards and had issued instructions and posted notices to encourage compliance. He stated that there had never been an accident in this mine or any other Sewell mine as a result of a violation of this standard.

The parties waived submission of briefs. Based upon the evidence, I make the following conclusions of law and order:

Occurrence of Violation: The evidence is undisputed that on the date, time, and at the place alleged in the citation, the vehicle in question had only two of its four sanding devices in operating condition. The vehicle transported more than five men. Therefore, Respondent violated the standard at 30 CFR 75.1403-6(b)(3).

Gravity of Violation: I agree with Petitioner that this is a serious violation. Despite Respondent's arguments that the vehicle was equipped with brakes to impede its descent, the sanding devices were designed to prevent the vehicle from losing control and to increase traction between the vehicle's wheels and the tracks. I find that the devices were necessary for the vehicle's safe operation. At the time that the citation was issued, the vehicle in question was about to carry seven men down into the mine. The grades in the No. 1A Mine were fairly steep and areas near the vehicle's track had narrow clearances and no shelter holes. Therefore, if the vehicle lost control it is quite likely that serious injury or death would result.

Negligence: The parties stipulated that the operator was cited for between 30 and 40 violations of this safety standard during the 24-month period preceding this incident. During January 1979, the operator was served with nine citations for violation of this standard. The inspection of the vehicle made by Mr. Neal was inadequate, as he did not notice the inoperative sanding devices. This indicates negligence on the part of the Respondent.

Good Faith Efforts to Achieve Rapid Compliance: As stipulated, the operator acted in good faith in correcting this violation. The evidence showed that this was done within about 15 minutes.

Size of Operator's Business and Effect of Penalty on Operator's Ability to Continue in Business: The parties stipulated, and I find, that Respondent is a large operator and that the proposed penalty would have no effect upon its ability to continue in business.

History of Previous Violations: There were 452 previous violations by the operator during the 24-month period preceding this incident, covering 242 man-days of inspections.

Assessment of Penalty: The Assessment Office recommended a penalty of $295. Counsel for the Secretary contended that that amount is too small in view of the gravity of the violation and Respondent's high degree of negligence. I agree. I am impressed with the large number of violations of this safety standard committed by this operator. I think the recommended penalty is insufficient to motivate the operator to comply with this standard. A larger penalty is required to impress upon Respondent the seriousness of this type of violation and encourage future voluntary compliance. Therefore, I assess a penalty of $1,000.

ORDER

Respondent is ORDERED to pay $1,000 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

Barbara Krause Kaufmann and Sidney Salkin, Attorneys, Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Gary W. Callahan, Esq., Sewell Coal Company, Lebanon, VA 24266 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. PIKE 79-7-P A.C. No. 15-09867-03001
v.		Mine No. 1
TRIPLE S COAL COMPANY,	Respondent	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Docket No. PIKE 79-24-P A.C. No. 15-03785-03001 Mine No. 1
v.		
BELINDA COAL COMPANY,	Respondent	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Gary Stiltner, Ash Camp, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, as amended May 7, 1979, a hearing in the above-entitled consolidated proceeding was held on May 17, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty in Docket No. PIKE 79-7-P was filed on October 16, 1978, seeking to have a civil penalty assessed for an alleged violation of 30 CFR 75.1204 by Triple S Coal Company. The Petition for Assessment of Civil Penalty in Docket No. PIKE 79-24-P was filed on November 15, 1978, seeking to have a civil penalty assessed for an alleged violation of 30 CFR 75.1204 by Belinda Coal Company.

Issues

The issues raised by the Petitions for Assessment of Civil Penalty are whether violations of the mandatory health and safety standards occurred and,

if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Respondents' sole defense in their answers to the Petitions for Assessment of Civil Penalty and in the testimony of their witness at the hearing is that no violations of section 75.1204 occurred. Therefore, the first question to be determined in this proceeding is that of whether either respondent violated section 75.1204.

Docket No. PIKE 79-7-P

Notice No. 2 TLA (7-3) 12/13/77 § 75.1204 (Exhibit 5)

Findings. Section 75.1204, to the extent here pertinent, provides that when an operator permanently abandons a coal mine, he shall within 60 days after such abandonment file with the Secretary a copy of the mine map revised and supplemented to the date of abandonment or closure. Respondent Triple S Coal Company abandoned its No. 1 Mine in March or May 1977 and, within 2 weeks after such abandonment, one of its copartners personally took copies of the final map to MSHA's Pikeville Office and gave them to an inspector named Doug Fleming who gave the copartner no receipt showing that the final map had been submitted (Tr. 41).

When Triple S Coal Company received Notice No. 2 TLA alleging that the final map had not been submitted, the copartner who had delivered the map to Mr. Fleming called MSHA's Pikeville Office. Someone in that office stated that there had been some confusion regarding the map and that the matter would be taken care of. The copartner subsequently examined his old records and found two additional copies of the final mine map which were sent to MSHA and received by the Pikeville Office on January 20, 1978 (Tr. 33-34).

MSHA presented two witnesses in support of Notice No. 2 TLA. The first witness was Mr. Thomas L. Adams who wrote the notice. Notice No. 2 TLA alleges that respondent did not submit a final map of its No. 1 Mine although the mine had been abandoned for more than 90 days. Mr. Adams testified that he issued Notice No. 2 TLA on the basis of information supplied to him by MSHA's Ventilation Department at the Pikeville Office, but Mr. Adams did not know the date on whch the No. 1 Mine had been abandoned. Mr. Adams visited the site of the No. 1 Mine on or about December 1, 1977, and again about a week later. Since he found no one on the mine property on either occasion, he concluded that the mine was abandoned at that time, but he did not know how long the mine had been abandoned before he issued Notice No. 2 TLA (Tr. 30-31).

MSHA's other witness was Mr. Elmer Fuller who wrote on February 7, 1978, a notice of termination of Notice No. 2 TLA after he had been given a copy of the final map showing that it had been received on January 20, 1978 (Tr. 34-36). Mr. Fleming, to whom respondent's copartner gave the final maps, was unable to attend the hearing to state whether or not he agreed that respondent's copartner had submitted the final map within 2 weeks after the mine was closed (Tr. 11).

Conclusions. In my notice of hearing issued in this proceeding, I referred to the fact that respondent's defense was that it had submitted the final maps as required by section 75.1204. My notice then stated that MSHA should try to present as a witness the person to whom respondent allegedly gave the maps so that he could state whether or not he agreed or disagreed with respondent's claim that the final map had been submitted. MSHA did not have that person present at the hearing and gave no reason for his unavailability as a witness other than indicating through Mr. Adams' testimony that Mr. Fleming "* * * was unable to attend this hearing this morning" (Tr. 11).

Since respondent's witness testified under oath that he submitted the final map within 2 weeks after Triple S Coal Company's No. 1 Mine was abandoned, his testimony is entitled to more weight than MSHA's testimony because neither of MSHA's witnesses had personally examined MSHA's files in order to determine for certain that no final map had been submitted (Tr. 31; 36). They based their allegations that the final map had not been submitted solely on a list of companies which had been given to them by their supervisor. That list included respondent's No. 1 Mine, but neither of MSHA's witnesses was able to rebut with any personal knowledge respondent's claim that the final map had been submitted (Tr. 31-38). MSHA's Pikeville Office no doubt processes a large number of filings. Even the most competent employees occasionally make mistakes. In the absence of some evidence showing that a mistake was not made in processing respondent's maps, I believe that respondent's claim that it submitted the required map should be upheld.

Inasmuch as MSHA's evidence fails to show that respondent's copartner incorrectly alleged that the final maps were submitted within 60 days after respondent's No. 1 Mine was abandoned, I find that no violation of section 75.1204 was proven as alleged by Notice No. 2 TLA dated December 13, 1977. Therefore, MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-7-P will hereinafter be dismissed.

Docket No. PIKE 79-24-P

Notice No. 1 BHT (8-1) 1/30/78 § 75.1204 (Exhibit 2)

Findings. Notice No. 1 BHT alleged that respondent had violated section 75.1204 by failing to submit a final map for its No. 1 Mine which had been abandoned since June 23, 1975. Belinda Coal Company's witness agreed that the No. 1 Mine had been abandoned on June 23, 1975, but he insisted that he had personally, within 1 or 2 days after abandonment, submitted to Mr. Rick Keene in MSHA's Pikeville Office copies of the final map (Tr. 20; 27). Respondent's witness stated that he lives 30 miles from Pikeville and that it was his practice to come to Pikeville and fill out abandonment papers for both Federal and State agencies because "* * * I think practically everyone knows you have to have final maps before you can abandon mines" (Tr. 20).

MSHA's first witness in support of Notice No. 1 BHT was Mr. Billy H. Tackett. He stated that he had issued the notice after his supervisor gave him a "big list" of mines which had been abandoned without submission of final maps. Mr. Tackett did not check any files to determine whether Belinda

Coal Company had submitted a final map (Tr. 8). Another of MSHA's witnesses, Mr. Thomas Adams, testified that a final map was eventually submitted for Belinda's No. 1 Mine but that he did not know the date on which such a map was submitted (Tr. 13).

Conclusions. Apparently Mr. Adams was confused about the submission of a final map by Belinda in response to Notice No. 1 BHT because Belinda's witness stated that he never did submit a final map in response to Notice No. 1 BHT because he knew that he had already done so and that he had declined to do so after receiving Notice No. 1 BHT (Tr. 45). Nevertheless, Belinda's witness agreed at the hearing that he would submit a final map for a second time in order that MSHA's records could be completed with respect to Belinda's No. 1 Mine (Tr. 45).

MSHA's evidence in support of Notice No. 1 BHT was inadequate. Although MSHA did know when Belinda's No. 1 Mine had been abandoned, MSHA was unable to present as a witness Mr. Rick Keene or anyone else who had personal knowledge about Belinda's claim that copies of the final map had been submitted to Mr. Rick Keene 1/ (Tr. 10; 32; 36). MSHA's witnesses had not examined any files pertaining to Belinda Coal Company and could not personally state what specific information had been used to prepare the "big list" alleging that Belinda Coal Company had failed to submit a final map (Tr. 5-13).

Belinda's witness testified under oath that he had submitted the final map within 1 or 2 days after the No. 1 Mine had been abandoned and that he had done so because both MSHA and the State of Kentucky require that a final map be submitted at the time a mine is abandoned. The witness also recalled specifically that he had handed the final map to Mr. Rick Keene who then worked in the Ventilation Department in MSHA's Pikeville office (Tr. 19).

I cannot find that the testimony of MSHA's witnesses who possessed only a "big list" of abandoned mines prepared by other personnel in the Pikeville Office can be used to prove a violation of section 75.1204 when the company charged with such violation introduces the testimony of a credible witness to the effect that the final map was submitted within 60 days after abandonment as required by section 75.1204. I find that MSHA failed to prove that the violation of section 75.1204 alleged in Notice No. 1 BHT occurred. Therefore, I shall hereinafter dismiss MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-24-P.

1/ Belinda's witness claimed that he had given the map to Mr. Keene in this instance, instead of to Mr. Fleming as was the case with respect to Triple S Coal Company, supra. Moreover, there is doubt in the record as to when Mr. Keene actually stopped working for MSHA because one witness testified that he left in late August or early September 1976, while another of MSHA's witnesses stated that Mr. Keene left on April 8, 1976 (Tr. 32; 36). Regardless of whether Mr. Keene left in April or September 1976, he would have been working in the Pikeville Office in 1975 at the time Belinda's witness claimed he gave the final map to Mr. Keene.

Ultimate Findings and Conclusions

For the reasons hereinbefore given, MSHA failed to prove that the violation of section 75.1204 alleged in Notice No. 2 TLA (7-3) dated December 13, 1977, and the violation of section 75.1204 alleged in Notice No. 1 BHT (8-1) dated January 30, 1978, occurred. Since no violations of the mandatory safety standards were proven, it is unnecessary for me to consider the six criteria under which civil penalties are assessed if violations are found to have occurred.

WHEREFORE, it is ordered:

MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 79-7-P and PIKE 79-24-P are dismissed for failure of MSHA to prove that the violations of section 75.1204 alleged therein actually occurred.

Richard C. Steffey

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

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Triple S Coal Company and Belinda Coal Company, Attention: Gary Stiltner, Copartner, P.O. Box 196, Ash Camp, KY 41512 (Certified Mail)

G and R Coal Company, Attention: Gary Stiltner, Copartner, Route 3, Box 10, Cedar Bluffs, VA 25609 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding	
		: Docket Nos.	Assessment Control Nos.
v.		: KENT 79-181	15-11702-03001
		: Pyro Central Shop	
PYRO MINING COMPANY,	Respondent	: KENT 79-182	15-10815-03010
		: Wheatcroft Mine	
		: KENT 79-183	15-02131-03020
		: Pyro Mine No. 2	
		: KENT 79-184	15-10353-03019V
		: KENT 79-185	15-10353-03020
		: KENT 79-186	15-10353-03021
		: Pyro Mine No. 6	
		: KENT 79-187	15-10339-03017
		: Pyro Mine No. 11	

DECISION APPROVING SETTLEMENT

Counsel for the Secretary of Labor filed on December 31, 1979, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement, respondent would pay penalties totaling $8,378 instead of penalties totaling $9,505 as proposed by the Assessment Office. Respondent's motion was accompanied by a considerable number of documents to support the settlement agreement.

The motion for approval of settlement states that the parties considered the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Three of those criteria may be given a generalized evaluation which will apply to all of the 40 violations alleged in MSHA's seven Petitions for Assessment of Civil Penalty, while the remaining three criteria will be considered on an individual basis when each of the alleged violations is hereinafter reviewed. The three criteria which may be given a general evaluation are the size of respondent's business, the question of whether payment of penalties would cause respondent to discontinue in business, and respondent's history of previous violations.

The orders of assessment prepared by the Assessment Office show that respondent's mines produce a total of 1,634,680 tons of coal per year, whereas an income statement submitted with the motion for approval of settlement shows that respondent sold a total of 1,228,353 tons of coal during the 12 months ending July 31, 1979. Since respondent's income statement provides data which are more current than the production figures in the assessment orders, I shall use the income statement for the purpose of determining the size of respondent's business. Assuming that respondent operated its mines for 250 days during the 12 months covered by its income statement, the average daily production would have been 4,912 tons per day. On the basis of those figures, I find that respondent is a large operator and that penalties in an upper range of magnitude should be assessed to the extent that they are determined under the criterion of the size of respondent's business.

The financial data submitted with the motion for approval of settlement show that respondent lost about $14.6 million during the 12 months ending July 31, 1979, of which an amount of at least $7 million is attributable to its coal operations. Respondent's quarterly report submitted to the Securities and Exchange Commission states that respondent is in violation of the debt and equity covenants under its financing agreements with both of its lenders, but that respondent hopes to avoid defaulting under its agreement by selling its Corinne gas field in Mississippi for $25,800,000 of which amount a sum of $20,000,000 is to be paid in cash. The financial data also show that respondent's net losses made it unnecessary for respondent to provide for payment of any Federal income taxes for the periods ending January 31, 1978, and January 31, 1979.

On the other hand, the motion for approval of settlement (p. 5) states that "[w]hile the agreed upon penalty will affect respondent's financial posture it will have no effect on respondent's ability to remain in business." Respondent's answers to MSHA's Petitions for Assessment of Civil Penalty indicate that respondent does not agree with the above-quoted statement in the motion for approval of settlement because respondent's answers claim that "civil penaties will substantially affect our ability to stay in business." Respondent's answers further allege that inflation, higher interest rates, and EPA restrictions, which required respondent to construct expensive cleaning plants which wash away 30 percent of the coal which respondent used to sell, all contribute to respondent's inability to make a profit on its coal operations.

It would appear that the financial data submitted by respondent would support a finding that payment of penalties might cause respondent to discontinue in business if it were not for the fact that one of the few optimistic statements in respondent's quarterly report to the SEC states as follows (p. 9):

> Coal revenues increased significantly principally due to a 31% increase in tons sold by the Registrant's Kentucky operation and the fact that a substantial portion of the sales

were under higher-priced contracts. In addition, the Registrant's Alabama operation was shut down during a significant portion of the three months ended October 31, 1978 due to the erection of a large dragline on the property.

After considering all of the financial data submitted by respondent, I conclude that the payment of penalties will not cause respondent to discontinue in business.

The assessment orders in this proceeding assign anywhere from 0 points (Docket No. KENT 79-181) to 13 points (Docket No. KENT 79-187) for assessment of penalties under the criterion of history of previous violations. The data submitted in support of the motion for approval of settlement do not provide information which would permit me to find that the Assessment Office has attributed more penalty points to the criterion of history of previous violations than is warranted. In the absence of any facts to show that the Assessment Office has erred in its evaluation of the criterion of history of previous violations, I find that the Assessment Office has made reasonable conclusions with respect to the criterion of history of previous violations and no further effort to analyze the Assessment Office's determinations as to that criterion will be made.

The remaining three criteria, namely, respondent's negligence, if any, the gravity of the alleged violations, and respondent's good faith effort to achieve rapid compliance will hereinafter be individually considered in my review of the specific violations alleged in each docket.

Docket No. KENT 79-181

Citation No. 795149 alleged that respondent had violated section 77.1607(o) because a truck used during daylight hours was not provided with operative headlights. The Assessment Office considered that the violation involved no negligence, that it was moderately serious, and that there was a normal effort to achieve compliance. The Assessment Office proposed a penalty of $14 and respondent has agreed to pay the full proposed penalty. I find that the Assessment Office derived an appropriate penalty and that respondent's agreement to pay the full amount should be approved.

Citation No. 795152 alleged that respondent had violated section 77.410 because a truck had not been equipped with an adequate backup alarm. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated normal good faith in achieving compliance. The Assessment Office proposed a penalty of $60. Respondent has agreed to pay the full proposed penalty. I find that the Assessment Office properly arrived at an appropriate penalty and that respondent's agreement to pay the full amount should be approved.

Docket No. KENT 79-182

Citation No. 795701 alleged that respondent had violated section 75.1100-1(e) because the fire extinguisher on a battery-powered locomotive

did not contain expellant or powder. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average good faith effort to achieve compliance. The Assessment Office proposed a penalty of $90 and respondent has agreed to pay a penalty of $65. The operator's evaluation sheet shows that the operator believed the alleged violation to be nonserious because the operator did not think that the violation would result in injury or that the conditions surrounding the violation would be likely to cause a fire. If a hearing had been held, questions would have been raised as to the degree of the operator's negligence and the gravity of the violation. In such circumstances, I find that respondent's agreement to pay a penalty of $65 is reasonable and should be approved.

Citation No. 795702 alleged that respondent had violated section 75.1100-2(d) by failing to equip a battery-powered personnel carrier with a fire extinguisher. The Assessment Office found that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay a penalty of $70. Respondent's evaluation sheet claims that respondent was nonnegligent because an unauthorized person had removed the fire extinguisher. Respondent did not believe that the conditions existing at the time the citation was written would produce a fire and doubted that any injury would occur as a result of the absence of the fire extinguisher. If a hearing had been held, questions would have been raised as to the degree of respondent's negligence and the gravity of the alleged violation. Therefore, respondent's agreement to pay a reduced penalty of $70 is approved.

Citation No. 795703 alleged that respondent had violated section 75.601-1 because the circuit breaker for the trailing cable to a roof-bolting machine was set 400 amps higher than it should have been. The Assessment Office considered the violation to involve ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay a penalty of $70. Respondent alleges that no overcurrent was present. In such circumstances, a question exists as to whether the Assessment Office may have assigned an excessive number of points to the criterion of gravity. I find that respondent's agreement to pay a penalty of $70 should be approved.

Citation No. 795704 alleged that respondent had violated section 75.1722(a) because the tramming chain and tramming sprockets on the feeder were not guarded. The Assessment Office believed that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve compliance. Respondent has agreed to pay a penalty of $100, whereas the Assessment Office proposed a penalty of $130. There are remarks on the inspector's statement indicating that the feeder only moves when the conveyor belt is being extended and that no more than one person would be likely to be injured by an unguarded tramming chain. I find that a question exists as to whether the Assessment Office assigned

an excessive number of points under the criteria of negligence and gravity and that respondent's agreement to pay a reduced penalty of $100 should be approved.

Citation No. 795705 alleged that respondent had violated section 75.601 because the circuit breaker for the trailing cable of an offside shuttle car had been set 400 amps higher than it should have been. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $114 and respondent has agreed to pay a penalty of $80. Respondent claims that no overcurrent was present. That allegation raises an issue as to whether the violation was as serious as the Assessment Office believed. I find that respondent's agreement to pay a reduced penalty of $80 should be approved.

Citation No. 795706 alleged that respondent had violated section 75.523 because the deenergization device, or panic bar, on a shuttle car was inoperative when tested. The Assessment Office believed that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $130 and respondent has agreed to pay a penalty of $100. Respondent claims that injury resulting from the violation was improbable and that few miners would be exposed to danger by the violation. Additionally, it should be noted that respondent had provided a panic bar, but it had become inoperative and there is nothing in the file to show how long the bar had been in an inoperative condition. In such circumstances, the violation may not have involved as much negligence or gravity as the Assessment Office assigned to those criteria. Therefore, respondent's agreement to pay a reduced penalty of $100 should be approved.

Citation No. 795712 alleged that respondent had violated section 75.904 because the 400-amp circuit breaker for the conveyor belt drive was not marked for identification. The Assessment Office considered that the violation involved ordinary negligence, that it was very serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay $115. Remarks on the inspector's statement allege that no other plug the size of the one for the conveyor belt was being used. Also the main plug had been marked, but the suboutlet had not been marked. Those factors would reduce the likelihood that the circuit breaker for the belt drive would be mistaken for the circuit breaker for a different piece of equipment. That consideration indicates that the Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity. Therefore, I find that respondent's agreement to pay a reduced penalty of $115 should be approved.

Citation No. 795713 alleged that respondent had violated section 75.601 because the circuit breaker for the battery charger was set 400 amps above the allowable setting. The Assessment Office believed that the violation involved ordinary negligence, that it was serious, and that respondent had

demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay $70. Respondent claims that conditions were unfavorable for occurrence of any injuries and that no injury caused by the violation could be expected. Therefore, the Assessment Office may have assigned more points under the criteria of both negligence and gravity than the facts warranted and respondent's agreement to pay a reduced penalty of $70 should be approved.

Citation No. 795714 alleged that respondent had violated section 75.516 because the power cables for the battery charger were not supported on insulators and were permitted to come into contact with combustible materials at several locations. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay a penalty of $75. Respondent claims that the power cable was insulated. That fact indicates that the likelihood of fire was improbable and that the Assessment Office may have rated the violation as involving more negligence and gravity than the facts warrant. Therefore, respondent's offer to pay a reduced penalty of $75 should be approved.

Citation No. 795715 alleged that respondent had violated section 75.1722(b) because the tail pulley roller on a conveyor belt was not adequately guarded. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a normal good faith effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay a penalty of $115. It should be noted that the citation refers to failure to guard "adequately" rather than a failure to provide any guard at all. If a hearing had been held, a question of fact would have arisen as to whether respondent's guard was adequate. In such circumstances, it appears that the Assessment Office may have assigned a larger number of points under the criterion of gravity than was warranted. Therefore, respondent's agreement to pay a reduced penalty of $115 should be approved.

Citation No. 795716 alleged that respondent had violated section 75.515 because the trailing cable for the coal drill was not equipped with a suitable device to prevent strain from being exerted on the electrical connections within the drill. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay a penalty of $115. The conditions set forth in the citation are ambiguous. The inspector alleges that respondent failed to provide a "suitable" fitting, but he fails to say that no fitting at all was provided. Additionally, there is nothing to show that there was any sign that the cable was worn or would have exposed anyone to an electrical shock at the time the citation was written. There is nothing in the inspector's statement which would show that the violation was as serious as the Assessment Office considered it to be. Therefore, respondent's offer to pay a penalty of $115 should be approved.

Citation No. 795717 alleged that respondent had violated section 75.1722(b) because the pulley roller to the tailpiece had not been adequately guarded. The Assessment Office considered that this violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay a penalty of $115. Here again, the citation shows that respondent had provided a guard, but that it was not as "adequate" as the inspector believed it should have been. The fact that respondent had provided a guard shows that the Assessment Office may have assigned an undue number of points under the criterion of negligence and justifies acceptance of respondent's offer to pay a reduced penalty of $115.

Citation No. 795718 alleged that respondent had violated section 75.400 because loose coal and coal dust had been permitted to accumulate on and around the two 40-horsepower motors on the feeder. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal good faith effort to achieve compliance. The Assessment Office proposed a penalty of $122 and respondent has agreed to pay a penalty of $95. The Assessment Office reduced the proposed penalties with respect to several of the citations involved in this docket when respondent corrected the alleged violation within a period of 30 minutes. The alleged violation in this instance was corrected within a period of only 30 minutes, but no credit was given for that rapid effort to achieve compliance in this instance. Giving proper credit to respondent's effort to achieve rapid compliance justifies acceptance of respondent's offer to pay a reduced penalty of $95.

Docket No. KENT 79-183

Citation No. 794820 alleged that respondent had violated section 75.606 because there was evidence that the trailing cable to the cutting machine had been run over by rubber-tired equipment. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay a penalty of $79. The inspector's statement indicates that respondent took extraordinary steps to gain compliance in this instance. Also the inspector's termination of the citation states that there was no short circuit in the trailing cable and that no damage had been done to the trailing cable by the equipment which appears to have run over it. In such circumstances, the Assessment Office may have assigned more points under the criterion of gravity than was warranted. Therefore, respondent's offer to pay a penalty of $79 should be approved.

Docket No. KENT 79-184

Order No. 795432 was issued under the unwarrantable failure provisions of the Act and alleged that respondent had violated section 75.200 by failing to install bolts on 5-foot centers in compliance with its roof-control plan. The roof bolts were alleged to be up to 6-1/2 feet apart in the Nos. 1

through 6 entries and 9 feet away from the ribs. Over 98 roof bolts had to be installed to restore the area to the requirements of the roof-control plan. The Assessment Office waived the point system normally used in determining penalties and made findings of fact as to the six criteria to support its proposed penalty of $5,000 which respondent has agreed to pay in full. The inspector's statement alleges that two roof falls had previously occurred in the section here involved. It appears that enough negligence and gravity were associated with the alleged violation to warrant imposition of a penalty of $5,000. Respondent's agreement to pay the full amount should be approved.

Docket No. KENT 79-185

Citation No. 9948483 alleged that respondent had violated section 70.250 by failing to submit a valid respirable dust sample or give a reason for not sampling for one employee. The Assessment Office considered that the violation involved ordinary negligence, that it was nonserious, and that respondent demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. Section 70.250 requires that the atmosphere of each miner on a working section be sampled at intervals of 120 days and that the atmosphere of other miners be sampled at intervals of 180 days. The samples required under section 70.250 are unrelated to the sampling of the high-risk employee whose samples are used to determine if an operator's mine is in compliance with the respirable-dust program. While there is generally some negligence associated with the failure to submit the 120-day and 180-day samples, a penalty of $60 is a sufficient amount unless there is evidence to show that an operator has been grossly negligent in continuously violating section 70.250. Since there is no evidence in this proceeding to show that respondent frequently violated section 70.250, I believe that respondent's agreement to pay $60 should be approved.

Citation No. 795155 alleged that respondent had violated section 75.1714 because the operator of a roof-bolting machine was not provided with a self-rescue device. The Assessment Office considered that the violation involved no negligence, that it was serious, and that respondent demonstrated an average good faith effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. The inspector's statement does not rate the seriousness of the violation. There must have been extenuating facts associated with the alleged violation or the inspector would not have considered the operator to be nonnegligent. In such circumstances, I believe that respondent's agreement to pay a penalty of $60 should be approved.

Docket No. KENT 79-186

Citation No. 795340 alleged that respondent had violated section 75.603 because a temporary splice in the trailing cable for the coal drill had been made by tying the conductors in square knots. The Assessment Office considered that the violation involved ordinary negligence, that it was serious,

and that respondent demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $122 and respondent has agreed to pay $95. Respondent's evaluation sheet claims that the splice was well insulated and that no one would have been injured because of the use of square knots in the temporary splice. Moreover, respondent states that production was immediately stopped and the splice was remade in the correct manner. In such circumstances, the Assessment Office may have assigned more penalty points to the criterion of gravity than were warranted. Therefore, respondent's agreement to pay a penalty of $95 should be approved.

Citation No. 795521 alleged that respondent had violated section 75.605 because respondent had failed to clamp the trailing cable of the coal drill to the cable reel so as to prevent strain from being placed on the electrical connections. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $122 and respondent has agreed to pay $95. The Assessment Office may have assigned excessive penalty points because the operator's evaluation sheet shows that the operator felt that it was improbable that an injury would occur as a result of the alleged violation. The operator believed the violation to be nonserious because the grounding mechanism was in good condition as well as the circuit breaker. Moreover, respondent alleges that it had made a better than average effort to achieve rapid compliance, but the Assessment Office considered that there had been only a normal effort to achieve compliance. In such circumstances, respondent's agreement to pay $95 should be approved.

Citation No. 795522 alleged that respondent had violated section 75.1107-16(b) because a loading machine's fire-suppression device had been rendered inoperative by a severed hose. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that the operator had demonstrated an outstanding effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. The operator's evaluation sheet claims that the operator was nonnegligent and alleges that any injury as a result of the violation was improbable since the loading machine was in a clean condition and there was good ventilation in the mine. In such circumstances, the Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity. Therefore, respondent's agreement to pay a penalty of $60 should be approved.

Citation No. 795523 alleges that respondent had violated section 75.603 because a temporary splice had been made in the trailing cable on a roof-bolting machine and the splice was close to the reel. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. Respondent's evaluation sheet claims that it was nonnegligent because the miners had been instructed in proper splicing procedures and alleges that the violation was nonserious because the splice

had been well insulated. In such circumstances, respondent's agreement to pay a penalty of $95, instead of the penalty of $122 proposed by the Assessment Office, should be approved.

Citation No. 795524 alleged that respondent had violated section 75.1722 because 5 feet of the fencing used to guard the belt head were missing which would permit a person to come in contact with moving head rollers. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $114 and respondent has agreed to pay $80. The Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity because respondent's evaluation sheet claims that respondent was nonnegligent and that the likelihood of injury was improbable. In such circumstances, respondent's offer to pay a penalty of $80 should be approved.

Citation No. 795525 alleged that respondent had violated section 75.202 because overhanging ribs ranging in size from 12 to 28 inches were observed in four entries. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. The respondent's evaluation sheet claims that the violation involved no negligence and alleges that the overhanging ribs were not large enough to have been likely to injure anyone. It appears that the Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity. Therefore, respondent's agreement to pay a penalty of $75 should be approved.

Citation No. 795526 alleged that respondent had violated section 75.503 because the loading machine had two openings which exceeded the width permitted by the permissibility standards. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that the operator demonstrated a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay $70. Respondent's evaluation sheet claims that the mine atmosphere contained no methane and that the weekly check of equipment had revealed no permissibility violations. In view of the contested facts, the Assessment Office may have assigned excessive points under the criteria of negligence and gravity. Therefore, respondent's offer to pay a penalty of $70 should be approved.

Citation Nos. 795527 and 795528 alleged that respondent had violated section 75.503 because permissibility violations existed in a shuttle car and cutting machine, respectively. The Assessment Office considered that both violations involved ordinary negligence, that they were serious, and that respondent demonstrated a better than average effort to achieve rapid compliance with respect to Citation No. 795527 and demonstrated a normal effort to achieve compliance with respect to Citation No. 795528. The Assessment

Office proposed a penalty of $122 and $98 for Citation Nos. 795527 and 795528, respectively, and respondent has agreed to pay penalties of $95 and $70, respectively. The operator's evaluation sheet claims that the weekly examination had revealed no permissibility violations, that no methane was present, and that ventilation was good. In view of the extenuating circumstances alleged by the operator, I find that respondent's agreement to pay penalties of $95 and $70 should be approved.

Citation No. 795536 alleged that respondent had violated section 75.1722 because the belt feeder head roller was not adequately guarded in that the wire guard had been pulled back far enough to expose a person to the hazard of being caught in the roller. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had made a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $114 and respondent has agreed to pay a penalty of $80. Respondent's evaluation sheet indicates that the belt examiners had not yet made their inspection as the citation was written at 7:50 a.m. Respondent corrected the violation within 10 minutes after the citation was written. In such circumstances, I find that respondent's agreement to pay $80 should be approved.

Citation No. 795538 alleged that respondent had violated section 75.200 because a crosscut between the Nos. 4 and 5 entries was 25 feet wide in violation of respondent's roof-control plan which permits crosscuts to be no more than 20 feet wide. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $170 and respondent has agreed to pay $130. Respondent's evaluation sheet claims that the wide crosscut was needed for the purpose of turning the mining machine around and that it was improbable that injury would result from the violation, and that production was stopped so that the crosscut could be timbered immediately. Respondent's evaluation sheet raises questions as to whether the alleged violation was as serious or involved as much negligence as the Assessment Office believed. Therefore, respondent's agreement to pay a penalty of $130 should be approved.

Citation No. 795539, as modified, alleged that respondent had violated section 75.316 because there was an excessive amount of dust in the No. 4 Unit as a result of respondent's failure to use water to control dust. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. Respondent's evaluation sheet contends that no violation occurred as no dust was in suspension. In view of the question of fact which would have been raised if a hearing had been held, I find that respondent's agreement to pay a penalty of $75 should be approved.

Citation No. 795540 alleged that respondent had violated section 75.200 because a roof bolter was not provided with two temporary supports as

required by the roof-control plan. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay $70. Respondent's evaluation sheet alleges that no roof bolting had yet been done and that the roof was in good condition. If a hearing had been held, questions of fact would have been raised as to respondent's negligence and as to the gravity associated with failure to install temporary supports before any roof bolting had been started. Therefore, respondent's agreement to pay a penalty of $70 should be approved.

Citation No. 796521 alleged that respondent had violated section 75.503 because there were nonpermissible openings on a scoop while it was being used inby the last open crosscut in No. 2 entry. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. Respondent's evaluation sheet claims that no methane was present in the mine atmosphere and that there was no likelihood of an explosion. In view of the questions of fact raised by respondent's claim that the violation was nonserious, respondent's agreement to pay a penalty of $75 should be approved.

Citation No. 796522 alleged that respondent had violated section 75.316 because an airlock had not been provided at the belt tailpiece. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay a penalty of $60. Respondent's evaluation sheet claims that an airlock had been constructed but that it had been torn down when it became caught in the belt conveyor. Respondent also claims that good ventilation was being maintained on the section. If a hearing had been held, questions of fact would have been raised as to whether respondent was negligent and as to whether the violation was serious in the circumstances. Therefore, respondent's agreement to pay $60 should be approved.

Citation No. 796523 alleged that respondent had violated section 75.703 because a battery charger was being used to charge the batteries on a scoop without providing a proper frame ground for the charger. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $140 and respondent has agreed to pay a penalty of $110. Respondent's evaluation sheet claims that the frame ground was torn loose during the shift preceding the shift on which the inspector's citation was written and that chargers are equipped with back-up grounding systems. If a hearing had been held, questions of fact would have been raised as to the extent of respondent's negligence and as to the gravity of the violation. Therefore, I find that respondent's agreement to pay a penalty of $110 should be approved.

Citation No. 796525 alleged that respondent had violated section 75.303 because inadequate examinations of the conveyor belts had been made in that obvious violations were observed by the inspector but a record of the violation had not been recorded in the approved belt examiners' book located on the surface. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent made a normal effort to achieve compliance. Respondent's evaluation sheet claims that management had no knowledge that the belts were not being adequately examined and that they had been examined that day. If a hearing had been held, a number of factual issues would have been raised as to whether respondent was negligent and as to the gravity of the alleged violation. Therefore, respondent's agreement to pay a penalty of $140, instead of the penalty of $180 proposed by the Assessment Office, should be approved.

Citation No. 596531 alleged that respondent had violated section 75.606 because a scoop was observed as it was driven over the energized cable of the loading machine. The Assessment Office considered that the violation involved no negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. Respondent's evaluation sheet claims that management had no control over the situation because the employee disobeyed company orders in running over the cable. Respondent also claims that the grounding mechanism and circuit breaker were operative. The inspector's citation shows that the violation was corrected within 10 minutes and that it was determined that the loading machine's cable had not been damaged. The Assessment Office failed to give respondent credit for stopping production to make a quick examination of the cable. In such circumstances, respondent's agreement to pay a penalty of $60 should be approved.

Docket No. KENT 79-187

Citation No. 401741 alleged that respondent had violated section 70.100(b) because the average concentration of respirable dust in the environment of the high-risk miner was 3.6 milligrams per cubic meter of air. The Assessment Office considered that the violation involved ordinary negligence, that it was very serious, and that respondent demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $255 and respondent has agreed to pay a penalty of $200. Neither the official file nor the materials submitted with the motion to approve settlement contain any statements showing that the Assessment Office incorrectly overstated the negligence or seriousness of the alleged violation. On the other hand, respondent's agreement to pay $200 for this violation of the respirable dust standard shows that the parties have recognized that the degree of negligence and gravity associated with this alleged violation was rather high. Since there is nothing in the record to show how long the condition lasted, I conclude that the miners were not exposed to 3.6 milligrams of respirable dust for a long period of time. Therefore, respondent's agreement to pay $200 is reasonable and should be approved.

Citation No. 794976 alleged that respondent had violated section 75.301 because respondent had not provided enough air at the working face for the velocity of the air to be measured with an anemometer. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. Respondent's evaluation sheet explains that the curtain had been torn by a shuttle car, that the helper of the cutting-machine operator was in the process of moving up the waterline, and that no methane was detected. The inspector's citation shows that respondent increased the velocity of air to 3,600 cubic feet within 5 minutes after the citation was written. I find that there were enough extenuating circumstances to justify acceptance of respondent's offer to pay a penalty of $75.

Citation No. 794978 alleged that respondent had violated section 75.316 by failing to have two water sprays on the cutting machine. Respondent's ventilation, methane, and dust control plan requires that the machine have two operable sprays. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $140 and respondent has agreed to pay $110. Respondent's evaluation sheet claims that two water sprays had been installed on the cutting machine and that one had been knocked off. Respondent claims that management was unaware of the missing spray because one spray was doing an adequate job of wetting the coal. Respondent also claims that production was stopped and that an additional spray was installed within a period of 30 minutes. In such extenuating circumstances, respondent's offer to pay a penalty of $110 should be approved.

WHEREFORE, it is ordered:

(A) For the reasons hereinbefore given, the seven motions for approval of settlement filed in this proceeding on December 31, 1979, are granted and the settlement agreements are approved.

(B) Pursuant to the settlement agreements, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $8,378.00 which are allocated to the respective alleged violation as follows:

Docket No. KENT 79-181

Citation No. 795149 3/8/79 § 77.1607(o).....	$	14.00
Citation No. 795152 3/12/79 § 77.410.....		60.00
Total Settlement Penalties in Docket No. KENT 79-181.....	$	74.00

Docket No. KENT 79-182

Citation No. 795701 3/20/79 § 75.1100-1(e).....	$	65.00
Citation No. 795702 3/20/79 § 75.1100-2(d).....		70.00

Citation No. 795703 3/20/79 § 75.601-1.....	70.00
Citation No. 795704 3/20/79 § 75.1722(a).....	100.00
Citation No. 795705 3/20/79 § 75.601.....	80.00
Citation No. 795706 3/20/79 § 75.523.....	100.00
Citation No. 795712 3/27/79 § 75.904.....	115.00
Citation No. 795713 3/27/79 § 75.601.....	70.00
Citation No. 795714 3/27/79 § 75.516.....	75.00
Citation No. 795715 3/27/79 § 75.1722(b).....	115.00
Citation No. 795716 3/29/79 § 75.515.....	115.00
Citation No. 795717 3/29/79 § 75.1722(b).....	115.00
Citation No. 795718 3/29/79 § 75.400.....	95.00
Total Settlement Penalties in Docket No. KENT 79-182.....	$1,185.00

Docket No. KENT 79-183

Citation No. 794820 2/5/79 § 75.606.....	$ 79.00
Total Settlement Penalties in Docket No. KENT 79-183.....	$ 79.00

Docket No. KENT 79-184

Order No. 795432 2/15/79 § 75.200.....	$5,000.00
Total Settlement Penalties in Docket No. KENT 79-184.....	$5,000.00

Docket No. KENT 79-185

Citation No. 9948483 3/2/79 § 70.250.....	$ 60.00
Citation No. 795155 4/3/79 § 75.1714.....	60.00
Total Settlement Penalties in Docket No. KENT 79-185.....	$ 120.00

Docket No. KENT 79-186

Citation No. 795340 3/19/79 § 75.603.....	$ 95.00
Citation No. 795521 3/19/79 § 75.605.....	95.00
Citation No. 795522 3/19/79 § 75.1107-16(b).....	60.00
Citation No. 795523 3/20/79 § 75.603.....	95.00
Citation No. 795524 3/20/79 § 75.1722.....	80.00
Citation No. 795525 3/21/79 § 75.202.....	75.00
Citation No. 795526 3/21/79 § 75.503.....	70.00
Citation No. 795527 3/21/79 § 75.503.....	95.00
Citation No. 795528 3/21/79 § 75.503.....	70.00
Citation No. 795536 3/27/79 § 75.1722.....	80.00
Citation No. 795538 3/27/79 § 75.200.....	130.00

Citation No. 795539 3/27/79 § 75.316.....	75.00
Citation No. 795540 3/27/79 § 75.200.....	70.00
Citation No. 796521 3/27/79 § 75.503.....	75.00
Citation No. 796522 3/27/79 § 75.316.....	60.00
Citation No. 796523 3/27/79 § 75.703.....	110.00
Citation No. 796525 3/29/79 § 75.303.....	140.00
Citation No. 796531 3/30/79 § 75.606.....	60.00
Total Settlement Penalties in Docket No. KENT 79-186.....	$1,535.00

Docket No. KENT 79-187

Citation No. 401741 12/12/78 § 70.100(b).....	$ 200.00
Citation No. 794976 4/6/79 § 75.301.....	75.00
Citation No. 794978 4/6/79 § 75.316.....	110.00
Total Settlement Penalties in Docket No. KENT 79-187.....	$ 385.00
Total Settlement Penalties in This Proceeding.....	$8,378.00

Richard C. Steffey
Administrative Law Judge

Distribution:

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Pyro Mining Company, Attention: Bennie E. Morgan, Director of Safety and Training, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. PIKE 79-22-P
Petitioner	:	Assessment Control No.
v.	:	15-09646-03001
	:	
TRIPLE S COAL COMPANY,	:	Mine No. 2
Respondent	:	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gary Stiltner, Ash Camp, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, as amended May 7, 1979, a hearing in the above-entitled proceeding was held on May 17, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty was filed on November 14, 1978, in Docket No. PIKE 79-22-P seeking assessment of a civil penalty for an alleged violation of 30 CFR 75.1711 by respondent.

Issues

The issues raised by the Petition for Assessment of Civil Penalty are whether a violation of 30 CFR 75.1711 occurred and, if so, what monetary penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act. My decision as to whether a violation occurred will be based on the findings of fact set forth below:

Findings of Fact

(1) The respondent in this proceeding is Triple S Coal Company which is a four-man partnership (Tr. 19). For a short period of time, respondent operated a No. 1 Mine near Feds Creek, Kentucky. Respondent subleased the mineral rights to the coal in its No. 1 Mine from Hawkins Coal Company.

(2) Another company, B D and D Coal Company, operated a mine about one-half mile from respondent's No. 1 Mine. B D and D Coal Company also subleased the mineral rights to the coal in its mine from Hawkins Coal Company. After BD&D had stopped producing coal in its mine, Hawkins Coal Company asked Mr. Gary Stiltner, one of the copartners in Triple S Coal Company, to inspect the mine which BD&D had abandoned to determine if any more coal could economically be produced from that mine (Tr. 20).

(3) After a coal mine is abandoned, no person may reenter that mine without filing with MSHA for permission to reopen the mine (Tr. 21). Therefore, in order for Mr. Stiltner to inspect the mine abandoned by BD&D, it was necessary for him to travel to Phelps, Kentucky, and execute certain forms which indicated that Triple S Coal Company wished to reopen, as its No. 2 Mine, the mine which BD&D had abandoned (Exh. 4; Tr. 20).

(4) In May 1977, Mr. Stiltner and two MSHA inspectors examined the No. 2 Mine to determine whether there was coal in the mine which could be produced economically (Tr. 22). The MSHA inspectors and Mr. Stiltner found that so much work would have to be done to the No. 2 Mine to make it operable, that the small amount of coal reserves remaining in the mine could not be economically produced (Tr. 20). After he had determined that the No. 2 Mine could not be operated economically, Mr. Stiltner returned to MSHA's office and filled out the necessary forms to show that Triple S Coal Company had abandoned the No. 2 Mine (Tr. 20). MSHA's Mine Information Form alleges that Triple S Coal Company had four men working at the No. 2 Mine, but not producing coal. Mr. Stiltner intended for the information furnished to MSHA to show how many men planned to work at the No. 2 Mine if the initial inspection of the mine had indicated that the No. 2 Mine could become a feasible operation (Tr. 21-22; Exh. 4).

(5) As it turned out, Triple S Coal Company never did produce any coal at the No. 2 Mine and none of the Triple S Coal Company's copartners, other than Mr. Stiltner, ever went to the No. 2 Mine, and Mr. Stiltner only entered the No. 2 Mine once while in the company of two MSHA inspectors (Tr. 22).

(6) Section 75.1711 provides that any coal mine which is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator of the mine in a manner prescribed by the Secretary. The manner of sealing is set forth in section 75.1711-2 providing that the entries of abandoned or closed mines are to be sealed with materials such as concrete blocks or by filling the entries with incombustible material for a distance of 25 feet. Additionally, drain pipes at least 4 inches in diameter must be installed in at least one entry (Tr. 10).

(7) An MSHA inspector examined the site of respondent's No. 2 Mine on September 20, 1977, and found that the Nos. 1 and 3 entries had been properly sealed, but the Nos. 2 and 4 entries had not been properly sealed. Dirt had been pushed into the Nos. 2 and 4 entries for a distance of only about 5 or 10 feet and there was space above the dirt through which persons could enter the mine (Tr. 6-7).

(8) After observing the conditions described in paragraph (7) above, the inspector issued Notice No. 1 ELF (7-2) on September 20, 1977, citing respondent for a violation of section 75.1711 (Tr. 6; Exh. 1).

On the basis of the findings set forth above, I conclude that a violation of section 75.1711 occurred. Mr. Stiltner was actually making an economic evaluation of the coal reserves remaining in the No. 2 Mine as an agent for Hawkins Coal Company (Tr. 21), but there is nothing on the Mine Information Form in MSHA's files to show that Mr. Stiltner was acting for Hawkins. The Mine Information Form shows only that Triple S Coal Company had applied for permission to reopen the mine which BD&D had been operating. The Form shows that Triple S Coal Company intended to operate the mine as its No. 2 Mine. Although Mr. Stiltner was acting as Hawkins' agent, he was also acting on behalf of the partnership which owned Triple S Coal Company because he stated that if producible coal reserves had been found, the four partners who comprised Triple S Coal Company would have jointly participated in operating the No. 2 Mine (Tr. 27-28; Exh. 3).

Having found that a violation occurred, it is now necessary to consider the six criteria before assessing a civil penalty.

Size of Respondent's Business

Respondent's No. 1 Mine produced only about 20 tons of coal daily over a short period of time (Tr. 26). Respondent never did operate the No. 2 Mine as an active mine (Tr. 18; 21). The four partners who operated the No. 1 Mine are now producing coal from a mine in Virginia under the name of G and R Coal Company. The reserves from the Virginia mine were obtained from Bostic Coal Company. The Virginia mine produces about 50 or 60 tons of coal per day. The coal was sold to Bostic Coal Company until May 14, 1979, when Bostic notified the partners that it no longer had any orders to fill and would not purchase any more coal from the four partners until further notice (Tr. 29-30).

On the basis of the facts set forth above, I find that respondent is a very small operator and that the penalty should be assessed in a low range of magnitude to the extent that it is determined under the criterion of the size of respondent's business.

Effect of Penalties on Ability of Respondent To Continue in Business

The facts reviewed above show that the four partners are now operating only a single coal mine. At the time of the hearing, they were stockpiling their coal because they had no market for it. Even when they have a market for their coal, they would be likely to have a marginal operation because they were producing only 50 to 60 tons per day. I find that some consideration should be given in assessing a penalty to the criterion of whether payment of penalties will cause respondent to discontinue in business.

History of Previous Violations

Counsel for MSHA stated at the commencement of the hearing that respondent does not have a history of previous violations at its No. 2 Mine (Tr. 3). Therefore, it is unnecessary to consider the criterion of history of previous violations in assessing a penalty.

Good Faith Effort To Achieve Rapid Compliance

Notice No. 1 ELF was written on September 20, 1977, and provided that respondent should have until October 21, 1977, within which to seal the entries on the No. 2 Mine (Exh. 1). On October 25, 1977, an inspector other than the one who had written Notice No. 1 ELF issued Order of Withdrawal No. 1 HB stating that entry No. 1 was not properly sealed and that no drain pipes had been provided for the Nos. 1, 2 and 3 openings within the time allowed. The conditions stated in the withdrawal order imply the existence of sealing requirements which are inconsistent with MSHA's actual requirements for the sealing of abandoned mines. The withdrawal order alleges that respondent had failed to place drain pipes in the Nos. 1, 2 and 3 entries, whereas MSHA's reqirements for installation of drain pipes state (Tr. 10-11):

> * * * A means to prevent a build-up of water behind the seal shall be provided in at least one of the seals. Metal pipes used for this purpose shall be a minimum of 4 inches in diameter and shall be installed of sufficient height above the bottom of the seal to prevent it from becoming blocked with mud or debris. [Emphasis supplied.]

The inspector who wrote Notice No. 1 ELF testified that no drains had been placed in the entries and that the Nos. 1 and 3 entries had been sealed, whereas the Nos. 2 and 4 entries had not been adequately sealed (Tr. 7). The order of withdrawal alleges that only the No. 1 entry had not been adequately sealed and that drains were needed in three of the four entries. The inference which could be drawn from the order of withdrawal is that some work had been done between the writing of the notice by one inspector and the issuance of the withdrawal order by a different inspector. Inasmuch as the inspector who wrote the notice had not been back to the mine after he issued the notice and since Mr. Stiltner had not returned to the mine after the notice was written, there were no witnesses at the hearing who could state whether any work had been done to improve the seals on the entries between the time the notice was issued and the time the withdrawal order was issued.

Respondent's defense in this proceeding has always been that since it owned neither the mineral rights nor the land on which the No. 2 Mine was situated, it was not obligated to seal the mine under the requirements of section 75.1711 (Tr. 23). Mr. Stiltner testified that the owner of the land on which respondent's No. 1 Mine was located did not want the entries sealed after respondent abandoned the No. 1 Mine, but Hawkins Coal Company,

from whom he subleased the coal, had sealed the entries to the No. 1 Mine despite the land owner's objections. Mr. Stiltner stated that whatever work had been done in sealing the entries to the No. 2 Mine had also been done by someone hired by Hawkins Coal Company (Tr. 23).

The facts reviewed above show that Hawkins Coal Company may have attempted to do some additional work toward sealing the No. 2 Mine after the notice was issued, but there is no specific evidence in the record to support a finding that Hawkins or anyone else actually did any additional work toward sealing the mine after the notice was issued. The discrepancies between the conditions described in Notice No. 1 ELF and Order No. 1 HB may have resulted from two inspectors having come to slightly different conclusions after examining the same physical evidence.

In order to find that respondent made a good faith effort to achieve compliance, there should be some evidence showing that respondent took some kind of action to make certain that all the entries of the No. 2 Mine were sealed after Notice No. 1 ELF was issued, but the evidence shows that respondent did nothing. Although respondent knew that Hawkins Coal Company had undertaken to seal the entries before the notice was issued, respondent made no effort to get Hawkins to improve or complete the sealing work which had already been started. Mr. Stiltner knew that Hawkins had hired a third party to do the work that had been done before the notice was written (Tr. 23). It is inconceivable that Hawkins would have hired a third party to seal the entries in a fashion which would not pass MSHA's inspection. That third party was liable to Hawkins for doing a satisfactory job in sealing the entries. The least that respondent should have done would have been to have reported to Hawkins that the No. 2 Mine had not been properly sealed and that as a result of the poor workmanship done by the third party which Hawkins had hired to seal the entries, respondent had been cited for a violation of section 75.1711. Respondent could have then insisted that Hawkins have the third party complete the work which had been started, but not completed in a satisfactory manner.

Respondent's failure to do anything whatsoever after Notice No. 1 ELF was issued supports a finding, and I so find, that respondent failed to make a good faith effort to achieve compliance after Notice No. 1 ELF was issued. Therefore, respondent's indifference about seeing that the mine was properly sealed will be given considerable weight in assessing a penalty.

Negligence

As indicated above, respondent did not own the mineral rights to the coal and did not own the land on which the No. 2 Mine was situated. The land owner did not want the mine entries sealed after respondent had abandoned its No. 1 Mine, but Hawkins Coal Company, which owned the mineral rights, sealed the entries despite the contrary wishes of the land owner (Tr. 24-25). Respondent has been involved in several coal-mining operations and is knowledgeable about the obligations which an operator has to

assume when he abandons a mine. Moreover, MSHA sends each operator who abandons a mine a letter advising him that he must do certain things. Among those things is the requirement that he seal the openings of the mine which he has abandoned (Tr. 9-10). Respondent did not deny that it had received that sort of information from MSHA.

Even if MSHA failed to send a letter to respondent advising him about the requirement that entries of abandoned mines are required to be sealed, the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that the operator is conclusively presumed to know what the mandatory health and safety standards are. Consequently, I find that respondent's failure to inquire about the sealing of the No. 2 Mine involved ordinary negligence even though respondent expected Hawkins Coal Company to do the actual sealing of the mine. Respondent's witness agreed at the hearing that abandonment of the No. 2 Mine involved the furnishing of a final map just as if respondent had actually produced coal from the No. 2 Mine (Tr. 23). Since respondent also knew that the entries had to be sealed (Tr. 23), he should have made an effort to seal the mine or determine for certain that Hawkins Coal Company intended to seal the entries as required by section 75.1711.

Gravity of the Violation

The inspector stated that the danger associated with failure to seal the mine was that the mine was located about one-half mile from the nearest residence and that a person might venture to the site of the mine and might enter it and be injured or killed either by rocks falling from the roof or by encountering air devoid of oxygen. The No. 2 Mine was a relatively shallow mine which extended only about 400 feet underground (Tr. 8-9), but that would be a sufficient distance for a person to be injured or killed if he should venture into the mine. The mine was located only 2 miles from a school house and it is easily possible that someone from the school might walk to the mine from the school and be injured (Tr. 5). Therefore, I find that the violation was serious.

Assessment of Penalty

There are many extenuating circumstances associated with assessing a penalty in this proceeding. The facts show that Mr. Stiltner was acting as an agent of Hawkins Coal Company. He apparently expected Hawkins Coal Company to seal the No. 2 Mine just as it sealed his No. 1 Mine. Hawkins Coal Company's failure to seal the mine adequately resulted in respondent's being cited for the violation of section 75.1711. As Mr. Stiltner conceded at the hearing, he made a mistake in not showing on the Mine Information Form that it was really Hawkins Coal Company which wanted the No. 2 Mine reopened in order to evaluate the economic feasibility of recovering coal from that mine (Tr. 21). If Hawkins Coal Company's name had appeared on the Mine Information Form, there is reason to assume that Notice No. 1 ELF would have been issued in the name of Hawkins Coal Company instead of Triple S Coal Company.

It seems somewhat unfair to require respondent to pay a civil penalty for failure to perform an obligation which another company probably should have done, and did attempt to do in an inadequate fashion. There was no information in MSHA's files, however, which even hinted that Mr. Stiltner was really having the No. 2 Mine reopened at the request of Hawkins Coal Company. Therefore, MSHA properly held Triple S Coal Company liable for sealing the mine because it had no reason to believe that any other entity was liable.

Considering that respondent operates a very small business, that its operations would be adversely affected by a large penalty, that a good faith effort was not made to achieve compliance, that there is no history of previous violations, that ordinary negligence was involved, and that the violation was serious, a penalty of $150 will hereinafter be assessed for this violation of section 75.1711.

Ultimate Findings and Conclusions

(1) Respondent should be assessed a civil penalty of $150.00 for the violation of section 75.1711 cited in Notice No. 1 ELF (7-2) dated September 20, 1977.

(2) Respondent, as the operator of record of the No. 2 Mine, is subject to the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $150.00 for the violation described in paragraph (1) above.

Richard C. Steffey

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

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Triple S Coal Company, Attention: Gary Stiltner, Copartner, P.O. Box 196, Ash Camp, KY 41512 (Certified Mail)

G & R Coal Company, Attention: Gary Stiltner, Copartner, Route 3, Box 10, Cedar Bluffs, VA 24609 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-157-P
Petitioner	:	A.C. No. 15-09816-03002
v.	:	
	:	No. 1 Surface Mine
BLACK JACK COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Larry Cleveland, Esq., Frankfort, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, a hearing in the above-entitled proceeding was held on May 16, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty in this proceeding was filed on December 13, 1978, and seeks to have civil penalties assessed for three alleged violations of the mandatory health and safety standards by respondent.

Issues

In a civil penalty proceeding, the issues normally raised by the Petition for Assessment of Civil Penalty are whether violations occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. In this proceeding, counsel for respondent stipulated that the violations alleged in MSHA's citations had occurred and that the only matters which he wished to have me consider are those pertaining to the six criteria (Tr. 3).

Four of the six criteria may usually be given a general evaluation, but in this proceeding it is perferable to consider on a generalized basis only two of the criteria, namely, the size of respondent's business and the question of whether the payment of penalties would cause respondent to discontinue in business. The remaining four criteria, that is, respondent's good

faith effort to achieve rapid compliance, respondent's negligence, if any, the gravity of the violations, and respondent's history of previous violations, will be considered on an individual basis when the parties' evidentiary presentations are hereinafter reviewed. The two criteria concerning the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business are considered below.

Size of Respondent's Business

The three citations to be considered in this proceeding were all written on April 12, 1978. At that time, respondent's mine employed about 20 men and produced approximately 500 tons of coal per day from the Little Caney coal seam (Tr. 6-7). At the time of the hearing, which was held on May 16, 1979, respondent was employing between 60 and 70 miners and was producing about 290,000 tons of coal per year, or about 1,160 tons per day, assuming that the coal mine operated 250 days each year (Tr. 51). Those facts support a finding that respondent is a relatively small operator and that penalties should be assessed in a fairly low range of magnitude insofar as the penalties are determined under the criterion of the size of respondent's business.

Effect of Penalties on Operator's Ability To Continue in Business

Respondent's witness testified that assessment of penalties in the range proposed by the Assessment Office, that is, $150 for each alleged violation, would not be likely to cause respondent to discontinue in business. A company which has tripled its working force in a period of about 1 year is not likely to discontinue in business even if penalties considerably greater than $150 were to be assessed. Inasmuch as respondent is operating a strip mine, it is likely that exhaustion of suitably located coal reserves is more likely to cause it to discontinue in business than payment of penalties.

Citation No. 123424 April 12, 1978 § 77.107 (Exhibit 2)

Findings. Section 77.107 requires every operator of a coal mine to provide a program approved by the Secretary for the training and retraining of personnel in the tasks which they are required to perform as certified and qualified persons. Respondent stipulated that the violation occurred (Tr. 3). The violation was moderately serious because there is no way to be certain that mine personnel have been scheduled to receive training in such subjects as first aid, mine rescue, safety regulations, use of self-rescuer, methods for detecting methane and oxygen deficiency, etc., unless respondent has a written program providing for such training. Respondent was negligent in failing to have a program because such programs were required to be submitted on or before September 30, 1971, and respondent should certainly have submitted the program by April 12, 1978 (Tr. 9-20).

Conclusions. Respondent's witness stated that he was certain that he had certified persons at his mine, but he was unaware that they had to be retrained on an annual basis (Tr. 45-46). It is no doubt difficult to keep

abreast of the regulations, but the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that the operator is conclusively presumed to know what the mandatory health and safety standards are. The mine foreman did not have a card to show that he had received the necessary annual retraining in the required subjects (Tr. 20).

The inspector conceded that respondent's personnel appeared to be competent in operating their equipment but he stated that he could not conclude from their ability to operate equipment that they also knew how to administer first aid in case of an accident nor that they knew how to test for oxygen deficiency or the presence of methane (Tr. 18). The fact that a mine foreman may at some time have had an initial course in first aid is not a reason to reduce the degree of negligence involved in respondent's failure to submit a training program for MSHA's approval as required by section 77.107.

Considering that respondent operates a relatively small business, that the violation was moderately serious, that respondent was negligent, that respondent showed a normal good faith effort to achieve compliance, and that respondent has not previously violated section 77.107, a penalty of $75 will hereinafter be imposed.

Citation No. 123425 April 12, 1978 § 77.106 (Exhibit 4)

Findings. Section 77.106 requires the operator of each coal mine to maintain a list of all certified and qualified persons. Respondent stipulated that a violation of section 77.106 had occurred (Tr. 3). The violation was nonserious. Respondent was negligent in failing to maintain a list of certified and qualified persons (Tr. 21-30).

Conclusions. In the inspector's opinion, it is important for each operator of a coal mine to make a list of the persons who are certified at his mine so that everyone will know which person is in charge in case a miner should be injured (Tr. 24). On cross-examination, the inspector conceded, however, that the miners would expect the foreman to be in charge in case of an emergency (Tr. 28).

The operator submitted to MSHA's office located in Barbourville, Kentucky, a list of three persons for the purpose of complying with section 77.106. The list was received in evidence as Exhibit 10. The three persons whose names appear on the list received a first-aid course, but the list does not indicate the dates on which the three persons received first-aid training. Nevertheless, the inspector stated that he had been accepting a list such as that submitted by respondent as satisfactory compliance with section 77.106 (Tr. 32-33).

Considering that a moderately small operator is involved, that the violation was nonserious, that ordinary negligence was involved, that respondent showed a normal good faith effort to achieve compliance, and that respondent has not previously violated section 77.106, I believe that a penalty of $25

is reasonable, especially since the charge in Citation No. 123424 for failure to have a training program somewhat overlaps the charge in Citation No. 123425 for failure to submit a list of certified persons.

Citation No. 123426 April 12, 1978 § 77.1000 (Exhibit 6)

Findings. Section 77.1000 requires each operator to establish and follow a ground control plan for the safe control of all highwalls, pits, and spoil banks to be developed at his mine. It was stipulated that respondent had violated section 77.1000 (Tr. 3). The violation was nonserious because the inspector stated that respondent's highwall and spoil bank were both stable and that he saw no violation in the way respondent was controlling his highwall. Respondent was negligent for failing to have and to submit a ground control plan (Tr. 37-41).

Conclusions. Respondent's witness stated that he thought the ground control plan was associated with the surface mining regulations which are administered by the Department of the Interior. He understood that those regulations were to become effective on May 3, 1978. He said he was, therefore, surprised to be cited on April 12, 1978, for failure to have a ground control plan (Tr. 50; 60). It is difficult to keep informed as to all the regulations pertaining to mining coal, but respondent's witness stated on cross-examination that he had not tried to obtain clarification as to the regulations even though his mine is not far from the MSHA office at Hazard, Kentucky (Tr. 54). Additionally, Exhibit 1 indicates that respondent was previously cited for a violation of section 77.1000 on July 15, 1976. That previous violation should have made him acutely aware of the fact that he was required to establish a ground control plan and submit it to MSHA before May 3, 1978.

Respondent's witness did, however, appear to be sincerely interested in complying with all safety regulations and he stated that he had been mining coal for 3 years without ever having had a lost-time accident at his mine (Tr. 47). Respondent's witness stated that he had asked for a hearing on the three violations involved in this proceeding primarily because he wanted to receive some clarification about the training program he had been cited for not having and about whether the ground control plan was required in April at the time he received the citation (Tr. 54-57).

Considering that a relatively small business is involved, that the violation of section 77.1000 was nonserious in the circumstances, that respondent was negligent for failing to submit the plan to MSHA, and that there was a good faith effort to achieve compliance, a penalty of $50 would have been assessed. Exhibit 1 shows, however, that respondent has violated section 77.1000 on a previous occasion. That tends to offset the operator's claim that he thought a ground control plan was one of the requirements of the new surface mining regulations which were not effective on April 12, 1978, when the instant violation of section 77.1000 was cited. Therefore, the penalty will be increased by $25 to $75 because of respondent's history of a previous violation.

Summary of Assessments and Conclusions

(1) On the basis of all the evidence of record and the foregoing findings of fact, respondent should be assessed the following civil penalties:

Citation No. 123424 4/12/78 § 77.107.....	$ 75.00
Citation No. 123425 4/12/78 § 77.106.....	25.00
Citation No. 123426 4/12/78 § 77.1000.....	75.00
Total Assessments in This Proceeding.....	$ 175.00

(2) Respondent was the operator of the No. 1 Mine at all pertinent times and, as such, is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $175.00 as summarized in paragraph (1) above.

Richard C. Steffey

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

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd, Arlington, VA 22203 (Certified Mail)

Larry Cleveland, Esq., Attorney for Black Jack Coal Company, Inc., P.O. Box 595, 314 Wilkinson Street, Frankfort, KY 40602 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-55-PM
Petitioner	:	A.O. No. 22-00313-05001
v.	:	
	:	Artesia Quarry & Plant Mine
UNITED CEMENT COMPANY,	:	
Respondent	:	

DECISION

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Joe F. Canterbury, Jr., Esq., Smith, Smith, Dunlap & Canterbury, Dallas, Texas, for Respondent.

Before: Judge Cook

I. Procedural Background

On October 24, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act), against United Cement Company alleging violations of various sections of the Code of Federal Regulations. All of the subject citations were issued pursuant to section 104(a) of the Act. The Respondent filed its original answer on November 27, 1978, and filed an amended answer on December 14, 1978.

A notice of hearing was issued on February 22, 1979, setting the case for hearing on the merits beginning at 9:30 a.m., May 22, 1979. On March 1, 1979, counsel for the Respondent filed a request for a continuance. An order was issued on March 12, 1979, continuing the hearing to May 31, 1979, in Birmingham, Alabama.

The hearing was held as scheduled. Representatives of both parties were present and participated. A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing. Counsel for the Petitioner stated that he would not file a brief (Tr. 187-188). Respondent's posthearing brief was filed on July 16, 1979.

II. Violations Charged

Citation No. 80420, April 4, 1978, 30 CFR 56.9-87. 1/

Citation No. 80421, April 4, 1978, 30 CFR 56.12-34.

Citation No. 80422, April 4, 1978, 30 CFR 56.16-5.

Citation No. 80423, April 4, 1978, 30 CFR 56.20-3.

Citation No. 80424, April 4, 1978, 30 CFR 56.11-2.

Citation No. 80425, April 4, 1978, 30 CFR 56.14-1.

Citation No. 80426, April 4, 1978, 30 CFR 56.9-12.

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, the parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

The Petitioner called as its witness Clyde H. Gilliam, an MSHA inspector on April 4, 1978, and an assessment conference specialist with the Office of Assessments on the date of the hearing.

The Respondent called as its witness Darrell Price, the Respondent's production manager.

C. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

M-1 is a copy of Citation No. 80420, April 4, 1978, 30 CFR 56.9-87.

M-1(a) is a copy of the inspector's statement pertaining to M-1.

M-2 is a copy of Citation No. 80421, April 4, 1978, 30 CFR 56.12-34.

M-2(a) is a copy of the termination of M-2.

M-2(b) is a copy of the inspector's statement pertaining to M-2.

1/ The Petitioner moved, at the close of its case-in-chief, to dismiss the petition as relates to Citation No. 80420. The motion was thereupon granted (Tr. 60-61).

M-3 is a copy of Citation No. 80422, April 4, 1978, 30 CFR 56.16-5.

M-3(a) is a copy of a modification of M-3.

M-3(b) is a copy of the inspector's statement pertaining to M-3.

M-4 is a copy of Citation No. 80423, April 4, 1978, 30 CFR 56.20-3.

M-4(a) is a copy of the inspector's statement pertaining to M-4.

M-5 is a copy of Citation No. 80424, April 4, 1978, 30 CFR 56.11-2.

M-5(a) is a copy of the termination of M-5.

M-5(b) is a copy of the inspector's statement pertaining to M-5.

M-6 is a copy of Citation No. 80425, April 4, 1978, 30 CFR 56.14-1.

M-6(a) is a copy of the inspector's statement pertaining to M-6.

M-7 is a copy of Citation No. 80426, April 4, 1978, 30 CFR 56.9-12.

M-7(a) is a copy of the inspector's statement pertaining to M-7.

2. The Respondent introduced the following exhibits into evidence:

O-1 is a photograph pertaining to Citation No. 80425.

O-2 is a photograph pertaining to Citation No. 80424.

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 Facts

A. Stipulations

1. The Administrative Law Judge has jurisdiction of the above-captioned proceeding (Tr. 4).

2. Clyde H. Gilliam was an authorized representative of the Secretary of Labor (Tr. 4).

3. The United Cement Company received copies of each of the subject citations (Tr. 4).

4. The United Cement Company was served a copy of the complaint in the above-captioned proceeding (Tr. 4).

5. The United Cement Company has been served all papers necessary for appearances at the hearing (Tr. 4).

6. There is no history of previous violations (Tr. 5-6).

7. The size of the Artesia Quarry & Plant is rated at approximately 250,000 man-hours per year (Tr. 7).

8. United Cement Company is a wholly-owned subsidiary of Texas Industries (Tr. 7).

9. The size of Texas Industries' combined mining operations (sand, gravel, cement and crushed stone) is rated at approximately 2 million man-hours per year (Tr. 9-10).

10. The size of United Cement Company is rated at approximately 250,000 man-hours per year (Tr. 9-10).

11. The amount of the proposed penalties will not affect the United Cement Company's ability to remain in business (Tr. 10).

B. Occurrence of Violation, Negligence, Gravity and Good Faith

MSHA inspector Clyde H. Gilliam, issued the subject citations on April 4, 1978, during an inspection of the Respondent's Artesia Quarry & Plant (Tr. 14, Exhs. M-1, M-2, M-3, M-4, M-5, M-6, M-7). He was accompanied on the inspection tour by Mr. Darrell Price (Tr. 15-16, 171). According to Inspector Gilliam, Mr. Price was the general mill foreman (Tr. 15-16). However, Mr. Price described himself as the production manager, but stated that his duties as production manager encompassed responsibility for safety at the plant (Tr. 167).

The findings with respect to the individual citations are set forth as follows:

1. Citation No. 80421, April 4, 1978, 30 CFR 56.12-34

The mandatory standard embodied in 30 CFR 56.12-34 provides that "[p]ortable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded."

Inspector Gilliam cited the following "condition or practice" as violating the regulation: "Three light bulbs located approximately 7 feet above the floor did not have a protective guard around them. Should a worker with a metal bar be working below the light bulbs accidentally break the glass, the filament could cause electrical shock" (Exh. M-2).

According to the inspector, the light bulbs were located in a structure used as a conveyor belt transfer station (Tr. 63) that measured approximately 20 feet in length by 20 feet in width (Tr. 70). One of the bulbs was located directly above the transfer point (Tr. 71-72). He testified that the lights were approximately 7 feet above the floor, but indicated that it could have been less (Tr. 69). He did not measure the height, but estimated it visually (Tr. 72). Mr. Price testified that the company measured the height and determined that it was less than 7 feet (Tr. 184).

The 7-foot figure, standing alone, would not be significant absent the so-called "7-foot rule" agreed upon amongst the inspectors during their meetings (Tr. 72-73). By Inspector Gilliam's own admission, 7 feet is "not in the law." He stated that "we" presumably the inspectors, "have to set some arbitrary figure," and indicated that 7 feet "is common sense." (Tr. 72). He stated that the "7-foot rule" is not applicable throughout the nation because "Washington would put out something to that effect and we have never seen nothing to that effect" (Tr. 73). Apparently, the "requirement" was devised after an individual in Georgia, employed by Vulcan Materials, was electrocuted when a bulb broke and his sweaty arm touched the two electrodes. According to the inspector:

> A. Since that time we have made it a point to put guards around light bulbs where it's possible that a man may have a rod in his hands or moving, say around 7-feet or less, where the light bulbs could be broken, and catch the two electrodes.

(Tr. 64).

The testimony of Inspector Gilliam, the description of the "condition or practice" contained in the citation and the comments contained in the document known as the inspector's statement reveal that the possibility of a worker receiving an electrical shock was the sole hazard that the inspector associated with the condition (Exhs. M-2, M-2(b), Tr. 64-66). Neither the documents nor his testimony associate a burn hazard with the condition.

According to the inspector, a metal object being carried by a worker could accidentally strike the bulb, break the glass and make contact with the filaments (Exh. M-2, Tr. 64-65). A sweaty individual could thus be electrocuted, while a dry individual could sustain a shock (Tr. 66).

The testimony as to the derivation of the "7-foot rule," when viewed in the light most favorable to the Petitioner, and the testimony as to the hazard posed by the three unguarded light bulbs, when taken alone and without

regard to the nature of the work actually performed in the transfer station, sets forth a plausible basis for finding a violation. However, the question as to whether the regulation has been violated can only be answered by giving due consideration to all of the evidence adduced. It is only through an appraisal of the nature of the actual work performed in the transfer station that a determination can be made as to whether the location of the lights presented a shock hazard to the workers within the meaning of the regulation. 2/

According to the inspector, employees are not assigned to the transfer station on a continuous basis, but work there periodically to perform repair and maintenance functions (Tr. 63, 65, 73). It is not a regular work station, but merely houses some equipment (Tr. 70-71). The inspector stated that the area is visited by workers to remove blockages from the chute (Tr. 65). Pieces of wood or metal were identified as the possible obstructions (Tr. 75-76). He testified that removal of a blockage would definitely require the use of metal rods approximately 1 inch in diameter and 6 feet in length (Tr. 65, 71). The inspector stated that an individual wielding such a tool could accidentally shatter the bulb with the rod (Tr. 65), and achieve contact with the exposed filaments. It was the fear of this type of accident that cause him to issue the citation (Tr. 73-74). However, he admitted that he did not see anyone working in the area, that he could not recall seeing any metal bars in the transfer station (Tr. 71), and that he did not see anyone with a metal bar entering the room (Tr. 74).

2/ At the close of MSHA's case-in-chief, the Respondent moved to dismiss the petition as relates to Citation No. 80421 on two grounds: First, counsel for the Respondent argued that no evidence had been presented to establish that any employee had ever used any type of metal bar in the transfer station. Second, the Respondent argued that the so-called "7 foot rule" was arrived at arbitrarily and that operators cannot be bound by unwritten requirements.

However, the evidence contained in the record at the time the motion was made established a prima facie case as to the alleged violation and was sufficient to withstand a motion to dismiss. The inspector testified as an expert witness that a metal rod, approximately 6 feet in length and 1 inch in diameter, would be required to remove a blockage from the chute at the transfer point. The existence of such expert testimony supported the inference that unguarded light bulbs located approximately 7 feet above the floor presented a shock hazard. On the basis of this, it was immaterial that an informal "7-foot rule" happened to exist because reliance on it was unnecessary to sustain the finding of a violation. Additionally, the fact that the inspector testified as an expert witness was sufficient at that stage of the case to support an unrebutted opinion that a metal rod of the specified dimensions would be needed to alleviate a blockage.

Accordingly, based on the evidence in the record when the motion was made, the Respondent's motion to dismiss is DENIED.

The sole evidence as to how blockages are actually removed from the chute was provided by Mr. Price, who testified that a blockage would normally be one floor above the level on which the subject light bulbs are located and that picks and shovels would be used to alleviate the blockage (Tr. 178).

Thus, the sum total of all the evidence fails to establish that employees were exposed to an electrical shock hazard of the type alleged in the citation because there was no proof that employees used metal objects in the cited area to remove chute blockages.

Accordingly, I find that the evidence fails to establish a violation of 30 CFR 56.12-34 by a preponderance of the evidence.

2. Citation No. 80422, April 4, 1978, 30 CFR 56.16-5

a. Occurrence of Violation

The mandatory standard codified at 30 CFR 56.16-5 provides: "Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner." Inspector Gilliam cited the following condition as a violation of the standard: "The oxygen cylinder located in the welding area of the shop was not secured in an upright position by a chain, rope or other means" (Exh. M-3).

The inspector testified that the unsecured cylinder was full of oxygen, and testified as an expert that the pressure inside was approximately 2,000 pounds (Tr. 81). The Respondent offered no rebuttal evidence on this point.

The question of whether a violation occurred is simplified by the Respondent's admission that the cylinder was not secured, but that it should have been secured (Tr. 87).

Accordingly, it is found that a violation of 30 CFR 56.16-5 has been established by a preponderance of the evidence.

b. Negligence of the Operator.

The area in which the violation was observed was classified as a big storage area containing many oxygen cylinders (Tr. 88). Only one of the cylinders was unsecured (Tr. 88). Facilities were provided for tying down the cylinders (Tr. 88), although the witnesses differed as to the type of facilities provided. Inspector Gilliam testified that chains were provided (Tr. 83), while Mr. Price testified that ropes were provided (Tr. 178). The differences in their testimony on this point are immaterial, because both agree that adequate facilities were provided.

The inferences drawn from Inspector Gilliam's testimony indicate that it is more probable than not that an employee had been using the oxygen cylinder, but had replaced it in its proper location without securing it (Tr. 83). The inspector made a general observation to the effect that employees will often leave a cylinder unsecured with the intention of using it again within approximately the next 30 minutes (Tr. 88). However, this

general observation is of no assistance in the instant case because the record does not contain any indication as to precisely why the cylinder was not secured.

According to Mr. Price, all employees had been instructed to secure the cylinders (Tr. 178). That this requirement was enforced effectively by the Respondent is attested to by the inspector's interpretation of his own observations as confirming that the Respondent enforced its safety rules (Tr. 91-92). Thus, the evidence in the record is inadequate to establish that the violation was anything other than an isolated occurrence.

Although the inspector testified that the unsecured cylinder was sufficiently conspicuous so as to be observable to an employee working in the area (Tr. 84), the evidence fails to establish that the Respondent or any of the Respondent' s supervisory personnel knew or should have known of the condition. There is no indication that the Respondent had actual knowledge of the condition because the inspector did not know whether the operator, Mr. Price or a foreman actually observed the unsecured cylinder prior to the issuance of the citation (Tr. 90). The sole basis for imputing constructive knowledge to the Respondent is the inspector's statement that a foreman in the area would have known about the condition had it existed for 5 minutes (Tr. 89). However, he admitted not only that it could have existed for substantially less than 5 minutes (Tr. 89-90), but also that it was possible that the foreman was unaware of it (Tr. 89).

Therefore, the evidence is insufficient to establish anything other than the fact that the violation was an isolated occurrence of which the Respondent neither knew nor should have known.

Accordingly, it is found that the Petitioner has failed to establish operator negligence by a preponderance of the evidence.

c. Gravity of the Violation

The unsecured cylinder posed a danger of falling over and hitting the concrete floor, thus damaging the brass, hand-operated valve and causing an oxygen leak (Exh. M-3(b), Tr. 82, 85). The inspector classified an occurrence as probable and noted that one person was exposed to the hazard (Exh. M-3(b)).

The inspector's testimony points to an anticipated fatality as a result of a gas leakage providing sufficient thrust to propel the cylinder as a missile through the walls of the metal building (Tr. 81-84, 85).

Accordingly, it is found that an extremely serious degree of gravity has been established.

d. Good Faith in Attempting Rapid Abatement

The citation was issued at 11 a.m. on April 4, 1978, (Exhs. M-3, M-3(a), Tr. 81). Although the citation was not terminated until 3 p.m. the same day,

i.e., 4 hours after issuance, the inspector testified that the condition was abated immediately (Tr. 85-86, 88). In fact, both his testimony and the inspector's statement reveal that the Respondent took extraordinary steps to gain compliance (Tr. 88-89, Exh. M-3(b)).

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

3. Citation No. 80423, April 4, 1978, 30 CFR 56.20-3

a. Occurrence of Violation

The mandatory standard codified at 30 CFR 56.20-3 provides, in part, as follows: "Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms and service rooms shall be kept clean and orderly." Inspector Gilliam cited the following condition as violating the mandatory standard: "There was loose paper, conduit, empty wire reel and a gallon glass jug in the floor and walkway of the electrical control room for the electro-static precipitator" (Exh. M-4).

The control room was approximately 14 feet long and 7 feet wide (Tr. 171). The inspector testified that it was not a work area (Tr. 107), the inference being that it was frequented periodically by employees recording the readings from the instrument panels (Tr. 102). No one was in the control room when the examination was made (Tr. 102).

According to the inspector, all of the debris was in front of the control panel (Tr. 106). He testified that the wire reel was 36 inches in diameter (Tr. 106), and 12 to 15 inches in height (Tr. 109). It was composed of wood (Tr. 106). The piece of conduit was composed of metal (Tr. 112), and, to the best of his recollection, was approximately 24 to 36 inches in length. The paper volume consisted of 12 to 18 sandwich bags and approximately 6 pieces of newspaper (Tr. 112). Based on these observations, the inspector deduced both that electrical work had been performed in the area (Tr. 111), and that employees had been using the control room as a lunch room (Tr. 113).

Although Mr. Price classified the area as sloppy by company standards (Tr. 172), his testimony differs from the inspector as to both the volume of refuse present and potential safety hazard arising from it. According to Mr. Price, a glass jug, a brown paper bag, a Frito bag and a Coke can were present (Tr. 172). He recalled the piece of metal conduit as being approximately 6 to 8 feet in length and leaning in a corner of the room (Tr. 172), not lying in front of the control panel. He recalled the reel as being approximately 6 to 8 inches in diameter and 8 to 12 inches in length (Tr. 172), which would make it much smaller than the inspector's recollection would indicate.

The resolution of this conflict in the testimony of the witnesses can be accomplished only by assessing their credibility. Although both witnesses

were completely honest and forthright in their testimony, the inspector's memory, in light of all the evidence, appears more accurate. Accordingly, I find that Inspector Gilliam's recollection of the nature, composition, extent and location of the refuse in the control room accurately reflects the conditions existing on April 4, 1978. Thus, it is found that the control room was was not being kept clean and orderly as required by 30 CFR 56.20-3.

Accordingly, it is found that a violation of 30 CFR 56.20-3 has been established by a preponderance of the evidence.

b. Negligence of the Operator

Although the inspector testified that the condition would be obvious to a foreman entering the area, he did not know whether a foreman actually saw it (Tr. 107-108). He had no actual knowledge as to when the debris was placed in the room (Tr. 108), an admission with particular significance as to the Respondent's actual or constructive knowledge of the presence of the sandwich bags, newspaper and glass jug. Since the conditions were observed at 1:20 p.m., i.e., shortly after the employees' lunch period (Tr. 108), there is a substantial basis for the inference that those materials had not been present for a sufficient period of time for a foreman to have observed them. In fact, the inspector testified that there was nothing upon which to base an opinion as to operator negligence except the presence of the reel and the conduit (Tr. 110-111). The presence of these two articles dictates the common sense conclusion that people had been working in the area (Tr. 110-111).

However, it is found that the evidence indicates a very minor degree of negligence.

c. Gravity of the Violation

Gravity must be assessed with reference to both the potential tripping hazards and the potential fire hazard posed by the refuse.

The inspector testified that it was unlikely that a person would trip over the reel, but noted that the conduit posed more of a hazard (Tr. 109, 112). The feared injuries, at most, ranged from a sprained ankle to a sprained back (Tr. 101, 103). A back sprain could result in lost workdays (Tr. 103).

No ignition sources were present on the front of the electrical panel, but an ignition source would be presented by a blown cable on the back of the panel (Tr. 113). However, the inspector could not recall any bare cables (Tr. 113).

Both the inspector's statement (Exh. M-4(a)) and the testimony reveal that an occurrence was improbable (Tr. 109), that the injury resulting from the violation could most reasonably be expected to result in no lost workdays, and that one worker was exposed to the hazard.

Accordingly, it is found that the violation was accompanied by moderate gravity.

d. Good Faith in Attempting Rapid Abatement

The Respondent abated the condition in the 40 minutes allotted (Exh. M-4, Tr. 103-104). In fact, the inspector begrudgingly admitted that the Respondent took extraordinary steps to gain compliance (Tr. 109).

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

4. Citation No. 80424, April 4, 1978, 30 CFR 56.11-2

a. Occurrence of Violation

30 CFR 56.11-2 provides: "Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

Inspector Gilliam cited the following condition as violating the mandatory standard: "There was no handrails around the platform nor on the steps at the kiln oxygen analyzer station. The platform was approximately 30 inches above the ground. A worker will visit this station once each shift" (Exh. M-5).

The kiln oxygen analyzer station was described as a small, isolated building atop a raised platform (Tr. 119).

The platform, more accurately characterized as an elevated walkway, was located outside the building. It was approximately 5 to 6 feet in width and approximately 15 feet in length (Tr. 115). It was reached by climbing four steps (Exh. O-2).

The fact that the platform was elevated approximately 30 inches above the ground, in conjunction with the fact that it provided access to the station, renders it an elevated walkway within the meaning of the subject regulation. 3/

3/ In this regard, the existence or nonexistence of the so-called "30-inch regional rule" (Tr. 123-125, 172-173), is immaterial to the finding of a violation. It is unnecessary to decide, assuming that such a rule had been developed informally amongst the inspectors, whether all walkways 30 inches above the ground require handrails per se. In the instant case, reliance on such an informal rule is unnecessary to find a violation because the height of the platform and the nature of its use dictate that handrails should have been present.

Additionally, the fact that toeboards were not provided (Tr. 117, 130) is immaterial since their absence is not alleged in the citation.

Accordingly, it is found that a preponderance of the evidence establishes that the Respondent violated 30 CFR 56.11-2 in that neither the elevated walkway nor the stairway were provided with handrails.

b. Negligence of the Operator

The Respondent's position with respect to operator negligence centers around the Respondent's alleged compliance with Occupational Safety and Health Administration (OSHA) regulations. According to the Respondent, the fact that the plant was constructed according to OSHA specifications demonstrates a lack of operator negligence. (Respondent's Brief, p. 6) (see also, Tr. 173, 183). I am in partial agreement with the tenor of the Respondent's argument, but I am unable to accept the implication that compliance with those standards, at the time the plant was constructed, necessarily requires a per se finding that negligence was not present. The controlling considerations when such a defense is raised are: (1) whether the subject area complied with the OSHA regulations at the time of construction, and (2) the amount of time intervening between the termination of OSHA inspections and the inspection by a Federal mine inspector giving rise to the subject citation. For purposes of the instant case, it is important to bear in mind that an absence of handrails was present on both the elevated walkway and the stairway.

The plant was completed by March of 1974 (Tr. 167). The OSHA standards in effect at that time pertaining to handrails around walkways and stairways, 29 CFR 1910.23(c) and 1910.23(d) (1973), provided:

> (c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
>
> (i) Persons can pass,
>
> (ii) There is moving machinery, or
>
> (iii) There is equipment with which falling materials could create a hazard.
>
> (2) Every runway shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

Runways used exclusively for special purposes (such as oiling, shafting, or filling tank cars) may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway of not less than 18 inches wide. Where persons entering upon runways become thereby exposed to machinery, electrical equipment, or other danger not a falling hazard, additional guarding than is here specified may be essential for protection.

(3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

(d) Stairway railings and guards. (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in subdivisions (i) through (v) of this subparagraph, the width of the stair to be measured clear of all obstructions except handrails:

(i) On stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending.

(ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.

(iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.

(iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side.

(v) On stairways 88 or more inches wide, one handrail on each enclosed side, one stair railing on each open side, and one intermediate stair railing located approximately midway of the width.

(2) Winding stairs shall be equipped with a handrail offset to prevent walking on all portions of the treads having width less than 6 inches. [Emphasis added.]

In addition to the foregoing, the regulations prescribing the construction characteristics of fixed industrial stairs required standard railings "on the open sides of all exposed stairways and stair platforms." 29 CFR 1910.24(h) (1973) (emphasis added). Under 29 CFR 1910.24(b) (1973):

> Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required. . . .

As relates to the elevated walkway, the salient provisions of the above-quoted regulation are those requiring railings 4/ around runways 5/ and open sided floors or platforms 6/ 4 feet or more above floor or ground level. It will be recalled that the elevated walkway in the instant case was 30 inches above ground level.

As relates to stairways, the above-quoted regulations require standard stair railings or standard handrails for every flight of stairs having four

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4/ 29 CFR 1910.21 (1973), sets forth the following definitions:

"(a) As used in § 1910.23, unless the context requires otherwise, floor and wall opening, railing and toe board terms shall have the meanings ascribed in this paragraph.

* * * * * * *

(3) Handrail. A single bar or pipe supported on brackets from a wall or partition, as on a stairway or ramp, to furnish persons with a handhold in case of tripping.

* * * * * * *

(6) Standard railing. A vertical barrier erected along exposed edges of a floor opening, wall opening, ramp, platform, or runway to prevent falls of persons.

* * * * * * *

(8) Stair railing. A vertical barrier erected along exposed sides of a stairway to prevent falls of persons."

5/ The term "runway," as used in 29 CFR 1910.23 (1973), is defined at 29 CFR 1910.21(a)(5) (1973), which provides the following:

"Runway. A passageway for persons, elevated above the surrounding floor or ground level, such as a footwalk along shafting or a walkway between buildings."

6/ The term "platform," as used in 29 CFR 1910.23 (1973), is defined at 29 CFR 1910.21(a)(4) (1973), which provides the following:

"Platform. A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."

or more risers, 7/ and, as relates to industrial stairs, on the open sides of all exposed stairways and stair platforms. In the instant case, neither standard was complied with.

These standards remained in effect after the termination of OSHA inspections in 1975 (Tr. 183-184). 29 CFR 1910.23(c) and 1910.23(d), 1910.24(b) and 1910.24(h) (1975).

Based on the foregoing, I conclude that the elevated walkway complied with the OSHA regulations in effect both when the plant was completed in 1974 and when OSHA inspections of the plant ceased in 1975. Although permitting this condition to exist during the approximate 3-year time period between 1975 and 1978 would ordinarly constitute gross negligence, the reliance on the previously applicable OSHA requirements during that time period, under the facts presented herein, is sufficient to reduce the degree of negligence demonstrated by the Respondent. Accordingly, it is found that the Respondent demonstrated a high degree of ordinary negligence by failing to provide handrails around the elevated platform.

The stairway, however, presents a different problem because it did not comply with the OSHA requirements either in 1974 or at any time subsequent thereto. Therefore, permitting the condition to exist between 1975 and 1978 constituted gross negligence.

c. Gravity of the Violation

The fact that the walkway was exposed to the elements indicates that rain or other weather conditions could render it slick (Tr. 116). Logically, the same consideration applies to the stairway.

According to the inspector, an individual could back off the walkway, fall 30 inches to the ground and sustain back injuries (Tr. 114-115). However, the inspector classified an occurrence as improbable (Tr. 126, Exh. M-5(b)), noting that how a person fell would determine whether an injury would be sustained (Tr. 125-126). One person would have been exposed to the hazard (Exhs. M-5, M-5(b), Tr. 114).

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fn. 7 (continued)

7/ The regulations contain no definition of the term "riser" applicable to 29 CFR 1910.23 (1973). Guidance as to its meaning under that section is provided by 29 CFR 1910.21(b)(7) (1973), which provides the following:

"(b) As used in § 1910.24, unless the context requires otherwise, fixed industrial stair terms shall have the meaning ascribed in this paragraph."

* * * * * * *

(7) Riser. The upright member of a step situated at the back of a lower tread and near the leading edge of the next higher tread."

Accordingly, it is found that moderate gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

Inspector Gilliam allotted the Respondent 1 day to abate the condition (Tr. 118-119, Exh. M-5). According to Mr. Price, the installation of handrails commenced immediately and was completed the next day (Tr. 174). The citation was terminated when the inspector returned on April 11, 1978 (Tr. 120, Exh. M-5(a)).

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

5. Citation No. 80425, April 4, 1978, 30 CFR 56.14-1

a. Occurrence of Violation

30 CFR 56.14-1 provides: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

Inspector Gilliam cited the following condition as violating the standard: "A guard was not installed around the rotating line shaft of the fan for the dust collector located in the bag house. A worker probably walked by the rotating shaft once during a shift" (Exh. M-6).

The Respondent does not contend that a guard was present on the drive shaft. Indeed, it contends in its answer that the condition existed in an isolated area with no employee exposure. Accordingly, it is found that the conditions described in the citation existed as alleged.

In view of the wording of the regulation it must be concluded that exposed moving shafts must be guarded if they may be contacted by persons and cause injury to such persons.

As set forth in Part V(B)(5)(c), infra, addressing gravity, the rotating line shaft could have been contacted by and caused injury to employees of the Respondent.

Accordingly, I conclude that the condition set forth in the citation constituted a violation of 30 CFR 56.14-1.

b. Negligence of the Operator

According to the inspector, anyone operating the equipment or working in the area should have observed the violation (Tr. 136). Although there is no indication as to precisely how long the Respondent had permitted the condition to exist, it can be inferred that the condition had existed since the plant was built.

Mr. Price did, however, state that throughout the plant numerous covers had been placed on pulleys, sprockets and shafts, although he did not know why a cover had not been placed on the subject shaft (Tr. 176). In fact, the chain drive adjacent to the subject shaft was guarded (Tr. 138-140, 177). Inferences drawn from this testimony indicate that at some point in time the Respondent undertook to provide guards for all exposed moving machine parts, but that, for some unexplained reason, the subject shaft was not provided with a guard. Accordingly, I find that the Respondent demonstrated a high degree of ordinary negligence.

c. Gravity of the Violation

The line shaft was mounted between two pillar blocks (Tr. 133, Exh. O-1), and was between 20 to 24 inches above the floor (Tr. 134, 184). The inspector estimated that the shaft rotated at 1,800 revolutions per minute and believed, based on experience, that the machine was powered by a 10-horsepower motor (Tr. 136, 147). Alamite fittings were present on each pillar block to permit lubrication (Tr. 147). According to the inspector, the shaft was accessible to all personnel walking in the area (Tr. 134).

The inspector indicated that a guard would prevent loose clothing from becoming wound around the rotating shaft (Tr. 133, 148), although he testified that for this to occur a burr would have to be present on the shaft (Tr. 136). There is no indication that a burr was present. Although he indicated that workers walking by the shaft were exposed to the hazard (Tr. 133), both the testimony and the inspector's statement reveal that the worker directly exposed to the hazard would be the one lubricating the bearings inside the pillar blocks (Exh. M-6(a), Tr. 140, 147). However, the testimony of Mr. Price reveals an employee would not be required to climb over any obstacles in order to reach the alamite fittings (Tr. 185). It is significant to note that the Respondent permitted lubrication of the equipment without requiring its employees to lock out the equipment (Tr. 176), a practice that could greatly facilitate injuries caused by accidentally starting the machinery.

Since an accident could result in the loss of a limb, the inspector classified the potential injury as permanently disabling (Exh. M-6(a), Tr. 136-137). However, he classified an occurrence as improbable (Exh. M-6(a)).

Accordingly, it is found that a high level of gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

The Respondent immediately commenced fabricating a guard following the issuance of the citation (Tr. 135, 176). Although the inspector gave the Respondent 1 day to abate the violation (Exh. M-6, Tr. 135), the guard was in place, and thus the violation was abated in 1-1/2 hours (Exh. M-6, Tr. 135-136).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

6. Citation No. 80426, April 4, 1978, 30 CFR 56.9-12

a. Occurrence of Violation

This citation was issued when Inspector Gilliam observed several pieces of refuse on the floor inside the cab of a water truck (Exh. M-7, Tr. 155, 158). The citation (Exh. M-7) describes the condition as follows: "There was loose papers and 2 Coke cans in the floor of the water truck cab. The Coke cans can roll under the brake pedal and prevent the operator from applying the brakes."

The cited standard, 30 CFR 56.9-12, provides: "Mandatory. Cabs of mobile equipment shall be kept free of extraneous materials."

The inspector's testimony dealt mainly with the presence of the two Coca Cola cans (Tr. 155-166). Mr. Price confirmed the presence of the two cans in the truck (Tr. 183).

Accordingly, it is found that a violation of 30 CFR 56.9-12 has been established by a preponderance of the evidence in that extraneous material in the form of two Coca Cola cans were present on the floor of the water truck's cab.

b. Negligence of the Operator

As relates to actual knowledge of the violation, Inspector Gilliam admitted that he did not know whether the Respondent knew of the condition (Tr. 160). The truck was stationary and nobody was in the cab (Tr. 158, 161). In fact, the inspector testified that it would be difficult for the Respondent to check each truck every time the driver got out (Tr. 160). Mr. Price did not know that the cans were present in the truck (Tr. 179).

The inspector's testimony indicates that in order to charge the Respondent with constructive knowledge, the Respondent would have to issue instructions to the drivers to keep the floorboards clear of such refuse and conduct spot inspections to assure that the instructions were being followed (Tr. 157). He admitted, however, that the Respondent would have to rely, to a certain degree, on the drivers following the instructions (Tr. 157). According to Mr. Price, all drivers had been instructed to keep all cabs free of debris (Tr. 179). Both Mr. Price and his supervisor conducted spot checks of the cabs (Tr. 179), presumably to assure that the instructions were being followed. The fact that at least five trucks were on the premises and that only the subject truck had rolling material on the floorboard (Tr. 159), tends to support the proposition that the Respondent effectively enforced its rule relating to debris in truck cabs.

Accordingly, it is found that the Petitioner has failed to establish negligence by a preponderance of the evidence.

c. Gravity of the Violation

The inspector did not recall whether there was a hump in the floorboard or whether the cans were on the driver's side or the passenger's side of the cab (Tr. 155-156). However, he recounted an incident in which an unnamed individual, presumably working for some unidentified company, was killed when a bottle rolled under his brake pedal, preventing him from applying his brakes (Tr. 156).

The "rolling bottle" example is not very material to the gravity of the violation in the instant case because an aluminum Coca Cola can is malleable (Tr. 156), whereas a glass bottle is not. The fact that the ends of a Coco Cola can are stiff (Tr. 156), does not, standing alone, establish that one or two mashed cans present a significant safety hazard of the type envisioned by the inspector (Exhs. M-7, M-7(a)). This is especially true in light of the fact that the cans were under the seat (Tr. 160) and that it was not established that they could roll under the brake.

Of greater significance is the fact that the truck was stationary with nobody in the cab when the violation was cited (Tr. 158, 161). The inspector never saw the truck move and did not know whether it had been operated with the Coke cans inside of it (Tr. 161-162).

In light of this, I am unable to accept the inspector's estimate that the occurrence of an accident was probable (Exh. M-7(a)). Based on all the facts, I must conclude that an occurrence was highly improbable. If, however, an accident did occur, one worker would have been exposed to the hazard and the resulting injury would most reasonably be expected to result in lost workdays or restricted duty (Exh. M-7(a)).

Accordingly, I find that de minimis gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

The inspector gave the Respondent 15 minutes to abate the violation, and abatement was accomplished within the prescribed time period (Exh. M-7, Tr. 163).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

C. History of Previous Violations

The Respondent has no history of previous violations (Tr. 5-6).

D. Size of the Operator's Business

The United Cement Company is a wholly-owned subsidiary of Texas Industries (Tr. 7). The size of Texas Industries' combined mining operations (sand, gravel, cement and crushed stone) is rated at approximately

2 million man-hours per year (Tr. 9-10). The size of United Cement Company is rated at approximately 250,000 man-hours per year (Tr. 9-10). The size of the Artesia Quarry & Plant is rated at approximately 250,000 man-hours per year (Tr. 7).

E. Effect of Penalty on Operator's Ability to Continue in Business

The parties entered into a stipulation that the amount of the proposed penalties will not affect the United Cement Company's ability to remain in business (Tr. 10). Any penalty proposal computed by the Office of Assessments is immaterial to the issues presented herein because civil penalty proceedings are de novo proceedings. The amount of the penalty is determined by the Judge solely with reference to the six statutory criteria contained in section 110 of the Act. In this regard, it has long been recognized that the Judge is empowered to assess penalties greater than those proposed by the Office of Assessments. Gay Coal Inc., 7 IBMA 245, 84 I.D. 99, 1977-1978 OSHD par. 21,662 (1977); Old Ben Coal Company, 4 IBMA 198, 82 I.D. 277, 1974-1975 OSHD par. 19,723 (1975); Buffalo Mining Company, 2 IBMA 226, 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973); 29 CFR 2700.27(c) (1978).

However, the Interior Board of Mine Operations Appeals (Board) has held that evidence relating to whether a penalty will affect the ability of the operator to stay in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find therefore, that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. United Cement Company and its Artesia Quarry & Plant have been subject to the provisions of the Federal Mine Safety and Health Act of 1977 at all times relevant to this proceeding.

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

3. Former MSHA inspector Clyde H. Gilliam was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The violations charged in Citation Nos. 80422 through 80426 are found to have occurred as set forth in Part V, supra.

5. The Petitioner has failed to establish the violation charged in Citation No. 80421 by a preponderance of the evidence.

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

VII. Proposed Fingings of Fact and Conclusions of Law

The Respondent filed a posthearing brief, the Petitioner did not. 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 grounds 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 Assessment

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
80422	4/4/78	56.16-5	$ 75.00
80423	4/4/78	56.20-3	40.00
80424	4/4/78	56.11-2	150.00
80425	4/4/78	56.14-1	100.00
80426	4/4/78	56.9-12	25.00
			$390.00

ORDER

Accordingly, the oral determination made at the hearing granting the Petitioner's motion to dismiss the petition as relates to Citation No. 80420 is hereby REAFFIRMED, and the citation is herewith VACATED.

IT IS FURTHER ORDERED that the petition be DISMISSED as relates to Citation No. 80421, and the citation is herewith VACATED.

IT IS FURTHER ORDERED that the Respondent pay civil penalties in the amount of $390 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, 1929-9th Avenue, South Birmingham, AL 35205 (Certified Mail)

Joe F. Canterbury, Jr., Esq., Smith, Smith, Dunlap & Canterbury, 4050 First National Bank Building, Dallas, TX 75202 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PITT 79-200-P
	:	A/O No. 36-02617-03003
v.	:	
	:	Solar No. 5 Mine
SOLAR FUEL COMPANY, Respondent	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Eugene E. Fike II, Esq., Somerset, Pennsylvania, for Respondent.

Before: Judge Cook

I. Procedural Background

On May 2, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Solar Fuel Company (Respondent) in the above-captioned proceeding. This petition, filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 820(a) (1978) (1977 Mine Act), alleged two violations of the Code of Federal Regulations. The Respondent filed its answer on May 11, 1979.

On August 27, 1979, the Petitioner filed a motion to amend the petition for assessment of civil penalty as relates to Citation No. 4230, issued on November 8, 1978, to allege a violation of 30 CFR 75.1712-3(a). The petition, as filed, had alleged a violation of 30 CFR 71.402(a). The Petitioner's motion was granted by an order issued on September 12, 1979.

Pursuant to notices issued on October 1, 1979, and October 10, 1979, the hearing was conducted on October 31, 1979, in Somerset, Pennsylvania. Representatives of both parties were present and participated.

At the beginning of the hearing, counsel for the Petitioner moved to dismiss the petition for assessment of civil penalty as relates to

Citation No. 9903735, November 15, 1978, 30 CFR 70.250. This motion was granted. (Tr. 4) 1/

The record was left open for the filing of exhibits by the Petitioner as relates to the size of the operator's business and history of prior violations. Additionally, the Respondent was accorded time to file objections and supplemental exhibits. The Petitioner filed these exhibits (Exhs. M-6, M-6A) on December 17, 1979. The Respondent did not file objections or supplemental exhibits. Exhibits M-6 and M-6A were received in evidence by an order dated January 15, 1980.

The parties waived the filing of briefs. Accordingly, no briefs were filed. 2/

II. Violations Charged

The petition for assessment of civil penalty, as amended, charges the following violations of provisions of the Code of Federal Regulations:

Citation No.	Date	30 CFR Standard
4230	11/8/78	75.1712-3(a)
9903735	11/15/78	70.250

III. Evidence Contained in the Record

A. Stipulations

During the course of the hearing, the parties entered into various stipulations which are set forth in the findings of fact, infra.

1/ Counsel for the Petitioner advanced the following reasons in support of the motion to dismiss:

"The Secretary has agreed to vacate the Citation No. 9,903,735 citing violation 30 CFR 70.250A, I think it is--.250. Basically this case involves what we originally thought was a failure to submit valid dust samples. The facts of this appear to have been that Operator's sample have been sent [sic] in time with the regular mine cycle as required in 70.250. However, in submitting the data cards he inadvertently placed the same Social Security number for two different men. At this point, after discussions between the parties, we determined those factors do not constitute a violation 70.250 [sic] but would perhaps constitute a violation of 70.260 which is the transmission of sample section as opposed to the section requiring individual samples once every nine days which were cited. For those reasons the Secretary has decided, after that knowledge, the Petition will be dismissed" (Tr. 4).

2/ In spite of the waiver, the parties were afforded 2 weeks in which to reconsider their position (Tr. 93).

B. Witnesses

The Petitioner called as its witness Theodore R. Dues, an MSHA inspector.

The Respondent called as its witnesses James L. Custer, the Respondent's manager of safety and health; and William R. Hutchinson, an employee of the Respondent.

C. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 4230, issued on November 8, 1978, originally issued alleging a violation of 30 CFR 71.402(a)

M-2 is a copy of the termination of M-1.

M-4 is a copy of the inspector's statement pertaining to M-1.

M-5 is a copy of a modification of M-1 to reflect a violation of 30 CFR 75.1712-3(a).

M-5A is a modification of M-5.

M-6 is a computer printout compiled by the Office of Assessments listing the history of prior violations for which the Respondent had paid assessments between November 9, 1976, and November 8, 1978.

M-6A is a copy of a controller information report.

2. The Respondent introduced the following exhibit in evidence:

O-16 is a document styled "Record of River and Climatological Observations."

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine 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 course of the hearing, the parties entered into the following stipulations:

1. Solar Fuel Company owns and operates the Solar No. 5 Mine and both are subject to the jurisdiction of the 1977 Mine Act (Tr. 4).

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act (Tr. 5).

3. Inspector Theodore R. Dues, who issued the subject Citation, was a duly authorized representative of the Secretary of Labor at all times relevant to the proceeding (Tr. 5).

4. The Solar No. 5 Mine produces an average of 80,000 tons of coal annually (Tr. 5).

5. Solar Fuel Company mines an average of 243,000 tons per year (Tr. 5).

6. The assessment of a civil penalty in this proceeding will not affect the operator's ability to do business (Tr. 5).

B. Occurrence of Violation

MSHA inspector Theodore R. Dues conducted a regular health and safety quarterly inspection of the Respondent's Solar No. 5 Mine on November 8, 1978 (Tr. 13, Exh M-1). After leaving the mine office, the inspector obtained his boots and coveralls from his car and proceeded to the change room (Tr. 14). The change room was located in a trailer approximately 300 feet from where the men go to work (Exh. M-1, Tr. 26, 48). The evidence reveals that the change room facility was located in close proximity to a belt used to haul coal from the mine (Tr. 78-79).

The inspector observed that the change room was not clean and orderly (Tr. 14). He thereupon issued the subject citation at 9:15 a.m., describing the conditions observed as follows:

> The bathing facilities, change room and sanitary flush toilet facilities that were located in a trailer mobile home on the surface was not being maintained in a clean and sanitary condition in that coal dust, spit on the wall, flush toilet not clean and an odors [sic] in the shower and toilet facilities.

The petition for assessment of civil penalty, as amended, alleges that the cited condition constitutes a violation of mandatory standard 30 CFR 75.1712-3(a), which provides that:

> All bathing facilities, change rooms, and sanitary toilet facilities shall be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and such facilities shall be maintained in a clean and sanitary condition.

According to the inspector, coal dust was on the sink, bathroom facilities, bench, floor and lockers (Tr. 14-15). The best available evidence reveals that the coal dust on the floor was mixed with water. Some of it was partially dry (Tr. 30, 34, 44,). The inspector observed a sufficient accumulation of coal dust on the bathroom sink to permit a person to write his name in it (Tr. 15, 31-33). The inspector further testified that tobacco or snuff spit was present at numerous locations on the wall near the benches (Tr. 14-15, 27-28). In addition, he testified that he detected the odor of urine in the toilet area (Tr. 15, 22).

The Respondent's witnesses, Messrs. Custer and Hutchinson, recalled observing several spots, described as discolorations, on the wall above the trash receptacle. Although neither witness could positively identify the composition of the spots, Mr. Hutchinson described their physical appearance as "splatters" (Tr. 46, 81). Inspector Dues, during his rebuttal testimony, reasserted that the material was spit (Tr. 90-91). In light of the inspector's positive identification, I find that spit was present on the wall as described in his testimony during the Petitioner's case-in-chief.

The Respondent's witnesses attempted to establish the odor detected by the inspector as emanating from the water supply and the soiled mine clothing. According to the Respondent's witnesses, the water supply at the mine contains sulphur, imparting to it a slight odor similar to that of rotten eggs (Tr. 61-63, 80). In addition, Mr. Custer testified that any odors present would be accentuated by the heat in the trailer (Tr. 63). The inspector's rebuttal testimony convincingly establishes a urine odor in the cited area. He was aware of the problem posed by the mineral content of the water and did not cite the Respondent for the stains on the toilet and bathing facilities caused by the sulphur. He reasserted that he detected the odor of urine and testified that he did not detect the "rotten egg smell" described by the Respondent's witnesses (Tr. 89-91).

Accordingly, I find that the conditions cited by the inspector constituted a violation of 30 CFR 75.1712-3(a). 3/

3/ The testimony establishing the presence of cigarette butts in the cited area (Tr. 14-15) is not deemed material to the issue of whether a violation occurred since they are not alleged in the petition for assessment of civil penalty.

C. Gravity of the Violation

The inspector classified the violation as serious because of the health hazard posed (Tr. 22-23), while Mr. Custer, a former MSHA inspector (Tr. 63), did not believe the cited area to be in an unsanitary condition (Tr. 64). However, it is significant to note, in assessing Mr. Custer's testimony on this point, that he was unable to identify the composition of the material on the wall and that he did not testify to detecting the odor of urine.

The best available evidence indicates that no miners were in the cited area when the inspector observed the condition, but that approximately 10 miners had been in the area shortly prior to his arrival (Tr. 16, 26-27, 47). No evidence was presented as to the probability of an occurrence.

Accordingly, I conclude that a slight amount of gravity was associated with the violation.

D. Negligence of the Operator

The inspector's opinion that the condition had existed for over a week (Tr. 16) was rebutted in part by the testimony of Mr. Hutchinson. Mr. Hutchinson testified that he cleaned the cited area between 7 and 8 p.m. on November 7, 1978, in accordance with his customary practice (Tr. 77-78). The cleaning consisted of mopping, sweeping and wiping (Tr. 77). In addition, he testified that he cleaned the sink, bathing and toilet facilities. However, there is evidence indicating that the cleaning job was less than thorough (Tr. 78, 85). Specifically, he testified that he did not remove the splatter marks observed by him from the wall (Tr. 85).

However, above and beyond this consideration, the record clearly reveals that substantial coal dust accumulations were a recurrent problem in the area, and that this state of affairs should have been known by the Respondent. According to Mr. Hutchinson, coal dust accumulates quickly in the cited area due to its proximity to a belt leading from the mine to a bin (Tr. 78-79). He further testified that an appreciable amount of coal dust could have accumulated over a 6- to 12-hour period because "I could clean it like tonight and tomorrow morning you could go in and write your name in dust" (Tr. 81). The fact that the facility was used by one section foreman on each shift (Tr. 47) indicates that the Respondent should have known of this recurrent problem.

Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

E. Good Faith in Attempting Rapid Abatement

Abatement was accomplished in the time allotted by the inspector (Exhs. M-1, M-2, M-5A). Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The history of previous violations at the Solar No. 5 Mine for which the Respondent had paid assessments between November 9, 1976, and November 8, 1978, is summarized as follows:

30 CFR Standard	Year 1 11/9/76 - 11/8/77	Year 2 11/9/77 - 11/8/78	Total
All Sections	9	10	19
75.1712-3(a)	0	0	0

(Exh. M-6).

G. Appropriateness of the Penalty to the Size of the Operator's Business

Gulf and Western Industries, Inc. (Gulf and Western), is the controller of Solar Fuel Company (Exh. M-6A). Exhibit M-6A reveals that all of Gulf and Western's coal production in 1978 and 1979 was attributable to Solar Fuel Company. The parties stipulated that Solar Fuel Company mines an average of 243,00 tons of coal annually, and that the Solar No. 5 Mine produces an average of 80,000 tons of coal annually (Tr. 5).

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

The parties stipulated that the assessment of a civil penalty in this proceeding will not affect the operator's ability to do business (Tr. 5). 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 a penalty otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Solar Fuel Company and its Solar No. 5 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to this proceeding.

3. MSHA inspector Theodore R. Dues was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.

4. The conditions set forth in Citation No. 4230, issued on November 8, 1978, are found to have occurred and to have constituted a violation of 30 CFR 75.1712-3(a).

5. The oral determination at the hearing granting the Petitioner's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 9903735, November 15, 1978, 30 CFR 70.250 is AFFIRMED.

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

VII. Penalty Assessed

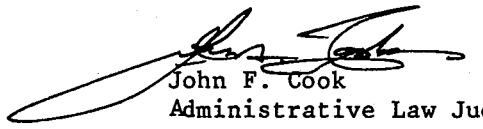
Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
4230	11/8/78	75.1712-3(a)	$40

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of $40 assessed in this proceeding within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to Citation No. 9903735, November 15, 1978, 30 CFR 70.250.



John F. Cook
Administrative Law Judge

Distribution:

James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Eugene E. Fike II, Esq., Scull Building, Somerset, Pennsylvania 15501 (Certified Mail)

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceeding	
	: Docket Nos.	Assessment Control Nos.
v.	: PIKE 79-19-P	15-09727-03002
	: PIKE 79-111-P	15-09727-03005
C.C.C.-POMPEY COAL COMPANY, INC., Respondent	: PIKE 79-112-P	15-09727-03006 V
	: PIKE 79-117-P	15-09727-03003 V
	: PIKE 79-125-P	15-09727-03004 V
	: KENT 79-116	15-09727-03007 V
	:	
	: No. 3 Mine	

DECISION

Appearances: Robert A. Cohen, Esq., and Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Garred O. Cline, Esq., Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued June 7, 1979, as amended on June 26, 1979, and August 29, 1979, a hearing in the above-entitled proceeding was held on September 25, 26, and 27, 1979, in Pikeville, Kentucky, under Section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves six Petitions for Assessment of Civil Penalty filed by the Mine Safety and Health Administration. The tabulation below shows the dates on which the Petitions were filed and lists the number of violations alleged in each Petition:

Docket Numbers	Dates of Filing	Number of Alleged Violations
PIKE 79-19-P	November 14, 1978	20
PIKE 79-111-P	March 13, 1979	3
PIKE 79-112-P	March 13, 1979	1
PIKE 79-117-P	March 19, 1979	1
PIKE 79-125-P	March 22, 1979	11
KENT 79-116	May 30, 1979	1
Total Alleged Violations		37

Counsel for the parties entered into the following stipulations (Tr. 5-6):

(1) Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(2) The inspectors who wrote the notices of violation, orders of withdrawal, and citations involved in this proceeding were authorized representatives of the Secretary of the Interior or the Secretary of Labor at the time such documents were written.

(3) At the time the alleged violations were cited, respondent's No. 3 Mine employed between 20 and 40 miners and produced approximately 60,000 tons of coal per year.

(4) Exhibit 1 in this proceeding shows that respondent has paid penalties for 64 previous violations at the No. 3 Mine.

The Summary of Assessments given at the end of this decision shows that seven of the 37 violations alleged by MSHA in this consolidated proceeding were the subject of evidentiary presentations by the parties and that the remaining 30 alleged violations were the subject of a settlement agreement entered into by the parties. I rendered bench decisions with respect to the seven contested violations. The bench decisions will first be reproduced in this decision as they appear in the transcript. Subsequently, this decision will summarize the reasons advanced by counsel in support of their request that their settlement agreement be approved with respect to the remaining 30 alleged violations.

The Contested Violations

Docket No. PIKE 79-19-P

Notice No. 2 FIJ (7-8) 2/28/77 § 75.1710

Upon completion of introduction of evidence by the parties, I rendered the bench decision quoted below with respect to Notice No. 2 FIJ (Tr. 198-199):

> The former Board of Mine Operations Appeals held in several cases -- Buffalo Mining Company, 2 IBMA 226, at Page 259 (1973) -- that if the materials needed for abatement are not available, no Notice of Violation should be written; and the Board held the same thing in two other cases -- Associated Drilling, Incorporated, 3 IBMA 164, at Page 173 (1974); and Itmann Coal Company, 4 IBMA 61 (1975).
>
> The Board also held in P and P Coal Company, 6 IBMA 86 (1976) that an administrative law judge cannot raise this impossibility of performance defense himself, and I do not think I have raised it here.

But it does seem to me Mr. Cline's testimony, through both Mr. Chaneys, do[es] show that this Acme 100 was unfit and unqualified for installation of canopies in 1977 -- that is February 26, 1977, when the Notice was written.

And I realize and recognize the inspectors had a job to do and they were applying this Section 75.1710 to all mines in an effort to get these canopies put on them.

And as Mr. Cline pointed out, they did require a lot of companies to get into the designing of canopies, to make their own, and some of the more affluent companies such as the Pittston Company did actually redesign shuttlecars; and in one case I had, they spent three million dollars redesigning equipment so that canopies could be put on them; but I do not think C.C.C.-Pompey Coal Company is large enough to have done a job such as that.

So, I think the evidence here clearly shows it was an impossibility of performance on this Acme 100 roof drill; consequently, I am going to grant Mr. Cline's motion to dismiss the petition in Docket Number PIKE 79-19-P, insofar as it seeks assessment of penalty with respect to Notice Number 2 FIJ dated February 28, 1977.

Notice No. 5 BHT (7-23) 5/11/77 § 75.1710

Upon completion of introduction of evidence by the parties with respect to the above Notice, I rendered the following bench decision (Tr. 236-238):

This particular Notice is much more difficult to deal with because it is a fact it was terminated with the company acquiring a usable canopy, if you consider the conditions Mr. Chaney talked about as being usable.

But it is also a fact it took them over a year after the Notice was originally issued before they were able to get a canopy that would work. I recognize on the day the Notice was issued, as Mr. Chaney also recognized, the height was forty-eight inches; and that perhaps if he can keep it at forty-eight inches all the time and keep a level floor all the time, he might be able to accommodate this canopy fairly well.

But as he pointed out, it is not quite that easy; it fluctuates, both in height and floor condition, and is still giving them an awful lot of trouble.

And one of the factors I have to give considerable weight to is the fact Mr. Tackett said that on May 11, 1977,

he had not found other mines that were using a Galis 300 with canopies on them any more than Mr. Chaney was succeeding with that.

And as Mr. Chaney pointed out, he did try to get a canopy on this machine about six months before the Notice was issued, which shows an unusual amount of effort and certainly more so than if he had waited around until he was cited and then tried to get one.

So, I think this situation, even though there are many factors about it that weigh heavily, the fact a violation perhaps -- the Notice, rather, should have been issued in order to protect miners and apparently did ultimately succeed in getting them the protection, the fact remains there is a certain amount of danger associated with these canopies, and it is still a debatable situation; but that is neither here nor there.

The important and only thing I have to consider today is whether this is truly a situation where the materials needed for the canopy were available on the date the Notice was issued, and I think the preponderance of the evidence shows that the equipment was not available; and therefore, I am going to grant Mr. Cline's motion with respect to Notice Number 5 BHT dated May 11, 1977, and dismiss the petition in Docket Number PIKE 79-19-P with respect to that particular Notice.

Upon completion of the introduction of evidence by the parties, I rendered the following bench decision with respect to the alleged violations which are discussed in the bench decision (Tr. 602-616):

There are four general criteria as to which I can make a general finding and those findings will be applicable for all of the remaining alleged violations unless there is some specific evidence persuading me there was not a good faith effort to achieve rapid compliance.

The evidence submitted by stipulation indicates as to the size of Respondent's business that it produced sixty thousand tons per year and if you assume two hundred fifty working days a year that would amount to about two hundred forty tons per day.

Yesterday Mr. Cline referred to production of three hundred tons per day in some of his questions so I assume the daily production is somewhere between two hundred forty tons and three hundred tons. I would conclude from that that

Respondent operates a relatively small business, so the penalties that I assess will be in a relatively low magnitude under the criteri[on] of the size of Respondent's business.

Mr. Cline indicated on Tuesday he did not intend to introduce evidence regarding Respondent's ability to pay penalties; therefore, in the absence of any evidence, I find payment of penalties will not cause Respondent to discontinue in business.

I am finding there was a normal good faith effort to achieve rapid compliance with respect to all the alleged violations. I recognize that Inspector Steele did not think there had been a good faith effort to achieve rapid compliance with respect to some of his citations and orders, but he based that primarily on the fact that the alleged violations were not abated until May 25, and it so happens that a lot of notices or citations were issued on the same day, May 12, and all of them had the effect of closing down the mine.

The Respondent worked on all of them simultaneously and finished cleaning up the mine and getting ready for inspection by May 25 so I don't think you could make a finding of failure to abate any one of the alleged violations at a given point between May 12 and May 25 would have shown a lack of good faith effort to achieve rapid compliance.

So as to all the citations and orders that have been issued up 'til now I find a good faith effort to achieve rapid compliance unless we have evidence of a contrary nature at some subsequent point in which case I would give that criteri[on] additional consideration at that time.

As to the history of previous violations, I shall consider that criteri[on] individually when the penalty is assessed. Of course, I shall also give individual consideration to the remaining two criteria of negligence and gravity.

Turning then to the order in which the evidence was received [in] Docket No. [PIKE] 79-19-P, the first one of those was Citation No. 66814 issued on May 25, 1978, by Inspector Murphy alleging a violation of Section 75.400. The alleged violation consisted of float coal dust extending from the portal to Spad No. 605 which was a distance of about eight hundred feet.

The float coal dust existed in an entry which had been designated as an escapeway and while it was an intake escapeway on May 25, 1978, when the citation was written, the

escapeway had previously been a return entry because in the inspector's opinion, based upon a review of the mine map, the float coal dust had accumulated in the entry during the time the entry had been used as a return which would have made the accumulation form in a period prior to about May 8 to May 12, 1978, when the flow of air was reversed in the escapeway.

The inspector did not take any samples because the float coal dust was paper thin and defied the taking of samples. Moreover, the former Board of Mine Operations Appeals held in the Kaiser Steel case at 3 IBMA 489 (1974), that it is unnecessary to take samples to support a violation of Section 75.400.

The former [B]oard did establish some very strict criteria which must be shown or proven by an inspector in order to make a prima facie case with respect to an alleged violation of Section 75.400. The [B]oard's opinion on that matter was issued in Old Ben Coal Company, 8 IBMA 98, where at pages 114 to 115 the [B]oard said that a prima facie case requires the following steps in proof: First, an accumulation of combustible material existed in the active workings or on electrical equipment in the active workings of a coal mine; two, that the coal mine operator was aware, or by exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and three, that the operator failed to clean up such accumulation or failed to undertake to clean it up within a reasonable time after discovery or within a reasonable time after discovery should have been made.

There is a close question between Inspector Murphy and Mr. Harold Chaney with respect to whether the gray appearance of the escapeway was dark enough to be considered a float coal dust accumulation because both witnesses stated the appearance of the entry was gray.

Mr. Chaney claims the gray appearance was the result of dampness and after the entry was rock dusted to abate the citation it regained its gray appearance a short time after the rock dusting when the new coat of rock dust became as wet as the old coat of rock dust.

That evidence requires me to make a credibility determination between the two witnesses and I'm finding in favor of Inspector Murphy because both Mr. Harold Chaney and his brother praised the fair and objective manner in which Inspector Murphy made his inspection and I don't -- and I mean all inspections -- and I don't believe Inspector

Murphy would have written a citation as to float coal dust without making a very careful and thorough examination which convinced him an accumulation of float coal dust existed.

Therefore, I find that the accumulation of float coal dust existed and I find Mr. Chaney either knew about it or should have known about it if he had made as diligent an examination of the escapeway as Inspector Murphy did.

Inspector Murphy believed that Respondent had failed to clean up the accumulation within a reasonable time because he wrote the citation on May 25, 1978, and he believed the float coal dust had existed since about May 8, 1978, when the air flow was reversed from the return to intake air.

Mr. Harold Chaney said the air flow was reversed on May 12, 1978, and he stated there was no float coal dust in the escapeway on May 12, 1978. Nevertheless, I have found the float coal dust existed on May 25, 1978, so it would have had to have accumulated after May 12, 1978, under Mr. Chaney's view of the facts.

In the Old Ben case the [B]oard stated that the operator knew exactly when the accumulation there involved occurred and knew when the cleanup was begun and how many men were being used to do the cleanup. In this case, Mr. Harold Chaney did not know when the escapeway was last rock dusted; therefore, I find he lacked the necessary facts to overcome MSHA's prima facie case that violation of Section 75.400 occurred.

I find that the violation was only moderately serious because Inspector Murphy cited no ignition hazards and stated that an explosion at the face of some size would be required for propagation of an explosion down the escapeway. There was normal negligence involved because the gray color of the float coal dust might have been a reason for Mr. Chaney to omit having a new coat of rock dust applied; therefore, a penalty of one hundred dollars ($100) will be assessed for this violation of Section 75.400.

Exhibit 1 shows Respondent violated Section 75.400 twice in 1976, and eight times in 1977. That is a very adverse trend in the numbers of violations of Section 75.400; therefore, the penalty will be increased by one hundred dollars ($100) to two hundred dollars ($200) because of Respondent's unfavorable history of previous violations.

Also in Docket No. PIKE 79-19-P there is an alleged violation of Section 75.1704 alleged by Inspector Murphy in

Citation No. 66815 dated May 25, 1978. Section 75.1704 requires an escapeway [to] be maintained in a safe condition.

Inspector Murphy stated a two hundred foot portion of the same escapeway inby Spad No. 605 mentioned in the previous citation was unsafe because the roof needed scaling in several locations and additional timbers needed to be installed to maintain a travelway six feet wide.

Mr. Chaney stated the two hundred foot portion had just been added to the escapeway to correct another alleged violation but the two hundred foot portion had been marked as an escapeway and was required to be in a safe condition.

Inspector Murphy believed that this violation was only potentially serious and I find it was moderately serious and involved normal negligence; therefore, a penalty of one hundred dollars ($100) will be assessed for this violation of Section 75.1704.

Exhibit 1 shows Respondent has violated this section on one previous occasion. It is important that escapeways be maintained in a safe condition so the penalty will be increased by twenty-five dollars ($25) to one hundred twenty-five dollars ($125) because of Respondent's history of a previous violation.

The petition for assessment of civil penalty filed in Docket No. PIKE 79-117-P seeks assessment of civil penalty with respect to Citation No. 66866 dated May 12, 1978, involving an alleged violation of Section 75.301 because the velocity of air was too low to be measured with an anemometer.

There was a great deal of discussion in the record about the way that Inspector Steele conducted himself during the inspection made on May 12, 1978, but Respondent has presented no witness who denies that the air velocity was below nine thousand cubic feet per minute when Inspector Steele issued Citation No. 66866.

Mr. Harold Chaney found a velocity of more than nine thousand cubic feet per minute when he made his preshift examination prior to 6:00 a.m. but Mr. Chaney agrees some of the required curtains were down when he next examined the section and since he did not take an air reading at the subsequent time when Inspector Steele issued Citation No. 66866 on May 12, 1978, I believe the evidence shows the velocity was very low at the time Inspector Steele made his examination.

While all witnesses agree no coal was being mined on May 12, 1978, all witnesses did agree that the coal was being loaded on May 12 and the ventilation, methane, and dust control plan requires that a velocity of nine thousand cubic feet of air be maintained at the last open crosscut if coal is being mined, cut or loaded; therefore, I find a violation of Section 75.301 occurred.

The preponderance of the evidence shows the violation was only moderately serious because the low air velocity had not existed for more than one or two hours as it occurred between the preshift examination and the writing of the citation at 8:30 a.m.

The low air velocity was caused by heavy rain which caused the belt on the fan to slip and turn more slowly than was normal and by the fact that the scoop operator knocked down curtains when they began cleaning up the coal on the section at the beginning of their shift. The section foreman was considerably negligent in failing to maintain his air velocity or check with Mr. Chaney if he could not determine why he lacked the required air velocity.

Inspector Steele did not observe a tremendous amount of dust in suspension in the section at the time the citation was written and since the violation had existed for only one or two hours there was not a great likelihood of an explosion from methane accumulation since no methane was detected by Inspector Steele and none has ever been detected in the No. 3 Mine.

Since there was a high degree of negligence a penalty of three hundred dollars ($300) is warranted. Exhibit 1 shows no previous violations of Section 75.301; therefore, the penalty will not be increased under the criteri[on] of history of previous violations.

There was only one alleged violation in that docket [PIKE 79-117-P]. The next docket that was considered is Docket No. PIKE 79-125-P. In that one, the first one that was considered was Order No. 66869 which was written by Inspector Steele on May 12, 1978, at 9:00 a.m. citing a violation of Section 75.400.

Here again the [B]oard's Old Ben opinion at 8 IBMA 98 must be considered. All witnesses, namely Inspector Steele, Inspector Ratliff, and both Mr. Harold Chaney and Mr. Ronald Chaney, agreed there was some coal dust, oil and grease on the S&S scoop cited in Inspector Steele's order.

There is disagreement among the witnesses as to whether the accumulations were great enough to warrant the issuance of an order but Inspector Ratliff believed it would take -- or would have taken about a week for the oil to accumulate to the extent he observed it when he was checking permissibility.

But he did not express an opinion as to the time that would have been required for the coal dust to accumulate. Nevertheless, the preponderance of the evidence supports my finding, and I find an accumulation of combustible materials existed on the scoop.

The next step in building a prima facie case is barely made out by the evidence but I find the operator knew or should have known that the accumulation existed. The third step in the prima facie case, however, is not supported by Inspector Steele because he stated during cross-examination that he could not put a time limit on the period the accumulation had existed and he stated he did not ask when the scoop had last been cleaned.

The [B]oard in the Old Ben case reversed the finding that a violation of Section 75.400 had occurred primarily because of the Inspector's failure to make an investigation as to whether the operator had failed to clean up the accumulation within a reasonable time after the accumulation occurred.

It should be noted that Inspector Murphy in the previous violation that I found as to Section 75.400 knew an exact time when the float coal dust in the escapeway should have been removed and re-rock dusted but here Inspector Steele did not have the necessary facts to support all steps of the prima facie case required by the [B]oard's Old Ben opinion; therefore, I find that MSHA failed to prove that a violation of Section 75.400 occurred with respect to Order No. 66869 and that its petition for assessment of civil penalty in Docket No. PIKE 79-125-P should be dismissed to the extent that a penalty is sought with respect to the violation of Section 75.400 1/ alleged in Order No. 66869 dated May 12, 1978.

1/ On December 12, 1979, the Commission issued its decision in MSHA v. Old Ben Coal Co., Docket No. VINC 74-11, 79-12-4, in which it held that the mere existence of a combustible accumulation could be considered a violation of Section 75.400. Since my bench decision was rendered on September 27, 1979, and was final insofar as the parties were concerned,

Also in Docket No. PIKE 79-125-P Order No. 66870 dated May 12, 1978, cited Respondent for a violation of Section 75.316 because Respondent had failed to install stoppings in five open crosscuts. Inspector Steele's allegation that five stoppings were missing was strongly challenged by Respondent's witness, Mr. Harold Chaney, who said that stoppings were required in only four crosscuts because the section had only advanced four crosscuts to the right of the main heading.

The confusion as to the disagreement between Mr. Chaney and Inspector Steele was resolved and Inspector Steele numbered the affected crosscuts on Exhibit 4 or the mine map. Mr. Chaney, thereafter, said Inspector Steele was including a crosscut inby the feeder which Mr. Chaney did not consider to be a part of the [working] section cited in Order No. 66870.

Inspector Steele agreed the stoppings which were installed at the time Mr. Chaney made his preshift examination would have been in compliance with the ventilation plan or Exhibit 3, since Mr. Chaney had obtained an air velocity of nine thousand cubic feet a minute or more at the last open crosscut. Eventually, both Mr. Chaney and Inspector Steele agreed that enough stoppings had been knocked down by the scoop operator when he was cleaning up to reduce the required number of stoppings below those required to be maintained to have a proper separation of the return from the intake entries; therefore, I find a violation of Section 75.316 occurred.

Here again, the preponderance of the evidence shows that the violation existed for only about three hours, so the miners were not exposed for long to excessive respirable dust or a possible explosion, which would have been remote in any event since no methane was detected on May 12, 1978, or has ever been [detected] in the No. 3 Mine. Again I find the section foreman was very negligent in failing to see th[at] proper ventilation was maintained and a penalty of three hundred dollars ($300) is warranted.

Exhibit 1 shows Respondent has previously violated Section 75.316 on two prior occasions; therefore, the penalty will be increased by fifty dollars ($50) to three hundred

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fn. 1 (continued)
I do not believe that my decision should be amended to change my finding with respect to the violation of Section 75.400 alleged in Order No. 66869 because the Board's Old Ben opinion was the applicable law at the time my bench decision was rendered.

fifty dollars ($350) under the criteri[on] of Respondent's history of previous violations.

Also in Docket No. PIKE 79-125-P Order No. 66872 dated May 12, 1978, cited Respondent for a violation of Section 75.200 because Respondent had failed to comply with its roof control plan or Exhibit 3 by driving seven entries for three crosscuts inby and two crosscuts outby Survey Station No. 1708 to a width of from twenty-one feet, ten inches to twenty-three feet, one inch, whereas the roof control plan permits a width of only twenty feet.

Mr. Harold Chaney challeged that order, that is No. 66872, as having correctly cited a violation of Section 75.200 because he stated a provision on page 8 of Respondent's roof control plan allows Respondent to drive an entry up to four feet in excess of the normal twenty foot width, provided an extra roof bolt is installed, so as to prevent a spacing of roof bolts greater than four feet from the rib.

Since Inspector Steele did not allege he had checked the roof bolts at the wide places cited in his order and found spaces -- and therefore did not know whether spaces existed at the roof bolts greater than four feet [from the ribs], Mr. Chaney correctly contended no violation of the roof control plan had been proven.

I find Mr. Chaney's point is well taken. The provision on page 8 of the roof control plan would permit varying entry widths of up to four feet so long as an extra roof bolt is installed to prevent a roof bolt spacing from the rib of more than four feet.

Inspector Steele stated another inspector had examined the spacing of the roof bolts and that he did not personally make that a part of his order. I find that Inspector Steele's failure to consider the roof bolt spacing as a simultaneous part of the citation of a violation of the roof control plan is a fatal flaw in his Order No. 66872 and prevents me from finding that a violation of Section 75.200 is proven.

Therefore, MSHA's petition for assessment of civil penalty in Docket No. PIKE 79-125-P will be dismissed to the extent it seeks assessment of a civil penalty for a violation of Section 75.200 with respect to Order No. 66872 dated May 12, 1978.

Upon completion of the introduction of evidence by the parties, I rendered the following bench decision with respect to Order No. 70617 (Tr. 627-632):

> The order that Mr. Cline has been talking about is No. 70617 issued August 14, 1978, alleging violations of Sections 75.603, 75.604 and 75.517. Considering those in the order they are set forth in Order No. 70617 I shall discuss the alleged violation of 75.603 first.
>
> Inspector Murphy alleged there were four temporary splices in the trailing cable to a Galis 300 roof bolting machine, whereas only one temporary splice is permitted in a twenty-four period. Mr. Harold Chaney, Respondent's witness, stated he had added an exten[s]ion to the pre-existing trailing cable to the roof bolting machine and that the exten[s]ion was obtained by removing it from an unused Acme roof bolter on the surface.
>
> Mr. Chaney connected the exten[s]ion to the pre-existing cable by using a temporary splice. Mr. Chaney said there were some taped places on the trailing cable but as far as he knew the only temporary splice in the cable was the one he used for connection of the cable to the pre-existing cable.
>
> Inspector Murphy's rebuttal testimony shows that he specifically found the spliced conductor in the cable and since Inspector Murphy examined the trailing cable with greater care than Mr. Chaney I find that his testimony supports a finding that the four temporary splices existed and at the time I wrote that language, I did not have before me Mr. Cline's offer of proof on behalf of witness Cantrell.
>
> I cannot give Mr. Cantrell's proposed statement as much weight as I do Inspector Murphy's statement because Inspector Murphy was here and [was] cross-examined in great detail about all these matters. I am unwilling to find that an offer of proof is sufficient to rebut Inspector Murphy's testimony on this point, particularly in light of general testimony in this record to the effect that Mr. Murphy is a fair and objective inspector.
>
> So with respect to the temporary splices I find the violation was only moderately serious because the four temporary splices were apparently in satisfactory condition inasmuch as

no bare wires were cited by Inspector Murphy when he examined them; the shock and fire hazard associated with the temporary splices was therefore only potential.

The negligence associated with this violation, however, was of a high degree because Mr. Chaney, Mr. Harold Chaney, used a temporary splice without making certain that other temporary splices were nonexist[e]nt.

He says there were taped places but he was not sure whether there were splices in those tapes or not. While Mr. Chaney intended to remove the temporary splice within the twenty-four period so as to avoid a violation of Section 75.603, it is a fact that he used the temporary splice to save the cost of buying a permanent splicing kit and to avoid stopping production for from one to one half of one shift because he expected to pull out of [the area here involved] after roof bolts had been installed to abate another violation written at a previous time.

Mr. Ronald Chaney, Respondent's president, was aware the trailing cable had been lengthened but he believed any defects in the cable were nonserious because they existed near the nip station where miners would be unlikely to walk unless a fuse should need to be replaced. It is haste and taking unnecessary risks which produce fatalities in coal mines.

While neither of Respondent's witnesses believed the extension of the cable exposed the miners to serious injury, it is a fact that the extension could have resulted in the electrocution of a miner who might have come to the nip station to replace a fuse which might have blown because of the use of a different size cable or defects in the old piece of cable used to make the extension; therefore, I believe the moderate seriousness and high degree of negligence involved in this violation of Section 75.603 warrants a penalty of five hundred dollars ($500).

I would assess more if a relatively small operator were not involved. Exhibit 1 does not indicate that Respondent has previously violated Section 75.603, so the penalty will not be increased under the criterion of history of previous violations.

Passing on to the alleged violation of Section 75.604 which deals with permanent splices and a bare wire in one and worn places in others, there's no dispute about the fact the trailing cable had worn permanent splices in it. As both Inspector Murphy and Mr. Harold Chaney agreed, the

cable contained permanent splices and Mr. Chaney agreed that some of the permanent splices were worn and needed to be repaired.

While Mr. Chaney stated he did not see a bare wire exposed in any permanent splice, Mr. Chaney did not examine the splices as carefully as Inspector Murphy and therefore I find Inspector Murphy's testimony supports the finding [that] an exposed bare wire existed in one of the splices.

Since an exposed wire is capable of causing electrocution I find that the violation was very serious. Mr. Chaney was very negligent in failing to repair the permanent splices; therefore, a penalty of seven hundred fifty dollars ($750) will be assessed for the violation of Section 75.604.

Exhibit 1 shows no history of previous violations with respect to Section 75.604 and therefore there will be no increase in the penalty under that criteri[on].

As to Section 75.517, Inspector Murphy's testimony also supports a finding that two damaged places existed in the trailing cable. Since one of the damaged places had a bare wire exposed in it, the violation of Section 75.517 was equally serious and involved a similar degree of negligence.

For those reasons a penalty of seven hundred fifty dollars ($750) will be assessed for the violation of Section 75.517. Exhibit 1 indicates that Respondent has not previously violated Section 75.517 so the penalty will not be increased under that criteri[on].

That completes the decision on all the cases or alleged violations as to which we had evidence. I assume that you're ready to proceed to the matters that were settled?

Settlement Agreements

Docket No. PIKE 79-19-P

Citation No. 66877 dated May 12, 1978, alleged that respondent had violated Section 75.200 because loose roof bolts had been observed in an area starting at the portal and extending inby to the 001 Section. The citation was subsequently changed to Withdrawal Order No. 66813 when Inspector Murphy returned on May 25, 1978, and found that the alleged violation had not been abated. The Assessment Office proposed a penalty of $760 for this alleged violation and respondent has agreed to pay a penalty of $400. MSHA's counsel stated that he had agreed to accept the reduced amount because the operator's contention is that in some places the roof had been doubly supported by additional roof bolts. Also there was no allegation made that

the roof itself was bad, other than around the roof bolt area, and there is doubt as to the number of roof bolts involved in this particular violation. Those facts warrant a reduction in the penalty. Additionally, even though the operator had been issued a withdrawal order for failure to abate on May 25, 1978, MSHA's counsel thought that some consideration should be given to the fact that the operator's mine had been closed by numerous outstanding withdrawal orders and the operator was having some difficulty in abating all of the orders simultaneously (Tr. 633).

Citation No. 67701 dated May 12, 1978, alleged that respondent had violated Section 75.514 because suitable connectors were not being used in approximately 40 splices installed in 200 feet of feeder wire. Wire rope clamps were being used for connectors and a dispute arose over the types of clamps that can be installed in feeder wire. MSHA's counsel stated that in some instances some of the clamps that had been installed as connectors had been acceptable by MSHA in the past. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay a penalty of $500. MSHA's counsel stated that he had agreed to accept the reduced amount because even though it was a serious violation, the small size of the operator should be considered. Also the fact that the operator failed to abate in a timely fashion was again the result of the fact that he was under numerous withdrawal orders and may have been hindered from abating all alleged violations as rapidly as he would have preferred to have corrected them (Tr. 634-635).

Citation No. 67702 dated May 12, 1978, alleged that respondent had violated section 75.517 in that the 300-volt DC feeder wire was uninsulated in approximately 40 places along its entire length from the drift up to the face of the 001 Section. MSHA's counsel noted that some of this wire was located in places not frequently traveled by the miners and that factor reduced the miners' likelihood of exposure to danger associated with the uninsulated places. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay a penalty of $500. The penalty was increased substantially by the Assessment Office because a subsequent withdrawawl order was issued on May 25 for failure of the operator to abate the condition, but, again, the operator was trying to cope with numerous withdrawal orders and was hindered from abating the citation as quickly as the inspector seemed to think it should have been abated (Tr. 636).

Citation No. 67703 dated May 12, 1978, alleged that respondent had violated Section 75.516 in that the DC feeder wire was not properly supported on insulators and was in contact with the roof or mine floor along its entire length from the portal to the working section. MSHA's counsel stated that this was a serious violation since the principal danger was the possibility of a fire. The operator claims that there were areas where the wire was properly supported. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay $500. MSHA's counsel stated that the Assessment Office increased the proposed penalty substantially because a withdrawal order had been issued. MSHA's counsel said

that the operator was hampered from supporting the feeder wire by obligations resulting from other orders and that he believed a penalty of $500 was fair and reasonable in this instance (Tr. 637-638).

Citation No. 67704 dated May 12, 1978, alleged that respondent had violated Section 75.512 because the switch used to control the No. 2 belt drive from the tailpiece was not properly designed in that a bare wire and nail were being used to make contact on the 230-volt DC control circuit. The Assessment Office considered that the violation involved gross negligence, that it was very serious, and proposed a penalty of $690 which respondent has agreed to pay in full (Tr. 638-639).

Citation Nos. 67706 and 67708 were both dated May 12, 1978, and both alleged that respondent violated Section 75.523-2. Both citations alleged violations because the deenergization devices, or panic bars, installed on two scoops were inoperative. The scoops were used to load coal in the 001 Section. Respondent's and MSHA's counsel agreed that panic bars do break down on a fairly regular basis. MSHA's counsel stated that there was no way to determine how long the panic bars had been inoperative prior to the inspection. The operator claims that the panic bars had been checked before the inspection and found to be working. Therefore, the operator contends that he was unaware of their inoperative condition. The Assessment Office proposed a penalty of $195 for each of the alleged violations and respondent has agreed to pay $125 for each alleged violation (Tr. 640-641).

Citation No. 67707 dated May 12, 1978, alleged that respondent had violated Section 75.503 by not maintaining the scoop so that it was in a permissible condition. Counsel for MSHA stated that the lack of permissibility should have been found during an electrical inspection, but he noted that no methane had been detected and he believed that the lack of methane should be considered as a factor to reduce the gravity of the alleged violation. The Assessment Office proposed a penalty of $255 and respondent has agreed to pay $200 (Tr. 641-642).

Citation No. 67709 dated May 12, 1978, alleged that respondent had violated Section 75.503 because an S & S scoop was not maintained in a permissible condition. That condition, when considered with the fact that no methane was found, reduced the gravity of the alleged violation sufficiently, in the opinion of MSHA's counsel, to justify accepting respondent's offer to pay a penalty of $150 instead of the penalty of $170 proposed by the Assessment Office (Tr. 642).

Citation No. 67710 dated May 12, 1978, alleged that respondent had violated Section 75.313-1 because the methane monitors on two scoops were inoperative. The operator stated that the panic bars were not operating either because an electrical problem had developed on the scoops which the operator claims prevented his knowing of the inoperative monitors. Respondent alleges that it endeavors to keep the monitors in good condition even though no methane has been found on the working section. The Assessment

Office proposed a penalty of $195 and respondent has agreed to pay $150 for the alleged violation (Tr. 643).

Citation No. 67711 dated May 12, 1978, alleged that respondent had violated Section 75.518 because no short circuit protection had been provided for the 30-horsepower belt drive motor. The violation produced a fire and shock hazard. The Assessment Office proposed a penalty of $655 and respondent has agreed to pay $500 for the alleged violation. Here, again, the Assessment Office increased the penalty substantially because a withdrawal order was subsequently issued. MSHA's counsel stated that the operator was confronted with abating a large number of alleged violations and could not work on all of them simultaneously. In such circumstances, MSHA's counsel stated that he believed the acceptance of a reduced penalty was justified (Tr. 643-644).

Citation Nos. 67712 and 67713 dated May 12, 1978, alleged that respondent had violated Sections 75.515 and 75.701, respectively. Both of the alleged violations deal with electrical connections for the belt-drive motor. MSHA's counsel said that the first citation deals with the fact that suitable cable fittings were not provided where the power cable entered the metal frame of the motor. In the second citation, the alleged violation was that respondent had failed to provide a frame ground. Both alleged violations produced possible shock and fire hazards. Again, the Assessment Office increased the penalties substantially because withdrawal orders were subsequently issued for failure of the operator to abate within the time originally given by the inspector. The Assessment Office proposed a penalty of $760 for the alleged violation of Section 75.515 and respondent has agreed to pay $500. MSHA's counsel was agreeable to accepting the reduced penalty because no worn places existed on the wires for which proper fittings had not been provided. For the alleged violation of Section 75.701, the Assessment Office proposed a penalty of $920 and MSHA's counsel believed that respondent's agreement to pay $500 was reasonable in view of the problems respondent was having in correcting a large number of alleged violations (Tr. 644-645).

Citation No. 67728 dated May 12, 1978, alleged that respondent had violated Section 75.1722 because a guard had not been provided for the chain-type control between the drive motor and the speed reducer for the No. 2 belt drive. MSHA's counsel stated that two protective guards are required in this area. The operator was engaged in repairing one guard and another had been broken during the shift. In the opinion of MSHA's counsel, those circumstances reduced the degree of negligence and warranted accepting a reduced penalty of $150 instead of the penalty of $240 proposed by the Assessment Office (Tr. 646-647).

Citation No. 67716 dated May 25, 1978, alleged that respondent had violated Section 75.200 by failing to maintain a required apron over the portal to prevent rocks from falling from the highwall on the men as they went in and out of the mine. MSHA's counsel stated that the supports had been dislodged and were not serving the purpose for which they had been installed.

The Assessment Office proposed a penalty of $305 and respondent has agreed to pay a penalty of $200. The operator claimed that a scoop had knocked the supports down on the same morning during which the inspector made his examination. MSHA's counsel stated that the short period of time between the knocking down of the supports and the time the citation was written supported a finding of a low degree of negligence and justified accepting the reduced penalty (Tr. 647-648).

Citation No. 67715 dated May 25, 1978, alleged that respondent had violated Section 75.202 because overhanging brows were present in the working section and in the outby haulage roadways. The overhanging brows had not been scaled or supported. Counsel for MSHA said that when an overhanging brow is present, it either has to be taken down or supported and that MSHA feels this was a serious violation. In the opinion of MSHA's counsel, roof brows have been the cause of both deaths and serious injuries in coal mines and the operator should have been aware of the condition. The operator claims that a lot of the brows were in crosscut areas where they would not normally have exposed miners to danger. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay $600. MSHA's counsel believed that the reduced penalty was warranted since the Assessment Office had increased the penalty largely on the basis that a withdrawal order had subsequently been issued. As has previously been stated, a large number of citations had been issued within a relatively short period of time. Respondent's mine had ceased to produce coal while the alleged violations were being corrected, but respondent was unable to abate all of the violations simultaneously (Tr. 648-649).

Docket No. PIKE 79-125-P

The Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P seeks assessment of civil penalties for 11 alleged violations. Three of those violations were alleged in Order Nos. 66869, 66870, and 66872 which have already been considered in my bench decision, supra (Tr. 613-616).

Order No. 66873 dated May 12, 1978, alleged that respondent had violated Section 75.1704 by failing to prevent the accumulation of water to a depth of 30 inches in the intake escapeway. The Assessment Office proposed a penalty of $600 and respondent has agreed to pay $350. Counsel for MSHA stated that there was some evidence that the operator had attempted to provide another escapeway around this area. The violation occurred during a rainy period when water could accumulate rapidly. MSHA's counsel believed that the circumstances justified acceptance of a reduced penalty (Tr. 650).

Order No. 66874 dated May 12, 1978, alleged that respondent had violated Section 77.1104 in that the diesel generator was not maintained in a safe operating condition because oil and grease had accumulated on the generator and oil was standing in puddles under it. Counsel for MSHA stated that this particular piece of equipment was on the surface and that its location had the effect of reducing the danger of fire. The operator showed good faith in abating the condition rapidly. The Assessment Office

proposed a penalty of $400 and respondent has agreed to pay $200. MSHA's counsel believed that good reasons had been given for accepting a reduced penalty in view of the fact that respondent claimed that some of the puddles consisted of water and that the oil was engine-lubricating oil rather than diesel fuel. The engine oil was less ignitable than fuel oil would have been (Tr. 650-652).

Order No. 66875 dated May 12, 1978, alleged that respondent had violated Section 77.404 in that the front-end loader was not being maintained in a safe operating condition because its windshield was cracked, it was not equipped with a fire extinguisher, and its back-up alarm was not operative. MSHA's counsel said that the mitigating circumstances were that the loader was not being used at the time of inspection and the fact that it was a surface violation made it less serious than if the equipment had been used in the underground mine. The Assessment Office proposed a penalty of $400 and respondent has agreed to pay $250 which MSHA's counsel believed to be appropriate for the reason stated above (Tr. 652-653).

Order No. 66876 dated May 12, 1978, alleged that respondent had violated Section 77.202 in not maintaining the belt drive located on the surface in a safe operating condition because oil and float coal dust had been permitted to accumulate on the drive. MSHA's counsel stated that the Assessment Office had proposed a penalty of $400, but he had concluded that no assessment should be made because this particular alleged violation was a duplication of another citation written by a different inspector. The operator has agreed to pay the full penalty proposed by the Assessment Office with respect to the overlapping citation and MSHA's counsel said that since the same belt drive was involved in both citations, he believed that fairness justified assessment of only one penalty. Therefore, MSHA's counsel requested that he be permitted to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P to the extent that it alleged a violation of Section 77.202 with respect to Order No. 66876. That request is hereinafter granted in the order accompanying this decision (Tr. 654-655).

Order No. 67705 dated May 12, 1978, alleged that respondent had violated Section 75.701 because the cutting machine and roof-bolting machine had not been properly grounded. MSHA's counsel said that an effort to ground the machines had been made, but the inspector was not convinced that the machines had been adequately grounded. The Assessment Office proposed a penalty of $400 and respondent has agreed to pay $300. MSHA's counsel stated that he believed a reduced penalty was justified in light of the operator's strong contention that the machines had been adequately grounded (Tr. 655-656).

Order No. 67726 dated May 12, 1978, alleged that respondent had violated Section 75.400 by allowing excessive amounts of loose coal, coal dust, and float coal dust to accumulate in the conveyor belt entry and connecting crosscuts. The accumulation ranged from 1/8 inch to 10 inches in depth. The conveyor belt is 900 feet long. The Assessment Office believed that

the violation involved a high degree of negligence and gravity and proposed a penalty of $1,100 which respondent has agreed to pay in full (Tr. 656-657).

Order No. 67727 dated May 12, 1978, alleged that respondent had violated Section 75.1100-1 by having removed a joint in the waterline running parallel to Nos. 1 and 2 conveyor belts with the result that the conveyor belts did not have adequate fire protection. It was the contention of the operator that the waterlines had been temporarily disconnected so that a motor on the belt drive could be fixed. It was the operator's intention to restore the waterlines to an operable condition as soon as the repairs had been completed, but the inspector observed the condition before the necessary work had been done. The Assessment Office proposed a penalty of $900 and respondent has agreed to pay $500. It was the opinion of MSHA's counsel that a reduced penalty of $500 was adequate when the extenuating circumstances are taken into consideration because there is nothing to show that a fire was likely to occur at the time the waterline was out of service (Tr. 656-658).

Order No. 67729 dated May 12, 1978, alleged that respondent had violated Section 75.200 because approximately 50 roof bolts had not been installed in accordance with the roof-control plan inasmuch as the bolts were required to be installed on 4-foot centers, whereas they had been installed from 4-1/2 to 6 feet apart. The Assessment Office correctly found that a high degree of negligence and gravity were involved and proposed a penalty of $500 which respondent has agreed to pay in full (Tr. 658).

Docket No. KENT 79-116

Order No. 66871 dated May 12, 1978, alleged that respondent had violated Section 75.403 because no rock dust had been applied for a distance of three crosscuts beginning at a point two crosscuts inby Survey Station No. 1708. Two samples were taken by the inspector of the area cited in his order and the analyses of the samples showed the incombustibility content of one sample to be 35 percent while the incombustibility content of the other sample was 79 percent. No explanation exists for the fact that one sample showed no violation while the other did. MSHA's counsel stated that the equivocal nature of the evidence justified acceptance of a reduced penalty of $400 instead of the penalty of $800 proposed by the Assessment Office (Tr. 658-659).

Docket No. PIKE 79-112-P

Order No. 66868 dated May 12, 1978, alleged that respondent had violated Section 75.400 in that the operator had allowed combustible material consisting of loose coal and float coal dust to accumulate on the ribs and floor in depths ranging from 1 inch to 24 inches. The accumulations started two crosscuts outby Survey Station No. 1708 in the No. 5 entry and extended inby for three crosscuts. The area included Nos. 1 through 7 entries and

connecting crosscuts. The Assessment Office proposed a penalty of $600 and respondent has agreed to pay the proposed penalty in full.

I find that counsel for respondent and MSHA gave satisfactory reasons for the penalties agreed upon in their settlement conference and that the settlement agreements hereinbefore discussed should be accepted.

Summary of Assessments and Conclusions

(1) Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreements, the following civil penalties should be assessed:

Docket No. PIKE 79-19-P

Citation No. 66814 5/25/78 § 75.400 .. (Contested)	$ 200.00
Citation No. 66815 5/25/78 § 75.1704 .. (Contested)	125.00
Citation No. 66877 5/12/78 § 75.200 ... (Settled)	400.00
Citation No. 67701 5/12/78 § 75.514 ... (Settled)	500.00
Citation No. 67702 5/12/78 § 75.517 ... (Settled)	500.00
Citation No. 67703 5/12/78 § 75.516 ... (Settled)	500.00
Citation No. 67704 5/12/78 § 75.512 ... (Settled)	690.00
Citation No. 67706 5/12/78 § 75.523-2 . (Settled)	125.00
Citation No. 67707 5/12/78 § 75.503 ... (Settled)	200.00
Citation No. 67708 5/12/78 § 75.523-2 . (Settled)	125.00
Citation No. 67709 5/12/78 § 75.503 ... (Settled)	150.00
Citation No. 67710 5/12/78 § 75.313-1 . (Settled)	150.00
Citation No. 67711 5/12/78 § 75.518 ... (Settled)	500.00
Citation No. 67712 5/12/78 § 75.515 ... (Settled)	500.00
Citation No. 67713 5/12/78 § 75.701 ... (Settled)	500.00
Citation No. 67715 5/25/78 § 75.202 ... (Settled)	600.00
Citation No. 67716 5/25/78 § 75.200 ... (Settled)	200.00
Citation No. 67728 5/12/78 § 75.1722 .. (Settled)	150.00
Total Settlement and Contested Penalties in Docket No. PIKE 79-19-P	$6,115.00

Docket No. PIKE 79-111-P

Order No. 70617 8/14/78 § 75.603 ..... (Contested)	$ 500.00
Order No. 70617 8/14/78 § 75.604 ..... (Contested)	750.00
Order No. 70617 8/14/78 § 75.517 ..... (Contested)	750.00
Total Penalties in Docket No. PIKE 79-111-P	$2,000.00

Docket No. PIKE 79-112-P

Order No. 66868 5/12/78 § 75.400 ..... (Settled)	$ 600.00
Total Settlement Penalty in Docket No. PIKE 79-112-P	$ 600.00

Docket No. KENT 79-116

Order No. 66871 5/12/78 § 75.403 ..... (Settled)	$ 400.00
Total Settlement Penalty in Docket No. KENT 79-116	$ 400.00

Docket No. PIKE 79-117-P

Citation No. 66866 5/12/78 § 75.301 .... (Contested)	$ 300.00
Total Penalty in Docket No. PIKE 79-117-P	300.00

Docket No. PIKE 79-125-P

Order No. 66870 5/12/78 § 75.316 ..... (Contested)	$ 350.00
Order No. 66873 5/12/78 § 75.1704 ..... (Settled)	350.00
Order No. 66874 5/12/78 § 77.1104 ..... (Settled)	200.00
Order No. 66875 5/12/78 § 77.404 ..... (Settled)	250.00
Order No. 67705 5/12/78 § 75.701 ..... (Settled)	300.00
Order No. 67726 5/12/78 § 75.400 ..... (Settled)	1,100.00
Order No. 67727 5/12/78 § 75.1100-1 .... (Settled)	500.00
Order No. 67729 5/12/78 § 75.200 ..... (Settled)	500.00
Total Settlement and Contested Penalties in Docket No. PIKE 79-125-P	$3,550.00
Total Settlement and Contested Penalties in This Proceeding	$12,965.00

(2) Respondent was the operator of the No. 3 Mine at all pertinent times and, as such, is subject to the provisions of the Act and to the regulations promulgated thereunder.

(3) For the reason given in my bench decision, supra (Tr. 198-199, and Tr. 236-238), the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-19-P, should be dismissed to the extent that penalties are sought for violations of Section 75.1710 cited in Notice Nos. 2 FIJ (7-8) dated February 28, 1977, and 5 BHT (7-23) dated June 6, 1977.

(4) For the reason given in my bench decision, supra (Tr. 616), the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P, should be dismissed to the extent that a penalty is sought for a violation of Section 75.200 cited in Order No. 66872 dated May 12, 1978.

(5) For the reason given in my decision at page 20, supra, the request of MSHA's counsel to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P, should be granted to the extent that a penalty is sought for a violation of Section 77.202 cited in Order No. 66876 dated May 12, 1978.

WHEREFORE, it is ordered:

(A) The parties' request for approval of settlement is granted and the settlement agreements submitted in this proceeding are approved.

(B) Pursuant to the parties' settlement agreement and the bench decision rendered in this proceeding, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $12,965.00 as set forth in paragraph (1) above.

(C) MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 79-19-P and PIKE 79-125-P are dismissed to the extent specified in paragraphs (3) and (4) above.

(D) MSHA's request to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P is granted and the Petition is deemed to have been withdrawn to the extent described in paragraph (5) above.

Richard C. Steffey

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

Distribution:

Robert A. Cohen, Esq., and Michael C. Bolden Esq., Trial Attorneys, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Garred O. Cline, Esq., Attorney for C.C.C.-Pompey Coal Company, Inc., Farley Building, Pikeville, KY 41501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 29 1980

RIO ALGOM CORPORATION,		:	Application for Review
	Applicant	:	
v.		:	Docket No. DENV 79-347
		:	
SECRETARY OF LABOR,		:	Order No. 336661
MINE SAFETY AND HEALTH		:	January 29, 1979
ADMINISTRATION (MSHA),		:	
	Respondent	:	Lisbon Mine

DECISION

Appearances: F. Alan Fletcher, Esq., Parson, Behle & Latimer, Salt Lake City, Utah, for Applicant; James Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Stewart

PROCEDURAL BACKGROUND

The above-captioned application for review was brought by Applicant, Rio Algom Corporation, pursuant to section 107(e) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). Applicant sought review of an order issued under section 107(a) of the Act.

The hearing in this matter was held on September 5, 1979, in Moab, Utah. Applicant called two witnesses. Respondent called one witness and introduced one exhibit. At the conclusion of the hearing, the parties chose to make oral argument and waived their right to submit posthearing briefs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Inspector Ronald Beason issued the subject order in this case, Order No. 336661, on January 29, 1979, in the course of an investigation of an unintentional roof fall at Applicant's Lisbon Mine. The inspector issued the order pursuant to section 107(a) of the Act and alleged a violation of 30 CFR 57.3-22. He described the relevant condition or practice as follows:

> The 13 north drift 90 ft. from the 4th east pillar had excessive weight. The 8 X 8 timbered sets were breaking the cap on the second cap had a 3-1/4" gap in the center of the

cap. The plates on 25 split bolts in this area were stripped. The 13 north & 19th west, a length of 37 feet, had 5-8 x 8 sets of timber which had broken caps. The 13 north and 7th West intersection had caved above the anchorage. This was the full width of the drift and extended 25 feet in 13 north. The mechanical bolts were pulled and several split bolts broken. The plates on the split bolts from 7th west to 4 west along the 13th north haulage were stripped and the area taking excessive weight.

The order of withdrawal encompassed the following areas: 13th North, 90 feet from 4th East pillar; 13 North 19 West for 37 feet; 13 North and 7th West; 13 North from 7th West to 4th East.

The unintentional roof fall which gave rise to Inspector Beason's investigation occurred on January 24, 1979, at 12:30 p.m. in the 18th North, 8th West drift. Approximately 40 feet of roof collapsed after breaking above the anchorage point of its roof bolts. The fall had occurred near a shop area in which a number of employees were eating lunch, but it did not result in injury or death. Mr. Pearson, Applicant's Safety Supervisor, testified that the main haulage and travelway to the area was blocked because of the fall. Only the emergency access, designated as the 8C manway, remained open.

Mervyn Lawton, the manager and president of Rio Algom Corporation as well as the supervisor of the Libson Mine, was in the area of the fall at the time of its occurrence. He instructed one crew of miners to remove equipment from the area. A second crew was instructed to continue driving an entryway in an effort to open a new entrance into that working area. It was estimated by Mr. Lawton that two additional blasts would be necessary to complete the entryway. All miners were withdrawn from the area on the following day, January 25, 1979, at 10 a.m., when it became evident that more than two blasts were needed to accomplish the breakthrough.

All supervisory personnel were instructed to keep people out of the area and a sign reading "No admittance, keep out" was placed on the haulage level entering the 8C manway. This finding was based on the testimony of both Mr. Pearson and Mr. Lawton, notwithstanding the inspector's testimony that he did not recall seeing a sign posting the area as closed.

The fall which occurred on January 24 was not reported to MSHA until January 28. On the following day, Inspector Beason conducted his inspection of the area. He examined the first roof fall and discovered a second fall at 13th North, 7th West. This second fall extended 25 feet for the entire width of the entryway. As with the first fall, this break occurred above the anchorage point of the roof bolts. The inspector observed both mechanical roof bolts and split sets in the debris. Prior to the inspector's investigation, mine management had been unaware of the second roof fall. It had occurred after the company had removed its miners from the area.

In the 13th North, 4th East drift, the inspector observed timbers taking an inordinate amount of weight. These timbers measured 8 inches by 8 inches and had been placed 6 feet apart for a distance of 60 feet. Caps on approximately 10 of these timbers had been smashed by the weight of the roof. Some of these caps had stress cracks and had been deflected downward. The inspector estimated that 25 split sets in the area had been stripped of their plates.

The inspector observed compression of caps and stripped plates in the 13th North, 6th West drift. He noted that there were five sets of affected timbers. These timbers also measured 8 inches by 8 inches and had been placed at 6-foot intervals. One post had split and stress cracks were observed in some of the caps. Plates had been stripped from some split sets and some of the mechanical bolts had been pulled.

The inspector also observed a number of split sets from which plates had been stripped in the 13th North, 7th West to 4th West drifts.

Witnesses for Applicant generally corroborated the inspector's testimony relating to the conditions in those areas included in the order. Their testimony established that, for the most part, the conditions observed on January 29 did not exist on January 25 when the mining crew had been removed from the area. In particular, the roof fall had not yet occurred in the 13th North, 7th West drift. Mr. Pearson, Applicant's safety supervisor, was in the affected areas on Thursday morning. He stated that fewer plates had been stripped from split sets than Inspector Beason noted later and that he he did not observe signs of unusual compression of timber or caps.

All of the witnesses agreed that the roof falls, the stripped plates and the compression of caps were evidence of ground movement in the area. This movement occurred while the 13th North drift was being driven because the area had been developed on an incline. The inspector believed that retreat mining in the general area created additional pressure on the roof in the affected area. Retreat mining was ongoing approximately 100 feet straight through a pillar on the uphill side of the original roof fall.

"Imminent danger" has been defined in section 3(j) of the Act to mean the "existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Interior Board of Mine Operations Appeals, with the affirmance of the Fourth and Seventh Circuits, has stated that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 32-33 (7th Cir. 1975), aff'g, 3 IBMA 252 (1974), Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 745 (7th Cir. 1974), aff'g, 2 IBMA 197, 212 (1973); Eastern Associated Coal Co. v. Interior Board of Mine Operations Appeals,

491 F.2d 277, 278 (4th Cir. 1974), aff'g, 2 IBMA 128, 136 (1973). In that case the Board enumerated the following test to be used in determining whether an immient danger existed:

> Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment but not necessarily immediately? Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 743-4, (7th Cir. 1974), 2 IBMA 197, 212 (1973).

The conditions in the Lisbon Mine constituted an imminent danger under all of the criteria that should be considered in making the determination. Inspector Beason's finding was reasonable and proper. The conditions which he observed clearly indicated that ground movement had occurred recently in the area. There was nothing to suggest that this movement had ceased or that the extant roof support was sufficient. In a period of 5 to 6 days two unintentional roof falls had occurred and increased strain on the roof support system was pervasively evident. During this time, roof conditions had changed markedly. Moreover, only one route existed which allowed exit from the area. Finally, the areas encompassed by the order were ones in which miners would have worked regularly. If normal mining operations were permitted to proceed, the conditions could reasonably have been expected to cause death or serious harm. The order was properly issued under section 107(a) of the Act.

The issuance of a 107(a) order of withdrawal was appropriate, notwithstanding the Applicant's prior voluntary removal of miners from the areas covered by the order. The purpose of such an order is not only to cause the withdrawal of miners, but to ensure that they remain out of the affected areas until the condition is corrected. The Valley Coal Company, 1 IBMA 243, 248 (1972).

In issuing Order No. 336661 which alleged that an imminent danger existed, the inspector also noted that there was a violation of 30 CFR 57.3-22. He testified that he believed the fourth sentence of the standard had been violated. This sentence reads as follows: Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary." Toby Pearson, the safety supervisor at Rio Algom Mine, testified that he conducted such inspections along the haulageways and travelways in the affected area prior to the time that men were withdrawn. He also stated that at that time there was no need to scale or support in the areas encompassed by the order. The Interior Board of Mine Operations Appeals, however, has noted "whether a condition or practice constitutes a violation which was not intended to be and is not a controlling issue in a proceeding to review an imminent danger withdrawal order." Freeman Coal Mining Corporation, 2 IBMA 197, 207-208 (1973). A finding need not be made, therefore, as to whether a violation of section 57.3-22 existed. Such a finding would not be determinative of the issues in this case.

ORDER

Accordingly, it is ORDERED that the operator's application for review is DISMISSED.

Forrest E. Stewart
Administrative Law Judge

Distribution:

F. Alan Fletcher, Esq., Parsons, Behle & Latimer, 79 South State Street, P.O. Box 11898, Salt Lake City, UT 84147 (Certified Mail)

James Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 29 1980

SUNBEAM COAL CORPORATION, Contestant	:	Contests of Citations
v.	:	Docket No. PITT 79-210
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 229432 February 22, 1979
	:	Docket No. PITT 79-211
	:	Citation No. 229433 February 22, 1979
	:	Docket No. PITT 79-212
	:	Citation No. 229434 February 22, 1979
	:	Docket No. PITT 79-213
	:	Citation No. 229362 February 22, 1979
	:	Docket No. PITT 79-214
	:	Citation No. 229363 February 22, 1979
	:	Sunbeam Mine

DECISIONS

Appearances: Bruno A. Muscatello, Esquire, Butler, Pennsylvania, for the contestant;
Eddie Jenkins, Esquire, Arlington, Virginia, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern notices of contests filed by the contestant (Sunbeam) on March 21, 1979, pursuant to section 105 of the Federal Mine

Safety and Health Act of 1977, seeking review of the captioned abated citations issued pursuant to section 104(a) of the Act, on the ground that the unilateral "Significant and Substantial" findings made by the inspector on the face of the citations was unreasonable, unjustified, and unwarranted. Respondent filed its answers on April 6, 1979, asserting that the citations were properly issued, that the violations existed as stated in the citations, and that the time fixed for abatement of the citations was reasonable and proper. At the same time, respondent filed motions to dismiss the contests on the ground that the conditions cited were fully abated and the citations terminated. In support of the motions, respondent cited a prior Interior Board of Mine Operations Appeals' decision under the 1969 Act, Reliable Coal Corporation, 1 IBMA 50, 59 (1971), and several judges' decisions pursuant to the 1977 Act, Helvetia Coal Company, PITT 78-322, August 23, 1978; Monterey Coal Company, VINC 78-372, June 19, 1978; Peter White Coal Mining Corporation, HOPE 78-371, June 16, 1978; and Itmann Coal Company, HOPE 78-356, May 26, 1978. By order issued on May 9, 1979, I denied respondent's motions to dismiss, and I did so on the basis of the Commission's decision of May 1, 1979, in Energy Fuels Corporation v. MSHA, DENV 78-410. Hearings were subsequently conducted in Pittsburgh, Pennsylvania, on October 10, 1979, and the parties appeared and participated therein. Posthearing proposed findings, conclusions, and supporting briefs were filed by the parties and the arguments presented therein have been fully considered by me in the course of these decisions.

Issues Presented

1. Whether the contestant is entitled to immediate review of section 104(a) citations which have been abated and terminated.

2. Whether the citations which were issued in these proceedings constituted violations of the cited safety standards and whether they were "significant and substantial" violations as found by the inspector.

Applicable Statutory Provisions

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

2. Section 104(a) of the Act provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the

citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a violation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

3. Section 104(d) provides in pertinent part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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. [Emphasis added.]

4. Section 105(a) provides that:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment

of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

5. Section 105(d) provides that:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement of a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

Discussion

Docket No. PITT 79-210

Citation No. 229432, issued on February 22, 1979, citing a violation of 30 CFR 77.1607(cc) reads as follows: "The unguarded No. 1 Wash Belt at Sunbeam Preparation Plant was not provided with emergency stop devices or cords along the walkway. The belt was energized and operating."

MSHA's Testimony and Evidence

MSHA inspector John E. Felichko testified that he has been a coal mine inspector since 1977, but has 9 years of mining experience. His primary

duties entail the inspection of electrical circuits, and he attended a 13-week MSHA coal mine inspector's training course at Beckley, West Virginia, and he has also had 4 weeks additional electrical training during the past two summers. He confirmed that he issued the citation in question and stated that he did so on the ground that the conveyor belt cited failed to have the required emergency stop pull cord or similar device along the full length of the belt walkway where employees are exposed to moving belt rollers and the belt. The conveyor belt in question is an inclined belt which originates inside the coal preparation plant and extends outside where it carries washed coal to be loaded on railroad cars for shipment, and it was energized and operating when he observed the violation.

The inspector indicated that there is no type of emergency stop device located anywhere along the conveyor belt except inside the coal preparation plant where the control is located, and the belt posed a hazard to employees because there is no means of stopping the belt in the event a person should become entrapped either in the roller or belt. Employees, especially repairmen, clean, lubricate and repair the conveyor belt periodically. In the event of an accident, the operators in the control room may be able to see an employee on the conveyor belt, but this would depend on where the person is located along the conveyor belt. Since there is a window in the control room, if one were to look out, he may be able to determine whether an employee is along the conveyor belt before he starts it (Tr. 10-19).

Inspector Felichko testified that the citation was abated in good faith and he believed the condition cited was serious because there was no means to control the belt along the walkway. He identified a copy of a "gravity sheet" (Exh. M-3) which he filled out at the time the citation issued, and he stated that the person likely to be injured, as shown on that sheet, was one man who he assumed would be along the belt performing his duties, but he actually observed no one there at the time of the citation. Regarding the "S & S" or "Significant and Substantial" finding which he marked on the citation, he answered as follows when asked why he checked that box on the citation form (Tr. 21):

> Q. Thank you. When you checked significant and substantial what was going through your mind?
>
> A. The conditions surrounding the citation.
>
> Q. And?
>
> A. And also that it is MSHA's method of recordkeeping to determine whether hazard [sic] violations exist or not.

On cross-examination, Inspector Felichko testified that the inclined conveyor belt is approximately 125 to 150 feet long, and the head roller was about 25 feet above ground level. The walkway was composed of expanded metal which has a guard on the outside edge facing the ground, and both the belt and rollers were exposed. Although he looked out of the control

room window, he could not recall whether he could see the entire length of the belt and did not take this fact into consideration when he cited the violation. He made no inquiries as to whether anyone is required to be in the area while the belt was running, and he observed no maintenance or lubrication going on while the belt was running. In his experience, such work is definitely not done while a belt is running. The only time someone would come in contact with the belt would be if they were walking along one side, or if the belt were shut from inside while someone was performing maintenance and someone inadvertently started it up with no means to shut it off. Although there is an alarm that is energized by hand before the belt starts up, the belts do not run in sequence and can be started independently, and with the noise level of other running belts, it is possible that one would not hear the alarm (Tr. 23-26).

Mr. Felichko stated that there is guarding along the right side of the belt to prevent one from falling off the walkway to the ground below. He stated that the violation was serious and that is why he marked the "S & S" box on the citation form. He believes that all violations are serious, but the question of whether all violations are "significant and substantial" would depend on the circumstances involved. He confirmed that MSHA utilizes the "S & S" findings to determine whether a pattern of violations exists. When asked to explain his understanding of the term "significant and substantial," he answered as follows (Tr. 28): "To me significant and substantial means that the violation could be more hazardous. Whenever you check that box, it is a more hazardous condition. It is hard to answer exactly what it means."

Mr. Felichko stated that he was concerned about all of the moving parts on the belt, i.e., rollers, belt, and belting, where a person could become trapped, caught, or pulled in. The belting was exposed, the plant operates year round, and one could slip or fall on the walkway, and while there is spillage at times, he observed none on the belt or walkway in question (Tr. 30). The required emergency stop device is not to prevent one from being entangled in the belt, but only to stop the belt. He confirmed that he issued two other citations the same day and he deemed those to be significant and substantial because they were of a serious nature (Tr. 31). During the first inspection quarter of 1979, he issued approximately 35 citations, and only one of those was not a significant and substantial violation because it dealt with recordkeeping. He is not aware of any July 5, 1979, MSHA interpretative memorandum dealing with significant and substantial violations (Tr. 34-36).

Mr. Felichko testified that while he was aware of injuries caused by moving conveyor belts and rollers, he was not aware of any injuries resulting from a failure to provide an emergency belt shut-off device, and the purpose of such a device is to deenergize the belt in the event someone wants to shut it down or someone becomes entrapped (Tr. 36-37).

On redirect examination, Mr. Felichko identified a blank MSHA citation form, and reading from the reverse side concerning the issuance of a significant and substantial citation, he read the following into the record

(Tr. 38): "By checking the significant and substantial box the inspector has indicated that this violation could significantly and substantially contribute to a health or safety hazard, and that this violation will be considered in determining whether a pattern exists."

In response to bench questions, Mr. Felichko testified that the belt in question moves "fairly fast," and he described its operation. The walkway was of a non-slip surface, and the handrailing on the right side was there for someone to hold onto while walking up the incline. The tail roller was guarded, the head belt roller was guarded by location, and the entire open-type belt was required to be guarded by either stop cords or guards. A stop cord is a substitute for a guard, and while a guard would physically prevent one from falling into the belt, a stop cord would give him access to shut the belt off as he was falling in. Had a stop cord been installed along the entire length of the belt, he would not have issued a citation, and he considered the citation significant and substantial because of the lack of such a cord. The walkway was in fairly good condition, and general periodic maintenance has to be performed on the belt and the roller bearings should be greased once a day, but he does not know the company's maintenance schedule. Even if he did, he would still have made a finding that the violation was significant and substantial because of the injury which would result from one getting caught in a belt (Tr. 40-49).

Contestant's Testimony and Evidence

Nicholas DiBiase, general manager, Sunbeam Coal Corporation, described the belt conveyor in question as being on a 15-degree incline, and the belt area which concerned the inspector was the last 30 feet of the conveyor. The walkway in question was parallel to the ground and was not on the same incline as the belt, and in fact, he described it as a standing work area completely visible from the plant operator's station. He characterized the belt as a slow 30-inch belt carrying 100 tons of coal a minute. Mr. DiBiase indicated that he helps establish company policy regarding maintenance and lubrication, and stated that this work is done at the beginning of the shift before the plant is started or at the end or evening shift when the plant is down. Maintenance and lubrication never takes place while the belt is running, and no one is allowed near the walkway while the belt is running. No one has any need to be at the belt and the two operators on duty are at their stations (Tr. 51-56). If the operator observes someone on the walkway, he is instructed to shut down, but he should be able to observe anyone approaching the belt before he gets near it because there are 25 or 50 steps to climb to reach the belt area (Tr. 56). The shut-off device was installed soon after the inspection and as soon as he could get an electrician, and it was installed in a day and a half. The installation of the device would still not prevent an accident (Tr. 57).

On cross-examination, Mr. DiBiase testified that 30 percent of the belt is visible from the control room, and the catwalk area, which is the only area where anyone could get near the belt, is visible and the belt is 12 feet off the ground in some places, and one would need to use a ladder

and intentionally climb to reach the belt in those areas. If someone were in the other 70-percent area of the belt, he could not be seen if he were caught in it. There are only two men in the plant and they both have speakers for communication. The main switches are locked out at noon and at the end of the shift (Tr. 59). He was aware of the fact that emergency stop devices are required, but only where there are workers in the area, and that is the way he interpreted the standard. In his view, the belt in question does not require such a device (Tr. 61). However, he did as the inspector requested and installed a stop cord. No one would walk up the incline parallel to the belt since he would have no need to (Tr. 62). He agreed that a stop cord along the belt would help prevent a further accident if the person caught in the belt was conscious enough to grab it (Tr. 64).

Mr. DiBiase drew a diagram of the belt area on a blackboard provided in the courtroom and he stated that the walkway described by the inspector did not run parallel to the belt, but rather, the area described as a "walkway" was in fact a platform that intersected the belt (Tr. 65; Exh. ALJ-1). There is no walkway running adjacent to the full length of the belt, and the walkway is parallel to the ground (Tr. 66). The two people on duty are the only two assigned to the belt system. One main operator stands at the top of the wash plant and controls all the conveyor belts and the feeder area, and the second operator is inside the plant and he controls the dryer and drag tank area. If one were to climb the ladder off the platform, he would be exposed to some portion of the belt which was an exposed unguarded portion where the platform intersects the belts (Tr. 68). Greasing is performed by walking up the ladder, and the grease lines come down from the head pulley so that the greaser can reach them with a grease gun, but this is done when the belt is down (Tr. 69). Access to the head pulley is by a ladder (Tr. 70). One can touch the conveyor from the platform, and he could reach about 15 or 20 feet of the belt (Tr. 72). The platform structure has been in place for some 20 years (Tr. 74).

Inspector Felichko was called in rebuttal and testified as to a diagram which he believe depicts the location of the so-called walkway (Exh. M-3-a). He described the area and indicated where the belt came from the plant, and he agreed with Mr. DiBiase's description of the location of the platform (Tr. 76-81). Mr. Felichko stated he remembered the unguarded portion of the belt where the walkway was located did not have an emergency stop device (Tr. 86).

Docket No. PITT 79-211

Citation No. 229433, issued on February 22, 1979, citing a violation of 30 CFR 77.701, states as follows: "The 110 V light fused disconnect box located in the shop of Sunbeam Preparation Plant was not frame grounded. The light circuit was energized."

MSHA's Testimony and Evidence

Inspector Felichko confirmed that he issued the citation in question after observing that a disconnect box which controlled the lights in the shop area of the preparation plant was not frame grounded in that there was no safety ground to the frame of the box. The box was located on the inside of an outside wall of the shop, and it was energized because the lights were on and the entrance of the preparation plant was wet and muddy. There was no insulated mat where the switchbox was located, and the purpose of the frame ground is to protect a person from electric shock. He described a frame ground as a safety wire that carries shock currents through the ground wire to the earth to protect against a shock hazard. Although he did not measure the amperage to find out how much current was involved, the circuit was energized because the fluorscent lights were on. Based on the fact that the box frame was not properly grounded and the outer insulation on the cables which entered the box was frayed, he believed this to be a significant and substantial violation. In order for a person to be shocked, the box must become energized under fault conditions which entail several things such as dampness, a loose fuse, or physical damage. The citation was abated by contestant installing a grounding conductor to the box frame (Tr. 88-91).

The inspector believed the violation was serious because it presented a potential shock hazard under fault conditions. He believed it was significant and substantial because the fuse disconnect box was mounted on a wooden board, the floor was wet and muddy, and the box was not frame grounded. In the event someone touched the box while it was energized, a potential shock hazard would exist. Although he knows of no incidents where such an ungrounded box resulted in an injury, he is aware of two fatalities in 1978 involving low-voltage circuits, and in one case a person holding a hand-held paint sprayer that faulted out and did not have a frame ground or double insulation was electrocuted. The other case involved a welder who was electrocuted by a light bulb filament which burst when he contacted it (Tr. 92-93).

On cross-examination, Inspector Felichko testified that the outer insulation on the cable was frayed but the insulation on the inner conductors was in good shape. The box could possibly become energized if the fuse loosened under the load. Although contestant was cited for improper grounding, he did not issue a citation for substandard cable conduction. With the floor being wet, and the absence of an insulation mat, an electrocution was likely to occur, especially in light of improperly-grounded electrical equipment, and a person can easily get electrocuted with 110 volts (Tr. 93-98).

In response to bench questions, the inspector conceded that he did not test the amperage with a meter and his reason for not doing so was that from his past experience there is more than ample amperage to cause a fatality under fault conditions (Tr. 101).

Docket No. PITT 79-212

Citation No. 229434, issued on February 22, 1979, citing a violation of 30 CFR 77.513, states as follows: "The 110 V light fused disconnect box located in the shop of Sunbeam Preparation Plant did not have an insulated mat or a grounded metal plate at the same potential as the grounded metal, non current carrying parts of the power switch box. The switch box was energized."

MSHA's Testimony and Evidence

Inspector Felichko confirmed that he issued the citation in question and he stated that section 77.513 required an insulated mat or a grounded metal plate at the same potential as a noncurrent-carrying part of the electrical installation at each disconnect switchbox where there is a shock hazard potential. The disconnect box in question was the same one cited in the previous docket. The lack of an insulated mat, coupled with the lack of a frame ground, makes this violation more serious. The circuit was energized and the floor was wet and muddy. The outer cable insulation was frayed at the point where it enters the cable clamp. The violation was abated by installing a piece of belting on a wooden pallet which created a difference of potential between the earth and the box frame (Tr. 106-109).

Mr. Felichko confirmed that he indicated on his inspector's gravity statement that "the occurrence of the event against which this cited standard is directed was probable," and he stated it was probable because the frayed insulation on the outer cable jacket would possibly cause the box to become energized. He marked the "S & S" box on the citation form because he believed the violation was serious and thought it could contribute significantly and substantially to a health or safety hazard (Tr. 110-111).

Contestant's Testimony and Evidence

Mr. DiBiase testified as to both Citation Nos. 229433 and 229434, and stated that the failure to frame ground the switchbox in question would contribute to a possible accident, but that it was not imminent. However, the failure to install an insulated mat would not substantially contribute to the cause and effect of a potential accident. He considers electrocution to be serious, and he indicated that he has operated power tools in the past after removing the required ground, and knew that by doing this he was placing his life and health in jeopardy. He agreed "pretty much" with the inspector's testimony and did not dispute the fact that the box was not frame grounded and that there was no insulated mat provided (Tr. 116-119).

Docket No. PITT 79-213

Citation No. 229362, issued on February 22, 1979, citing a violation of 30 CFR 77.205, states as follows: "A safe means of access was not provided

and maintained to the working place in that the end of the walkway on the third level of the Sunbeam Preparation Plant was not protected by a railing, barrier, or other protective device."

MSHA's Testimony and Evidence

MSHA inspector James A. Magness confirmed that he issued the citation in question citing a violation of section 77.205 on the ground that a safe means of access was not provided and maintained to the working place in that the end of the walkway on the third level of the preparation plant was not protected by a railing, barrier, or other protective devices. The walkway was approximately 40 inches wide, and while the lighting was not inadequate, it was poor, but he could not be more specific since he did not use a light meter. The east wall of the preparation plant was on one side of the walkway, and plant machinery on the other. He considered the violation to be serious, and reading from the citation form, he defined a "significant and substantial" violation as "[a] violation could significantly and substantially contribute to the health and safety hazard and that the violation will be considered in determining whether a pattern exists." He believed that an employee walking in the area could possibly fall off a 7-foot drop at the end of the walkway to the next level. The walkway was level, and there are access stairs or ladders from level to level. He observed no one in the area during his inspection but indicated that it is possible that a repairman would be in the area. The violation was abated by installing a gate-type guard structure to prevent employees from falling off the end. There was a beam some 5 feet above the walkway running parallel to the end of the walkway, but he observed nothing that one could grab onto to prevent him from falling to the lower level. There were no warning devices of any kind advising persons that the walkway would end by a drop to the next level below, and he considers the violation serious and that it is significant and substantial because it contributes to a safety and health hazard (Tr. 120-129).

Mr. Magness confirmed that he marked "improbable" on the gravity portion of his inspector's statement, and he stated that the reason he did so was the fact that while he observed no one in the area at the time of his inspection, it was still significant and substantial because "it could happen to anybody at any time." If one were to fall over the end of the unguarded walkway, serious injuries could result (Tr. 130).

On cross-examination, Mr. Magness testified that the only written directive he has received on the meaning of the term "significant and substantial" is the instruction printed on the back of the citation form. He denied that he made the "S & S" finding with the intent or the possibility of establishing a pattern of violations (Tr. 130-131). He candidly admitted that he has received oral instructions to treat all violations as significant and substantial (Tr. 130-135). Regarding the overhead beam at the end of the walkway, Mr. Magness stated that it would not keep anyone from walking off the end of the walkway. He did not discuss with anyone the purpose for and the use made of the walkway in question, and he observed no safety belts or lines in the area (Tr. 137).

In response to bench questions, Mr. Magness testified that he considered the location cited a working place because the walkways are used to support the machinery in the plant. He was concerned with subsection (e) of section 77.205, and he would accept any type of a barrier as compliance as long as it prevented one from going off the end of the drop-off. The walkway was not a "communication travelway" frequently used by men to get around the plant, but someone could possibly be there for maintenance purposes. Even if one were to go there only once a year, the fact that he might fall off the end that one time makes it a significant and substantial violation. He believes that any violation which is going to create a hazard to an employee is significant and substantial (Tr. 139-141).

Contestant's Testimony and Evidence

Mr. DiBiase described the overhead beam in question and stated that it was part of the superstructure of the building and some 4-1/2 feet from the walkway, shoulder height, and some 18 inches or 2 feet from the end of the platform. One would have to dip or stoop under the beam to get to the end of the platform. The platform is used to raise equipment up from the lower levels for maintenance, and it is normally used when there is a major breakdown or repairs once a month, but in the last year it has not been used at all. Safety belts are required to be worn at anytime persons are working on an unguarded platform. He believed the lighting was sufficient because it was not an area where an employee normally stands to work, and if he is in the area working he will use a trouble light. When the plant is operating there is no reason for anyone to be working at the end of the platform. However, when maintenance is being performed or materials are being hoisted, it sometimes is necessary to get near the end (Tr. 143-148).

On cross-examination, Mr. DiBiase testified that safety belts are provided anywhere work is performed in heights, and that he was aware of the fact that there was no handrail at the end of the walkway. The reason for not having one at that location is that equipment is moved on and off the end of the walkway and such a rail would not provide enough clearance. The walkway is used only for maintenance, and in the past this has been approximately once a month (Tr. 148-149).

Inspector Magness was recalled and testified that his interpretation of the term "safe means of access" is that one can travel in a working area in safety without falling off the end. Had there been a handrail, chain, barricade, partition, etc., installed there, he would not have cited a violation. He indicated that he went to the edge of the walkway but he did not hit anything overhead and he is 5 feet 11 inches tall. Abatement was achieved by the installation of a guard railing (Tr. 151-156).

Docket No. PITT 79-214

Citation No. 229363, issued on February 22, 1979, citing a violation of 30 CFR 77.400, states as follows: "A guard was not provided on the conveyor drive head of the clean coal (stoke) belt at the Sunbeam Preparation Plant."

MSHA's Testimony and Evidence

Inspector Magness confirmed that he issued the citation in question and stated that the purpose of the conveyor belt guard is to protect an employee from becoming entangled between the belt and metal roller which is powered by an electric motor. There is little or no space between the belt and roller, and at the entry of the belt over the drive head roller there is a pinch point, but he could not state whether any employees would be at that location. Although the belt was not in operation when he cited the violation, it was not disconnected. He considered the violation to be serious and significant and substantial because people have been caught in similar belts. To abate the citation, a metal and wire guard was installed around the belt to substantially protect a man from being caught in it (Tr. 157-160). Mr. Magness stated that he marked his gravity statement "improbable" because the belt was not running and the mine foreman advised him that the belt was seldom used since it was a special one used only for stoker coal. Although there is always a chance of someone being caught in a belt, in this case there was less chance of this event happening (Tr. 160).

On cross-examination, Mr. Magness stated that while he made no measurement, the end of the conveyor was within his extended reach of some 5 feet 11 inches off the ground and he could reach the drum and belt pinch point by standing. One could not inadvertently be caught in the pinch point unless they fell or were working on the parts, and he could recall no extended grease fittings. If one were working on the equipment, it is possible that the guards would be removed, and if he is working on a belt roller the power will be disconnected completely. He observed no one working in the area on the day he issued the citation and he did not know how frequently the belt was used (Tr. 162-167).

In response to bench questions, Mr. Magness stated that there was no guard of any kind at the cited belt location, and if the motor had been disconnected altogether there would be no violation because there would not have been a functioning piece of equipment that could do damage to anyone. However, if it were merely deenergized he would still cite a violation. He considered the violation to be significant and substantial because the belt was functional and probably operated on previous occasions without a guard and someone could inadvertently catch their hand in the pinch point (Tr. 167-170).

Contestant's Testimony and Evidence

Mr. DiBiase testified that he did not believe one could inadvertently become entangled in the conveyor belt in question, and in order for this to happen, a person would have to make an effort to reach in or someone flipped the switch on. However, the disconnect switch is pulled and locked out whenever someone is working on the belt. The belt in question is used infrequently or 5 to 10 percent of the time. He did not believe the violation was significant and substantial because it is not an obvious violation which presented an obvious risk of injury to a worker and the

plant had been inspected for years and no one ever pointed the violation out to him in the past (Tr. 174-177).

On cross-examination, Mr. DiBiase stated that due to the fact that the head pulley was located shoulder-high, he did not believe someone could inadvertently fall into it even though he agreed with the inspector that someone could trip on the adjacent walkway. The belt had guards installed where he believed they were needed, and chain guards were installed in the gear box to the drive motor on the head pulley. There was a physical metal can-type guard covering the gear sprocket drive, but the conveyor belt was not guarded (Tr. 177-181).

Respondent's Arguments

In its posthearing brief, MSHA argues that the term "significant and substantial" is found in substantially identical form in two sections of the 1977 Act, namely, sections 104(d)(1) and 104(e)(1). Section 104(d)(1) deals with citations and orders for violations of the Act, and in that context "significant and substantial" refers to one element which must be present for the proper issuance of a 104(d)(1) citation. Section 104(e)(1) also deals with violations of mandatory health and safety standards, but in particular with instances where a pattern of violations exists.

In analyzing the meaning of the term in either section, MSHA asserts that it must be remembered that "significant and substantial" is really a shorthand expression, and for that reason it must not be divorced from the language which surrounds it. The term can only be effectively understood by viewing it in the context in which it appears. In either section it refers to a violation which is of "such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards * * *." (Emphasis in original.) Once it is appreciated that the term "significant and substantial" cannot be treated in isolation, the importance of the surrounding language becomes clear.

In support of its arguments, MSHA points out that the first observation one makes in a contextual analysis is that the nature of the violation need only be such as "could have" significantly and substantially contributed to the cause and effect of a mine health or safety hazard. The term "could have" suggests far less certainty than other language such as "would have" infers. In this context, "could have" means "possibly, but not necessarily have" significantly and substantially contributed to the cause and effect of a mine health or safety hazard. Citing the case of Alabama By-Products Corporation, 7 IBMA 85, November 23, 1976, MSHA states that the term "could have" means less than probable, and that the violation need only significantly and substantially contribute to the cause and effect of a mine safety or health hazard. That is, the cited violation need only contribute to the hazard in terms of playing a role in its cause and effect and need not cause the hazard. However, the nature of such contribution must be significant and substantial.

With respect to the meaning of the term "significant and substantial," MSHA maintains that as defined in Alabama By-Products, the phrase refers to all violations except those which are purely technical or those where any injury could result but there is only a remote or speculative chance of that injury coming to fruition. Citing the legislative history of the 1977 Act, MSHA quotes the following statement which it believes supports its interpretation that the construction of the term "significant and substantial" applies to all violations except those that are purely technical: "The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the 'significant and substantial' language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1)." S. Rep. No. 181, 95th Cong., 1st Sess., 31 (1977 Senate Report).

In summary, MSHA argues that applying the rationale of Alabama By-Products, the significant and substantial contribution to the cause and effect of a mine health or safety hazard means that the cited violation could play a role in the creation or existence of a hazard, and that the role it could play would be neither technical, remote nor speculative. On that basis, two questions should be asked in making this determination:

1. Could the cited violation contribute to the cause and effect of a mine health or safety hazard?

2. If the answer is yes, is the nature of the contribution such that its role as contributor would be neither technical, remote, nor speculative?

An affirmative answer to both questions should mandate a finding that the cited violation is "significant and substantial."

Contestant's Arguments

In its posthearing brief, contestant takes the position that the "significant and substantial" block used by MSHA on the citation form should only be used when a condition exists that increases the likelihood of an accident occurring. Since all standards are promulgated with the hope that a potential accident could be avoided, and since citations are issued for failure to comply with the requirements of a standard, contestant asserts that the additional finding by an inspector that the mere violation of a standard would significantly and substantially contribute to a health or safety hazard is not justified in every case. Further, contestant argues that the significant and substantial criteria should only be used when the likelihood of a mining accident is greatly increased by the failure of the operator to comply with the standard, and that the use of the criteria in a section 104(a) citation is not justified since neither the Act nor MSHA's regulations issued thereunder permit an inspector to unilaterally determine that an alleged violation could significantly and substantially contribute to the cause and effect of a mine safety hazard.

With respect to each of the citations issued in these proceedings, contestant argues that the only reasonable interpretation of the criteria

of "significant and substantial" is one of cause and effect, and that a simple "but for" test should be applied to the question. That is, "but for" the absence of the protective device required by the cited safety standard, would an accident have happened. Contestant maintains that the seriousness of the injuries that might result from the failure to comply with the criteria is not relevant to the question of whether a condition could cause an accident. Since the inspector who issued the citations testified that he had received instructions to mark all violations "significant and substantial," contestant concludes that an inspector is given no discretion to determine this criteria on a case-by-case basis. Additional arguments presented by the contestant with regard to each citation are discussed in my following findings and conclusions.

Findings and Conclusions

Reviewability of the Citations

Although MSHA's posthearing brief does not address the question of the reviewability of an abated section 104(a) citation, during the course of the hearing MSHA's position was stated to be as follows (Tr. 7, 8):

> MR. JENKINS: It is the Secretary's position that the 105 review which is permitted in the Federal Mine Safety and Health Act of 1977 does not establish the right by the Applicant to contest the box marked S and S of a 104(a) citation.
>
> The 105 review is for citations of proposed assessments. The Secretary believes that the Applicant has contested neither, but contested MSHA's recordkeeping box designated S and S.
>
> We feel that 105(a) does not require a finding of significant and substantial. Any challenge to the significant and substantial box on the citation is irrelevant and immaterial to the review of a 104(a) citation.
>
> S and S is part of MSHA's recordkeeping system. An inspector may find in the cases before court today, will testify that these violations are serious, but the S and S is part of the recordkeeping process to the finding of a 104(e) pattern.
>
> Since there has been no finding of a 104(e) pattern, the violation is a challenge to S and S and is premature and not ripe for this proceeding. Similar to a probable cause by a police officer, the S and S is MSHA's recordkeeping process, and is not reviewable until the adversary proceeding of a 104(e) is at issue.

In this particular case there has been no charge, formal charge of a 104(e). Therefore, this type of action within a 105 proceeding is inapplicable.

Energy Fuels Corporation v. MSHA, DENV 78-410, decided by the Commission on May 1, 1979, concerned a section 104(a) citation which contained section 104(d)(1) findings of a "significant and substantial" and "unwarrantable failure" violation. The question presented in that case was whether an operator served with a citation for a violation that has been abated may immediately contest the allegation of violation in that citation. The Commission answered the question in the affirmative. After a somewhat exhaustive discussion of the legislative history, during which it noted that reliance on the uncertainties in the legislative history makes reliance on it an uncertain matter, the Commission concluded that the safety and health of the miners would not be adversely affected by immediate review of an abated citation, and that any adverse impact on the interests of the Secretary by immediate contestability were not entirely clear. In discussing the potential adverse impact on an operator which would result if he were not afforded an opportunity for immediate review, the Commission at several points in its discussion (pages 9 and 10) alluded to the fact that the citation which was issued contained special findings under section 104(d), and it seems clear that this fact influenced the Commission in concluding that review of the citation was in order.

Helvetia Coal Company v. MSHA and Rochester & Pittsburgh Coal Company v. MSHA, Docket Nos. PITT 78-322 and PITT 78-323, decided by the Commission on May 1, 1979, both involved review petitions seeking review of section 104(a) citations issued pursuant to the 1977 Act, and the conditions were abated and the citations terminated at the time the review petitions were filed. In addition, contrary to the instant proceedings in Sunbeam, neither citation contained any special findings under sections 104(d) or (e) of the Act. Judge Merlin dismissed the applications for review of the citations on the ground that the citations were not reviewable until after the Secretary proposed civil penalties. On October 11, 1978, the Commission granted discretionary review, and on May 1, 1979, reversed and remanded the cases to Judge Merlin and in so doing followed its decision of that same date in Energy Fuels Corporation v. MSHA, Docket No. DENV 78-410.

In Helvetia and Rochester & Pittsburgh, the Commission took note of the fact that in Energy Fuels, the 104(a) citation contained special findings under section 104(d) and thus exposed the operator to a possible withdrawal order before a penalty could be proposed. Although the citations in Helvetia and Rochester & Pittsburgh had no special findings, the Commission nevertheless held that permitting the immediate contests of the citations would not "unduly burden others." Further, while commenting that it was arguably unlikely that Helvetia and Rochester & Pittsburgh will need a hearing before a penalty is proposed, and while taking particular note of the fact that the citations in question were abated and contained no special findings, the Commission nevertheless noted that it would be desirable for a hearing to be quickly scheduled if the conditions cited often recur, if

abatement efforts are expensive, or if another case is being heard on the same issue and early consolidation would be beneficial.

In view of the foregoing, I believe it is clear that the Commission recognized that under certain circumstances and conditions, immediate review of abated citations is in order. In Energy Fuels, the special findings made under section 104(d) exposed the operator to a possible withdrawal order before a penalty could be proposed. In Helvetia and Rochester & Pittsburgh, while no special findings were made in connection with the section 104(a) citation, the Commission was obviously concerned with circumstances such as recurring violations, expensive abatement efforts, and consolidation of similar issues.

In the instant cases, all of the citations were issued pursuant to section 104(a) of the Act. In addition to the narrative description of the condition on the face of the citation, which prompted the inspector to cite the specific mandatory safety standard allegedly violated, the inspector checked the "significant and substantial" box on the face of the citation form and thus made the special findings in this regard referred to in section 104(d) as an additional finding in support of the section 104(a) citation.

Inspector Felichko indicated that the term "significant and substantial" means a "serious violation," that when he checks the "S & S" box on the citation form he considers the "conditions surrounding the citation," and that the "S & S" finding "is MSHA's method of recordkeeping to determine whether a violation was significant and substantial" (Tr. 21). He also believes that all violations are serious but that the circumstances presented in each case would determine whether a violation was significant and substantial (Tr. 27). He defined the term as follows (Tr. 28): "To me significant and substantial means that the violation could be more hazardous. Whenever you check that box, it is a more hazardous condition. It is hard to answer exactly what it means."

Inspector Magness testified that the only directive available to him as to the meaning of "significant and substantial" is the statement imprinted on the back of the citation form and that his intent was not to attempt to establish a pattern of violations. He indicated that he issued the citations on the basis of "what I thought could possibly create a hazard" and that his primary consideration when issuing citations is to prevent health and safety hazards (Tr. 130-132). He candidly admitted that he has received oral instructions that all health and safety violations are significant and substantial (Tr. 135-136).

It seems to me that Congress must have had something in mind when it enacted the 1969 Act, and the 1977 Amendments thereto, and provided a varied enforcement scheme which encompasses the issuance of citations and withdrawal orders for violations of mandatory standards (104(a)); withdrawal orders for failure to timely abate a violation (104(b)); unwarrantable failure citations and withdrawal orders (104(d)(1) and (2)); imminent danger orders

pursuant to section 107(a); and "almost" imminent danger citations and orders pursuant to sections 107(b)(1) and (2). Unfortunately, the legislative history of both the 1969 and 1977 Acts has little substance insofar as the construction of the term "significant and substantial" is concerned. The Board in the Alabama By-Products case simply read into the D.C. Circuit's opinion in UMWA v. Kleppe a theory of construction on which the court had nothing to say, and the Senate Committee simply gave it its blessing by noting with approval the Board's conclusion that "significant and substantial" does not include purely "technical" violations. From that point on, it is obvious to me that MSHA has instructed its inspector force to mark all citations "S & S" without any real considerations being given to the facts and circumstances which prompted the inspector to cite a violation in the first place. In short, MSHA has lifted from section 104(d) a construction of the term "significant and substantial" so as to apply it automatically to virtually all citations, transposed it to section 104(a), and once a citation is issued, will use that section 104(a) citation as the basis for again citing a mine operator with a pattern violation notice which, in turn, will leave him vulnerable to a summary closure order if another 104(a) citation is issued within 90 days of the pattern notice.

The "pattern of violation" provision of the 1977 Act is an additional and exceptional enforcement tool available to MSHA. Section 104(e) requires that an operator be given a notice that a "pattern of violations" exists in his mine if the violations could "significantly and substantially" contribute to the cause and effect of a health and safety hazard. The issuance of a notice that a pattern of violations exists at the mine not only alerts the mine operator of serious health and safety problems in his mine, but also triggers a series of subsequent MSHA enforcement actions which could result in the issuance of withdrawal orders and the closing down of the mine. The chain of "pattern" citations and withdrawal orders can only be broken if, pursuant to section 104(e)(3), an inspection of the entire mine discloses no "significant and substantial" violations. However, if any such citations are issued, the operator is deemed to have reestablished a "pattern" and the mine reverts to the "chain" provisions of sections 104(e)(1) and (2).

It should be noted that while an unwarrantable failure citation issued pursuant to section 104(d) must be of a "significant and substantial" nature and must be the result of an operator's "unwarrantable failure" to comply, a "pattern" citation issued pursuant to section 104(e), need only be based on a "significant and substantial" finding, and there is no requirement that the violations establishing the pattern be the result of the operator's "unwarrantable failure" to comply. Leg. Hist., S. Rep. No. 95-181, 95th Cong., 1st Sess., 33 (1977). Further, while section 104(a) contains no specific provision for a finding of "significant and substantial" in conjunction with the issuance of a citation under that section, section 104(d) authorizes an inspector to make such a finding in any citation given to the operator under this Act. Thus, while it may be argued that the lack of any specific mention of the term "significant and substantial" in section 104(a) is a clear indication that Congress did not intend to authorize such

a finding in connection with a citation issued under that section, but only intended such a finding to be made in connection with unwarrantable failure citations under subsection (d), the statutory language "in any citation given to the operator under this Act," coupled with the legislative history and judicial decisions dealing with the construction of "significant and substantial," indicates Congressional approval of the practice of making such findings in a section 104(a) citation. It also seems clear that citations issued pursuant to section 104(a) which contain "significant and substantial" findings by an inspector will serve as the basis for the issuance of subsequent "pattern" citations pursuant to section 104(e), and the reverse side of the MSHA citation form confirms this. The pertinent portion of the form reads as follows: "NOTE: By checking the significant and substantial box, the Inspector has indicated that this violation could significantly and substantially contribute to a health or safety hazard and that this violation will be considered in determining whether a pattern exists."

Section 104(e)(4) of the Act mandates that the Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations exists. As reported in a recent October 14, 1979, issue of the Mine Safety and Health Reporter, published by the Bureau of National Affairs, at page 233, MSHA's Director for Civil Penalty Assessments indicated that MSHA is in the process of preparing guidelines for determining when a pattern exists. In light of MSHA's assertions in these proceedings that the marking of the "S & S" box on the citation form is merely a "recordkeeping" function, and in view of the inspector's testimony that his instructions are to check the "S & S" box on every citation which he issues, the promulgation of such guidelines should be of top priority in order to assure even-handed enforcement by communicating the ground rules to those mine operators being regulated under the Act. To do otherwise would subject an operator to serious sanctions and penalties based on arbitrary and unreasonable actions by an inspector who automatically, and without any considered judgment, makes "findings" that a violation is significant and subtantial by merely checking a box on a citation form. This becomes particularly critical, from a due process point of view, when the groundwork for the issuance of pattern citations and withdrawal orders is begun by an inspector who mechanically checks the "S & S" box for every section 104(a) citation which he issues without any serious consideration being given to all of the prevailing facts and circumstances which prompted him to make that judgment in the first instance.

Following Energy Fuels and the foregoing discussion, I conclude that since an operator is vulnerable to serious consequences resulting from an "S & S" finding, the contestant is entitled to a review of both the fact of violation and the inspector's additional finding of "significant and substantial," notwithstanding the fact that the citations were abated. I further conclude that the burden of proof is on the Secretary to establish the existence or occurrence of the violation as well as the burden of producing facts to support the conclusion that the citations were significant and substantial.

Significant and Substantial

The "significant and substantial" provision found in section 104(d) of the 1977 Act is identical to that found in section 104(c) of the 1969 Act. In interpreting the meaning of this provision under the 1969 Act, the former Interior Board of Mine Operations Appeals in Eastern Associated Coal Corporation, 3 IBMA 331 (1974), took a rather restrictive view of the test of "significant and substantial" when it held that a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if the evidence shows that the condition or practice cited as a violation posed a probable risk of serious bodily harm or death, 3 IBMA 355. The Board noted that "if we thought that the hazard in question had only a speculative possibility of occurring, we would of course conclude otherwise." (Emphasis added.)

In Zeigler Coal Company, 4 IBMA 139 (1975), the Board reexamined its prior interpretation of the term "significant and substantial" and characterized it as a "phrase of art," 4 IBMA 154; and at 4 IBMA 156 stated as follows:

> If we were to give each of the words of that clause an ordinary meaning, it would become a superfluous truism; by definition, the violation of any mandatory standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, since it is plain that the Congress intended by these words to enact one of several discriminating criteria designed to separate those violations that merit 104(c) treatment from those that do not, such a literal interpretation would be squarely at odds with the apparent congressional intent. Such interpretation would render the phrase nugatory when the Board is obliged under the usual norms of statutory construction to give meaning to all the terms of a statute. Sutherland, Statutes and Statutory Construction, § 46.06 (4th ed. 1973).

Commenting on its prior Eastern Associated Coal Corporation decision, the Board stated further at 4 IBMA 160, 161:

> Against this background and in order to give effect to all the statutory terms, we held and still believe that the clause "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" is a phrase of art. The key word of that clause is "hazard" which in our view refers not to just any violation, but rather to violations posing a risk of serious bodily harm or death. The part of the clause which reads "* * * could significantly and substantially contribute to the cause and effect * * *" states a probability requirement, designed in our opinion, to prevent application of section 104(c) to largely speculative "hazards."

In Alabama By-Products Corporation, 6 IBMA 168 (1976), the Board affirmed a judge's decision vacating two section 104(c)(1) withdrawal orders issued pursuant to the 1969 Act. The judge held that the underlying notice was improperly issued because the violation cited did not pose a "probable risk of serious bodily harm or death" and therefore did not meet the "significant and substantial" test previously laid down in Eastern and Zeigler. In affirming the judge's decision, the Board rejected the UMWA arguments that the definition of "significantly and substantially" should be given its ordinary meaning which needs no definition and that the Board's construction of the term only deters the violation of a few of the mandatory health and safety standards while the UMWA's "ordinary meaning" construction of the term would deter violations of many more mandatory standards.

In Alabama By-Products Corporation, 7 IBMA 85, November 23, 1976, the Board reconsidered its prior determinations and construction of the term "significant and substantial," and it did so on the basis of the D.C. Circuit Court of Appeals' decision in International Union, United Mine Workers of America (UMWA) v. Kleppe, 532 F.2d 1403 (1976), cert. denied, sub nom. Bituminous Coal Operators' Association, Inc. v. Kleppe, 429 U.S. 858 (1976), reversing Zeigler Coal Company, supra, and holding that there was no implied gravity prerequisite for the issuance of a section 104(c)(1) withdrawal order. Noting the asserted narrowness of the court's holding and its silence on the Board's construction of "significant and substantial," the Board nevertheless held that the court's opinion had broader implications and compelled a change in the Board's prior construction, and it stated as follows at 7 IBMA 92:

> The reason that the appellate court's holding and supporting reasoning is important here is quite simply that our construction of the "significant and substantial" language in section 104(c)(1) was the product of virtually the same reasoning that the Court rejected in reversing Zeigler. When we construed that language to mean "probable risk of serious bodily harm or death," we disregarded the plain semantical meaning of that phrase in favor of a more restrictive reading of the statutory words which fitted in with our overall concept of the enforcement scheme. The emphasis of the D.C. Circuit on literalism which promotes wider operator liability and its rejection of our holding and the underlying reasoning in support thereof have undermined the "probable risk" test completely. An honest reading of the Court's opinion thus compels us to overrule Eastern Associated Coal Corp. * * *, and Zeigler Coal Company, * * * insofar as they validate the "probable risk" test. [Footnote omitted.]

The Board's reconstructed interpretation of the term "significant and substantial," as enunciated in its second Alabama By-Products' decision, is set forth at 7 IBMA 94 as follows:

> Section 104(c)(1), it should be recalled, mandates the issuance of a notice when an inspector finds that "* * * a

> violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." Our position now is that these words, when applied with due regard to their literal meanings, appear to bar issuance of notices under section 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under section 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death. [Emphasis in original.]

Commenting on the enforcement ramifications of its new interpretation, the Board stated as follows at 7 IBMA 95:

> The inspector's judgment as to whether a given violation is "* * * of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" must be reasonable. The reasonableness of such a judgment is dependent upon the peculiar facts and circumstances of each case, and it is up to an Administrative Law Judge initially, and the Board ultimately, to determine whether an inspector was reasonable in so finding in any given case.
>
> We recognize that our interpretation today means that federal coal mine inspectors have a very wide area of discretion to issue section 104(c) notices with all the attendant liability to summary withdrawal orders which necessarily follows upon even the most trivial of violations after issuance of such a notice. However, with the present controversy is viewed in the reflected light cast by the D.C. Circuit on section 104(c) in UMWA v. Kleppe, supra, no other conclusion can sensibly be drawn.

Considering the foregoing judicial evolution of the construction of the term "significant and substantial," I conclude and find that practically all or most violations occurring at a mine are of a "nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard," except in two categories:

1. Those violations which pose no risk of injury at all, such as the so-called "purely technical violations"; and

2. Those violations which pose a source of injury which has only a remote or speculative chance of happening.

Further, it also seems clear that the term can apply to a violation without regard to the seriousness or gravity of any injury for which the violation poses a risk of occurrence, that is, there need not be a finding that the violation poses a risk of serious bodily injury or death for the term to apply.

The present construction of the term "significant and substantial" as it evolved in the aforementioned cases is favorably reflected in the legislative history of the 1977 Act as follows:

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the "gravity test" and has required that the violation be so serious as to very closely approach a situation of "imminent danger", Eastern Associated Coal Corporation, 3 IBMA 331 (1974).
>
> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1).
>
> The Board there held that "an inspector need not find a risk of serious bodily harm, let alone death" in order to issue a notice under Section 104(c)(1).
>
> The Board's holding in Alabama By-Products Corporation is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when "technical" violations do pose a health or safety danger to miners, and are the result of an "unwarranted failure" the unwarranted failure notice will be issued.

S. Rep. No. 181, 95th Cong., 1st Sess., 31 (1977).

Docket No. PITT 79-210

Citation No. 229432, 30 CFR 77.1607(cc)

30 CFR 77.1607(cc) states as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."

The citation issued in this case charges that the No. 1 wash belt was not provided with emergency stop devices or cords along the belt walkway. The inspector testified that he issued the citation because the conveyor

belt in question is required to have an emergency stop pull cord along the full length of the walkway where a person might be exposed to the moving belt rollers and the belting itself (Tr. 12). He described the belt as being inclined from inside the plant to the outside, that it had an inclined walkway along its full length from ground level to the head roller, and that the purpose of the belt was to carry washed coal from inside the plant to the outside where it was loaded (Tr. 13). He estimated the length of the belt to be 125 to 150 feet, and indicated that the walkway was to the right of the belt and that it was composed of expanded metal, and while he looked out of the window of the control room inside the plant, he could not recall whether he could see the entire belt length (Tr. 23-24). He observed one around or on the belt, made no inquiries as to whether anyone is required to be in the belt area while it was running, and did not know whether the plant maintenance schedule provided for work and lubrication of the belt while it was running (Tr. 25). The belt tail roller was guarded, and the head roller was guarded by location because the walkway only went up to the front of it (Tr. 41).

The unguarded portion of the belt which concerned the inspector consisted of the idler rollers and the belting itself (Tr. 42). The stop cord was a suitable substitute for a physical guard, and a person would have access to the stop cord to shut the belt off as he was falling into it (Tr. 43). He believed that under certain conditions it would be a hardship on an operator to require a physical guard along the entire length of the belt, but the installation of a stop cord is not such a hardship (Tr. 44). The walkway was in fairly good condition and he observed no spillage (Tr. 46).

Mine Manager DiBiase testified that the so-called belt "walkway" was in fact a work area or platform which was parallel to the ground and did not run along the same incline as the belt (Tr. 53, 58, 65, 66; ALJ Exh. 1). The exposed unguarded portion of the belt was at the point where the inclined belt intersected the platform and the belt did not have a walkway adjacent to its entire length (Tr. 66, 68). He assumed that it was what the inspector had in mind when he cited the violation (Tr. 72).

In an attempt to resolve the discrepancy in the testimony concerning the existence of the alleged conveyor belt walkway, Inspector Felichko was recalled in rebuttal. His testimony in rebuttal reflects that the walkway he previously described as being along the entire length of the conveyor belt was in fact the platform area described by Mr. DiBiase (Tr. 80; Exh. M-3(a)), and he indicated that the walkway was not adjacent and parallel to the belt along its entire length (Tr. 81). MSHA's counsel believed that the inspector had in mind a portion of the belt near the platform and counsel conceded that his testimony was confusing (Tr. 82, 83). The inspector added to the confusion when he indicated that the platform "ran parallel with the belt," and that one "could walk along that platform and be next to this belt for the full length of the walkway" (Tr. 84).

After careful review and consideration of the testimony presented with respect to this citation, I conclude and find that the inspector was confused as to what he actually observed on the day the citation issued. While his direct testimony clearly indicated to me that there was a walkway along the entire length of the conveyor belt which was not guarded by a stop cord and that he was concerned that someone walking that walkway could possibly trip or fall into the belt and become caught in a belt idler roller, it turns out that what he apparently had in mind was an exposed unguarded belt area at a point where the belt intersected a work platform which was apparently used as a maintenance station and as a belt crossover point. Subsection (cc) of section 77.1607 requres the installation of stop cords on conveyors equipped with walkways. In this case, I cannot conclude that the conveyor belt in question had a walkway along its full length which exposed anyone to a possible hazard, and I find that MSHA has not established that this was in fact the case. I accept Mr. DiBiase's testimony as credible and find that MSHA has failed to establish by any credible evidence that the belt conveyor in question had a walkway. This being the case, I find that the cited standard does not apply in the situation here presented and the citation is VACATED.

Docket No. PITT 79-211

Citation No. 229433, 30 CFR 77.701

30 CFR 77.701 provides as follows: "Metallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

Contestant admitted that the shop area switchbox in question was not frame grounded as charged in the citation (Tr. 118; Brief, p. 5). Its defense is that another suitable means for grounding the box was used and Mine Manager DiBiase's testimony that the absence of the frame ground would not make the likelihood of an accident imminent. This defense is rejected. Mr. DiBiase candidly admitted that the lack of a frame ground could contribute to a possible accident, and he also indicated that he had removed tool grounds in the past even though he realized he was jeopardizing his health and life (Tr. 116, 117). As for the alternative use of a ground to the fuse, Mr. DiBiase admitted that this was not a proper ground.

The inspector testified that the 110-volt circuit was energized, there was no insulation mat on the floor, and the floor was muddy and wet, and coupled with what he described as "frayed" outer insulation of the cables, he believed that there was a shock or electrocution hazard presented by the condition cited. Under fault conditions, the box could become energized, and the inspector believed that the lack of a frame ground, aggravated by the frayed outer cable insulation, constituted a significant and substantial violation. In addition, the box was located in a shop area by an entrance door and one could just walk up to it (Tr. 89).

I find that MSHA has established the fact of violation and I also find that the violation was not technical. To the contrary, I find that the lack of a proper frame ground, coupled with the other prevailing conditions and the proximity of the box at the entrance of the shop, presented a real shock and electrocution hazard which could have resulted in serious injuries or death and the absence of the frame ground increased the likelihood of those events happening. Accordingly, I conclude that the violation was significant and substantial, and the citation is AFFIRMED.

Docket No. PITT 79-212

Citation No. 229434, 30 CFR 77.513

30 CFR 77.513 states as follows:

> Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

Contestant does not dispute the fact that there was no insulation at the switchbox in question (Tr. 117; 118; Brief, p. 6). The box in question was the same one for which the inspector issued Citation No. 229433 for lack of a proper frame ground. The inspector believed the violation was significant and substantial because the lack of an insulation mat aggravated or added to the potential for a shock or electrocution, particularly in light of the prevailing conditions such as a wet and muddy floor, lack of a frame ground on the box, and the frayed cable which he described (Tr. 107). I agree with the inspector and find that the violation has been established and that it was significant and substantial and not technical. The citation is AFFIRMED.

Docket No. PITT 79-213

Citation No. 229362, 30 CFR 77.205(e)

30 CFR 77.205(a) and (e) provide as follows:

> (a) Safe means of access shall be provided and maintained to all working places.
>
> * * * * * * * *
>
> (e) Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided.

The citation (Exh. M-12) charges the contestant with a violation of subsection (a) of section 77.205 for failure to provide and maintain a safe means of access to the working place in that the end of a third level walkway of the preparation plant was not protected by a railing, barrier, or other protective device. By motion filed on December 12, 1979, 2 months after the evidentiary hearing, MSHA seeks to amend its pleadings to reflect a citation of subsection (e) rather than (a). In support of its motion, MSHA asserts that the original citation described with particularity the conditions and practices which constitutes a violation of subsection (e), that contestant was in fact informed of the violation and is not unduly prejudiced, and that Rule 15(b) of the Federal Rules of Civil Procedure liberally permits a party to amend its pleadings to conform to the evidence.

The inspector's testimony is somewhat confusing as to what he intended to cite, and what he apparently had in mind was the fact that the surface area of an elevated platform or balcony in the preparation plant did not have a protective barrier or barricade installed at one end of the edge so as to preclude someone from falling off the next level below for a distance of some 7 feet. The area in question was approximately 3-1/2 feet wide, with a wall on one side and plant machinery on the other. Access to the platform was gained by a stairway leading up from the level below the area cited. Although subsection (e) specifically requires the installation of handrails, the inspector testified that he would have accepted a removable chain rail, barricade, wire, boarding or a partition as compliance, and he likened the hazard presented to someone walking off the end of an apartment balcony (Tr. 138, 152). It seems obvious to me from his testimony, and from the way the condition is described on the face of the citation, that the inspector intermingled the requirements of subsections (a) and (e). Stated another way, he apparently intended to apply a standard which would read: "Safe means of access shall be provided and maintained to all working places, and in the case of elevated walkways or working places where work is to be performed, compliance shall be achieved by the installation of a handrail or other substantial barrier." The problem with this is that the inspector's function is not to rewrite safety standards. His function is to cite conditions or practices which he believes constitutes a violation of a standard as promulgated.

MSHA's counsel indicated that the substance of the citation deals with subsection (e) in that the inspector was concerned that someone would fall off the unprotected edge of the elevated platform where there was room for him to walk up to the edge (Tr. 138, 150-151), and the inspector attempted to clarify his position when he testified that:

> My interpretation and understanding of safe means of access is that a man can travel in that working area, and a safe means of access to that working area is that he can travel through that working area, and that is the whole working area, in safety without falling off the end (Tr. 153).

The inspector conceded that there was a safe means of access up to the point of the end of his trip when he falls off the edge (Tr. 153).

Contestant has filed no response or opposition to MSHA's motion to amend, nor did it raise any objection at the hearing during the colloquy and questioning of the inspector by the parties. As correctly pointed out by MSHA in its motion, Rule 15(b) of the Federal Rules of Civil Procedure is liberally construed, and in a case decided under the Occupational Health and Safety Act, National Realty Company, Inc. v. Occupational Safety and Health Review Commission, 489 F.2d 1257 (D.C. Cir. 1973), the court observed as follows at 489 F.2d 1264:

> So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue. This follows from the familiar rule that administrative pleadings are very liberally construed and very easily amended. The rule has particular pertinence here, for citations under the 1970 Act are drafted by non-legal personnel, acting with necessing dispatch. Enforcement of the Act would be crippled if the Secretary were inflexibly held to narrow construction of citations issued by his inspectors.

Amendments of pleadings to conform to the evidence is one thing, but attempts to rewrite or reissue citations is another. On the facts here presented, it seems obvious that MSHA's motion seeks to amend the citation to reflect a violation of subsection (e) rather than (a). In effect, MSHA is seeking to issue a new citation so as to take advantage of the inspector's oral testimony which I believe supports neither a violation of subsections (a) or (e) of section 77.205. See Tilden Coal Company, 7 IBMA 57 (1976). On the facts presented in this case, it seems obvious to me that the inspector confused the two subsections since the narrative portion of the condition or practice as described on the face of the citation parrots the exact requirements of subsection (a); that is, the inspector did not believe a safe means of access was provided to the working place because of the lack of a railing on the so-called "walkway." However, the evidence establishes that the only access to the platform was by means of the stairway from the lower level up to the platform and there is no evidence that the stairway was unsafe. Further, in response to a question as to whether the area cited was a travelway used by personnel as a means of going through the plant, the inspector answered "[i]t is not a communication travelway, a necessary communication travelway," and he indicated that part of the reason for the structure being there was for maintenance purposes (Tr. 140).

The term "working place" is not further defined by Part 77. However, I believe it is reasonable to conclude that since work is performed on the platform area in question from time-to-time, that the area may be considered a working place for purposes of subsection (a) of section 77.205. However, since I have concluded that MSHA has not established by any

credible evidence that access to that area was unsafe, I also find that a violation of that subsection has not been established.

With regard to the application of subsection (e) of section 77.205, I am not convinced by any credible evidence that the area cited was in fact a walkway within the meaning and intent of the standard. The area cited was more of a platform and work station used for maintenance purposes and it was not a walkway used by employees to travel in and through the plant and the inspector candidly admitted as much. It seems obvious to me that the inspector attempted to apply a standard which simply does not fit the factual circumstances here presented. The protection of personnel from falling from unprotected elevated work platforms and work stations appears to be a most obvious situation which should be covered by a mandatory standard, and subsection (b) of section 77.205 comes close. However, that standard only requires the area to be kept clear of stumbling or slipping hazards and by including it among "travelway" standards, its application becomes all the more confusing. It seems to me that if MSHA desires to provide barriers and other protective devices to prevent personnel from falling off an elevated platform, it should promulgate a precise standard to cover that situation. In the instant case, the inspector attempted to apply a walkway handrail requirement to a factual situation which I believe is not covered by that requirement, and the inspector's acknowledgement that he would accept chains, wires, boards, or partitions as suitable barricade substitutes for the handrail emphasizes my point. Subsection (e) on its face only requires handrails, and what may suit one inspector as suitable for compliance may not suit another. I find that MSHA has not established that the area cited was in fact a walkway within the meaning and intent of subsection (e), and that it has not established a violation of that standard.

Since I have found that MSHA has failed to establish a violation of either subsections (a) or (e) of section 77.205, its motion to amend its pleadings is moot. However, even if I were to grant it, I would limit it to permit MSHA to amend its pleadings to the extent that it wishes to cite subsection (e) rather than (a), but would not permit MSHA to reissue or reconstruct the condition or practice cited by the inspector. In the final analysis, I conclude that MSHA is bound by the conditions or practices described by the inspector on the face of his citation and that MSHA has failed to establish a violation of either subsection (a) or (e). The citation is VACATED.

Docket No. PITT 79-214

Citation No. 229363, 30 CFR 77.400(c)

30 CFR 77.400 provides as follows:

> (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

(b) Overhead belts shall be guarded if the whipping action from a broken line would be hazardous to persons below.

(c) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

(d) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Fact of Violation

The citation (Exh. M-15), and the inspector's testimony (Tr. 157), clearly indicates that the inspector cited subsection (c) of section 77.400 as the alleged violation. However, that subsection requires that guards at conveyor heads be extended for a sufficient distance to prevent a person from reaching behind it and becoming caught between the belt and the pulley. In my view, this subsection is applicable in a situation where a guard is already installed but does not adequately provide protection. The citation here was issued because no guard was provided at the drive head location and contestant does not dispute this fact. Under the circumstances, the inspector should have cited subsection (a) which specifically requires that head pulleys be guarded. However, the fact that he did not does not in my view vitiate the citation. Although each subsection of section 77.400 constitutes a separate requirement and may serve as the basis of separate citations, in this case, contestant is charged with one violation of section 77.400(c), and since the head pulley had no guard at all installed, I believe the facts support a finding of a violation. In addition, contestant does not claim prejudice or surprise, knew what it was charged with, abated it, had an ample opportunity to present its defense, and does not dispute the fact that the head pulley was not guarded. In the circumstances, I find that MSHA has established a violation.

Was the Violation Significant and Substantial

MSHA's support for a finding of a significant and substantial violation rests on its assertion that a worker's limb could become entangled between the belt and metal roller, the existence of pinch points at the entry of the belt over the drive head roller, and the inspector's belief that a worker could reach straight into the drive head or inadvertently fall in and seriously injure himself. Since the belt was operable, MSHA argues that all that was necessary to energize it was to push a button.

Mine Manager DiBiase testified that the belt in question is not frequently used, that one cannot inadvertently trip into the pinch point, and that the belt is locked out with a lock when maintenance is being performed (Tr. 174). He installed guards where he believed they were required, and in the 20 years the plant has been in operation and inspected, no one has

ever advised him that the location cited required a guard. He conceded that the conveyor belt did not have a guard, but indicated that the gear box sprocket to the drive motor on the head pulley was guarded and the inspector agreed this was the case (Tr. 179-180).

Contrary to MSHA's assertion that a person could reach straight into the drive head, the inspector's testimony is that one would have to stand and extend himself into the area, that it was within his extended reach, and that he is 5 feet 11 inches tall (Tr. 162). His testimony reflects that one would have to deliberately reach into the pinch point while performing work there and that one would not inadvertently get caught in the pinch point unless he fell or tripped (Tr. 163-164). In addition, the gravity portion of the inspector's statement prepared at the time the citation issued (Exh. M-17) contains a notation by the inspector that the belt in question was "seldom used" and that the occurrence of the event against which the cited standard is directed was "improbable." He also indicated that one person would be affected if the event occurred or were to occur, and he described the "event" which would have to occur before an accident would have resulted from the violation as "a miner would have to be caught between the belt and the drive pulley." Further, as to the presence of any conditions or circumstances which might have increased the likelihood or severity of that happening, he indicated "none." When asked about these notations, the inspector conceded that the belt was seldom used, that it was not in operation at the time the citation issued, and he justified his significant and substantial finding by the fact that "there was less chance of a man becoming involved, although there was always a chance of a man becoming involved," and the fact that "something could happen if someone inadvertently got their hand caught in the pinch point" (Tr. 160, 170). MSHA's counsel conceded that all citations issued for unguarded belt drive pulleys are not necessarily, and as a general rule, significant and substantial (Tr. 181).

After careful consideration of the inspector's testimony with respect to this citation, I cannot conclude that the violation was significant and substantial. To the contrary, based on the totality of the prevailing conditions at the time the citation issued, I find that the hazard presented by the unguarded conveyor drive head pulley presented a situation which at most exposed miners to a remote or speculative possibility of an accident occurring. The evidence establishes that chain guards were installed at the gear box head pulley drive, the gear sprocket guard was properly guarded, contestant's evidence that the belt is locked out before maintenance is performed is unrebutted, the belt was seldom used and was not in operation, the inspector believed that an injury was improbable, and the probability of someone falling into the precise pinch point, which was at an extended vertical reach approximating 6 feet is remote. Under the circumstances, I conclude that the violation was not significant and substantial.

ORDER

All briefs and proposed findings and conclusions filed by the parties have been considered, and to the extent they are inconsistent with the

foregoing findings and conclusions, they are rejected. In view of my findings and conclusions made herein, IT IS ORDERED THAT:

1. Citation No. 229432, February 22, 1979, issued in Docket No. PITT 79-210, is VACATED.

2. Citation No. 229433, February 22, 1979, issued in Docket No. PITT 79-211, is AFFIRMED as a significant and substantial violation.

3. Citation No. 229434, February 22, 1979, issued in Docket No. PITT 79-212, is AFFIRMED as a significant and substantial violation.

4. Citation No. 229362, February 22, 1979, issued in Docket No. PITT 79-213, is VACATED.

5. Citation No. 229363, February 22, 1979, issued in Docket No. PITT 79-214, is AFFIRMED, but the violation is not significant and substantial.

George A. Koutras
Administrative Law Judge

Distribution:

Bruno A. Muscatello, Esq., Brydon & Stephanian, 228 South Main Street, Butler, PA 16001 (Certified Mail)

Eddie Jenkins, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 29 1980

FMC CORPORATION,		:	Notice of Contest
	Applicant	:	
v.		:	Docket No. WEST 79-419-RM
		:	
SECRETARY OF LABOR,		:	Citation No. 575882;
MINE SAFETY AND HEALTH		:	August 24, 1979
ADMINISTRATION (MSHA),		:	
	Respondent	:	FMC Mine

ORDER APPROVING SETTLEMENT
AND
DISMISSING THE PROCEEDING

On September 24, 1979, FMC Corporation (Applicant) filed a notice of contest in the above-captioned proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (1978). Subsequent thereto, an answer was filed by the Mine Safety and Health Administration (MSHA).

Pursuant to notices of hearing, the hearing convened at 1 p.m., Tuesday, November 6, 1979, in Salt Lake City, Utah, at which time counsel for both parties apprised the Judge that a settlement had been negotiated in the form of an agreement by the Applicant to withdraw its notice of contest in return for certain stipulations.

The agreement was filed subsequent to the hearing in the form of a document styled "stipulation of settlement and joint motion to approve settlement agreement." This document, filed on January 7, 1980, states the following:

> Applicant and respondent, by and through their respective counsel of record, hereby stipulate to the following facts and agree as follows:
>
> 1. On August 24, 1979, an inspector of the Mine Safety and Health Administration ("MSHA"), United States Department of Labor, issued Citation No. 0575882 to FMC Corporation for violation of the Health and Safety Standard contained in 30 C.F.R. §57.4-29 ("Standard 4-29").
>
> 2. MSHA has not and does not intend to interpret Standard 4-29 to require that fire extinguishing equipment be located within arm's length of a welder during all welding

and cutting operations regardless of the fire hazard, or lack thereof, presented by all circumstances at the work site.

3. MSHA intends to use as a guideline for the enforcement of Standard 4-29 that fire extinguishing equipment should be located within 50 feet of a welder during welding and cutting operations unless the familiarity of the welder with fire extinguishing equipment locations or an immediate fire hazard peculiar to the work site warrants a closer placement of the fire extinguishing equipment.

4. Citation No. 0575882 issued by MSHA Inspector William W. Potter on August 24, 1979, was properly issued based upon the facts then known to the inspector. Additional facts, however, have subsequently been made known to MSHA which demonstrate that FMC Corporation was in compliance with the application and guidelines described in Paragraphs 2 and 3 above at the time the Citation was issued. Therefore, it now appears that Citation No. 0575882 should be withdrawn.

5. FMC Corporation hereby agrees to withdraw its Notice of Contest.

6. MSHA hereby agrees to withdraw Citation No. 0575882. Based upon the foregoing Stipulation, the parties jointly move the Commission to approve this Settlement Agreement.

Based on the representations made by counsel for the parties, it appears that a disposition approving the settlement will adequately protect the public interest. Accordingly, the settlement negotiated by the parties is herewith APPROVED and the above-captioned proceeding is herewith DISMISSED.

John F. Cook
Administrative Law Judge

Distribution:

Clayton J. Parr, Esq., and Robert G. Holt, Esq., Martineau, Rooker, Larsen & Kimball, 1800 Beneficial Life Tower, 36 South State Street, Salt Lake City, UT 84111 (Certified Mail)

James L. Abrams, Esq., Henry Mahlman, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Harrison Combs, Esq., United Mine Workers of America, 900-15th Street, NW., Washington, DC 20005 (Certified Mail)

Mr. Albert Battisti, P. O. Box 1315, Rock Springs, NY 82901 (Certified Mail)

UNITED STATES OF AMERICA

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

JAN 29 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BRUBAKER-MANN, INCORPORATED, Respondent.	)	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-193-M ASSESSMENT CONTROL NO. 04-00030-05001 MINE NAME: BRUBAKER-MANN QUARRY AND MILL

DECISION

APPEARANCES:

Linda R. Bytof, Esq. and Marshall P. Salzman, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California,
for the Petitioner,

Jennifer Mann and William J. Mann, of Barstow, California, appearing pro se,
for Respondent.

Before: Judge John J. Morris

Respondent is charged with failing to guard the edge of its elevated access road, with failing to barricade a walkway, and with failing to require the use of a safety belt at its grizzly dump. Petitioner contends these conditions violate standards promulgated under the authority of the Federal Mine Safety and Health Amendments Act of 1977, (30 U.S.C. 801 et seq).

ISSUES

The issues are whether the violations occurred; whether the fines adversely affect respondent; whether "instant fines" are legally permissible and finally, whether the California Occupational Safety and Health Administration (CAL-OSHA) pre-empts the Federal Mine Safety and Health Administration (MSHA).

CITATION 376433

This citation alleges a violation of 30 CFR 56.9-22. [1/]

The uncontroverted evidence on this issue establishes the following facts.

1. Respondent's front end loaders use an elevated access road, 25 to 30 feet wide, to reach a diesel pump (Tr 14-16, R1).

2. There is a 25 foot drop off within 6 feet of the pump (Tr 16-19).

3. The roadway lacks berms or guards on its outer edge (Tr 15).

4. A berm or guard consists of material such as rocks or dirt that could restrain a vehicle from overturning or from rolling off of an elevated roadway (Tr 15).

This citation should be affirmed.

Respondent asserts it abated the condition and that no accidents have occurred on its road. Further, respondent contends the compliance officer admitted being unfamiliar with the safety devices on the truck.

I reject these arguments.

Abatement of a violation is an element to be considered in assessing a penalty under the Act, [2/] but subsequent abatement cannot excuse prior noncompliance.

The mere fact that no accidents have occurred is not dispositive of whether respondent violated the standard. The purpose of a safety regulation is to prevent the first accident, Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir., 1975).

1/ The standard provides as follows:

> 56.9-22 Berms or guards shall be provided on the outer bank of elevated roadways.

2/ Section 110(i), 30 U.S.C. 820(i).

Respondent's argument concerning safety devices on the vehicles is likewise rejected. Guardrails would be a safety feature completely apart from any safety devices on the truck.

CITATION 346434

This citation alleges a violation of 30 CFR 56.11.2. 3/

The evidence is conflicting and I find the following facts on this citation.

5. Respondent's bulk tank is constructed from an old railroad car; it sits 35 feet high (Tr 22-23, R-2).

6. There was no reason for anyone to be on the top of the bulk tank; the operator diverts materials from a guarded railed platform (Tr 54-55).

7. Respondent's president had never seen an employee on top of the tank (Tr 56).

This citation should be vacated. There is sufficient evidence in petitioner's case to infer that workers used the walkway (Tr 27-28), but this directly conflicts with the testimony of the quarry operator. Inasmuch as the operator should be more familiar with his company's work activities, I find his testimony more credible than that of the inspector.

Petitioner's post trial brief argues those facts most favorable to his position. However, as indicated, I have rejected those facts for the reasons stated.

3/ The standard provides as follows:

> 56.11-2 Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

CITATION 376435

This citation alleges a violation of 29 CFR 56.15-5. 4/

The evidence is uncontroverted.

8. A front end loader moves limestone to the grizzly dump (Tr 30, R3, R4).

9. A set of grizzlies are rails 7 to 8 feet long and set 13 1/4 inches apart. The grizzlies are 4 to 5 feet above a conveyor which moves material (Tr 30-31).

10. A worker, without a safety belt and life lines, pushes the rock through the grizzly dump opening. If the pieces are too large, the worker breaks them up with a sledge hammer (Tr 30).

11. If a person fell through the grizzlies, he would fall onto a conveyor moving toward a crusher (Tr 31).

This citation should be vacated. The gravamen of this citation revolves on the single issue of whether a worker could fall through the 13 1/4 inch grizzly opening.

The evidence is in conclusory form. Petitioner's evidence show that a normal size worker could fall through this space (Tr 31, 71); however, respondent shows that the crusher operator could not fall through the opening (Tr 63). The evidence is at best evenly balanced. Accordingly, the petitioner has not sustained his burden of proof.

CIVIL PENALTIES

Respondent contends that harassment, fines, paperwork, and the like, will make it so costly to produce its product that it can no longer remain in business. 5/ Further, respondent contends "instant fines" are unjust.

4/ This standard provides as follows:

> 56.15-5 Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

5/ The proposed penalty for the citation not vacated is $84.

I reject these arguments. Respondent presented no evidence in support of its "harassment" argument. The inspection appears to be of a routine nature to which members of the regulated industry are subjected.

In addition, the imposition of civil penalties in furtherance of the congressional policies is generally constitutional. Frank Irey, Jr., Inc. v. OSHRC 519 F.2d 1200 Cert granted-affirmed 97 S. Ct. 1261, 430 U.S.C. 442.

Respondent alleges the imposition of "instant fines" is unjust. Respondent's views overlook the pertinent provisions of the Federal Mine Safety and Health Amendments Act of 1977. Under Section 110(i) 6/ the Commission has the authority to assess "all civil penalties" provided in the Act. The "instant fines" referred to by the respondent are, in law, merely proposals of MSHA.

CAL-OSHA JURISDICTION

Respondent's contention that the California Occupational Safety and Health Act pre-empts the Mine Safety and Health Act lacks merit.

CAL-OSHA derives its authority from the Federal Occupational Safety and Health Act (29 U.S.C. 651 et seq). That legislation applies generally to employers engaged in a business affecting commerce. 29 U.S.C. 652(5).

The Federal Mine Safety and Health Act derives its authority from the Federal Mine Safety and Health Amendments Act of 1977. 30 U.S.C. 801 et seq. The latter Act defines in part a "coal or other mine" as an area of land from which minerals are extracted. 30 U.S.C. 802(h)(1).

Inasmuch as the Federal Mine Safety Act is more specific as it relates to miners, it is applicable over the more general statute.

6/ 30 U.S.C. 820(i)

FINDINGS OF FACT

I find the facts as outlined in paragraphs 1 through 11 of this decision.

CONCLUSIONS OF LAW

1. Respondent violated 30 CFR 56.9-22 and Citation 376433 should be affirmed (Facts 1, 2, 3, 4).

2. Petitioner failed to prove a violation of 30 CFR 56.11-2 and Citation 346434 should be vacated (Facts 5, 6, 7).

3. Complainant failed to prove a violation of 30 CFR 56.15-5 and Citation 376435 should be vacated (Facts 8, 9, 10, 11).

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. Citation 376433 and the proposed penalty of $84 are affirmed.

2. Citation 346434 and all penalties therefor are vacated.

3. Citation 346435 and all penalties therefor are vacated.

John J. Morris
Judge

Distribution:

Ms. Linda R. Bytof, Esq.
Mr. Marshall P. Salzman, Esq.
Office of the Solicitor
U. S. Department of Labor
Room 10404 Federal Building, Box 36017
450 Golden Gate Avenue
San Francisco, CA 94102

Mr. William J. & Ms. Jennifer Mann
Brubaker-Mann, Incorporated
30984 Soapmine Road
Barstow, CA 92311

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 30 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. BARB 79-219-PM A/O No. 09-00231-05001
v.		
FREEPORT KAOLIN COMPANY,	Respondent	Docket No. BARB 79-280-PM A/O No. 09-00231-05003 Docket No. BARB 79-281-PM A/O No. 09-00231-05004 Docket No. BARB 79-282-PM A/O No. 09-00231-05002 Griffin Mill

DECISION

Appearances: Thomas P. Brown IV, Esq., W. Thomas Truett, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gene B. Strouss, Personnel Manager, Freeport Kaolin Company, Gordon, Georgia; and Alexander E. Wilson III, Esq., and Thomas J. Hughes, Jr., Esq., Jones, Bird & Howell, Atlanta, Georgia, for Respondent.

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (MSHA) filed petitions for assessment of civil penalty against Freeport Kaolin Company (Freeport) in the above-captioned cases pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act). The petition in Docket No. BARB 79-219-PM was filed on January 17, 1979. The petitions in the remaining cases were filed on February 9, 1979. Freeport filed its answer in Docket No. BARB 79-219-PM on February 21, 1979, and filed answers in the remaining cases on March 12, 1979.

An order was issued on June 8, 1979, consolidating the above-captioned cases for hearing and decision. Pursuant to notice of hearing issued on June 5, 1979, a hearing on the merits was conducted on June 21 and June 22, 1979, in Macon, Georgia. Representatives of both parties were present and participated. During the course of the hearing, the representatives of the parties informed the undersigned Administrative Law Judge that a settlement

had been reached as relates to three of the alleged violations in Docket No. BARB 79-281-PM and as relates to five of the alleged violations in Docket No. BARB 79-282-PM. The motion to approve settlement pertaining to those eight alleged violations was filed on October 22, 1979. A decision and order approving the proposed settlements is included herein.

A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing. The original briefs were to be filed simultaneously by both parties on August 22, 1979, with reply briefs due on September 6, 1979. On August 21, 1979, counsel for the Respondent requested a 30-day extension of time from August 22, 1979, for the filing of its brief, which request was granted by an order dated August 22, 1979. Under the revised schedule, both parties were accorded until September 21, 1979, to file their briefs, with reply briefs due on October 5, 1979. MSHA and Freeport filed their posthearing briefs on September 24, 1979, and September 25, 1979, respectively. No reply briefs were filed. The final filing of information necessary to consider approval of settlement in Docket Nos. BARB 79-281-PM and BARB 79-282-PM occurred on December 27, 1979.

II. Violations Charged

A. Docket No. BARB 79-219-PM

Citation No.	Date	30 CFR Standard
96161	July 20, 1978	55.12-16

B. Docket No. BARB 79-280-PM

Citation No.	Date	30 CFR Standard
96162	July 20, 1978	55.14-26
96173	July 25, 1978	55.14-1
96174	July 25, 1978	55.12-30
96179	July 26, 1978	55.12-34
96181	July 26, 1978	55.14-6
96184	July 26, 1978	55.12-30 1/

C. Docket No. BARB 79-281-PM

Citation No.	Date	30 CFR Standard
96191	July 26, 1978	55.14-1
96194	July 26, 1978	55.12-30*
96200	July 26, 1978	55.14-8(b)*
97202	July 27, 1978	55.12-34*
97205	July 27, 1978	55.4-18

1/ During the hearing, the Judge granted MSHA's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 96184, July 26, 1978, 30 CFR 55.12-30 (Tr. 258).

D. Docket No. BARB 79-282-PM

Citation No.	Date	30 CFR Standard
96145	July 18, 1978	55.11-2*
96149	July 18, 1978	55.14-1*
96398	July 18, 1978	55.20-3*
96399	July 18, 1978	55.20-3
96156	July 19, 1978	55.14-1*
96158	July 19, 1978	55.14-1*
96159	July 20, 1978	55.17-1
96160	July 20, 1978	55.17-1

[NOTE: Citations accompanied by an asterisk are encompassed in the October 22, 1979, motion to approve settlement.]

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, the parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

MSHA called as its witnesses MSHA inspector Spencer Lindbeck; MSHA supervisory inspector Reino Mattson; and Bruce Dial, an MSHA employee who accompanied Inspector Lindbeck on his July 1978, inspection of Freeport as a trainee.

Freeport called as its witnesses Ronnie D. Amerson, a mechanic's helper for Freeport at the time of the hearing, and who had been the Nos. 8 and 9 dryer operator on July 20, 1978; Paul H. Bacon, vice president and general manager of Freeport at the time of the hearing, and manager of production and shipping in July 1978; William Wharton, Freeport's supervisor of safety and health; Ray Crumbley, Freeport's manager of production and shipping at the time of the hearing, and production superintendent of section No. 1 in July 1978; L. E. Scandlyn, Freeport's maintenance superintendent; and James V. Turner, Jr., the president of Welding Supply and Service Company, Inc.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

M-1 is a computer printout prepared by the Office of Assessments listing the history of previous violations for which Freeport had paid assessments beginning July 27, 1976, and ending July 27, 1978.

M-2 is a computer printout prepared by the Office of Assessments listing the history of previous violations for which Freeport had paid assessments beginning July 20, 1976, and ending July 20, 1978. 2/

M-3, page 1, is a copy of Citation No. 96161, July 20, 1978, 30 CFR 55.12-16.

M-3, page 2, is a copy of the inspector's statement pertaining to Citation No. 96161.

M-4, page 1, is a copy of Citation No. 96173, July 25, 1978, 30 CFR 55.14-1.

M-4, page 2, is a copy of the termination of Citation No. 96173.

M-4, page 3, is a copy of the inspector's statement pertaining to Citation No. 96173.

M-5, page 1, is a copy of Citation No. 96162, July 20, 1978, 30 CFR 55.14-26.

M-5, page 2, is a copy of the termination of Citation No. 96162.

M-5, page 3, is a copy of a modification pertaining to Citation No. 96162.

M-5, page 4, is a copy of the inspector's statement pertaining to Citation No. 96162.

M-5, page 5, is a copy of a modification of M-5, page 3.

M-6, page 1, is a copy of Citation No. 96174, July 25, 1978, 30 CFR 55.12-30.

M-6, page 2, is a copy of the termination of Citation No. 96174.

M-6, page 3, is a copy of the inspector's statement pertaining to Citation No. 96174.

M-7, page 1, is a copy of Citation No. 96179, July 26, 1978, 30 CFR 55.12-34.

M-7, page 2, is a copy of the termination of Citation No. 96179.

2/ All entries on Exhibit M-2 also appear on Exhibit M-1. All of the violations recorded thereon occurred in July of 1978. Accordingly, the exhibits confirm the parties' stipulation that no evidence exists establishing a history of prior violations.

M-7, page 3, is a copy of the inspector's statement pertaining to Citation No. 96179.

M-8, page 1, is a copy of Citation No. 96181, July 26, 1978, 30 CFR 55.14-1.

M-8, page 2, is a copy of the termination of Citation No. 96181.

M-8, page 3, is a copy of the inspector's statement pertaining to Citation No. 96181.

M-9, page 1, is a copy of Citation No. 96184, July 26, 1978, 30 CFR 55.12-30.

M-9, page 2, is a copy of the termination of Citation No. 96184.

M-9, page 3, is a copy of the inspector's statement pertaining to Citation No. 96184.

M-10, page 1, is a copy of Citation No. 96191, July 26, 1978, 30 CFR 55.14-1.

M-10, page 2, is a copy of the termination of Citation No. 96191.

M-10, page 3, is a copy of the inspector's statement pertaining to Citation No. 96191.

M-11, page 1, is a copy of Citation No. 97205, July 27, 1978, 30 CFR 55.4-18.

M-11, page 2, is a copy of the termination of Citation No. 97205.

M-11, page 3, is a copy of the inspector's statement pertaining to Citation No. 97205.

M-12, page 1, is a copy of Citation No. 96399, July 18, 1978, 30 CFR 55.20-3.

M-12, page 2, is a copy of the termination of Citation No. 96399.

M-12, page 3, is a copy of a modification of M-12, page 2.

M-12, page 4, is a modification of M-12, page 3.

M-12, page 5, is a copy of the inspector's statement pertaining to Citation No. 96399.

M-13, page 1, is a copy of Citation No. 96159, July 20, 1978, 30 CFR 55.17-1.

M-13, page 2, is a copy of the termination of Citation No. 96159.

M-13, page 3, is a copy of the inspector's statement pertaining to Citation No. 96159.

M-14, page 1, is a copy of Citation No. 96160, July 20, 1978, 30 CFR 55.17-1.

M-14, page 2, is a copy of the termination of Citation No. 96160.

M-14, page 3, is a copy of the inspector's statement pertaining to Citation No. 96160.

2. Freeport introduced the following exhibits into evidence:

O-1 is a drawing of a drum dryer.

O-2 is a letter concerning lock-out procedures established for Freeport's production and shipping department.

O-3 is a photograph.

O-4 is a photograph.

O-5 is an engineering drawing.

O-6 is a photograph.

O-7 is a photograph.

O-8 is a photograph.

O-9 is a booklet entitled "Welding, Cutting & Heating Guide."

O-10 is a gauge.

O-11 is a photograph.

O-12 is a photograph.

O-13 is a photograph.

3. X-1 is a drawing.

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.

1. Between July 17, 1978, and July 27, 1978, the Respondent, Freeport Kaolin Company, was the operator of a kaolin mine in the State of Georgia known as the Griffin Mine, and with accompanying mills known as the Griffin Mill and the Savannah Mill. In addition, Freeport operates a research lab at the same location (Tr. 4).

2. Between July 17, 1978, and July 27, 1978, Freeport was subject to the provisions of the Federal Mine Safety and Health Act of 1977 with respect to said operations (Tr. 4).

3. Freeport is a large operator. During 1978, the size of said operation was rated at 909,699 man-hours (Tr. 4).

4. There is no evidence of a history of prior violations (Tr. 5).

5. Any penalty that may be assessed may not affect the Respondent's ability to continue in business (Tr. 6).

B. Opinion and Findings of Fact

Between July 18, 1978, and July 27, 1978, MSHA inspector Spencer Lindbeck conducted an inspection of the Freeport Kaolin Company (Tr. 9-10). The subject citations were issued during the course of the inspection (Exhs. M-3, p. 1; M-4, p. 1; M-5, p. 1; M-6, p. 1; M-7, p. 1; M-8, p. 1; M-9, p. 1; M-10, p. 1; M-11, p. 1; M-12, p. 1; M-13, p. 1; M-14, p. 1). The various citations are addressed individually, herein.

I. Docket No. BARB 79-219-PM

Citation No. 96161, July 20, 1978, 30 CFR 55.12-16

Inspector Lindbeck issued Citation No. 96161 on July 20, 1978, citing Freeport for a violation of the mandatory safety standard codified at 30 CFR 55.12-16, when he observed Mr. Ronnie D. Amerson, an employee of Freeport, cleaning the screw conveyor on the No. 8 drum dryer without having the controls locked out (Exh. M-3, p. 1; Tr. 11, 19). The inspector recorded in the body of the citation that Mr. Amerson had the door on the screw conveyor open with his arm inside cleaning clay from the screw (Exh. M-3, p. 1).

The machine in question was a double drum Buffalo Vac atmospheric drum dryer employed to process kaolin by a technique known as thermal evaporation

(Tr. 12-13, 42). Thermal evaporation was accomplished through the use of two rotating cast iron drums, each approximately 3-1/2 feet in diameter and approximately 10 feet in length, heated by steam to a temperature of approximately 300 degrees Fahrenheit (Tr. 42, 45). The sequential steps employed in processing kaolin with the drum dryers is set forth as follows: Clay slurry, or slip, consisting of approximately 55 to 60 percent solid material, is introduced into a pan located beneath the two rotating drums (Tr. 42). Two splash shafts throw clay slurry up onto the underside of the drums (Tr. 21, 42). The heated drums rotate, removing the moisture from the mixture, and eventually reach a point at which a doctor blade, or drum blade, removes the dried product from the drums (Tr. 42). The dry product falls into a trough where the screw conveyor mentioned in the citation is located (Exh. O-1; Tr. 21-22, 42). The door mentioned in the citation was a hinged door, described as a drop-out chute, covering a 12-inch by 16-inch opening in the trough (Tr. 72, 76; Exhs. O-1, O-3, O-4).

Mr. Amerson testified that he had changed the blades on the drum dryer approximately 30 minutes before Inspector Lindbeck arrived (Tr. 28-29), but admitted that he had not locked out the machine while changing the blades (Tr. 30). The machine was not locked out when the inspector arrived and observed Mr. Amerson working on the drum dryer, although the magnetic switch, located approximately 25 feet from where Mr. Amerson was working, was off (Tr. 11, 18, 29, 34, 76-77). The evidence clearly establishes that Mr. Amerson had his hand inside the screw conveyor (Tr. 11, 13, 17, 92), and Freeport's own vice president and general manager testified that under the company's lock-out procedure (Exh. O-2) the machine should have been locked out if a worker had to place his hand inside the screw conveyor (Tr. 69).

Freeport advances two theories contending that 30 CFR 55.12-16 is inapplicable to the facts presented. In its answer to the petition for assessment of civil penalty, Freeport contends that the regulation deals with working on "electrical equipment." Freeport characterizes the equipment involved in the instant proceeding as "mechanical equipment," and not "electrical equipment." Accordingly, Freeport argues, the machine operator was not performing work on any kind of electrical equipment within the meaning of the cited regulation. In its proposed findings of fact and conclusions of law, Freeport argues that 30 CFR 55.14-29 is the regulation applicable to the facts presented. According to Freeport, 30 CFR 55.14-29 permits the machinery to be in motion when such motion is necessary to make adjustments during repair and maintenance. Freeport argues that the evidence convincingly demonstrated that machinery motion was absolutely necessary during maintenance and adjustment of the drum dryer (Respondent's Proposed Findings of Fact and Conclusions of Law, p. 4).

30 CFR 55.12-16, the provision in the Code of Federal Regulations cited by the inspector, provides:

> Mandatory. Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken

which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

30 CFR 55.14-29, the regulation upon which Freeport relies, provides: "Mandatory. Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

I am unable to agree with either theory advanced by Freeport. The purported distinction between "electrical equipment" and "mechanical equipment," as set forth in Freeport's answer to the petition for assessment of civil penalty, does not have a bearing on the issue of whether the cited condition constitutes a violation of 30 CFR 55.12-16. The regulation, insofar as it applies to the facts presented in the instant case, requires the use of lock-out devices or other measures to prevent electrically-powered equipment from being energized without the knowledge of the individuals performing mechanical work on such equipment. The reference is to "electrically-powered equipment" and to "mechanical" work done on it, a reference that fails to support the "electrical/mechanical" distinction advanced by Freeport. The evidence in the record, and the inferences drawn therefrom, establishes that the No. 8 drum dryer was electrically-powered equipment within the meaning of the cited regulation (Tr. 11-12, 13-14, 26, 29-30, 34).

Freeport's reliance on 30 CFR 55.14-29 is misplaced. 3/ The testimony germane to this issue reveals that the drum dryer had to be in operation in order to adjust the blade subsequent to the blade's replacement (Tr. 23-24, 27, 43-45, 56), and that during this operation both the drums and the screw conveyors are in motion (Tr. 42-43). Although the inspector indicated to Mr. Amerson that the machine did not have to be locked out while adjusting the blade (Tr. 29-30, 37), the evidence in the record reveals that a lock-out procedure should have been observed at other stages of the blade-changing operation. According to Mr. Crumbley, the Respondent's manager of

3/ As relates to the reference to 30 CFR 55.14-29 it should also be pointed out that the Respondent in its own safety lock-out procedure (Exh. O-2) makes reference to 30 CFR 57.12-16 which regulation relates to electrical equipment as does 30 CFR 55.12-16, which is the regulation involved herein. It should also be pointed out that 30 CFR 55.12-16 and 30 CFR 57.12-16 were changed such that the first sentence thereof, on the date of the violation herein, read: "Electrically powered equipment shall be deenergized before mechanical work is done on such equipment" (emphasis added); whereas prior thereto the first sentence read: "Electrical equipment shall be deenergized before work is done on such equipment." The changes were reported in the October 31, 1977, issue of the Federal Register. 42 Fed. Reg. 57040, 57043 (October 31, 1977).

production and shipping, the machine should have been locked out while the machine operator was changing the blade (Tr. 83), a safety precaution which Mr. Amerson had failed to observe (Tr. 30).

Mr. Amerson and Mr. Bacon testified that rust develops on the drums during the blade-changing procedure, rust that would contaminate the product if permitted to reach the product bin (Tr. 22, 45). Since the clay produced while adjusting the blade contains contaminants, it is necessary that the door on the screw conveyor dropout chute be open while the screw conveyor is running in order to prevent the contaminated material from reaching the product bin (Tr. 22-23, 45). The testimony of Mr. Bacon indicates that the door is somewhat larger than the dropout chute opening. Accordingly, a buildup of clay on the door will prevent obtaining a tight fit when the door is closed (Tr. 45).

Mr. Amerson was not adjusting the blade when the inspector arrived at the No. 8 drum dryer. He was waiting for feed, and the blade adjustment was not completed (Tr. 30). Neither the drum nor the screw conveyor was running at the time (Tr. 30, 32-33, 76). Mr. Amerson testified that he was in the process of cleaning the door on the screw conveyor when the inspector arrived (Tr. 25, 32-33; Exhs. O-1, O-3). He indicated that the next step in the operation would have been to turn on the machine, finish adjusting the blade, and obtain a sample of the material inside the screw conveyor in order to check the moisture (Tr. 34-35). Mr. Amerson indicated that it was not necessary to place his hand inside the screw conveyor since the sample material would simply fall through the opening (Tr. 35-36). The next sequential step would have been to clean and close the door (Tr. 36).

Under the procedure instituted subsequent to the issuance of the citation, the cleaning of the door occurred with the machine locked out (Tr. 38-39). According to Mr. Amerson, this procedure did not produce a satisfactory product (Tr. 39), a statement confirmed by Mr. Bacon's assertion that the screw conveyor must be in operation in order to clean the flap and maintain a good product (Tr. 58).

Although it may be true that machine motion was necessary during certain stages of the blade adjustment process, the evidence establishes that machine motion was not required at the point in time when the inspector observed the violation. As noted above, Mr. Amerson was cleaning the flap and the machine was not in motion. Mr. Bacon confirmed that machine motion was not necessary for the performance of these activities (Tr. 64-65). At one point in his testimony, Mr. Bacon indicated that shutting down the machine in order to close the dropout chute door would permit the heated drums to expand sufficiently to ride against the blade holders (Tr. 57-58). However, he indicated that this problem would not occur with neither the drum nor the conveyor turning and no product being processed (Tr. 61).

Assuming for purposes of argument that 30 CFR 55.14-29 applies to the facts presented, the above-noted considerations reveal that the machine should have been locked out both while changing the blade and while the

machine operator was engaged in the door-cleaning activities observed by the inspector. Machine motion was not necessary for the performance of these steps.

Accordingly, I conclude that a violation of 30 CFR 55.12-16 has been established by a preponderance of the evidence in that the No. 8 drum dryer was not locked out while the operator was performing mechanical work on the machine.

Negligence of the Operator

Exhibit O-1, dated May 31, 1977, mandates a lock-out procedure for the No. 8 drum dryer. The existence of this document establishes not only that Freeport was aware of the importance of locking out electrically-operated equipment prior to performing work on the equipment, but also that Freeport was aware of this for more than 1 year prior to the issuance of the citation.

The evidence in the record indicates that the company's lock-out procedure had not been effectively communicated to the employees. Inspector Lindbeck testified that when the violation was observed, he querried Mr. Amerson as to the lock-out procedure. Not only did Mr. Amerson have no idea of what the lock-out procedures were, but Mr. Scandlyn, the maintenance superintendent, and Mr. Wharton, the supervisor of safety and health, had to show Mr. Amerson how to use the lock-out device after one had been obtained (Tr. 12). The inspector's testimony was confirmed by Mr. Amerson, who testified that he was not told that he was required to lock out the machine while changing the blades until the day the citation was issued (Tr. 30-31). In fact, Mr. Crumbley opined that it was unnecessary to use a lock-out and that Mr. Amerson was following the normal procedure for the piece of equipment involved (Tr. 77). Mr. Bacon testified that the failure to lock out the machine was a common practice, stating that no danger was involved since the workman would be accustomed to working near moving parts (Tr. 62-63).

Although Mr. Bacon stated that the lock-out procedure was posted on the bulletin boards and was covered with the section foremen and the section superintendents (Tr. 46), he could not state affirmatively that each employee received a copy (Tr. 63). He testified that the foremen were supposed to distribute them, but noted that the company did not have them signed and that no meeting was held (Tr. 63). Although Mr. Amerson had seen a copy of the letter, he testified that he was left to interpret it on his own (Tr. 104-105).

In light of these considerations, I conclude that Freeport demonstrated gross negligence.

Gravity of the Violation

As noted previously, Mr. Amerson's hand was inside the screw conveyor (Tr. 11, 13, 17, 92). Although the screw conveyor was not in operation at the time (Tr. 33, 76), the evidence establishes that Mr. Amerson was exposed

to a danger of serious injury or death. Inspector Lindbeck testified that a man could lose his life or an arm in the screw conveyor in the event the machine was started inadvertently (Tr. 13-15). Mr. Bacon conceded that an individual would sustain an injury to the portion of his body inside the screw conveyor if the machine was turned on (Tr. 49). The evidence clearly showed that the screw conveyor would be in motion if the machine started. Even under Mr. Crumbley's definition of "dangerous," Mr. Amerson was in a hazardous situation. According to Mr. Crumbley, "dangerous" means "near moving parts" (Tr. 81). In such cases, the machine should be locked out (Tr. 81).

Accordingly, I conclude that the violation was extremely serious.

Good Faith in Attempting Rapid Abatement

Abatement was achieved by providing a lock-out device, and abatement was completed in approximately 5 minutes (Exh. M-3, p. 1; Tr. 14-15). Accordingly, In conclude that Freeport demonstrated good faith in attempting rapid abatement.

II. Docket No. BARB 79-280-PM

Citation No. 96162, July 20, 1978, 30 CFR 55.14-26

Inspector Lindbeck issued Citation No. 96162 citing the following condition as a violation of 30 CFR 55.14-26: "The glass coverings are broken on the oxygen and acetylene guages [sic] on the service truck at the selas building" (Exh. M-5, p. 1; Tr. 113).

The evidence reveals that two gauges were present on the oxygen cylinder and two gauges were present on the acetylene cylinder. One gauge on each cylinder was a high pressure gauge, monitoring the pressure inside the cylinder (Tr. 288). These high pressure gauges indicate the contents of the cylinders (Tr. 305). The remaining gauge on each cylinder was a low pressure gauge used to indicate the pressure on the hose and torch (Tr. 305).

At the time of the inspection, the glass was broken out and missing from the high and low pressure gauges on both the oxygen and acetylene cylinders (Tr. 301). Inspector Lindbeck testified that the indicator needle was bent on one of the gauges on the oxygen cylinder. He believed that the bent needle was on the low pressure gauge (Tr. 301). He did not recall the condition of the needles on the acetylene tank gauges (Tr. 301-302).

The regulation in question, 30 CFR 55.14-26, is a mandatory safety standard which provides: "Unsafe equipment or machinery shall be removed from service immediately." The question presented is whether MSHA has established a violation of the regulation by a preponderance of the evidence. 29 CFR 2700.48 (1978) (interim procedural rules). For the reasons set forth below, I answer this question in the negative.

In order to establish a violation of 30 CFR 55.14-26, MSHA must affirmatively establish that the welding equipment was unsafe and that it had not been removed from service immediately.

The threshold question is whether MSHA has established that the welding equipment was unsafe. In this regard, it is important to bear in mind that the low pressure gauges and the high pressure gauges perform different functions, as set forth above, and that each type of gauge presents separate considerations from the standpoint of safety.

Inspector Lindbeck, at one point in his testimony, indicated that the absence of the glass coverings and the presence of the bent indicator needle rendered the gauges defective in that their absence interfered with the operator's ability to obtain accurate pressure readings (Tr. 118-119, 128-130, 132-133). The testimony of Inspector Lindbeck further reveals his opinion that the inability to obtain accurate pressure readings renders the welding equipment unsafe by presenting an explosion hazard (Tr. 137). According to Inspector Lindbeck, if the welding equipment operator is obtaining a different pressure than the one indicated by the gauges, an explosion can occur when the welder lights the cutting torch (Tr. 138).

Both Inspector Lindbeck and Inspector Mattson indicated that safe welding procedure envisions the welder adjusting this oxygen/acetylene mixture with reference to the pressure gauges, a procedure that requires him to stand near the regulator (Tr. 139, 262-263, 284-290). The photograph on page 22 of Exhibit O-9 reveals that the regulator is attached to the tank. According to Mr. Scandlyn, the regulator, not the gauge, is what controls the flow of gas from the tank (Tr. 197). According to Inspector Mattson, a welder adjusts his pressure for both oxygen and acetylene by monitoring the gauges while turning the valve controls on the respective regulators (Tr. 284-290).

Inspector Mattson associated two safety hazards with the defective gauges. First, it was his position that too much pressure in the lines running from the oxygen tank and the acetylene tank to the torch can cause a hose to rupture since the hoses are designed to withstand pressures less than the maximum pressure that can pass through the regulator (Tr. 287-290). Second, improperly functioning gauges induce welders to take shortcuts having an adverse effect on safety. According to Inspector Mattson, a welder should "back up" the regulator by turning it counterclockwise upon completion of his welding to prevent a sudden burst of pressure from rupturing the diaphragm when the tank valve is subsequently opened (Tr. 262-263, 270-271, 290-295). The absence of properly-functioning gauges induces workers not to "back up" the regulators. The inspector stated that rupturing the diaphragm can result in an explosion occurring at the gauge (Tr. 290-291).

Mr. James V. Turner, an individual with 26 years of experience in welding (Tr. 303) and the president of the Welding Supply and Service Company, Inc., the supplier of Freeport's welding equipment, testified on behalf of Freeport. His description of the equipment and its functioning is germane to the issue of safety raised in the instant proceeding. According to

Mr. Turner, the regulator has a safety device that opens and vents the gases should the pressure exceed permissible levels inside the regulator (Tr. 309, 339). This venting system exists to prevent explosions (Tr. 340). The type of regulators used by Freeport are 175 pounds. The hoses are 300 psi test hoses. Accordingly, the regulator will not build up sufficient pressure to burst the hose (Tr. 309, 311). The safety valve is designed to activate if a sudden burst of pressure enters the regulator (Tr. 309-310). According to Mr. Turner, the regulator will not pass enough pressure to ignite the acetylene because 175 pounds is the maximum pressure that the adjusting screw will allow to enter the oxygen hose (Tr. 326). It is recommended that acetylene not be used at a pressure exceeding 15 pounds (Tr. 326). A gauge is not needed to prevent the equipment operator from exceeding 15 pounds because the spring inside the acetylene regulator prevents exceeding this pressure (Tr. 326-327). No evidence was presented establishing that the spring was defective.

Mr. Turner conceded that if the diaphgram ruptured, the 2,200 pounds of pressure in the tank could escape through the regulator, notwithstanding the fact that the regulator is rated at 175 pounds. However, he indicated that this gas would escape through the vents, not the hoses, and further indicated that an explosion hazard was not present (Tr. 340-341).

I am unable to conclude that a preponderance of the evidence establishes that the gauges in question were unsafe. The testimony addressing the possibility of rupturing one of the hoses clearly refers to the low pressure gauge, since that type of gauge monitored the pressure in the hoses.

As relates to rupturing the diaphgram, the crucial consideration is the failure of a welder to "back up" the regulator upon completion of his welding operations, not the proper functioning of the pressure gauge per se. I am not persuaded that an accurate reading from this gauge is necessary from a safety standpoint. As noted by Inspector Mattson, the gas released from the pressure tanks into the regulator will "shoot fast" irrespective of how slowly the tank valve is opened (Tr. 294-295).

MSHA's witnesses sought to establish that a properly functioning low pressure gauge is necessary to avoid rupturing a hose at a given point in the welding operation. The Government has failed to show that the absence of the glass on both guages and the bent needle on the oxygen tank gauge rendered the low pressure gauges unsafe per se. The most persuasive testimony by the Respondent's well qualified expert totally rebutted MSHA's claim that the condition was unsafe.

His experience and knowledge was much greater than that of MSHA's witnesses. Much greater weight must be accorded his opinions as to the safety issue.

In light of these consideration, it cannot be found that a violation of 30 CFR 55.14-26 has been established by a preponderance of the evidence.

Citation No. 96173, July 25, 1978, 30 CFR 55.14-1

This citation was issued because covers were not provided on the screw conveyor at the spray dryer bagging building (Exh. M-4, p. 1; Tr. 140). The missing cover was approximately 6 feet long and 14 inches in width (Tr. 141), and was lying on the floor beside the screw conveyor (Tr. 143). The screw conveyor was open at the time (Tr. 141). Although none of the witnesses affirmatively stated that the screw conveyor was in operation, the fact that the inspection party heard an air leak emanating from the back of the machine renders it more probable than not that it was in operation (Tr. 143).

Mr. Scandlyn agreed that the cover was, in fact, off the conveyor (Tr. 206). His testimony further reveals that the "floor" mentioned by the inspector was a maintenance walkway or maintenance platform 12 to 15 feet above the ground (Tr. 202-203; Exh. O-5). Access to the platform was provided by a ladder located inside the building and by a stairway located outside the building (Tr. 211). Although it was not a normal operating area in the sense that an employee would not go there to perform a routine function such as bagging clay (Tr. 202), employees would be in the area in the event of a breakdown or to perform some other maintenance function (Tr. 202). A man's arm could be tangled up in the open screw conveyor (Tr. 142).

The mandatory safety standard embodied in 30 CFR 55.14-1 states that: "Gears; sprockets; chains; * * * and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The location of the screw conveyor, coupled with the fact that employees would be in the area to perform maintenance work on occasion, indicates that the exposed moving screw conveyor should have been covered. Accordingly, I conclude that a violation of 30 CFR 55.14-1 has been established by a preponderance of the evidence.

Negligence of the Operator

Mr. Scandlyn believed that a malfunction in the vent indicator, or bin indicator, in the bagging bin caused the clay to pile up in the screw conveyor and force the cover off (Tr. 203-204, 208). A bin indicator is a device used to measure the flow into a particular bin, cutting off a line when the bin is full (Tr. 206).

Mr. Scandlyn testified that he remembered "a report of a problem with the bin indicator at the beginning of the shift," i.e., at approximately 8 a.m. (Tr. 206-207). The citation in question was issued at approximately 10 a.m. (Tr. 203; Exh. M-4, p. 1).

According to Mr. Scandlyn, once it has been discovered that the bin indicator is not working, the normal procedure is to request the electrical foreman to check it and to discover and correct the problem (Tr. 207). It is routine to check the entire line to determine whether the malfunction

of the bin indicator could have caused flow problems down the line, an inspection encompassing the subject screw conveyor (Tr. 207). However, Mr. Scandlyn could not state that it had been checked (Tr. 207-208).

Based on the foregoing, I conclude that if this routine practice had been followed, it is more probable than not that Freeport knew or should have known of the condition. The 2-hour time period between 8 and 10 a.m. afforded sufficient time to discover the problem.

Accordingly, I conclude that Freeport demonstrated ordinary negligence.

Gravity of the Violation

Inspector Lindbeck testified that one employee was in the area when the violation was observed (Tr. 141-142). Mr. Scandlyn indicated uncertainty as to the identity of this employee. He believed that a foreman had been summoned to the area, and thought that the foreman had been the employee (Tr. 204). A maintenance man would pass by the area. Accordingly, I conclude that one employee would be exposed to the hazard.

A man could have been injured by getting his arm tangled in the machinery or by getting his clothing caught in it (Tr. 142). Although the inspector testified that an occurrence could prove fatal (Tr. 142), I believe the statement contained in the inspector's statement (Exh. M-4, p. 3), which was made closer in time to the actual occurrence, to be more probative. It indicates that the contemplated injury could reasonably be expected to be permanently disabling, and that an occurrence was probable.

Accordingly, I conclude that the violation was serious.

Good Faith in Attempting Rapid Abatement

The violation was abated by Mr. Scandlyn. He picked up the cover lying on the floor and placed it on the screw conveyor (Tr. 142). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

Citation No. 96174, July 25, 1978, 30 CFR 55.12-30

This citation was issued when the inspector observed that: "The conduit is broken loose at the damper valve at the No. 2 dryer" (Exh. M-6, p. 1). According to Mr. Scandlyn, the conduit is not a rigid pipe, but a spiral-wound rubber or plastic-coated conduit providing a flexible connection (Tr. 220). Inspector Lindbeck indicated that the conduit was composed of metal (Tr. 146). The break was caused by deterioration of the conduit (Tr. 220).

The inspector testified that he did not notice any break in the wiring's insulation (Tr. 150). Mr. Scandlyn testified that the power conductor was

visible, but that it was still insulated (Tr. 220). The inspector was uncertain of the precise voltage, but testified that it was either 110 or 120 volts (Tr. 147). The power conductor was energized (Tr. 156).

According to the inspector, vibration could cause the insulation to rub against the conduit and wear through, thus posing an electrocution hazard (Tr. 147, 154-155).

The question presented is whether this condition constitutes a violation of 30 CFR 55.12-30, which provides: "Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized." (Emphasis added.) Although the condition was potentially dangerous, this fact, standing alone, is insufficient to establish a violation of the mandatory safety standard. I interpret the regulation as requiring MSHA to prove knowledge of the condition before a violation can be found to have occurred, as demonstrated by the regulation's use of the word "found." In essence, the regulation proscribes the knowing use of electrical equipment or wiring once a potentially dangerous condition is discovered. There is no indication in the record that Freeport had knowledge of this condition prior to the issuance of the citation.

Accordingly, I conclude that a violation has not been established by a preponderance of the evidence.

Citation No. 96179, July 26, 1978, 30 CFR 55.12-34

This citation was issued when Inspector Lindbeck observed that: "There are several lights along the upper walkway that are not provided with guards" (Exh. M-7, p. 1). The inspector did not recall the number of unguarded lights (Tr. 157). The walkway in question, located at the Savannah Plant (Exh. M-7, p. 1), was above the bin storage area (Tr. 157) and served as an accessway for maintenance personnel and operators (Tr. 222). The inspector did not recall the dimensions of the walkway in terms of width and height, but opined that the height was less than 6 feet in some places because he and Mr. Scandlyn "had to bend over to walk through it." Mr. Bacon testified that all of the lights are probably within striking distance of a person wearing a hardhat (Tr. 157; Exh. O-7; Tr. 227). The testimony of Inspector Lindbeck and Mr. Bacon establish the existence of a shock or burn hazard (Tr. 158, 229).

30 CFR 55.12-34, the cited mandatory safety standard, provides that: "Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded." It is clear that the bulbs in the walkway area were located in such a manner as to present a shock or burn hazard. They should have been guarded in order to comply with the regulation's requirements. The fact that the evidence failed to establish the precise number of unguarded bulbs does not prevent finding a violation. One unguarded bulb would have been sufficient for this purpose.

Accordingly, I conclude that a violation of 30 CFR 55.12-34 has been established by a preponderance of the evidence.

Negligence of the Operator

Mr. Bacon testified that company practice, in recent years, had been to provide guards for lights located in "normal walkways" (Tr. 224). The fact that Mr. Bacon did not deem the cited area a "normal walkway" (Tr. 223) is not controlling. He stated that it is used by maintenance personnel and operators of equipment (Tr. 222). The fact that the company practice of providing guards existed indicates that the company was aware of the need to provide guards in areas open to access by its employees. Accordingly, I conclude that Freeport demonstrated a high degree of ordinary negligence.

Gravity of the Violation

One employee was observed in the area, and he was wearing a hardhat (Tr. 158, 160). The inspector testified that an employee could sustain an electric shock causing a fall and could be exposed to an electrocution hazard as a result of breaking a bulb (Tr. 158). The fact that the walkway was less than 6 feet in some places would aggravate the hazard (Tr. 157). The area was dry (Tr. 161). Additionally, the testimony of Mr. Bacon indicates that a burn hazard was present and that employees carried metal parts for screw conveyors through the area (Tr. 229-230).

Although the inspector's testimony implies that an occurrence could prove fatal, the entry contained in the inspector's statement indicates that the contemplated injury could reasonably be expected to be lost workdays or restricted duty (Exh. M-7, p. 3). I am inclined to accord greater probative value to the entry in the inspector's statement since it was made at a point in time closer to the observation of the condition than was his testimony.

An occurrence was classified as "probable" (Tr. 158; Exh. M-7, p. 3).

Based on the foregoing, I conclude that the violation was moderately serious.

Good Faith in Attempting Rapid Abatement

The inspector's testimony implies that the violation was abated expeditiously (Tr. 159). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

Citation No. 96181, July 26, 1978, 30 CFR 55.14-6 4/

This citation was issued when Inspector Lindbeck observed a loose guard over the metal saw's drive belts (Exh. M-8, p. 1; Tr. 161). The saw

4/ The citation was written alleging a violation of 30 CFR 55.14-1. However, during the course of the hearing, the Judge granted MSHA's motion to amend the petition for assessment of civil penalty as relates to Citation No. 96181 to charge a violation of 30 CFR 55.14-6 instead of 30 CFR 55.14-1.

in question was located in the auto repair shop (Tr. 161-162). The best available evidence indicates that the piece of equipment in question was a continuous motorized hacksaw used for cutting steel pipes and steel bars (Exh. O-8; Tr. 232, 235-236). Mr. Scandlyn's testimony confirms the presence of the loose guard (Tr. 249). Although the equipment was not in operation when the inspector observed the loose guard (Tr. 347), his testimony reveals that it is more probable than not that an employee was using the equipment immediately prior to the issuance of the citation (Tr. 162, 166, 352).

30 CFR 55.14-6, the applicable mandatory safety standard, provides that: "[e]xcept when testing the machinery, guards shall be securely in place while machinery is being operated." No evidence was presented by Freeport rebutting the inspector's testimony that the equipment was in operation immediately prior to the issuance of the citation, and no evidence was presented by Freeport indicating that the employee in question was merely testing the equipment.

Accordingly, in view of the foregoing, I conclude that a violation of 30 CFR 55.14-6 has been established by a preponderance of the evidence.

Negligence of the Operator

The maintenance supervisor was present in the shop when the inspector arrived on the scene (Tr. 162), but the inspector admitted that he did not know whether the supervisor knew of the condition (Tr. 166). The record contains no evidence indicating how long the condition had existed (see, e.g., Tr. 162).

The fact that a supervisory employee was present in the shop indicates that Freeport should have known of the violation. Freeport demonstrated ordinary negligence in connection with the violation.

Gravity of the Violation

The area was a normal work area (Tr. 163). The hazard posed by the violation was that the guard could make contact with the drive belts causing them to break and strike an employee (Exh. M-8, p. 3). The inspector classified the probability of occurrence as "slightly remote" (Tr. 163). One employee was exposed to the hazard (Exh. M-8, p. 3).

Accordingly, I conclude that moderate gravity was associated with the violation.

Good Faith in Attemtping Rapid Abatement

The condition was corrected immediately (Tr. 236). In fact, the condition was corrected while the inspector was present (Tr. 166). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

III. Docket No. BARB 79-281-PM

Citation No. 96191, July 26, 1978, 30 CFR 55.14-1

This citation was issued when the inspector observed a guard missing from the end shaft on the No. 4 calciner (Tr. 358; Exh. M-10, p. 1). The testimony of Mr. Scandlyn reveals that the cited piece of equipment was located on a bin discharge drive located under a bin which supplies the feed for the No. 4 calciner. He testified that the drive shaft connection was approximately 3 inches in diameter. The variable speed drive shaft rotated at 10 to 20 revolutions per minute (Tr. 400). The unguarded portion of the shaft was approximately 3 to 4 inches in length (Tr. 400). A keyway was present on the end of the shaft. A keyway is a slot in the shaft for the placement of a key (Tr. 402). The inspector testified that the end of the shaft was burred, and that the shaft was in operation when he observed the condition (Tr. 362).

According to Mr. Scandlyn, maintenance employees could perform maintenance work near the shaft (Tr. 407-408). The testimony of both Inspector Lindbeck and Mr. Scandlyn establishes that the condition presented a possibility of injury to employees (Tr. 359, 361, 402-403).

30 CFR 55.14-1 provides: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

Based on the foregoing testimony of Inspector Lindbeck and Mr. Scandlyn, I conclude that a violation of 30 CFR 55.14-1 has been established by a preponderance of the evidence.

Negligence of the Operator

The inspector testified that the operator should have known of the condition because it was in a frequently-traveled area (Tr. 359). The inspector's assertion that supervisors travel in the area daily (Tr. 361) was never rebutted by Freeport's witnesses. However, there is no evidence in the record indicating how long the condition had existed. Without such evidence, it is impossible to determine that the condition had existed long enough for one of Freeport's supervisory personnel to have observed it.

Accordingly, I conclude that operator negligence has not been established by a preponderance of the evidence.

Gravity of the Violation

A cleanup or maintenance man working in the area could be near the exposed shaft (Tr. 361, 407-408). According to the inspector, burrs or a keyway on the end of the shaft could get a man's clothing entangled in the shaft (Tr. 359). As noted previously in this decision, the shaft possessed both characteristics. I therefore conclude that an occurrence was probable.

Mr. Scandlyn described the potential harm as ranging from a torn pair of pants to a small scratch or cut, but not a deep laceration (Tr. 402-403). Based on the fact that the shaft rotated at a low rate of speed, I find his testimony on this point credible.

Based on the foregoing, I conclude that the violation was accompanied by moderate gravity.

Good Faith in Attempting Rapid Abatement

Mr. Scandlyn testified that the guard was replaced immediately (Tr. 402). Although the inspector believed that the condition was abated on July 27, 1978, the day after the issuance of the citation, he nevertheless testified that the operator attempted rapid compliance after notification of the condition (Tr. 360). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid compliance.

Citation No. 97205, July 27, 1978, 30 CFR 55.4-18

The citation alleges, in pertinent part, that oxygen was being stored in an area where grease, paint and oils were stored (Exh. M-11, p. 1). The testimony reveals that the "oxygen" in question consisted of a fully-charged oxygen cylinder on an oxyten-acetylene welding set located in part of the pilot plant (Tr. 363-364, 409).

According to Mr. Scandlyn, the pilot plant building was probably 60 feet in width, 100 to 150 feet in length and approximately 25 to 30 feet in height (Tr. 408). According to the inspector, the building was basically a large open room which he described as an operating area (Tr. 367).

Two areas screened off by wire mesh, and each measuring approximately 10 feet by approximately 15 to 20 feet, were located inside the building (Tr. 409). According to Mr. Scandlyn, the first wire cage area was a workshop area. He testified that it "has power tools, drill presses, I believe a band saw, and tools of various nature, a work table, a sorting iron, this type of thing, what we call a lazy susan for part storage approximately four feet in diameter with several rotating shelves on it" (Tr. 409). Mr. Scandlyn confirmed that an oxygen-acetylene tank set mounted on a hand truck was in the area on July 27, 1978 (Tr. 409). Mr. Scandlyn classified the area as a "normal work place," and would not classify the area as a storeroom (Tr. 410).

The inspector, however, classified the area as a storage area containing tools, paint, grease, oil, and solvent, in addition to the oxygen cylinder (Tr. 363). The inspector testified that at least a dozen cans of paint and oil were present (Tr. 363-364).

Mandatory safety standard 30 CFR 55.4-18 states that "[o]xygen cylinders shall not be stored in rooms or areas used or designated for oil or grease storage." The question presented is whether the evidence establishes

"storage" within the meaning of the regulation. At the outset, it cannot be found that the paint observed by the inspector was "oil" within the meaning of the regulation. Such a finding would have to be based on probative evidence establishing the presence of oil-based paint in the subject area of the pilot plant building. The record contains no evidence establishing this fact. Accordingly, only the grease and oil observed by the inspector are germane to a resolution of the issues presented.

I am inclined to accept the inspector's characterization that the oxygen was at the time in question being "stored" with the oil and grease cans due to the dimensions of the wire mesh area, and the volume and types of materials observed there and the fact that it was locked. This conclusion is bolstered by inferences drawn from the testimony of Mr. Scandlyn, which indicate that the time the oxygen would be in the cage area between uses could be days; and therefore the area was used as a "short-term" storage area (Tr. 414-415).

Accordingly, I conclude that a violation of 30 CFR 55.4-18 has been established by a preponderance of the evidence.

Negligence of the Operator

Regular supervision was attached to this area of the plant and the condition was in plain view (Tr. 364). Inferences drawn from the testimony of Mr. Scandlyn (Tr. 411-412) indicate that it is more probable than not that the condition had existed for an appreciable period of time prior to July 27, 1978. However, considering the fact that the area was used periodically as a workshop, and the other surrounding circumstances, it cannot be found that Freeport demonstrated gross negligence.

Accordingly, I conclude that Freeport demonstrated ordinary negligence.

Gravity of the Violation

An occurrence was probable (Exh. M-11, p. 3; Tr. 364). The resulting injury could reasonably be expected to produce lost workdays or restricted duty (Exh. M-11, p. 3). The record contains no evidence relating to the number of employees exposed to the hazard.

Accordingly, I conclude that moderate gravity was associated with the violation.

Good Faith in Attempting Rapid Abatement

Abatement was accomplished by expeditiously moving the combustibles to another area (Tr. 365; Exh. M-11, p. 2). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid compliance.

IV. Docket No. BARB 79-282-PM

Citation No. 96399, July 18, 1978, 30 CFR 55.20-3

This citation was issued when Inspector Lindbeck observed "several holes in [the] walkway on top of storage tank I-T-17 that need to be covered" (Exh. M-12, p. 1). The subject walkway was constructed of expanded metal (Tr. 371). The cited holes were three or four in number (Tr. 372). Estimates as to the size of the holes varied. Inspector Lindbeck estimated that the holes were approximately 6 inches by 8 inches or 8 inches by 8 inches (Tr. 372), while Mr. Scandlyn's estimate was "4 to 6 inches * * * to about 6 to 8 inches" (Tr. 421, 426). However, it is significant to note that Mr. Scandlyn believed, as a general proposition, that holes over 4 inches "probably should be covered" (Tr. 422).

Mr. Scandlyn testified that the walkway in question was located above a holding tank (Tr. 419). The platform was reached by a spiral stairway (Tr. 424). The tank was approximately 32 feet in height and 37 feet in diameter and was used to hold a mixture consisting of clay and water (Tr. 419, 426). He further testified that an agitator gearbox and grind motor was located atop the tank which operated a large shaft extending toward the bottom of the tank. A rake arm on the shaft prevents mixed material from "settling out and becoming semi-solid in the bottom of the tank" (Tr. 419-420).

Mr. Scandlyn testified that the holes had been cut in the walkway around the "periphery of the base of the agitator gear box" to provide access to a support chain used to stabilize the agitator shaft (Tr. 420, 429). The testimony of Mr. Wharton indicates that the walkway was 3 to 4 feet wide (Tr. 430-431).

Mandatory safety standard 30 CFR 55.20-3 provides, in part, as follows: "Mandatory. At all mining operations: * * * (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable." It is undisputed that the holes existed in the subject walkway. Furthermore, the evidence establishes that it was practicable to keep the walkway free of holes. There is no indication that the holes performed any function essential to the daily operation of the agitator mechanism, outside of providing periodic access to the support chain. This conclusion is confirmed by the testimony of Mr. Scandlyn, wherein he expressed his belief that the employees had permitted the platform to remain in the condition observed by the inspector "because they knew they would be back there someday to do that same job over, and they would need that same access" (Tr. 424-425). Furthermore, the steps taken to abate the condition, infra, reinforce the view that it was practicable to keep the walkway free of holes.

Accordingly, it is found that a violation of 30 CFR 55.20-3 has been established by a preponderance of the evidence.

Negligence of the Operator

Two employees were observed performing maintenance functions on the walkway, but the inspector's testimony reveals that those employees were not engaged in alleviating the violation (Tr. 371-372, 374). The inspector did not know how long the holes had been present in the walkway (Tr. 373, 376). He testified, however, that Mr. Scandlyn and a foreman indicated that either a motor or its base had been replaced and that the resulting hole had not been covered (Tr. 379), a statement which differs radically from Mr. Scandlyn's previously-mentioned testimony wherein he indicated that the holes had been made to provide access to the agitator shaft stabilizing chain. Having been afforded the opportunity to assess the credibility of the witness, I conclude that Mr. Scandlyn's testimony accurately reflects the circumstances surrounding the cutting of the subject holes.

It can be inferred from Mr. Scandlyn's testimony that the condition not only existed for a long period of time but also would have been permitted to exist for a period of several months or several years into the future (Tr. 425). Furthermore, Mr. Scandlyn stated that holes greater than 4 inches should be covered and even acknowledged the presence of a tripping hazard (Tr. 422).

In view of these considerations, I conclude that Freeport demonstrated gross negligence.

Gravity of the Violation

Two maintenance employees were present on the walkway when the inspector arrived (Tr. 371). Additionally, an employee visited the area daily to check the tank level (Tr. 423-424).

The inspector indicated that a man's foot could enter one of the holes and he could either suffer a broken leg or stumble and fall into a storage tank (Tr. 373; Exh. M-12, p. 5). However, I conclude that the presence of the handrail around the outside of the walkway (Exhs. O-13, X-1) would render improbable falling into the storage tank. Considering the size of the holes, the dimensions of the walkway, and the extent of employee exposure, I conclude that a broken leg hazard existed. An occurrence was probable. An occurrence could reasonably be expected to result in lost workdays or restricted duty (Exh. M-12, p. 5).

Accordingly, I conclude that the violation was moderately serious.

Good Faith in Attempting Rapid Abatement

The condition was abated immediately by covering the holes with steel plates (Tr. 373). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid compliance.

Citation No. 96159, July 20, 1978, 30 CFR 55.17-1

On July 20, 1978, Inspector Lindbeck conducted a night inspection at Freeport's Griffin Mill facility (Exh. M-13, p. 1; Tr. 380). The subject citation was issued, citing Freeport for a violation of 30 CFR 55.17-1 as follows: "The lighting in the warehouse area does not illuminate all areas - 6 large overhead lights are not working" (Exh. M-13, p. 1).

The condition was observed in the warehouse storage area (Tr. 380). The building was approximately 100 feet in length and approximately 50 feet in width (Tr. 380). The lights were approximately 20 to 25 feet above the floor (Tr. 436). According to Mr. Scandlyn, they were basically 300-Watt incandescent lamps with reflectors (Tr. 436).

Six lights were unlit out of a total of approximately 20 lights (Tr. 380-381, 435-436). Four were in the vicinity of the inspection party and two were toward the other end of the building (Tr. 436). Approximately five or six employees were working in the area. At least one forklift was operating in the area (Tr. 380).

Mandatory safety standard 30 CFR 55.17-1 provides that: "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." The question presented is whether a preponderance of the evidence establishes that the illumination in the cited area was inadequate to provide safe working conditions. The record clearly reflects that the inspector's opinion as to inadequate lighting was based solely on his visual observation (Tr. 385-386). The inspector testified that he cited the condition because he was unable to see all employees working in the work area, and indicated that he was unable to see individuals approximately 30 to 40 feet away (Tr. 388-389). He further testified that shadows in the area prevented forklift operators from seeing the men (Tr. 381). This testimony is contradicted by the tenor of Mr. Scandlyn's testimony wherein he indicated that he was fairly certain that he was able to see a good 50 feet and distinguish color (Tr. 433).

Freeport argues that the regulation in question "is unduly and unenforceably vague in that there are no objective criteria or parameters of illumination by which an operator can reasonably be expected to measure its levels of illumination for purposes of compliance" (Respondent's Proposed Findings of Fact, Conclusions of Law, p. 21; see also Respondent's Brief in Support of Proposed Findings of Fact and Conclusions of Law, p. 3). I am unable to agree with Freeport's contention. It may be desirable as a matter of policy to promulgate a regulation specifying with particularity the level of illumination necessary to provide safe working conditions. But simply because such action is desirable from a policy standpoint does not mean that the existing regulation is unenforceably vague as a matter of law. Whether a given level of illumination is sufficient to provide safe working conditions presents a question of fact, and there is no indication in the record that such factual issue cannot be resolved by presentation of evidence of

some recognized scientific test with an objective standard as to adequate lighting in the work place. An objective standard is necessary to prevent enforcement actions initiated solely on the basis of an inspector's subjective evaluation. It should be pointed out that certain occasions will arise where the evidence will establish inadequate lighting even absent reference to an objective standard. But this will be limited to cases where reasonable minds cannot be expected to differ as to the adequacy of the lighting, such as cases involving a complete absence of lighting or cases where other evidence clearly establishes an inadequacy of illumination.

In the instant case MSHA has failed to present enough objective evidence to sustain its burden of proof as to the warehouse area in general. The inspector's testimony that he was unable to see individuals at a distance of approximately 30 to 40 feet was rebutted by Mr. Scandlyn's assertion that he could distinguish color at approximately 50 feet. In addition, the fact that approximately 14 lights with 300-Watt incandescent bulbs and reflectors were present and alight in and of itself implies adequate illumination.

However, MSHA has sustained its burden of proof as to one specific area of the warehouse. The inspector, at one point in his testimony, indicated that Mr. Bruce Dial, the MSHA trainee who accompanied the inspector, stepped onto the edge of a large hole in the floor due to the inadequate lighting (Tr. 389-392). Since it was established that the inspector could not see the hole and the circumstances almost lead to an accident, it is considered that this is the kind of evidence which clearly establishes inadequate illumination at that one location.

Accordingly, I conclude that a violation of 30 CFR 55.17-1 has been established by a preponderance of the evidence.

Negligence of the Operator

The fact that six lights were not operating in the warehouse and the lack of sufficient lighting near a refuse hole in the warehouse should have been known to the supervisors for the Respondent.

Accordingly, the Respondent has demonstrated ordinary negligence.

Gravity of the Violation

The potential hazard in the specific situation is a fall leading to a possible broken leg or lesser injury. Accordingly, I conclude that the violation was moderately serious.

Rapid Abatement

The violation was abated the next day. Therefore, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

Citation No. 96160, July 20, 1978, 30 CFR 55.17-1

This citation was issued by Inspector Lindbeck during his July 20, 1978, night inspection at the Griffin Mill (Tr. 393; Exh. M-14, p.1). The citation states that "there is not sufficient illumination at rail load out area (tank car). Lights were not in working order at time of inspection." The condition allegedly constitutes a violation of 30 CFR 55.17-1.

As noted previously in this decision, 30 CFR 55.17-1 mandates that illumination sufficient to provide safe working conditions be provided on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas. Although the citation, as incorporated into the petition for assessment of civil penalty, appears to be confined to an allegation that the illumination was insufficient only in a loading area, the testimony of the inspector sought to characterize the area not only as a loading area but also as a walkway (Tr. 394). However, certain statements contained in the inspector's statement (Exh. M-14, p. 3) reveal that Inspector Lindbeck cited the area solely on the basis of its use as a load-out area. Under the heading of "Gravity," the inspector wrote that "poor lighting in the area could cause a slip or fall from either cars or loading platform." Accordingly, I conclude that the allegation in the petition is confined to the use of the area as a rail load-out area.

The testimony of both Inspector Lindbeck and Mr. Scandlyn reveals that no employees were working in the cited area at the time of the inspection (Tr. 393, 437-438). According to the inspector, bulk loading of the railroad cars occurs in the area at night (Tr. 393-394). However, he admitted that he did not see either tank car movement nor switching activities that night (Tr. 396). Additionally, Mr. Scandlyn testified that no cars were being loaded in the area on the night in question (Tr. 437).

Since the record reveals that work was not being performed in the rail load-out area at the time, I conclude that a violation of 30 CFR 55.17-1 has not been established by a preponderance of the evidence.

Even assuming for purposes of argument that the petition can be construed to allege a violation of 30 CFR 55.17-1 based on insufficient illumination in a walkway, or that this issue has been tried with the implied consent of the parties, I conclude that the evidence fails to establish a violation. First, the deficiences in evidence of some scientific test with an objective standard, noted previously in this decision, presents a substantial obstacle to the finding of a violation. Logically, the objective standards should be set forth in the regulation. Second, the evidence reveals that residual lighting from surrounding buildings provided enough illumination to permit a man to walk through the area without the use of a flashlight (Tr. 397, 438, 440, 443-444). Accordingly, I am unable to conclude that a preponderance of the evidence establishes that the illumination in the cited area was insufficient to permit its safe use as a walkway.

VI. History of Previous Violations

The parties stipulated that no evidence exists to establish a history of prior violations (Tr. 5).

VII. Size of the Operator's Business

The parties stipulated that Freeport is a large operator. During 1978, the size of the operator was rated at 909,699 man-hours (Tr. 4).

VIII. Effect on the Operator's Ability to Continue in Business

The parties stipulated that any penalty that may be assessed may not affect Freeport's ability to continue in business (Tr. 6).

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 these proceedings will not impair the operator's ability to continue in business.

IX. Conclusions of Law

A. Freeport Kaolin Company and its Griffin and Savannah Mills have been subject to the provisions of the 1977 Mine Act at all times pertinent to this proceeding.

B. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

C. MSHA inspector Spencer Lindbeck was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of these proceedings.

D. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to amend the petition for assessment of civil penalty as relates to Citation No. 96181 to allege a violation of 30 CFR 55.14-6 instead of 30 CFR 55.14-1 is affirmed.

E. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 96184, July 26, 1978, 30 CFR 55.12-30 is affirmed.

F. The violations described in the following citations are found to have occurred as alleged:

(1) Docket No. BARB 79-219-PM (Citation No. 96161, July 20, 1978, 30 CFR 55.12-16);

(2) Docket No. BARB 79-280-PM (Citation Nos. 96173, July 25, 1978, 30 CFR 55.14-1; 96179; July 26, 1978, 30 CFR 55.12-34; 96181, July 26, 1978, 30 CFR 55.14-6);

(3) Docket No. BARB 79-281-PM (Citation Nos. 96191, July 26, 1978, 30 CFR 55.14-1; 97204; July 27, 1978, 30 CFR 55.4-18);

(4) Docket No. BARB 79-282-PM (Citation No. 96399, July 18, 1978, 30 CFR 55.20-3; No. 96159, July 20, 1978, 30 CFR 55.17-1).

G. MSHA has failed to prove the violations charged as relates to the following citations:

(1) Docket No. BARB 79-280-PM (Citation Nos. 96162, July 20, 1978, 30 CFR 55.14-26; 96174, July 25, 1978, 30 CFR 55.12-30);

(2) Docket No. BARB 79-282-PM (Citation No. 96160, July 20, 1978, 30 CFR 55.17-1)

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

X. Proposed Findings of Fact and Conclusions of Law

Freeport and MSHA submitted posthearing briefs. Neither party submitted reply briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have 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 these cases.

XI. Penalties Assessed

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

Docket No. BARB 79-219-PM

Citation No.	Date	30 CFR Standard	Penalty
96161	July 20, 1978	55.12-16	$255

Docket No. BARB 79-280-PM

Citation No.	Date	30 CFR Standard	Penalty
96173	July 25, 1978	55.14-1	$ 60
96179	July 26, 1978	55.12-34	50
96181	July 26, 1978	55.14-6	40

Docket No. BARB 79-281-PM

Citation No.	Date	30 CFR Standard	Penalty
96191	July 26, 1978	55.14-1	$ 40
97205	July 27, 1978	55.4-18	75

Docket No. BARB 79-282-PM

Citation No.	Date	30 CFR Standard		Penalty
96399	July 18, 1978	55.20-3		$ 75
96159	July 20, 1978	55.17-1		40
			Total	$635

XII. Approval of Settlement

During the hearing on June 22, 1979, the representatives of the parties informed the undersigned Administrative Law Judge that a settlement had been negotiated as relates to eight of the 13 citations at issue in Docket Nos. BARB 79-281-PM and BARB 79-282-PM. It was further stated that a motion requesting approval of settlement would be filed at a later date (Tr. 344-346). On October 22, 1979, the parties filed a joint motion to approve settlement and dismiss addressing the eight above-noted citations.

Information as to the six statutory criteria contained in section 110 of the 1977 Mine Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The alleged violations and the settlements are identified as follows:

Docket No. BARB 79-281-PM

Citation No.	Date	30 CFR Standard	Assessment	Settlement
96194	July 26, 1978	55.12-30	$ 38	$ 38
96200	July 26, 1978	55.14-8(b)	60	60
97202	July 27, 1978	55.12-34	48	48
		Totals	$146	$146

Docket No. BARB 79-282-PM

Citation No.	Date	30 CFR Standard	Assessment	Settlement
96145	July 18, 1978	55.11-2	$ 24	$ 24
96149	July 18, 1978	55.14-1	48	48
96398	July 18, 1978	55.20-3	34	34
96156	July 19, 1978	55.14-1	66	66
96158	July 19, 1978	55.14-1	48	48
		Totals	$220	$220

The parties set forth the following reasons in support of the proposed settlements:

After a review of all available evidence, the parties hereby agree that the settlement set out in this motion would be proper because:

1. There is no reduction in the proposed assessment.

2. The respondent has paid the $366.00, which is the proposed assessment and such payment will have no effect on its ability to remain in business.

3. Respondent is a large operator.

4. The violations were moderately serious.

5. Respondent demonstrated good faith by attempting to achieve required compliance after notification of the alleged violation. Respondent represents that the conditions cited were immediately abated.

6. Respondent has no history of previous violations at this mine.

7. Respondent withdraws its request for a hearing.

It is the parties belief and conviction that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

The reasons given above by the representatives of the parties for the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

XIII. Order

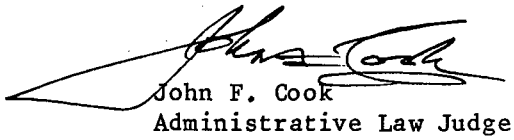
A. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to amend the petition for assessment of civil penalty as relates to Citation No. 96181 to allege a violation of 30 CFR 55.14-6 instead of 30 CFR 55.14-1 is AFFIRMED.

B. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 96184, July 26, 1978, 30 CFR 55.12-30 is AFFIRMED.

C. The settlement outlined in Part XII of this decision is herewith APPROVED. Since Freeport has paid the agreed-upon settlement figure of $336, IT IS ORDERED that the petitions for assessment of civil penalty be, and hereby are, DISMISSED as they relate to the citations encompassed by the settlement.

D. IT IS FURTHER ORDERED that the citations set forth in Part IX(G) of this decision be, and hereby are, VACATED and the various petitions for assessment of civil penalty be, and hereby are, DISMISSED as they relate to those citations.

E. IT IS FURTHER ORDERED that Freeport pay civil penalties in the amount of $635 within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

Distribution:

W. T. Truett, Esq., and Thomas P. Brown IV, Esq., Office of the Solicitor, U.S. Department of Labor, 1371 Peachtree Street, NE., Room 339, Atlanta, GA 30309 (Certified Mail)

Gene B. Strouss, Personnel Manager, Freeport Kaolin Company, P.O. Box 37, Gordon, GA 31031 (Certified Mail)

Alexander E. Wilson III, Esq., and Thomas J. Hughes, Jr., Esq., Jones, Bird & Howell, Haas-Howell Building, 75 Poplar Street, Atlanta, GA 30303 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 31 1980

LOCAL UNION NO. 6843, DISTRICT 28, UNITED MINE WORKERS OF AMERICA, Applicants	:	Complaint for Compensation
	:	Docket No. VA 80-17-C
v.	:	
	:	Amonate No. 31 Mine
WILLIAMSON SHAFT CONTRACTING COMPANY, Respondent	:	

DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Applicants;
Timothy J. Parsons, Esq., Loomis, Owen, Fellman & Howe, Washington, D.C., for Respondent.

Before: Judge Charles C. Moore, Jr.

Applicants United Mine Workers filed a complaint for compensation under section 111 of the Act (Federal Mine Safety and Health Act of 1977), based upon events which transpired during a roof control inspection conducted by MSHA inspector Carl E. Boone on August 9, 1979, at Consolidation Coal Company's Amonate No. 31 Mine.

The facts not in issue show that Inspector Boone conducted a roof control inspection of "the main headings being turned off the ventilation shaft" (Complaint, para. III). The shaft and headings in question were being constructed by Respondent Williamson Shaft Contracting Company pursuant to a contract with Consolidation Coal Company. After this, the facts are disputed.

In a report filed by Inspector Boone with his supervisor, 1/ the inspector states that upon inspecting the roof bolt installation near the bottom of the shaft in question he found that the majority of the roof

1/ Attached to Applicants' Statement in Opposition to Respondent's Motion to Dismiss as Exhibit A (sent under separate cover). I do not consider this report to be determinative of the facts but treat it as relevant evidence. Any denials by Respondent as to the contents of the inspector's report are duly noted, infra.

bolts installed against the coal roof had less torque than that required by Consolidation Coal Company's approved roof control plan. This allegation is denied by Respondent.

Inspector Boone wrote that "the company" was also checking the roof bolts and makes further reference to "management." It is unclear whether he is referring to the management of Consolidation Coal Company or to William Shaft Contracting Company but for the purposes of this decision I will assume he means Consolidation Coal Company. The report further states that when management asked for Inspector Boone's recommendations concerning the roof bolts, he informed them that they could either rebolt the area using mechanical bolts with adequate anchorage or use resin rods. The company decided to use resin rods, to be installed within 1 or 2 days after the proper materials were ordered and delivered. At this point, Inspector Boone told the company that the only work that they should do in the area would be to install one of the roof support methods he had recommended in order to comply with safety precaution No. 12(c) of their approved roof control plan. As a result of this recommendation, several miners were idled during the day and afternoon shifts on August 9, 1979.

Section 111 of the Act (30 U.S.C. § 821) entitles miners to compensation at varying rates for the time they are idled when a mine or a portion of a mine is closed pursuant to an order issued under sections 103, 104 or 107 of the Act (30 U.S.C. §§ 813, 814 and 817, respectively). Applicants claim that Inspector Boone's recommendation amounted to a verbal withdrawal order under sectin 107(a) of the Act (Complaint, para. IX). That section reads as follows:

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

Thus, an inspector may issue withdrawal orders under this section where he or she determines that an imminent danger exists. However, subsection (d) of section 107 specifically requires such orders to be in writing. 2/

2/ Section 107(d) provides as follows:
"Each finding made and order issued under this section shall be given promptly to the operator of the coal or other mine to which it pertains

Construing the facts in a light most favorable to the Applicants, 3/ there is no evidence in this case of a specific verbal finding of imminent danger by the inspector, nor of a written finding of imminent danger nor, as both parties concede, of a written withdrawal order pursuant to section 107.

Applicants point out that Inspector Boone's statement had the same effect as a withdrawal order by causing a temporary cessation of mining activities. Applicants then use a "but for" test to create a causal nexus between the Inspector's statement and their claims for compensation. Assuming that Inspector Boone's statement did cause a cessation of mining activities, idling some miners, it is necessary to determine whether section 111 or any other section of the Act anticipates an award of compensation in such a case.

As to other than imminent danger orders, subsections (a) through (f) of section 103 of the Act authorize the Secretary to inspect mines, investigate accidents, require operators to maintain records, and provide for a representative of the miners to accompany inspectors during inspections. Section (g) provides for miner-initiated inspections upon a written notice to the Secretary alleging a violation of the Act or an imminent danger. These inspections may be conducted independently or may be incorporated into a regular inspection by the Secretary. There is no evidence in this case that the inspection which took place was initiated by a miner or by a representative of the miners.

Subsections (h) through (j) of section 103 provide for the maintenance of certain records, prescribe a minimum number of inspections of mines containing explosive gases and set forth the Secretary's powers in the event of an accident. Subsection (k) authorizes the Secretary to issue appropriate orders in accident situations. The alleged order in this case was not connected to an accident in the mine.

Section 104(b) authorizes the Secretary to issue orders where an operator has failed to abate a violation for which he was cited within the time allowed and the Secretary determines that the abatement time should not be extended. There is no evidence of a prior citation in this case. Section 104(d) allows withdrawal orders to issue in two cases. In the

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fn. 2 (continued)
by the person making such finding or order, and all of such findings and orders shall be in writing, and shall be signed by the person making them. Any order issued pursuant to subsection (a) may be modified or terminated by an authorized representative of the Secretary. Any order issued under subsection (a) or (b) shall remain in effect until vacated, modified, or terminated by the Secretary, or modified or vacated by the Commission pursuant to subsection (e), or by the courts pursuant to section 106(a)." (Emphasis added.)

3/ As required by Federal Rules of Civil Procedure Rule 56, 28 U.S.C.A. (note 124), advisory for purposes of Commission decisions.

first case, the Secretary must issue a withdrawal order under section 104(d)(1) where an operator violates, unwarrantably, any mandatory health and safety standard within 90 days of the issuance of an unwarrantable failure citation. In the second case, an order must promptly issue under section 104(d)(2) where the Secretary, upon subsequent inspection, finds violations similar to those in the original unwarrantable failure citation and no interim inspection has verified abatement of the original violations. Again, there is no evidence of a citation in this case so that the alleged order could not have been issued pursuant to section 104(d). Section 104(e) allows the Secretary to issue withdrawal orders where it finds that an operator has a pattern of violating mandatory health or safety standards. There is no evidence of such a pattern in this case. Section 104(f) allows the Secretary to issue withdrawal orders where it finds that the atmosphere of a mine contains an excessive amount of respirable dust. There is no evidence that the order alleged here was such an order.

The statutory scheme outlined above anticipates that withdrawal orders would be issued subsequent to the issuance of a citation where the operator either has not abated the condition described in the citation or the condition has recurred, except in the case of imminent danger orders which may be issued without reference to particular health and safety standards. While sections 103 and 104 of the Act do not specifically require orders issued thereunder to be in writing, there are other references in the Act to publishing orders and making them available for public inspection which assumes that the orders would be in writing. Although section 107 is the only section which specifically requires orders to be in writing, it appears that all orders under the 1977 Act are expected in all cases to be in writing. The legislative history is in accord.

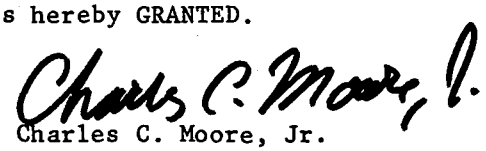
Section 111 of the 1977 Act entitling miners to compensation for idle time was taken directly from its counterpart in the Federal Coal Mine Health and Safety Act of 1969 ("1969 Act"): section 110(a). (See Legislative History of the Federal Mine Safety and Health Act of 1977 at 1337.) Section 110(a) of the 1969 Act entitled a miner to compensation for time lost when a mine was closed by an order issued under section 104 of the 1969 Act. Section 104 in turn described the various withdrawal orders the Secretary could have issued upon finding violations of the Act and imminent dangers and required, inter alia, in subsection (f) that "all such notices and orders shall be in writing." Thus, the requirement of a writing is clearly stated under the 1969 Act.

Applicant further offers the case of Alabama By-Products Corporation v. Mining Enforcement and Safety Administration and United Mine Workers of America, BARB 76-153, 76-220 and 76-221 (August 19, 1976), in support of its position that a verbal recommendation can constitute an order of withdrawal. It should be noted that the administrative law judge in that case was considering a written citation and specifically confined his decision to the facts presented (at 19).

Based upon the foregoing, the only type of withdrawal order the inspector could have issued would have been for imminent danger and he clearly did not do that.

ORDER

Respondent's motion to dismiss is hereby GRANTED.



Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America, 900-15th St., NW., Washington, DC 20005 (Certified Mail)

Timothy J. Parsons, Loomis, Owen, Fellman & Howe, 2020 K St., NW., Washington, DC 20006 (Certified Mail)

Assistant Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

JAN 31 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 79-24 A.O. No. 33-01173-03036
v.	:	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION AND ORDER

In response to the order to show cause of December 6, 1979, the Secretary has filed a motion for summary disposition and the operator a response that is in effect a cross-motion for summary disposition or to dismiss based on the legal defense raised in its pretrial submission of September 17, 1979. Oral argument on the motions was heard on January 17, 1980. The operator claims its defense challenging the validity of Citations Nos. 278700, 278801 and 278802, 1/ is timely and may be raised under sections 105(a) and (d) of the Act, 30 U.S.C. 815(a), (d), Rule 22 of the Commission's Rules of Procedure, and the Commission's decision in Energy Fuels Corporation, DENV 78-410, 1 BNA MSHC 2013, 2020, 1 FMSHRC Decisions 299, 315 (May 1, 1979) (dissenting opinion of Commissioner Lawson).

I agree that as interpreted by the Commission in Energy Fuels, the Act permits an operator to challenge the validity of an abated citation either within thirty days of its issuance or

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1/ The other two citations involved in this proceeding are subject of a motion to approve settlement filed November 29, 1979.

thirty days after receipt of a notice of proposed penalty assessment. 2/ On the other hand, the Commission has held the validity of closure orders must be challenged immediately or not at all. Pontiki Coal Corp., PIKE 78-420-P, 1 BNA MSHC 2208, CCH 1979 OSHD ¶23,979, 1 FMSHRC Decisions 1476 (October 25, 1979); Wolf Creek Collieries, PIKE 78-70-P, FMSHRC 79-3-11 (March 26, 1979). This anomaly results from the fact that the Commission has interpreted section 105(a) of the Act as permitting a challenge to the issuance (validity) of a section 104(a) citation after receipt of a notice of proposed penalty assessment. Energy Fuels, supra; Rule 22. For the reasons set forth in Commissioner Lawson's dissenting opinion in Energy Fuels, I believe the Commission should reconsider and eliminate this anomaly in the review procedure. Compare Beckley Coal Mining Co., HOPE 79-35, et al, (November 27, 1978).

Assuming therefore, without deciding, that a challenge to the issuance of a citation includes a challenge to its validity on the ground that the inspection giving rise to its issuance was unauthorized, 3/ I will proceed to consider the operator's motion on its merits. 4/

2/ The challenge to validity was not filed until September 17, 1979. This was much longer than thirty days after receipt of the notice of proposed penalty assessment. The Rules, however, do not provide at what stage of a civil penalty proceeding a challenge to validity other than a general denial must be filed. Compare Rule 22 with Rule 28. In view of the uncertainty in the Commission's statement of its procedures, I will assume for the purpose of this disposition that the challenge was timely.

3/ Since an ultra vires inspection does not result in automatic application of the exclusionary rule, the fact that an inspection is found to be unauthorized may not retroactively invalidate the use of the citation as the predicate for a valid penalty proceeding. See Savina Home Industries v. Secretary, 594 F.2d 1358, 1361-1365 (10th Cir. 1979); Todd Shipyards Corp. v. Secretary, 586 F.2d 683, 690 (9th Cir. 1978). As noted in the text infra, the inspector here acted pursuant to clear congressional authorization. It is obvious, therefore, that enforcement of the instant citations will not contravene the imperative of judicial integrity that calls for application of the exclusionary rule. See, United States v. Peltier, 422 U.S. 531, 536 (1975).

4/ For purposes of disposing of the operator's motion, I have assumed that the inspection and citations were the result of a request for special inspection made under section 103(g)(1) of the Act, 30 U.S.C. 813(g)(1). Transcript p. 14.

The undisputed facts show that during a closeout conference following a regular inspection of the Meigs No. 2 Mine on December 21, 1978, Inspector Petit received an oral request from a representative of the miners to examine the areas referred to in the challenged citations. (Wilson Deposition at 34). As a result of the inspector's observations, three citations issued charging the operator with failure to comply with its approved roof control plan and the mandatory safety standard set forth in 30 CFR 75.200. The conditions cited were promptly abated and thereafter the Secretary proposed a penalty of $325.00 for each citation.

Section 103(g)(1) of the Mine Act, 30 U.S.C. 813(g)(1), provides that at the written request of a miner or representative of miners who has reasonable grounds to believe that an imminent danger or a violation of the Act or a mandatory standard exists MSHA shall perform an immediate special inspection to determine the existence of the complained of condition or practice, except that if the complaint indicates an imminent danger the operator shall be notified "forthwith" so that action can be taken to abate the condition or withdraw the miners even before the inspection. 5/ 30 CFR Part 43 (1978); Legislative History, Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 1324 (July 1978). Section 103(g)(1) further provides that a copy of the notice given MSHA by the miner or his representative "shall be provided the operator or his agent no later that at the time of the inspection." Id.

5/ Section 103(g)(1), 30 U.S.C. 813(g)(1) provides:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

Respondent claims the failure of the inspector to furnish this copy to its agent at the time of the inspection requires a finding that the inspection was unauthorized and that citations issued as a result are null and void. I do not agree.

Sections 103(g)(1) and (2) 6/ originated as sections 104(f)(1) and (2) of the Senate Bill, S. 717. Leg. Hist., supra, at 531-532. With reference to the requirement for furnishing a copy of the miner's written notice to the operator, the Senate Report states:

> While Section 104(f)(1) requires that such complaints be written, and signed by the complaining party, the Committee does not intend to preclude the Secretary's response to unwritten or unsigned complaints. The Committee notes that MESA currently maintains an inward WATS line (an "800" number) for the express purpose of receiving complaints about hazardous conditions in the mines. The Secretary must respond to appropriate complaints under section 104(f)(1), but need not necessarily follow up on complaints that do not meet the requirements of that section. Leg. Hist., supra, at 617. 7/

It appears therefore that while an inspector is not required he is authorized to make a special spot inspection "to determine if such violation or danger exists in accordance with the provisions of" Title 1 of the Act.

6/ Section 103(g)(2), 30 U.S.C. 813(g)(2) provides:

> Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

7/ Resort to legislative history may be had even where the statutory language seems clear and unambiguous because "while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best' . . . and hence it is essential that we place the words of a statute in their proper context by resort to legislative history." Tidewater Oil Co. v. United States, 409 U.S. 151, 157 (1972).

This construction is consonant with section 103(g)(2) which does not require that a copy of the request for inspection be furnished the operator where the request is made prior to or during an inspection. While the failure of the miner to reduce his request for inspection to writing may justify a refusal by the inspector to make either a (g)(1) or (g)(2) inspection, it does not render the inspection performed an illegal or unauthorized search or furnish any ground for complaint by the operator of a violation of any procedural or substantive rights conferred by the Act.

Reference to the Conference Report, S. Rep. 95-461, 95th Cong., 1st Sess., at 46, Leg. Hist., supra, at 1324, shows that the purpose of the requirement that the "request for an inspection be served on the mine operator no later than the commencement of the inspection" was "to protect [the complaining] miners from possible retribution" by the operator. This echoes the statement by the Senate Committee that "the Committee is aware of the need to protect miners against possible discrimination because they file complaints. . ." Leg. Hist., supra, at 617.

Finally, with respect to the requirement that MSHA notify an operator or his agent "forthwith" if the complaint indicates an imminent danger, 8/ the Conference Report states:

> The failure of the Secretary to notify the operator or his agent under this provision will not nullify any citation or order that may be issued as the result of the inspection in response to the request under this section, even if such inspection discloses the existence of an imminent danger situation in the mine. Leg. Hist., supra, at 1324.

The corollary of this is that the inspector's failure to give a copy of the written notice to the operator at the time of the inspection does not invalidate any citation issued under section 103(g) because (1) an operator is not entitled to advance notice of a compliance inspection; (2) the purpose of furnishing a copy of the miner's complaint is for the miner's

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8/ Supra, note 5.

protection not the operator's; (3) the inspector is authorized to make the inspection even where the request is oral; and (4) there is no requirement for furnishing a copy of the notice where the request for inspection is made prior to or during the course of a regular inspection. Leg. Hist., supra, at 617, 1324; 30 CFR part 43.

What was fashioned by Congress as a shield against retaliation should not by an exercise in literalism be converted into a sword of nullification.

I conclude therefore that the purpose of furnishing a copy of the miner's complaint to the operator is to put the operator on notice that the complainant was engaged in a protected activity in filing the complaint. The operator acts then at his peril if he retaliates because the copy of the notice lays the foundation for a finding of willful and knowing violation of the anti-discrimination provisions of the Act. Section 105(c)(1), 30 U.S.C. 815(c)(1). Such a violation may be subject to the civil and criminal sanctions of sections 110(c) and (d), 30 U.S.C. 820(c), (d).

For these reasons, I find the failure to furnish a copy of a request for a special inspection does not invalidate the inspection or nullify the citations issued as a result of the inspection. It is ORDERED therefore that the operator's motion for summary disposition or to dismiss be, and hereby is, DENIED.

Following oral argument on the motions, counsel for both parties moved that in the event respondent's legal defense was overruled settlement of the three violations involved be approved at the amount originally assessed for each violation, $325.00. The remaining two violations charged are subject of a motion for approval of settlement in the amount of $160.00 each filed November 29, 1979. For the reasons set forth in the parties' submissions and based on an independent evaluation and de novo review of the circumstances, I find the proposed settlement in accord with the purposes and policy of the Act.

Accordingly, it is FURTHER ORDERED that the motions to approve settlement be, and hereby are, GRANTED, and that the operator pay the penalty agreed upon, $1295.00, on or before Wednesday, February 20, 1980, and that subject to payment the captioned petition be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Linda Leasure, Esq., U.S. Department of Labor, Office of the Solicitor, 881 Federal Office Building, 1240 E. Ninth St., Cleveland, OH 44199 (Certified Mail)

David Cohen, Esq., American Electric Power Service Corp., P.O. Box 700, Lancaster, OH 43130 (Certified Mail)

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